FUNDAMENTALS OF PREPARING A UNITED STATES SUPREME COURT AMICUS BRIEF

Dan Schweitzer*

The prominence of amicus briefs in United States Supreme Court practice was dramatically illustrated during oral argument in last Term's most prominent case, *Grutter v. Bollinger*.[1] Less than five minutes into the argument, Justice Ginsburg posed the following question to petitioner's counsel:

> Mr. Kolbo, may I call your attention in that regard to the brief that was filed on behalf of some retired military officers who said that to have an officer corps that includes minority members in any number, there is no way to do it other than to give not an overriding preference, but a plus for race. . . . What is your answer to the argument made in that brief that there simply is no other way to have Armed Forces in which minorities will be represented not only largely among enlisted members, but also among the officer cadre?[2]

---

* Dan Schweitzer was appointed Supreme Court Counsel of the National Association of Attorneys General in February 1996. His principal responsibility is to assist state appellate litigators who appear before the United States Supreme Court. Toward this end, he organizes and participates in moot courts, edits thirty-five to forty state briefs filed each year in the Court, edits the weekly *Supreme Court Report*, and provides strategic and technical assistance to state Attorney General offices. Mr. Schweitzer wishes to thank the following people for reviewing an earlier version of this article: Barbara Billet, Michael Catalano, Tim Delaney, Judge Virginia Linder, Carter Phillips, Walter Smith, Richard Slowes, Benna Ruth Solomon, Judge Jeffrey Sutton, and Richard Westfall.

1. 123 S. Ct. 2325 (2003) (upholding the race-based admissions policy of the University of Michigan Law School).

2. U.S. S. Ct. Official Transcr. at 7, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-241.pdf) (referring to the Brief for Julius W. Becton, Jr., et al. as Amici Curiae) (accessed Sept. 10, 2003; copy on file with Journal of Appellate Practice and Process).

The next several minutes, and the first several minutes of Solicitor General Theodore Olson's argument, were devoted to addressing the retired officers' amicus brief.[3]

To be sure, few amicus briefs (apart from those filed by the Solicitor General) have such a profound effect on the course of an argument or decision.[4] But virtually all amicus briefs are read by the Justices and/or their clerks, and the submission of such briefs is an established and accepted part of Supreme Court practice.[5] It is therefore incumbent upon persons and entities with a stake in Supreme Court cases to understand the amicus brief process and the types of arguments that are effective in an amicus brief.

Supreme Court amicus briefs are unique documents that pose strategic and often new challenges to even the most experienced appellate advocate. The Court has its own set of rules and customs, as well as a unique outlook arising from its position atop our judicial system. Arguments that would be powerful before a federal court of appeals—such as the decisions of other federal courts of appeals—carry far less weight in the Supreme Court. Policy arguments, on the other hand, are often far more important to the Supreme Court than to other courts. This Article seeks to assist practitioners in navigating through the shoals of Supreme Court practice and crafting amicus briefs that move the Court in their direction.

Part I below reviews the procedural rules governing amicus briefs; Part II discusses the role of amicus briefs and their subject matter; and Part III addresses the specific sections of amicus briefs.

I. THE RULES

Rule 37 of the Rules of the Supreme Court specifically addresses amicus practice, but you should also study Rule 29

---

3. *Id.* at 7-13, 19-23.

4. The Court devoted an entire paragraph of its opinion in *Grutter* to the arguments and facts set forth in the retired officers' amicus brief, 123 S. Ct. at 2340, and cited seven other amicus briefs in its opinion.

5. *See generally* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743 (2000); *see also* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 663 (8th ed. 2002).

(on filing and service), Rule 30 (on computation of time) and Rule 33 (on document formatting, including page limits and cover colors). The following is a brief rundown of the most important requirements.

