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Featured Article

With Friends Like These: The Troubling Implications of the Government's Recent Effort to Block Amicus Curiae Briefs in a Controversial White Collar Criminal Appeal

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In an unusual move, the United States—by far the most frequent *amicus curiae* in the federal appellate courts—has sought to block the filing of all friend-of-the-court briefs supporting the defendant in a high-profile criminal appeal alleging that federal prosecutors and a district court judge engaged in months of improper *ex parte* communications. The government's effort to bar the defendant's *amici* is just the latest twist in a prosecution that already has garnered national criticism. It also raises broader questions about the government's policies regarding *amicus curiae* and threatens to shut the courthouse doors to organizations and individuals who traditionally have provided valuable assistance to the federal judiciary.

In *United States v. Rubashkin*,[1] an appeal pending in the U.S. Court of Appeals for the Eighth Circuit, several prominent organizations—joined by leading law professors and former federal judges and prosecutors—sought to file *amicus curiae* briefs in support of a former executive convicted of bank fraud after his company was the subject of a controversial immigration raid in which more than one-tenth of an entire Iowa town was arrested. The *amicus* briefs highlighted allegations that the presiding district court judge spent months coordinating the raid and subsequent prosecutions with the U.S. Attorney's office, purportedly acting as a *de facto* member of the prosecution team.

The United States not only refused to consent to the filing of the *amicus* briefs, but also took the rare step of submitting a "resistance," arguing that the briefs "should not be filed."[2] In the process, the government urged the Eighth Circuit to adopt a restrictive standard for granting leave to file *amicus* briefs—one that has been criticized by courts and commentators and is contrary to the government's own longstanding *amicus curiae* practice.

While the government's hard line on *amici* in *Rubashkin* may well reflect the reaction of a single U.S. Attorney's office smarting from allegations of misconduct, the "resistance" filing on behalf of the United States raises the specter of a more sweeping policy shift away from the government's traditional open-door approach to *amicus* briefs. Moreover, if adopted by the Eighth Circuit, the restrictive standard could foreclose the participation of *amici* that historically have proven helpful—even indispensible—to the development of federal law.

The Prosecution of Sholom Rubashkin

The May 2008 Postville Immigration Raid

Sholom Rubashkin was a top executive at Agriprocessors, Inc., once the largest producer of kosher meat in the United States and the largest employer in northeast Iowa. In May 2008, Immigration and Customs Enforcement (ICE) agents raided the company's plant in the small town of Postville, Iowa. The raid reportedly was the largest in U.S. history and resulted in the arrests of nearly 400 undocumented workers—more than ten percent of the town's population.[3] It set off a media firestorm, including allegations of abuses of the workers.[4]

Rubashkin initially was indicted exclusively for immigration-related violations,[5] but over time, the government's case morphed into a bank fraud prosecution featuring allegations that Rubashkin defrauded a Missouri bank out of millions in order to keep Agriprocessors afloat.[6] After a jury convicted Rubashkin of numerous financial crimes in November 2009, the government dropped all of the immigration charges.[7]

The government originally sought a life sentence for Rubashkin, but that request was scaled back to twenty-five years after six former attorneys general, one former solicitor general, and more than a dozen former U.S. attorneys criticized "the government's extreme sentencing position" and questioned "how truly sound and sensible sentencing rules could call for a life sentence—or anything close to it—for Mr. Rubashkin, a 51-year-old, first-time, nonviolent offender."[8] In June 2010, Judge Linda Reade, who also presided over the trial, sentenced Rubashkin to twenty-seven years in prison.[9] Judge Reade soon was embroiled in a controversy over her alleged participation in the planning and execution of the Postville raid.

