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## The Amicus Machine

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THE AMICUS MACHINE

*Allison Orr Larsen\* & Neal Devins\*\**

*The Supreme Court receives a record number of amicus curiae briefs and cites to them with increasing regularity. Amicus briefs have also become influential in determining which cases the Court will hear. It thus becomes important to ask: Where do these briefs come from? The traditional tale describes amicus briefs as the product of interest-group lobbying. But that story is incomplete and outdated. Today, skilled and specialized advocates of the Supreme Court Bar strategize about what issues the Court should hear and from whom they should hear them. They then “wrangle” the necessary amici and “whisper” to coordinate the message. The result is orchestrated and intentional—the product of what we call “the amicus machine.”*

*This Article has two goals: The first is to offer a new description of the origin of many Supreme Court amicus briefs, explaining how it is that the Justices and the advocates benefit from this choreographed amicus process. Second, we make the perhaps surprising claim that the amicus machine is normatively desirable. Others have warned about the influence of the powerful lawyers of the Supreme Court Bar generally. While acknowledging these risks, we argue that—when it comes to amicus briefs—the benefits of specialization outweigh the costs.*

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\*\* Sandra Day O’Connor Professor of Law and Professor of Government, The College of William and Mary School of Law. We are very grateful to the dozens of leading Supreme Court specialists (listed in the Appendix) who generously gave their time to help us with this project. We also thank the participants at the Cornell Constitutional Law Workshop and the University of Chicago Constitutional Law Workshop for helpful comments; thanks too to Jonathan Mitchell, Dan Schweitzer, and Kate Shaw for comments on a draft of this article. Finally, we are very grateful for the excellent research assistance provided by MiQuel Davies, Ben Ellis, Connor Garstka, Katlyn Moseley, John Nelson, Eric Sutton, and Michael Umberger.

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#### INTRODUCTION

THE amicus machine has arrived. Ninety-eight percent of U.S. Supreme Court cases now have amicus curiae (“friend of the court”) filings; 800 briefs are filed each term with the marquee cases attracting briefs in the triple digits.<sup>1</sup> This is over an 800% increase from the 1950s<sup>2</sup> and a 95% increase from 1995.<sup>3</sup> The real surprise, however, is the story behind the scenes—a story that amplifies fundamental changes in both

<sup>1</sup> Anthony J. Franze & R. Reeves Anderson, Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm, *Nat’l L.J.*, Aug. 19, 2015 (“In the 2014–15 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. . . . [W]e conclude that mountains of briefs, shattered records and the justices’ reliance on amici simply reflect the new norm.”).

<sup>2</sup> Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 *U. Pa. L. Rev.* 743, 749 (2000) (“While the number of cases that the Court has disposed of on the merits has not appreciably increased during this time (indeed it has fallen in recent years), the number of amicus filings has increased by more than 800%.”); see Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* 46 (2008); Ryan J. Owens & Lee Epstein, *Amici Curiae During the Rehnquist Years*, 89 *Judicature* 127, 128–29 (2005).

<sup>3</sup> There were 400 amicus briefs filed in the 1995 Term, see Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 *Law & Soc. Inquiry* 955, 961 (2007), and 781 briefs filed in the 2014 Term, see Franze & Anderson, *supra* note 1.

lawyering before the Supreme Court and, more significantly, Supreme Court decision making.

The dominant narrative of the amicus growth spurt to date is a story about interest-group lobbying: The “friends” responsible for amicus briefs are motivated interest groups that want to urge their policy positions on the Justices much like they lobby Congress.<sup>4</sup> But this narrative is now outdated and incomplete.

Even though the rise of amicus filings is partially linked to interest-group activity,<sup>5</sup> the real story in the growth and especially the influence of amicus filings is the dramatic spike in activity by the so-called Supreme Court Bar. Today, elite, top-notch lawyers help shape the Court’s docket by asking other elite lawyers to file amicus briefs requesting that the Court hear their case.<sup>6</sup> When the Court grants certiorari (or “cert”), these very lawyers strategize about which voices the Court should hear

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<sup>4</sup> Collins, *supra* note 2, at 27 (“[A]micus perform a function similar to that which lobbyists perform for legislations. That is, by informing the justices of the implications of their decisions, amici enable justices to render decisions that both maximize the application of their policy preferences and allow them to create efficacious law.”); Omari Scott Simmons, *Picking Friends From the Crowd: Amicus Participation as Political Symbolism*, 42 *Conn. L. Rev.* 185, 192 (2009) (Amicus briefs “provide the judicial counterpart of lobbying” and are a way for “interest groups to influence government decision making” (quoting Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 *Yale L.J.* 694, 717 (1963))); see also Neal Devins, *Measuring Party Polarization in Congress: Lessons from Congressional Participation as Amicus Curiae*, 65 *Case W. Res. L. Rev.* 933, 939–40 (2015) (assessing patterns in congressional amicus filings over the past forty years). For a comprehensive history of the role of the amicus curiae, see Krislov, *supra*, at 694–704.

<sup>5</sup> For example, on church-state issues, the rise in amicus filings is undoubtedly tied to the proliferation of religious interest groups. In 1950, there were approximately sixteen major religious lobbies; in 1985, the number was eighty; in 1994, 120; and in 2012, there were more than 200 organizations engaged in religious lobbying. Neal Devins & Louis Fisher, *The Democratic Constitution* 270 (2d ed. 2015). More generally, there has been a tremendous upswing in the number of nonprofit organizations and, not surprisingly, there are substantially more interest groups likely to file amicus briefs. See Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?* 52 *J. Pol.* 782, 783–84, 793 (1990) (noting characteristics of organizations that file amicus briefs); Registered 501(c)(3) Public Charities by IRS Ruling Date, Nat’l Ctr. for Charitable Statistics, <http://nccsweb.urban.org/tablewiz/showreport.php> (documenting ten-fold growth of nonprofits from the 1950s (30,599) to the 2010s (326,101)).

<sup>6</sup> See Richard J. Lazarus, *Docket Capture at the High Court*, 119 *Yale L.J. Online* 89, 89 (2009) [hereinafter Lazarus, *Docket Capture*], [http://www.yalelawjournal.org/pdf/841\\_89m7e6cx.pdf](http://www.yalelawjournal.org/pdf/841_89m7e6cx.pdf) (“[T]he Court’s plenary docket is increasingly captured by an elite group of expert Supreme Court advocates, dominated by those in the private bar.”).

and they pair these groups with other Supreme Court specialists to improve their chances with the Court.<sup>7</sup>

The end result is orchestrated and intentional. Skilled advocates find the arguments that matter, the clients that matter, and the lawyers that matter—and then they match them up and package them for the Justices. A successful venture at the Supreme Court, in other words, requires a sophisticated “amicus strategy.”<sup>8</sup> “We urged our friends to cover specific topics that added value to the merits,” Supreme Court specialist Kathleen Sullivan explained.<sup>9</sup> “This is not a high-profit law practice . . . We really do think of it as a way of helping the court.”<sup>10</sup> Sullivan and others have noticed that a calculated amicus plan like this has become “much more systematic.”<sup>11</sup> And it works.

Take, for example, *King v. Burwell*, 2015’s high-stakes decision about the Affordable Care Act.<sup>12</sup> Breaking from tradition, the government in that case used an outside member of the private Supreme Court Bar to recruit and coordinate amicus briefs in support of the its case.<sup>13</sup> These amicus efforts (which journalist Linda Greenhouse says “w[ere] no accident”) made a real difference;<sup>14</sup> the Chief Justice cited two such

<sup>7</sup> For a fascinating account of the rise of the Supreme Court Bar, see Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 *Geo. L.J.* 1487, 1525 (2008) [hereinafter Lazarus, *Advocacy Matters*] (describing the power and influence of members of the Supreme Court Bar, which includes “push[ing] hard for amici support”); Joan Biskupic, Janet Roberts & John Shiffman, *The Echo Chamber*, *Reuters* (Dec. 8, 2014, 10:30 AM), <http://www.reuters.com/investigate/s/special-report/scotus/> [<https://perma.cc/K57F-HMDK>] (“They are the elite of the elite: Although they account for far less than 1 percent of lawyers who filed appeals to the Supreme Court, these attorneys were involved in 43 percent of the cases the high [C]ourt chose to decide from 2004 through 2012.”). For an earlier study of this phenomenon (including data contrasting amicus filings in cases handled by Supreme Court insiders and novices), see Kevin T. McGuire, *The Supreme Court Bar: Legal Elites in the Washington Community* 121–26 (1993).

<sup>8</sup> See Evan Caminker, *A Glimpse Behind and Beyond Grutter*, 48 *St. Louis U. L.J.* 889, 895 (2004).

<sup>9</sup> Stephanie Francis Ward, *Friends of the Court Are Friends of Mine*, *A.B.A. J.* (Nov. 1, 2007, 8:10 PM) (quoting Kathleen Sullivan) (internal quotation marks omitted), [http://www.abajournal.com/magazine/article/friends\\_of\\_the\\_court\\_are\\_friends\\_of\\_mine](http://www.abajournal.com/magazine/article/friends_of_the_court_are_friends_of_mine) [<https://perma.cc/7PPM-5JZB>].

<sup>10</sup> *Id.* (quoting Kathleen Sullivan) (internal quotation marks omitted).

<sup>11</sup> *Id.*

<sup>12</sup> 135 S. Ct. 2480 (2015).

<sup>13</sup> See Linda Greenhouse, *Op-Ed.*, *The Roberts Court’s Reality Check*, *N.Y. Times* (June 25, 2015), <http://www.nytimes.com/2015/06/26/opinion/the-roberts-courts-reality-check.html>.

<sup>14</sup> *Id.*

briefs in his opinion, including one (filed on behalf of economists) on which he appears to have placed substantial reliance.<sup>15</sup>

Examples like this abound. Many will recall the well-known amicus briefs for the military leaders and corporations filed in the 2003 affirmative action case *Grutter v. Bollinger*.<sup>16</sup> Justice O'Connor cited these briefs in her opinion for the Court, referenced them in her oral bench statement when the decision was announced, and mentioned one of them repeatedly in oral argument as the “Carter Phillips brief,” apparently referring to the lawyer who drafted it.<sup>17</sup> Similarly and more recently, five Justices repeatedly asked the advocates in *Hollingsworth v. Perry* (one of the Court’s same-sex marriage cases) about standing arguments pressed by “the Dellinger brief”—referring to Walter Dellinger, another prominent Supreme Court expert.<sup>18</sup>

But these briefs—seemingly influential on the Justices as far as we can tell—were not organically developed by concerned interest groups who saw the case as an opportunity to press their policy positions. They were instead the product of targeted recruitment and design by Supreme Court experts.<sup>19</sup> Fingerprints of these experts can be seen on the amicus

<sup>15</sup> *King*, 135 S. Ct. at 2486, 2493–94.

<sup>16</sup> 539 U.S. 306 (2003). The most-discussed brief was written by attorneys at Sidley Austin. Kelly J. Lynch, Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs, 20 J.L. & Pol. 33, 33–34 (2004). For Carter Phillips’s accounting of the writing of the brief and why he thinks it was influential, see Carter G. Phillips, Was Affirmative Action Saved By Its Friends?, in *A Year at the Supreme Court* 113, 129 (Neal Devins & Davison M. Douglas eds., 2004).

<sup>17</sup> Matthew M.C. Roberts, Oral Argument and Amicus Curiae 15 n.16 (2012); see also Transcript of Oral Argument at 19, 22, *Grutter*, 539 U.S. 306 (No. 02-241) (“I’d like you to comment on Carter Phyllip’s [sic] brief. What is your view of the strength of that argument?”). Interestingly, Carter Phillips was not actually the author of the brief. The counsel of record was Virginia Seitz, Phillips’s law partner. See Robert Barnes, Supreme Court Receives Outpouring of Conflicting Views on Affirmative Action, Wash. Post (Oct. 7, 2012), [https://www.washingtonpost.com/politics/decision2012/supreme-court-receives-outpouring-of-conflicting-views-on-affirmative-action/2012/10/07/d38c59c2-0f04-11e2-bb5e-492c0d30bff6\\_story.html](https://www.washingtonpost.com/politics/decision2012/supreme-court-receives-outpouring-of-conflicting-views-on-affirmative-action/2012/10/07/d38c59c2-0f04-11e2-bb5e-492c0d30bff6_story.html) [<https://perma.cc/8TS5-5GN3>].

<sup>18</sup> See Transcript of Oral Argument at 10, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144); Adam Liptak, Justices Say Time May Be Wrong for Gay Marriage Case, N.Y. Times (Mar. 26, 2013), <http://www.nytimes.com/2013/03/27/us/supreme-court-same-sex-marriage-case.html>.

<sup>19</sup> See Denise O’Neil Green, Justice and Diversity: Michigan’s Response to *Gratz*, *Grutter*, and the Affirmative Action Debate, 39 Urb. Educ. 374, 386–88 (2004) (describing how Michigan enlisted the support of organizations as amici in *Grutter*); Madeleine Schachter, The Utility of *Pro Bono* Representation of U.S.-Based *Amicus Curiae* in Non-U.S. and Multi-National Courts as a Means of Advancing the Public Interest, 28 Fordham Int’l L.J. 88, 96–97 (2004) (noting that “Kathryn Kolbert coordinated the submission of *amici* briefs on

briefs cited by the Court in *Riley v. California* (the 2014 cell phone search case),<sup>20</sup> a brief discussed in oral argument in *Fisher v. University of Texas* (the Court's most recent affirmative action case),<sup>21</sup> and a brief some say was responsible for the outcome in *Hollingsworth* (the above-mentioned challenge to California's ban on same-sex marriage).<sup>22</sup>

Coordinated amicus briefs are not entirely new, but the forces that make them routine *are* new, and the cumulative effect of these forces—what we call the “amicus machine”—is previously unrecognized. The amicus machine is our phrase to describe the origin of many amicus briefs today—a system where Supreme Court experts are responsible for recruiting amici and coordinating their messages to the Court.

Several modern dynamics keep the machine running. First, as Professor Richard Lazarus has documented, the rise of the Supreme Court Bar over the last several decades has completely changed the nature of Supreme Court advocacy.<sup>23</sup> Because these repeat players both solicit briefs from and write briefs for their cohorts, they enhance their reputations and increase the ranks of other lawyers who also perpetuate the amicus machine.<sup>24</sup>

Moreover, the Court's new hunger for information outside the record and the unprecedented rise in briefs conveying that information also fuel the amicus machine.<sup>25</sup> It is an open secret inside the Beltway that as the sea of amici expands, a targeted amicus strategy becomes essential. Sophisticated players know they need an “amicus wrangler” to ensure that their chosen expert voices (as opposed to the many competing ones) are

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behalf of the ACLU and the Planned Parenthood Federation in *Webster v. Reprod. Health Servs.*,” 492 U.S. 490 (1989)).

<sup>20</sup> *Riley v. California*, 134 S. Ct. 2473, 2486–87 (2014); Interview with Jeffrey L. Fisher, Professor and Co-Director, Stanford Law School Supreme Court Litigation Clinic, in Williamsburg, Va. (Sept. 25, 2015).

<sup>21</sup> See Transcript of Oral Argument at 48, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (No. 14-981).

<sup>22</sup> Interview with Walter Dellinger, Partner, O'Melveny & Myers, in Wash., D.C. (June 16, 2015); see also Liptak, *supra* note 18 (noting that five Justices seemed persuaded by the kinds of standing arguments made in the Walter Dellinger brief).

<sup>23</sup> Lazarus, *Advocacy Matters*, *supra* note 7, at 1488–92.

<sup>24</sup> See *infra* Section II.B.

<sup>25</sup> On the Justices' increasing use of Internet searches to seek information not in the record, see Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 Va. L. Rev. 1255, 1260–62 (2012) [hereinafter Larsen, *Confronting Supreme Court Fact Finding*]. On the Justices' increasing reliance on amicus filings to supplement the record with (sometimes incorrect) legislative facts, see Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757, 1761–64 (2014) [hereinafter Larsen, *The Trouble with Amicus Facts*].

appropriately highlighted.<sup>26</sup> Just as one might expect, and as one survey of Supreme Court law clerks reveals, the more amicus briefs that are filed on the merits, the greater the chance that the valuable ones will get lost in the shuffle.<sup>27</sup>

Finally, the modern Supreme Court itself embraces the work of the amicus machine. The Justices seem to prefer a system dominated by Supreme Court specialists who can be counted on for excellent advocacy.<sup>28</sup> They look to these briefs both for legal theories and factual evidence, and they cite them at an increasingly high rate.<sup>29</sup> The Justices also seem to prefer a system (fostered by these briefs) that facilitates the declaration of broad legal rules rather than resolving narrow disputes.<sup>30</sup> Supreme Court specialists are experts in identifying ways in which a case is a good or bad vehicle to establish broad legal principles and, as such, the amicus machine helps the Court identify which cases to hear and how to rule on those cases.

The goals of this Article are twofold. One is to describe the current practice of amicus filings at the Supreme Court, explaining how it is that the Justices and members of the Supreme Court Bar both benefit from a system that incentivizes the filing of high-quality briefs by Supreme Court specialists. The other is to make the perhaps counterintuitive nor-

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<sup>26</sup> See Ward, *supra* note 9. For additional discussion, see Subsection II.A.2.

<sup>27</sup> See Lynch, *supra* note 16, at 44–45.

<sup>28</sup> See Biskupic et al., *supra* note 7, pt. 3 (“In exclusive interviews, many of the justices acknowledge the growing specialization of the Supreme Court bar, and they largely welcome it.”).

<sup>29</sup> Franze & Anderson, *supra* note 1 (noting that in 2014–15, the Justices cited amicus briefs in 55% of signed opinions, which is keeping with the overall increase in citations in the past five years). See also Kearney & Merrill, *supra* note 2, at 757 (“There is no question but that the total number of references to amici is substantial, and that the frequency of such references has been increasing over time.”).

<sup>30</sup> Renowned Supreme Court advocate Carter Phillips explains:

[A]s long as the Court properly views its role as announcing broad declarations of federal law that will significantly affect the litigating and programmatic interest of hundreds or thousands of groups and millions of people, then it should solicit or at least be willing to entertain broader views than most single litigants can or are willing to provide.

Phillips, *supra* note 16, at 129. For recent studies suggesting that the Court increasingly sees its role as being law declarer and not dispute resolver, see Neal Devins & Saikrishna B. Prakash, Essay, Reverse Advisory Opinions, 80 U. Chi. L. Rev. 859, 863 (2013); Brianne J. Gorod, The Adversarial Myth: Appellate Court Extra-Record Factfinding, 61 Duke L.J. 1, 66 (2011); Henry Paul Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, Essay, 112 Colum. L. Rev. 665, 668–69 (2012). For further discussion, see *infra* Section III.C.

mative claim that this amicus machine is actually beneficial. Several scholars and journalists, most famously Richard Lazarus and Joan Biskupic, have warned about the power of the Supreme Court Bar and the possibility of the Supreme Court's docket being captured by a pro-business club of elites.<sup>31</sup>

While these worries are significant, we argue there are several overlooked benefits to an amicus machine. Specifically, we note three: (1) the machine alters the role of the Solicitor General ("SG"), and disperses the advantage this office has long held to a broader group of people, thus increasing the number of individuals with credibility and reputation interests at stake available to police unreliable claims made to the Court; (2) at the jurisdiction stage, the machine assists law clerks in finding cases that are worthy of the Court's attention, an important signal in an era where circuit splits are less common and reasons for cert are more nuanced; and (3) it is an appropriate turn to reflect a larger change in the function of the Court, a Court less interested in resolving disputes and most interested in enunciating broad legal principles. Such a Court benefits in hearing from Supreme Court specialists who understand the types of legal arguments and factual presentations that will be most useful to the Justices.

To be sure, the amicus machine has downsides. It is clubby. It is elite. There is a risk that people who can afford the best advocates will get the ear of the Justices, and the democracy-enhancing ideal of the amicus will be lost. But, we argue, it is a mistake to focus only on the costs and to overlook the benefits. We push back on claims that the Supreme Court Bar is monolithically pro-business and that these lawyers effectively dictate much of the Court's docket. In an era of infinite information and virtually limitless briefs, coordination efforts by Supreme Court experts are a controlling force on a potentially unruly system. At the end of the day, the amicus machine may be a virtue, and not a vice, of current Supreme Court practice.

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<sup>31</sup> See Lazarus, *Advocacy Matters*, supra note 7, at 1531; Biskupic et al., supra note 7. Of course neither author makes the argument that the Supreme Court Bar is all bad. In fact, Lazarus specifically notes that "[a]s a general matter, the promotion of more effective advocacy both before and within the Court should be considered a positive development." Lazarus, *Advocacy Matters*, supra note 7, at 1554. Biskupic likewise observes that the Justices "welcome" the growing specialization of the Supreme Court Bar. Biskupic et al., supra note 7. See also *infra* Subsection II.B.3.

This Article proceeds in three parts. Part I explains the traditional story of Supreme Court amici: lobbying groups attempting to influence the policy that comes from Supreme Court decisions on the merits. Part II describes what we call “the amicus machine”: a more complicated story involving party coordination, a new emphasis on amicus briefs at the cert stage, and the multilayered incentives of those who file and receive amicus briefs. Part III then builds the normative argument in favor of the amicus machine, focusing on overlooked benefits of the current system.