- *Consent.* As a general matter, an amicus brief may only be filed if the parties consent or the Court grants a motion for leave to file an amicus brief.[6] The Court grants such motions (when timely filed) as a matter of course; knowledgeable counsel for parties therefore agree to most requests for consent. Consent is *not* required of the United States, of States, or of local governmental units with respect to amicus briefs filed by the Solicitor General, state Attorneys General, or authorized local law officers, respectively.[7] A government amicus brief does not have to alert the Court to this fact in the brief; the Court knows.

- *Disclosure footnote.* In 1997, the Court adopted Rule 37.6, which requires most amicus briefs to disclose, in the first footnote of the brief, "whether counsel for a party authored the brief in whole or in part and [to] identify every person or entity, other than the *amicus curiae*, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief." Excluded from this requirement are the same governmental entities specified in Rule 37.4 as not needing to obtain consent.[8]

- *Color.* At the certiorari stage, the covers of amicus briefs must be cream colored. At the merits stage, they must be light (pale) green if in support of the petitioner, appellant or neither party; and dark green if in support of the respondent or appellee.[9]

---

6. R. S. Ct. 37.2.

7. R. S. Ct. 37.4.

8. For a very helpful discussion of how Rule 37.6 applies in practice, see Stern, et al., *supra* n. 5, at 661-63.

9. R. S. Ct. 33.1(g).

• *Page limits.* Amicus briefs at the certiorari stage may not exceed twenty pages; at the merits stage, they may not exceed thirty pages.[10]

• *Cover page.* Rule 34.1 sets forth what belongs on the cover page of a brief filed with the Supreme Court, and it fully applies to amicus briefs. One point to remember: specify whom the brief supports (e.g., the Brief of the States of X and Y as Amici Curiae *in Support of Petitioner*).

• *Contents.* According to Rule 37.5, a Supreme Court amicus brief *must* contain the following subsections: Interest of the Amicus Curiae; Summary of Argument; Argument; and Conclusion. Other sections, such as Statement of the Case, are optional.

> ***Practice pointer:*** There is a slight twist for amicus briefs that support a cert petition. Because cert petitions are not required to have a Summary of Argument, as a matter of custom amicus briefs in support of cert petitions need not include such summaries either.

• *Timing.* Amicus briefs in support of cert petitions are due on the date on which the brief in opposition is due.[11] Amicus briefs on the merits are due on the date on which the brief for the party that amici are supporting is due.[12] If you are supporting neither party, the amicus brief is due on the date on which petitioner's (or appellant's) brief is due.[13]

> ***Practice pointer:*** Keep an eye out for extensions of time granted to parties, especially at the certiorari stage. These extensions change *your* due date, and you should take advantage of them. The Court frequently grants extensions of time in which to oppose cert petitions—and when the United States is the respondent, it often seeks such an extension. By filing your amicus brief on or just before the new due date, you obtain more time to polish your brief and convince additional persons or entities to join it.

---

10. *Id.*
11. R. S. Ct. 37.2(a).
12. R. S. Ct. 37.3(a).
13. *Id.*

> ***Practice pointer***: Conversely, the petitioner needs to inform you if the respondent waives his or her right to file a brief in opposition. If respondent chooses that tack, the cert petition will be circulated to the Justices far sooner than expected. This means you have to expedite completion of the amicus brief so that it will be filed in time for the Justices and clerks to have it while they ponder whether to order respondent to file a response to the petition.

II. THE ROLE AND SUBJECT MATTER OF AMICUS BRIEFS

Any effective amicus brief abides by the instruction given in Supreme Court Rule 37.1: It "brings to the attention of the Court relevant matter not already brought to its attention by the parties." This means consulting with the party whom your brief will support and determining what *additional* arguments you can make that would favorably influence the Court. The Justices and their clerks will not be influenced by a brief that merely parrots the arguments made in the party's brief.

What, then, should an amicus brief contain? This depends, first, on whether the brief supports a cert petition or supports a party in a case before the Court for oral argument (hereafter, a case "on the merits"). Indeed, those two types of briefs have such different objectives that they must be analyzed separately.