The Controversy over the Judge's Alleged Work with the Prosecution Team

In August 2010, Rubashkin moved for a new trial, asserting that new evidence obtained through the Freedom of Information Act revealed that Judge Reade had engaged in months of *ex parte* communications with prosecutors regarding the planning and execution of the raid.[10] According to Rubashkin's motion, internal government documents show that "Judge Reade personally participated in a series of meetings with ICE officials and the U.S. Attorney's Office during which she was briefed on 'the ongoing investigation' and the raid"; the raid was "timed to comport with [the judge's] vacation schedule," and that "she and the prosecutors together 'surveyed' the location where detainees would be held and their trials conducted"; and the judge "expressed personal commitment 'to support the operation in any way possible'" and "personally participated" in meetings to discuss "'an overview of charging strategies' to follow the raid."[11]

Judge Reade denied Rubashkin's new trial motion.[12] She found that "statements and innuendo published in the media or elsewhere simply do not represent the facts,"[13] and that "[t]he undersigned's planning was limited to ensuring that a sufficient number of judges, court-appointed attorneys and interpreters would be available and that the court would be able to function efficiently at an off-site location."[14] Judge Reade also rejected Rubashkin's request for another judge to decide his new trial motion, finding that nothing "requir[ed] the undersigned to refer the Motion to another judicial officer or to permit discovery. Further, there is nothing to discover that would support the Motion. The Motion is totally devoid of merit and further proceedings with reference to it would be an [*sic*] useless waste of time."[15]

Rubashkin appealed to the Eighth Circuit, arguing, among other things, that he was entitled to a new trial based on the judge's alleged *ex parte* communications with prosecutors and that his sentence was substantively unreasonable.[16]

The Government's Effort to Bar All Amicus Support for Rubashkin

In January 2011, three prominent organizations, joined by numerous law professors and former federal officials, sought leave to file *amicus curiae* briefs supporting Rubashkin's appeal.[17] The briefs of the American Civil Liberties Union of Iowa (ACLU-Iowa) and the National Association of Criminal Defense Lawyers (NACDL) et al. argued that Judge Reade's alleged participation in the Postville immigration raid was improper and unconstitutional and that Rubashkin should have received a new trial before an impartial judge.[18] The brief of the Washington Legal Foundation (WLF) et al. argued that the judge's application of the United States Sentencing Guidelines was erroneous and contrary to Supreme Court precedent.[19]

All of the *amici* sought the government's consent to file their briefs. And in all instances, the government refused.[20] Beyond refusing to consent, moreover, the U.S. Attorney's office—the same office that allegedly engaged in *ex parte* communications with the judge—took the unusual step of filing a brief entitled "Government's Resistance to Motions for Leave to File Amicus Curiae Briefs," in which it "object[ed] to the filing of the proposed amicus curiae briefs."[21]

The government's brief urged the Eighth Circuit to adopt a restrictive standard, employed by only one federal appellate court, under which *amicus* briefs would be allowed only where "(1) one party is inadequately represented, (2) 'the would-be amicus has a direct interest in another case' that may be impacted by the decision in the instant case, or (3) 'the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do.'"[22] The United States argued that the "less restrictive" approach employed by nearly all federal appellate courts "encourage[s] more, and less meritorious, amicus filings" and can "require the expenditure of the opposing party's resources to re-address issues the primary litigant is capable of raising and has raised" or "to respond to arguments so lacking in merit that they were deliberately passed up by the other party's lawyers."[23]

Based on the restrictive standard, the United States argued that the court should deny leave to file the ACLU-Iowa, NACDL, and WLF briefs because (1) Rubashkin was adequately represented; (2) "[t]he proposed amici curiae do not have interests sufficiently distinct from defendant's"; and (3) "the proposed amicus briefs are mere extensions of [Rubashkin's] brief."[24] In the government's view, the briefs were nothing more than "an attempt to inject interest group politics into this case."[25]

Finally, the United States criticized what it viewed as improper coordination between *amicus* counsel and Rubashkin's lawyers. The government's resistance brief noted that "counsel for the NACDL acknowledged sending drafts of the [*amicus*] brief to appellate counsel for defendant who had done some editing and made some 'small suggestions.' The government did not consent to the filing of the brief."[26]

Rubashkin filed a response principally to clarify that his counsel merely "recommended corrections to factual recitations, but made no editorial suggestions regarding the legal arguments in the [NACDL] brief."[27] In any event, the response stated that the *amicus* briefs presented arguments "from the point of view of the amici curiae and express their position regarding the facts of this case. They are definitely not, as the Government pejoratively characterizes them, 'an attempt to inject interest group politics into this case.'"[28]

