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Separating Amicus Wheat from Chaff

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INTRODUCTION

The number of amicus briefs filed in the United States Supreme Court has been growing for decades, and that number is now huge. The seventy-five or so cases on the Supreme Court's argument calendar each year generate some nine hundred amicus briefs in total.[1] Cases with thirty or more amicus briefs are no longer particularly rare, and the highest-profile cases see amicus filings reaching the triple digits.[2]

Although amicus briefs can provide valuable information, the large and growing volume of amicus filings threatens the Court and commentators with a form of information overload. Knowledgeable sources tell us what logic suggests, namely that some truly valuable information can get lost in the amicus avalanche.[3] Experts also report that too many amicus briefs are of the "me too" variety—that is, briefs that largely repeat the arguments made by the parties or other amici rather than adding new information.[4] As the Supreme Court's rules explain, the Court benefits from amicus briefs that "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties," but "[a]n amicus curiae brief that does not serve this purpose"—as many briefs today probably do not—"*burdens the Court*."[5] There is, in short, a growing threat of amicus overload, especially in the most salient cases, and the problem will only become more acute if current filing trends continue.

If the Supreme Court faces an overabundance of amicus briefs, especially duplicative ones, is there a solution? We do not claim to have a complete solution, but—like a good amicus brief—we can make a novel

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1. *See* 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), https://perma.cc/4QLR-U958; Jacqueline Bell & Christina Violante, *BigLaw's Amicus Business Is Booming, But Is the Court Listening?*, LAW360 (Oct. 2, 2016), https://perma.cc/KNP9-U88Y.

2. Anthony J. Franze & R. Reeves Anderson, *In Unusual Term, Big Year for Amicus Curiae at the Supreme Court*, NAT'L L.J. (Sept. 21, 2016), https://perma.cc/5L98-UWNK.

3. *See* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 101 VA. L. REV. 1901, 1924 (2016).

4. *See* Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 44–45 (2004) (describing clerks' efforts to find the relatively few briefs that made novel contributions).

5. SUP. CT. R. 37.1 (emphasis added).

and useful contribution to the problem's management. Someone facing a huge pile of amicus briefs with limited time needs a way to engage in triage. We propose the use of plagiarism-detection software as a tool to help identify the amicus briefs with the most useful and novel content. Such a prioritization tool should prove valuable to the Court (especially to the law clerks, who are mostly responsible for wading through amicus briefs), as well as to other audiences like the press, the academy, and anyone else who wants to make his or her limited reading time more productive.

The remainder of this essay describes several potential solutions to the amicus overload problem, explains our method and its relative virtues (along with its limitations), provides some illustrative results from using the method on high-profile cases from recent terms, and points toward further applications and refinements.

I. WEAKNESSES OF GATEKEEPING SOLUTIONS TO AMICUS OVERLOAD

In a world of unlimited time and attention, the Supreme Court Justices, their law clerks, and other interested observers could carefully read every amicus brief. But in a world of limited resources, reading scores of briefs, many of them duplicative, is probably neither practicable nor desirable. The most obvious solution to the overload problem is to rely on some gatekeeper—such as the Supreme Court itself, the parties, or the expert Supreme Court bar—to control the filing of briefs and to keep out duplicative, low-quality briefs. Such restriction-oriented approaches have some merit, but they also have significant drawbacks, as we briefly explain.

A. THE SUPREME COURT AS GATEKEEPER

The Supreme Court's rules require most entities that wish to file an amicus brief to obtain permission from either the Court or both parties.[6] It is unusual today for parties to withhold their consent, and indeed the parties often submit blanket consents to any and all potential amicus filings.[7] As a result, amicus participation is essentially open access. One obvious solution is eliminating the option of party consent and instead requiring potential amici to file a motion explaining to the Court why the brief provides valuable information or is otherwise worthy of the Court's attention.

This proposal has obvious drawbacks, which might explain why the Court has not adopted it. For one, the Court would be burdened with the duty to decide each motion for permission to file, which is probably not a

6. SUP. CT. R. 37.3.

7. STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 749–51 (10th ed. 2013); Franze & Anderson, *supra* note 1.

good use of its time,[8] and the parties might feel compelled to file their own responses opposing certain motions. Further, there is some expressive, democratic value in having a Supreme Court that freely permits amicus filings.[9] The Court makes national policy, so it is good for it to give affected persons (i.e., all of us) a say in its decisions.