A. Amicus Briefs Supporting Petitions for Writs of Certiorari

To understand the role of an amicus brief in support of a petition for certiorari, one must understand the certiorari process. The Supreme Court grants very few cert petitions—it granted only about two percent of the petitions filed in the 2002 Term. The key for a petitioner, therefore, is to distinguish its case from the other 150 or so being reviewed that particular week.

In attempting to convince the Court to grant a cert petition, the petitioner (and its amici) must keep in mind that the Court does not grant certiorari simply to correct errors of the lower courts. It grants certiorari for the following reasons, in descending order of importance:

- there is a conflict among the federal courts of appeal and/or state supreme courts;

- the issue is extremely important;
- the decision below conflicts with Court precedent;
- the Court left the issue open in a prior case; and/or
- there is tension among prior Court decisions.[14]

The second factor—importance—comes into play in several ways. Standing on its own, a compelling showing of importance occasionally leads to a grant of certiorari even where the lower courts are not in conflict. Moreover, a circuit split is often, but not always, enough to obtain a grant of certiorari. A compelling showing of importance can convince the Court that your circuit split needs prompt resolution, or that certiorari should be granted even where the conflict among the lower courts is not direct or is between only two courts.

An amicus brief, particularly if written by a state or local government or a prominent association, affects this process in two powerful ways. First, it helps distinguish the cert petition from the hundreds of others under consideration. Relatively few cert petitions are accompanied by amicus briefs.[15] Second, an amicus brief typically underscores and brings into sharp relief the asserted importance of the case. If, for example, more than twenty sovereign states urge the Court to hear a case, this lets the Court know that the matter is genuinely important—that it is, indeed, one of the few cases so important that it warrants taking up the Court's time.

> ***Practice Pointer***: Never file an amicus brief *opposing* certiorari. This only highlights the importance of the case and makes it stand out, when the goal is to have the petition blend in with the pile of rejects. Besides, if certiorari is granted, you will still have time to express your views as amicus at the merits stage.

Amicus briefs supporting cert petitions are most effective, therefore, when they powerfully convey to the Court the adverse consequences of the decision below. There are many examples of adverse consequences to which an amicus brief can point: If the decision below is left standing, law enforcement efforts will be hindered; federal judges will micromanage state prison systems; businesses cannot plan their affairs because of

---

14. *See* Rule 10 (discussing each of these reasons except for the final two, which supplement the other reasons).

15. *See* Kearney & Merrill, *supra* n. 5, app. B, 835.

conflicting rules; state health regulations across the country will be called into question; the balance of federal–state powers will be unduly shifted. This does not mean that the entire amicus brief should be a recital of these concerns. But the Interest of the Amicus section, and the general tenor of the brief, should forcefully convey them.

Is an amicus brief in support of a cert petition a proper place to discuss the conflict among the lower courts or the conflict between the decision below and a prior Supreme Court opinion? Sometimes. Each case presents a unique combination of lower court opinions on the issue, Supreme Court precedent, impact on the amici, and the like. Thrown into that mix are the quality and structure of the petition for certiorari itself. You should always study the cert petition closely to see where amplification or elaboration would be useful.

The key is to *add* something to the dialogue, and a cert-stage amicus brief should always be able to add a deeper appreciation of the importance of the case. The more concrete the discussion—for example, by providing citations to the numerous state statutes that would be unconstitutional under the court below's reasoning—the better. And it is particularly effective when you can convincingly show that the mere uncertainty of the law, which will remain until Supreme Court review, is harmful to the amici. On the other hand, generalities—simply waving the banner of federalism, for example—are not enough. The Court wants a concrete legal and/or factual presentation.

> ***Practice pointer:*** Where an amicus brief does not focus on the conflict among the lower courts because the petitioner ably did so, the amicus brief should at least remind the Court of the conflict and cross-reference the cert petition's discussion of it.

Finally, an amicus brief supporting a petition for certiorari is most effective when it is joined by a large number of states, cities, or organizations. This point needs little elaboration. Plainly, when forty states inform the Court that an issue is of pressing importance, for example, the argument carries more weight than when seven states so inform the Court.