Commentary

The "Too Narrow and Grudging" Standard Proposed by the Government

To file a friend-of-the-court brief in a federal court of appeals or the Supreme Court, an *amicus curiae* generally must obtain the consent of the parties or leave of court.[29] In the rare instances where a party refuses consent, most courts of appeals "freely grant amici leave to file briefs," and the Supreme Court has granted "virtually all motions for leave to file amicus briefs."[30] By contrast, the restrictive approach to *amicus* briefs advocated by the United States in *Rubashkin* has been adopted by only one court of appeals and has been criticized by commentators as "too narrow and grudging."[31] Notably, then-Judge Samuel Alito of the Third Circuit issued the leading decision rejecting this minority standard.[32]

The government was wrong to advocate that the Eighth Circuit adopt the standard and permit *amicus* briefs in only three narrow circumstances. For one, there is no reason to limit *amicus* briefs to cases in which the party lacks adequate representation:

> Even when a party is very well represented, an amicus may provide important assistance to the court. "Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group."[33]

There are myriad examples where *amicus* briefs made significant contributions even though the parties were represented by esteemed counsel.[34] This limitation also would require *amicus* to "undertake the distasteful task" of arguing that the party's lawyers are inadequate, something few *amicus* counsel would be willing to do.[35]

It similarly would be disadvantageous to adopt the second restrictive criteria and limit *amicus* to only those who have a "direct interest" in another lawsuit that "may be impacted by the decision."[36] That requirement "flies in the face of current appellate practice" where groups generally aligned with the parties, but not necessarily involved in any related case, appear regularly before the Supreme Court and federal courts of appeals.[37] Under the government's approach, *amici* whom studies show are among the most well-regarded friends of the court would be shut out except in the infrequent instances where they are litigants in another case that would be directly affected by the outcome of the appeal.[38] For instance, the ACLU often is singled out for its *amicus* contributions in landmark cases;[39] the NACDL's briefs likewise have helped shape modern Supreme Court jurisprudence;[40] and the WLF is cited as one of the organizations whose briefs receive the most attention from Supreme Court law clerks.[41]

The third proposed limitation, which restricts *amicus* briefs to those presenting "a unique perspective . . . beyond what the parties are able to do"[42]—an obvious effort to cut down on judicial workload from duplicative "me too" briefs—may create more work than it saves. As then-Judge Alito observed, this approach "seems to be an unpromising strategy for lightening a court's work load [since] the time required for skeptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merits stage if leave had been granted."[43] Further, "private amicus briefs are not submitted in the vast majority of court of appeals cases, and because poor quality briefs are usually easy to spot, unhelpful amicus briefs surely do not claim more than a very small part of a court's time."[44] Justice Ruth Bader Ginsberg, for instance, has said that "her clerks often divide the amicus briefs into three piles: those that should be skipped

entirely, those that should be skimmed, and those that should be read in full."[45] That approach seems more sensible than the government's resistance in *Rubashkin*, which would require the Eighth Circuit carefully to evaluate the motions for leave and compare the *amicus* and party briefs to determine whether the restrictive standard has been satisfied.

In any case, the government acknowledged that the *amici* briefs in *Rubashkin* included arguments that Rubashkin did not make and expanded on arguments he did.[46] Unlike Rubashkin's brief, the ACLU-Iowa advocated a constitutional standard for recusal based on the Supreme Court's 2009 decision in *Caperton v. A.T. Massey Coal Co., Inc.*[47] The NACDL and other *amici*, including a former U.S. Attorney for the Northern District of Iowa and Professor Alan Dershowitz of Harvard, argued that Judge Reade's alleged involvement with prosecutors in the Postville raid "denied [Rubashkin] a fair trial by an impartial judge" under principles set forth in *Morrison v. Olson*; the brief also argued that a federal statute—not relied upon by Rubashkin—required that Rubashkin's new trial motion be decided by a different judge.[48] And the brief of the WLF, leading law professors, and former federal judges and prosecutors "highlight[ed] their deep concerns over substantial flaws they *see* in the district court's sentencing of [Rubashkin] to a functional life sentence in this high-profile case" and compared his sentence to those in other recent high-profile white collar cases.[49]

