

SUPREME COURT BRIEF

In Unusual Term, Big Year for Amicus Curiae at the Supreme Court

BY ANTHONY J. FRANZE AND R. REEVES ANDERSON

It was a difficult year at the U.S. Supreme Court. Not only did Justice Antonin Scalia’s death cast a shadow over the term, but Senate politics left the court with a key vacancy amid a stalled nomination. As a result, the 2015-16 term had several 4-4 ties in some of the biggest cases of the year. The justices even took the rare step of remanding the latest challenge to the Affordable Care Act, instructing the parties to try to work out a compromise.

Despite the unusual term, friends of the court continued to play a key role at One First Street. In our sixth year analyzing the Supreme Court’s amicus curiae docket for The National Law Journal, we found that amici filed more than 860 briefs, participated in more than 90 percent of merits cases, and, more often than not, seemed to capture the justices’ attention.

MOUNTAINS OF BRIEFS

In the 2015-16 term, amici curiae filed 863 briefs across all argued cases. “This is over an 800% increase from the 1950s and a 95% increase from 1995.” Allison



Anthony J. Franze, left, and R. Reeves Anderson, right.

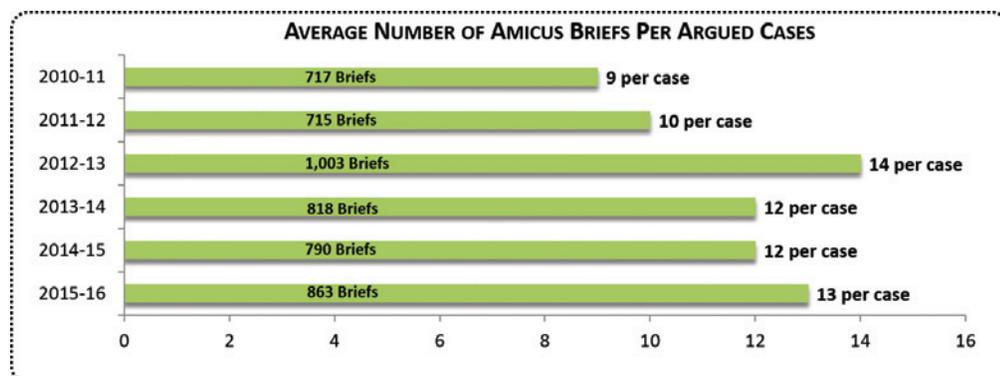
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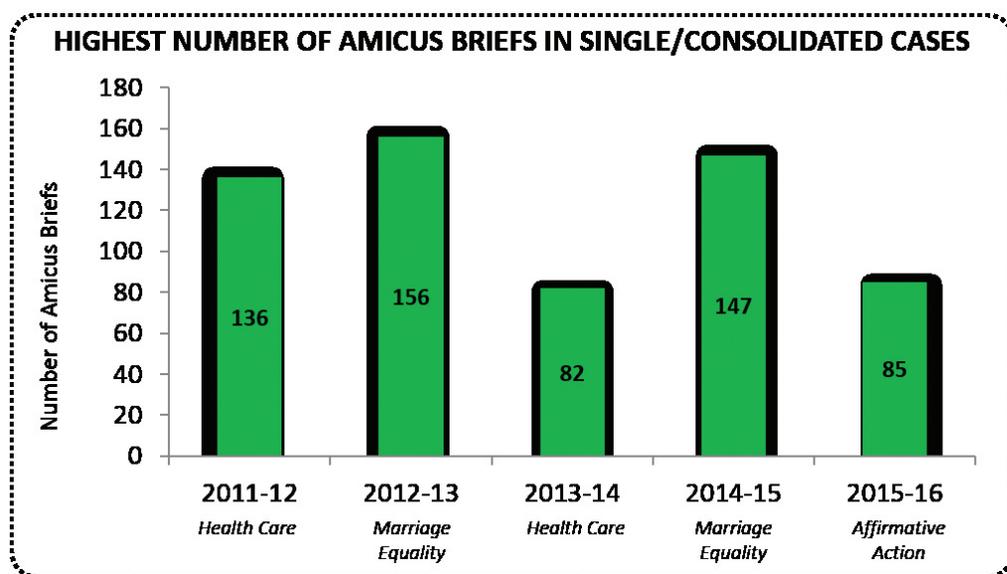
Orr Larsen & Neal Devins, “The Amicus Machine,” 102 Va. L. Rev. (forthcoming Dec. 2016) (comparing similar number of briefs from the 2014-15 term).

