

The Supreme Court's Reliance on Amicus Curiae in the 2012-13 Term

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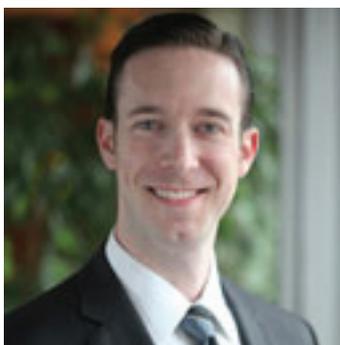
Same-sex marriage. Affirmative action. Voting rights. It was another blockbuster term at the U.S. Supreme Court. But the 2012-13 term had another, less noticeable, historic feature: the most amicus curiae briefs ever filed in a single term. The 1,001 briefs submitted by “friends of the court” in 73 decided cases—averaging 14 amicus briefs per case—shattered the previous record set last year of 10 briefs per case. In this, our third year analyzing the high court’s amicus docket for *The National Law Journal*, we wondered whether this steady increase in volume has influenced the Court’s receptiveness to amicus briefs. And for amici curiae, we questioned whether it is getting harder to stand out in the crowd.

As it turns out, the avalanche of briefs was not enough for the Court to curb amicus participation. The Court in fact amended its rules this summer to include changes that arguably make it easier for amici to submit briefs. The new rules endorse a practice long employed by Supreme Court practitioners of granting “blanket consent” to the filing of amicus briefs, rather than requiring each amicus individually to seek the parties’ consent. The new rules also clarify that when multiple amici join a single brief, only one of them needs to obtain consent. Sup. Ct. R. 37.2, 37.3.

If more briefs equal more work, why hasn’t the Court discouraged amicus filings? Perhaps it would be more trouble to limit and screen amicus briefs than simply to have law clerks separate the wheat from the chaff. See Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 102-03 (2008)



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(suggesting that only clerks see most of the amicus briefs). In our past reviews of the 2010 and 2011 terms, however, we suggested an alternative reason: the justices continue to find the briefs useful. See Franze & Anderson, NLJ Supreme Court Brief, August 24, 2011; Franze & Anderson, NLJ, Sept. 24, 2012. We reach a similar conclusion this year.

But we also found that the proliferation of briefs seems to be making it harder for amici to get noticed, at least for nongovernment amici. The 2012-13 term saw a drop in how often the justices cited nongovernment amicus briefs, possibly signaling that amicus participation is reaching a saturation point. Certain types of briefs, however, seemed to garner more attention than others.

CASES SET FOR ARGUMENT OT2012

	Number of cases	Nongovernment amicus briefs	U.S. amicus briefs	State/local gov amicus briefs
Signed decisions	73	907	36	58
Dismissed	1	2	0	0

A RECORD-BREAKING NUMBER OF BRIEFS

To put the 2012-13 term in perspective, it bears mention that the past two terms were themselves record breakers. In the 2010-11 term, amici filed 687 briefs, for an average of nine briefs per decided case. In the 2011-12 term, amici filed 715 briefs, an average of 10 per case. Going further back, amici averaged roughly one brief per case in the 1950s and about five briefs per case in the 1990s. Joseph Kearney & Thomas Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 752-54, 765 n.71 (2000).

In the 2012-13 term, amici also participated in more of the Court’s argued cases. In the 2010-11 term, amici filed briefs in 93 percent of cases with signed opinions, and in 2011-12 they participated in 95 percent of those cases. In 2012-13, the number was up slightly to 96 percent of cases with signed opinions. Again, to put those numbers in perspective, in the 1950s amici filed briefs in about 23 percent of argued cases, and in the 1990s they participated in about 85 percent of cases. Kearney & Merrill, *supra*, at 753.

As for the highest number of briefs filed in a single case, the 2011-12 term set a high mark of 136 amicus briefs filed in the companion health care cases. The 2012-13 term might (or might not) have eclipsed that record, depending on how you count. There were 156 amicus briefs in the same-sex marriage cases,

but some may question treating *Windsor* and *Perry* as a single case. Either way, considering the cases separately still leads to impressive totals—61 briefs filed in *Windsor*, 76 in *Perry* and 19 additional briefs that were filed in both cases. *Brown v. Board of Education*—which in our past reviews served as a historical benchmark for high-profile cases—generated only six amicus briefs.

LESS RELIANCE ON THE BRIEFS

An increase in number of amicus briefs filed does not necessarily correlate to an increase in the justices' reliance on them. This term we found the opposite, suggesting that some briefs may be getting lost in the pile. Academics long have tried to quantify the "influence" of amicus briefs using a variety of techniques, with little success. Paul M. Collins Jr., *Friends of the Supreme Court 4* (2008) (surveying more than 50 studies and finding it an "area of confusion"). Frankly, there is no foolproof manner to measure "influence," given that only nine individuals will ever know what truly influenced their decision-making. Nevertheless, a justice's use of a brief is a helpful proxy that signals that the brief contributed to the justice's analysis of the case.