B. GREATER PARTY CONTROL

Another approach would be to give the parties greater control over amicus filings. As envisioned by Michael Solimine in a recent essay, such a system would allow each side in a case to parcel out a limited number of amicus slots (say, five or ten) to amici of its choice.[10] One virtue of this proposal is that it acknowledges that supposedly disinterested "friends of the court" are often just friends of a party. At the same time, that is also a weakness of this proposal: it gives the parties *too much* control over which groups can officially present their views to the Court. A Supreme Court decision not only resolves a particular dispute but also, and probably more importantly, establishes national law. The public interest may be served by a resolution that *neither* party favors (like deciding the case on statutory rather than constitutional grounds or dismissing for lack of jurisdiction). What's more, the parties' attorneys might not even want this formal gatekeeping power and the headaches that come with it.[11] To be sure, the party-control model could have a safety-value through which a potential filer could seek the Court's permission after being rebuffed by the parties. But, as we have said, the Court probably does not want, and arguably should not have, this gatekeeping function.

C. EXPERT COORDINATION

The proposals above rely on some formal barrier to filing, but another approach relies on informal coordination of amicus filings. A recent article by Allison Orr Larsen and Neal Devins tells the story of how the small, highly sophisticated club of Supreme Court specialists facilitates the

8. *See* On Lee v. United States, 343 U.S. 924 (1952) (opinion of Frankfurter, J.).

9. *See* Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 346–47 (2008). There are other ways of limiting amicus briefs that are also unappealing from the point of view of public participation, like imposing a sizable filing fee to encourage potential amici to appreciate some of the costs of their actions.

10. Michael E. Solimine, *Retooling the Amicus Machine*, 102 VA. L. REV. ONLINE 151, 165 (2016).

11. *See* Larsen & Devins, *supra* note 3, at 1913 n.69 (noting that the Supreme Court litigators they interviewed overwhelmingly opposed limitations on briefs and did not want to serve as gatekeepers).

coordination of effective amicus teams.[12] A party represented by one of these specialists—as parties with business before the Court increasingly often are[13]—lines up a team of amici (also represented by members of this club) and assigns each of them a topic or angle on the case. The attorney coordinating the amicus effort also tries to *prevent* or at least refocus some amicus filings that would be duplicative or unhelpful.[14] This coordination among repeat-player experts should lead to the filing of a collection of high-quality, non-repetitive amicus briefs.

Informal gatekeeping and coordination among members of the Supreme Court bar does provide several benefits, but it is not a complete solution to the problem of information overload. We already have a pretty well-oiled "amicus machine," but we also still have cases with a hundred amicus briefs. Supreme Court experts are not a cartel that can prevent organizations and attorneys from filing briefs, and ethical rules limit the parties' ability to control amicus arguments. Nor can the experts themselves easily turn away a client (especially a client that generates lots of fees in other cases) who wants to file an amicus brief that does not fit with the approved strategy or who wishes to file a "me too" brief that merely serves to signal the client's position to its constituencies.[15]

II. AN INFORMATIONAL ALTERNATIVE: SCORING AMICUS BRIEFS ACCORDING TO THEIR DISTINCTIVE CONTENT

What the proposals above, and many other potential solutions, have in common is the use of some gatekeeper to directly or indirectly limit amicus filings. An alternative to limiting filings is to help readers prioritize them so as to allocate scarce resources to the most valuable briefs. The prioritization approach requires some method—other than reading all of the briefs—to quickly assess a brief's likely contributions. This is already done today through the use of proxies such as the identity of the amicus or its attorney.[16] We propose instead to rate a brief's value according to its substance as measured through automated content analysis. More specifically, we suggest using software to identify the amicus briefs with the greatest proportion of non-duplicative material. The resulting rankings can then be made available online for any interested person—inside or outside the

12. *Id.* at 1903–04, 1915–26.

13. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1491–1502 (2008).

14. Larsen & Devins, *supra* note 3, at 1925.

15. *See* Bell & Violante, *supra* note 1 ("In some cases, there's little even a highly experienced attorney can do to limit the number of amicus briefs. Anyone can file one . . . creating a tidal wave of briefs that is nearly impossible to stop.").

16. *See* Lynch, *supra* note 4, at 46–47, 54–56.

Supreme Court—to consider. This information-based approach to the overload problem preserves openness while providing another way to separate the wheat from the growing pile of chaff. We do not imagine that busy law clerks will stop using other heuristics and proxies, such as the assumption that a prominent Supreme Court litigator is likely to file a worthwhile amicus brief. But our distinctiveness scores can supplement those reputational proxies with information that is systematic and evenhanded.

