

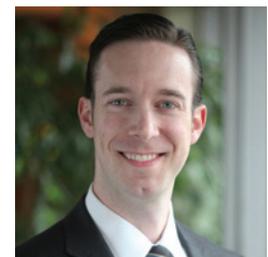
Amicus Curiae at the Supreme Court: Last Term and the Decade in Review

Anthony Franze and Reeves Anderson, members of Arnold & Porter's appellate and Supreme Court practice, analyze last term's amicus docket and review their findings since 2010.

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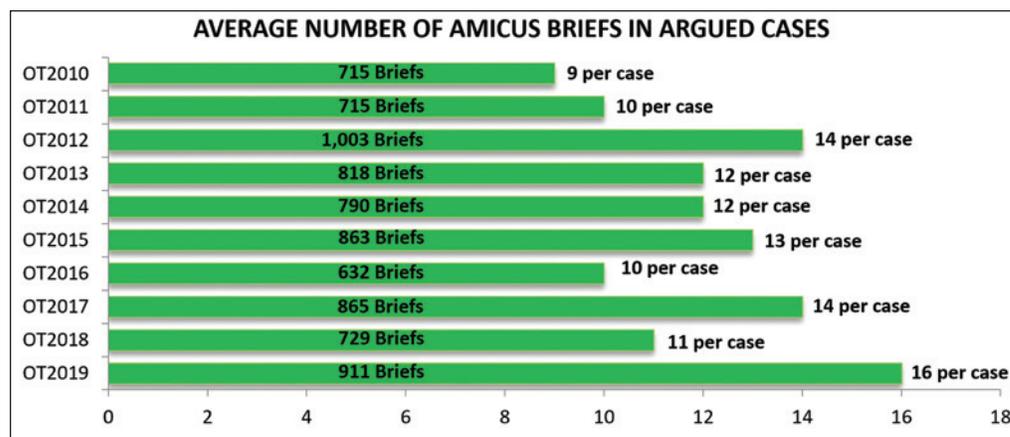
Over the past decade, the Supreme Court has issued landmark rulings on health care, same-sex marriage, affirmative action, and many other critical issues of our times. During those ten years, the Notorious RBG cemented herself as a cultural icon, three new justices joined the court, and One First Street was shuttered during a pandemic.

Along the way, amici curiae—"friends of the court"—played a prominent role in the decision-mak-

ing process. In our first installment of what became annual reviews of the high court's amicus curiae docket for the *National Law Journal*, we noted that the 2010–11 term reflected an "explosion of amicus briefs." Franze & Anderson, *The Court's Increasing Reliance on Amicus Curiae in the Past Term*, Nat'l L.J., Aug. 23, 2011. If we only knew.

Over ten terms, amici cumulatively filed more than 8,000 briefs, participated in 96 percent of all argued cases, and were cited by the justices

in more than half of their rulings. Once a rarity even in blockbuster cases, amicus participation repeatedly shattered records both for the overall number of briefs and the number of amici appearing in a single case. The decade further revealed the types of amicus briefs that grabbed the court's attention. The justices frequently cited briefs from the federal and state governments, briefs written by Supreme Court specialists, and "scholar briefs" from the academy. Most of all, the justices were drawn



to briefs that did not just reiterate the parties' arguments but instead provided real-world information that contextualized the difficult questions before the court.

Reflecting on these past ten years, we found it fitting that Justice Ruth Bader Ginsburg—a person with so many friends during her life—was the justice most likely to cite friends of the court over the past decade.

In many ways, last term was emblematic of modern Supreme Court amicus practice. The 2019–20 term had more than 900 amicus briefs filed in argued cases, the highest average number of amicus briefs per case ever. The justices cited briefs in 65 percent of cases—another record—relying on friends of the court for perspectives on government policies, history, religion, medicine, psychology, and even the financial implications of the court's decisions.

LAST TERM BROKE MORE RECORDS

In the 2019–20 term, amici curiae filed on average 16 briefs per case at the merits stage, an all-time high. Overall participation increased

as well, with friends of the court filing briefs in 97 percent of argued cases, for a total of 911 amicus briefs. That total is the second highest since we started tracking amicus filings in 2010, trailing only the 1,003 amicus briefs filed during the 2012–13 term.

