

The Supreme Court's reliance on amicus curiae in the 2011-12 term

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The Supreme Court's 2011-12 term could be considered the "year of the amicus" based on the prominent role friend-of-the-court briefs played at the high court. The term saw a record-breaking 136 amicus briefs—plus two court-appointed amici—in the health care cases. See Eric Lichtblau, "Groups Blanket Supreme Court on Health Care," N.Y. Times, March 24, 2012. In another closely watched case, *Kiobel v. Royal Dutch Petroleum*, the Court ordered reargument on an issue raised principally in two amicus briefs. See Sue Reisinger, "The Impact of Corporate Amicus Briefs on the Supreme Court in *Kiobel*," Corp. Counsel, March 8, 2012. And outside the courtroom, academia was abuzz with Harvard law professor Richard Fallon's article critiquing—some might say condemning—amicus practices of law professors. Richard H. Fallon Jr., "Scholars' Briefs and the Vocation of a Law Professor," 4 J. Legal Analysis 223 (2012).

Last year, our review of the 2010-11 term indicated that the justices relied on amicus briefs more than ever. See Anthony J. Franze & R. Reeves Anderson, "The Court's Increasing Reliance on Amicus Curiae in the Past Term," NLJ Supreme Court Insider, August 24, 2011. This year revealed a somewhat different picture. While the 2011-12 term contin-

ued the upward trajectory in the number of amicus briefs per case, there was a precipitous drop in how frequently the justices cited those briefs, including a sharp decline in the Court's citation of amicus briefs submitted by the solicitor general. Why the change? And what else can the term tell us about amicus practice in the high court? Our review this year yielded some unexpected findings.

MORE AMICUS BRIEFS PER CASE

From 1946 to 1955, amici curiae filed briefs in only about 23 percent 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 percent. *Id.*; see also Lee Epstein et al., *The Supreme Court Compendium* 721 (5th ed. 2012) (showing amicus participation annually

from 1946 to 2001). The upward trend continued in the 2011-12 term: 95 percent of cases with signed opinions included at least one amicus brief at the merits stage. That's up from 93 percent in the 2010-11 term.

The sheer number of briefs per case also continued to rise. In the decade from 1946 to 1955, amici cumulatively filed 531 briefs—an average of fewer than one brief per case. By the 1990s, the Court was receiving about five amicus briefs per case. Kearney & Merrill, *supra*, at 752-54, 765 n.71. The 2011-12 term saw twice that number, averaging 10 amicus briefs per case, for a total of 715 amicus submissions in all cases scheduled for argument. That's up from nine briefs per case in the 2010-11 term.

As noted, the 2011-12 term also broke the record for the most briefs filed in a case. The 136 amicus briefs filed in the health care cases surpassed by 30 percent

Cases set for argument, 2011-12 term				
	Number of cases	Non-government amicus briefs	U.S. amicus briefs	State amicus briefs
Signed decisions	64	563	26	38
Per curiam decisions	1	4	1	1
Dismissed	3	40	2	4
Reset for argument	1	35	1	0
Totals	69	642	30	43

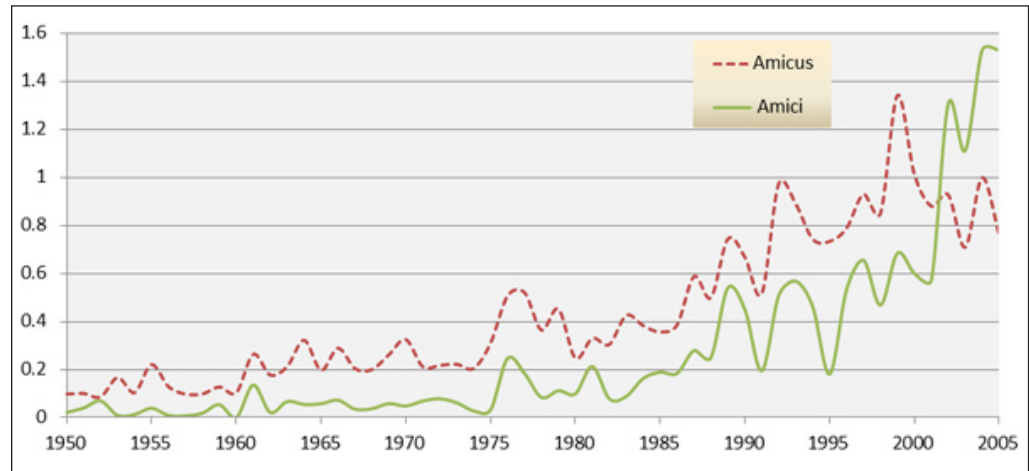
the past record of 107 briefs in the Michigan affirmative action cases in 2003, *Gratz v. Bollinger* and *Grutter v. Bollinger*. To put the 136 health care briefs in perspective, in *Brown v. Board of Education*, amici filed only six briefs.

The increased number of amicus briefs per case, however, warrants two caveats. First, the unprecedented number of briefs in the health care cases necessarily skewed the overall average for the term. (Omitting the health care briefs drops the average in the 2011-12 term to eight briefs per case. By contrast, omitting the top case from the 2010-11 term had no effect after rounding.) Second, the sample size in the 2011-12 term was smaller, given the decline in the number of decisions. The court issued 75 signed decisions after argument in the 2010-11 term, but that number dropped to 64 in the following term. As a result, the number of briefs per case increased in the 2011-12 term, even though the overall amicus participation in decided cases in that term (627 briefs) was lower than in the previous term (687 briefs).