The basic method for identifying distinctive briefs is simple enough. We compare an amicus brief against a corpus composed of all other amicus briefs filed in the same case. Our comparison tool is the plagiarism-detection program WCopyfind, which is freely available and fairly easy to use.[17] The software generates a percentage reflecting how much of a subject text overlaps with a comparison text. Plagiarism-detection software, and the WCopyfind program in particular, has been used before in empirical legal studies, most often to detect overlap between Supreme Court opinions and sources like briefs and lower-court opinions.[18] Our focus here is not the sources of the language in the Court's opinions (though that is an important topic too) but rather studying amicus briefs themselves and ranking them according to one important dimension of their value.

We do not believe that briefs share language primarily because one brief actually copies from another, nor that actual copying would always be improper in this context. That is, we are not dealing with "plagiarism" in the academic-misconduct sense. The most common explanation for overlap is that briefs are repeating the same key passages from leading precedents, dredging up the same bits of legislative debate, using the stock arguments that have developed while a circuit split percolated, and the like. There is nothing unusual about that kind of unoriginality, but a brief that is unoriginal in that way is, other things being equal, less likely to contribute information not already before the court.

We should note a few limitations of our approach. Although plagiarism-detection software is recognized as a reliable enough tool for finding similarities between legal documents, the software cannot perfectly measure the kind of original content we care about the most. The software

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17. *See* THE PLAGIARISM RESOURCE SITE: WCOPYFIND, https://perma.cc/M8ES-XQXH.

18. *See, e.g.*, RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE SUPREME COURT 98 (2012); Paul M. Collins, Jr. et al., *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y REV. 917, 919, 928 (2015); Paul M. Collins, Jr. et al., *Me Too? An Investigation of Repetition in U.S. Supreme Court Amicus Curiae Briefs*, 97 JUDICATURE 228, 230–32 (2014); Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POL. RES. Q. 468, 471–77 (2008); Adam Feldman, *All Copying Is Not Created Equal: Borrowed Language in Supreme Court Opinions*, 17 J. APP. PRAC. & PROCESS 21 (2016).

captures similarity of language, which is not the same as detecting duplicative ideas and arguments. Subtle changes in wording can generate very different meanings, and wholly different words can express virtually the same meaning.[19]

A further limitation is that non-duplication is an imperfect proxy for a brief's value. A measure of non-duplication will incorrectly highlight some low-value briefs and fail to identify some high-value briefs. As an illustration of the first problem, consider that an amicus brief consisting of Lewis Carroll's "Jabberwocky" would score as extremely distinctive when compared to other briefs in a case. The problem with a brief full of nonsense is that it is *too original*, in the wrong kind of way. Norms of professional conduct, fortunately, usually suffice to prevent the filing of briefs that are highly distinctive by virtue of being wholly divorced from the arguably relevant law and facts. And even when they are filed, the reader can recognize them easily, often from the table of contents or odd formatting alone. In practice, we expect manual intervention on the part of the clerks by separating out such briefs through a combination of reviewing the proxies on the briefs and taking a quick glance at the distinctive, although non-useful, substantive material within the briefs.

More significantly, some briefs are valuable even if they are not distinctive. One way in which a Supreme Court expert can excel is by fashioning the same legal materials that have been rehearsed in a dozen prior circuit decisions—the conflicting Supreme Court precedents, the key sections of a statute—into an argument that hits the Justices just right. An amicus brief written by one of the bar's famous names may be worth reading even if it is not very distinctive by our measure. Similarly, a brief filed by the Solicitor General will always command attention. The office's reputation for evenhandedness and rigor makes its pronouncements particularly trustworthy; and to the extent that the Solicitor General's brief sets forth the government's official position on matters of statutory and regulatory law, that position may even possess legally operative force.[20]

Further, sometimes a brief's value does not depend on its content at all but rather derives simply from the fact that a specific entity took a particular position. The filing of a brief can function as a signal of interest-group

19. Note that a tool's success in detecting the right kind of duplication depends on the state of technology. WCopyfind has the virtues of being simple and accessible, but there are more sophisticated techniques for measuring a text's contribution to informational efficiency; in the future, we can expect methods that are even better.

20. *See* Auer v. Robbins, 519 U.S. 452, 461–63 (1997) (deferring to an agency interpretation that was presented to the Court in an amicus brief); *cf.* BLACK & OWENS, *supra* note 18, at 97–112 (finding that the Solicitor General's merits briefs do not need to be clearly written to be influential).

alignments or elite opinions.[21] If the Chamber of Commerce, forty state attorneys general, and the American Bar Association all support an outcome, the mere fact of their support, especially their common support, is relevant information even if the content of their briefs is duplicative. Of course, if a brief's value comes from its mere existence, one does not have to read beyond its front cover to perceive that dimension of value. A measurement of the brief's distinctive content, which our method provides, would still help one decide which briefs to read *for what they say*.[22]

In short, distinctive content is one important aspect of a brief's value and plagiarism-detection software is one relatively tractable way to measure distinctive content. That is enough to make our method valuable to the busy clerk, reporter, or researcher who wants to identify the most valuable amicus briefs in a case featuring scores of them.

