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Amici Curiae in the Federal Courts of Appeals: How Friendly Are They

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AMICI CURIAE IN THE FEDERAL COURTS OF APPEALS: HOW FRIENDLY ARE THEY?

The United States Courts of Appeals should consider certain changes to current rules and practices in order to limit undesirable amicus curiae participation. Although amicus briefs do not pose an overwhelming burden on these courts, these briefs are of limited value in a majority of federal appellate cases and the potential for abusive overuse of the amicus device could have damaging effects. Increased publication of reasoned decisions denying motions for leave to file an amicus brief will deter improper filings. Additionally, the funding and preparation of amicus briefs by parties to a case should be prohibited in federal courts of appeals.[1]

The role of an amicus curiae was accepted in ancient Roman times, under English law, and is now also accepted in the United States Supreme Court.[2] Times have changed, however, in the usages of the amicus curiae device, the judicial workload, and the amount of information available. Considering these changes along with the unique context and purpose of the federal appellate courts, it is necessary to rethink the current amicus practice. This process has begun to take place in the courts. A line of Seventh Circuit opinions rejecting proposed amicus submissions have taken the position that participation should be limited. These decisions have attempted to clarify when an amicus brief is appropriate.[3] Proponents of broader amicus practice have responded.[4]

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[1] This Note specifically addresses amicus curiae participation in the federal courts of appeals. It does not address or challenge Supreme Court policy or practice regarding amici. The Note intends to point out material differences in characteristics between these courts which justify a different approach in the courts of appeals.

[2] Nancy Bage Sorenson, Comment, *The Ethical Implications of Amicus Briefs: A Proposal for Reforming Rule 11 of the Texas Rules of Appellate Procedure*, 30 ST. MARY'S L.J. 1219, 1224-25 (1999) (discussing amicus practice in the Texas appellate courts and proposing changes to rules).

[3] *See* Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542 (7th Cir. 2003); Nat'l Org. for

The first section of this Note provides background information relevant to the issue. It begins by summarizing current law regarding amicus submissions, namely Federal Rule of Appellate Procedure 29 and recent federal appeals court cases that have taken up this issue. Next is a discussion of current amicus practice in the federal courts of appeals with some history and generalities about the amicus device to provide context. The section ends with a brief discussion of amicus participation in the United States Supreme Court for comparative purposes.

The second section analyzes whether or not amicus participation in the federal courts of appeals should be restricted. This section of the Note begins with a discussion of the burden that these briefs place on the courts of appeals. Some empirical research attempts to measure and contextualize this burden. After this discussion, this Note considers the value that amicus participation offers to the courts of appeals. The unique characteristics of the federal appellate system are juxtaposed with amicus usage and purposes to determine whether broad amicus participation in the courts of appeals is beneficial to the system. Lastly, this section discusses some of the problems that broad amicus participation causes in the courts of appeals, focusing on the rights of parties, possibilities of inequitable results, and increased litigation costs.

The third and final section of this Note deals with possible methods of limiting amicus participation or otherwise alleviating problems identified in the previous section. It begins by considering the factored approach applied by the Seventh Circuit and identifying problems that may be associated with such an approach. Next, it proposes two other possible solutions. The first deals with financing, preparation, and solicitation of amici by parties to a case. The second deals with the publication of opinions denying amici leave to file.

I. BACKGROUND: CURRENT LAW AND AMICUS PRACTICE

Federal appeals court jurisprudence discussing the parameters of amicus participation is fairly sparse, but there are some recent decisions on the subject that express differing viewpoints. This section discusses these cases along with Federal Rule of Appellate Procedure

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Women v. Scheidler, 223 F.3d 615 (7th Cir. 2000); Ryan v. CFTC, 125 F.3d 1062 (7th Cir. 1997).

[4] *See* Neonatology Assocs. v. Commissioner, 293 F.3d 128 (3d Cir. 2002), *aff'd*, 299 F.3d 128 (3d Cir. 2002); *see also* Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. APP. PRAC. & PROCESS 279 (1999) (arguing against a restrictive approach to amicus participation).

29 and frames the issue. It also provides background on amicus practice, with a focus on the federal courts of appeals. Supreme Court practice is also discussed briefly.

A. *Federal Rule of Appellate Procedure 29 and Relevant Case Law*

Amicus participation in the federal courts of appeals is a privilege within "the sound discretion of the courts."[5] Although this standard does not provide clear guidelines, it is dependent "upon a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice."[6] More specifically, Federal Rule of Appellate Procedure 29, as amended in 1998, governs amicus curiae participation. The Seventh and Third Circuits have issued opinions indicating their approach to amicus participation in light of the 1998 amendments to Rule 29. Most circuits, however, are silent on the issue.

Under Rule 29(a), the United States, its officers and agencies, and other state entities may file an amicus brief without party consent or leave of the court.[7] Private parties who cannot file an amicus brief as of right have two options. First, a potential amicus can file its brief if all parties have consented to the filing.[8] If the parties do not consent, the amicus may file a brief only by leave of the court.[9] In order to get leave of the court, an amicus must file a motion for leave to file, accompanied by the proposed brief, and stating "(1) [its] interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case."[10] From this section, the inferred requirements for amicus participation are an interest, desirability, and relevance. The remainder of Rule 29 deals with the form of the brief and other procedural requirements.[11] The focus of this Note will be on motions to file an amicus curiae brief requiring leave of the court and when leave is proper.[12]

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[5] United States v. Michigan, 940 F.2d 143, 165 (6th Cir. 1994) (quoting Northern Sec. Co. v. United States, 191 U.S. 555 (1903)).

[6] *Id.*

[7] FED. R. APP. P. 29(a) ("The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court.").

[8] FED. R. APP. P. 29(a).

[9] *Id.*

[10] FED. R. APP. P. 29(b)(1)-(2).

[11] FED. R. APP. P. 29(c)-(g).

[12] As already discussed, under Rule 29 an amicus will only need leave of the court if it is a private individual or organization and has not obtained the consent of all parties to the case. Because statistics regarding amicus participation are not readily available, it is not clear how often amici gain access through leave of the court. This information is important because if motions for leave to file an amicus brief under Rule 29(b) are very rare, the debate about how

Although Rule 29 sets out some basic guidelines for when the court should grant leave to file an amicus brief, it is fairly open-ended.[13] The general practice in the federal courts of appeals is to grant leave to file an amicus brief in most situations.[14] However, this open-door policy has been challenged of late. Interpretation of Rule 29 and the question of when an appeals court should allow amicus participation has become an issue in some recent cases.

In *Voices for Choices v. Illinois Bell Telephone Co.*, a Seventh Circuit decision, Judge Posner denied a motion for leave to file an amicus brief. He noted that the decision "to allow the filing of an amicus curiae brief is a matter of 'judicial grace.'"[15] Further, he noted that the court would deny permission to file amicus briefs that did not add anything to a party's brief.[16] Judge Posner cited several reasons for limiting amicus participation:

> The reasons for the policy are several: judges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is

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restrictive or open courts should be is not very significant. Statistics would be valuable in assessing the importance of this issue. However, from some judicial opinions that raise this issue, it can be inferred that a significant number of amici do attempt to gain access to a case by filing a motion for leave to file. The line of Seventh Circuit opinions taking a restrictive approach towards amicus participation cite a need to reduce heavy workloads as a rationale. *See* Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 544 (7th Cir. 2003); Nat'l Org. for Women v. Scheidler, 223 F.3d 615, 616 (7th Cir. 2000); Ryan v. CFTC, 125 F.3d 1062, 1064 (7th Cir. 1997). It would be an illogical assertion that reducing amicus participation could aid a workload problem if the court only had the ability to deny participation in a negligible number of cases. Indeed, the fact that the court has taken the time to explain its rationale and approach on these occasions suggests that it is an important issue at least to the Seventh Circuit. Additionally, by opposing a restrictive approach, the Third Circuit has indicated that is also believes this is a significant issue. *See* Neonatology Assocs. v. Commissioner, 293 F.3d 128 (3d Cir. 2002), *aff'd*, 299 F.3d 128 (3d Cir. 2002) (explaining negative effects which would result from a restrictive approach). Arguments on both sides of this debate would be moot if amici rarely needed leave of court to participate. Finally, parties may consent when they know courts are very likely to allow participation anyway. Changes in court policy could affect consent filings as well in this manner. Therefore, even without the statistics, this Note assumes that judicial standards for leave to file an amicus brief are significant.