## I. THE TRADITIONAL AMICUS STORY

### A. *Evolution from Friend to Lobbyist*

Amicus briefs have ancient roots. Originating in Roman law and common in England during the seventeenth and eighteenth centuries, an amicus curiae was an outsider to a dispute who a court would permit, and sometimes invite, to present “neutral, unbiased information.”<sup>32</sup> The original amicus was a lawyer physically present in the courtroom who would assist the court with an “oral ‘shepardizing,’ the bringing up of cases not known to the judge.”<sup>33</sup>

Shortly after crossing the Atlantic, however, the amicus curiae evolved, in the famed words of historian Samuel Krislov, “from friendship to advocacy.”<sup>34</sup> According to Krislov, the nature of the amicus changed in response to tough consequences and injustices that flowed from restrictions inherent in the adversarial process.<sup>35</sup> These problems were exacerbated in America: “The assertion of judicial review and of the Court’s role as ‘umpire to the federal system’” meant that private disputes were used to shape the Constitution, leading the Supreme Court to “strictly scrutinize the right of parties to appear before federal courts as parties in interest.”<sup>36</sup>

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<sup>32</sup> Roberts, *supra* note 17, at 7. See also Krislov, *supra* note 4, at 694 (providing comprehensive history of the amicus curiae).

<sup>33</sup> Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 *Fordham Urb. L.J.* 1605, 1607 (1999); see also Collins, *supra* note 2, at 38 (describing history of the amicus).

<sup>34</sup> Krislov, *supra* note 4, at 694 (capitalization omitted). Indeed, at least one historian argues that there was never a time in America when the amicus did not play an advocacy role. Stuart Banner, *The Myth of the Neutral Amicus: American Courts and Their Friends, 1790-1890*, 20 *Const. Comment.* 111, 112–13 (2003).

<sup>35</sup> Krislov, *supra* note 4, at 696–97.

<sup>36</sup> *Id.* at 697.

The name “amicus curiae” once described “an essentially professional relation to the Court,” where the amicus was the lawyer assisting the judge, not the client sponsoring the assistance.<sup>37</sup> Through the end of the nineteenth century, American amici clung to this approach.<sup>38</sup> Shortly after the turn of the twentieth century, however, this façade was abandoned and the amicus evolution from friend to advocate was almost complete.<sup>39</sup> By the 1930s, it became common for the organizational sponsor to appear on the amicus brief.<sup>40</sup>

Now everyone sees the amicus brief as the arm of an activist: “No longer a mere friend of the court, the amicus has become a lobbyist, an advocate, and, most recently, the vindicator of the politically powerless.”<sup>41</sup> Indeed, today organizations are established at least in part for the very purpose of filing amicus briefs; they do not seek to hide that they have a dog in the fight, calling themselves “litigating amic[i]” and “acknowledged adversaries.”<sup>42</sup>

This amicus shift coincides with two other changes in American politics: the proliferation of interest groups to effectuate major social change,<sup>43</sup> and the corresponding rise of the courts as engines of social reform.<sup>44</sup> The end of the nineteenth century marked a departure from the personal politics of the handshake and the growth of the impersonal, organized, and systematic tools of interest group politics.

According to many, the amicus flourished in this new environment.<sup>45</sup> The idea is that “[t]he emergence of the public law model and its maturation over the latter half of the twentieth century created a ripe environment for interested non-parties to weigh in on the development of

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<sup>37</sup> Id. at 703.

<sup>38</sup> Id.

<sup>39</sup> Id. (describing how after the turn of the century the amicus was “no longer a neutral, amorphous embodiment of justice, but an active participant in an interest group struggle.”).

<sup>40</sup> Id.

<sup>41</sup> Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 *Am. U. L. Rev.* 1243, 1245 (1992) (footnotes omitted).

<sup>42</sup> Schachter, *supra* note 19, at 90–91 (alteration in original, emphasis and internal quotation marks omitted).

<sup>43</sup> Krislov, *supra* note 4, at 704.

<sup>44</sup> See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281, 1284, 1300–01 (1976) (discussing the rise of public law litigation and the judiciary’s enlarged role in deciding social issues).

<sup>45</sup> See, e.g., Collins, *supra* note 2, at 3; Lucius J. Barker, *Third Parties in Litigation: A Systemic View of the Judicial Function*, 29 *J. Pol.* 41, 53, 60 (1967); Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 *Rev. Litig.* 669, 674 (2008).

policy through the courts; the amicus brief provided the tool to accomplish this goal.”<sup>46</sup>

Many political scientists have explicitly made the analogy between amici curiae and interest-group lobbyists.<sup>47</sup> “[W]hen law is perceived as a powerful instrument, individuals and groups within society will endeavor to seize or co-opt the law in every way possible.”<sup>48</sup> Because amici engage in “partisan advocacy,” they “allow[] the Court to weigh ‘political’ information in a judicial way.”<sup>49</sup> Amicus briefs, the story goes, are one mechanism—and a growing one—that motivated interest groups increasingly use to “further their economic, political, and social agendas.”<sup>50</sup>

It stands to reason that amicus briefs would proliferate in conjunction with the explosion of interest groups and an ever-expanding judicial role. And amicus efforts have certainly intensified. Amicus briefs were filed in 96% of all Supreme Court cases in 2013–14, and in 98% of all cases decided in 2014–15 (meaning all but one case).<sup>51</sup>

To put this in a historical perspective, “amici averaged roughly one brief per case in the 1950s and about five briefs per case in the 1990s.”<sup>52</sup> By contrast, the number of amicus briefs in the 2014-15 term’s same-sex marriage case reached 148 (a new record).<sup>53</sup> The health care case two

<sup>46</sup> Simard, *supra* note 45, at 674; see also Kearney & Merrill, *supra* note 2, at 746 (attributing to Justice Scalia the suggestion that “amicus briefs reflect a form of interest group lobbying directed at the Court”).

<sup>47</sup> Collins, *supra* note 2, at 1–2; Lee Epstein & Jack Knight, Mapping Out the Strategic Terrain: The Informational Role of *Amici Curiae*, in *Supreme Court Decision-Making: New Institutional Approaches* 215, 215 (Cornell W. Clayton & Howard Gillman eds., 1999) (comparing the role of amici curiae for Justices to the role of lobbyists for legislators); Kearney & Merrill, *supra* note 2, at 783 (“Political scientists have long perceived an analogy between interest groups lobbying legislatures and interest groups seeking to influence judicial decisions through the filing of amicus briefs.”).

<sup>48</sup> Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* 1 (2006).

<sup>49</sup> Barker, *supra* note 45, at 53, 60.

<sup>50</sup> Collins, *supra* note 2, at 3.

<sup>51</sup> See Franze & Anderson, *supra* note 1; Anthony J. Franze & R. Reeves Anderson, Justices Are Paying More Attention to Amicus Briefs, *Nat’l L.J.*, Sept. 8, 2014, at 11.

<sup>52</sup> Anthony J. Franze & R. Reeves Anderson, The Supreme Court’s Reliance on Amicus Curiae in the 2012-13 Term, *Nat’l L.J.*, Sept. 18, 2013; see also Kearney & Merrill, *supra* note 2, at 765 n.71 (listing the average number of amicus briefs filed per case between 1986 and 1995 as ranging from 3.3 to 5.46).

<sup>53</sup> Nina Totenberg, Record Number of Amicus Briefs Filed in Same-Sex-Marriage Cases, *Nat’l Pub. Radio* (Apr. 28, 2015, 5:00 AM), <http://www.npr.org/sections/itsallpolitics/2015/04/28/402628280/record-number-of-amicus-briefs-filed-in-same-sex-marriage-cases>.

years earlier, *NFIB v. Sebelius*, had 136 amicus briefs on the docket.<sup>54</sup> For the sake of comparison, consider that *Roe v. Wade* had “twenty-two or twenty-three” amicus briefs.<sup>55</sup> In *Brown v. Board of Education*, there were only six.<sup>56</sup> In *Lochner v. New York*, that number was zero.<sup>57</sup>

The traditional tale connects the dramatic increase in the quantity of briefs to the rise of interest-group law reform efforts.<sup>58</sup> The explosion of amici tracks the rise of interest-group politics generally.<sup>59</sup> This story is well entrenched and familiar. As Paul Collins describes it, “interest group amicus participation at the Court is now the norm, not the exception.”<sup>60</sup> This, he tells us, has “reached the status of conventional wisdom.”<sup>61</sup>

### B. “Friends of the Court” Not “Friends of the Party”

One other aspect of the traditional amicus story merits a pause. Judge Richard Posner has explained that the proper role of an amicus is a “friend of the court,” not a “friend of the party.”<sup>62</sup> Although acknowledging “an adversary role of an amicus curiae has become accepted,” Judge Posner complains that these briefs should be reserved for situations when the adversary system fails to do its job—when party representation is poor, when information is limited, or when voices of the

<sup>54</sup> 132 S. Ct. 2566 (2012); Franze & Anderson, *supra* note 1.

<sup>55</sup> 410 U.S. 113 (1973); Sarah Weddington, The Donahue Lecture Series: “*Roe v. Wade*: Past and Future” (Dec. 7, 1989), *in* 24 Suffolk U. L. Rev. 601, 605 (1990).

<sup>56</sup> 347 U.S. 483 (1954); Kearney & Merrill, *supra* note 2, at 754 n.28; Mark V. Tushnet, *The NAACP’s Legal Strategy Against Segregated Education, 1925–1950* (1987) (discussing the litigation strategy laying the groundwork for *Brown*).

<sup>57</sup> 198 U.S. 45 (1905); 14 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 653 (Philip B. Kurland & Gerhard Casper eds., 1975).

<sup>58</sup> See, e.g., Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. Rich. L. Rev. 361, 362 (2015) (“Amicus curiae participation has surged in recent years, primarily by interest and advocacy groups wishing to advance their law reform efforts . . .”); Simard, *supra* note 45, at 676–77.

<sup>59</sup> See Simard, *supra* note 45, at 6.

<sup>60</sup> Collins, *supra* note 2, at 6.

<sup>61</sup> *Id.*

<sup>62</sup> *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997). As explained below, this reflects a larger belief about a separation between amicus and litigant. Of course, not everyone buys that tale. See Caldeira & Wright, *supra* note 5, at 788 (“[C]ontemporary amici are really friends of the parties, not necessarily friends of the Court, even though the original intent of amicus curiae briefs was, of course, to provide the Court with new information and to act in a neutral fashion.”).

population who will be affected by the legal rule in question are not being heard.<sup>63</sup>

This intuition is widely shared. Two basic theories of amicus utility run through the political science literature: (1) the affected groups theory; and (2) the information theory.<sup>64</sup> Affected groups theory assumes the Justices “look to amicus briefs as a barometer of opinion on both sides of the issues.”<sup>65</sup> Information theory suggests that amicus briefs are useful “because they supplement the arguments of the parties by providing information not found in the parties’ briefs.”<sup>66</sup>

What both of these theories share in common, however, is the assumption reflected in the Posner quote: that an amicus brief is an entity that is separate from the parties.<sup>67</sup> There is a common conception about amici curiae (perhaps folklore, perhaps not) that these briefs are democracy enhancing because they operate outside of the adversary process.<sup>68</sup> Everyone is invited to the Supreme Court docket; the Justices want to hear all sides and opinions—not just the litigants’—before deciding a case.<sup>69</sup>

Supreme Court rules reinforce this belief. Rule 37.1 states that an amicus brief “that brings to the attention of the Court relevant matter not

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<sup>63</sup> *Ryan*, 125 F.3d at 1063. For its part, the Supreme Court embraces this view when it appoints an amicus to advance arguments that neither party to a dispute is willing to advance. See Katherine Shaw, Essay, Friends of the Court: Evaluating the Supreme Court’s Amicus Invitations, 101 Cornell L. Rev. 1533 (2016); Brian P. Goldman, Note, Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?, 63 Stan. L. Rev. 907, 909–10 (2011).

<sup>64</sup> Simard, *supra* note 45, at 681.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 682.

<sup>67</sup> *Id.* at 680.

<sup>68</sup> See, e.g., Simmons, *supra* note 4, at 185 (“The modern process of amicus curiae participation is a form of political symbolism reflecting the Supreme Court’s irreconcilable role in American democracy as a quasi-representative policy-making institution.”). Indeed one scholar has even argued that amicus participation is protected by the First Amendment. Rubin J. Garcia, A Democratic Theory of Amicus Advocacy, 35 Fla. St. U. L. Rev. 315, 319 (2008).

<sup>69</sup> This view is also widely shared by members of the Supreme Court Bar. In interviews conducted for this paper, we asked leading Supreme Court advocates whether limits should be placed on the number of amicus briefs filed and whether lawyers for the parties should serve as gatekeepers to the filing of amicus briefs. Each and every lawyer we asked unequivocally rejected this suggestion precisely because of the democracy-enhancing characteristics of unrestricted amicus filings. See, e.g., Interviews with Lisa Blatt, Partner, Arnold & Porter, Paul Smith, Partner, Jenner & Block, and Charles Rothfeld, Special Counsel, Mayer Brown, in Wash., D.C. (June 16, 2015).

already brought to its attention by the parties may be of considerable help to the Court.”<sup>70</sup> This rule, as Brianne Gorod has helpfully observed, is the Court’s way of explicitly encouraging arguments and claims outside what the adversary system can provide.<sup>71</sup>

But the rules do even more to strengthen this separation. Rule 37.6 requires disclosure if any lawyer for a party had a hand in funding or authoring an amicus brief.<sup>72</sup> Indeed, in the explanatory notes accompanying this rule, the Clerk of the Supreme Court explained the disclosure was necessary “both in considering questions of recusal and in assessing the credibility to be attached to the views submitted by the amicus.”<sup>73</sup> This language suggests that an amicus brief is less credible when tainted by a party’s touch.

According to the leading treatise on Supreme Court practice, the addition of this disclosure requirement in 2007 was prompted by “the Court’s perception that some parties to a case had silently been authoring or financing amicus curiae briefs in support of their positions.”<sup>74</sup> Although the rule was not meant “to discourage party counsel from soliciting supporting briefs from amici curiae,” it was “designed to discourage party counsel from taking over the preparation and submission of supporting amici briefs.”<sup>75</sup>

These rules underscore the separating line between Supreme Court amicus and Supreme Court litigant. It is a line, however, that was perhaps always illusory and in any event is fading fast.<sup>76</sup>

<sup>70</sup> Sup. Ct. R. 37.1.

<sup>71</sup> Gorod, *supra* note 30, at 36–37 (arguing that this rule encourages the Justices to abandon “the adversarial myth” and, particularly, to look outside the record for facts).

<sup>72</sup> Sup. Ct. R. 37.6. This Rule was added in 1997 and amended in 2007. All amicus briefs have boilerplate language in the front of them to this effect:

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Stephen M. Shapiro et al., *Supreme Court Practice* 518 n.174 (10th ed. 2013). The language came from an August 6, 2007 memorandum from the Clerk’s Office at the Supreme Court. See *id.*

<sup>73</sup> *Id.* at 518 (discussing Sup. Ct. R. 37.6).

<sup>74</sup> *Id.* at 755.

<sup>75</sup> *Id.*

<sup>76</sup> As we demonstrate below, notwithstanding the Court’s 2007 rule change, the Justices themselves facilitate a system that rewards Supreme Court insiders who coordinate the filing of amicus briefs. See *infra* Subsections II.B.2–3.

## II. THE AMICUS MACHINE

The amicus folklore needs to be updated. To be sure, some amicus briefs are organically grown and the product of interest-group lobbying at the Court. But an increasing number are filed by—or at least recruited by—an elite few. Supreme Court practice in 2016 is very different from Supreme Court practice thirty years ago or even fifteen years ago. Significant changes include the rise of an elite group of lawyers who handle the majority of business before the Court, the ease with which information is submitted to the Court in a digital age, and an explosion of amicus briefs routinely filed at the Court.<sup>77</sup>

Together these conditions have birthed what we call “the amicus machine”—a systematic, choreographed engine designed by people in the know to get the Justices the information they crave, packaged by lawyers they trust. In researching this Article, and to understand the way the amicus process operates today, we interviewed twenty-six Supreme Court specialists from private firms, Supreme Court clinics, interest groups, state solicitor general offices, and the Federal Office of the Solicitor General. These attorneys have collectively argued over 400 cases before the Court and have written or coordinated several thousand Supreme Court amicus briefs.<sup>78</sup>

In this Section, we describe three facets of the machine: (1) party coordination and control of amicus briefs by an elite group; (2) the complicated incentives driving those that file these briefs and those that receive them; and (3) agenda setting for the Court by increased amicus briefs at the cert stage.

*A. Party Coordination & Control*

Over the past several decades, the art of practicing before the Supreme Court has transformed. Although there are technically over 262,000 members of the Supreme Court Bar,<sup>79</sup> the vast majority of cases

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<sup>77</sup> Franze & Anderson, *supra* note 1; Franze & Anderson, *Justices Are Paying More Attention to Amicus Briefs*, *supra* note 51, at 11.

<sup>78</sup> See *infra* Appendix (listing names and other information about the lawyers we interviewed). In calculating oral argument totals, we looked to the attorney pages available on the Oyez website, <https://www.oyez.org>. In addition to advocates, we also spoke with three journalists who regularly cover the Court. Their names are also listed in the Appendix.

<sup>79</sup> See Lazarus, *Advocacy Matters*, *supra* note 7, at 1491 (noting 262,684 members as of 2006). To become a member of the Supreme Court Bar, one only has to pass the minimal requirements of being admitted to practice law in any state for three years; earn sponsorship

now feature a select group of fewer than 100 lawyers who are repeat players at the Court.<sup>80</sup>

### *1. The Players*

Richard Lazarus tells this story well.<sup>81</sup> In 1985 the law firm of Sidley Austin hired Rex Lee, President Ronald Reagan's first Solicitor General.<sup>82</sup> Lee set out "to establish a highly visible Supreme Court and appellate practice that could provide to private sector clients the kind of outstanding expert advocacy that the Solicitor General's Office had provided federal agencies."<sup>83</sup> In response to this hire, other private law firms followed suit—Mayer Brown hired deputy SGs Ken Geller and Andy Frey; Gibson Dunn hired former SG Ted Olson; Wilmer Cutler (now WilmerHale) hired former SG Seth Waxman; Hogan & Hartson (now Hogan Lovells) hired now-Chief Justice John Roberts fresh from his stint in the SG's office, and so on.<sup>84</sup>

Relatively quickly, a private Supreme Court Bar of elites began to develop.<sup>85</sup> And they now dominate. As documented in 2014 by Joan Biskupic and her colleagues at Reuters, from "the pool of approximately 17,000 lawyers and 8,000 law firms doing business at the Court over the last decade, 66 lawyers and 31 firms stood out" as writing the most petitions, briefs, and earning oral argument most frequently.<sup>86</sup> As a group, this "elite cadre of lawyers" was "involved in 43 percent of cases the high [C]ourt agreed to hear."<sup>87</sup> Indeed, eight lawyers now account for

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by two current members; submit a \$200 check payable to the Court; and have a certificate of good standing from your bar. *Id.*

<sup>80</sup> See Biskupic et al., *supra* note 7, pt. 1; Lazarus, *Advocacy Matters*, *supra* note 7, at 1492–93 & n.28. For other accounts corroborating Biskupic and Lazarus's accounts of the rise of the Supreme Court Bar, see, e.g., Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 *J. Pol.* 187, 187–88 (1995) [hereinafter McGuire, *Repeat Players*]; John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 *J. Sup. Ct. Hist.* 68, 75–76 (2005); Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and Its Effect on Certiorari*, 9 *J. App. Prac. & Process* 175, 176–77 (2007).

<sup>81</sup> Lazarus, *Advocacy Matters*, *supra* note 7, at 1492.

<sup>82</sup> *Id.* at 1498.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1499–1500; see Kenneth S. Geller, Mayer Brown, <https://www.mayerbrown.com/en-US/people/Kenneth-S-Geller/>; Andrew L. Frey, Mayer Brown, <https://www.mayerbrown.com/people/andrew-l-frey/>.

<sup>85</sup> Lazarus, *Advocacy Matters*, *supra* note 7, at 1497, 1501.

<sup>86</sup> Biskupic et al., *supra* note 7, pt. 3.

<sup>87</sup> *Id.* pts. 1, 3.

20% of oral arguments made by private attorneys, and the vast majority of lawyers appearing before the Court have made more than one argument (as compared to 1980, when roughly 80% of advocates were arguing for their first time).<sup>88</sup>

Although leading the pack, the big firms were not the only ones to develop lawyers who specialize in practicing before the Court. Many states (currently the number has reached thirty-eight) have built state solicitor general offices, modeled after the U.S. Solicitor General and typically staffed by former Supreme Court law clerks.<sup>89</sup> Additionally, a few nonprofit organizations—although certainly not the majority—have begun building their own “in-house” Supreme Court litigators. The American Civil Liberties Union (“ACLU”) for example, employs lawyers with significant Supreme Court expertise.<sup>90</sup> And the Chamber of Commerce—representing business interests—has been on a hiring spree of Supreme Court law clerks recently and has “created the equivalent of a boutique law firm at its headquarters.”<sup>91</sup>

A perhaps surprising addition to this club comes from the country’s youngest lawyers: Supreme Court clinics at the nation’s leading law schools. Stanford’s Supreme Court Litigation Clinic, led by giants of the Supreme Court Bar Jeffrey Fisher and Pamela Karlan, was the first of this sort of innovative organization.<sup>92</sup> Similar clinics now exist all across

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<sup>88</sup> *Id.* pt. 3 (listing the 2014 statistics); Roberts, *supra* note 80, at 75 (providing the 1980 figure).

<sup>89</sup> Lazarus, *Advocacy Matters*, *supra* note 7, at 1501; Telephone Interview with Dan Schweitzer, Supreme Court Counsel, Nat’l Ass’n of Attorneys Gen. (Feb. 29, 2016) (stating that today there are thirty-eight states with solicitor general offices). See generally Symposium Transcript, *The Rise of Appellate Litigators and State Solicitors General*, 29 *Rev. Litig.* 545, 637–42 (2010) (charting growth of state solicitor general offices since 2000). The National Association of Attorneys General (“NAAG”) has pushed for the creation of these offices and taken other steps to facilitate coordinated Supreme Court filings by the states. Telephone Interview with Dan Schweitzer, Supreme Court Counsel, NAAG (Oct. 28, 2015). For example, NAAG circulates draft briefs to Attorneys General, organizes moot courts, and takes other steps to improve the quality of state representation and influence before the Supreme Court. See *id.*

<sup>90</sup> Telephone Interview with Steven R. Shapiro, Legal Dir., ACLU (Nov. 18, 2015).

