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Commentary: The Court's increasing reliance on amicus curiae in the past term

This year marked the 50th anniversary of *Mapp v. Ohio*, a decision celebrated as "the most famous search-and-seizure case ever decided by the U.S. Supreme Court." Yale Kamisar, "*Mapp v. Ohio 50 Years Later*," NLJ, June 13, 2011, at 50. *Mapp* also is significant for a less-celebrated reason: It was one of the rare occasions in which the Supreme Court adopted a position not advanced by either party to the case, but instead, urged solely by an amicus curiae — the ACLU. In the 2010-11 term, nearly 50 years to the day after Mapp was decided, the Court in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), again based its decision on an argument raised exclusively in an amicus brief — this time one submitted by the Office of the Solicitor General.

Such clear examples of amicus influence on the high court are unusual, and the *Turner* dissent criticized the majority for departing from "the wise and settled general practice of this Court not to consider an issue in the first instance, much less one raised only by an amicus." Id. at 2524 (Thomas, J., dissenting). But the *Turner* divide conjures a long-enduring debate: Just how much influence do amicus briefs really carry at the high court? Our analysis of the 2010-11 term suggests that the justices are relying on friend-of-the-court briefs more than ever.

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THE SURGE OF AMICUS

The Supreme Court in recent years has received increasing help from its "friends," as amicus participation at the merits stage has skyrocketed. From 1946 to 1955, amicus briefs were filed in only about 23% of argued cases. Joseph Kearney & Thomas Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court," 148 U. Pa. L. Rev. 743, 753 (2000). From 1986 to 1995, that number jumped to 85%. Id. The upward trend continued last term, with 93% of the cases with signed opinions including at least one amicus brief at the merits stage. (In the 2010-11 term, the Court issued 75 signed opinions, only five of which had no amicus participation. The authors compiled the statistics in this article from the 70 cases that included at least one amicus brief. Excluded are the 10 unsigned (per curiam) decisions issued during the term.)

The sheer number of briefs also has surged over the years. In the decade from 1946 to 1955, amici cumulatively filed 531 briefs — an average of fewer than one brief per case. Id. at 752-53. By the 1990s, the Court received about five amicus briefs per case. Id. at 765 n.71. Last term, that number ballooned to an average of nine amicus briefs per case, for a total of 687 amicus submissions.

This proliferation can be seen among individual cases, too. Historically, the Court would receive only a handful of amicus briefs in a headline-grabbing case. In *Brown v. Board of Education*, for instance, amici filed only six briefs. Today, the "big" cases of a term dwarf that amount. For example, amici filed 68 briefs in the D.C. gun case in 2008, *District of Columbia v. Heller*, and a record 100-plus briefs in the Michigan affirmative action cases in 2003, *Gratz v. Bollinger* and *Grutter v. Bollinger*. This phenomenon carried over into more obscure cases last term. The 2010-11 high mark of 49 amicus briefs went to *Microsoft v. i4i L.P.*, a case familiar to few outside the patent bar.

THE GREEN BRIEF: FRIEND OR FOE?

The extent to which the Court is influenced by these briefs, on the other hand, is an unsettled question. That is particularly true for nongovernment amicus briefs, so-called "green briefs" because of the color of their covers. Some lawyers, judges and academics bluntly have asked whether green briefs are a waste of time — for the amicus, the brief-writers and the Court. Kelly Lynch, "Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs," 20 J.L. & Pol. 33, 37-38 (2004). Political scientist Paul Collins recently reviewed more than 50 studies that attempted to assess the influence of nongovernment amicus briefs and found it "an area of confusion." Paul Collins Jr., Friends of the Supreme Court 4 (Oxford Univ. Press 2008). Nevertheless, it is possible to assess objectively whether the justices found amicus briefs useful: by tracking how often the briefs were, in fact, used — i.e., cited by the Court.