[13] *See, e.g.*, *Neonatology Assocs.*, 293 F.3d at 132 ("The criterion of desirability set out in Rule 29(b)(2) is open-ended . . . .").

[14] *See* MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE 181 (3d ed. 1999).

[15] *Voices for Choices*, 339 F.3d at 544 (quoting *Nat'l Org. for Women*, 223 F.3d at 616).

[16] *Id.*

> often an attempt to inject interest group politics into the federal appeals process.[17]

For the above reasons, the court announced the criteria it would apply in deciding whether to allow amicus participation. The court would look at "whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs."[18] According to this standard, amicus participation is more likely to be granted when a party to the case is inadequately represented, the potential amicus has "a direct interest in another case that may be materially affected by a decision in [the current case]," or the potential amicus has a unique perspective or specific information to assist the court.[19]

Voices for Choices was the third of a series of Seventh Circuit decisions which took a restrictive approach toward amicus participation and set out specific criteria to be applied in determining whether to grant leave to file an amicus brief.[20] Although other circuit courts have not yet explicitly applied the Seventh Circuit approach in considering a motion for leave to file an amicus brief, some district courts have cited one of the Seventh Circuit cases while deciding whether to allow amicus participation.[21]

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[17] *Id.*

[18] *Id.* at 545.

[19] *Id.*

[20] *See* Nat'l Org. for Women v. Scheidler, 223 F.3d 615, 616-17 (7th Cir. 2000) (denying motion to file an amicus brief for the same reasons and applying the same criteria as *Voices for Choices*); Ryan v. CFTC, 125 F.3d 1062, 1063-64 (7th Cir. 1997) (applying the same criteria to limit amicus participation because amicus briefs are mostly repetitive).

[21] *See, e.g.*, Cobell v. Norton, 246 F. Supp. 2d 59, 62-63 (D.D.C. 2003) (quoting *Ryan v. CFTC* extensively in order to both deny and allow participation by various amici); Georgia v. Ashcroft, 195 F. Supp. 2d 25, 33 (D.D.C. 2002) (denying ACLU motion for leave to file an amicus brief and stating "the limitations on *amicus* filings outlined by the Seventh Circuit in *National Organization for Women v. Scheidler* . . . are applicable here."); Long v. Coast Resorts, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999) (citing *Ryan v. CFTC* in an order denying a motion for leave to file an amicus brief); United States v. Boeing Co., 73 F. Supp. 2d 897, 900-01 (S.D. Ohio 1999) (citing *Ryan v. CFTC* while granting leave to participate as amicus); United Stationers v. United States, 982 F. Supp. 1279, 1288 n.7 (N.D. Ill. 1997) (citing Judge Posner's "insightful opinion on amicus curiae briefs" in *Ryan v. CFTC* in explaining the court's denial for leave to file). *But see,* United States v. Alkaabi, 223 F. Supp. 2d 583, 592 (D.N.J. 2002) (citing *Neonatology Associates v. Commissioner of Internal Revenue,* which advocates an open policy towards amicus submission, in an opinion granting leave to file an amicus brief). District courts are not governed by FED. R. APP. P. 29 and have different reasons for allowing or disallowing amici. The support of Judge Posner's position in some of these opinions may be due to the fact that amici are not as appropriate in trial courts. *See* Liberty Lincoln Mercury v. Ford Marketing Corp., 149 F.R.D. 65, 82 (D.N.J. 1993) (suggesting that "[a]t the trial level, where issues of fact as well as law predominate, the aid of *amicus curiae* may be less appropriate than at the appellate level where such participation has become standard procedure") (quoting Yip v. Pagano, 606 F. Supp. 1566, 1568 (D.N.J. 1985)). These opinions, however, are valuable in that they are expressions of judicial approval of the Seventh Circuit approach.

This approach, however, is not without opponents. A recent Third Circuit opinion granting a motion for leave to file an amicus brief states that a broad reading of Rule 29 is proper.[22] The opinion cited "a small body of judicial opinions that look with disfavor on motions for leave to file amicus briefs," including two of the Seventh Circuit opinions, and clearly implied that those were not the law of the Third Circuit.[23] The court expressed concerns that a restrictive approach towards amicus participation would deprive the court of a valuable resource because judges would not be able to gage the relevance of an amicus brief at an early stage, and would create a perception of viewpoint discrimination by selective denials of participation.[24] Additionally, the opinion expressed doubt as to whether denying amicus participation would have any effect on the court's workload.[25]

While these circuits are the only two to squarely address standards for allowing amicus participation under Rule 29, other circuit courts have skirted the edge of this issue and offered some insight into their opinions on amicus participation. In an Eleventh Circuit opinion denying attorney fees for time spent on an amicus brief, the court cited *Voices for Choices* for the proposition that amicus briefs are often solicited by party attorneys as a way to avoid page limitations on their briefs.[26] The court indicated its opinion of this practice, stating: "To pay a party for such work would encourage the practice, which we are loathe to do."[27] In a pair of cases in the District of Columbia Circuit, although an amicus brief was validly before the court, the majority and the dissent expressed opposite views about how the court may use amicus briefs.[28] These cases call into question the proper role of

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[22] Neonatology Assocs. v. Commissioner, 293 F.3d 128, 132 (3d Cir. 2002).

[23] *See id.* at 130 (citing *National Organization for Women* and *Ryan* as examples of the restrictive approach before expressing the view that an open approach is better).

[24] *Id.* at 132-33.

[25] *Id.* at 133. *See also* Munford, *supra* note 4, at 279-284 (arguing against Chief Judge Posner's restrictive approach in *Ryan* and for freely granting leave to file amicus briefs according to Rule 29). The debate over the importance of amicus briefs is not entirely novel in the Third Circuit. In 1983, the court did not allow a group of law professors to file an amicus brief. In a cursory opinion, the court reasoned that the professors had no interest in the subject matter and the parties would adequately present the issues. Am. Coll. of Obstetricians and Gynecologists v. Thornburgh, 699 F.2d 644, 645 (3d Cir. 1983). In a more elaborate dissent, Judge Higginbotham stressed the importance of amicus participation and the Supreme Court's open policy towards granting leave to amici. He believed that the proposed brief could supply the court with valuable insight. *Id.* at 645-47 (Higginbotham, J., dissenting).

[26] Glassroth v. Moore, 347 F.3d 916, 919 (11th Cir. 2003).

[27] *Id.*

[28] *See* Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001), *aff'd*, 537 U.S. 186 (2003); Eldred v. Ashcroft, 255 F.3d 849 (D.C. Cir. 2001). Although these cases do not deal directly with the standards by which a court will deny or grant leave to file an amicus brief, they do indicate differing opinions as to the importance and scope of amici. Judge Sentelle's dissents in both of these cases indicate a belief in the importance of amici in appellate adjudication, while the

amici in the federal courts of appeals and could indicate that other courts may join the debate in the future.

B. Current Amicus Practice in the Courts of Appeals

"Amicus curiae" is Latin for friend of the court. At common law, this was a true definition of the role of an amicus curiae.[29] The amicus was not a person with an adversary interest in the proceeding; rather, he served to aid the court. He was a servant of the court who "acts for no one, but simply seeks to give information to the court."[30] This traditional description of the amicus curiae, although adhered to through most of the twentieth century, has not been accurate in the United States for a long time.[31] In the early part of the twentieth century, amici did not identify themselves with a group. By the 1930's, however, organizations were commonly sponsoring the briefs.[32] By the 1960's, in his article about the changing role of the amicus brief, Samuel Krislov wrote: "The amicus is no longer a neutral, amorphous embodiment of justice, but an active participant in the interest group struggle."[33]

An amicus brief is ordinarily limited in what it can do on appeal. It will not be permitted to bring up new issues on appeal, request relief not requested by the parties, or present new evidence on appeal.[34] Generally, amicus briefs will argue the cause by pointing out relevant points of law and facts.[35] Amici "address the implications of a par-

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majority's view might suggest a view that amici have a less prominent and thus less important role.