Last term likewise saw a return of mega-cases for amicus participation. “Cases with thirty or more amicus briefs are no longer particularly rare, and the highest-profile cases see amicus filing reaching the triple digits.” Aaron-Andrew P. Bruhl & Adam Feldman, *Separating Amicus Wheat from Chaff*, 106 *Geo. L.J. Online* 135, 135 (2017). In 2019–20, eight different cases included at least 30 amicus briefs (*Bostock*, *Espinoza*, *June Medical*, *Little Sisters of the Poor*, *NY State Rifle*, *Our Lady of Guadalupe*, *Regents of Univ. of California*, and *Seila Law*).

Cases involving hot-button issues like marriage equality and health care tend to generate the most briefs, though patent cases also spur significant amicus participation. Keeping with that trend, *Bostock v. Clayton County*, which held that Title VII's ban on sex discrimination protects

LGBT employees, topped the list in 2019–20. *Bostock* and its consolidated companion cases (*Harris* and *Altitude Express*) received 94 unique amicus filings.

CITATION OF “GREEN” AND GOVERNMENT BRIEFS

In the 2019–20 term, the justices cited amicus briefs in 65 percent of argued cases with amicus participation and signed majority opinions. That rate tops the previous nine terms, during which justices cited friend-of-the-court briefs in 46 to 63 percent of cases. Last term, the justices cited amicus briefs in 22 majority/plurality opinions, 20 dissents, six concurrences, and two opinions concurring and dissenting in part. As in prior years, we exclude from our statistics the term's two court-appointed amici, whose submissions are more akin to party briefs.

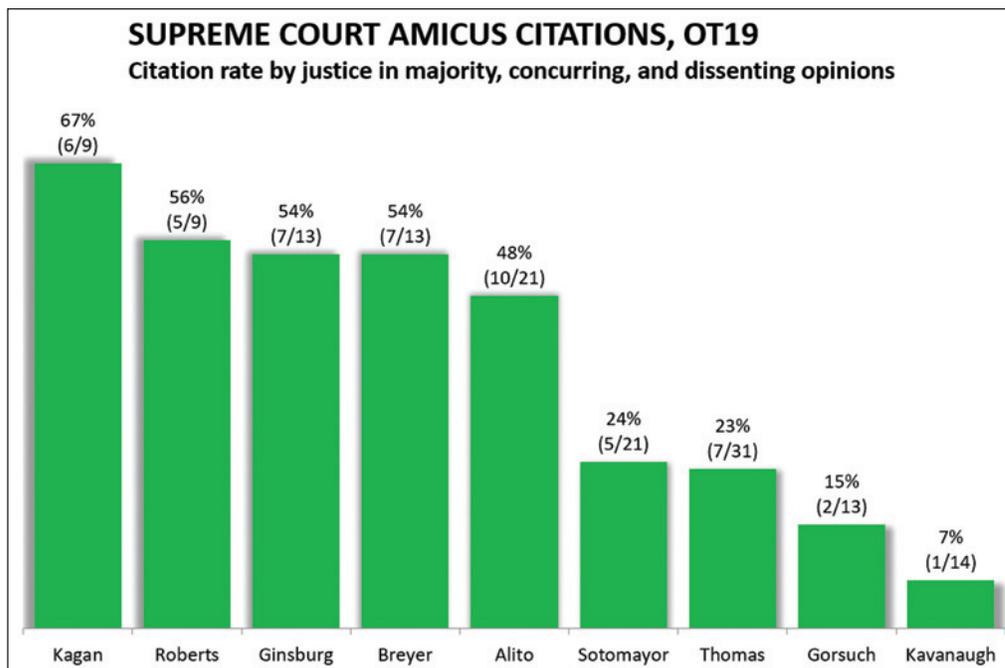
The justices cited 10 percent (76/768) of the nongovernment amicus briefs filed in cases with signed opinions. That citation rate of “green briefs”—so-called for the color of their covers—is in line with the prior nine terms, where the justices cited between 5 and 12 percent of nongovernment briefs.

As for government amicus briefs, the justices cited 63 percent (15/24) of briefs submitted by the Office of the Solicitor General in 2019–20, again roughly in the middle of the 44 to 81 percent range over the prior nine terms.