III. RESULTS FROM RECENT HIGH-PROFILE CASES

Using the strategy described above, we constructed a dataset of all amicus briefs from nine high-profile cases, more specifically the three cases with the most amicus filings from the 2014, 2015, and 2016 Supreme Court terms. These cases were:

> *Obergefell v. Hodges*,[23] *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*,[24] and *King v. Burwell*[25] from 2014;
>
> *Whole Woman's Health* v. *Hellerstedt*,[26] *Fisher v. University of Texas at Austin*,[27] and *Zubik v. Burwell*[28] from 2015; and

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21. *See* Lee Epstein & Jack Knight, *Mapping out the Strategic Terrain: The Informational Role of* Amici Curiae, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 215, 225–28 (Cornell W. Clayton & Howard Gillman eds., The University of Chicago Press 1997); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 782–87 (2000).

22. One more methodological note: We are concerned with briefs filed at the merits stage, not the certiorari stage, and so our comparison corpus includes only merits-stage briefs. At the certiorari stage, the overload problem is less acute (though it is growing). Plus, the signaling value of an amicus brief (i.e., the demonstration that interest groups care about the issue) is especially important at that stage, with content being relatively less important than it is at the merits stage.

23. 135 S. Ct. 2584 (2015).

24. 135 S. Ct. 2507 (2015).

25. 135 S. Ct. 2480 (2015).

26. 136 S. Ct. 2292 (2016).

27. 136 S. Ct. 2198 (2016).

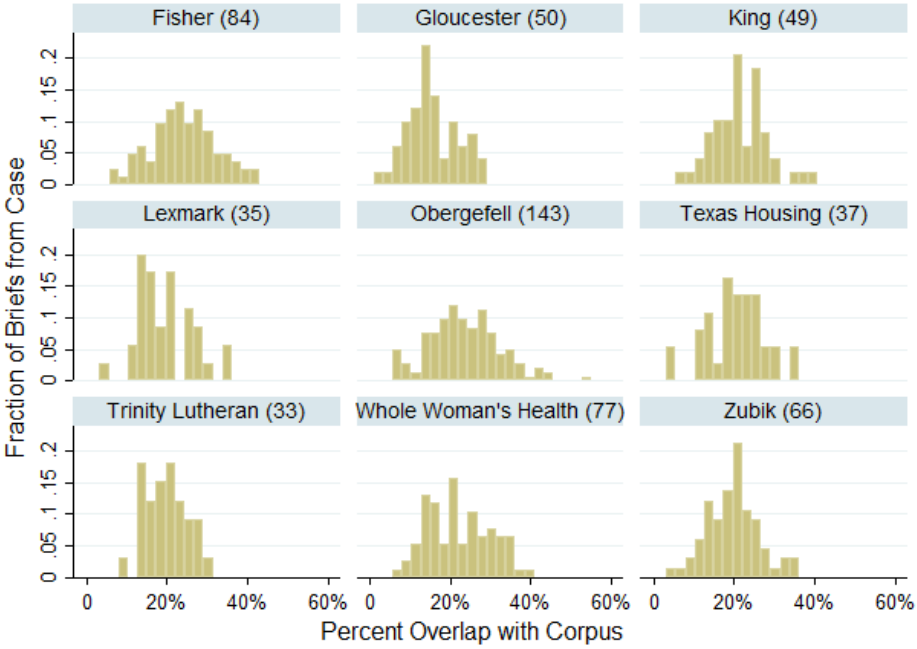
28. 136 S. Ct. 1557 (2016).

Trinity Lutheran Church v. Comer,[29] *Impression Products v. Lexmark International*,[30] and the remanded case of *Gloucester County School Board* v. *G.G.*[31] from 2016.

The total sample size from these cases is 574 amicus briefs.

We measured the amount of language each amicus brief in these cases shares with the corpus composed of all other amicus briefs from the same case.[32] To provide an overview of these data, we created histograms for each case showing the fraction of briefs on the vertical axis and the percentage of overlapping language that this fraction of briefs share with their respective corpora on the horizontal axis.