[29] *See* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 694-99 (1962) (explaining the history and development of the amicus curiae from English common law to the 20th century United States). *See also* Note, *Amici Curiae*, 34 HARV. L. REV. 773, 773-74 (1920) ("An *amicus curiae* cannot perform any act on behalf of a party; his suggestions are simply for the purpose of supplementing the information of the court. He represents no one and obviously no one is bound by what he does.").

[30] Krislov, *supra* note 29, at 697 (quoting Campbell v. Swasey, 12 Ind. 70, 72 (1859)).

[31] Some definitions of amicus curiae still refer to the traditional role. *See, e.g.*, 4 AM. JUR. 2D *Amicus Curiae* § 1 (2003) (amicus curiae "refers to persons, whether attorneys or laypersons, who interpose in a judicial proceeding to assist the court by giving information, or otherwise, or who conduct an investigation or other proceeding on request, or by court appointment").

[32] Krislov, *supra* note 29, at 703.

[33] *Id.*

[34] 4. AM. JUR. 2D *Amicus Curiae* § 8 (2003). *See also* Eldred v. Reno, 239 F.3d 372, 379 (D.C. Cir. 2001), *aff'd*, 537 U.S. 186 (2003) (quoting Resident Council of Allen Parkway Vill. v. HUD, 980 F.2d 1043, 1049 (5th Cir. 1993) (amicus constrained "by the rule that [it] generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal")).

[35] The difference between making an argument and raising an issue is not always clear. The dialogue between the majority and dissent in *Eldred* is a good example of this. Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001).

ticular rule . . . in a broader context than the . . . party" and point out effects that will reach beyond the parties.[36] They can also make detailed arguments that page limitations would not support.[37] The court of appeals may even allow amicus participation in oral argument.[38]

Federal appellate courts have cited amicus briefs for a variety of purposes. For example, the Third Circuit cited an amicus brief extensively in recounting the facts of a case where the brief was submitted by an individual who was involved in every stage of a contract dispute at issue but was not a party.[39] On other occasions, the court has recognized the argument of an amicus pointing out another body of law,[40] pointing out third party effects of a particular judicial decision,[41] arguing for a particular statutory interpretation,[42] or providing background information relevant to the dispute.[43]

Amici are often not only interested third parties, but extensions of the parties themselves. Parties often solicit amicus support as another weapon in the adversarial struggle.[44] Rule 29 does not ignore this role since an amicus brief must be filed "no later than 7 days after the principal brief of the party being supported is filed" and must indicate which party is supported by the brief.[45] In this sense, the briefs can be repetitive extensions to a party's arguments.[46]

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[36] TIGAR & TIGAR, *supra* note 14, at 181.

[37] *Id.*

[38] *Id.*

[39] New Eng. Patriots Football Club v. Univ. of Colo., 592 F.2d 1196, 1198-1200 (3d Cir. 1979) (citing brief by football coach in a dispute over his services).

[40] *See, e.g.*, Thompson v. County of Franklin, 314 F.3d 79, 98 (2d Cir. 2002) ("Affording due deference to the St. Regis Tribe, I would decline to question the representation of its clerk, reiterated in the Tribe's amicus curiae brief, that under the law or custom of the St. Regis Tribe, Thompson remains a member notwithstanding her purported resignation letter.").

[41] *See, e.g.*, Turtle Island Restoration Networks v. Evans, 299 F.3d 1373, 1376 (Fed. Cir. 2002) (quoting an amicus brief by Georgia Shrimp Association and Boone Seafood which noted that the majority approach put domestic shrimpers at a competitive disadvantage).

[42] *See, e.g.*, In re Paschen, 296 F.3d 1203, 1209 (11th Cir. 2002) (quoting an amicus brief by the National Association of Consumer Bankruptcy Attorneys arguing legislative intent based on placement of a modifier in statutory text).

[43] *See, e.g.*, Kootenai Tribe of Idaho v. Venemai, 313 F.3d 1094, 1116 (9th Cir. 2002) (referencing an amicus brief submitted by the Montana Attorney General providing statistical data demonstrating that the challenged rule was publicly supported).

[44] *See* Glassroth v. Moore, 347 F.3d 916, 919 (11th Cir. 2003) (addressing the amount of time plaintiff's lead counsel spent requesting amici from various organizations); Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 544 (7th Cir. 2003) (claiming that parties often solicit amicus briefs in order to circumvent court-imposed limitations on the length of parties' briefs).

[45] FED. R. APP. P. 29(e).

[46] *See Voices for Choices*, 339 F.3d at 544 (expressing belief that briefs are often solicited by parties to "make an end run around court-imposed limitations on the length of parties' briefs"). *See also Glassroth*, 347 F.3d at 919 ("nor are we shocked that counsel for a party would have a hand in writing an amicus brief"); Neonatology Assocs. v. Commissioner, 293 F.3d 128, 133 (3d Cir. 2002) (acknowledging that some amicus briefs make "little if any contribution").

C. *Amicus Practice in the Supreme Court*

Amicus curiae participation is most prominent in the Supreme Court. Supreme Court Rule 37 governs participation and is similar in some respects to Federal Rule of Appellate Procedure 29.[47] In practice, the Court grants almost all motions for leave to file an amicus brief.[48] The Supreme Court's policy "is to allow essentially unlimited amicus participation."[49] There are few signs that this open-door policy will change.[50] In recent years, at least one amicus brief has been filed in 85% of Supreme Court cases.[51] Amicus briefs appear to be relied on by the Court as they are cited quite frequently.[52]

Amicus curiae briefs have played a prominent role in Supreme Court jurisprudence. There are many examples of amicus effects on significant Supreme Court decisions. The NAACP, as amicus curiae, suggested overturning *Plessy v. Ferguson* in 1941 in the case of *Henderson v. United States.*[53] In *Sweatt v. Painter*, the law school segregation case prior to *Brown v. Board of Education*, the Court relied on a brief from a group of law professors arguing that segregated legal education violated the Fourteenth Amendment.[54] And it was the ACLU in an amicus brief, and not the appellants, who suggested overruling *Wolf v. Colorado* in *Mapp v. Ohio.*[55] Amicus briefs continue to be present in large numbers in socially important Supreme Court decisions. The Court referenced the arguments of the many amici in *Roe v. Wade.*[56] Fifty-eight amicus briefs were filed in *Bakke v. Regents of the University of California.*[57] Amici also played an

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[47] SUP. CT. R. 37.

[48] Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 762 (2000).

[49] *Id.* at 764 (quoting Gregory A. Caldeira and John R. Wright, *Amici Curiae before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782 (1990)).

[50] *But see* SUP. CT. R. 37(6) (requiring disclosure of relationships between amici and parties, including whether or not a party counsel participated in writing the brief, possibly suggesting concern about misuse of amicus briefs). *See also* Jaffee v. Redmond, 518 U.S. 1, 35-36 (1996) (Scalia, J., dissenting) (noting that, in a case in which 14 amicus briefs were submitted all in support of one party, the Court allowed organized self-interest groups to override its responsibility to the pursuit of truth).

[51] Kearney & Merrill, *supra* note 48, at 744.

[52] *Id.* at 757.

[53] Krislov, *supra* note 29, at 712 (citing Brief for NAACP as Amicus Curiae, Henderson v. United States, 314 U.S. 625 (1941)).

[54] Jonathan L. Entin, Sweatt v. Painter *and Education Law*, 5 REV. LITIG. 3, 57 (1986) (explaining that the Court's analysis, in finding Texas's separate law school unconstitutional, "bore the unmistakable imprint of the Law Teachers' amicus brief").

[55] Krislov, *supra* note 29, at 712 (referencing Mapp v. Ohio, 367 U.S. 643, 675 n.5 (1961) (Harlan, J., dissenting)).