<sup>91</sup> John Shiffman, *Chamber of Commerce Forms Its Own Elite Law Team*, *Reuters* (Dec. 8, 2014, 6:22 AM), <http://www.reuters.com/article/us-scotus-firms-chamber-idUSKBN0JM10Q20141208> [<https://perma.cc/GTD4-D4YS>].

<sup>92</sup> The Stanford clinic was founded by Professor Karlan and Tom Goldstein, now of Goldstein & Russell, a law firm that specializes in Supreme Court practice. Michael Falcone, *Stanford Law Students Get Early Supreme Court Duty*, *N.Y. Times* (Mar. 15, 2006), <http://www.nytimes.com/2006/03/15/education/stanford-law-students-get-early-supreme-court-duty.html>.

the country—at law schools at Yale, Harvard, Penn, Chicago, Texas, Northwestern, UCLA, and Virginia, to name a few. First created in 2004, clinics of this sort pair eager, hard-working students with experienced Supreme Court litigators to offer pro bono services that rival an elite firm’s Supreme Court practice but in the context of an academic institution.<sup>93</sup>

The idea for these clinics is based on a belief that also fuels the existence of the Supreme Court Bar generally: Supreme Court practice is different in kind than other litigation and requires highly specialized skills. As Pam Karlan explains, “there is real lawyering, and not merely doctrinal analysis, behind the Supreme Court’s decisions.”<sup>94</sup> Examples of these special skills range “[f]rom identifying cert-worthy cases to filing petitions for cert to writing merits briefs to dealing with amici and sometimes the government,” she says.<sup>95</sup>

The goal of the clinics is to teach these skills to emerging young stars of the legal profession while simultaneously making a mark on the Supreme Court’s docket and decisions.<sup>96</sup> And their footprint is wide. Over the past five Supreme Court terms, Supreme Court clinics have represented either petitioners or respondents in fifty-four cases before the Court. Clinics now represent a party in more than 10% of the Court’s plenary docket.<sup>97</sup> In 2015 alone, these clinics represented ten parties before the Court and six other groups as amici. The clinics at Yale, Penn, Virginia, and Stanford, among others, can all boast recent victories at the Court in several high-profile cases.<sup>98</sup> And the Stanford Law Clinic, by

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<sup>93</sup> *Id.*

<sup>94</sup> Pamela S. Karlan et al., *Go East, Young Lawyers: The Stanford Law School Supreme Court Litigation Clinic*, 7 *J. App. Prac. & Process* 207, 210 (2005).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 226 (“[W]e hope that the Clinic is well on the way to developing what the Court once called ‘a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise’ in cases before it.” (quoting *NAACP v. Button*, 371 U.S. 415, 422 (1963))).

<sup>97</sup> Jeffrey L. Fisher, *A Clinic’s Place in the Supreme Court Bar*, 65 *Stan. L. Rev.* 137, 143 (2013). In the October 2015 Supreme Court term, the UCLA clinic had four cases before the Court, and the Yale clinic marked ten consecutive years of having at least one case before the Court. The fifty-four cases were collected by examining the briefs filed in all cases before the Supreme Court during the 2014–15 term and noting the cases in which an appellate or Supreme Court clinic filed a party or amicus brief.

<sup>98</sup> See, e.g., *Penn Law Supreme Court Clinic Wins Important Constitutional Case*, U. Pa. L. Sch. (June 10, 2013), <https://www.law.upenn.edu/live/news/2667-penn-law-supreme-court-clinic-wins-important#.VqKGZsdhPII> [<https://perma.cc/423X-CDQY>]; *Supreme Court Clinic Successful in Recently Decided Cases*, Yale L. Sch. (June 22, 2010), <https://www.la>

one count, actually has a higher rate of cert grants than any other practicing lawyer before the Court (with a cert grant rate of 29%).<sup>99</sup>

Cumulatively, the dramatic rise of private firms with Supreme Court practices, state SG offices, in-house Supreme Court specialists at non-profits, and law school Supreme Court clinics has led to a set of repeat players on the steps of the Court. This change is quite visible. As Chief Justice Roberts explains in his history on the subject, “[i]n 1980, the odds that the advocate making his way to the lectern for an oral argument before the Supreme Court had ever been there before were about one in three.”<sup>100</sup> By 2002, “those odds were over 50 percent.”<sup>101</sup> More and more, the Chief Justice tells us, “there are familiar faces appearing at the lectern.”<sup>102</sup>

## 2. *The “Amicus Wrangler”*

These familiar faces are doing more than just appearing before the Court at oral argument. Behind the scenes, their handiwork can be felt even more keenly—and particularly so in their role as “friends of the Court.” To borrow Kathleen Sullivan’s terrific phrase, every Supreme Court team needs an “amicus wrangler”—someone who has the job of recruiting the “right” amici.<sup>103</sup>

Paul Smith, a leading Supreme Court advocate who has argued nearly twenty cases before the Court, including *Lawrence v. Texas*,<sup>104</sup> explains the process this way:

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w.yale.edu/yls-today/news/supreme-court-clinic-successful-recently-decided-cases [https://perma.cc/5RDL-A78X]; UVA Law Supreme Court Litigation Clinic Wins Facebook Threat Case, U. Va. L. Sch. (June 1, 2015), [http://www.law.virginia.edu/html/news/2015\\_sum/elonis-update.htm?v=fLEDXl-jcak](http://www.law.virginia.edu/html/news/2015_sum/elonis-update.htm?v=fLEDXl-jcak) [https://perma.cc/GDR9-YFS5]; Jeffrey L. Fisher & Sharan Driscoll, Stanford Law School’s Supreme Court Litigation Clinic Wins Landmark Fourth Amendment Case on Cellphone Searches, Stan. L. Sch. (June 25, 2014), <https://law.stanford.edu/2014/06/25/stanford-law-schools-supreme-court-litigation-clinic-wins-landmark-fourth-amendment-case-on-cellphone-searches/>.

<sup>99</sup> Adam Feldman & Alexander Kappner, Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001–2015, at 26 (S. Cal. Law Sch. Legal Stud. Research Paper Series, Working Paper No. 16-5, 2016) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2715631](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715631) [https://perma.cc/5PP7-WZE3].

<sup>100</sup> Roberts, *supra* note 80, at 78.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 79.

<sup>103</sup> Ward, *supra* note 9.

<sup>104</sup> 539 U.S. 558 (2003); see *Our People: Paul M. Smith, Jenner & Block*, <https://jenner.com/people/PaulSmith> [https://perma.cc/S9JC-YWRB]

At the Supreme Court level, sophisticated parties and counsel often convene meetings of potential amici in an attempt to form coalitions and to influence the nature of the presentations that will be made. Potential amici, in turn, often contact counsel for the party they support, recognizing that such party coordination can be beneficial.<sup>105</sup>

Each sophisticated Supreme Court team thus has an amicus mastermind, or as one commentator calls it an “*Amicus Queen*.”<sup>106</sup>

This role is not entirely new. There is evidence amicus briefs were coordinated in *Roe v. Wade*, for example.<sup>107</sup> And indeed Justice Ginsburg was known for her skill at coordinating amici when she was litigating before the Court in the 1970s and 1980s.<sup>108</sup>

But while coordinating briefs may have been a smart move in 1973, it is an absolutely essential move now. Carter Phillips, who has argued more cases before the Court than any other private advocate currently practicing,<sup>109</sup> explains the changes he has seen in the amicus practice: “It’s been interesting to watch the changes over the years,” says Phillips. “The situation now is there is virtually no case that doesn’t have amicus briefs, and sometimes the number of briefs is breathtaking.”<sup>110</sup> With so many briefs out there demanding the Court’s attention, it is necessary to dedicate firm resources to “herd the cats.”<sup>111</sup>

Apart from the expansion of the Court’s available “friends,” there is another change motivating the “amicus wrangler” these days. The Supreme Court has embarked on “a widespread empirical turn,”<sup>112</sup> and its

<sup>105</sup> Paul M. Smith, *The Sometimes Troubled Relationship Between Courts and Their “Friends”*, No. 4 Litig., Summer 1998, 24, 25.

<sup>106</sup> Dale Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas: How a Bedroom Arrest Decriminalized Gay Americans 198* (2012) (referring to *Lawrence* litigator Susan Sommer).

<sup>107</sup> 410 U.S. 113 (1973); David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* 491–95 (1994); Weddington, *supra* note 55, at 605.

<sup>108</sup> See Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women’s Rights Project*, 11 *Tex. J. Women & L.* 157, 224–25 (2002) (“A critical component of Ginsburg’s litigation strategy was the coordination of amicus briefs for the cases on which she was the primary attorney.”).

<sup>109</sup> Carter Phillips, Sidley Austin, <http://www.sidley.com/people/carter-phillips> [https://perma.cc/NJ2K-SCEM]

<sup>110</sup> See Ward, *supra* note 9; Interview with Carter Phillips, Partner, Sidley Austin, in Williamsburg, Va. (Feb. 28, 2012).

<sup>111</sup> Interview with Carter Phillips, Partner, Sidley Austin, in Williamsburg, Va. (Feb. 28, 2012).

<sup>112</sup> Timothy Zick, *Constitutional Empiricism: Quasi-neutral Principles and Constitutional Truths*, 82 *N.C. L. Rev.* 115, 118 (2003).

decisions are full of factual claims about the way the world works, so-called “legislative facts.”<sup>113</sup> Several of the advocates we spoke to were of the belief that one could not win a Supreme Court case without assembling a portfolio of “Brandeis briefs” from historians, social scientists, physicians, and other individuals who could impart their expertise to the Court as amici.<sup>114</sup> Competing expert briefs are mainstream now, and conventional wisdom is that you cannot win a big case without them.<sup>115</sup> In fact, Professor A.E. Dick Howard calls the modern collection of expert amici an “arms race” between Supreme Court parties.<sup>116</sup>

In the new world of amicus domination and factual free-for-all, recruitment and message coordination become imperative. And that is exactly what these sophisticated actors are doing. Newspaper accounts have documented coordinated amicus strategies employed in the recent federal same-sex marriage case,<sup>117</sup> the D.C. Second Amendment case,<sup>118</sup> the case about health care subsidies in the Affordable Care Act,<sup>119</sup> and

<sup>113</sup> One of us has previously written about this change in the Court’s emphasis on facts. See Larsen, *Confronting Supreme Court Fact Finding*, supra note 25, at 1256.

<sup>114</sup> The Brandeis brief is a colloquial term for a brief to the Court that focuses only on submitting factual information. Larsen, *The Trouble with Amicus Facts*, supra note 25, at 1770.

<sup>115</sup> See Interviews with Lisa Blatt, Partner, Arnold & Porter, in Wash., D.C. (June 16, 2015); Walter Dellinger, Partner, O’Melveny & Myers, in Wash., D.C. (June 16, 2015); Jeffrey L. Fisher, Professor and Co-Director, Stanford Law Sch. Supreme Court Litig. Clinic, in Williamsburg, Va. (Sept. 25, 2015).

<sup>116</sup> A.E. Dick Howard, *The Changing Face of the Supreme Court*, 101 *Va. L. Rev.* 231, 274–75 (2015).

<sup>117</sup> Oralandar Brand-Williams, *Same-Sex Marriage Case in Court: Attorney Mary Bonauto*, *Detroit News* (Apr. 24, 2015, 6:38 PM), <http://www.detroitnews.com/story/news/politics/michigan/2015/04/23/sex-marriage-case-court-attorney-mary-bonauto/26277549/> [<https://perma.cc/CG8A-6NBL>] (highlighting the role of Mary Bonauto, the legal director of Gay & Lesbian Advocates & Defenders, stating, “Bonauto also led GLAD’s federal court challenges to the Defense of Marriage Act, which led to the first district and appellate court victories against DOMA. She also coordinated amicus briefs for the Windsor case at the Supreme Court.”).

<sup>118</sup> Robert Barnes, *D.C. Gun Case Draws Crowd of High Court ‘Friends’*, *Wash. Post* (Mar. 9, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/08/AR2008030802243.html> [<https://perma.cc/DVP7-7BPD>] (“Alan Gura, who will represent District resident Dick Anthony Heller in arguing the challenge to D.C.’s law on March 18, coordinated the 47 amici who have filed on his client’s behalf since the court took the case.”).

<sup>119</sup> Robert Pear, *Flood of Briefs on the Health Care Law’s Subsidies Hits the Supreme Court*, *N.Y. Times* (Feb. 21, 2015), <http://www.nytimes.com/2015/02/22/us/flood-of-briefs-on-the-health-care-laws-subsidies-hits-the-supreme-court.html> (“Critics of the law coordinated their briefs, as did supporters of the Obama administration, to a lesser degree.”).

the case about religious exemptions from the Affordable Care Act for Hobby Lobby,<sup>120</sup> to name a few.

It is not just the flashiest cases that require an “amicus wrangler,” however. Kathleen Sullivan explains that amicus coordination has particularly increased in business-related cases.<sup>121</sup> In an interview with the ABA Journal, Sullivan discussed a 2005 case that challenged bans of direct wine shipment to out-of-state consumers.<sup>122</sup> Sullivan was counsel of record for the challengers in that case, along with Kenneth W. Starr, then-Dean of Pepperdine Law School and of counsel at Kirkland & Ellis in Los Angeles. Sullivan and Starr recruited lawyers to file amicus briefs for the appeal: “[o]ne laid out the history, and another laid out alternative regulations for wine shipment, showing how to protect minors and collect taxes.”<sup>123</sup>

One job of the “amicus wrangler,” therefore, is to function much like a trial lawyer by selecting a roster of expert witnesses for trial. This is no small task. Indeed, as demonstrated in a recent fight over attorneys’ fees in a Supreme Court case, the cost of “soliciting and coordinating amici support” was billed at over \$531,000.<sup>124</sup> Of course supporting amici are optional, but a careful attorney dare not forego building his “team” of specialists. Although perhaps an extreme example, on at least one occasion Justice Alito faulted a respondent for not disputing the factual claims from experts in amicus briefs filed to support the other side.<sup>125</sup>

In addition to assembling experts, Supreme Court specialists also know that sometimes the names of those filing the briefs matter to the Justices (and their law clerks) just as much as the names of the organizations (or experts) sponsoring them.<sup>126</sup> Thus one way to highlight the

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<sup>120</sup> Brigitte Amiri, Senior Staff Att’y, ACLU Representative Freedom Project, Remarks at the Center for Gender & Sexuality Law’s Symposium on Marriage Equality and Reproductive Rights (Feb. 28, 2014), in *The Hobby Lobby Amicus Effort*, 29 Colum. J. Gender & L. 104, 107–08 (2015) (“[W]e convened a call and we tried to decide what messages, what points we wanted the Court to hear, and which messengers should make those points. . . . We ended up with twenty-three amicus briefs, most of which, the coordinators knew about.”).

<sup>121</sup> Ward, *supra* note 9.

<sup>122</sup> *Id.*; *Granholm v. Heald*, 544 U.S. 460, 465 (2005).

<sup>123</sup> Ward, *supra* note 9.

<sup>124</sup> See Brief of Respondent at 10, *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 890 (2016) (No. 15-375), 2016 WL 1165966, at \*10.

<sup>125</sup> See *Ohio v. Clark*, 135 S. Ct. 2173, 2182 (2015) (“Clark does not dispute those findings.”).

<sup>126</sup> See Lynch, *supra* note 16, at 44 (“During their terms, clerks developed expectations of quality from certain repeat, regular Supreme Court advocates. One clerk explained that look-

most important briefs for the Justices is to recruit the most important people to author them.

Indeed, this does not necessarily happen in the order one might suppose. Jeff Fisher, Supreme Court specialist and Stanford Law professor, explains that it is easier to convince an interest group to file an amicus brief if one comes to that conversation with a willing author ready.<sup>127</sup>

Take for example the amicus brief filed on behalf of the Seattle Floating Homes Association and the Floating Homes Association of Sausalito in the recent statutory interpretation case about whether floating homes count as “vessels” in admiralty law.<sup>128</sup> Fane Lozman, petitioner in the Supreme Court case, owned a floating home in Florida and was challenging the designation of his home as a “vessel,” which would subject him to various rules coming from admiralty law.<sup>129</sup>

Jeff Fisher represented Lozman as petitioner, and he knew he would need to convince the Court that floating homes were generally more like homes than like boats—a fact not easily demonstrated on the facts of *Lozman v. City of Riviera Beach*,<sup>130</sup> but was easier to establish in communities like Seattle and Sausalito. Fisher first reached out to floating home associations in both communities; they were potentially interested but did not have the resources to get involved. He then reached out to a friend at the law firm of Munger, Tolles & Olson who found an associate (and former Supreme Court clerk) interested and eager to volunteer because he happened to be from Sausalito. After securing an author for the brief, Fisher went back and again pitched the idea to the community groups in Seattle and Sausalito. It was a much easier pitch to those organizations, Fisher explains, with a Supreme Court specialist already on board.<sup>131</sup>

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ing at the attorney and law firm names on an amicus brief ‘decreased the informational cost of determining what would help.’”).

<sup>127</sup> Interview with Jeffrey L. Fisher, Professor and Co-Dir., Stanford Law Sch. Supreme Court Litig. Clinic, in Williamsburg, Va. (Sept. 25, 2015).

<sup>128</sup> Brief for the Seattle Floating Homes Ass’n and the Floating Homes Ass’n of Sausalito as *Amici Curiae* in Support of Petitioner at 1, *Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013) (No. 11-626), 2012 WL 1773029, at \*1.

<sup>129</sup> *Lozman*, 133 S. Ct. at 739–40.

<sup>130</sup> *Id.* at 735.

<sup>131</sup> Interview with Jeffrey L. Fisher, Professor and Co-Dir., Stanford Law Sch. Supreme Court Litig. Clinic, in Williamsburg, Va. (Sept. 25, 2015).

And Fisher's wrangling efforts paid off. This amicus brief was discussed at oral argument,<sup>132</sup> addressed by the respondent in its brief,<sup>133</sup> and even cited in Justice Breyer's majority opinion for the point that many states treat floating homes like ordinary land-based homes rather than like vessels.<sup>134</sup>

### 3. The "Amicus Whisperer"<sup>135</sup>

The coordination of amici does not stop with recruitment, however. If the "amicus wrangler" finds willing amici, it is the job of the "amicus whisperer" to keep those amici in line. Mindful of the important strategic benefits amici can provide and fearful of duplicating efforts, or—worse—missing a chance to make a valuable point to the Justices, many Supreme Court advocates do not just recruit amici participation, but effectively handle the ones that they've got.

In the past, when a case like *Brown v. Board* would attract only six amicus briefs, there was little need for an "amicus whisperer."<sup>136</sup> Now, by contrast, without such effort there is a good chance the briefs the parties deem most valuable will get lost in a sea of green (the color of brief cover for amici). As one advocate candidly described the plan, "We were trying to narrow the number of amicus briefs and trying to encourage people to work together to file a single brief rather than having multiple briefs because frankly, the Court's just not going to read a ton of briefs."<sup>137</sup>

A well-documented example of using an "amicus whisperer" (and a wrangler to boot) is Neal Katyal in the *Hamdan v. Rumsfeld* case from 2006 about the propriety of using military tribunals to try enemy com-

<sup>132</sup> Transcript of Oral Argument at 16, *Lozman*, 133 S. Ct. 735 (No. 11-626), 2012 WL 4486096, at \*16.

<sup>133</sup> Brief for Respondent at 54–55, *Lozman*, 133 S. Ct. 735 (No. 11-626), 2012 WL 2883262, at \*54.

<sup>134</sup> *Lozman*, 133 S. Ct. at 744.

<sup>135</sup> Pam Karlan coined this phrase in connection with Mary Bonauto's coordination of amicus filings in the DOMA case, *United States v Windsor*, 133 S. Ct. 2675 (2013). E-mail correspondence with Pamela S. Karlan, Professor, Stanford Law Sch. (Feb. 9, 2016); see also Justin Peters, Mary Bonauto, Gay Marriage Hero, Slate (June 26, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/06/mary\\_bonauto\\_doma\\_repeal\\_why\\_every\\_gay\\_marriage\\_supporter\\_should\\_be\\_thanking.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/mary_bonauto_doma_repeal_why_every_gay_marriage_supporter_should_be_thanking.html) [<https://perma.cc/VRW7-75KJ>] (describing Mary Bonauto as the "mastermind behind the legal strategy" in *Windsor*).

<sup>136</sup> *Supra* note 56 and accompanying text.

<sup>137</sup> Amiri, *supra* note 120, at 108.

batants held in Guantanamo Bay.<sup>138</sup> Perhaps unlike the houseboat case discussed above, the *Hamdan* case was extremely high profile and generated a lot of interest in groups wanting to file amicus briefs.

According to Katyal, managing these amici took a lot of work.<sup>139</sup> The goal, he says, was “to ensure that the Court was hearing only from a far-flung and diverse set of amici, represented by the best advocates, with the most affected clients, with the most expertise on the issues, and with no repetition.”<sup>140</sup>

This means, first, that Katyal turned down several groups who wanted to file amicus briefs. It is the widespread custom for parties at the Supreme Court to file blanket consent to amicus briefs. Katyal chose not to do that in this litigation—in part because “[t]here were over 150 proposed briefs, and [Katyal] spent hundreds of hours convincing groups not to submit them.”<sup>141</sup> He ultimately settled on a cast of just thirty-seven amicus briefs.<sup>142</sup> His reasons were straightforward: He “didn’t want to overwhelm the justices with amicus briefs and, in so doing, blunt the impact of the strongest ones.”<sup>143</sup>

Second, Katyal took one additional step at orchestrating the amici. “[W]ith the permission of the Clerk of the Court,” he pioneered “the use of a short label on the cover of each amicus brief that announced the unique substantive issue it addressed.”<sup>144</sup> This not only organized the amicus effort, but also subtly signaled to the Justices which briefs were particularly important to him.