The following are examples of effective amicus briefs in support of cert petitions:

Example 1

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), a city filed a cert petition seeking review of a Fifth Circuit decision holding that the Religious Freedom Restoration Act (RFRA) was constitutional. The underlying facts of the case involved a zoning dispute, specifically, whether a city may deny a permit to enlarge a church in reliance on an ordinance governing historic preservation. Ohio prepared a multi-state amicus brief letting the Court know that RFRA affected far more than zoning regulations: It was causing serious problems in state prison systems. The Court granted certiorari, notwithstanding the absence of a circuit split.

Example 2

The Southern Christian Leadership Conference and other "individuals and associations committed to principles of social justice" filed an amicus brief supporting the cert petition in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003). The Seventh Circuit had held that anti-abortion protestors were liable under RICO based on wrongful acts they committed during the protests. The amicus brief argued that RICO liability in that context would chill the speech of those who participate in *all* social protest movements—an argument far more powerful when coming from the SCLC, rather than from the petitioners. The Court granted certiorari and reversed the Seventh Circuit.

B. Amicus Briefs on the Merits

Amicus briefs on the merits are more difficult to write than amicus briefs supporting a petition for certiorari. It is no longer enough to show that the case is important—the Court agrees. And you should be wary of simply writing a full-blown merits brief that tracks the arguments the party will presumably be making. You should bring additional arguments and perspectives to bear. Before turning to examples of what amici can add to the dialogue, we need to address a few preliminary points.

Amicus briefs can be enjoyable and liberating to write because you are not subject to many of the strategic and political constraints a party faces. You can be bolder in your claims,

pursue a pet legal theory you have been itching to try on the Court, or delve into *The Federalist Papers*, if that's your fancy. That said, when it comes to style, organization, and strength of reasoning, an amicus brief should be treated like any other brief filed with the Supreme Court. It should be persuasive, well organized, clear, moderate in tone, and responsive to the other side's arguments. It should stand on its own as a powerful forensic tool, every bit as polished as the party's brief (even if not as comprehensive).

The reasons for this are simple. The goal of an amicus brief is to persuade nine Justices (or maybe a decisive Justice or two) of your position. They are far more likely to be persuaded by a document that looks and reads as though it were written by a thoughtful, even-tempered, experienced appellate advocate. The Supreme Court has broad latitude in deciding cases, and it cares about the views of states and local governments, as well as prominent professional and business associations. This means that your amicus brief can truly make a difference—if it is the polished, outstanding work the Court expects from advocates before it.

With regard to content, there are a number of approaches a useful amicus brief on the merits can take. As a first step, you should *always* consult with the party whom you are supporting. The party may suggest productive avenues for you based on its own strategic constraints. Or you may find that the party is not pursuing an argument you believe is important or is advocating a narrower result than you desire.

Some first-rate amicus briefs, most notably those prepared by the Solicitor General's office, read like party briefs and are studied by the Court as closely as the parties' briefs. On rare occasion—such as where you have reason to question the quality of the party's work product—it is enough simply to write a persuasive brief, even if it overlaps most of the arguments made by the party. But as a general rule, you should focus on what you can specifically add to the dialogue. Here are some ideas.

1. The "Practical Implications" or "Brandeis" Brief

The Court often looks to amicus briefs to provide non-record information that will illuminate the real-world

consequences of the case. (These are called "Brandeis briefs" after a famous brief Louis Brandeis filed in *Muller v. Oregon*.[16]) The Court's practice is to take judicial notice of respectable non-record information that does not pertain to the facts of the particular case (so-called "legislative facts"). This brief is the most difficult to prepare—because it requires obtaining information from different sources than appellate lawyers typically use—but is the most helpful to the Court when done well.

