

Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm

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U.S. Supreme Court.

Photo: Diego M. Radzinski/NLJ

In the 2014-2015 term, “friends of the court” participated in 98 percent of the U.S. Supreme Court’s cases, filed nearly 800 amicus curiae briefs and broke two records: the most amicus briefs filed in a case and the most signatories on a single brief.

But in many ways, this was just business as usual at One First Street. In this, our fifth year analyzing Supreme Court amicus practice for The National Law Journal, we conclude that mountains of briefs, shattered records and the justices’ reliance on amici simply reflect the new norm.

THE NEW ORDER

In the 2014-2015 term, amicus curiae filed 781 briefs in argued cases, averaging about 12 briefs per case. That’s more than double the

briefs-per-case filed in the 1990s, and 12 times those filed in the 1940s-1950s. See Joseph Kearney & Thomas Merrill, “The Influence of Amicus Curiae Briefs on the Supreme Court,” 148 U. Pa. L. Rev. 743, 752-53 (2000). Yet a dozen amicus briefs per case is in line with the average for the past five terms.

In 2014-2015, it was again the rare case that didn’t have amicus support. Amici participated in 98 percent of argued cases, slightly up from the 93 to 96 percent participation rates of the prior four terms. The only 2014-2015 case without amici, however, wasn’t the usual fly-under-the-radar decision. *Davis v. Ayala* garnered substantial public attention due to Justice Anthony Kennedy’s concurrence, which questioned the practice of solitary

confinement—an opinion sure to generate lots of amicus interest in the coming terms.

As noted, the 2014-2015 term broke a record for the most briefs filed in a single case—147 amicus briefs in the marriage equality case. The majority in fact alluded to the “more than 100 amici” as support for its determination that there had been sufficient public debate over the issue of same-sex marriage.

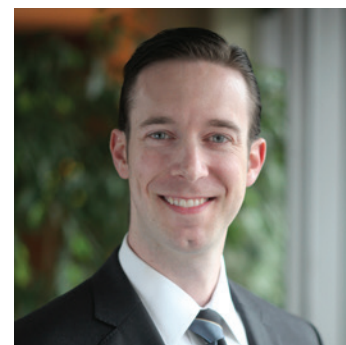
Breaking into the triple digits also reflects the new normal. The 2011-2012 term saw 136 amicus briefs in the companion health care cases. And the prior marriage equality cases in 2012-2013—*Windsor* and *Perry*—generated a combined 156 amicus briefs between the two decisions.

JUSTICES’ RELIANCE ON AMICUS BRIEFS

The overall rate of citations to amicus briefs also remained high. The justices in 2014-2015 cited amicus briefs in 55 percent of the cases with signed opinions that had amicus participation. That’s in line with the 53 to 63 percent range that the justices cited in the prior four terms.

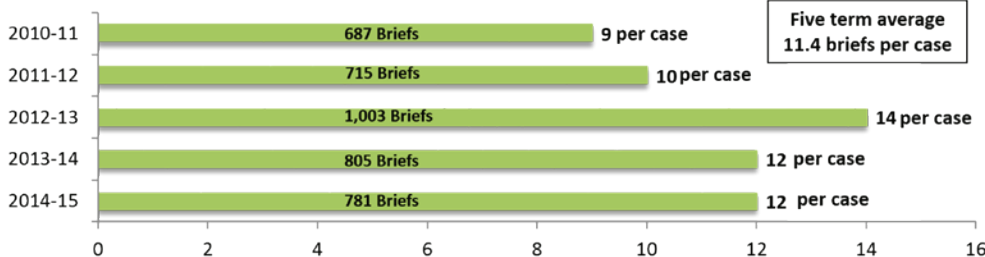


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AVERAGE NUMBER OF AMICUS BRIEFS PER CASE



The high court's citation rate to so-called "green briefs"—nongovernment amicus briefs—also stayed in the modern single-digit range. In 2014-2015, the justices cited 5 percent of the 710 green briefs in about one third of signed opinions, down from 8 percent last year. In the prior four terms the justices cited between 5 and 11 percent of nongovernment amicus briefs.

One notable change this year was the justices' increased citations to amicus briefs filed by the Solicitor General's Office, which has long been "king of the citation-frequency hill." Kearney & Merrill, *supra*, at 760. The justices cited the government's briefs in 81 percent of cases where the United States appeared as amicus, double the 40 percent from the 1990s and exceeding the high mark from the past four terms, which ranged from 54 to 79 percent. The United States fared well on the merits, too, supporting the prevailing party in 25 of 32 cases.