[56] *See* Roe v. Wade, 410 U.S. 113 (1973) (referring to amici arguments throughout the opinion).

[57] Gregory A. Caldeira & John R. Wright, *Amici Curiae before the Supreme Court: Who*

important role in the recent University of Michigan affirmative action cases.[58]

Several attempts have been made to empirically study the effects of amicus briefs on Supreme Court decisions.[59] For example, a recent study analyzed 6,000 Supreme Court decisions from 1946-1995 and made observations on success rates for certain common amicus filers and certain patterns of participation.[60] Another study analyzed the Court's 1982 term and concluded that amicus briefs positively influence the decision to grant certiorari.[61]

Most of the empirical analysis regarding amicus curiae participation has focused on the Supreme Court.[62] Unfortunately, support of broad amicus participation in the courts of appeals is sometimes based on what has occurred in the Supreme Court without looking closely at what is occurring specifically in the courts of appeals.[63] It is harder to compile empirical data from the thousands of appeals cases, and some information is not easily accessible. The analysis below, however, attempts to create a basic picture of what is occurring in the courts of appeals. The Supreme Court experience and the scholarship surrounding it is useful for context and comparison. But

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Participates, When, and How Much?, 52 J. POL. 782, 804 (1990).

[58] *See* Jonathan Alger & Marvin Krislov, *You've Got To Have Friends: Lessons Learned from The Role of Amici in The University of Michigan Cases*, 30 J.C. & U.L. 503 (2004) (discussing the ways that amicus briefs aided the Supreme Court's decision making process in these two cases). This article cites Judge Posner, among others, as a critic of amicus overuse. *Id.* at 503-04.

[59] *See* Kearney & Merrill, *supra* note 48, at 767-74 (summarizing some of the more influential studies of the effects of amici on Supreme Court outcomes).

[60] *Id.* at 829 (finding the Solicitor General was the most successful amicus, and the ACLU, AFL-CIO, and States had above-average success; finding also that when one or two briefs supported one side and none supported the other, the supported side might be more likely to be successful, although larger disparities did not lead to increased success rates).

[61] Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1122 (1988) (finding that "[w]ithout question . . . interested parties can have a significant and positive impact on the Court's agenda by participating as amici curiae prior to the Court's decision on certiorari or jurisdiction"). *See also* Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 768 (2001) (finding a "positive association between the granting of review and the filing of . . . an amici brief in favor of review").

[62] Some studies have focused on state level amicus curiae participation. *See, e.g.*, Sylvia H. Wabolt & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 STETSON L. REV. 269 (2003) (exploring the use and effects of amicus briefs in Florida and considering possible changes in Florida amicus practice).

[63] *See, e.g.*, Am. Coll. of Obstetricians and Gynecologists v. Thornburgh, 699 F.2d 644, 645-47 (3d Cir. 1983) (Higginbotham, J., dissenting) (citing the Supreme Court's open policy towards amicus participation and participation by law professors as amici in some influential Supreme Court decisions such as *Bakke v. Regents of the University of California*, *Sweatt v. Painter*, and *Roe v. Wade*); Munford, *supra* note 4, at 280-82 (citing Supreme Court cases as examples of useful amicus briefs in argument against Judge Posner's position).

as the analysis below indicates, there are important distinctions that justify a different approach to appellate amicus practice.

II. THE ARGUMENT FOR RESTRICTING AMICUS PARTICIPATION IN THE FEDERAL APPEALS COURTS

The arguments against broad amicus participation raise concerns about workload problems, increased litigation costs, improper use of the device by parties, and the improper use of courts of appeals to further interest group politics.[64] Proponents see a value in amicus participation that outweighs these concerns.[65] These arguments are analyzed below in three sections discussing the burden of, the value of, and the harm caused by a broad policy of allowing amicus participation.[66]

A. The Burden of Amicus Participation

In *National Organization for Women v. Scheidler,* Judge Posner argued that the court should be more restrictive towards amicus submissions because "judges have heavy caseloads... and [therefore] wish to minimize extraneous reading."[67] It is no secret that the courts of appeals have heavy workloads, but to what extent amicus briefs contribute to the problem is the question.

A detailed study of federal appellate amicus practice for 2002 sheds some light on the extent of any burden resulting from amicus submissions. The data indicates the cases in which at least one amicus appeared, whether or not the amicus was mentioned in the text of the opinion, whether or not the amicus brief was quoted, how many briefs were filed, and who the amici were.[68] During 2002, at least one

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[64] *See* Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 544 (7th Cir. 2003).

[65] *See* Neonatology Assocs. v. Commissioner, 293 F.3d 128, 130-32 (3d Cir. 2002) (discussing reasons for a broad reading of Rule 29).

[66] The Supreme Court has already considered much of this rationale and rejected it as grounds for restricting amicus participation. The 1949 amendment to the Supreme Court rule governing amicus participation had the effect of cutting participation by more than half by 1951. *See* Karen O'Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 JUST. SYS. J. 35, 37 (1983) (participation dropped from 31.6% of cases in 1949 to 13.6% in 1951). According to O'Connor and Epstein, "[t]he Justices found many of the briefs had only limited value, and thus were unnecessary additions to the paperwork involved in their already spiraling caseload." *Id.* at 35. By the mid 1950s, however, after negative comments by Justices Frankfurter and Black, as well as scholarly criticism of the restrictive rule, amicus participation was on the rise again. *Id* at 38-39. The increasing caseload in the 1970s and 1980s led O'Connor and Epstein to hypothesize that the Court would deny more motions for leave to file as amicus. *Id.* at 39-40. Denials were rare despite the caseload problems, leading to the conclusion that the Court viewed "the utility of amicus briefs as outweighing their impact on its already overcrowded docket." *Id.* at 41, 43.

[67] 223 F.3d 615, 616 (7th Cir. 2000).

[68] The data referred to consists of Westlaw reported cases for 2002. The numbers were ar-

amicus participated in 413 reported federal appeals court cases.[69] There were a total of 635 briefs submitted in these 413 cases.[70] The majority of these cases only had one brief, but the most briefs submitted in one case was eleven. Considering that these cases are dispersed over thirteen courts of appeals (twelve regional circuits and the Federal Circuit) composed of a total of 179 authorized regular judges which usually sit in panels of only three judges, each judge probably encounters only a small number of amicus briefs per year.[71] If each brief is read three times (by three judges on a panel), then a total of 1905 briefs must be read. Dividing this number by 179 active judges, each judge read an average of 10.64 briefs in 2002.[72] The length of an amicus brief is limited to half the length of a party's principal brief, and a response is also allowed by Rule 29.[73] Based on this, it does not seem that amicus briefs pose a very large burden on the courts of appeals.

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rived at by searching all federal court of appeals cases with the word amicus or amici in the area of the opinion where participants (usually just the lawyers) are indicated. The search terms were: {AT(AMICUS AMICI) & DA(AFT 12/31/2001 & BEF 1/1/2003)}. To find cases where an amicus brief was referred to in the text of the opinion, {& OP(AMICUS AMICI)} was added to the above search. The part of the opinion with the word amicus or amici indicated whether or not it was a quotation. Amici were usually named and separated by the briefs onto which they signed. It was not always clear who the amicus was or how many briefs were submitted. Sometimes the court listed a lawyer but did not indicate if he or she was representing a group or organization as an amicus. Despite this imprecision, the data provides a rough but useful contrast to empirical studies that have been conducted regarding amicus participation in the Supreme Court.

[69] *See infra* Figure 1 (presenting data on 2002 amicus participation in Westlaw reported cases).

[70] *Id.*

[71] *See* TIGAR & TIGAR, *supra* note 14, at 240, 243, 244-50 (explaining the organization of the federal appeals courts).

[72] This number will only be an approximation. If the court is sitting *en banc*, then many more judges will have to read the amicus brief. Also, the calculation does not account for senior judges who may read briefs on occasion.

[73] FED. R. APP. P. 29(d).