Example 1

In *Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding state's ban on physician-assisted suicide), the American Medical Association filed an amicus brief detailing its code of professional ethics, physicians' ability to reduce the pain of dying patients, studies on patients who have sought assisted suicide, and the difficulties in regulating physician-assisted suicide. For each of these subjects, the AMA was able to provide more detailed information than the party and was able to reference a wider variety of sources.

Example 2

In *City of Chicago v. Morales*, 527 U.S. 41 (1999), Chicago defended its anti-gang loitering ordinance against a variety of constitutional challenges. Assisting the city was an amicus brief filed by the Center for the Community Interest, which described in detail the actual harm gangs were causing in urban areas throughout the country and the various innovative measures communities have been taking in response.

2. The "Go Further Than the Party" Brief

Often, the party fails to ask the Court to overrule a precedent that you believe should be overruled. An amicus brief is an excellent place to be bold—bolder than the party dares to be. Even if the Court does not take up your suggestion, you have alerted it to the possibility and might elicit language that can be used to open the door in the future.

16. 208 U.S. 412 (1908).

Example

In *United States v. Halper*, 490 U.S. 435 (1989), the Court held that, after imposition of a criminal punishment, the Double Jeopardy Clause's "multiple punishments" prohibition barred imposition of a civil penalty far in excess of the government's damages. At issue in *Hudson v. United States*, 522 U.S. 93 (1997), was the application of the *Halper* rule in a particular case. The United States argued that *Halper* should be read narrowly. An amicus brief prepared by the State of Ohio went further, arguing that *Halper* should be overturned. The Court essentially did just that, stating that it "in large part disavow[ed] the method of analysis used in [*Halper*]." *Hudson*, 522 U.S. at 96.

3. The "More Restrained Than the Party" Brief

Notwithstanding all this talk of using amicus briefs to be bold, sometimes the better course is to ask the Court to adopt a narrower rule than the party is seeking. The amici may have an institutional reason to support a narrower rule. Or you may conclude that the broader rule has virtually no chance of adoption. When taking this tack, it is sometimes effective to be ambivalent about the result in the case at hand. You show the Court your objectivity by making clear that all that matters is that the Court adopt the proper legal rule.

Example

At issue in *Richards v. Wisconsin*, 520 U.S. 385 (1997), was whether the execution of a search warrant for evidence of drug trafficking always presents a sufficient risk of violence or destruction of evidence to justify immediate entry by police without a knock or announcement. Wisconsin asked the Court to affirm the Wisconsin Supreme Court and adopt a bright-line rule that the police need not ever knock and announce in that situation. The United States argued, as amicus curiae, that the Court should adopt a narrower rule: "that a police officer is ordinarily justified" in bypassing the knock and announce requirement in drug-related searches, but that where "police officers know sufficient facts to make the ordinary inferences of dangerousness and destruction of evidence unreasonable in a given case, they may not rely on those

risks to justify an unannounced entry." The Court adopted the rule proposed by the United States.

4. The "Different Legal Argument" Brief

A party sometimes entirely excludes an argument that you believe should be brought to the Court's attention. Whatever the reason for this—be it institutional or based on differing legal analyses—an amicus brief can aid the Court by alerting it to another legal argument in support of the party's claim.

Example

In *Blessing v. Freestone*, 520 U.S. 329 (1997), the Court considered whether private individuals could bring a § 1983 action claiming that Arizona's child support enforcement program failed to comply with the mandates of Title IV-D of the Social Security Act. The amicus brief of the Council of State Governments et al. (prepared by the State and Local Legal Center) made an argument that Arizona did not make: that beneficiaries of Spending Clause programs are, in essence, third-party beneficiaries of federal–state contracts, and at the time of enactment of § 1983 such beneficiaries could not sue for the contractual benefits. Two Justices, citing the amicus brief, adopted that position in a concurring opinion.

5. The "Surprising Source" Brief

Some amicus briefs are powerful because they are written by entities that one would expect to be supporting the other side of the case. A brief of this sort can be particularly effective in rebutting the other side's contentions regarding the practical implications of the case.