The court averaged about 13 briefs per argued case. That’s in line with

the previous five terms, which averaged between nine and 14 briefs per case.

The previous five terms have routinely set records for the largest number of briefs in a single (or consolidated) case. In 2011-12,





amici filed 136 briefs in the consolidated challenges to the Affordable Care Act (*Sebelius*), breaking the previous record of 107 briefs in the 2003 affirmative action cases (*Gratz* and *Grutter*). In 2012-13, amici filed 156 briefs in the marriage-equality cases (*Windsor* and *Perry*). In 2013-14, there was a dip with 82 amicus briefs in the challenge to the Affordable Care Act's contraception mandate (*Hobby Lobby*). The 2014-15 term was back in the triple digits with 147 amicus briefs in the latest round of consolidated marriage-equality cases (*Obergefell*).

The 2015-16 term did not break any records, but two cases had more than 80 amicus briefs each. In *Fisher v. University of Texas*, involving affirmative action in college admissions, amici filed 85 briefs. And in *Whole Woman's Health v. Hellerstedt*, concerning state restrictions on abortion, there were 82 briefs. To put these totals in historical perspective, *Brown v. Board of Education* garnered only six amicus

briefs, and *Roe v. Wade* had only 23. Larsen & Devins, *supra*.

AMICUS RELIANCE AND THE 4-4 FACTOR

As in previous years, for the 2015-16 term we examined the court's reliance on amicus briefs by examining the frequency with which the justices cited amicus briefs in cases that had amicus participation and that resulted in a signed opinion. These limitations are necessary because the justices obviously can only cite amicus briefs when amici participated in the case and the court issues a substantive decision on the merits.

This year, however, posed a challenge for that metric given the unusual number of unsigned, per curiam decisions. When the justices are deadlocked, the court typically does not issue a signed opinion, but rather a one-line order stating that "the judgment is affirmed by an equally divided Court." In 2015-16, that meant several marquee cases were resolved without an opinion, including the challenge to the executive

branch's immigration policy and the litigation over public-sector union fees. Twelve percent (105 of 863) of the amicus briefs submitted this term were filed in 4-4 cases. In addition, 8 percent of amicus briefs (71 of 863) were filed in *Zubik v. Burwell*, which the justices vacated in a unanimous but nonsubstantive per curiam decision. Thus, 20 percent of all amicus briefs submitted this term were filed in cases decided without signed opinions.

All told, in 2015-16, friends of the court filed briefs in 92 percent of the 62 argued cases with signed opinions, a six-term low. In the prior five terms, participation rates ranged from 93 to 98 percent.

The justices cited amicus briefs in 54 percent of cases with signed opinions, which is in the middle range of the prior five terms where the justices cited amicus briefs in 46 to 63 percent of cases.

The court's citation rate to nongovernment amicus briefs, called "green briefs" for the color of their covers, was on the high end from the past five terms. In 2015-16, the justices cited 9 percent of the 620 green briefs filed in cases with signed opinions. In the prior five terms the citation of nongovernment briefs ranged from 5 to 11 percent.