And while the government suggested that efforts by a party's counsel to coordinate *amici* are unseemly, such efforts are commonplace and proper. The leading treatise on Supreme Court practice, for instance, states that "consultation and communication [between party and *amicus* counsel] is both appropriate and essential" and that party counsel properly may "review[] an amicus brief in order to identify inaccuracies and avoid repetition of matter already presented in the party's brief," even if "such a review may result in advice by party counsel that the amicus counsel rewrite, delete, or add certain matter."[50]

Finally, a restrictive policy on *amicus* participation could cast a negative light on the judiciary by creating "at least the perception of viewpoint discrimination" and conveying "an unfortunate message about the openness of the court."[51] Indeed, "[u]nless a court follows a policy of either granting or denying motions for leave to file in virtually all cases, instances of seemingly disparate treatment are predictable."[52] To many, the government's rare resistance to *amici* who have criticized its conduct in *Rubashkin* could suggest such viewpoint discrimination or disparate treatment by the United States.

Government: "Do As I Say, Not As I Do"

In sharp contrast to the restrictive standard advocated by the government in *Rubashkin*, the United States itself may file an *amicus* brief in any case without consent of the parties or leave of court. In the federal courts of appeals, the rules provide that "[t]he United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court."[53] The Supreme Court Rules similarly provide that "[n]o motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General [or] on behalf of any agency of the United States . . . ."[54]

The government takes full advantage of the rules allowing it freely to participate as an *amicus*. The United States is "the most successful as well as the most frequent amici before the [Supreme] Court."[55] It is widely recognized that the United States is "in a class by itself in terms of its influence as an amicus filer."[56] In the Supreme Court's 2009-10 term alone, for instance, our review indicates that the government filed *amicus* briefs in more than half of the merits cases in which it was not a party. The restrictive standard advocated by the United States in

Rubashkin therefore could limit *amicus curiae* practice largely to governmental entities, silencing the perspectives of nongovernmental *amici* with a proven track record as friends of the court.[57]

In addition, although the United States in *Rubashkin* criticized the *amici* for seeking to "inject interest group politics into this case,"[58] academics long have argued that "the first consistent utilization of the amicus brief's potential as a form of judicial lobbying can be attributed to the Department of Justice."[59] In the early 1900s, U.S. attorneys general honed the art of filing *amicus* briefs "with a broader aim of effectuating major social changes and implementing broad public policies," and the practice thereafter became commonplace.[60]

Apart from its own role as an *amicus*, in Supreme Court cases where the government is a party, the Office of the Solicitor General (OSG) routinely consents to the filing of nongovernmental *amicus* briefs.[61] In the Supreme Court's 2009-10 term, in merits cases where the United States was a party, the OSG consented to numerous briefs by the *amici* in *Rubashkin* or their affiliates. It consented to eleven *amicus* briefs by the NACDL; three by the ACLU national; three by the WLF; more than a dozen by law professors; and one by former judges. In our personal experience, obtaining consent from the OSG to file an *amicus* brief in a government case in the Supreme Court is a purely ministerial matter. The government's approach in *Rubashkin*, then, is not only unduly restrictive, but also facially conflicts with the government's own longstanding *amicus* practice in the Supreme Court. We do not know whether the OSG or anyone at main Justice approved or even was informed of the government's resistance to Rubashkin's *amici*.[62]

Conclusion

Studies reflect that most federal judges find *amicus* briefs helpful, the great majority of federal appellate courts freely accept *amicus* briefs, and the federal government is the most frequent *amicus* around. Yet, in a highly publicized appeal where its conduct has been criticized, the United States has sought to bar all friend-of-the-court briefs supporting the defendant. By itself, this stance could be written off as a knee-jerk reaction by an isolated U.S. Attorney's office. But the government's resistance—representing the views of the United States—has broader implications. The United States has advocated a restrictive standard that, if adopted, would drastically alter *amicus curiae* practice in the Eighth Circuit and potentially beyond. The Eighth Circuit hopefully will not depart from the more accepting approach of *amicus* briefs applied in the overwhelming majority of federal appellate courts. But whatever the outcome in *Rubashkin*, the government's effort to quiet the defendant's *amici* ironically has only given them a louder voice.

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[1] *United States v. Rubashkin*, 718 F. Supp. 2d 953 (N.D. Iowa 2010), *appeal docketed*, No. 10-2487 (8th Cir. July 6, 2010).