Consistent with the prior four terms, the divisiveness of a case was a strong indicator of amicus citation rate. In cases where the majority consisted of eight or nine justices, amicus briefs were cited only 39 percent of the time in 2014-2015. In closer cases with five or six justices in the majority, the court cited amicus briefs in 68 percent of such cases.

We caution, as always, that a justice's citation to a brief does not necessarily measure the "influence" the amici or brief may have on the court. Sometimes a justice will cite an amicus brief just to rebuff its position. In *Dart Cherokee Basin Operating v. Owens*, for instance, the court rejected a jurisdictional argument

raised only by an amicus. Nevertheless, the fact that justices routinely cite amicus briefs suggests they serve a helpful purpose in the court's decision-making.

As in the prior four terms, in 2014-2015 the justices rarely cited amici to support their analysis of the law. Instead, they frequently cited briefs for relevant background information or "legislative facts." More than once, the justices cited amicus briefs that provided surveys of state or municipal law on relevant questions (*Williams-Yulee v. Florida Bar*, *Melloui v. Lynch*, *Los Angeles v. Patel*). Amici also provided historical information the justices found useful. In *Zivotofsky v. Kerry*, for example, the majority stated that the briefs of the parties and amici were of "considerable assistance to the Court" concerning the history of the president's recognition power.

Surveys of law clerks indicate that they find most useful amicus briefs on technical issues or specialized areas of the law. Kelly J. Lynch, "Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs," 20 J.L. & Pol. 33, 41-42 (2004). True to form, in the latest challenge to the Affordable Care Act, the majority cited multiple amicus briefs describing the history of health care reforms. And in a tax case, *Comptroller of Treasury of Md. v. Wynne*, the majority and dissent sparred over reliance on amicus briefs. The court cited amicus briefs on the economic impact of interstate tax laws, and the dissent lamented that "the majority faults the dissents for not 'disputing' its 'economic analysis' but beyond citation to a pair of amicus briefs, its opinion offers no analysis to dispute."

JOCKEYING FOR ATTENTION

As the current roster of presidential candidates can attest, it is often difficult to stand out in a crowd. Studies suggest that justices and their clerks give more attention to briefs submitted by amicus organizations known for quality submissions and briefs authored by established Supreme Court practitioners. See, e.g., Lynch, *supra*, 46-56. The last five terms support this view.

During the 2014-2015 term, the U.S. Chamber of Commerce, known for its strong briefs, was one of only two amici cited in more than one case. And for the past five terms, other respected amici—the American Civil Liberties Union, the National Association of Criminal Defense Lawyers and the Pharmaceutical Research Manufacturers of America—were among the few cited in more than one case each term. Also consistent with past years, more than half of the green briefs cited by justices in 2014-2015 were authored by experienced Supreme Court practitioners.

JUSTICES' CITATION RATES

Over the prior four terms, the justices have varied substantially in how often they cite amicus briefs in their opinions. The 2014-2015 term was no different.

For instance, Justice Stephen Breyer was the top amicus citer—referencing amicus briefs in 63 percent of his majority, concurring and dissenting opinions—whereas in past terms he has cited amici in less than half of his opinions.

At the other end of the spectrum, Justice Clarence Thomas cited amicus briefs the least in 2014-2015, referencing amicus briefs in only 17 percent of his 35 opinions this term, down from 47 percent a year ago. Despite varying citation rates from year to year, the 2014-2015 term generally was consistent with the five-term average for most justices, with a couple notable outliers.

After five terms analyzing amicus participation and nearly 4,000 amicus briefs, it is clear that amici are established, indispensable players in Supreme Court practice today.

More so, the past five terms indicate that a new norm has emerged with double-digit briefs per case and the justices' consistent reliance on their "friends."

Anthony J. Franze and R. Reeves Anderson are members of Arnold & Porter LLP's Appellate and Supreme Court practice. Arnold & Porter represented amici in some of the cases referenced in this article. The authors thank Deborah Carpenter and Sara Murphy for their assistance with the compilation of data.

SUPREME COURT'S AMICUS CITATIONS

Rate of citations by justices in rulings, concurring or dissenting opinions in cases with amicus participation.