For the fourth straight term, Justice Elena Kagan led the court by citing amicus briefs in the highest percentage of her opinions (67%). At the other end of the spectrum, Justices Neil Gorsuch and Brett Kavanaugh had the lowest percentage of amicus citations in 2019–20, at 15 and 7 percent respectively. Time will tell

Amicus Participation in Argued Cases, 2019–20

	Number of cases	Nongovernment amicus briefs	U.S. amicus briefs	State/local gov. amicus briefs
Signed decisions	53	768	24	51
Per curiam opinions	3	52	2	2
Dismissed	1	10	1	1
Totals	57	830	27	54



whether the lower citation rates of the court's two newer justices is a reflection of their views of amicus briefs or perhaps attributable to other factors. The remaining justices cited amicus briefs in 23 to 56 percent of their opinions.

THE BRIEFS THAT GOT NOTICED

So how does an amicus get noticed in the crowd? Last term, like its predecessors, reflected some recurring guideposts for the types of briefs that catch the court's attention—and not always because the justices agreed with their friends.

Government briefs. The justices often cite amicus briefs filed by the Office of the Solicitor General, given the OSG's institutional credibility with the high court. As noted, that held true in 2019–20. The government's briefs earned attention across the court's lineup, with seven of nine justices citing an OSG brief during the 2019–20 term.

That's not to say the justices always agree with the United States. The justices regularly cite OSG amicus briefs to scrutinize or reject the government's arguments. Last term, for

instance, in *Our Lady of Guadalupe School v. Morrissey-Berru*, where the court held that Catholic elementary school teachers are “ministers” who cannot sue for employment discrimination, Justice Sonia Sotomayor's dissenting opinion cited an OSG brief to call out the government for “switch[ing] sides without explanation” on the question presented.

Other government amicus briefs also drew attention last term. In *Ramos v. Louisiana*, where the court held that the Sixth Amendment establishes a right to a unanimous jury in criminal cases, the majority and dissenting opinions discussed an amicus brief submitted by the State of Oregon regarding the number of pending appeals that could be affected by the court's decision. The justices similarly relied on state amicus briefs in the majority and dissenting opinions in *County of Maui v. Hawaii Wildlife Fund*, a case involving the scope of the Clean Water Act.

Scholar Briefs. Studies show that briefs by academics get “closer attention—at least initially.” Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae*

Briefs, 20 J.L. & Pol. 33, 52 (2004). Last term again illustrates the point. In 2019–20, every single justice cited a brief by professors in at least one of their opinions. They cited professors of criminal law (*Kahler*), immigration law (*Barton*), habeas corpus law (*Thuraissigiam*), and church-state law (*Little Sisters of the Poor*), among others. Again, just because justices cite scholar briefs does not always mean that they agree with them. In Justice Kavanaugh's dissenting opinion in *Bostock*—the only opinion where he cited an amicus brief—he highlighted a scholar amicus brief just to note his disagreement with it.

Legislative Facts. If the past ten terms have reflected anything about amicus briefs, it's that submissions that merely reiterate the arguments made by the parties—“me too” briefs—are almost never cited. Instead, the justices appear drawn to briefs that contain what have been called “legislative facts”—“generalized facts about the world that are not limited to any specific case.” Allison Orr Larsen, *The Trouble With Amicus Facts*, 100 Va. L. Rev. 1757, 1759 (2014). Our past reports have chronicled the array of legislative facts provided by amici that have found their way into the justices' opinions. The 2019–20 term was no different.

The justices cited amicus briefs that provided information on the number of “individuals killed by border agents” (*Hernandez*), studies on the reasons drivers have their licenses suspended (*Glover*), the financial strain to businesses from excluding DACA recipients from the lawful labor force (*Regents of Univ. of California*), guidance on how effective consumer surveys are designed (*Booking.com*), data on the health and other benefits of effective contraception (*Little Sisters of the Poor*), and insights into religious practices of different faiths (*Our Lady*

of *Guadalupe*), just to name a few. Though not as prevalent last term, the justices in prior years regularly have cited amicus briefs that compile statutes, legislative history material, and surveys of state laws.