Figure 1. Histogram of Briefs' Overlap by Case (Number of Briefs in Each Case in Parentheses)



29. 137 S. Ct. 2012 (2017).
30. 137 S. Ct. 1523 (2017).
31. 137 S. Ct. 1239 (2017).
32. The WCopyfind software has various sensitivity settings that make it more or less likely to detect common language across two texts; here, we use the settings that previous researchers have generally used. Most importantly, we set the program to locate phrases minimally six words in length that were at least 80% identical. All of the briefs were obtained from Lexis in a plain-text format that omits the table of authorities, so that section does not play a role in the comparisons. Including the table of authorities would probably increase all of the overlap percentages slightly.

These histograms depict the similarities and differences in the dispersion of overlap between briefs in the different cases. Although there are differences between cases, there is also a strong similarity between them, as most of the briefs in each case fit into the 5%-40% overlap region.

To obtain a better sense of the differences between overlap values within each case, Figure 2 presents the mean overlap values along with 95% confidence intervals for each case. In these graphs the means are the red diamonds while the lines extending above and below the diamonds give the 95% confidence-interval ranges.

Figure 2. Mean Overlap Values with 95% Confidence Intervals by Case

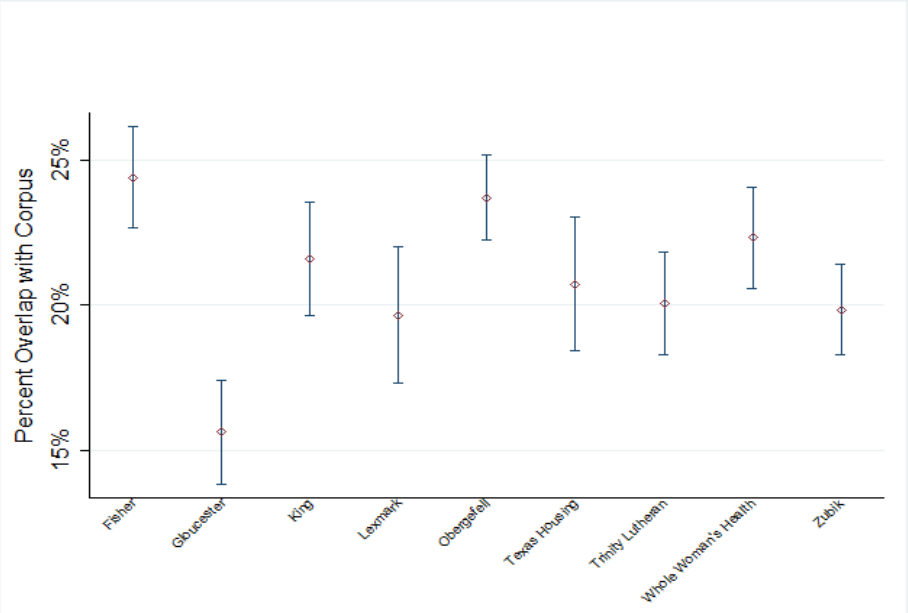


Figure 2 enhances our understanding of the distinctions between the briefs in the various cases. The means in the first two cases plotted, *Fisher* and *Gloucester*, are the farthest apart of any two cases in the dataset. This Figure also confirms a conclusion that could be deduced from Figure 1—that the mean overlap values of most of the briefs in these cases hovers around the 20% level. This 20% level coincides with the top of most of the bells in the histograms in Figure 1.

With these ranges in mind, the overlap values of the briefs in each case have greater meaning. The following table reports the five (or more, in case of ties) most and least distinctive briefs from each of the nine cases along with the percentage of each brief that overlaps with its respective corpus.[33]

33. Attorney David Boyle filed amicus briefs on his own behalf in six of the nine cases (more than any other amicus filer in this set of cases), and his briefs are among the most distinctive briefs in four of the cases. We removed these briefs from the results after reviewing them. Most of the briefs are unconventional in style and sources. As stated earlier, unique content is neither necessary nor sufficient in determining a brief's value to the Court. His briefs are likely known at the Court, so we feel comfortable excluding them

The absolute percentages of overlap are, of course, sensitive to changes in the software's settings, but the relative rankings provide meaningful measures of variations in briefs' distinctive content.