2002 Westlaw Reported Courts of Appeals Cases	
Cases with Amicus Participation	413
Total Number of Briefs Submitted	635
Average Briefs Per Case with Amicus Participation	1.54
Opinions Referencing Amicus	152
Percentage Referencing Amicus	36.90%
Opinions Quoting Amicus	45
Percentage Quoting Amicus	10.90%
Cases with One Brief	291
Percentage with One Brief	70.60%
Cases with Two Briefs	68
Cases with More Than Two Briefs	53
Cases with Five or More Briefs	12
Cases with Eight or More Briefs	3

Figure 1.

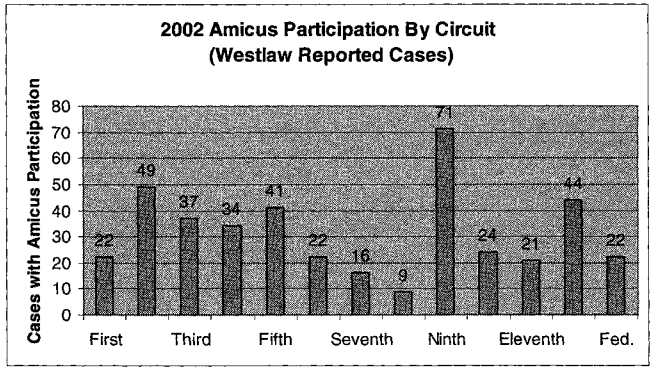

Figure 2.

Certainly, it appears as if amicus briefs are a far greater burden on the Supreme Court. As indicated before, a single Supreme Court case might draw over 50 amicus briefs and numerous submissions are not uncommon.[74] The vast majority of Supreme Court cases involve

[74] *See* Caldeira & Wright, *supra* note 57, at 804.

amicus brief submissions.[75] Additionally, the Supreme Court might be faced with hundreds more amicus briefs while making decisions on certiorari.[76]

Amicus submissions to the courts of appeals are not increasing at a rate that would cause a substantial burden in the near future either. In 1992, 363 Westlaw reported appeals court cases listed a participating amicus compared to 413 for 2002.[77] This represents an increase of 14.6% over this ten year period. Over the same ten year period, total appeals terminated by federal courts of appeals went from 44,373 in 1992 to 56,586 in 2002.[78] This represents a 27.5% increase. Thus, although the burden on the federal courts of appeals is increasing, amicus submissions are actually becoming a smaller portion of that burden.

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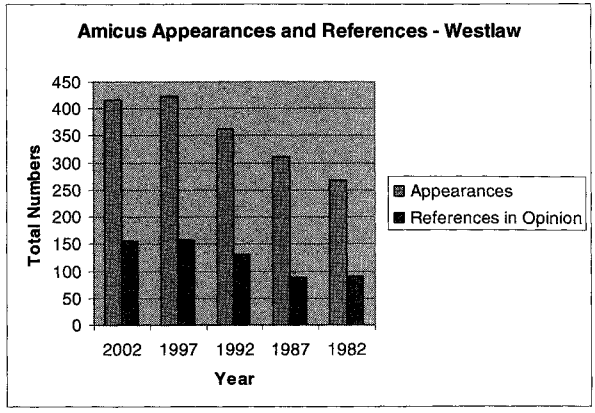
[75] *See* Kearney & Merrill, *supra* note 48, at 751-56.

[76] *See* Caldeira & Wright, *supra* note 61, at 1116 (at least 159 (148 cases plus 11 where a brief was submitted on both sides) were submitted for 1982 term).

[77] *See infra* Figure 3 (depicting amicus appearances in Weslaw reported cases for the years 1982, 1987, 1992, 1997, and 2002).

[78] Federal Court Management Statistics – 2002 – Courts of Appeals – National Totals, *available at* http://www.uscourts.gov/cgi-bin/cmsa2002.pl; *id.*, *available at* http://www.uscourts.gov/cgi-bin/cmsa.pl.

Amicus Appearances and References in US Court of Appeals Cases**



WESTLAW Reported Cases

Year	Appearances	References	Frequency
2002	416	155	0.37
1997	423	158	0.37
1992	363	130	0.36
1987	310	88	0.28
1982	268	89	0.33

**This data was compiled by searching for cases with the words "amicus" or "amici" in the attorney portion of the opinion and then searching the texts of those opinions for the words "amicus" or "amici".

Figure 3.

It is necessary to note that many appeals court decisions go unreported. In the twelve month period ending September 30, 2002, 80.5% of 27,758 federal appeals court opinions or orders were unpublished.[79] All of the data discussed above was generated only from reported cases. The numbers of amicus briefs that appear in unreported cases is an unknown variable. However, it might be a logical assumption that amicus briefs are most commonly submitted in cases drawing the most attention which would be reported more frequently. Even if the incidence of amicus participation in unreported cases was the same as in reported cases, meaning the numbers discussed above would increase by five times, it would still be a minor burden relative to the Supreme Court, although definitely significant.

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[79] Judicial Business of the United States Courts 2002 – U.S. Courts of Appeals – Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2002, *available at* http://www.uscourts.gov/judbus2002/tables/s03sep02.pdf [hereinafter Judicial Business, Types of Opinions or Orders].

Despite the relatively minor burden on appeals courts, one might argue that the appeals courts' dockets are so heavily overloaded, much more so than the Supreme Court, that it is more necessary to cut workload wherever possible. A total of 27,758 appeals were terminated on the merits in the twelve month period ending September 30, 2002.[80] The 179 regular authorized judges participated in a total of 64,916 cases.[81] This is an average of 362.7 cases each. This might justify a different approach in the courts of appeals. The Supreme Court does not hear near that many cases on the merits each year, although they do deal with a much larger number of petitions for certiorari. Even if amicus briefs are only a relatively slight burden, it might be a slight burden that the appeals courts cannot handle given the caseload crisis.[82]

B. The Value of Amicus Participation

It might make sense to alleviate even a very minor burden if it had no value. Judge Posner clearly does not think amicus briefs are useful to the court in many circumstances. He wrote: "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief."[83] Although even Judge Posner's opponents would not deny that amicus briefs can sometimes be repetitive and not of very much value, they see this as a minor negative associated with the generally valuable amicus curiae.[84]

The issue presented here is how often briefs are repetitive and disregarded, and, on the other hand, how often they aid the court in coming to a decision. One way to attempt to resolve this question is look-

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[80] Judicial Business of the United States Courts 2002 – U.S. Courts of Appeals – Appeals Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2002, *available at* http://www.uscourts.gov/judbus2002/tables/s01sep02.pdf.

[81] Judicial Business of the United States Courts 2002 – U.S. Courts of Appeals – Total Case Participations in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2002, *available at* http://www.uscourts.gov/judbus2002/tables/s02sep02.pdf.

[82] Another issue that is addressed below is whether or not restricting participation through requirements like Judge Posner suggests will actually provide more work, and thus increase the burden of amicus briefs. *See infra* Part III.A.

[83] Ryan v. CFTC, 125 F.3d 1062, 1063 (7th Cir. 1997).

[84] *See* Neonatology Assocs. v. Commissioner, 293 F.3d 128, 133 (3d Cir. 2002) ("[I]t is preferable to err on the side of granting leave. If an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief."); *see also* Munford, *supra* note 4, at 284 ("Even some repetition should be tolerated on the ground it is easily disregarded. After all, sometimes the most important thing a friend can do is remind you to do what is right.").

ing at the frequency with which courts cite and quote amicus briefs. This methodology was used by Joseph Kearney and Thomas Merrill in their 2000 article studying the impact of amicus briefs on the Supreme Court.[85] Their findings indicated that Supreme Court Justices were referring to amicus briefs in their opinions (the study included majorities, pluralities, concurrences, and dissents) with increasing frequency during the time period of 1946-1995.[86] In the period between 1986 and 1995, approximately 37% of Supreme Court decisions where an amicus was present referred to an amicus in the text of the opinion and approximately 15% actually quoted an amicus.[87]

According to the 2002 courts of appeals data, of the 413 cases in which an amicus was present, the court referred to the amicus in 152. This is equal to 37%. Forty-five, or 11%, of the cases quoted the brief of an amicus.[88] This is very similar to the most recent numbers reported by Kearney and Merrill for the Supreme Court and could suggest that the federal courts of appeals rely on amicus briefs when they are submitted just as much as the Supreme Court does.[89] Kearney and Merrill, however, noted that Supreme Court citations were increasing.[90] For the appeals courts, however, the incidence of court references to amici has remained fairly steady, remaining in the 30% range from 1982 to 2002.[91] Although the Supreme Court numbers may have increased to a greater rate, the courts of appeals numbers have remained fairly steady and the courts do not mention the amicus in nearly two-thirds of the cases in which an amicus is present.