[2] *See* Government's Resistance to Motions for Leave to File Amicus Curiae Briefs at 8, *Rubashkin*, No. 10-2487 (8th Cir. Jan. 19, 2011) [hereinafter Gov't Amicus Resistance].

[3] Spencer S. Hsu, *Immigration Raid Jars a Small Town*, Wash. Post, May 18, 2008, at A1.

[4] *See generally* Allison L. McCarthy, *The May 12, 2008 Postville, Iowa Immigration Raid: A Human Rights Perspective*, 19 Transnat'l L. & Contemp. Probs. 293 (2010) (discussing controversy over the raid).

[5] Julia Preston, *Federal Charges for Ex-C.E.O. at Meatpacker*, N.Y. Times, Oct. 31, 2008, at A14; Kari Lydersen, *Former CEO of Iowa Kosher Meatpacking Plant Is Arrested*, Wash. Post., Oct. 31, 2008, at A8.

[6] *United States v. Rubashkin*, No. 08-cr-01324, 2010 BL 254429, at *2 (N.D. Iowa Oct. 27, 2010); *see also* Lauren Etter, *Federal Trial Starts for Ex-Manager of Kosher Plant*, Wall St. J., Oct. 15, 2009, at A4.

[7] *Rubashkin*, 2010 BL 254429, at 2.

[8] Julia Preston, *Life Sentence Is Debated for Meat Plant Ex-Chief*, N.Y. Times, Apr. 29, 2010, at A21 (quoting letter from former government officials to the district court judge); *see also* Ashby Jones, *Should Sholom Rubashkin Receive a Life Sentence?*, Wall St. J. Law Blog, Apr. 29, 2010, *at* http://blogs.wsj.com/law/2010/04/29/should-sholom-rubashkin-receive-a-life-sentence.

[9] *Rubashkin*, 718 F. Supp. 2d at 987; *see also* Julia Preston, *27-Year Sentence for Plant Manager*, N.Y. Times, June 22, 2010, at A18 (commenting that Rubashkin's sentence is "unusually high in the recent history of financial crimes—longer than the term for Jeffrey K. Skilling, the former chief executive of Enron, and L. Dennis Kozlowski, the former chief executive of Tyco"); Nathan Koppel, *Sholom Rubashkin Gets Stiff Sentence*, Wall St. J. Law Blog, June 22, 2010, *at* http://blogs.wsj.com/law/2010/06/22/sholom-rubashkin-gets-stiff-sentence.

[10] Memorandum of Law in Support of Defendant's Motion for a New Trial at 1-2, *Rubashkin*, No. 08-cr-01324 (N.D. Iowa Aug. 5, 2010) (Dkt. # 942-1) [hereinafter New Trial Mot.]; *see also* Ashby Jones, *Lawyers Make Intriguing New Trial Motion for Sholom Rubashkin*, Wall St. J. Law Blog, Aug. 5, 2010, *at* http://blogs.wsj.com/law/2010/08/05/lawyers-make-intriguing-new-trial-motion-for-shalom-rubashkin.

[11] New Trial Mot. at 2.

[12] *Rubashkin*, 2010 BL 254429, at *14.

[13] *Id.* at *19.

[14] *Id.* at *5.

[15] *Id.* at *20.

[16] *See* Brief for the Appellant at xiii-xv, 100, *Rubashkin*, No. 10-2487 (8th Cir. Jan. 3, 2011).