Academics have developed some creative ways to analyze whether the justices have used an amicus brief. For instance, a research database hosted at Legal Language Explorer allows visitors to track how often the Court's opinions use the terms "amicus" or "amici." Political scientist Paul Collins recently published a study that employed plagiarism-detection software to see how frequently majority decisions incorporated language from amicus briefs. See Paul M. Collins, Jr. et al., *The Influence of Amicus Curiae Briefs*

on *U.S. Supreme Court Opinion Content*, APSA Annual Meeting Paper (2013) (finding that in the 2002-2004 terms justices varied in how frequently they incorporated language from amicus briefs, ranging from 1.8 percent to 4.4 percent of their majority opinions). For past terms, we focused on another indicator—how often the justices cite amicus briefs in their majority, concurring, and dissenting opinions.

In the 2010-11 term, the justices cited amicus briefs in 63 percent of the cases with signed opinions that had amicus participation. In 2011-12, that number dropped to 46 percent. In the 2012-13 term, the Court cited amicus briefs in 53 percent of those cases.

Amicus briefs filed by the Solicitor General's Office on behalf of the United States had the highest citation percentage. In the 2012-13 term, the justices cited the government's amicus briefs in 67 percent of the cases in which the United States appeared as amicus, up from 44 percent in 2011-12. For a number of reasons, including the office's expertise and its institutional relationship with the Court, see Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 *Geo. L. J.* 1487, 1493 (2008), the United States' amicus briefs have long held the title, "king of the citation-frequency hill." Kearney & Merrill, *supra*, at 760.

State and local governments did not fare nearly as well. In the 2012-13 term, the justices cited only 5 percent of the 58 state and local government amicus briefs filed. That number is down from the 13 percent citation rate for 38 amicus briefs filed by state and local governments in 2011-12.

The Court's citation rate to nongovernment amicus briefs (called "green briefs" because of the color of their covers) likewise dropped. In 2010-11, the justices cited 8 percent of

the 628 green briefs. In 2011-12, justices cited 11 percent of the 563 green briefs, relying on green briefs in 34 percent of signed decisions. In 2012-13, the justices cited just 5 percent of the 907 green briefs, referencing green briefs in about a quarter of the Court's decisions.

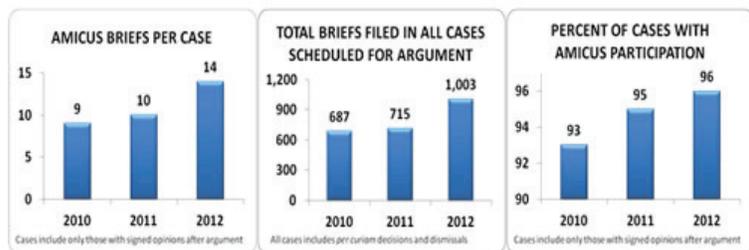
THE JUSTICES' CITATION RATES

Over the past three terms, the justices varied—often significantly—in how often they cited amicus briefs in their opinions. For the three-year average, Justice Sonia Sotomayor had the highest rate overall, citing amicus briefs in 54.5 percent of her opinions. Justice Antonin Scalia had the lowest (and most consistent) rate, averaging 11.9 percent. The overall variation, however, suggests that what drives amicus citation is not the number of briefs or any general personal predilections about the value of friend-of-the-court briefs, but whether the briefs were helpful to a given case.

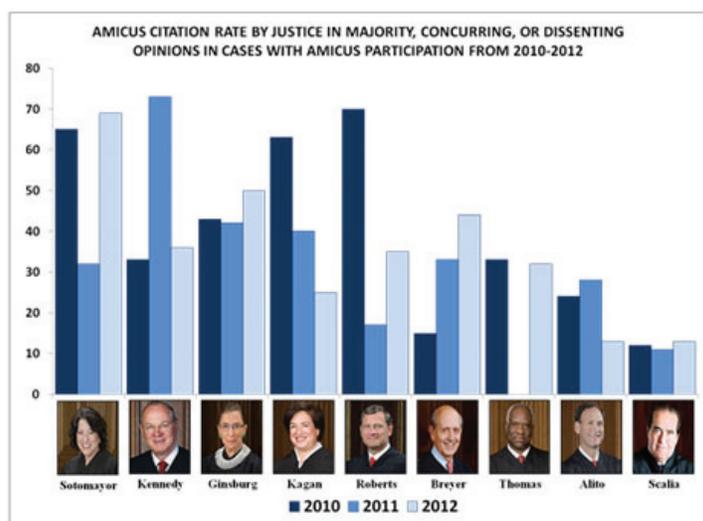
While no clear pattern emerges concerning whether a particular justice will or will not cite an amicus brief, what does appear to influence citation rate is whether the case is divisive. In the 2012-13 term, the Court cited amicus briefs more frequently (63 percent) when the majority consisted of either five or six members of the Court. When the Court's decision was unanimous, the justices cited amicus briefs only 36 percent of the time. These totals are similar to our findings for the 2011-12 term.