Finally, Katyal was very involved with the substance of the amicus briefs; he “insisted on micromanaging the process” and “control[ling] the message.”<sup>145</sup> For this he arranged an outside manager—or “whisperer” if you will,—to oversee the entire amicus process: David Remes of

<sup>138</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

<sup>139</sup> Neal Kumar Katyal, Comment, *Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice, 120 Harv. L. Rev. 65, 118 (2006) (“The *Hamdan* case required intense coordination and management of team members (both students and lawyers), along with affected nongovernmental organizations, executive branch officials, members of Congress and their staffs, diplomats and foreign leaders, retired generals and admirals, and other lawyers scattered across the globe.”).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*; see also Jonathan Mahler, The Challenge: *Hamdan v. Rumsfeld* and the Fight over Presidential Power 231–32 (2008) (recounting the litigation strategy of *Hamdan*).

<sup>142</sup> Mahler, *supra* note 141, at 231.

<sup>143</sup> *Id.* at 231–32.

<sup>144</sup> Katyal, *supra* note 139, at 118.

<sup>145</sup> Mahler, *supra* note 142, at 231.

Covington and Burling, whom Katyal describes as “a trusted legal confidant.”<sup>146</sup>

Anointing an outside “amicus whisperer” is a growing trend because it offers several advantages. Most obviously, keeping track of all amici, particularly in a marquee case, can take a lot of time and an extra hand or two is often essential. But outsourcing the “amicus whisperer” has other benefits as well. Recall that Supreme Court Rule 37.6 requires parties to disclose when they have funded or authored any amicus brief.<sup>147</sup> Supreme Court advocates hold different views about when heavy editing of amicus briefs crosses the line and becomes authoring (one person told us he is okay with comment bubbles but not redlining sentences). When the person coordinating the amici message is not a lawyer for a party, however, he or she has a lot more editing leeway without running afoul of the rules.

### *B. The Incentives: A Political Economy of the Amicus Process*

The perpetuation of the amicus machine is quite mysterious if money is the principal motivator; amicus briefs are certainly not big money makers for those who file them.<sup>148</sup> Why, then, have these briefs become such a staple in a Supreme Court practice? Why do high-demand litigators spend time wrangling and whispering to amici? And what makes the Justices seem to prefer amicus briefs authored and recruited by members of the machine?

In this Section, we will explain the various incentives that propel the amicus machine—the interests driving the law firms and Supreme Court specialists who head these appellate groups, what the Office of the Solicitor General has at stake, and finally, the interests motivating the Justices and the law clerks who receive these briefs.

#### *1. The Private Bar*

The principal drive of the amicus machine comes from the lawyers who practice before the Court, chiefly the private sector Supreme Court

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<sup>146</sup> *Id.* at 200.

<sup>147</sup> Sup. Ct. R. 37.6.

<sup>148</sup> See Ward, *supra* note 9 (quoting Thomas Goldstein, who heads the Supreme Court practice at Akin Gump in Washington, D.C., as saying, “It’s more about having the practice than the revenue the practice generates. . . . It shows the firm’s ability to operate at a very high level”); *id.* (quoting Kathleen Sullivan, who observed that Supreme Court practice is “not a high-profit[s]” business (internal quotation marks omitted)).

Bar. To start, as Kathleen Sullivan observed: “With the shrinking docket, there are too many [private sector] Supreme Court lawyers chasing too few cases on the merits. . . . So, many of us who have strong interests in the cases find ways to contribute by filing amicus briefs.”<sup>149</sup>

Indeed, as Table 1 reveals, a survey of merits and amicus filings by thirty-one leading law firms reveals that amicus briefs filed between July 1, 2013 and October 1, 2015 (304 total) substantially outnumbered merits briefs (113 counsel of record). Indeed, while several firms had no cases before the Court as counsel of record, all firms filed amicus briefs. Correspondingly, twenty-eight of the thirty-one firms filed more amicus briefs than counsel of record briefs.

Why chase these briefs at all? Amicus writers typically receive little or no compensation<sup>150</sup> and, with the Supreme Court hearing just seventy to eighty cases a year,<sup>151</sup> there is little monetary incentive for law firms to establish practice groups filled with high-priced lawyers whose claim to fame is often that they clerked on the Supreme Court and/or argued cases before the Supreme Court while working at the Office of Solicitor General.<sup>152</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> Ward, *supra* note 9; Biskupic et al., *supra* note 7, pt. 2; Interviews with Lisa Blatt, Partner, Arnold & Porter, in Wash., D.C. (June 16, 2015); Paul Smith, Partner, Jenner & Block, in Wash., D.C. (June 16, 2015).

<sup>151</sup> Lazarus, *Advocacy Matters*, *supra* note 7, at 1557.

<sup>152</sup> See *infra* Section I.B.

**Table 1: Comparison of Merits and Amicus Filings<sup>153</sup>**

<b>Firm</b>	<b>Counsel of Record Briefs</b>	<b>Other Party Briefs</b>	<b>Amicus Briefs</b>
Akin Gump	0	0	8
Baker & McKenzie	0	0	3
Baker Botts	3	2	5
Bancroft	6	4	9
Davis Wright	1	0	9
Dechert	0	3	13
Donahue & Goldberg	3	2	4
Gibson Dunn	11	1	24
Goldstein & Russell	9	7	7
Greenberg Traurig	2	2	4
Hunton & Williams	4	2	3
Jones Day	8	3	17
Kellogg Huber	4	4	11
King & Spalding	1	1	7
Kirkland & Ellis	4	3	8
Latham & Watkins	2	1	8
Mayer Brown	6	2	22
Morgan Lewis	2	1	4
Morrison & Foerster	1	0	9
O'Melveny & Myers	3	0	10
Orrick Herrington	1	1	13
Paul Hastings	0	1	3
Robbins Russell	1	0	6
Ropes & Gray	4	0	8
Sidley Austin	12	12	23
Skadden	0	0	11

<sup>153</sup> Joan Biskupic and her colleagues at Reuters identified these thirty-one law firms as those which filed at least eighteen petitions and had at least ten percent granted between 2004 and 2012. See Biskupic et al., *supra* note 7 (“The 31 top firms met Reuters’ criteria of filing at least 18 petitions – an average of two a year – in the period, making them extreme outliers among the 8,000 firms that filed appeals. At least 10 percent of their petitions – and no fewer than three – were granted certiorari, a success rate that is double the overall average.”). In preparing this table, we conducted searches in the Westlaw Supreme Court Briefs database for each of the thirty-one firms. On some briefs, there is more than one firm of record because of multiple parties on the same brief.

Vinson & Elkins	4	2	6
Weil	1	0	4
Wiley Rein	1	1	11
Williams & Connolly	4	1	2
WilmerHale	15	6	32

One explanation is that Supreme Court lawyers and the law firms that employ them see the Supreme Court practice as a bit of a “loss leader,”<sup>154</sup> a practice that sustains itself largely for nonmonetary reasons, and the “amicus machine” fits well with this business model. Former Solicitors General Seth Waxman, Ken Starr, Ted Olson, and Paul Clement, for example, have all taken on high-visibility cases either pro bono or at a deeply discounted fee.<sup>155</sup> Likewise, top Supreme Court law firms routinely sign onto pro bono amicus campaigns. For example, in a March 2016 cert petition involving birthright citizenship in U.S. territories, Gibson Dunn, WilmerHale, Bancroft, Mayer Brown, King & Spalding, Jenner & Block, Simpson Thacher, and Boies, Schiller & Flexner partnered on a coordinated amicus campaign.<sup>156</sup>

Putting the money aside, law firms gain in important ways through the hiring of Supreme Court specialists and the filing of amicus briefs. These specialists are obviously exceptional lawyers who practice in other areas—appearing before federal and state appeals courts and even arguing dispositive lower court motions.<sup>157</sup> The principal monetary drive of these practices is tied to their appellate work outside of the Supreme

<sup>154</sup> Greg Garre, Chairman, Supreme Court and Appellate Practice, Latham & Watkins, Address at William & Mary Law School: Supreme Court Preview 2015–16, Supreme Court Bar (Sept. 26, 2015); Lazarus, *Advocacy Matters*, supra note 7, at 1557–58.

<sup>155</sup> *Roper v. Simmons*, 543 U.S. 551, 554 (2005) (death penalty, Waxman); *Morse v. Frederick*, 551 U.S. 393, 395 (2007) (public school student speech, Starr); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2658 (2013) (same-sex marriage, Olson); *Bond v. United States*, 564 U.S. 211, 213 (2011) (treaty obligations, Clement); see also Biskupic et al., supra note 7; Lazarus, *Advocacy Matters*, supra note 7, at 1518; Telephone Interview with Paul Clement, Partner, Bancroft (Feb. 15, 2016).

<sup>156</sup> See Supreme Court Petition Receives Boost from Seven Amicus Briefs, We the People Project (Mar. 3, 2016), [http://www.equalrightsnow.org/supreme\\_court\\_petition\\_receives\\_boost\\_from\\_seven\\_amicus\\_briefs](http://www.equalrightsnow.org/supreme_court_petition_receives_boost_from_seven_amicus_briefs). [https://perma.cc/5D2D-EF9J] Thanks to Adam Liptak for telling us about this coordinated amicus effort.

<sup>157</sup> Interview with Kannon Shanmugam, Partner, Williams & Connolly, in Williamsburg, Va. (Sept. 26, 2015); Telephone Interview with Anthony Franze, Counsel, Arnold & Porter (Nov. 2, 2015).

Court,<sup>158</sup> and only one law firm (Goldstein & Russell) dedicates itself solely to Supreme Court practice.<sup>159</sup> In other words, glittering Supreme Court practitioners bring in other kinds of appellate business, and it is that business that sustains the Supreme Court Bar.

Supreme Court practices help law firms in other ways as well. The briefs they file before the Supreme Court are prominently displayed on their law firm websites<sup>160</sup> and, more generally, law firms publicize the hiring of these lawyers,<sup>161</sup> their public appearances,<sup>162</sup> their interviews with reporters,<sup>163</sup> and all that they do to add visibility to the firm.<sup>164</sup>

<sup>158</sup> Interview with Neal Katyal, Partner, Hogan Lovells, in Wash., D.C. (Nov. 2, 2015). See also Lazarus, *Advocacy Matters*, supra note 7, at 1557 (“The prestige associated with an active Supreme Court practice also promotes an attorney’s general appellate practice before the lower courts, where there is no similarly limited number of cases to be briefed and argued.”).

<sup>159</sup> Interview with Tom Goldstein, Partner, Goldstein & Russell, in Williamsburg, Va. (Feb. 11, 2015). It is noteworthy that this firm also sponsors SCOTUSblog. See Disclaimer, SCOTUSblog, <http://www.scotusblog.com/disclaimer/> [<https://perma.cc/3444-ABVH>].

<sup>160</sup> Several law firms highlight the activities of lawyers and practice groups before the Supreme Court. Bancroft, for example, notes arguments made, briefs filed, attorneys hired, and—where available—includes links to media coverage of firm activities before the Supreme Court. Press, Bancroft PLLC, <http://www.bancroftpllc.com/blog/category/press> [<https://perma.cc/Z6YN-CD64>]. The website for Gibson Dunn’s Appellate and Constitutional Law practice group prominently features accolades by media outlets such as *Fortune*, *National Law Journal*, and *Law 360*. Appellate and Constitutional Law, Gibson Dunn, <http://www.gibsondunn.com/practices/pages/ACL.aspx> [<https://perma.cc/VR6S-L7M3>]. Latham & Watkins issued and prominently displayed a press release when the *National Law Journal* named Latham & Watkins to its “‘Appellate Hot List’ for ‘appellate advocacy at its strongest—winning the big cases and changing the law.’” The *National Law Journal* Selects Firm for 2015 “Appellate Hot List,” Latham & Watkins (Nov. 16, 2015), <https://www.lw.com/news/firm-named-appellate-hot-list-2015> [<https://perma.cc/EYU2-EATU>].

<sup>161</sup> Former Acting Solicitor General Neal Katyal Joins Hogan Lovells as Partner and Co-Head of Appellate Practice, Hogan Lovells (Sept. 6, 2011), <http://www.hoganlovells.com/for-mer-acting-solicitor-general-neal-katyal-joins-hogan-lovells-as-partner-and-co-head-of-appellate-practice-09-06-2011/> [<https://perma.cc/KRN6-62YJ>]; Paul Clement, Former Solicitor General, Joins Bancroft PLLC, Bancroft PLLC (Apr. 25, 2011), <http://online.wsj.com/public/resources/documents/042511clementbancroft.pdf>. [<https://perma.cc/SXR3-TFGU>].

<sup>162</sup> See infra note 164 and accompanying text (discussing efforts of Akin Gump to publicize activities of its Supreme Court lawyers).

<sup>163</sup> Media Mentions & Press Releases, Akin Gump, [https://www.akingump.com/en/news-insights/index.html?action=news&dir=desc&name=&practices=241&sort=date&subsite\\_id=1&newstype=6#search\\_results](https://www.akingump.com/en/news-insights/index.html?action=news&dir=desc&name=&practices=241&sort=date&subsite_id=1&newstype=6#search_results) [<https://perma.cc/X236-N79A>].

<sup>164</sup> Akin Gump, for example, publicizes its Supreme Court and Appellate practice group by including an “Articles” section on its website that includes quotes from various media outlets. See Supreme Court and Appellate, Akin Gump, <https://www.akingump.com/en/experience/practices/litigation/supreme-court-appellate.html> [<https://perma.cc/627P-Y439>]; see, e.g., Pratik A. Shah, Akin Gump, <https://www.akingump.com/en/lawyers-advisors/pratik-a->

On occasion, moreover, the filing of an amicus brief on behalf of industry interests is helpful in establishing relationships with general counsels who might hire the lawyer and law firm on non-Supreme Court matters.<sup>165</sup> For example, Walmart is now a client of the law firm Gibson Dunn because of the firm's representation of the company in a significant employment discrimination lawsuit before the Supreme Court.<sup>166</sup> Indeed, "[s]ecuring profitable, long-term relationships with America's largest corporations is one reason major law firms began creating Supreme Court practices in the late 1980s and early 1990s."<sup>167</sup>

Supreme Court specialists also recruit top prospects, most notably highly sought-after Supreme Court clerks. The hiring of these clerks adds to the firms' stature and, consequently, generates business for law firms.<sup>168</sup> Law firms publicize these hires<sup>169</sup> and do what it takes to recruit these prospects, including offering \$300,000 signing bonuses and promises to work on Supreme Court matters with Supreme Court specialists—which often means the writing of amicus briefs.<sup>170</sup>

Given the paucity of cases before the Court, amicus filings are often the only mechanism by which Supreme Court specialists can get their name and their firm's name before the Court.<sup>171</sup> This matters because their status is tied to their participation in Supreme Court litigation. Amicus participation is thus critically important for one to be seen as a

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shah.html [https://perma.cc/V53Q-EGMW]. Moreover, WilmerHale's media-relations department has written to conference organizers about the willingness of their Supreme Court practitioners to participate as panelists. See Email from Neal Devins, Professor, William & Mary Law Sch., to Virginia Law Review (on file with Virginia Law Review Association).

<sup>165</sup> Interview with Paul Smith, Partner, Jenner & Block, in Wash., D.C. (June 16, 2015).

<sup>166</sup> *Id.*

<sup>167</sup> See Biskupic et al., *supra* note 7, pt. 2.

<sup>168</sup> "In a 2012 pitch letter to a potential client," for example, Gibson Dunn noted the number of clerks in the firm (twelve at that time, twenty-three today) and said that it knew "how to customize and tailor arguments to particular justices." *Id.*

<sup>169</sup> See, e.g., Jones Day Adds 10 U.S. Supreme Court Clerks in Four Offices; 29 Have Joined in Four Years, Jones Day (Nov. 2015), <http://www.jonesday.com/jones-day-adds-10-us-supreme-court-clerks-in-four-offices-29-have-joined-in-four-years-11-02-2015> [https://perma.cc/H655-H7Z5].

<sup>170</sup> Supreme Court rules forbid clerks from working on Supreme Court cases until two years after the clerkship has ended. Sup. Ct. R. 7. Nonetheless, top firms seek to build their Supreme Court practices and advance their reputations by hiring clerks immediately after they leave the Court. See Biskupic et al., *supra* note 7; Lazarus, *Docket Capture*, *supra* note 6, at 94 n.21 (noting the law firms that hired 2007–08 term clerks).

<sup>171</sup> See Ward, *supra* note 9.

“player” in the Supreme Court world—sometimes it is the only road available.

## 2. *The Office of the Solicitor General*

The Office of the Solicitor General (“OSG”) also fuels the amicus machine. Even though the Solicitor General hardly ever backs a coordinated amicus effort to support its positions in the Supreme Court,<sup>172</sup> attorneys in the office are very much linked to the Supreme Court Bar.

In the 2014–15 term, for example, the Solicitor General appeared in fifty-four of the sixty-six argued cases—twenty-one as a party and thirty-three as an amicus.<sup>173</sup> Members of the Supreme Court Bar also interface with the OSG when the Court calls for the views of the Solicitor General as to whether cert should be granted.<sup>174</sup> When this happens, counsel for petitioner and respondent typically schedule meetings with the OSG to pitch their position so that the government will support their position before the Court.<sup>175</sup> This somewhat formal process is yet another opportunity for Supreme Court practitioners to interface with, and strengthen their professional and personal connections to, OSG lawyers.

More significantly, many members of the Bar are alumni of the Solicitor General’s office, and its leading members are former Solicitors General themselves.<sup>176</sup> Indeed, with the notable exceptions of the Stan-

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<sup>172</sup> Interview with Andy Pincus, Partner, Mayer Brown, in Wash., D.C. (June 16, 2015). See also Greenhouse, *supra* note 13 (observing that “[o]rdinarily, as a party in a major Supreme Court case, the federal government doesn’t bother to do what private parties do routinely: mobilize organizations and well-credentialed individuals to support the position from different perspectives in briefs filed as ‘friends of the court’”).

<sup>173</sup> Allison Orr Larsen & Neal Devins, Database on Solicitor General’s Participation in Argued Cases (on file with the Virginia Law Review Association).

<sup>174</sup> For a general treatment of this practice, see Stefanie A. Lepore, The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General, 35 J. Sup. Ct. Hist. 35 (2010).

<sup>175</sup> See Patricia A. Millett, “We’re Your Government and We’re Here to Help”: Obtaining Amicus Support from the Federal Government in Supreme Court Cases, 10 J. App. Prac. & Process 209, 217 (2009); Lawrence S. Ebner, The United States as *Amicus Curiae*: Making Uncle Sam Your New Best Friend, DRIToday.com, <http://dritoday.org/feature.aspx?id=204>.

<sup>176</sup> See Biskupic et al., *supra* note 7. The Echo Chamber series identifies former Solicitors General Ted Olson, Gregory Garre, Paul Clement, Seth Waxman, and Neal Katyal as five of the eight advocates who appear most before the Court. See *id.* pt. 3; see also Janet Roberts et al., Special Report: In Ever-Clubbiest Bar, Eight Men Emerge as Supreme Court Confidants,

ford Law Clinic and Goldstein & Russell,<sup>177</sup> all leading Supreme Court groups are headed by alumni of the Solicitor General's office. Five of the top eight are former Solicitors General and twenty-five of the top sixty-six Supreme Court advocates worked in the U.S. Solicitor General's office.<sup>178</sup> In other words, the amicus machine values service in the Solicitor General's office and helps produce job opportunities for Solicitor General veterans.

### 3. *The Justices and Their Clerks*

Just as the Supreme Court Bar needs the Justices to hear their cases to stay in business and have power, the Justices want the Bar to be powerful because it supplies the Court with the types of legal arguments the Justices find most useful.<sup>179</sup> It is a professional relationship that is self-reinforcing. Indeed, nearly every Justice on today's Court is on record supporting the Supreme Court Bar.<sup>180</sup> For Justice Stephen Breyer, "The Supreme Court is not the CIA . . . I want people to know how the [C]ourt works."<sup>181</sup> For Justice Ruth Bader Ginsburg, "If you know you have a solid beginning, two people making the best argument on both sides, that makes it less anxious for you."<sup>182</sup> Justices Clarence Thomas and Antonin Scalia each reported that the Justices would (in Thomas's words) "vote against a cert petition if they think the lawyering is bad,"<sup>183</sup> where (in Scalia's words) "the petition demonstrates that the lawyer is

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Reuters (Dec. 8, 2014, 6:19 AM), <http://www.reuters.com/article/us-scotus-advocates-specialreport-idUSKBN0JM11E20141208> [<https://perma.cc/P9K6-FHXL>].

<sup>177</sup> See Stephanie Mencimer, *The Court Crasher*, *The Atlantic* (Nov. 2012), <http://www.theatlantic.com/magazine/archive/2012/11/the-court-crasher/309106> [<https://perma.cc/E43V-9FFN>]; Curriculum Vitae: Jeffrey L. Fisher, Stanford L. Sch., <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/06/2016-Aug-resume3.pdf> [<https://perma.cc/R5GG-74CB>]; Curriculum Vitae: Pamela Susan Karlan, Stanford L. Sch., <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/06/2015.KarlanCV.December1.pdf> [<https://perma.cc/87NZ-52HU>].