By that metric, the Supreme Court is finding amicus briefs increasingly helpful. During the 1986-1995 terms, only 37% of the Court's decisions referenced an amicus brief. Kearney & Merrill, supra, at 757. Last term, that number climbed to 63%, even excluding the two amici whom the Court appointed to represent the interests of respondents. The First Amendment "violent video games" case, *Brown v. Entertainment Merchants Association*, led the pack with citations to eight different amicus briefs.

The solicitor general's amicus briefs on behalf of the United States remain the "king of the citation-frequency hill." Kearney & Merrill, supra, at 760. The solicitor general is "the quintessential repeat player" at the Court and "reaps all of the advantages that flow from that status." Margaret Cordray & Richard Cordray, "*The Solicitor General's Changing Role in Supreme Court Litigation*," 51 Boston College L. Rev. 1323, 1337 (2010). Traditionally, the Court has cited the solicitor general's amicus briefs in just over 40% of the cases in which the SG appears as amicus. Kearney & Merrill, supra, at 760. For the 2010-11 term, however, amicus briefs filed by the SG were cited by the justices a remarkable 79% of the time.

Nongovernment amicus briefs historically have a lower citation rate. Last term, only 8% of the 628 green briefs were cited by the justices. Even so, nongovernment amici left their mark on the term, appearing in 40% of the Court's decisions.

Without the institutional relationship the SG shares with the Court, what's a nongovernment amicus to do for more attention? Studies suggest that the justices and their clerks might look to who filed the brief, considering both the identity of the amicus curiae and the brief's author. See Kearney & Merrill, supra, at 749-50. Briefs filed by organizations known for high-quality submissions, like the U.S. Chamber of Commerce and the ACLU, or drafted by experienced Supreme Court practitioners, may garner closer attention. Lynch, supra, at 49-56.

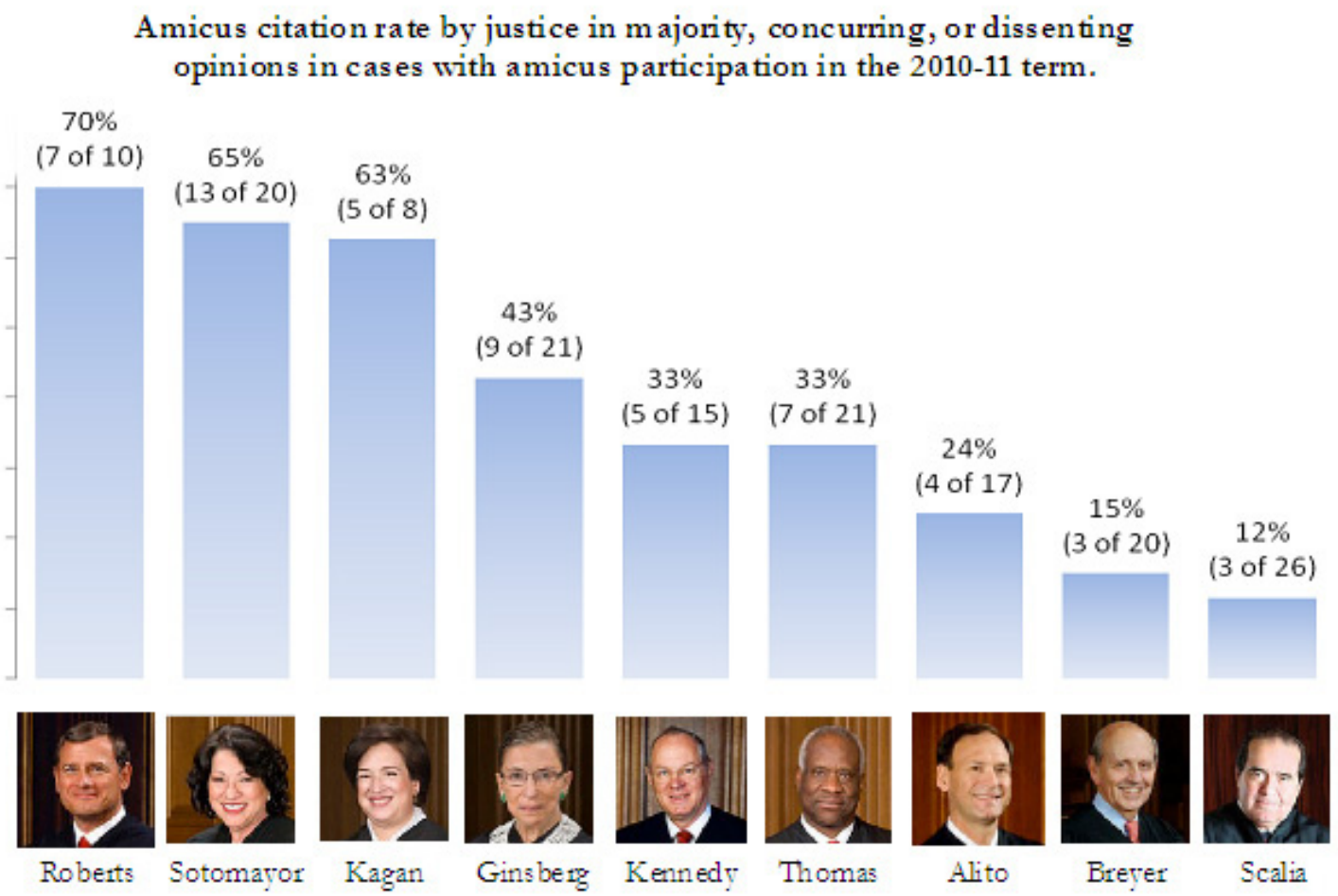
This theory aligns with the decisions of the 2010-11 term. Organizations known for excellent submissions had multiple briefs cited by the justices. The National Association of Criminal Defense Lawyers and the ACLU received the most attention, with four briefs and three briefs cited, respectively. They were closely followed by the Pharmaceutical Research and Manufacturers of America, Public Citizen and the National District Attorneys Association, each of which was cited in two cases. Amicus counsel's Supreme Court experience also seemed to matter. Nearly half of the nongovernment amicus briefs cited by the justices were written by experienced appellate advocates — many from D.C.-based law firms with Supreme Court practices.