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[85] *See* Kearney & Merrill, *supra* note 48, at 757 ("The only publicly visible manifestation of the impact of amici is the frequency with which their briefs are cited or quoted in opinions of the Justices.").

[86] *Id.*

[87] *Id.* at 757-758 (stating "[t]he incidence of quotations could yield a truer approximation of the extent to which the Court has actually relied on amicus arguments").

[88] *See supra* Figure 1.

[89] This method for determining reliance is relatively crude. A court may rely extensively on an amicus brief without ever mentioning it. As discussed above, the Supreme Court analysis in *Sweatt v. Painter* was influenced by an amicus brief. Entin, *supra* note 54, at 57. That decision, however, does not contain the word amicus or amici. Sweatt v. Painter, 339 U.S. 629 (1950). On the other hand, a single mention of the amici may not indicate the extent of reliance. *See, e.g,* Conant v. Walters, 309 F.3d 629, 641 n.3 (9th Cir. 2002) (noting: "I am indebted to the brief of amici American Public Health Association et al. for its lucid and forceful analysis of this issue. Much of the discussion in the text is plagiarized from that brief. For ease of readability, I dispense with further attribution."). Finally, a mention of the amici's brief may indicate absolutely no reliance. *See, e.g.,* Engine Mfrs. Ass'n v. South Coast Air Quality, 309 F.3d 550 n.1 (9th Cir. 2002) ("We decline to consider Amici's arguments regarding §246 of the Clean Air Act."). Despite these imperfections with this methodology, it gives an objective general picture of reliance and is useful in making comparisons with the Supreme Court.

[90] Kearney & Merrill, *supra* note 48, at 757-58.

[91] *See supra* Figure 3 (depicting number of appeals court cases with an amicus and the number of those cases where the text of the opinion referred to an amicus using both LexisNexis and Westlaw).

Amicus briefs are less valuable to the courts of appeals than to the Supreme Court because they are not used in the same ways. The Supreme Court allows amicus participation in the certiorari process. This is a role of the amicus brief that is unique to the Supreme Court as the courts of appeals do not make this decision regarding the appeals they hear. A statistical analysis performed by Gregory Caldeira and John Wright "demonstrates that the presence of amicus curiae briefs filed prior to the decision on certiorari significantly and positively increases the chances of the justices' binding of a case over for full treatment."[92] Amicus briefs prior to decisions on certiorari are submitted relatively infrequently, but the total numbers are significant considering how many petitions for certiorari are filed.[93]

This use of amicus briefs in decisions on certiorari indicates fundamentally different functions between the Supreme Court and the courts of appeals in our federal judicial system.[94] The Supreme Court is identifying important issues of federal law that it must decide. The incidence of amicus briefs, their mere presence rather than content, can be an indicator of how far-reaching and important an issue is.[95] Appeals courts do not do this. In most cases they are reviewing lower court decisions for reversible error and the opinions of others aside from the parties to the case should have limited value.

The *en banc* process, however, is a federal appellate practice that mirrors to a certain extent the Supreme Court certiorari process. According to Rule 35(a) of the Federal Rules of Appellate Procedure, an *en banc* hearing or rehearing is "not favored and ordinarily will not be ordered unless (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."[96] These cases are chosen not because of the effects on the parties themselves generally, but because of their effects on the legal system. Such cases are more likely to mirror the types of cases the Supreme Court hears and a larger role of the amicus might be warranted.[97] However, unlike the

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[92] Caldeira & Wright, *supra* note 61, at 1109.

[93] *See id.* at 1116 (reporting that "at least one brief was submitted in 148 of the 1,906 petitions" for writ of certiorari in the 1982 Supreme Court term, or 7.8%); *see also* Smith, *supra* note 61, at 753 n.113 (finding an amicus brief filed in 6.3% of 318 cases examined).

[94] The differing functions and an analysis of how that plays into the question of whether appeals courts should restrict amicus participation is discussed below.

[95] In their article on amicus participation in the University of Michigan cases, Alger and Krislov discuss how amicus briefs are important in especially complex and socially important cases. Alger & Krislov, *supra* note 58, at 526.

[96] FED. R. APP. P. 35(a).

[97] SUP. CT. R. 10 "indicate[s] the character of the reasons the Court considers." Generally, certiorari is more likely to be granted when there is conflict, need for supervision, or an unsettled important question of federal law.

Supreme Court where amici play a valuable and defined role in the certiorari process,[98] there is no indication that the federal appellate courts use amicus briefs to make the determination of when *en banc* is appropriate in a comparable manner. Rule 29 makes no mention of the *en banc* process.[99] Additionally, amicus filings regarding decisions whether or not to hear a case *en banc* are apparently rare.[100] *En banc* hearings in general are very rare and make up less than one percent of all court of appeals cases.[101] While strong arguments can be made that the appeals courts should be more lenient in granting amicus participation in *en banc* hearings, and possibly even on the decision whether or not to hear a case *en banc*, there are ways of limiting amicus participation generally that give courts the flexibility to recognize that a third-party viewpoint may be especially valuable in these circumstances.

The identity of the amicus may shed some light on the value of a brief as well. Kearney and Merrill found that certain institutional amici, such as the ACLU and the AFL-CIO, are more successful in swaying the Court than the average amicus.[102] They premised that such institutions might have more experienced lawyers that could lead to greater success.[103] Although this research may be inconclusive, it is worth considering who is filing amicus briefs in the appeals courts. Federal government agencies, most often the Department of Justice, and state attorneys general offices, were the most common amici during 2002.[104] Some other familiar institutions were also present. ACLU offices made fifteen appearances, and the AARP made ten appearances.[105] Other less prominent national advocacy groups and interest groups made more limited appearances. Aside from this, however, many of the amicus briefs were submitted by local groups

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[98] *See* Caldeira & Wright, *supra* note 61, at 1116 (stating that 148 petitions for certiorari involved an amicus filing); *See also* SUP. CT. R. 37.1 (providing filing requirements).

[99] FED. R. APP. P. 29.

[100] Amicus briefs at this stage are not non-existent however. *See, e.g.*, Turtle Island Restoration Network v. Evans, 299 F.3d 1373 (Fed. Cir. 2002) (denying *en banc* hearing but referencing an amicus submission).

[101] Judicial Business of the United States Courts 2002 - U.S. Courts of Appeals - Appeals Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2002, *available at* http://www.uscourts.gov/judbus2002/tables/s01sep02.pdf (reporting 77 *en banc* terminations out of 27,758 total terminations on the merits).

[102] Kearney & Merrill, *supra* note 48, at 819.

[103] *Id.* at 813-14 (discussing and citing KEVIN T. MCGUIRE, THE SUPREME COURT BAR 171-99 (1993)).

[104] *See infra* Figure 4. These amicus briefs are filed of right under FED. R. APP. P. 29 and thus are outside the scope of this Note. The courts do not have the power to restrict these briefs under the current rule.

[105] *Id.*

who were one-time filers.[106] It is difficult to draw conclusions from this data, but it does paint a picture of a somewhat random amicus practice. Amicus briefs are rarely filed, and when they are it is without a clear pattern. There do not appear to be many groups with an organized strategy of using amicus briefs to lobby the courts of appeals. To the extent that less experienced filers achieve limited success, as some research indicates, many of these groups might not be very successful at influencing the courts. It is a possibility, although unproven, that briefs by some of these local one-time filers may be of limited value to the courts.