<sup>178</sup> See Biskupic et al., *supra* note 7, pts. 1, 3.

<sup>179</sup> *Id.* pt. 3.

<sup>180</sup> Joan Biskupic, Janet Roberts, and John Shiffman spoke to eight Supreme Court Justices (all but Chief Justice Roberts) in their study, and the results suggested strong support for a specialized Supreme Court Bar. See *id.* pt. 1.

<sup>181</sup> *Id.* pt. 3.

<sup>182</sup> *Id.* pt. 1.

<sup>183</sup> *Id.* (internal quotation marks omitted).

not going to argue it well.”<sup>184</sup> In sharp contrast, top Supreme Court lawyers “earn respect by their performances” and that—as Justice Anthony Kennedy is described as putting it—“can change minds by framing a case or issue in ways the [J]ustices hadn’t considered.”<sup>185</sup> For then-Judge John Roberts, the Supreme Court Bar was a critical counterweight to the “specialists” in the Office of the Solicitor General.<sup>186</sup>

Law clerks too embrace the Supreme Court Bar. Indeed, these law clerks will often join the very law firms who file these briefs and work with the very advocates they look to for guidance.<sup>187</sup> Thirty-one of the top sixty-six Supreme Court advocates are former law clerks.<sup>188</sup> From 2004–12, 44% of successful cert petitions were filed by former Supreme Court clerks, most working in top appellate practice groups.<sup>189</sup> In the 2012–13 term, 53% of cases featured arguments by a former clerk to a sitting Justice.<sup>190</sup>

The self-reinforcing relationship between the Justices, their clerks, and the Supreme Court Bar (which is dominated by former clerks and alumni of the Office of Solicitor General) is on display in other ways—some professional and some social. Professional ties are bolstered by the Supreme Court’s growing practice of appointing former clerks to serve as amici.<sup>191</sup> In particular, when the Court wants to hear arguments that neither party will advance, it appoints an amicus to make that argument.<sup>192</sup> All twenty-five of the most recent invitations (since January 2016) have gone to former clerks.<sup>193</sup>

Former clerks also interface with the Justices at clerk reunions and a range of social events that more broadly include members of the Su-

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<sup>184</sup> *Id.* (internal quotation marks omitted).

<sup>185</sup> *Id.* pt. 3 (first internal quotation marks omitted).

<sup>186</sup> Roberts, *supra* note 80, at 77–79.

<sup>187</sup> Political scientist Kevin McGuire referred to this phenomenon as a “revolving door” from law clerking to law practice before the Court. Kevin T. McGuire, *Lobbyists, Revolving Doors and the U.S. Supreme Court*, 16 *J. L. & Pol.* 113, 114 (2000).

<sup>188</sup> Biskupic et al., *supra* note 7, pt. 1.

<sup>189</sup> *Id.* pt. 2.

<sup>190</sup> *Id.* pt. 3.

<sup>191</sup> Shaw, *supra* note 63, at 125.

<sup>192</sup> Devins & Prakash, *supra* note 30, at 866 n.29; Goldman, *supra* note 63, at 907 (2011).

<sup>193</sup> Shaw, *supra* note 63, at 125.

preme Court Bar.<sup>194</sup> These ties are deep and enduring.<sup>195</sup> Supreme Court Justices, clerks, attorneys for the OSG, and elite Supreme Court practitioners are part of a personal and professional network that regularly interfaces with each other and in which members often wear several hats over time. Four current Supreme Court Justices were advocates before the Court, three clerked on the Supreme Court, three worked in the Solicitor General's office, and one was also a leading member of the Supreme Court Bar. Lawyers for the OSG are often former clerks and are often en route to the Supreme Court Bar (a group in which close to half of the leading members are former law clerks).

Occasionally, these close ties reveal themselves even at oral argument. In addition to the "Carter Phillips brief" (as it was called by Justice O'Connor) in *Grutter v. Bollinger* as noted above, Chief Justice Rehnquist called Maureen Mahoney of Latham & Watkins, his former clerk and advocate for the University of Michigan, by her first name during that argument.<sup>196</sup> In interviews with journalist Joan Biskupic, several Justices referred to Ted Olsen (former Solicitor General and now head of the Gibson Dunn Supreme Court practice group) as "Ted."<sup>197</sup> And Justice Scalia responded to a question about a jocular exchange between him and Seth Waxman (former Solicitor General and head of the WilmerHale Supreme Court practice group) by remarking: "I know Seth and consider him a friend."<sup>198</sup>

The Supreme Court Bar, in other words, is not simply a conglomeration of talented lawyers. The Bar has deep ties to the Justices through former clerks and other social connections. Even many of the present

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<sup>194</sup> On the close personal relationships between Justices and law clerks, see generally In Chambers: Stories of Supreme Court Law Clerks and Their Justices (Todd C. Peppers & Artemus Ward eds., 2012); see also Jeffrey Rosen, Supreme Court Inc., N.Y. Times Mag. (Mar. 16, 2008), [http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html?\\_r=0](http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html?_r=0) (recounting story of Robin Conrad, head of litigation for the Chamber of Commerce, that "[w]hen Justice O'Connor was on the bench and we knew her vote was very important, we had a case where the opposition had her favorite clerk on the brief, so we retained her next-favorite clerk").

<sup>195</sup> McGuire argues that the patterns of association within the specialized Bar make it a unified network. See Kevin T. McGuire, Lawyers and the U.S. Supreme Court: The Washington Community and Legal Elites, 37 Am. J. Pol. Sci. 365, 366 (1993).

<sup>196</sup> Transcript of Oral Argument at 34, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

<sup>197</sup> Biskupic et al., *supra* note 7, pt. 3.

<sup>198</sup> *Id.*

clerks who work for the Justices have worked with members of the Bar as summer associates while in law school, and many of these clerks will return to work with members of the Bar after finishing their clerkships.<sup>199</sup> The amicus machine—the systematic orchestration of amicus briefs by specialists—is fueled by all of these reinforcing relationships.

### *C. The New Impact of Cert Stage Amici*

There is one more aspect of the amicus machine that merits discussion, and it is a point about timing. Although conventional wisdom among interest groups is that amicus participation begins once the Court agrees to take a case (which is largely a resource-driven decision),<sup>200</sup> Supreme Court experts know the game begins even before a cert petition is filed.

As any Supreme Court practitioner will observe, getting a cert grant is an “[u]phill [b]attle.”<sup>201</sup> While the number of cert petitions is increasing, the number of cases the Court actually takes is decreasing.<sup>202</sup> Thus the name of the game for lawyers is to find ways to elevate a cert petition off of the big stack of petitions facing the Justices and their law clerks (the latter of whom play an important role in summarizing petitions and recommending the ones that deserve more attention from the Justices).<sup>203</sup>

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<sup>199</sup> See, e.g., *id.* pt. 1 (discussing Neal Katyal’s experiences).

<sup>200</sup> Adam D. Chandler, *The Early Brief Gets the Worm: Liberal Groups are Ceding a Key Way to Influence the Supreme Court*, *Slate* (Dec. 5, 2008, 6:55 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2008/12/the\\_early\\_brief\\_gets\\_the\\_worm.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2008/12/the_early_brief_gets_the_worm.single.html) [<https://perma.cc/D5Q8-W9GM>] (“The ACLU has made an ‘organizational decision not to file cert-stage amicus briefs, except in extraordinary circumstances,’ according to Legal Director Steven Shapiro, as an ‘allocation-of-resources decision.’”). See also Telephone Interview with Steven Shapiro, Legal Director, ACLU (Nov. 18, 2015) (noting that the ACLU lacks the resources to file cert-stage amicus briefs given the number of merits briefs it files).

<sup>201</sup> Timothy S. Bishop et al., *Tips on Petitioning for Certiorari in the U.S. Supreme Court, The Circuit Rider* (2007), at 28.

<sup>202</sup> *Id.* (“While the number of petitions filed in the Supreme Court has increased from roughly 4,000 in the mid-1970s to 7,496 in the 2004 Term, the number of annual grants has decreased from about 150 to only 80 during that same period.”) Today the Court receives close to 10,000 petitions every year and grants approximately 80. Robert M. Yablon, *Justice Sotomayor and the Supreme Court’s Certiorari Process*, 123 *Yale L.J. F.* 551, 551 (2014), <http://www.yalelawjournal.org/forum/justice-sotomayor-and-the-supreme-courts-certiorari-process> [<https://perma.cc/E3TT-SCKQ>].

<sup>203</sup> Lazarus, *Advocacy Matters*, *supra* note 7, at 1523–24 (noting that many of the Justices have admitted they do not have the time to read every petition and instead “must and do delegate much of the real work of scrutinizing pleadings at the jurisdictional stage to the law clerks”); see also Artemus Ward & David L. Weiden, *Sorcerers’ Apprentices: 100 Years of*

Cert-stage amicus briefs are one way to do just that. For a variety of reasons they signal that a cert petition is one to watch.<sup>204</sup> For one thing, the addition of amicus briefs at the cert stage adds a striking visual effect—it increases the amount of bound paper on the law clerk’s desk, which sends a psychological message to the clerk that summarizing the case for the Justices is going to take some time.<sup>205</sup> Further, the very existence of such a brief is evidence of one reason the Court grants cert—the case raises an issue of national importance and for that reason someone has taken the time to file an amicus brief.<sup>206</sup> Finally, the identity of the lawyer on the amicus brief matters. In one (anonymous) survey of Supreme Court law clerks, 88% of the clerks admitted that they paid careful attention to amicus briefs written by renowned attorneys.<sup>207</sup> The clerks identified about two dozen lawyers, who, by virtue of their reputation, “would be read carefully.”<sup>208</sup> In the words of one clerk, “A famous name creates a certain level of expectation; it is a natural human quality to look at the source.”<sup>209</sup>

Thus it is now routine for an experienced Supreme Court practitioner to recruit an amicus brief in support of a cert petition.<sup>210</sup> As Richard Lazarus describes it:

[W]hile it is of course theoretically possible that some of these [cert stage] amicus briefs would be filed on their own initiative if a case is of potential legal significance, most are in fact filed because counsel for petitioner proactively alerts potential amici that a petition has been

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Law Clerks at the United States Supreme Court 109–49 (2006) (describing the role of law clerks in cert-stage decision making); Ryan C. Black et al., *Revisiting the Influence of Law Clerks on the U.S. Supreme Court’s Agenda-Setting Process*, 98 *Marq. L. Rev.* 75, 79–82 (2014) (stating that clerks seem to have the greatest influence on the Court with respect to the decision to grant cert).

<sup>204</sup> Swanson, *supra* note 80, at 184. “Petitions to watch” is a recurring feature on the popular SCOTUSblog. See, e.g., Kate Howard, *Petitions to Watch: Conference of June 23*, SCOTUSblog (June 22, 2016), <http://www.scotusblog.com/2016/06/petitions-to-watch-conference-of-june-23/>.

<sup>205</sup> Lazarus, *Advocacy Matters*, *supra* note 7, at 1528 (“The veterans know, often from personal experience based on their own clerkships at the Court, how the presence of multiple amicus briefs can persuade the law clerk that a case is certworthy.”).

<sup>206</sup> *Sup. Ct. R.* 10 (listing reasons for the Court to grant cert).

<sup>207</sup> See Lynch, *supra* note 16, at 56.

<sup>208</sup> *Id.* at 54–56.

<sup>209</sup> *Id.* at 55 (internal quotation marks omitted).

<sup>210</sup> See Lazarus, *Advocacy Matters*, *supra* note 7, at 1525 (“[Supreme Court advocates] push hard for amici support . . .”); see also Lazarus, *Docket Capture*, *supra* note 6, at 94.

filed, which is not something that would otherwise necessarily be known.<sup>211</sup>

Indeed, amicus coordination efforts are so well accepted that counsel for petitioner and affiliated interest groups embark on email campaigns to journalists and others touting the number of top law firms who back their cause through amicus filings.<sup>212</sup>

This early recruitment of amici is a marked change from years past. In the early 1990s, political scientist Kevin McGuire collected survey data from a sample of attorneys who represented petitioners at the Supreme Court during the 1987 term.<sup>213</sup> Only 23% of those who responded said they had sought amicus support for their petition.<sup>214</sup> McGuire suggests that it was only the most experienced lawyers who knew the importance of cert-stage amici.<sup>215</sup>

That secret is now out. Jurisdictional amicus briefs have gone through quite a modern growth spurt. The below chart captures changes in cert-stage amicus briefs for three different years: 1982, 2005, and 2014. A couple of observations stand out.

First, although the number of paid cert petitions is decreasing over time, the number of amicus briefs accompanying these petitions is dramatically increasing: Only 6% of all petitions had amicus support in 1982 compared to 9% in 2005 and 14% in 2014. In raw numbers this translates to 240 cert-stage amicus briefs in 1982, 270 such briefs in 2005, and 476 filed in 2014—almost double the amount of cert-stage amici in the last decade.

Second, the chances of obtaining a grant with a cert-stage amicus brief are significantly higher than the chances of obtaining a grant with-

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<sup>211</sup> Lazarus, *Advocacy Matters*, supra note 7, at 1528.

<sup>212</sup> See supra note 156 (discussing press release of coordinated amicus filings in birthright citizenship cases). Another example of interest groups publicizing amicus filings (albeit at the merits stage) is the 2016 abortion case, *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016). See Amicus Briefs in Support of Whole Woman's Health, Ctr. for Reprod. Rights (Jan. 5, 2016), <http://www.reproductiverights.org/document/amicus-briefs-in-support-of-whole-womans-health>; Memorandum, Amicus Filings in *Whole Woman's Health v. Cole* Show Breadth of Support for Ensuring Women Can Access a Safe & Legal Abortion, SKD Knickerbocker (Jan. 5, 2016), <http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/WWH%20Amicus%20Brief%20Memo%20010516%20FINAL.pdf> [<https://perma.cc/JV57-8995>].

<sup>213</sup> Kevin T. McGuire, *Amicus Curiae and Strategies for Gaining Access to the Supreme Court*, 47 Pol. Res. Q. 821 (1994).

<sup>214</sup> *Id.* at 825.

<sup>215</sup> *Id.* at 828.

out one. Although we make no causation claims of course, the numbers are still striking. In 2014, while a petition had only about a 2% chance of being granted if it had no supporting amicus briefs, it was six times as likely—about a 12% chance—to be granted if there was at least one supporting amicus brief. This amicus boost to getting a grant is consistent with Lazarus’s findings in 2005. As Lazarus explains:

The odds of the Court’s granting a paid petition in absence of amicus support in October Term 1982 was 5%, compared to approximately 2% today. With amicus support, however, the odds jump considerably. If there was at least one amicus brief filed in support, the odds of certiorari being granted in October Term 2005 was just shy of 20%.<sup>216</sup>

**Table 2: Certiorari-Stage Amicus Briefs<sup>217</sup>**

<b>CERTIORARI-STAGE AMICUS BRIEFS IN SUPPORT OF PETITIONS — 1982, 2005, 2014</b>			
	<b>1982</b>	<b>2005</b>	<b>2014</b>
1. Total paid cert petitions	1906	1523	1440
2. Number of paid cert grants	145	58	50
3. Percentage of all paid cert petitions granted	7.61%	3.80%	3.47%
4. Total paid cert petitions with amicus brief in support (percentage)	119 (6.24%)	144 (9.46%)	204 (14.17%)
5. Number of paid cert grants with amicus brief in support (percentage of grants)	N/A	28 (48.28%)	25 (50.00%)
6. Percentage of paid cert petitions with amicus brief in support that were granted	N/A	19.44%	12.25%
7. Percentage of paid cert petitions without amicus briefs in support that were granted	5%	2.18%	2.02%
8. Total number of amicus briefs in support filed at cert stage	240	270	476

<sup>216</sup> Lazarus, *Advocacy Matters*, supra note 7, at 1528.

<sup>217</sup> The 1982 data comes from Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 *Am. Pol. Sci. Rev.* 1109 (1988). The 2005 data comes from Lazarus, *Advocacy Matters*, supra note 7, at 1528–29. Although Caldeira and Wright included paid briefs both in support of and against petitions, Lazarus only included briefs in support of petitions. The 2014 data we collected ourselves from the listings of the Court’s issued Orders and the Docket Search function on the Court’s website. To keep the data from the three terms consistent, we only searched paid petitions and we only counted amicus briefs filed in support of petitions (not against, of which there were very few).

It seems that finding amicus support at the cert stage is one of the most important objectives a petitioner's lawyer can accomplish. And this trick of the trade is well known to Supreme Court specialists. In a recent empirical study, Adam Feldman and Alexander Kappner found a strong relationship between a high level of amicus participation at the cert stage and successful big-law attorneys.<sup>218</sup> The amicus machine, as it were, starts its engine well before the Justices are even aware of an upcoming case.<sup>219</sup>

### III. BENEFITS OF THE MACHINE

One's initial reaction to this amicus machine may well be skepticism. Why should something as important as the Justices' information resource be filtered through a club of elites? Indeed, Richard Lazarus makes this point in his influential work documenting the rise of the Supreme Court Bar.<sup>220</sup> Although Lazarus concurs that better advocacy before the Court is a "positive development," there is still "cause for concern," he says, "that the re-emergence of a dominant Supreme Court Bar may be skewing disproportionately the Court's docket and rulings on the merits in favor of those monied interests more able to pay for such expertise."<sup>221</sup> Similarly, Joan Biskupic and her colleagues at Reuters worry that domination of the Court's attention by Supreme Court specialists may have troubling consequences: "Law firms have different goals than advocacy groups—profit, for one—but their Supreme Court practices often share an ideological interest in shaping the law for clients."<sup>222</sup> These criticisms have significant implications for the amicus machine: If amicus briefs are being shaped by the "who's who" of the Supreme Court Bar, we should perhaps worry about undue influence of that group on the Court.

And yet it is unwise to focus solely on the risks of the amicus machine while overlooking the rewards. Our goal now is to build the nor-

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<sup>218</sup> Feldman & Kappner, *supra* note 99, at 24.

<sup>219</sup> Indeed, some Supreme Court specialists think the start line is even earlier by seeking out amicus participation in high profile federal court of appeals cases. See Interview with Kannon Shanmugam, Partner, Williams & Connolly, in Williamsburg, Va. (Sept. 26, 2015).

<sup>220</sup> Lazarus, *Advocacy Matters*, *supra* note 7, at 1491.

<sup>221</sup> *Id.* at 1491, 1554.

<sup>222</sup> Biskupic et al., *supra* note 7, pt. 2.

mative argument in favor of the amicus machine, or at least to articulate several benefits not previously recognized.

We make three such claims: (1) The Solicitor General advantage—the special spot that office holds in the eyes of the Justices—has been dispersed to members of the private bar and has effectively created a broader reputation market. This is good because more people have reputation and credibility interests to maintain, which keeps their amicus submissions to the Court reliable; (2) amicus participation at the cert stage serves as a valuable signal to law clerks in an era where circuit splits—the traditional dominant reason for granting cert—are less common; and (3) as long as the Court sees itself as a law declarer rather than a dispute resolver, it is appropriate for the Justices to educate themselves about the broad contours of the case, and specialized Supreme Court practitioners know how to do that.

Finally, we conclude by assessing the purported costs of the amicus machine. We push back on the argument that the Supreme Court Bar is responsible for producing a pro-business Court that favors the haves over the have-nots. And we argue that when considering the amicus machine—warts and all—there is less reason to fret and more attributes to commend.

#### *A. Repeat Players and Reputation Markets*

Repeat advocates before the Supreme Court have long invested heavily in their reputations. As political scientists Ryan Black and Ryan Owens explain, “[u]nlike parties who will appear only one time before the Court, repeat players know they will need Court support in the future. As such, they must prepare for the future; they must concern themselves with it always and they must jealously protect their reputations.”<sup>223</sup>

Chief among those repeat players with a vested interest in reputation are the lawyers who serve in the Office of Solicitor General, an office that supervises and conducts all federal litigation in the U.S. Supreme Court. A long line of scholars has observed what they call the SG advantage at the Court.<sup>224</sup> Attorneys from the SG’s office—who typically

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<sup>223</sup> Ryan C. Black & Ryan J. Owens, *The Solicitor General and the United States Supreme Court: Executive Branch Influence and Judicial Decisions* 35–36 (2012).

<sup>224</sup> See *id.* For others who have noticed and remarked on this phenomenon, see Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 Fla. St. U. L. Rev. 391, 405 (2000); Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General’s Changing Role in Supreme Court Litigation*, 51 B.C. L.

come to the SG with sterling resumes—are more likely than others similarly situated to win cases at the Court, to have cert petitions granted, and to have briefs cited by the Justices with approval.<sup>225</sup> This is what led Lincoln Caplan to famously refer to the SG as “the Tenth Justice.”<sup>226</sup>

With respect to amicus briefs, Justice Ginsburg has called the SG a “true friend of the Court.”<sup>227</sup> Supreme Court law clerks, too, label the SG as a sort of “super amicus.” In one survey, approximately 70% of the law clerks singled out the SG as the most important amicus filer.<sup>228</sup> One clerk reported, “Amicus briefs from the solicitor general are ‘head and shoulders’ above the rest, and are often considered more carefully than party briefs.”<sup>229</sup> And, another one explained, “You may not agree with the solicitor general’s argument, but the amicus brief will always be well researched.”<sup>230</sup> The gray brief—the color of the cover of briefs filed by the SG, as opposed to the green covers that other amici wear—is “the most important without a doubt.”<sup>231</sup>

There are several available explanations for the SG advantage at the Court. While some theories emphasize the SG’s political position in promoting the role of the executive,<sup>232</sup> and others stress the office’s ability to screen the cases it chooses to pursue,<sup>233</sup> most theories highlight the

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Rev. 1323, 1326 (2010); Kevin T. McGuire, Explaining Executive Success in the US Supreme Court, 51 Pol. Res. Q. 505, 505 (1998) [hereinafter McGuire, Explaining Executive Success]; Jim Rossi, Does the Solicitor General Advantage Thwart the Rule of Law in the Administrative State?, 28 Fla. St. U. L. Rev. 459, 464 (2000); Patrick C. Wohlfarth, The Tenth Justice? Consequences of Politicization in the Solicitor General’s Office, 71 J. Pol. 224, 224 (2009).