STANDING OUT IN THE CROWD

With more briefs filed and a decrease in the justices' citation rate for nongovernment briefs, it is harder than ever to get noticed. Of course, the surest way to get the Court's attention is to write a quality brief. Studies, and common sense, suggest that justices and their clerks give more attention to briefs submitted by lawyers or amici known for quality submissions. See Kearney & Merrill, *supra*, at 749-50; Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 *J.L. &*



Pol. 33, 46-56 (2004); Scalia & Garner, *supra*, at 103. In the 2012-13 term, roughly half of the green briefs cited by justices were filed by experienced Supreme Court practitioners. Unlike the past two terms, however, the justices did not cite a particular nongovernmental amicus curiae in more than one case. Interestingly, the justices cited amicus briefs submitted by law professors in eight cases, notwithstanding recent critiques of the law-scholar brief. See Richard H. Fallon Jr., *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. Legal Analysis 223 (2012).



Amicus briefs that provided certain types of information also received more attention. To be sure, the Court often cited amicus briefs simply to acknowledge—and then reject—arguments made by amici. For instance, though the justices often cited the solicitor general's briefs in the 2012-13 term, frequently it was to reject the government's view on a given issue (*e.g.*, *Lozman*, *Evans*, *Marx*, *McNeely*, *Vance*, *Adoptive Couple*). Other times, the justices acknowledged arguments made by amici, but declined to address them because the points had not been raised below (*e.g.*, *Arkansas Game and Fish*, *Phoebe Putney*). In *Decker v. Northwest Environmental Defense Center*, for instance, Chief Justice John Roberts noted in concurrence that "serious questions" existed about the Court's

precedents concerning administrative deference but agreed that the questions should not be addressed because they had been raised only in "dueling" amicus briefs submitted by two groups of law professors.

The justices seemed most inclined to positively cite briefs that provided information on the real-world implications of the Court's decisions. For example, *Kirtsaeng v. John Wiley & Sons*, a copyright decision that included the most amicus citations of any case, the Court cited the American Library Association's brief on how the decision could affect the distribution

of library books; a green brief by used-book dealers on the historical practice of international book sales "from the time when Benjamin Franklin and Thomas Jefferson built commercial and personal libraries of foreign books"; and a brief from the Association of Art Museum Directors describing their ability to display copyrightable works of art. In other

cases, the justices likewise cited briefs containing information derived from amici's experiences or expertise. The justices cited a brief from the National District Attorney Association describing how long it takes law enforcement to obtain DNA results on an arrestee (*King*); a brief by the National Immigrant Justice Center explaining the burdens noncitizen detainees have in preparing a defense to deportation (*Moncrieffe*); and a brief by economists on the market dynamics of patent litigation (*Actavis*), among others.

The justices also were more inclined to cite briefs that provided information on state or foreign laws. For instance, in *Lozman v. City of Riviera Beach*, which considered whether petitioner's floating "house-like plywood structure" was a "vessel" under federal law, the Court cited a green brief that described "laws in

States where floating home owners have congregated in communities." And in *Tarrant Regional Water District v. Herrmann*, the Court cited a brief by law professors on the features of several interstate water compacts. The justices similarly cited amicus briefs that described foreign laws or procedures in several cases (*Chafin*, *Kiobel*, *PLL Corp.*).

Future amici and their counsel should take note of the briefs the justices seemed least inclined to cite: ones that covered the substantive legal issues discussed by the parties. That is consistent with conventional wisdom (and the Supreme Court rules) disfavoring "me too" briefs.

With the total number of amicus briefs breaking records year after year, getting the Court's attention likely will present greater challenges for amici in the coming terms. And it is possible that at some point the justices may conclude that you really can have too many friends.

Anthony J. Franze and R. Reeves Anderson are members of Arnold & Porter's appellate and Supreme Court practice in Washington. Arnold & Porter represented amici and parties in several of the cases referenced in this article. The authors thank Matt Christiansen, Rich Culber, and Kathryne Lindsey for their assistance with the compilation of data.