2002 Amicus Filers

Organization or Category of Amicus Filer	Number of Filings
Total Briefs from Amici Who Filed 3 or Less Times	*431*
Federal Government Agencies	81
State and Local Government Agencies	56
ACLU	15
AARP	10
Washington Legal Foundation	7
National Employment Lawyers Association	6
AMA	5
Pacific Legal Foundation	5
National Association of Criminal Defense Lawyers	5
Public Citizen Litigation Group	4
Paralyzed Veterans of America	4
Christian Legal Society	4
Lawyers Committee for Human Rights	4

**This data is an approximation based on 2002 Westlaw reported cases. Courts are not consistent in naming amici so it is difficult to say for sure exactly who participated in every case.

Figure 4.

The types of cases that federal appellate courts hear are generally of the type where third party effects are limited, and thus, amicus participation may be unnecessary. For example, all Supreme Court opinions are published, an unquestionably wise choice considering the novelty and importance of those decisions. The majority of courts of appeals decisions are not published; only approximately 20% are

[106] *Id.*

published.[107] This could represent the fact that the majority of appeals court decisions do not, and are not intended to, have effects that reach beyond the parties to the dispute. Many of these cases involve an application of the law or a standard of review to a particular dispute and serve little precedential value. The possibility of precedential value is outweighed by the possibility of inconsistent, confusing, and insurmountable volumes of precedent that would exist were every decision published. Judge Gibbons of the Third Circuit made some of these points in arguing for a presumption against publication, and thus, against precedential value. He wrote, "[s]uch a rule would be an overdue recognition that our primary function is dispute resolution and our lawmaking function is only incidental to that primary function."[108]

Allowing basically unlimited amicus participation in the federal appellate courts is inconsistent with this situation. If most cases have no effects beyond the parties, there is no reason to allow such broad amicus participation. It is only in a minority of cases that an interested amici should have a place. As premised above, it is likely that the majority of appeals court decisions do not attract amicus participation for these very reasons.[109] Regardless, appellate procedure should be aimed at protecting effective dispute resolution. The door to amicus briefs should not be closed because they will be valuable and appropriate in certain cases. However, since this is a minority of cases, a broad reading of Rule 29 such that virtually any amicus has access to any case is unnecessary and invites abuse of the device.

Amici, even interested ones, however, may provide information that is helpful to the court in making a decision. But this traditional view of the friend of the court providing useful information is likely to be rare in this information age. Electronic databases provide access to and means to navigate through unending legal materials, both primary and secondary. Additionally, the internet provides access to an abundance of information. Many common amici may have websites with links to statistical studies and other information. In the

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[107] *See* Judicial Business, Types of Opinions or Orders, *supra* note 79.

[108] John J. Gibbons, *Maintaining Effective Procedures in the Federal Appellate Courts, in* THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 22 (Cynthia Harrison & Russell R. Wheeler eds., 1989).

[109] It could be, however, that a dispute that should only have significance to the parties winds up published because an amicus brief is submitted. Judge Gibbons wrote about Third Circuit publication procedures: "an opinion which appears to have value only to the trial court or to the parties is ordinarily not published." *Id.* at 26. Under such a practice, an amicus submission could theoretically create the appearance of wider value and result in a greater likelihood of publication.

past, courts may have been dependent on an amici to bring such information to its attention. Now, that is less likely to be the case.

Critics of a restrictive approach to amicus briefs in the courts of appeals consider amicus briefs as useful tools. While they certainly can be useful, it is difficult to identify important cases where this is evident. In the Supreme Court, it is easy to identify many landmark cases where an amicus brief was clearly influential, but this does not speak to their value to the courts of appeals.[110] Regardless, efforts to restrict amicus submissions are not aimed at the briefs which are truly valuable to the court. An approach can be tailored to allow the filing of briefs of potential value.

A final observation regarding value is that an overwhelming majority of appeals courts cases are decided without the aid of an amicus brief. The 413 cases in 2002 where a brief was submitted was a minor portion of the total published cases.[111] This is in contrast to the Supreme Court where the vast majority of cases are decided with the aid of an amicus brief. Overall, amicus briefs play a much smaller role at the appeals court level than at the Supreme Court level. Decreasing amicus participation even more would have limited negative effects on decision making. Although this tends to refute the idea that amici have much value to the courts of appeals, it also may point out the strongest argument for keeping the current open-door approach. If amici file briefs in such small numbers and without much organization, how big of a problem can they really be? However, this 'don't fix it if it isn't broke' theory ignores the possibility of simple ways to improve the system and protect litigants in individual cases. The next section discusses how problems do exist despite the limited amicus participation.

C. *Negative Effects of Unrestriced Amicus Participation*

Judge Posner, in *National Organization for Women*, expressed concern that the overuse of amicus briefs results from attempts "to inject interest group politics into the federal appeals process."[112] His opinions reflect a desire to limit legislative characteristics in federal appeals court cases.

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[110] *See* Munford, *supra* note 4, at 280-81 (citing some Supreme Court cases while making the point that amicus briefs are useful to the courts of appeals).

[111] Judicial Business, Types of Opinions or Orders, *supra* note 79 (showing publication of over 5,000 cases in this period).

[112] Nat'l Org. for Women v. Scheidler, 223 F.3d 615, 617 (7th Cir. 2000) (asserting three reasons nonparty amici curiae are a matter of judicial grace).

> The judicial process, in contrast [to the legislative process], though "political" in a sense when judges are asked to decide cases that conventional legal materials . . . leave undetermined, so that some mixture of judges' values, temperament, ideology, experiences, and even emotions is likely to determine the outcome, is not democratic in the sense of basing decision on the voting or campaign-financing power of constituents and interest groups. An appeal should therefore not resemble a congressional hearing.[113]

Justice Black took a somewhat different stance regarding amicus participation when he wrote in 1954, "[m]ost of the cases before [the Supreme] Court involve matters that affect far more than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against amicus curiae briefs."[114] While these statements may be the result of personal opinions, they represent different views on judicial decision making that could be, at least in part, attributed to the nature of the courts the judges represent.[115] These differing approaches to judging call into question the proper role of amicus briefs in each court. In appeals courts, if more cases can be decided with conventional legal materials, then outside opinions in the form of amicus briefs are less likely to be of value. Arguably, they can thwart the process by overloading the court with arguments that support only one side.

An appellant in a federal court of appeals might feel that he or she has a right to a fair process free from outside interference. Supreme Court litigants might want the same right, but a claim to that right would be less convincing. After all, no litigants have a right to argue their case before the Supreme Court in the first place, so expectations regarding outside participation in the form of amici would be less justified. The initial appeal, however, is guaranteed and litigants would have a stronger argument that limited outside interference in their case is necessary to preserve a fair process under our adversarial system. The idea that amicus participation may be more appropriate in one court than another is not novel.[116] At the appeals court level,

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[113] Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 544-45 (7th Cir. 2003).

[114] Krislov, *supra* note 29, at 715 (quoting Order Adopting Revised Rules of the Supreme Court, 346 U.S. 945, 947 (1954)).

[115] *See generally* Kearney & Merrill, *supra* note 48, at 775-87 (discussing three models of judicial decision making and their implications regarding the impact of amicus briefs in the Supreme Court).

[116] Liberty Lincoln Mercury v. Ford Marketing Corp., 149 F.R.D. 65, 82 (D.N.J. 1993) (suggesting that the aid of amici in the trial court may be less useful than at the appellate level)

especially when settled questions of law are at issue, amicus briefs may not make sense.

The contours of our adversarial process are well-studied. One commentator summed it up as follows: "[T]he adversary system assumes that the most efficient and fair way of determining the truth is by presenting the strongest possible case for each side of the controversy before an impartial judge or jury."[117] Although clearly a reference to fact-finding at trial level, the reasoning also applies to appeals. The most efficient and fair way of determining legal issues on appeal is to allow both parties to present their case by submitting appellate briefs of equal length. An amicus brief on one side may mean that that side has an advantage in making a case. This could skew the adversarial process. Even if the courts are able to disregard the additional brief for one side, the perceptions of inequality alone could be damaging. This is something with which courts are, and should be, concerned.[118] In 1962, Justice Frankfurter wrote: "The Court's authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction."[119] Although this concern may seem unrealistic, it is significant in an era where the cost of litigation and the time it takes to have a day in court are so high. Confidence in the courts may already be decreasing, so perceptions of inequality caused by the use of amici could be especially damaging.