As for amicus briefs filed by the Office of the Solicitor General, 2015-16 saw a steep drop in citations. In the 2015-16 term, the justices cited 45 percent of the 29 OSG amicus briefs filed in cases with signed opinions, on the low end of the past five terms, which ranged from 44 to 81 percent. Of course, that

Amicus participation in argued cases, 2015–16				
	Number of cases	Nongovernment amicus briefs	U.S. amicus briefs	State/local gov. amicus briefs
Signed decisions	62	620	29	37
4-4 affirmance	4	94	3	8
Per curiam vacatur	1	69	0	2
Dismissed	1	0	0	1
Totals	68	783	32	48

percentage vastly outpaces all other amici when it comes to citation rate, and the OSG is in no danger of surrendering its title as “king of the citation-frequency hill.” Joseph Kearney & Thomas Merrill, “The Influence of Amicus Curiae Briefs on the Supreme Court,” 148 U. Pa. L. Rev. 743, 760 (2000).

CITATION AND INFLUENCE

We caution, as always, that a justice’s citation to a brief in an opinion—while a useful proxy to gauge whether the justice found a brief helpful—does not measure the “influence” the amici or brief may have had on the court.

For one, several of the justices have publicly stated that they do not review all of the amicus briefs, but instead, have their law clerks plumb the mountain of briefs to pluck out those worth reading. Additionally, the justices might find an amicus brief persuasive, yet for any number of reasons might never cite the brief in an opinion. For instance, several justices referenced multiple amicus briefs during oral argument in *Zubik*, but the court issued an unsigned per curiam opinion that

did not cite any briefs. Tony Mauro, “Bolstered By Briefs, Liberal Justices Lash Out During Contraceptive Debate,” Nat. L.J., March 23, 2016.

Beyond that, even when justices cite an amicus brief, the manner in which they cite it often defies equating citation to “influence.” Sometimes a justice will cite an amicus brief just to rebuff its position (*Campbell, Americold Realty*) or to note that the parties and amici all agree on a given issue (*Puerto Rico*).

Nevertheless, with these caveats, the fact that justices routinely cite amicus briefs suggests they serve a helpful purpose in the court’s decision-making. During oral argument in *McDonnell v. United States*, a high-profile public corruption case against former Virginia Gov. Bob McDonnell, Chief Justice John G. Roberts described an amicus brief by former White House counsel as “extraordinary.” Marcia Coyle, “Roberts Singles Out Former White House Counsel for ‘Extraordinary’ Brief,” Nat. L.J., April 27, 2016. The brief, which criticized the government’s expansive interpretation of the public-corruption statute, then found its way into the chief justice’s

majority opinion reversing McDonnell’s conviction.

More often, though, the justices in 2015-16 cited amicus briefs for “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, 1784 (2014). The justices cited amicus briefs for background on how Eurail passes work (*OBB*), the number and nature of state health care databases (*Gobeille*), the caseloads and limited resources of federal public defenders (*Luis*), the median time between conviction and sentencing (*Betterman*), and the high cost of obtaining opinions of counsel in patent cases (*Halo*).

The most pronounced use of legislative facts of the term was in *Whole Woman’s Health*, in which the court struck down a Texas law requiring abortion providers to have admitting privileges at nearby hospitals. The majority opinion cited amicus briefs to show how many clinics had closed in light of the law, the overcrowding and negative effects on the clinics that remained open, and how admitting privileges have nothing to do with a physician’s ability to perform procedures.