[17] Motion for Leave of Court Pursuant to F.R.A.P. 29(b) by Amicus Curiae American Civil Liberties Union of Iowa to File Amicus Brief in Support of Appellant Rubashkin's Request for Reversal and Remand, *Rubashkin*, No. 10-2487 (8th Cir. Jan. 10, 2011) (attaching *amicus* brief [hereinafter ACLU-Iowa Br.]); Motion of the Washington Legal Foundation, Albert Alschuler, William Bassler, Douglas A. Berman, L. Barrett Boss, Robert J. Cleary, Nora V. Demleitner, Monroe H. Freedman, Bennett L. Gershman, Jeff Ifrah, Harold J. Krent, Marc Miller, Michael O'Hear, Stephen Orlofsky, Mark Osler, James Reynolds, Stephen F. Smith, Sandra Guerra Thompson, and Ronald Wright for Leave to File Brief as *Amici Curiae* in Support of Defendant-Appellant, Urging Vacatur, *Rubashkin*, No. 10-2487 (8th Cir. Jan. 10, 2011) (attaching *amicus* brief [hereinafter WLF Br.]); Motion of National Association of Criminal Defense Lawyers for Leave to File Amicus Curiae Brief in Support of Appellant, *Rubashkin* No. 10-2487 (8th Cir. Jan. 10, 2011) (attaching *amicus* brief joined by John M. Burkoff, Alan Dershowitz, Bennett L. Gershman, William E. Hellerstein, Brian Levin, James H. Reynolds, and Mark D. Rosen [hereinafter NACDL Br.]).

[18] ACLU-Iowa Br. at 3-5; NACDL Br. at 1-2.

[19] WLF Br. at 4-8.

[20] Gov't Amicus Resistance at 5-6 n.4 & 7-8.

[21] *Id.* at 7-8.

[22] *Id.* at 2 (quoting *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (Posner, J.)).

[23] *Id.* at 3 n.3.

[24] *Id.* at 4-5.

[25] *Id.* at 7.

[26] *Id.* at 5-6 n.4.

[27] Appellant's Motion for Leave to File Response to Government's Resistance to Motions for Leave to File Amicus Curiae Briefs at 3, *Rubashkin*, No. 10-2487 (8th Cir. Jan. 21, 2011).

[28] *Id.*

[29] *See* Fed. R. App. P. 29(a); S. Ct. R. 37.3.

[30] Carl Tobias, *Resolving* Amicus Curiae *Motions in the Third Circuit and Beyond*, 1 Drexel L. Rev. 125, 127, 130 (2009); *accord* Joseph D. Kearney & Thomas W. Merrill, *The Influence of* Amicus Curiae *Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 762 (2000) (The Supreme Court's "current practice in argued cases is to grant nearly all motions for leave to file as amicus curiae when consent is denied by a party."); Linda Sandstrom Simard, *An Empirical Study of* Amici Curiae *in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 Rev. Litig. 669, 708 (2008) (observing that federal appellate courts "have tended to grant leave to virtually all amicus briefs submitted").

[31] Andrew Frye, *Amici Curiae: Friends of the Court or Nuisances?*, 33 No. 1 Litig. 5, 5 (2006). Judge Richard Posner has been the primary proponent of the restrictive approach. *See* Ruben J. Garcia, *A Democratic Theory of* Amicus *Advocacy*, 35 Fl. St. U. L. Rev. 315, 326-28 (2008) (discussing and disagreeing with minority approach reflected in series of decisions by Judge Posner).

[32] *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128 (3d Cir. 2002) (Alito, J.).

[33] *Id.* at 132 (quoting Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. App. Prac. & Process 279 (1999)).

[34] *See* Garcia, *supra* note 31, at 333 (discussing majority's reliance on economists' *amicus* brief in *Leegin Creative Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)); Aaron S. Bayer, *Amicus Briefs*, Nat'l L.J., Feb. 25, 2008 (discussing influence of *amicus* brief filed on behalf of retired military officers in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003)); *see also* Eugene Gressman et al., *Supreme Court Practice* 741 (9th ed. 2007) ("Not infrequently a good amicus brief may help shape the judicial decision." (collecting examples)).

[35] *Neonatology Assocs.*, 293 F.3d at 132.

[36] Gov't Amicus Resistance at 2 (quoting *Nat'l Org. for Women*, 223 F.3d at 617).

[37] *Neonatology Assocs.*, 293 F.3d at 131.

[38] *See* Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective* Amicus Curiae *Briefs*, 20 J.L. & Pol. 33, 49 (2004) ("Clerks gave the ACLU's *amicus* briefs more consideration principally on account of their consistent superiority."); Simard, *supra* note 30, at 698 (survey of federal judges finding that majority of judges reported *amicus* briefs of interest groups are helpful and influential).