HIGH AND LOW AMICUS CITERS

The justice least likely to cite an amicus brief is…

Justice Antonin Scalia. Last year, he cited amicus briefs in only 12% of his opinions. Justice Scalia's sparing approach is consistent with his past statements noting the limitations of amicus briefs. See *Roper v. Simmons*, 543 U.S. 551, 617-18 (2005) (Scalia, J., dissenting). More surprising, however, is that Justice Stephen Breyer — who has stated that amicus briefs help improve the quality of high court decisions (Collins, supra, at 4) — had the second-lowest citation rate. Justice Breyer cited amicus briefs in only three of his 20 opinions last year (15%).

The top amicus citers, by contrast, were the newest members of the Court, as reflected in the accompanying chart. Last term, Justices Elena Kagan and Sonia Sotomayor both cited amicus briefs in more than 60% of their



opinions. Only Chief Justice John Roberts Jr. cited amici at a higher rate; seven of his 10 opinions cited at least one amicus brief. Interestingly, even though a justice's propensity to cite amicus briefs does not appear to correspond with ideology, Justice Anthony Kennedy landed in the middle once again.

Since their first appearance in the Supreme Court in 1823 through today, amici curiae have sought to exert their influence on the development of the law. While debate continues on whether they have been successful, the explosion of amicus briefs indicates that the organizations and individuals who file believe it is worth their time and money to participate.

For their part, the justices should be credited for not reining in the Court's longtime rules and practices allowing virtually unlimited amicus participation, given the increased workload this imposes on the Court. It could be that additional limitations would just create more work since the Court would have to review each brief to determine if it satisfied more demanding admission standards. Or, perhaps the justices feel that limiting amicus participation would send the wrong message. The 2010-11 term opinions, however, provide an alternative explanation: The justices find the briefs useful and increasingly are listening to their "friends."

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