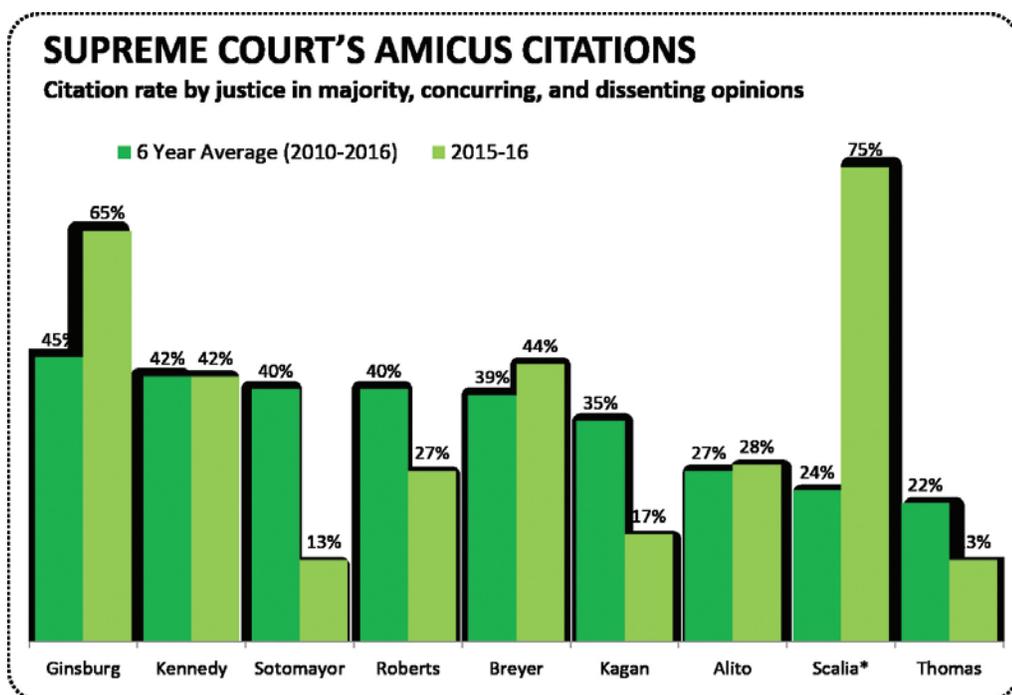
Consistent with conventional wisdom that “me too” amicus briefs are not helpful to the court, the justices rarely cited amici for legal arguments made by the parties. That said, a recent study using computer-assisted content analysis techniques found that “the justices adopt more language from amicus briefs that repeat information contained in” party

briefs, and that “rather than ignore repetitious arguments, the justices are likely to view repeated arguments as valid and intergrate those arguments into their opinions.” Paul Collins et al., “The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content,” 49 *Law & Soc. Rev.* 917, 936 (2015).

STANDING OUT FROM THE CROWD

Studies suggest that justices and their clerks give more attention to briefs submitted by amicus organizations known for quality submissions. See, e.g., Adam Feldman, “The Most Effective Friends of the Court,” *Empirical SCOTUS*, May 11, 2016; Kelly J. Lynch, “Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs,” 20 *J.L. & Pol.* 33, 46-56 (2004). Our reviews of previous terms have supported that conclusion. In the 2015-16 term, however, no single organization had its amicus briefs cited in more than one case.

Studies also suggest that briefs authored by experienced Supreme Court practitioners get more attention. In a forthcoming article published in the *Virginia Law Review*, professors Allison Orr Larsen and Neal Devins chronicled what they call “the amicus machine,” an impressive study of the influence of the Supreme Court bar on amicus practice. Among other interesting findings, Larsen and Devins describe some of the benefits of having expert, repeat-players author friend of the court briefs. Larsen &



Devins, *supra*. Indeed, the amicus brief that Roberts singled out as extraordinary and cited in *McDonnell* was authored by a prominent Supreme Court practice. And roughly half of the green briefs cited by the justices in the 2015-16 term were authored by experienced Supreme Court practices.

THE JUSTICES' CITATION RATES

Over the prior five terms, the justices varied substantially in how often they cited amicus briefs in their opinions. The 2015-16 term was no different. For instance, in our past assessment of the 2014-15 term, Justice Sonia Sotomayor had the highest five-term average for amicus citations in her majority, dissenting or concurring opinions. Yet in 2015-16, Justice Sotomayor tied with Justice Clarence Thomas for the lowest citation percentage.

Likewise, Justice Stephen G. Breyer has oscillated from the second-lowest amicus citer in 2010-11, to the highest in 2014-15, to the somewhere in between in 2015-16.

Though anecdotal, the past six terms suggest that what drives amicus citation is not the number of briefs or personal predilections about the value of amici, but whether the briefs were helpful to a justice in a particular case. In all events, the justices continue to steadfastly rely on their ever growing number of “friends.”

Anthony J. Franze and R. Reeves Anderson are members of Arnold & Porter'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 Avishai Don for their assistance with the compilation of data.