Advocates and Amici. Finally, studies and experience suggest that advocates and amici known for quality briefs get more attention. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901, 1922–23 (2016); see also Adam Feldman, *A Lot at Stake: Amicus Filers 2017/2018*, Empirical SCOTUS, Jan. 16, 2018. That held true in the 2019–20 term. Overall, around 40 percent of the green briefs cited by the justices were authored by firms with specialized Supreme Court practices.

THE DECADE BY THE NUMBERS

Over the past ten terms, amici filed 8,041 separate briefs on the merits in cases that were set for argument—a decade average of 12 amicus briefs per case, ranging from a low of nine briefs per case when we started counting in 2010 to a high of 16 briefs per case this year.

To put these numbers in perspective, a key study showed that from 1946 to 1955 amici cumulatively filed 531 briefs—an average of fewer than one brief per case. Joseph Kearney & Thomas Merrill, *The Influence of*

Amicus Curiae Briefs on the Supreme Court, 148 U. Pa. L. Rev. 743, 752–53 (2000). From 1986–1995, that number increased to about five briefs per case. *Id.* at 765 n.71.

Double and even triple-digit amicus briefs in a single case also has become the norm. In seven of the past ten terms, a single case generated at least 80 amicus briefs. These numbers dwarf the marquee cases of the past, when *Roe v. Wade* produced 23 amicus briefs and *Brown v. Board* saw just six.

Amicus participation has broadened, as well. Since 2010, amici have participated in 96 percent of all argued cases; it is now the rare exception to find a case *without* amici. By contrast, from 1946 to 1955, amici curiae filed briefs in only 23 percent of argued cases, and from 1986 to 1995, about 85 percent of argued cases that had amicus support. Kearney & Merrill, *supra*, at 753.

It is important to note that today's record-breaking numbers reflect just a fraction of overall amicus participation at the court. Excluded from our totals are briefs filed in cases that were removed from the court's docket before merits briefing was complete, as well as amicus briefs filed at the certiorari stage. Cert-stage amicus briefs are increasingly common; one study found that 14 percent of paid petitions were supported by

friend-of-the-court briefs during this period. Larsen & Devins, *supra*, at 1938 (reviewing petitions in OT14); see also Paul Gugliuzza, *The Supreme Court Bar at the Bar of Patents*, 95 Notre Dame L. Rev. 1233, 1249 (2020).

We also see consistency in the justices' citations to amicus briefs. In cases with signed opinions that included at least one amicus brief, the justices cited amicus briefs between 46 and 65 percent of the time over the past decade. The citation rate for green briefs stayed between 5–12 percent, and the OSG was typically cited in 60–80 percent of cases in which the United States participated as an amicus.

Looking at the justices' ten-year totals, Justice Ginsburg led the group by citing amicus briefs in 46 percent of her opinions. One might notice, too, an apparent correlation between amicus citation rates and a justices' perceived ideology along a political spectrum. Notably, however, the court's two "swing justices" since 2010—retired Justice Anthony Kennedy and Chief Justice John Roberts—seem to defy that trend by citing amicus briefs in a relatively higher percentage of their opinions.

AN INCREASED SPOTLIGHT ON AMICUS CURIAE

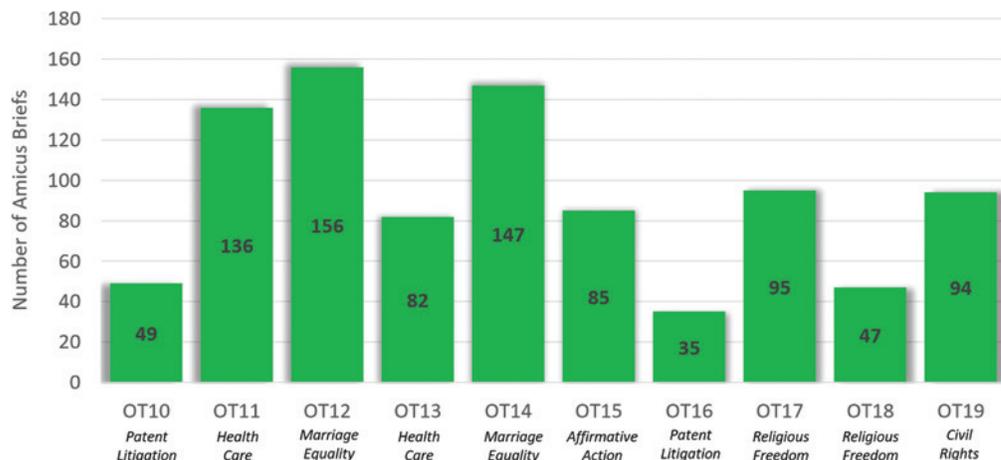
The vast increase in amicus participation has led to greater scrutiny of amicus practice. For example, prominent academics have criticized scholar briefs for not always adhering to the rigors of scholarship, Richard H. Fallon Jr., *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. Legal Analysis 223 (2012), but also praised scholar briefs as beneficial to both the Court and the academy. See Amanda Frost, *In Defense of Scholars' Brief*, 16 Green Bag 2d 135 (2013).