Table 1. Most and Least Distinctive Amicus Briefs in Each Case

(P) = in support of petitioner / (R) = in support of respondent / (N) = in support of neither

Most Distinctive Briefs		Least Distinctive Briefs	
Overlap %	**Filing Organization**	**Filing Organization**	**Overlap %**
Gloucester County School Board v. G.G.			
5%	Public Safety Experts (P)	Human Rights Watch (R)	28%
7%	Dean Ronald A. Cass et al. (P)	Foundation for Moral Law (P)	28%
7%	Dr. Ben Barres et al. (R)	Anti-Defamation League (R)	26%
8%	Wisconsin Institute for Law & Liberty (P)	Concerned Women for America (P)	26%
9%	American Bar Ass'n (R)	American Academy of Pediatrics (R)	25%
9%	NAACP Legal Defense Fund (R)	Scholars Who Study the Transgender Population (R)	25%
9%	William J. Bennett (P)		
Impression Products v. Lexmark International			
5%	Medtronic PLC and Zimmer Biomet Holdings (R)	Huawei Technologies (P)	34%
11%	Imaging Supplies Coalition (R)	Medical Device Manufacturers Association (R)	34%
12%	Plantronics, Inc. (R)	Mitchell Hamline School of Law IP Institute (P)	31%
13%	Boston Patent Law Association (R)	HTC Corp. (P)	28%
13%	Pharmaceutical Research and Manufacturers of America (R)	United States (P)	28%
13%	Interdigital, Inc. (R)		
13%	Licensing Executives Society (U.S.A. and Canada), Inc. (N)		
13%	Law Professors Adam Mossoff and Gregory Dolin (R)		

from the tables here, which are meant to provide information not otherwise readily available to a reader. Also dropped from the results was a brief for which the Court denied a motion for leave to file.

Trinity Lutheran Church v. Comer			
10%	Lambda Legal (R)	Members of Congress (P)	24%
13%	American Civil Liberties Union (R)	World Vision (P)	24%
14%	Belmont Abbey College (P)	Colorado (P)	23%
14%	Nat'l Education Ass'n (R)	Beckett Fund for Religious Liberty (P)	22%
15%	The Bronx Household of Faith (P)	U.S. Conference of Catholic Bishops (P)	22%
15%	Institute for Justice (P)		
15%	Justice and Freedom Fund (P)		
Fisher v. University of Texas at Austin			
6%	Professor W. Burlette Carter (R)	American Psychological Ass'n (R)	42%
8%	American Center for Law and Justice (P)	Richard Kahlenberg (N)	41%
9%	Jonathan Zell (P)	California (R)	39%
11%	Current and Former Student Body Presidents of University of Texas (R)	Family of Heman Sweatt (R)	39%
12%	Lt. Gen. Julius W. Becton, Jr. (R)	Coalition of Bar Ass'ns of Color (R)	38%
12%	Richard Sander (N)		
12%	Experimental Psychologists (R)		
Whole Woman's Health v. Hellerstedt			
8%	Illinois Right to Life (R)	163 Members of Congress (P)	40%
9%	Right to Life Advocates, Inc. (R)	Social Science Researchers (P)	37%
12%	Theologians and Ethicists (P)	American College of Obstetricians and Gynecologists (P)	36%
12%	Physicians for Reproductive Health (P)	450 Bicameral and Bipartisan State Legislators (R)	34%
12%	Hon. Wendy Davis (P)	Former Abortion Providers (R)	34%
12%	National Center for Lesbian Rights (P)	Judson Memorial Church (P)	34%
		Yale Information Society Project (P)	34%
Zubik v. Burwell			
8%	Military Historians (R)	Black Women's Health Imperative (R)	35%
9%	Baptist Joint Committee for Religious Liberty (R)	Guttmacher Institute (R)	34%
9%	50 Catholic Theologians and Ethicists (P)	Texas et al. (P)	32%
11%	Compassion & Choices (R)	Liberty Counsel (P)	32%
11%	National Jewish Commission on Law & Public Affairs (COLPA) (P)	Ass'n of American Physicians & Surgeons (P)	3%

Obergefell v. Hodges			
6%	Heather Barwick and Katy Faust (R)	American Family Ass'n—Michigan (R)	55%
6%	Jon Simmons (R)	CatholicVote.org Education Fund (R)	45%
8%	PFLAG (P)	Michigan Catholic Conference (R)	44%
8%	Mattachine Society (P)	167 Members of the House of Representatives (P)	43%
8%	Professor W. Burlette Carter (N)	Virginia (P)	42%
8%	American College of Pediatricians (R)	Family Equality Council (P)	42%
Texas Department Housing & Community Affairs v. Inclusive Communities Project			
5%	Students from the New York University School of Law (R)	Housing Equality Center of Pennsylvania (R)	35%
5%	Housing Scholars (R)	National Community Land Trust (R)	34%
12%	National Fair Housing Alliance (R)	Howard University School of Law Housing Clinic (R)	31%
12%	Cities of San Francisco et al. (R)	Texas Apartment Ass'n (P)	31%
12%	Sociologists, Social Psychologists, and Legal Scholars (R)	American Civil Rights Union (P)	27%
		Lawyers' Committee for Civil Rights Under Law (R)	27%
King v. Burwell			
7%	Joseph R. Evanns (P)	Asian & Pacific Islander American Health Forum (R)	40%
9%	Landmark Legal Foundation (P)	Virginia et al. (R)	38%
11%	Jewish Alliance for Law & Social Action (JALSA) (R)	National Women's Law Center (R)	34%
13%	Consumers' Research (P)	American Center for Law & Justice (P)	31%
14%	Missouri Liberty Project (P)	American Thoracic Society (R)	30%
14%	Pacific Research Institute (P)		