<sup>225</sup> In their recent book and empirical assessment, political scientists Ryan Black and Ryan Owens used a matching system—using lawyers and cases that are as identical as possible—and found that the OSG lawyer is more likely to win his Supreme Court case over the similarly situated non-OSG lawyer, and is also more likely to have a cert petition granted or a brief referenced in the decision. See Black & Owens, *supra* note 223, at 89–91, 111–12.

<sup>226</sup> Lincoln Caplan, *The Tenth Justice* 3–4 (1987).

<sup>227</sup> Ruth Bader Ginsburg, Thomas Jefferson Lecture: Workways of the Supreme Court, 25 T. Jefferson L. Rev. 517, 519 (2003).

<sup>228</sup> Lynch, *supra* note 16, at 46.

<sup>229</sup> *Id.* at 47 (emphasis removed).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*; see Sup. Ct. R. 33(1)(e), (g).

<sup>232</sup> John O. McGinnis, Principle Versus Politics: The Solicitor General’s Office in the Constitutional and Bureaucratic Theory, 44 Stan. L. Rev. 799, 804–05 (1982) (reviewing Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* (1991)).

<sup>233</sup> Neal Devins, Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation, 82 Calif. L. Rev. 255, 317–19 (1994); Rossi, *supra* note 224, at 466.

earned reputation and credibility of the attorneys who work in that office.

This credibility advantage takes one of several forms. First, OSG lawyers are trusted by the Justices to supplement the record with “valuable (and often otherwise unattainable) information about the practical consequences of a potential decision.”<sup>234</sup> Second, they have earned a reputation for not overreaching and for furthering principles of “stability.”<sup>235</sup> And, relatedly, they are known for producing high-quality briefs—they know how to speak the language of the Court both at an individual Justice level and at an institutional level.<sup>236</sup>

Overlooked to date, however, is the fact that these important features of the SG advantage no longer rest solely within the walls of the Department of Justice. Young lawyers who earn their reputation within the OSG now depart and head to private practice.<sup>237</sup> Gone are the days where an attorney spends his entire career in the OSG. As one advocate put it, the OSG is now the “farm team” of the future leaders of the practice.<sup>238</sup> Roughly half of the sixty-six elite Supreme Court specialists highlighted by Reuters are OSG alumni.<sup>239</sup>

This is a real change from years past.<sup>240</sup> Solicitors General did not litigate after leaving the government from 1952–81. By contrast, with the exception of now-Justice Elena Kagan, each of the six Solicitors General who served after 1996 now heads a Supreme Court litigation practice at

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<sup>234</sup> Cordray & Cordray, *supra* note 224, at 1365 (“When the Solicitor General, acting in the ‘tenth justice’ mode, provides the Court with valuable (and often otherwise unattainable) information about the practical consequences of a potential decision, the Solicitor General not only improves the Court’s decision making, but also strengthens the Court’s reliance on the Solicitor General.”). For an important article challenging the faith in the SG in this regard, see Nancy Morawetz, *Convenient Facts: Nken v. Holder*, the Solicitor General, and the Presentation of Internal Government Facts, 88 N.Y.U. L. Rev. 1600 (2013).

<sup>235</sup> Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 Ind. L.J. 1297, 1309 (2000) (“[T]he Court has come to rely on the Solicitor General to present briefs of the most scrupulous fidelity, and to combine statements of principle with strategies by which the Court may rule in a manner most consistent with principles of stability.”).

<sup>236</sup> See Black & Owens, *supra* note 223, at 39; Lynch, *supra* note 16, at 46–47.

<sup>237</sup> Matt Sundquist, *Analysis: Former Solicitors General and the Supreme Court Bar*, SCOTUSblog (Mar. 4, 2011, 1:38 PM), <http://www.scotusblog.com/2011/03/analysis-former-solicitors-general-and-the-supreme-court-bar> [<https://perma.cc/8ENP-MCJ3>].

<sup>238</sup> Kannon Shanmugam, *Williams & Connolly, Address at William & Mary Law School: Supreme Court Preview 2015–16*, Supreme Court Bar (Sept. 26, 2015).

<sup>239</sup> See Biskupic et al., *supra* note 7, pt. 1.

<sup>240</sup> Sundquist, *supra* note 237 (calling the change a stark “new trend”).

a private firm.<sup>241</sup> These lawyers are heavily recruited and heavily compensated. When Paul Clement left the OSG to join the private sector, for example, he was described as the “LeBron James” or “Holy Grail” of law firm recruiting.<sup>242</sup>

The implications of this change for the amicus machine are significant. When these OSG alums later file amicus briefs in their new capacity as leaders of the Supreme Court Bar, their badge of credibility stays with them. Put differently, the amicus machine has capitalized on these earned OSG reputational and credibility benefits and dispersed them to a broader group, namely members of the Supreme Court Bar generally. In the language of corporate law, it has created a broader “reputation market.”<sup>243</sup> And this is a very positive development in a post-Internet world.

As one of us has fretted about before, the interaction of the information age and the boom of Supreme Court amicus briefs can have troubling consequences.<sup>244</sup> Because today anyone can claim to be a factual expert and find information to support her view quickly and cheaply, amicus briefs are not uniformly dependable sources of information. The Justices will sometimes cite an amicus brief for a statement of fact that ultimately rests on dubious authority—blog posts that no longer exist, studies that were funded by an interested group, or statements of science from what turn out to be motivated political groups, to name a few examples.<sup>245</sup>

A real benefit of the amicus machine is that the members of the Supreme Court Bar—often led by former OSG attorneys—have a vested interest in avoiding these dubious authorities. In fact not a single example of troubling amicus facts highlighted by one of us in a prior article

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<sup>241</sup> Seth Waxman heads the practice at WilmerHale; Walter Dellinger at O’Melveny; Ted Olson at Gibson Dunn; Paul Clement at Kirkland & Ellis; Greg Garre at Latham & Watkins; and Neal Katyal at Hogan Lovells. For a general treatment of the shift from Solicitors General into private practice, see Matthew L. Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 *Charleston L. Rev.* 59 (2010).

<sup>242</sup> Sundquist, *supra* note 237 (internal quotation marks omitted).

<sup>243</sup> Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience*, 55 *Stan. L. Rev.* 1067, 1085–86 (2003). Reputation markets are extralegal mechanisms that constrain parties’ behavior. Reputation markets in the corporate community exist when there are (1) repeat players in a close knit community; (2) “shared expectations of what constitutes appropriate behavior”; and (3) an ability to police whether behavior conforms to those expectations. *Id.* All three features appear in the Supreme Court amicus business.

<sup>244</sup> Larsen, *The Trouble with Amicus Facts*, *supra* note 25, at 1791–92.

<sup>245</sup> *Id.* at 1792–95.

was filed by a member of the Supreme Court elite.<sup>246</sup> Rather, these repeat players have formed a reputation market—an extralegal mechanism to constrain behavior. To protect their credibility with the Justices and with each other, members of the Supreme Court Bar will not engage with suspect authorities and overly creative claims to the Court. Indeed, they likely will not want to associate with those players who would. They have formed an economy of trust that they do not wish to be broken.

Significantly, both the Justices and the advocates themselves can police appropriate conduct in this reputation market. Certainly, a Justice will expect credible sources and quality advocacy when he or she recognizes a name of a Supreme Court expert on an amicus brief. For example, Justice Anthony Kennedy lambasted a Supreme Court advocate who made a misstatement in an earlier case by asking at oral argument: “If you have repeated statements in your brief that require qualifications . . . shouldn’t we view with some skepticism what you tell us?”<sup>247</sup>

But even when the amicus brief is signed by an outside player, yet wrangled by an insider, there is a reputation market at work. Supreme Court advocates repeat business with each other—they write briefs for each other, they refer clients to one another, they recruit from the same pool of people, and they run in the same social circles. If one of them “wrangles” and “whispers” to an amicus who ends up submitting unreliable information to the Court, the advocates will know even if the Justices will not. Over time, this sort of behavior will cost an advocate in terms of the way she is viewed by her peers.<sup>248</sup>

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<sup>246</sup> See generally *id.*

<sup>247</sup> For a re-telling of this story, see Tony Mauro, *At the Supreme Court, the Seventh Time is not a Charm*, *The BLT: The Blog of LegalTimes* (Jan. 14, 2008), <http://legaltimes.typepad.com/blt/2008/01/at-the-supreme.html> [<https://perma.cc/TS4F-PKXG>].

<sup>248</sup> Indeed, this harks of “social network theory,” a school of thought that teaches that people in a connected community influence each others’ behavior. See Daniel J. Brass, Kenneth D. Butterfield & Bruce C. Skaggs, *Relationships and Unethical Behavior: A Social Network Perspective*, 23 *Acad. Mgmt. Rev.* 14, 15 (1998). Likewise, social psychology recognizes the import of reputation by one’s peers, especially among elites. See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *Geo. L.J.* 1515, 1532–36 (2010). Specifically, the desire to be liked and respected by other people is a fundamental psychological motivation, and self-esteem depends heavily on the esteem in which one is held by others. See, e.g., Rick H. Hoyle et al., *Selfhood: Identity, Esteem, Regulation* 31–35 (1999); Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 *Psychol. Bull.* 497, 497 (1995).

Thus, to the extent one is concerned with “junk science” in amicus briefs, leveraging the credibility interests of the Supreme Court Bar is a way to mitigate that worry. Put differently, part of the SG advantage has now been dispersed to a broader group. Just as the law clerks say they are attracted to the gray brief (from the OSG) because it is trustworthy and well-researched,<sup>249</sup> so too do the Justices pay more attention to the amicus briefs facilitated by members of the Supreme Court Bar.<sup>250</sup> Indeed, the litigation advantage of the SG “disappears completely” when the OSG goes head to head with equally experienced members of the Supreme Court Bar.<sup>251</sup> In cases pitting the OSG against members of the Supreme Court Bar (from October Term 2004 to October Term 2010), the Supreme Court Bar lawyers prevailed in 65.2% of their cases as petitioners and 57.1% as respondents.<sup>252</sup>

And while certainly this puts more power in the hands of elite advocates, that dynamic is nothing new. Attorneys in the OSG have long since cornered the market on reputation interests. They alone could be trusted to supplement the factual record. They alone had the track record of avoiding overreaching. They were the ones with the expertise in speaking Supreme Court language and knowing the right angles to press. Now those advantages are shared by a wider group through the amicus machine. And the Justices (and their decisions) are all the better for it.

### *B. Amicus Briefs Are Important Signals at the Cert Stage*

A second benefit of the machine emerges from the activity around the Court’s discretionary jurisdiction. As demonstrated above, amicus activity when the Court is considering granting cert has grown significantly (nearly doubling) in the past ten years.<sup>253</sup> This tracks the intuition of the advocates we spoke to from the Supreme Court Bar. The conventional wisdom now is that amicus support at the cert stage is a necessity, not a luxury.<sup>254</sup>

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<sup>249</sup> See Lynch, *supra* note 16, at 46–47.

<sup>250</sup> See Biskupic et al., *supra* note 7, pt. 1.

<sup>251</sup> McGuire, *supra* note 224, at 515.

<sup>252</sup> Fisher, *supra* note 97, at 155. In the same period, nonspecialists pitted against the OSG won 43.5% of their cases as petitioner and just 9.1% as respondent. See *id.*

<sup>253</sup> See *supra* note 217 and Table 2. As discussed above, a 2014 paid petition had a 2% chance of being granted without amicus support and a 12% chance with at least one amicus brief.

<sup>254</sup> See Interview with Jeffrey L. Fisher, Professor and Co-Dir., Stanford Law Sch. Supreme Court Litig. Clinic, in Williamsburg, Va. (Sept. 25, 2015); Interview with Andy

When spotting this trend ten years ago, Richard Lazarus assigned responsibility for this uptick to the Supreme Court Bar elites: “The veterans know, often from personal experience based on their own clerkships at the Court, how the presence of multiple amicus briefs can persuade the law clerk that a case is certworthy. They also possess the connections within the Supreme Court Bar itself to get the briefs filed.”<sup>255</sup>

Lazarus argues that this influence of the Supreme Court Bar on the Court’s agenda is not desirable. He warns that the current Court’s “pro-business shift” is attributable to the rise of the Bar and specifically to its efforts with amicus briefs at the cert stage.<sup>256</sup> “What the private Supreme Court bar has accomplished,” Lazarus warns, “is to persuade the Court to enter into areas of law of interest to the regulated community to correct what business perceives as problematic legal doctrine.”<sup>257</sup>

We push back on Lazarus’s claims of causation between the Bar and the Court’s business shift below. But even acknowledging the risk of undue influence of the private sector, there is another side of the amicus machine at the cert stage that is actually quite beneficial and so far unrecognized: These briefs serve as a useful signal to law clerks in an era where circuit splits—the historic indicator of a case’s importance—are far less common.

Supreme Court Rule 10 lists the reasons for the Court to exercise its jurisdictional discretion in taking up a case. The reasons include: to settle conflicting decisions among the federal circuit courts, to correct a departure by a state court of last resort on an important issue of federal law, or to answer an important federal question of national significance.<sup>258</sup>

Of these factors, the first one—known commonly as the “circuit split”—by far “stands out as the most important” reason the Court takes a case.<sup>259</sup> Indeed, as one commentator writes, “the experienced Supreme Court practitioner will [s]acrifice everything necessary to make the

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Pincus, Partner, Mayer Brown, in Wash., D.C. (June 16, 2015); Interview with Carter Phillips, Partner, Sidley Austin, in Williamsburg, Va. (Feb. 28, 2012).

<sup>255</sup> Lazarus, *Advocacy Matters*, supra note 7, at 1522–28. Although the trend of amicus practice at the cert stage is growing and relatively new, the idea that experienced Supreme Court litigators are more successful in getting petitions for their clients granted is not new. See McGuire, supra note 80, at 195.

<sup>256</sup> Lazarus, *Advocacy Matters*, supra note 7, at 1531–32.

<sup>257</sup> *Id.*

<sup>258</sup> Sup. Ct. R. 10.

<sup>259</sup> Swanson, supra note 80, at 183.

point [in the petition] that [the] case is an ideal vehicle to resolve an indisputable circuit split.”<sup>260</sup> Not surprisingly, Supreme Court law clerks watch for splits with myopic focus. They see circuit splits as the “driving force” behind the Court’s rare decision to grant cert.<sup>261</sup>

As is widely known, Supreme Court law clerks have a special role to play in the cert process. Because the Justices do not have the time to review 10,000 petitions (not to mention response briefs), they depend on law clerks to review and summarize the petitions and to make recommendations on whether the Justices should vote to grant or deny them.<sup>262</sup> But there is a strong inertia working against a law clerk—usually in their mid-twenties and newly minted from law school—in recommending a cert grant. As political scientist H.W. Perry, Jr. describes it, the law clerks approach each petition with a “presumption against a grant.”<sup>263</sup> One clerk told Perry, “We saw our role as clerks to find every reason possible to deny cert. petitions.”<sup>264</sup>

Historically, the most “certworthy” reason—the one most likely to defeat the law clerk presumption—was a true circuit split.<sup>265</sup> Seventy percent of the Court’s most recent docket involved cases that have split the Courts of Appeals.<sup>266</sup> The presence of a conflict among the circuits “remains by far the most important criteria in the Court’s case selection.”<sup>267</sup> And it is something the law clerks can identify. Supreme Court law clerks, though among the youngest members of the legal profession, are

<sup>260</sup> *Id.* at 183 n.55 (alterations in original) (quoting Tony Mauro, *Apprentice Appellants: Why the High Court is Now Reading Student Papers*, 26 *Am. Lawyer* 75, 76 (June 2004)).

<sup>261</sup> H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 246 (1991). For his book, Perry interviewed five Justices and sixty-four former Supreme Court law clerks who served during the 1976–80 Terms. *Id.* at 9.

<sup>262</sup> Beginning in 1972 (at the suggestion of Justice Powell), the Justices have divided cert petitions equally among the chambers who choose to participate in what is called “the cert pool.” For those chambers who join the pool (typically seven or eight), one law clerk will author a memo for every Justice in the pool summarizing the petition’s claims and recommending whether the Court vote to grant or deny it. Carolyn Shapiro, *The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court*, 37 *Fla. St. U. L. Rev.* 101, 117–18 (2009).

<sup>263</sup> Perry, *supra* note 261, at 218 (internal quotation marks omitted).

<sup>264</sup> *Id.* See also Tony Mauro, *The Hidden Power Behind the Supreme Court: Justices Give Pivotal Role to Novice Lawyers*, *USA Today*, Mar. 13, 1998, at 1A (observing that law clerks are predisposed against recommending grants of cert petitions).

<sup>265</sup> Amanda Frost, *Overvaluing Uniformity*, 94 *Va. L. Rev.* 1567, 1631–34 (2008).

<sup>266</sup> *Id.* at 1575.

<sup>267</sup> *Id.* at 1632.

very adept at spotting circuit splits and at sorting the true divisions in the courts from the so-called “illusory splits” manufactured by the parties.<sup>268</sup>

But the circuit split is fading in relevance today. Justices Breyer and Souter have both speculated publicly that the reason for the Court’s shrinking docket has to do with fewer circuit splits and greater “homogeneity” in the courts of appeals.<sup>269</sup> The empirical evidence on this question is mixed, but there is at least some support for the claim that circuit splits are less common in a world in which the lower courts have greater access to one another’s opinions and the emphasis on regulation leads to controversies focused on one jurisdiction.<sup>270</sup>

If true that the circuit split is a dying breed,<sup>271</sup> then how are the law clerks to know which split-less cases are certworthy? It is here that the amicus machine has a positive influence.

As demonstrated above, members of the Supreme Court Bar are key to an increase in amicus practice at the cert stage. Compared to the rest of the field, they are better positioned to seek these briefs out. They recognize certworthy issues in advance (while the case is in the lower court), they know what makes one case a better vehicle than another, and they are keenly aware of the value of amicus briefs in demonstrating a petition’s importance.<sup>272</sup> Referring to Supreme Court specialists, Justice Kennedy has explained, “They basically are just a step ahead of us

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<sup>268</sup> Carter G. Phillips, Providing Strategies for Success: Petitioning the Supreme Court for *Certiorari*, 46 *For the Def.*, Apr. 2004, at 22, 24 (“Law clerks are very adept at reading petitions and lower court opinions and deciding whether the asserted conflict among the lower courts is more apparent than real.”).

<sup>269</sup> Frost, *supra* note 265, at 1636 (attributing this speculation to the Justices, but noting skepticism that the evidence exists to support it).

<sup>270</sup> See Robert Barnes, Roberts Supports Court’s Shrinking Docket, *Wash. Post* (Feb. 2, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/01/AR2007020102213.html> (recognizing that the Court hears fewer cases now than in the past and noting that online databases make circuit splits less common).

<sup>271</sup> It may also be the case that the circuit split is overvalued and that more attention should be paid to a case’s significance. Professor Amanda Frost, for example, has called attention to the fact that there are plenty of questions the Court decides each year—say, for example, whether a typewritten name on a notice of appeal should satisfy the signature requirement—that are not issues of national importance and are only taken up by the Court because of the existence of disagreement among the circuits. See Frost, *supra* note 265, at 1569.

<sup>272</sup> See Feldman & Kappner, *supra* note 99, at 23; Phillips, *supra* note 268, at 23 (recognizing that arguing that one’s case is nationally important as a “lonely petitioner” can be difficult; Phillips says it is “always very important to have ‘friends’” at the cert stage and “the more friends the petitioner has the better”).

in identifying the cases that we'll take a look at . . . . They are on the front lines and they apply the same standards" as the Justices.<sup>273</sup>

The cert-stage amicus brief—a “must have” for players in the know—is thus a powerful signal to law clerks that a case is important—important enough that someone took the time to write an amicus brief about it.<sup>274</sup> It is an efficient way to convey that information quickly in a cert process that values speed.<sup>275</sup> And although it is fair to worry, as Lazarus does, about the tool being misused by private interests,<sup>276</sup> it is also a mistake to overlook the positive side of this development.<sup>277</sup>

Many people complain that the modern Supreme Court is not taking enough cases and, in fact, is taking the wrong ones—trivial circuit splits and not issues that truly merit national uniformity.<sup>278</sup> According to Professor Fred Schauer, this is a new development and not a welcome one: “[A]s the Court’s docket shrinks, it is also deciding fewer legally important cases, a recent and unfortunate change from past practice.”<sup>279</sup> There is a growing gap, he argues, between what issues the public thinks

<sup>273</sup> See Biskupic et al., *supra* note 7, pt. 1 (internal quotation marks omitted).

<sup>274</sup> Lazarus, *Advocacy Matters*, *supra* note 7, at 1522, 1526.

<sup>275</sup> See Perry, *supra* note 261, at 119–20 (“[I]n the cert. process, much information must be conveyed, and there exists a need to reduce time and effort in processing information . . .”).

<sup>276</sup> Lazarus, *Advocacy Matters*, *supra* note 7, at 1532; see also Lazarus, *Docket Capture*, *supra* note 6, at 89, 96 (expressing concern about “disproportionate influence that the expert Supreme Court Bar exerts on the content of the Court’s plenary docket”).