Example

At issue in *Washington State Department of Social & Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003), was whether a state agency, acting as a representative payee for a foster child who is receiving Social Security benefits, violates federal law when it uses those benefit payments to pay for the costs it has expended in providing the foster care. Washington State was immensely aided in defending its use of those payments by

an amicus brief filed by the Children's Defense Fund, Catholic Charities, USA, the Child Welfare League of America, and the Alliance for Children and Families that explained how children benefit from state government performing the function of representative payee for foster children.

6. The "Damage Control" Brief

This is a variant of the "more restrained than the party" brief. Sometimes you are afraid the Court will use a case to set forth a broad rule that you do not desire. Your amicus brief can explain to the Court why, based on the particular facts or procedural posture, it should issue a narrow opinion and reserve the broader issue for a later date.

Example

At issue in *Nike v. Kasky*, 123 S. Ct. 2554 (2003) (certiorari dismissed as improvidently granted), was whether a corporation that participates in a public debate about its employment practices may be subject to liability under California unfair trade practice and false advertising law on the theory that its statements are "commercial speech." The United States sympathized with the concerns expressed by Nike, but noted that it also enforces federal fair trade laws. The United States therefore suggested, in its amicus brief, that the Court decide the case on the narrow ground that California's unique laws sanction private causes of action (without any showing of injury) that lack the necessary safeguards required by the First Amendment. Accordingly, argued the United States, "this Court has no occasion to decide whether the speech at issue here is in fact 'commercial.'"

7. The "Amplify One Issue" Brief

A party often sets forth numerous independent reasons why it should prevail. As a consequence, the party may only briefly address an argument that you believe merits greater consideration. An amicus brief can fill that gap, spending (for example) twenty to twenty-five pages on an argument on which the party spends only five pages.

Example

The Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment bars the execution of the mentally retarded. In reaching that conclusion, the Court noted the world community's disapproval of the execution of mentally retarded offenders. The Court cited the amicus brief filed by the European Union, which discussed at length the growing international consensus against the execution of mentally retarded defendants. Atkins' brief made that point in a mere sentence and footnote.

8. The "Historical Background" Brief

Many members of the present Court care deeply about the historical roots of the law or practice under review. An amicus brief is a good place for a historical review—one in greater detail than the party can provide.

Example

In *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), the Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and held that a state statute criminalizing consensual sex between adults of the same sex violates substantive due process. In rejecting "the historical premises relied upon by the majority and concurring opinions in *Bowers*," the Court cited to three amicus briefs—Brief for Cato Institute, Brief for American Civil Liberties Union et al. and Brief for Professors of History et al.—that devoted large sections to the historical issue.

9. The "Answer the Other Side's Amici" Brief

You can often help the respondent by focusing your energies on arguments made primarily by petitioner's amici. This allows the respondent to save its firepower for the arguments the petitioner itself has made.

Example

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), the Court tackled the issue of when very large punitive damages awards violate the Due Process Clause. The Brief of Certain Leading Business Corporations as Amici Curiae in Support of

> Petitioner argued that recent studies "demonstrate that even conscientious and well intentioned juries produce systematically erratic and unpredictable awards." The brief described the studies and their findings in detail. In response, the Brief Amici Curiae of Certain Leading Social Scientists and Legal Scholars in Support of Respondents argued that the Brief of Certain Leading Business Corporations ignored "[a] broad social science consensus . . . that juries perform rationally in punitive damages cases" and that "[j]uries award such damages infrequently and in comparatively modest amounts." The amicus brief then described this purported "broad social science consensus" in detail.

C. More Pointers on Writing Merits Amicus Briefs

The Supreme Court is not impressed by lower court opinions. Although such opinions are sometimes relevant—for example, by demonstrating the confusion the current rule has sown or by using especially persuasive reasoning—they should almost never be a large part of your argument. Walking the Court through lower court decisions to show that they have adopted your view is usually a waste of paper.