This method for locating the most and least distinctive amicus briefs in each case gives us a sense of the types of amicus briefs that fall into each category. Although this sample only covers a small number of cases, many familiar amici who file multiple briefs every year do not file the most distinctive briefs. Notably, the United States, which is probably the most important amicus filer of all, filed five amicus briefs with a mean overlap of 26%, a rate that indicates less distinctive contributions than the average filer. That is not particularly surprising given that the Solicitor General's briefs tend to be conventional and doctrinal; as stated above, their value does not derive from being highly original but instead from being

authoritative. By contrast, the most uniquely informative briefs in these cases are often from scholars and lesser known groups. This suggests the possibility that such filers have more distinctive interests than large groups with broad memberships and conventional policy goals.

High-profile cases often attract amicus briefs of quite different kinds—conventional doctrinal briefs, of course, but also briefs that present legal history, social-scientific research, policy consequences, and more. Therefore, for some of the biggest cases one does not want to identify just the most valuable briefs in general but the most valuable briefs addressing a particular topic or presenting a certain kind of information. To illustrate a refinement on the basic approach above, we ran all of the amicus briefs from *Obergefell*, the case with the most amicus briefs of the nine cases in our dataset, through topic-modeling software to create topic clusters.[34] This software locates salient language in each brief and groups the briefs in categories or sets of topics that arise from a set of briefs. The user must specify the number of topic groups and number of topics within each group, as well as select a title for each topic. We created seven topic clusters from the briefs in *Obergefell*. We then created a separate corpus for each topic cluster to seek out the briefs with the most unique information within each cluster. The composition of the clusters can be found in Table 2.

Table 2. *Obergefell* Amicus Brief Topics

Clusters	**Topics in cluster**
Studies	sexual, sex, orientation, health, research, gay, men, study, studies, women
Federal Law	law, court, amendment, rights, laws, fourteenth, protection, loving, equal, clause
Religion	religious, marriage, sex, civil, government, rights, liberty, church, religion, equality
State Law	sex, state, couples, marriage, laws, states, court, law, discrimination, marriages
State Politics	marriage, court, states, state, petitioners, people, man, woman, political, law
Family	children, marriage, sex, parents, family, child, couples, parent, biological, social
Sexual Orientation	gay, couples, married, LGBT, lesbian, benefits, people, sex, health, equality

Table 3 shows the seven most distinctive briefs *within* each cluster. It should be no surprise that the percentages of overlapping language are lower here since the comparison corpora for this part of the analysis consist of only the briefs in the same cluster.

34. More specifically, we used MALLETT, https://perma.cc/QG2B-BA8Z.

Some amici fit within the cluster one would expect. The briefs filed by the American Psychological Association and the American Public Health Association both rely significantly on scientific research, and so, unsurprisingly, they land in the Studies cluster. But in other instances, the cluster assignment provides information about content that is not obvious from the nature of the filing entity. For example, the brief filed by the AFL-CIO and other labor organizations falls into the Sexual Orientation cluster because the brief focuses on the practical difficulties faced by the LGBT community in accessing employer health coverage, Social Security benefits, and other benefits that were traditionally limited to opposite-sex spouses. These results convey the utility of topic modeling's reliance on the language within each brief, rather than the filing party's identify, to organize the clusters.

Table 3. Most Distinctive Amicus Briefs in *Obergefell* Topic Clusters

Percent Overlap	Brief	Cluster
1%	Heather Barwick and Katy Faust	Family
3%	100 Scholars of Marriage	Family
4%	Leaders of the 2012 Republican National Convention Committee	Family
5%	The Donaldson Adoption Institute	Family
6%	Organizations and Scholars of Gender-Diverse Parenting	Family
7%	Scholars of the Welfare of Women, Children, and Underprivileged Populations	Family
10%	Organizations that Promote Biological Parenting	Family
2%	Professor W. Burlette Carter	Federal Law
4%	Mike Huckabee Policy Solutions	Federal Law
5%	South Carolina	Federal Law
7%	NAACP Legal Defense Fund	Federal Law
7%	Virginia	Federal Law
8%	Cato Institute	Federal Law
10%	Constitutional Accountability Center	Federal Law
4%	American Academy of Matrimonial Lawyers	Religion
4%	Religious Organizations, Public Speakers	Religion
6%	54 International and Comparative Law Experts from 27 Countries	Religion
6%	California Council of Churches	Religion
9%	The General Conference of Seventh-Day Adventists	Religion
9%	President of the House of Deputies of the Episcopal Church	Religion
9%	Douglas Laycock	Religion
4%	Elected Officials and Former Officeholders of Michigan	Sexual Orientation