<sup>277</sup> It is also important to recognize that the Justices can—and do—take steps that mitigate the risks of a law clerk being snookered by a Supreme Court specialist into thinking that a case is a good vehicle to resolve an important legal question. For example, over the past several years, the Justices increasingly re-list cases before granting cert. “The data suggests that a re-list . . . is, indeed, now almost a necessary condition for review . . .” Michael Kimberly & Kristin Liska, *The Statistics of Relists*, SCOTUSblog (Sept. 14, 2015, 4:50 PM), <http://www.scotusblog.com/2015/09/the-statistics-of-relists> [<https://perma.cc/EK56-KAAD>] (documenting that re-lists had been used for all October Term 2015 cert grants and in 84% of October Term 2014 grants). By re-listing cases, the Justices can ask for a second cert pool memo and take other steps to confirm that a case is, in fact, a good vehicle for Supreme Court review.

<sup>278</sup> See Amanda L. Tyler, *Setting the Supreme Court’s Agenda: Is There a Place for Certification?*, 78 *Geo. Wash. L. Rev.* 1310, 1310 (2010) (“Complaints about the Supreme Court’s current certiorari practices are legion. Broadly speaking, these objections tend to reduce to two general assertions: first, the Court is taking too few cases; and second, the Court is not taking the ‘right’ cases.”).

<sup>279</sup> Frederick Schauer, *Is It Important to Be Important?: Evaluating the Supreme Court’s Case-Selection Process*, 119 *Yale L.J.* 77, 77 (2009).

are important and the issues the Court actually chooses to decide.<sup>280</sup> If this criticism is true, the concentration of power in the Supreme Court Bar can once again be a mitigating tool. Through the coordinated filing of cert-stage amicus briefs, the machine is generating a valuable signal to law clerks (who need it) that a case is worthy of the Justices' attention.

A signal is only dangerous if it is not accurate. And, although of course not a perfect signal, a cert-stage amicus brief can accurately demonstrate importance. As Dan Schweitzer, Supreme Court counsel for the National Association of Attorneys General, explains, a cert-stage amicus brief is able to "add a deeper appreciation of the importance of the case."<sup>281</sup> These briefs stress, for example, the harm to third parties if the law remains uncertain, the consequences for an industry if the lower court opinion remains intact, and the unintended practical consequences that may result if the scope of the opinion in question is not clarified.<sup>282</sup> These facets of a petition may not be obvious to a law clerk, and they are arguably far more indicative of a case's importance than the standard signal of the circuit split.

Perhaps most obviously but also most importantly, the sheer fact that many entities sign a brief and ask for cert indicates that the case is significant.<sup>283</sup> If, as Schweitzer argues, "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."<sup>284</sup>

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<sup>280</sup> Id. at 80 ("When importance is measured by what the public and their elected representatives think is important, therefore, and by what the government actually works on, the Supreme Court's docket seems surprisingly peripheral.").

<sup>281</sup> Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. App. Prac. & Process 523, 529 (2003).

<sup>282</sup> Id. at 530. *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), are two interesting examples that underscore the value of a cert-stage amicus brief. Neither case presented a circuit split, but both petitions were accompanied by amicus briefs signed by multiple states urging the Court to grant cert to resolve multiple practical problems (state prison systems in *City of Boerne* and chilling effects on social movements in *Scheidler*). See Brief of the Amici Curiae States of Ohio et al. in Support of Petitioner at 1, *City of Boerne*, 521 U.S. 507 (No. 95-2074); Brief of the States of Ala. et al. as Amici Curiae in Support of Petitioners at 18–20, *Scheidler*, 547 U.S. 9 (Nos. 04-1244, 04-1352).

<sup>283</sup> Schweitzer, *supra* note 281, at 528.

<sup>284</sup> Id.

Moreover, because Supreme Court specialists often craft the cert petition and solicit cert-stage amicus briefs, this package is likely to both be high quality and to focus on issues of import to the Justices. In fact, the reputation market discussed above in the context of merits-stage amicus briefs applies with equal force to the cert stage. Supreme Court specialists—people who want to guard their reputation with the Justices—are not likely to put their names on a meritless cert petition. Thus, the law clerk inclination to hone in on the petitions filed by experts may not be such a bad tendency.

Finally, it is critical to remember that the cert-stage amicus brief does not guarantee that the Justices will grant cert in any given case. Although the brief may indicate a “closer look” (in the words of H.W. Perry) from the law clerks and the Justices, the ultimate decision to grant cert in a case is so multifarious it would be a mistake to think the Justices are granting cases just because a member of the Bar told them to.<sup>285</sup> Indeed, the numbers bear this out. Although the number of cert-stage amicus briefs has nearly doubled since 2005, the grant rate for these petitions has not doubled, but actually slightly *decreased* (from 19% in 2005 to 12% in 2014).<sup>286</sup> There thus seems to be a bit of a glass ceiling on the effectiveness of cert-stage amicus briefs: They certainly increase the petition’s chances of being granted, but there is a limit to their influence.

### *C. The System Serves a Law-Declarer Court*

The final benefit of the amicus machine is the way it suits the modern Court’s turn towards law declaration. As others have remarked at length, today’s Supreme Court sees itself more as a law declarer rather than a dispute resolver.<sup>287</sup> Amicus briefs filed by Supreme Court specialists help the Justices enunciate those broad legal rules.

The law declaration model emphasizes that adjudication is about “articulating public norms as well as settling private disputes”<sup>288</sup> and, relatedly, that “judges serve a dual role: they must resolve the concrete disputes before them, and . . . are also expected to make accurate

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<sup>285</sup> Perry, *supra* note 261, at 120.

<sup>286</sup> See *supra* Table 2.

<sup>287</sup> See, e.g., Monaghan, *supra* note 30, at 668–69.

<sup>288</sup> Robert G. Bone, Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation, 75 B.U. L. Rev. 1273, 1275 (1995).

statements about the meaning of law that govern beyond the parameters of the parties and their dispute.”<sup>289</sup> By way of contrast, the dispute resolution model emphasizes party control and sees the judicial role as limited to settling only legal and factual disputes between the parties; consequently, “[i]f the parties agree on a proposition, that proposition simply is not in dispute” and a court should neither raise issues sua sponte nor enlist amici to make legal arguments that one or the other party is unwilling to make.<sup>290</sup>

We take no position on the normative desirability of the law declaration model.<sup>291</sup> Nonetheless, it is clear that the Roberts Court favors this model. Evidence for this shift can be seen by the Court’s willingness to appoint amici curiae to argue issues raised by the Justices,<sup>292</sup> its increased tendency to call for the views of the Solicitor General on whether to grant cert,<sup>293</sup> its extra-record fact finding through amicus briefs and Internet searches,<sup>294</sup> its habit of raising issues sua sponte and related declarations of principles of law that are broader than necessary to resolve the dispute at hand,<sup>295</sup> its increasing practice of deciding (and not avoiding) constitutional controversies,<sup>296</sup> and its effort to rein in federal courts of appeals by mandating their adherence to Supreme Court precedent by forbidding “anticipatory overrulings.”<sup>297</sup>

<sup>289</sup> Frost, *supra* note 265, at 452.

<sup>290</sup> Gary Lawson, *Stipulating the Law*, 109 Mich. L. Rev. 1191, 1219 (2011).

<sup>291</sup> For an article defending the traditional adversarial model, see *id.* at 1223–24. For articles defending the law declaration model, see Frost, *supra* note 265, at 447; Gorod, *supra* note 30, at 39–40.

<sup>292</sup> Unlike earlier Courts, the Roberts Court “has made an unusually high number of appointments,” reflecting the notion that it sees itself as a law declarer and is willing to use a broad array of tools to pursue that task. Shaw, *supra* note 63, at 120.

<sup>293</sup> Devins & Prakash, *supra* note 30, at 861.

<sup>294</sup> See Gorod, *supra* note 30, at 36 (discussing amicus briefs); Larsen, *Confronting Supreme Court Fact Finding*, *supra* note 25, at 1260 (discussing Internet searches); Larsen, *The Trouble with Amicus Facts*, *supra* note 25, at 1778 (discussing amicus briefs).

<sup>295</sup> See Monaghan, *supra* note 30, at 730 (“The Court’s newly acquired freedom allows it—not the litigants—to shape the disputes before it.”). For discussions of whether the Supreme Court can raise issues sua sponte, see Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding *Dickerson v. United States**, 149 U. Pa. L. Rev. 287, 301 (2000); Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering *Miranda**, 149 U. Pa. L. Rev. 251, 257 (2000).

<sup>296</sup> Richard L. Hasen, *Constitutional Avoidance and Anti-avoidance by the Roberts Court*, 2009 Sup. Ct. Rev. 181, 182–84; Monaghan, *supra* note 30, at 668–69.

<sup>297</sup> See Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of “Judicial Power”*, 80 B.U. L. Rev. 967, 969 (2000); see also Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How*

Supreme Court advocates are adept at understanding the Justices' embrace of law declaration and, with it, the types of arguments that will matter to them, both at the cert stage and on the merits.<sup>298</sup> These briefs contain critical factual claims and legal arguments, and there are numerous examples of the "Court relying heavily on novel legal arguments raised [in these briefs] . . . sometimes even on a verbatim basis."<sup>299</sup> At oral argument, moreover, Supreme Court specialists speak the Justices' language. According to Paul Clement (former Solicitor General, then head of the appellate practice at Bancroft, and now Partner at Kirkland & Ellis): "There are definite ways that the justices want their questions answered . . . . If you know that, you can tailor your answers and presumably have better effect."<sup>300</sup>

Another advantage Supreme Court advocates have over their nonspecialist counterparts is their ability to strategize and identify what Dan Schweitzer calls "the surprising source" amici.<sup>301</sup> Amicus briefs can be powerful "because they are written by entities that one would expect to be supporting the other side of the case."<sup>302</sup> One example of a surprising source amicus should be familiar: the military amicus brief or "Carter Philips" brief supporting affirmative action in *Grutter v. Bollinger*.<sup>303</sup> In *Grutter*, military leaders made the (surprising to some) claim that affirmative action in law schools was critical to a successful military leadership.<sup>304</sup> As previously noted, this brief played a significant role both at oral argument and in the ultimate opinion.

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Supreme Court Justices Move the Law, 61 Emory L.J. 779, 784 (2012) (explaining how the Supreme Court has moved away from express anticipatory overrulings in recent years).

<sup>298</sup> Joan Biskupic, Janet Roberts, and John Shiffman recount the experiences of two nonspecialists who recently had cases before the Court. One refused to cede oral argument to an insider but allowed former Solicitor General Seth Waxman to sit next to him at oral argument. Waxman "passed [him] notes" during argument and that some of the "justices appeared piqued when [the nonspecialist] did not directly answer their questions." Biskupic et al., supra note 7, pt. 3. The other lawyer—around one week before the brief was due—ceded control to Supreme Court specialist David Frederick, who, according to the nonspecialist, "quickly redrafted the brief in a way 'that took it to a whole new level.'" Id.

<sup>299</sup> Lazarus, *Advocacy Matters*, supra note 7, at 1542; see also infra notes 112–16 and accompanying text (noting role of amicus briefs by Supreme Court specialists in advancing factual claims).

<sup>300</sup> Biskupic et al., supra note 7, pt. 3 (internal quotation marks omitted).

<sup>301</sup> Schweitzer, supra note 281, at 534 (capitalization omitted).

<sup>302</sup> Id.

<sup>303</sup> See supra notes 16–17 and accompanying text; *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>304</sup> Id.

Another, less familiar example of a surprising source is the amicus brief from states in the *FTC v. Phoebe Putney* antitrust case a few terms ago.<sup>305</sup> *Phoebe Putney* was a case about whether Georgia could set up a monopoly for public services, consistent with federal antitrust law. Twenty states made the surprising move to come in as amici supporting the FTC.<sup>306</sup> In their brief, they asked for clarity and warned of “significant, negative consequences” that would follow from the lower court opinion.<sup>307</sup> Like the brief in *Grutter*, this amicus brief was brought up by Justice Kagan at oral argument and then cited as significant by Justice Sotomayor in her opinion for the Court.<sup>308</sup> Both briefs were conceived, recruited, and authored by members of the Supreme Court Bar.<sup>309</sup> They are further examples that the sophisticated specialists know how to make an impact with an amicus pen.

As the following table reveals, amicus briefs written by Supreme Court specialists or filed in support of a Supreme Court specialist (not counting the SG)<sup>310</sup> were referenced in oral arguments thirty-four times from 2009 to 2014—roughly half of the times an amicus brief was ever mentioned. This means the “Carter Philips brief” and the “Walter Dellinger brief” are not one-offs. Overall, Supreme Court specialists are either writing or coordinating the writing of influential amicus briefs in a significant percentage of cases.

<sup>305</sup> *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003 (2013).

<sup>306</sup> See Brief of Amici Curiae States of Ill. et al. for Petitioner, *Phoebe Putney*, 133 S. Ct. 1003 (No. 11-1160), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs/11-1160\\_petitioneramcu20states.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-1160_petitioneramcu20states.authcheckdam.pdf) [<https://perma.cc/4X95-Q78D>].

<sup>307</sup> *Id.* at 4.

<sup>308</sup> See Transcript of Oral Argument at 31–32, *Phoebe Putney*, 133 S. Ct. 1003 (No. 11-1160), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-1160.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1160.pdf). [<https://perma.cc/96S9-GJAB>]; *Phoebe Putney*, 133 S. Ct. at 1016.

<sup>309</sup> The military brief (or “Carter Phillips brief”), as noted above, was recruited by the parties and authored by attorneys at Sidley Austin. See *supra* note 16 and accompanying text. The state brief in *Phoebe Putney* was authored by Michael A. Scodro, then the SG for Illinois (now at Jenner & Block). See Brief of Amici Curiae for Petitioner States of Ill. et al., *Phoebe Putney*, 133 S. Ct. 1003 (2013) (No. 11-1160), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs/11-1160\\_petitioneramcu20states.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-1160_petitioneramcu20states.authcheckdam.pdf) [<https://perma.cc/3WMG-KMWY>]; Overview: Michael A. Scodro, Jenner & Block, <https://jenner.com/people/MichaelScodro> [<https://perma.cc/2DH2-NMQ4>].

<sup>310</sup> Amicus briefs filed by the OSG are perhaps mentioned at oral argument for other reasons, so they were not included in this count.

**Table 3: Amicus Briefs Referenced by Supreme Court Justices<sup>311</sup>**

<b>Year</b>	<b>Total number of oral arguments in which a Justice mentions an amicus brief</b>	<b>Oral arguments in which a Justice mentions a brief filed by or in support of a specialist</b>	<b>Percentage</b>
<b>2009</b>	18	9	50%
<b>2010</b>	19	8	80%
<b>2011</b>	11	7	63.64%
<b>2012</b>	3	1	33.33%
<b>2013</b>	6	4	66.67%
<b>2014</b>	10	5	50%
<b>2009-2014</b>	67	34	50.75%

It makes sense that a Court that sees itself as a law declarer should favor Supreme Court insiders as opposed to their local nonspecialized counterparts (attorneys who take a case from beginning all the way up to the Supreme Court). While the adversarial model gives the parties control to define the factual and legal issues (something a nonspecialist would be perfectly comfortable doing), the law declaration model is asking the local lawyer to do something he is not used to doing. Supreme Court insiders are attuned to presenting the types of arguments and facts that the Justices care about—they know the Court’s language and they know the Court’s goals.

They know, in other words, which briefs will matter at the end of the day. In fact, of the twenty-one cases last term where a nongovernmental amicus brief was cited by a Justice in an opinion, twelve of them were filed by Supreme Court specialists. That number rises to fourteen if one also looks at the “sponsor” of the brief, the party for whom the brief was

<sup>311</sup> For this search, we combed through oral argument transcripts and identified every amicus brief that was mentioned by a Justice at oral argument. We omitted ones that were brought up by counsel or were filed by the SG. The phrase “Supreme Court specialists” on this chart includes elite lawyers highlighted by Reuters in *Biskupic et al.*, *supra* note 7, pt. 3, and briefs filed by the State SG’s Office. The phrase “filed by or in support of” means a Supreme Court specialist was counsel of record for either the amicus itself or the party in whose support the brief was filed. Allison Orr Larsen & Neal Devins, *Database of Amicus Briefs Mentioned by Justices at Oral Argument* (on file with the Virginia Law Review Association).

filed. Thus 66% of all amicus briefs that made it into a Supreme Court opinion last year came from someone who was an expert in knowing what the Justices are interested in learning.

Against this backdrop, it comes as no surprise that the Justices think the amicus machine is a good development. Chief Justice Roberts, in an article commenting on the rise of the Supreme Court Bar generally, argues that “things have changed, and for the better.”<sup>312</sup> Part of his argument includes the fact that the sophisticated Bar provides “better advocates” and “amicus help.”<sup>313</sup> He is not the only member of the Court to take this view. Most Supreme Court Justices have publicly embraced the Supreme Court Bar, welcoming the change they have witnessed in Supreme Court advocacy. We have already noted several supportive comments and here are two more: Justice John Paul Stevens, referring to the members of the machine, said “They earn respect by their performances. And because they have respect, they are more successful. I am not aware of any downside.”<sup>314</sup> And Justice Thomas said, speaking laudably of Supreme Court specialist Ted Olson, “You want to hear what Ted has to say.”<sup>315</sup>

#### *D. Assessing the Costs and Benefits of the Machine*

The benefits of the amicus machine are substantial, especially to a Court that embraces the law declaration model. But one can only appreciate the benefits of the amicus machine when compared to its costs. Those who have written about the Supreme Court Bar to date have emphasized these costs in their analysis, and it is to those concerns that we now turn.

The chief complaint noted by journalists (Joan Biskupic and Jeff Rosen), advocates (Richard Lazarus and Jeff Fisher), and political scientists (Kevin McGuire) is that the Supreme Court Bar serves the well-to-do, especially business interests.<sup>316</sup> Correspondingly, the worry is both (1) that the Supreme Court elite have “captured” the Court’s docket and

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<sup>312</sup> Roberts, *supra* note 80, at 78.

<sup>313</sup> *Id.*

<sup>314</sup> Biskupic et al., *supra* note 7, pt. 3 (internal quotation marks omitted).

<sup>315</sup> *Id.*

<sup>316</sup> See, e.g., Fisher, *supra* note 97, at 142; Lazarus, *Docket Capture*, *supra* note 6, at 89; Kevin T. McGuire, *The Supreme Court Bar: Legal Elites in the Washington Community* 5 (1993); Biskupic et al., *supra* note 7, pt. 1; Rosen, *supra* note 194, pt. IV.

pushed the Court in a business-oriented direction;<sup>317</sup> and (2) that “the corporate tilt of the [C]ourt’s specialty bar leaves consumers and workers with a smaller pool of top attorneys”<sup>318</sup> so that “the progressive antagonists of big business are understandably feeling beleaguered and outgunned.”<sup>319</sup>

We push back against both of these claims. First, we are skeptical of the causal link between the rise of the Supreme Court Bar and the Court’s pro-business shift. We think the Court’s embrace of business interests is principally connected to the jurisprudential preferences of the Justices and not the advocacy of the Supreme Court Bar. Second, we think that the resource advantage of business interests relative to individual interests is real but significantly overstated—particularly at the merits stage. Excellent Supreme Court specialists can be found on both sides of the dispute. The amicus machine, in other words, serves both business and nonbusiness interests.

To start, we are suspicious of claims that the Roberts Court has been “captured” by the talented lawyers of the Supreme Court Bar. That argument has the cart before the horse. Instead, the evidence points in the opposite direction—the Justices on the Roberts Court are especially conservative, and especially pro-business; elite Supreme Court lawyers (whether they represent business or individual interests) are actually taking their signals from the Roberts Court.

A study of around 1,800 business decisions from 1946 to 2011 reveals that the five most conservative members of today’s Court are among the ten most pro-business Justices from that sixty-five-year period.<sup>320</sup> The two Justices of all time most likely to favor business are Justice Alito and Chief Justice Roberts.<sup>321</sup> A 2013 study of the Roberts Court likewise reveals that the Court’s five most conservative Justices voted nearly lockstep with the position of the Chamber of Commerce in 5–4 decisions; the five conservatives backed the Chamber in 82% of these cases

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<sup>317</sup> Lazarus, *Docket Capture*, *supra* note 6, at 89 (“The same way that powerful economic interests can capture an agency . . . so too may the . . . economic interests that know best how to influence the decisionmaking of the Justices . . . .” (footnotes omitted)).

<sup>318</sup> Biskupic et al., *supra* note 7, pt. 2.

<sup>319</sup> Rosen, *supra* note 194, pt. IV.

<sup>320</sup> See Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 *Minn. L. Rev.* 1431, 1449, 1452 (2013).

<sup>321</sup> *Id.*

(whereas liberal Justices sided with the Chamber 19% of the time).<sup>322</sup> Studies published in the popular press also speak to the Roberts Court's proclivity to back business interests.<sup>323</sup> There is no reason to believe that the Court's pro-business bent would not exist but for the Supreme Court Bar telling it which cases to take.

Going hand in glove with its support for business, the Roberts Court is comparatively hostile to individual claims brought on behalf of labor as well as civil rights and civil liberties groups. Political science and other measures of the Justices' ideologies and tendencies on individual-rights cases underscore that the Roberts Court is particularly conservative, especially the five conservative Justices who tend to back business interests. Tables 4 and 5 make this point. Table 4 looks at two conventional measures of ideology—percentage of conservative votes in cases and Martin-Quinn scores (a scoring system devised by political scientists where positive scores suggest a Justice is conservative and negative scores suggest a Justice is liberal).<sup>324</sup> This table reveals that all five conservatives reach conservative outcomes in at least 56% of cases (as compared to 43% for the most moderate of the liberal Justices) and that each has a positive Martin-Quinn score (whereas all liberals have negative scores).<sup>325</sup> Table 5 looks at the proportion of liberal votes in civil-

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<sup>322</sup> Doug Kendall & Tom Donnelly, *Not So Risky Business: The Chamber of Commerce's Quiet Success Before the Roberts Court – An Early Report for 2012-2013*, Constitutional Accountability Ctr. (May 1, 2013), <http://theconstitution.org/text-history/1966/not-so-risky-business-chamber-commerces-quiet-success-roberts-court-early-report>. This report is arguably biased, but the data on whether the Justices voting did or did not back Chamber of Commerce filings is unassailable.