LESS RELIANCE ON AMICUS BRIEFS

Whether the court is influenced by amicus briefs is an unsettled question of particular importance to amici themselves. 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). The uncertainty is compounded by the fact that the justices likely review only a fraction of the amicus briefs, relying instead on their clerks to separate the wheat from the chaff. Fallon, *supra*, at 226; see also Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 102-03 (Thomson/West 2008). Nevertheless, one proxy exists to objectively measure

SUPREME COURT'S USE OF THE WORDS "AMICUS" AND "AMICI" PER DECISION



the potential influence amicus briefs have on the justices: whether they cite the briefs in their opinions. Of course, just because a brief is cited does not necessarily correlate with influence, but the citation does signal that the brief contributed to a justice's analysis of the case.

As recently as the 1950s, the justices almost never referred to “amicus” or “amici” in their opinions. But since then, according to a research database hosted at Legal Language Explorer, the justices' use of those terms has steadily climbed.

Likewise, the percentage of the Court's decisions citing specific amicus briefs has increased. From 1946 through 1955, the Court referred to amicus briefs in about 18 percent of its decisions that included amicus participation. Kearney & Merrill, *supra*, at 757. From 1986 to 1995, 37 percent of the Court's decisions referenced an amicus brief. *Id.* In the 2011-12 term, the justices cited amicus briefs in 46 percent of the cases with amicus participation. While this frequency falls in line with the citation rate of the early 1990s, it is a drop from the previous term, when the justices cited amicus briefs in 63 percent of their signed opinions. Franze & Anderson, *supra*, at 2.

One factor in the decline was the high court's reduced citation of amicus briefs filed on behalf of the United States by the Office of the Solicitor General. The

federal government generally fares well before the Court 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). Not surprisingly, then, government amicus briefs have earned the title, “king of the citation-frequency hill.” Kearney & Merrill, *supra*, at 760. While the solicitor general's office retained its spot atop the hill in the 2011-12 term, the justices cited the federal government's amicus briefs far less than in the prior term. In the 2010-11 term, the justices cited amicus briefs filed by the office in 79 percent of the cases where the government filed a brief. In the 2011-12 term, the justices cited government amicus briefs in 44 percent of those cases, near the historic average of 40 percent. *Id.* at 760. By way of comparison, the justices in 2011-12 cited 13 percent of the 38 amicus briefs filed by local and state governments.

Nongovernment amici fared better in the 2011-12 term than in the prior term. In 2010-11, the justices cited 8 percent of the 628 private amicus briefs (called “green briefs” because of the color of their covers). In 2011-12, justices cited 11 percent of the 563 green briefs, relying on green briefs in 34 percent of signed decisions.

The case in which the justices cited the most amicus briefs, not surprisingly, was the health care decision, where members of the Court cited 14 different briefs. Second place went to *Florence v. Board of Chosen Freeholders* (the “prison strip search case”), in which the justices cited 10 amicus briefs.

Consistent with studies suggesting that both the identity of the amicus curiae and the brief’s author may influence the level of attention a particular brief receives from the justices or their clerks, in the 2011-12 term, the green briefs that the justices cited were often filed by organizations known for high-quality submissions or written by experienced Supreme Court practitioners. As in the prior year, the National Association of Criminal Defense Lawyers was among the most cited, with the justices referring to NACDL briefs in three opinions. Other professional organizations also garnered citations in more than one case, including the American Psychological Association (two cases), the National Senior Citizens Law Center (three), and the Service Employees International Union (three). Interestingly,

given the debate prompted by Professor Fallon concerning legal scholar briefs, the justices cited law-professor-amici in five cases, more than in 2010-11.

THE JUSTICES’ CITATIONS RATES

In the 2011-12 term, Justice Anthony Kennedy cited amicus briefs in 73 percent of his opinions, the highest percentage of any justice. At the other end of the spectrum, Justice Clarence Thomas did not cite a single amicus brief in his majority, dissenting, or concurring opinions. These rankings represent a shift from the previous term, when Kennedy and Thomas tied for fifth by citing amicus briefs in 33 percent of their opinions. Other justices shifted rank as well, and only Justice Elena Kagan retained the same citation position from 2010-11. Though anecdotal, this suggests that what drives amicus citation—as one would expect and hope—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.

That conclusion is buttressed by the fact that the justices in the 2011-12 term cited amicus briefs more frequently in contentious cases, where amici might provide additional or unique perspectives on thorny issues. When the majority consisted of only five or six members of the Court, the justices cited amicus briefs in 63 percent of those cases. In contrast, the justices cited amicus briefs in only 29 percent of the cases when the decision was unanimous (9-0 or 8-0) or nearly unanimous (8-1).

As amici continue to file more and more briefs each year, Court-watchers will continue to scrutinize these nonparty participants that the justices cited in nearly half of the Court’s decisions this past term. While debate inevitably will continue on how much amicus briefs influence the outcome of the country’s highest-profile disputes, the justices apparently continue to find the briefs useful, which is a good thing because amicus participation shows no signs of slowing down.

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AMICUS CITATION RATE BY JUSTICE IN MAJORITY, CONCURRING, OR DISSENTING OPINIONS IN CASES WITH AMICUS PARTICIPATION IN THE 2011-12 TERM.