6%	ProtectMarriage.com – Yes on 8	Sexual Orientation
7%	Same-Sex Attracted Men and their Wives	Sexual Orientation
9%	Marriage Equality USA	Sexual Orientation
10%	379 Employers and Organizations Representing Employers	Sexual Orientation
11%	American Federation of Labor and Congress of Industrial Organizations	Sexual Orientation
11%	Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders	Sexual Orientation
6%	The Committee for Justice	State Politics
8%	Frank Schubert	State Politics
9%	Lighted Candle Society	State Politics
10%	CatholicVote.org Education Fund	State Politics
10%	Scholars of History and Related Disciplines	State Politics
11%	57 Members of U.S. Congress	State Politics
11%	Louisiana	State Politics
8%	Conflict of Law Scholars	State Law
8%	LGBT Student Organizations at Undergraduate, Graduate, and Professional Schools	State Law
9%	Family Law Scholars	State Law
9%	Freedom to Marry	State Law
9%	National Women's Law Center	State Law
9%	United States	State Law
13%	167 Members of the U.S. House of Representatives and 44 U.S. Senators	State Law
2%	The Mattachine Society of Washington D.C.	Studies
4%	Judith Reisman	Studies
5%	GLMA	Studies
6%	Prof. Daniel Robinson	Studies
6%	Dr. Paul McHugh	Studies
8%	American Psychological Association	Studies
8%	American Public Health Association	Studies

CONCLUSION

Plagiarism-detection software can be used to identify the amicus briefs with the most and least distinctive language. Distinctiveness so measured is not the only measure of an amicus brief's value, of course, but it is one important aspect of value along with other factors, including non-content-related attributes such as the institutional prestige or political power of the filing entity.

Our results provide suggestive findings regarding what kinds of briefs tend to be most distinctive, but further investigation could yield additional

insights into what kinds of filing entities and attorneys are most likely to file distinctive amicus briefs. In addition, one could test which kinds of cases are most likely to attract distinctive briefs. One could hypothesize that cases with multiple questions presented and cases that involve "new" legal controversies rather than well-rehearsed ones are likely to generate more varied filings. A hint of such a finding might be suggested by the way *Gloucester County School Board v. G.G.* stands out in Figure 2; the case involves the relatively new legal issue of transgender rights, and the Court's grant of certiorari encompassed two disparate issues.[35]

The distinctiveness measures illustrated here have a variety of practical applications for the legal community. For one, they can be used on an ongoing basis to provide a "reader's guide" for law clerks, law students, the press, and anyone else who wants help in selecting which of the fifty or more amicus briefs filed in the Supreme Court's biggest cases are most worth reading. If distinctiveness scores become widely known at the Court and among Court watchers, there is at least the possibility that reputation-conscious attorneys writing amicus briefs would, over time, change how they write briefs or work harder to coordinate with other amici to reduce unnecessary filings.

This project uses software to measure the unique content of amicus briefs, but automated techniques have also been used to measure other content-based features of legal filings, such as a document's clarity of expression.[36] One could combine multiple techniques into a composite score that aims to capture a broader measure of value. To be sure, there is no substitute for actually reading a brief and bringing one's sensitive professional judgment to bear. But in the absence of sufficient time to bring that judgment fully to bear on every document, automated analysis is a helpful sorting tool, and it will probably become more helpful as technology improves.

35. 137 S. Ct. 369 (2016) (granting certiorari on a question of administrative law and the substantive question of transgender rights).

36. *See, e.g.*, Brady Coleman & Quy Phung, *The Language of Supreme Court Briefs: A Large-Scale Quantitative Investigation*, 11 J. APP. PRAC. & PROCESS 75, 83–85 (2010); Lance N. Long & William F. Christensen, *Does the Readability of Your Brief Affect Your Chance of Winning an Appeal? An Analysis of Readability in Appellate Briefs and its Correlation with Success on Appeal*, 12 J. APP. PRAC. & PROCESS 145 (2011); Shaun B. Spencer & Adam Feldman, *The Empirical Relationship Between Brief Quality and Summary Judgment Success*, 22 LEGAL WRITING (forthcoming 2018) (manuscript at 15–17).