By contrast, the Supreme Court cares deeply about legal reasoning and logic, policy and practical considerations, and its own precedents. The Court is keenly aware that its decisions are binding across the nation, and that they affect cases and factual situations that are different from the case before it. For this reason, the Court wants to explore the limits of any possible rule it may adopt, as well as examine the jurisprudential and real world consequences. An amicus brief is well suited to assist the Court in that endeavor.

Try to keep your brief concise and to the point. The Justices and their clerks have plenty to read without having to wade through another thirty-page amicus brief. Brevity will be appreciated by those who count most. This does not mean that a thirty-page amicus brief is never appropriate; sometimes the nature of the subject matter requires a lengthy discussion. As an experienced Supreme Court advocate has written, "the goal of brevity should not override the more important goal of

helpfulness."[17] But as a general rule, brevity is a positive attribute.

The Justices' time constraints also put a premium on clarity. A straightforward, easy to follow argument is likely to have a greater impact than a dense, highly complex piece. For this reason, try to use footnotes sparingly. They slow down the reader and diminish the flow of the argument.

"Me too" briefs, which merely state that the amici agree with the party, are never appropriate at the merits stage. They simply do not provide the Court with useful information. The Court's decisions are based on legal reasoning and practical implications, not on a poll of who supports which position. For this reason, the Court does not care whether another governmental or private entity wishes to join an amicus brief that has already been filed. A letter sent to the Clerk's office informing the Court that state X or company Y wishes to join the brief is placed in a correspondence file that the Justices do not see.

III. THE SECTIONS OF AN AMICUS BRIEF

All amicus briefs include sections for the Interest of the Amici Curiae, Argument (or Reasons for Granting the Petition), and Conclusion. All amicus briefs on the merits must also include a Summary of Argument. These sections represent the bare minimum required by the rules and are often sufficient. Many amicus briefs also include Questions Presented and a Statement of the Case. Whether to include those additional sections are strategic considerations that depend on the nature of the case, the content of your argument, and the content of the brief of the party you are supporting. Let's take a closer look at what you should include in the various sections of an amicus brief, and whether you should include some of them at all.

17. Stephen M. Shapiro, *Amicus Briefs in the Supreme Court*, 10 Litig. 21, 22 (Spring 1984).

A. Questions Presented

If you are satisfied with the petitioner's phrasing of the Questions Presented, there is no need to rephrase them. On the other hand, if you believe the questions can be reformulated in a clearer, more precise or more helpful fashion—as will usually be the case when you are supporting the respondent—you should not hesitate to do so. The only limitation is that your questions should be substantively the same as the petitioner's; you should not smuggle in new issues.[18]

B. Interest of the Amici Curiae

In an amicus brief supporting a cert petition, the Interest section can serve several useful functions. This section is a natural place to let the Court know of the adverse consequences of the decision below and the pressing need for the Court to grant review. If the Argument section of your brief explicitly focuses on the importance of the issue, your Interest section could be a short introduction to that discussion. But if the focus of the Argument is something else, such as the conflict between the decision below and Supreme Court precedent, the Interest section should provide a thorough explanation of the importance of the case to the amici.

By contrast, the Interest section is rather unimportant in an amicus brief on the merits. Because this section might not even be read by the Justices and their clerks, a good rule of thumb is never to place a useful argument only in the Interest section of a merits amicus brief. The Interest section should merely set forth, concisely, the practical and programmatic relevance of the case to the amici.

---

18. Please note, however, that the Court has a few times ruled on issues presented solely by amicus curiae. *See e.g. Teague v. Lane*, 489 U.S. 288, 300 (1989) (adopting landmark rule on the retroactive application of new rules to criminal cases on collateral review, an issue "raised only in an *amicus* brief"); *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-38 (1991) (Stevens, J., dissenting) (discussing instances where the Court considered issues raised only by amici and arguing that the Court should have considered an issue raised only by amici in this case).