[39] *See Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961) (adopting *amicus* ACLU's argument that evidence obtained through unconstitutional search and seizure is inadmissible in state criminal proceeding, overruling *Wolf v. Colorado*, 338 U.S. 28 (1949)); Simard, *supra* note 30, at 671 & n.6 ("Amicus briefs have been influential in many other landmark cases declaring social policy" (citing as example, the ACLU's brief in *Brown v. Board of Education*, 327 U.S. 483 (1954))); Omari Scott Simmons, *Picking Friends from the Crowd:* Amicus *Participation as Political Symbolism*, 42 Conn. L. Rev. 185, 204 (2009) (discussing ACLU's influential *amicus* brief in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981)); Lynch, *supra* note 38, at 34 (noting influence of *amicus* briefs submitted by ACLU and history professors in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003)).

[40] *See Crawford v. Washington*, 541 U.S. 36, 51-52 (2004) (adopting standard for "testimonial" statements advocated by *amicus* NACDL).

[41] *See* Lynch, *supra* note 38, at 48.

[42] Gov't Amicus Resistance at 2 (quoting *Nat'l Org. for Women*, 223 F.3d at 617).

[43] *Neonatology Assocs.*, 293 F.3d at 133.

[44] *Id.*

[45] Simard, *supra* note 30, at 688; *see also* Gressman et al., *supra* note 34, at 742 ("[M]ost of the Justices have their law clerks sift out the briefs or parts of briefs that they think add enough to the parties' briefs to be worth reading.").

[46] Gov't Amicus Resistance at 6-7.

[47] ACLU-Iowa Br. at 5-6 (discussing *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009)).

[48] NACDL Br. at 3-6 (discussing *Morrison v. Olson*, 487 U.S. 654 (1988) and 28 U.S.C. § 144).

[49] WLF Br. at 3, 15 (discussing sentences of Bernie Ebbers, Jeffrey Skilling, and others).

[50] Gressman et al., *supra* note 34, at 739; *see also Tenafly Eruv Assoc. Inc. v. Borough of Tenafly*, 195 Fed. App'x 93, 99 n.8 (3d Cir. 2006) (rejecting "appellees' apparent belief that there is something unseemly about discussions between appellants and supportive *amici*").

[51] *Neonatology Assocs.*, 293 F.3d at 133.

[52] *Id.*

[53] Fed. R. App. P. 29(a).

[54] S. Ct. R. 37.4; *see also* Stephen R. McAllister, *The Supreme Court's Treatment of Sovereigns as* Amici Curiae, 13 Green Bag 2d 289, 290-91 (2010) (observing that the Court has maintained this laissez-faire approach to governmental *amicus* since it first adopted a rule governing *amicus* briefs in 1939).

[55] Simmons, *supra* note 39, at 211; *see also* Kearney & Merrill, *supra* note 30, at 753 n.25 (empirical study finding that the United States consistently files more *amicus* briefs in the Supreme Court than any other friend of the court).

[56] Kearney & Merrill, *supra* note 30, at 761; *see also id.* at 773 (study found that from 1952-82, "the Solicitor General's amicus filings supported the winning side approximately 75% of the time overall").

[57] Garcia, *supra* note 31, at 332 ("[B]ecause the Solicitor General can often file briefs on behalf of the government, the ability of nongovernmental groups to have broad access to the courts adds to the voices heard in the decisionmaking process.").

[58] Gov't Amicus Resistance at 7.

[59] Samuel Krislov, *The* Amicus Curiae *Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 705 (1963); *see also* Simard, *supra* note 30, at 678 ("The Department of Justice was one of the first entities to effectively invoke the amicus device in pursuit of public policy change.").

[60] Krislov, *supra* note 59, at 705-06.

[61] *Cf. Neonatology Assocs.*, 293 F.3d at 132 n.1 (noting that most parties routinely consent to *amicus* briefs).

[62] Where a U.S. attorney seeks to take an appeal or to file an *amicus* brief, the authorization of the OSG is required. *See* Dep't of Justice, *United States Attorneys' Manual* §§ 2-2.121, 2-2.123 [hereinafter USAM]; *see also* 28 C.F.R. § 0.20. But where, as in *Rubashkin*, the government is an appellee, the responsible U.S. attorney needs only to notify main Justice that the notice of appeal has been filed. USAM § 2-2.200.