<sup>323</sup> See Corporations and the Court, *The Economist*, June 25, 2011, at 75; Simon Lazarus, *The Stealth Corporate Takeover of the Supreme Court*, *New Republic* (Nov. 18, 2015), <https://newrepublic.com/article/123984/the-stealth-corporate-takeover-of-the-supreme-court>; Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, *N.Y. Times*, Dec. 19, 2010, at A1; Alicia Mundy & Shirley S. Wang, *In Drug Case, Justices to Weigh Right to Sue*, *Wall St. J.*, Oct. 27, 2008, at B1; Rosen, *supra* note 194, pt. IV. But see Jonathan H. Adler, *Business and the Roberts Court Revisited (Again)*, *Volokh Conspiracy* (May 6, 2013, 11:20 PM), <http://volokh.com/2013/05/06/business-and-the-roberts-court-revisited-again/> (arguing that the Roberts court is not necessarily pro-business in the environmental context).

<sup>324</sup> The procedure for calculating the score was first set out in a 2002 article and is widely used in research on the Supreme Court. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court 1953–1999*, 10 *Pol. Analysis* 134, 137–45 (2002).

<sup>325</sup> Another scoring system devised by Lee Epstein, William Landes, and Richard Posner claims that today's conservatives are among the most conservative Justices ever to sit on the Court. See Lee Epstein, William M. Landes & Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* 108–09 (2013).

liberties cases and shows that all conservatives have scores below 50% and all liberals have scores above 50%.

**Table 4: Percentage of Conservative Votes in Cases and Martin-Quinn Scores, 2010–14 Terms**<sup>326</sup>

Justice	Percentage of Conservative Votes	Martin-Quinn Scores
Thomas	62.7	3.14
Alito	62.8	1.81
Scalia	56.9	1.76
Roberts	56	0.99
Kennedy	52.9	0.17
Breyer	42.1	-1.41
Kagan	36.6	-1.53
Ginsburg	35.9	-2.31
Sotomayor	36.2	-2.05

**Table 5: Percentages of Liberal Votes in Civil Liberties Cases**<sup>327</sup>

Terms	2005–06	2007–08	2009–10	2011–12	2013–14
Ginsburg	62.5	71.4	60.2	67.1	67.1
Breyer	61.3	63.9	55.1	52.4	66.7
Sotomayor	—	—	61.9	65.9	69.9
Kagan	—	—	59.4	66.2	63.9
Kennedy	35.0	41.0	45.9	45.7	47.9
Alito	24.1	31.0	30.5	21.0	37.0
Scalia	26.3	33.3	39.8	32.9	41.1
Thomas	22.5	21.4	31.6	24.4	31.5
Roberts	26.9	35.7	41.2	31.7	47.9

<sup>326</sup> The 2010–14 terms were selected because Elena Kagan joined the Court in its 2010 term and Justice Antonin Scalia died during the 2015 term. The database used for calculating percentage of conservative or liberal votes is archived at <http://scdb.wustl.edu/>. We analyzed cases decided after oral argument (decision type = 1, 6, or 7). The criteria for coding votes as liberal or conservative are described at <http://scdb.wustl.edu/documentation.php?var=decisionDirection> [<https://perma.cc/LH9Q-N3Z5>]. Results of Calculations for Percentage of Conservative Votes (on file with the Virginia Law Review Association). Martin-Quinn scores are archived at <http://mqscores.wustl.edu/measures.php>. We use the mean estimated score for each Justice in a term, as recommended in the archive.

<sup>327</sup> Table 5 is drawn from widely used political science measures and is available at <http://scdb.wustl.edu/> (results on file with the Virginia Law Review Association).

Supreme Court specialists are well aware that a majority of the Justices are generally sympathetic to business claims and hostile to civil-liberties claims. These preferences are signaled by the Justices to the Bar, not the other way around. Justices “shape their dockets by encouraging potential litigants to bring particular cases or make specific arguments.”<sup>328</sup> They communicate these preferences through cert grants and blatant invitations in their opinions, and the Roberts Court has not been shy about using either technique. For example, the Court’s review of several environmental cases in its 2008–09 term is likely linked to industry clients “turn[ing] repeatedly to the expert Supreme Court bar for assistance.”<sup>329</sup> Perhaps more telling, it was no secret that several Justices were willing to reconsider a precedent on the constitutionality of mandatory public sector union fees. Justice Alito almost explicitly invited such a case in his 2013 opinion in *Harris v. Quinn*, and the complaint in *Friedrichs v. California Teachers Association* was promptly filed less than a year later.<sup>330</sup>

Against this backdrop, it is to be expected that the Supreme Court Bar would encourage their business clients to pursue cases that the Justices both want to hear and want to issue favorable rulings on. Likewise, civil rights and liberties interests are likely to hold back on cases that they are

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<sup>328</sup> Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets*, 16 *Sup. Ct. Econ. Rev.* 1, 1 (2008); see Vanessa Baird & Tonja Jacobi, *Judicial Agenda Setting Through Signaling and Strategic Litigant Responses*, 29 *Wash. U. J.L. & Pol’y* 215, 217–20 (2009); Hope Babcock, *How the Supreme Court Uses the Certiorari Process in the Ninth Circuit to Further Its Pro-Business Agenda: A Strange *Pas de Deux* with an Unfortunate Coda*, 41 *Ecology L.Q.* 653, 666–67 (2014) (using Ninth Circuit environmental decisions to illustrate how the Court’s selection of cases signals its preferences and, in so doing, influences the strategic decision making of lawyers who will shape the dockets of lower courts and ultimately the U.S. Supreme Court through their selection of cases to bring before lower courts).

<sup>329</sup> Lazarus, *Docket Capture*, *supra* note 6, at 91; see also Lazarus, *Advocacy Matters*, *supra* note 7, at 1532–35 (arguing that the Court’s revitalization of its antitrust docket in 2002 and its willingness to consider constitutional limits on punitive damages after 1998 were tied to the efforts of the Supreme Court Bar).

<sup>330</sup> The 2013 decision *Harris v. Quinn* was specifically referenced as the critical “signal” by the public interest group that filed *Friedrichs v. California Teachers Association*. See *Friedrichs v. CTA: Why Now?*, Ctr. for Individual Rights, <https://www.cir-usa.org/cases/friedrichs-v-california-teachers-association-et-al/friedrichs-v-cta-why-now> [https://perma.cc/NC82-2GLB]. See *Friedrichs v. Cal. Teachers Ass’n*, 136 S.Ct. 1083 (2016); *Harris v. Quinn*, 134 S.Ct. 2618 (2014). The lawyer arguing the case, Mike Carvin, also referred to *Harris* as an important signal that the Court was ready to reconsider the constitutionality of public sector union fees. Mike Carvin, Partner, Jones Day, Remarks (Nov. 2, 2015).

likely to lose.<sup>331</sup> Indeed, our conversations with Supreme Court specialists and studies on Supreme Court filings back up both propositions. Specialists from the ACLU, Public Citizen, the NAACP Legal Defense Fund, and the Stanford Supreme Court Clinic all said that they assess the likelihood of success when deciding whether to pursue or resist cert.<sup>332</sup>

These debates are hardly unique to the Roberts Court.<sup>333</sup> Civil-rights groups have long sought to avoid making “bad law” by screening out

<sup>331</sup> Indeed, Joan Biskupic, Janet Roberts, and John Shiffman—who criticize how it is that pro-business lawyers dominate the docket—recognize that “public interest lawyers effectively influence the court’s agenda, too. They do so by declining to draft petitions for some kinds of civil rights and consumer cases.” Biskupic et al., *supra* note 7, pt. 1.

<sup>332</sup> Telephone Interviews with Dale Ho, Dir., Voting Rights Project, ACLU (Nov. 5, 2015); Steven R. Shapiro, Legal Dir., ACLU (Nov. 18, 2015); Allison M. Zieve, Dir., Public Citizen Litig. Grp. (Dec. 18, 2015); Interview with Jeffrey L. Fisher, Professor and Co-Dir., Stanford Law Sch. Supreme Court Litig. Clinic, in Williamsburg, Va. (Sept. 25, 2015); Email Interview with Pamela Karlan, Professor and Co-Dir., Stanford Law Sch. Supreme Court Litig. Clinic (Feb. 9, 2016); Biskupic et al., *supra* note 7, pt. 1 (quoting Scott Nelson, a lawyer at Public Citizen, as saying, “You don’t want to go up and make matters worse” (internal quotation marks omitted)); Civil Rights Groups Avoid Taking Cases to Supreme Court, *Jet*, Mar. 22, 1999, at 38, <https://books.google.com/books?id=SjsDAAAAMBAJ&pg=PA1&pg=PA38#v=onepage&q&f=false> [<https://perma.cc/H48W-LG4K>] (quoting Ted Shaw, an NAACP Legal Defense and Education Fund lawyer, as saying, “There is too much at stake to risk pulling down affirmative action nationwide at the hands of a closely divided court” (internal quotation marks omitted)). Decisions likely impacted by such strategic screening include informed consent requirements and abortion (where women were told about suicide risks associated with the abortion procedure), disparate impact proofs in fair housing litigation, and the decision to pursue marriage equality before the Supreme Court. See Email from Dale Ho, Dir., Voting Rights Project, ACLU, to Neal Devins, Sandra Day O’Connor Professor of Law, William & Mary Sch. of Law (Nov. 6, 2015, 12:37 PM) (on file with authors) (discussing fair housing litigation); Linda Greenhouse, *The Illusion of a Liberal Supreme Court*, *N.Y. Times* (July 9, 2015), <http://www.nytimes.com/2015/07/09/opinion/the-illusion-of-a-liberal-supreme-court.html> (noting refusal of pro-choice groups to pursue abortion appeals); Margaret Talbot, *A Risky Proposal: Is It Too Soon to Petition the Supreme Court on Gay Marriage?*, *New Yorker* (Jan. 18, 2010), <http://www.newyorker.com/magazine/2010/01/18/a-risky-proposal> [<https://perma.cc/QLC8-DJGM>] (discussing the strategy behind the decision to bring *Perry v. Schwarzenegger*, 591 F.3d 1126 (9th Cir. 2009), as a challenge to California’s Proposition 8, which overturned a California Supreme Court decision to allow same-sex marriage); Howard Mintz, *Civil Rights Groups Give Cold Shoulder to Federal Lawsuit Challenging Proposition 8*, *Mercury News* (San Jose, Cal.) (May 27, 2009), [http://www.mercurynews.com/localnewsheadlines/ci\\_12462665](http://www.mercurynews.com/localnewsheadlines/ci_12462665) [<https://perma.cc/KN7T-P8MK>] (discussing the LGBTQ-rights community’s hesitance to challenge Proposition 8 through *Perry v. Schwarzenegger*).

<sup>333</sup> On the question of whether Supreme Court clinics should engage in screening, see Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 *N.Y.U. L. Rev.* 131, 168–71 (2011), (arguing that clinics should de-

certain cases;<sup>334</sup> political scientists studying the Court have observed that the Court's docket is skewed both by screening (where advocates do not pursue high-risk cases) and signaling (where advocates pursue cases that they think the Court wants to hear).<sup>335</sup>

For our purposes, the important point is that the Court's propensity to decide business cases may not be coming at the expense of the individual-rights cases it might hear—litigants for individuals may just not want to take their cases up to the Court. Likewise, the business-interest agenda at the Bar dates back well before the Roberts Court. Indeed, the advent of the business-oriented Supreme Court Bar can be traced to a 1971 appeal by Lewis Powell (before he joined the Court) to the Chamber of Commerce, calling on the Chamber and other business interests to follow the model of civil rights and liberties groups by advancing their agenda before the Court.<sup>336</sup>

We do not deny that the Supreme Court Bar contributes to shaping the Court's business docket. Supreme Court experts who represent business interests will look for signals from the Court and advance cases that will further their clients' pro-business agendas. At the same time, just as civil rights and liberties interests looked to a receptive Court to advance their agenda at an earlier time, it is the Justices—and not the lawyers—who are sending the signals and issuing the rulings. In other words, the Bar—both business and individual interests—is doing what lawyers always do: representing clients, seeking favorable rulings, and avoiding cases that are likely to produce unfavorable rulings.

There is a second type of criticism that needs to be addressed—namely, the worry that lawyers for business interests are better funded and more likely to provide high-quality representation than are lawyers for individual interests. At the cert stage, there is some—but only

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cline to assist rather than make bad law); cf. Fisher, *supra* note 97, at 191–94 (providing a competing, if not contradictory, view).

<sup>334</sup> See Civil Rights Groups Avoid Taking Cases To Supreme Court, *supra* note 332; Kathleen M. Sullivan, Supreme Court Avoidance, *Wash. Post.*, Dec. 7, 1997, at C1 (discussing civil-rights groups' efforts to settle an affirmative action dispute after the Supreme Court had granted cert).

<sup>335</sup> See Baird & Jacobi, *supra* note 328, at 218–23 (2009); Kevin T. McGuire et al., Measuring Policy Content on the U.S. Supreme Court, 71 *J. Pol.* 1305, 1308, 1310–11, (2009) (discussing the impact of screening on Supreme Court docket).

<sup>336</sup> See Rosen, *supra* note 194, pt. II. Powell thought it imperative that business interests counter the growing influence of public interest groups and, correspondingly, recognize that the courts “may be the most important instrument for social, economic, and political change.” *Id.* (quoting Powell) (internal quotation marks omitted).

some—truth to this claim; at the merits stage, we think this worry is misplaced.

At cert, there is an undeniable resource advantage for business interests. Most elite Supreme Court lawyers work for large law firms with a business-oriented client base. These lawyers are likely to spot plausible cases early on and invest substantial energy in securing amicus briefs and otherwise doing what they can to secure cert.<sup>337</sup>

Lawyers representing individual interests may be less inclined to seek cert, as the Court is somewhat hostile to their interests.<sup>338</sup> It is also the case that there are far fewer of these lawyers.<sup>339</sup> At the same time, three of the top eight Supreme Court specialists (Jeff Fisher, Tom Goldstein, and Dave Frederick) regularly represent individual interests. These lawyers, moreover, are as likely as their business-oriented counterparts to seek amicus briefs when petitioning for cert.<sup>340</sup> From 2005 to 2015, Fisher sought amicus backing in eight of seventeen cases in which he represented petitioner; Goldstein sought backing in four of eight cases in which he represented petitioner; and Frederick sought backing in six of ten cases in which he represented petitioner.<sup>341</sup> Moreover, Supreme Court clinics were intended to, and have, leveled the playing field in this regard. In fact Richard Lazarus predicted this possibility in 2005 when he suggested that “any current discrepancy in the allocation of Supreme Court expertise” could be temporary and may “correct itself over time.”<sup>342</sup>

Perhaps more significant, once the Court agrees to hear a case, Supreme Court experts are all willing to offer their services either pro bono or at a substantially reduced rate.<sup>343</sup> “Simply appearing before the top

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<sup>337</sup> See Lazarus, *Advocacy Matters*, supra note 7, at 1528–29 (discussing coordinated amicus filings in pro-business cases).

<sup>338</sup> See supra notes 316–19 and accompanying text.

<sup>339</sup> Biskupic et al., supra note 7, pt. 2.

<sup>340</sup> No one calls attention to their cases by seeking amicus briefs when opposing cert, and, consequently, we did not survey amicus filings in opposition to cert. See Interview with Carter Phillips, Partner, Sidley Austin, in Williamsburg, Va. (Feb. 28, 2012).

<sup>341</sup> In calculating these numbers, we looked to the Oyez website for a list of cases these attorneys had argued as petitioner and used the SCOTUSblog website to find filed cert-stage amicus briefs in these cases. If the SCOTUSblog website did not include briefs, we used Westlaw.

<sup>342</sup> Lazarus, *Advocacy Matters*, supra note 7, at 1558.

<sup>343</sup> *Id.* at 1557; Interview with Neal Katyal, Partner, Hogan Lovells, in Wash., D.C. (Nov. 2, 2015). It is interesting to contemplate in this regard whether public-interest organizations

court brings with it prestige and publicity that firms believe help them recruit new corporate clients and lure the next generation of top attorneys.”<sup>344</sup> Consequently, when cert is granted and one or both of the lawyers is not a member of the elite Supreme Court Bar, members of the Bar fight hard to take over the case. This includes cases that pit business against individual interests. From October Term 2012 to October Term 2014, “there were only two [cases] in which the non-corporate party litigated the case without obvious, substantial support either from Supreme Court counsel (representing the party) or the Solicitor General’s Office (as an amicus).”<sup>345</sup> Indeed, some regional attorneys have expressed dismay at the intense campaigning of top Supreme Court lawyers to take over their cases, some even complaining of the aggressiveness of these campaigns.<sup>346</sup> No doubt, the representation disadvantage that exists at the petition stage largely disappears at the merits stage.<sup>347</sup>

#### CONCLUSION

The days of the regional lawyer making her first and only argument before the Supreme Court are largely behind us; today’s Court is dominated by elite repeat players. That shift has made its mark on the amicus process. The “friend of the court” brief is no longer just the tool for lob-

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should systematically be granted discounts or even free printing costs to file briefs at the Court. That small change could also address any advocacy asymmetry.

<sup>344</sup> Biskupic et al., *supra* note 7, pt. 2.

<sup>345</sup> Tom Goldstein, *The Supreme Court Bar as a Tool of Business*, SCOTUSblog (Jan. 6, 2015, 5:35 PM) (emphasis omitted) <http://www.scotusblog.com/2015/01/the-supreme-court-bar-as-a-tool-of-business> [<https://perma.cc/54BR-UEYL>].

<sup>346</sup> Stephen B. Kinnaird, *All Over the High Court*, *Legal Times* (Oct. 6, 2008), <http://www.paulhastings.com/docs/default-source/PDFs/1023.pdf> [<https://perma.cc/AH6Z-LUXG>] (“When such a case [that is likely to be granted cert] is discovered, a ferocious competition ensues. Firms or clinics that discover a circuit conflict a day late are out of luck. The target party’s current lawyer is often stunned (and vexed) by the immediate onslaught of calls from eager appellate specialists. More than one prominent advocate has been known to hop a red-eye to visit a prison, hoping to sign up the inmate whose *pro se* petition the Court just granted.”). Efforts of Supreme Court specialists to take over cases even include efforts to take over cases from regional appellate specialists, including state Solicitors General. See Erwin Chemerinsky, *Dean, Univ. of Cal., Irvine Sch. of Law, Remarks at William & Mary School of Law Supreme Court Preview 2015–16* (Sep. 26, 2015).

<sup>347</sup> Even critics of the concentration of resources in the business-oriented Supreme Court Bar recognize that the “advocacy gap” is, to some extent, closed at the merits stage. Lazarus, *Advocacy Matters*, *supra* note 7, at 1557; see also Interview with Jeffrey L. Fisher, Professor and Co-Dir., Stanford Law Sch. Supreme Court Litig. Clinic, in *Williamsburg, Va.* (Sept. 25, 2015) (acknowledging that the representation issue is less pronounced at the merits stage and more of a concern at cert).

byists, organically grown by interest groups hoping to press their policy preferences at the Court. There is now an “amicus strategy,” and it is intentional and choreographed by Supreme Court specialists. Although it is natural to be skeptical of any cultural shift, this one is—for the most part—beneficial, not pernicious. The amicus machine creates a valuable reputation market, an important signal for the Court to build its docket, and a necessary tool for Justices interested in declaring rules rather than just adjudicating disputes. If the amicus boom is going to continue, it is better monitored by a set of repeat players and specialists than left to grow wildly on its own.

APPENDIX<sup>348</sup>

We are grateful to the following journalists and members of the Supreme Court Bar who generously gave their time and thoughts to us about the amicus process:

Joan Biskupic, Reuters

Lisa Blatt, Arnold & Porter and former Assistant Solicitor General

Beth Brinkmann, Civil Division of the Department of Justice, former Assistant Solicitor General, and formerly in private practice at Morrison & Foerster

Mike Carvin, Jones Day

Erwin Chemerinsky, Dean, University of California, Irvine School of Law

Paul Clement, Bancroft, former Solicitor General

Walter Dellinger, O'Melveny & Myers and former Acting Solicitor General

Jeff Fisher, Stanford Law School

Anthony Franze, Arnold & Porter

Greg Garre, Latham & Watkins and former Solicitor General

Tom Goldstein, Goldstein & Russell and publisher of SCOTUSblog

Linda Greenhouse, *New York Times* and Yale Law School

Dale Ho, American Civil Liberties Union

Neal Katyal, Hogan Lovells and former Acting Solicitor General

Pam Karlan, Stanford Law School, and former assistant counsel, NAACP Legal Defense Fund

Doug Laycock, University of Virginia School of Law and Supreme Court advocate

Adam Liptak, *New York Times*

Jonathan Mitchell, Hoover Institution and former Solicitor General of Texas

Carter Phillips, Sidley Austin and former Assistant Solicitor General

Andy Pincus, Mayer Brown, Yale Law School, and former Assistant Solicitor General

Charles Rothfeld, Mayer Brown, Yale Law School, and former Assistant Solicitor General

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<sup>348</sup> We spoke to all of these Supreme Court experts in various forms: most in formal interviews, some for background, and some in more casual contexts.

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Dan Schweitzer, National Association of Attorneys General

Mike Scodro, Jenner & Block, University of Chicago, and former Illinois Solicitor General

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