Some have criticized how amicus practice is increasingly inhabited

Amicus Participation in Argued Cases, 2010–20

	Number of cases	Total amicus briefs filed	Briefs per case	Participation rate
OT 2010	78	715	9	94%
OT 2011	69	715	10	94%
OT 2012	74	1,003	14	96%
OT 2013	69	818	12	96%
OT 2014	67	790	12	98%
OT 2015	68	863	13	93%
OT 2016	64	632	10	98%
OT 2017	61	865	14	100%
OT 2018	69	729	11	96%
OT 2019	57	911	16	97%
Totals	676	8,041	12	96%

HIGHEST NUMBER OF AMICUS BRIEFS IN SINGLE/CONSOLIDATED CASES



by a small group of specialist lawyers, while other notable scholars have defended the so-called “amicus machine.” Larsen & Devins, *supra*. And while the court continues to rely on amicus briefs for a wide range of expertise, William & Mary law professor Allison Orr Larsen has urged caution when relying on amici for legislative facts. Larsen, *supra*.

The sheer volume of amicus briefs also sparked debate. Professor Adam Feldman, who runs Empirical SCOTUS—a go-to source for statistics on the high court—and Professor Aaron-

Andrew Bruhl have warned of “a growing threat of amicus overload, especially in the most salient cases,” projecting that “the problem will only become more acute if current filing trends continue.” Bruhl & Feldman, *supra*. Nevertheless, to date, the court has not placed any new restrictions on amicus submissions other than a recent, modest reduction in the overall word limit for amicus briefs.

Finally, Senator Sheldon Whitehouse has urged the Supreme Court to increase transparency in the funding of nongovernment briefs. See Mike

Scarcella, *Sheldon Whitehouse Slams ‘Plainly Inadequate’ SCOTUS Amicus Disclosure Rule*, Nat’l L.J., Jan. 23, 2020. Senator Whitehouse again voiced his concerns during the recent confirmation hearing of Justice Amy Coney Barrett. The current term will provide a first glimpse into whether Justice Barrett adopts the Supreme Court’s solicitous view of amicus briefs or maintains the more restrictive approach to amicus participation championed by her former colleagues on the Seventh Circuit. See *Prairie Rivers Network v. Dynegy Midwest Generation LLC*, 976 F.3d 761 (7th Cir. 2020) (Scudder, J., in chambers) (citing cases reflecting the Seventh Circuit’s more restrictive policy regarding amicus briefs and providing guideposts for effective and permissible briefs).

It’s been nearly 200 years since the first recorded amicus brief was filed by famous statesman Henry Clay in *Green v. Biddle*, 21 U.S. (8 Wheat) 1 (1823), a case involving Virginia’s cession of the land that became Clay’s home state of Kentucky. Amici curiae have steadily become a mainstay of Supreme Court practice ever since. If the past decade is any indication, the justices can continue to count on their “friends” showing up in record numbers to share their views and maybe, just maybe, influence the course of history. Though many would happily settle for a citation.

Anthony J. Franze and R. Reeves Anderson are members of *Arnold & Porter’s* appellate and Supreme Court practice. The firm represented parties or amici in several cases referenced in this article. The authors thank *Kathryne Lindsey* for her invaluable assistance with the compilation of data.

SUPREME COURT AMICUS CITATIONS, 2010-2020

Citation rate by justice in majority, concurring, and dissenting opinions