C. Statement of the Case

The Statement of the Case is an optional section. Although an amicus brief of the Solicitor General's office or the State and Local Legal Center will uniformly include a Statement of the Case, Statements are not indispensable to a quality brief. The Court relies on the parties, not the amici, to inform it of the pertinent facts and the procedural background. Nevertheless, if your Argument would be strengthened by highlighting particular facts or proceedings, or if the Statement by the parties is for some reason inadequate, you should feel free to include a brief Statement. Moreover, some advocates believe that amicus briefs should include Statements because amicus briefs are not always read immediately after the parties' briefs; an independent Statement refreshes the Justice's or clerk's memory.

D. Summary of Argument

It is a major strategic mistake to treat the Summary of Argument as a mere formality. The Summary can be critical to the success of an amicus brief on the merits. Although the Court hears about half as many cases as it did a decade ago, the Justices and their clerks are still stretched thin for time. This time constraint places a premium on effectively conveying the crux of your argument in summary fashion at the outset of your brief. Sometimes, the Summary of Argument is the only section of an amicus brief that will be read.

A good Summary provides the Court with a roadmap to your brief. After reading it, the Court should know which of the issues in the case you are addressing, whether you are proposing a rule different than the one advocated by the parties, whether you are focusing on historical information, and the like. Although you cannot possibly mention all of your "sub"-arguments, your Summary should alert the Court to all of the principal arguments you are making. Ideally, the Summary tracks the order of the Argument, and it can open with a prefatory paragraph putting your gloss on the case.

At the certiorari stage, summaries are less important because the amicus briefs are shorter, fewer amicus briefs are filed, and the cert petitions themselves typically do not include

summaries. A suitable replacement for a Summary is an introductory paragraph or two to the Reasons for Granting the Petition section that summarizes what is to follow.

> ***Practice pointer***: Beware of redundancy at the start of the brief. An amicus brief presents special challenges, for it contains three places where you can summarize your position—the Interest of Amici Curiae; the Summary of Argument; and the introductory paragraph of the Argument, before the first subheading. The trick is to take advantage of these three opportunities without being redundant or superficial. You should therefore be careful not to summarize your argument in the Interest of the Amici section except to the extent necessary to provide the context of your interest. Remember, the Justices and clerks will soon read the Summary of Argument.

E. Argument (or Reasons for Granting the Petition)

Little needs to be added to the discussion in Part II on the role and subject matter of Supreme Court amicus briefs. The keys to effective written advocacy in any court—organization, powerful reasoning, good use of case authority, persuasive but temperate language—are the keys to an effective Argument section in a Supreme Court amicus brief. The basic differences, as discussed in Part II, are strategically determining the optimal role of your amicus brief and tailoring your Argument to your audience (for example, by not focusing on lower court opinions, by stressing reasoning and practical consequences, and by knowing whose the swing votes may be).

> ***Practice pointer***: Use block quotes sparingly—the Court generally does not like them. Better to integrate the most favorable language into a sentence you construct.

> ***Practice pointer***: Argument headings should concisely summarize the argument to follow. When placed together in the Table of Contents, they should read like another Summary of Argument.

F. Conclusion

Supreme Court Rules require a "conclusion specifying with particularity the relief the party seeks."[19] Common practice before the Court is that the Conclusion state no more than that. The Conclusion is not the place for a closing summary of your position. Examples of Conclusions from briefs filed in the 2002 Term by the Solicitor General's office are, in full: "The petition for a writ of certiorari should be granted"; "The judgment of the Washington Supreme Court should be reversed." Slight variations of these, such as "For the foregoing reasons, the judgment below should be reversed," are also acceptable to the Court.

IV. CONCLUSION

Amicus briefs unquestionably have an effect on Supreme Court opinions. They have convinced the Court to hear many cases it otherwise would have ignored, and provided arguments that helped the Court reach a favorable result for the amici. It is, therefore, in the interest of state and local governments and private entities to continue filing amicus briefs, and to make those briefs as powerful and persuasive as possible. Ideally, the information in those briefs will not only serve the interests of the amici, but will also assist the Court in its deliberations.

19. R. S. Ct. 24.1(j).