Perceptions, however, are not the only concern. Fears regarding unfair results and a tilting of the adversarial balance might be warranted. Kearney and Merrill found that, in the Supreme Court, "small disparities of amicus support (one or two briefs to none) may be associated with increased success for the supported party."[120] This would not be considered a problem at the Supreme Court level because the concern is more about the far-reaching policy implications of a decision than it is for fairness to the individual litigants. Additionally, so many amicus briefs are submitted for Supreme Court cases that "[i]n most cases the amicus briefs are symmetrically distributed between the parties."[121] These cases draw so much attention that amici often come out in force on both sides of an issue.

(quoting Yip v. Pagano, 606 F. Supp. 1566, 1568 (D.N.J. 1985)).

[117] MONROE FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 9 (1975).

[118] *See* Neonatology Assocs. v. Commissioner, 293 F.3d 128, 132-33 (3d Cir. 2002) (discussing viewpoint discrimination concerns).

[119] Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

[120] Kearney & Merrill, *supra* note 48, at 829.

[121] *Id.*

This is not the case in the courts of appeals. Of the cases surveyed for 2002, only one amicus brief was present in 291 of the 413 cases, or 70%.[122] In the remaining cases, two or more briefs were present which often supported only one side. In all of these cases, the party supported by an amicus brief may have gained an advantage. Whether or not these amicus briefs give an advantage to the supported party is not clear. Amici may be less effective at swaying appeals court judges deciding more straightforward legal questions. Additionally, the undesirably repetitive amicus briefs would presumably not be very effective. Nevertheless, there is a possibility that the side with the support of an amicus has an advantage.

The cost of litigation is already high and even higher when an amicus brief is submitted. A litigant may be unable to respond to an amicus brief for the opposing side by soliciting one of his or her own because of cost concerns. The cost of filing an amicus brief has been estimated to range from $10,000 to $15,000, and often more.[123] Even if a party is not going to attempt to solicit an amicus brief to support his or her side, he or she may feel compelled to reply to the opposing amicus brief which will also be an added expense.[124] Given the sparse amicus participation in the appeals courts and at least the perception, if not the reality, that a supporting amicus provides an advantage, the public may come to believe that favorable adjudications can be bought by soliciting a supporting amicus.

It is often not the case that interested third parties independently come into the case and happen to support one party. While it is difficult to say exactly how often it occurs, it is clear that parties to a case participate in amicus solicitation, preparation, and financing. Judges have expressed dislike of this practice, and rules, including Supreme Court Rule 37, have adopted disclosure requirements to keep an eye on these practices.[125] Secondary legal materials also provide evidence of the prevalence of these practices. There are several practice guides advising on methods and benefits of party use of amici.[126] The fact

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[122] *See supra* Figure 1.

[123] Caldeira & Wright, *supra* note 57, at 800.

[124] *See* FED. R. APP. P. 29(e) (indicating that a party may reply to an amicus brief supporting the opposing side).

[125] *See* Glassroth v. Moore, 347, F.3d 916, 919 (11th Cir. 2003) ("we suspect that amicus briefs are often used as a means of evading the page limitations on a party's brief"); Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 544 (7th Cir. 2003) (remarking that amicus briefs are often solicited by parties). *See also* SUP. CT. R. 37(6) (disclosure requirements).

[126] *See, e.g.*, John J. Ursu, Thomas A. Boardman, & David F. Herr, *Amicus Curiae*, *in* 4 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 66.24 (Robert L. Haig ed., West Group 2000) (discussing strategy for solicitation of amici and noting "counsel can be uniquely valuable in coordinating the process of identifying likely amici and motivating organizations to participate as amicus"); David B. Smallman, *Amicus Practice: New Rules for Old*

that parties are intentionally using amici in an attempt to gain an advantage may exacerbate perceptions of inequity.

In his criticism of a restrictive policy towards amicus briefs in *Neonatology Associates*, Judge Alito expressed concern about "the perception of viewpoint discrimination" and the message that our courts are not open.[127] A more damaging perception, however, would be that the party with deeper pockets, or the party who has more interest groups in its corner, could gain an advantage in the court.

That is not to say that the party with the least money or experience in litigation will always be harmed under the current system. For example, it may seem just to allow an amicus to support an employee challenging a corporation with presumably more resources and legal sophistication.[128] But the reforms suggested by Justice Posner would look for cases where a party is inadequately represented. [129] There is no reason why a court could not look to relative adequacy of representation in considering this factor.

Finally, in discussing possible inequitable or harmful effects resulting from amicus participation, it is worth reiterating that if a court has before it a motion for leave to file an amicus curiae brief, at least one party has refused to consent to its filing.[130] In granting a motion for leave to file an amicus brief, the court is going against the wishes of at least one party in opening the case to third party participation. Clearly the wishes of a party are not dispositive. There are many situations in which the court will allow additional parties to enter litigation (*e.g.*, intervention), and existing parties may have no say in that. Also, it is a reality that money can be a powerful tool in litigation. Just consider the use of expensive expert witnesses for example. However, in a judicial system in which "respect for the individual . . . is the lifeblood of the law,"[131] it is necessary to look at

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Friends, *in* 25 LITIGATION 25, 29 (1999) (discussing strategy in response to new participation rules and suggesting that parties "[l]ine up amicus support early. Assuming that amicus support is desired, a good approach is to find similarly situated entities at the earliest possible stage of the case."); TIGAR & TIGAR, *supra* note 14, at 181 ("[a]n advocate whose case involves an issue of great consequence should seriously consider inviting an amicus brief from organizations and individuals that support his or her position.").

[127] Neonatology Assocs. v. Commissioner, 293 F.3d 128, 133 (3d Cir. 2002).

[128] *See, e.g.*, Adams v. Bowater, Inc., 313 F.3d 611 (1st Cir. 2002) (holding AARP participation as amicus curiae in a suit by employees challenging a corporations amendments to a pension plan as a violation of ERISA).

[129] Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 545 (7th Cir. 2003) (refusing to permit state legislative leaders and telecommunications workers' union leave to file amicus curiae briefs that would be repetitive of the briefs already filed by adequately represented parties).

[130] FED. R. APP. P. 29(a).

[131] Illinois v. Allen, 397 U.S. 337, 351 (1970) (Brennan, J., concurring) (referring to the

the justification for infringing on a party's rights and raising costs and the possible effects of such actions. Since there is very little value in allowing broad systematic amicus participation in federal appeals court, efforts to restrict participation are appropriate.

III. LIMITING PARTICIPATION: REFORMING RULE 29 AND PUBLICATION

This section discusses the possibility of a codified factored approach to decisions on whether to allow an amicus and rejects such an approach. Then it suggests reforms to Rule 29 regarding financing and preparation. It also advocates publication as a way to deter unwanted filings.

A. A Factor Approach to Amicus Participation

Any method of restricting amicus participation that actually increases the workload on the courts of appeals is not likely to be popular in the already overburdened system. The approach advocated by Judge Posner would look at whether (1) a party is inadequately represented, or (2) the potential amicus has a direct interest in another case that may be materially affected by a decision in this case, or (3) the potential amicus has a unique perspective and specific information that can aid the court.[132] It has been argued that an application of this requirement on motions to file amicus briefs could actually increase the workload of the court.[133] This logic is easy to follow. Under the current rule, a motion for leave to file an amicus brief must be attached to a copy of the proposed brief.[134] If the court will be reading the brief to decide whether to allow it, it is hard to see how this will relieve the court of any burden. Additionally, the court will also be considering arguments regarding inadequate representation, material interests, and unique perspectives.

However, the policy of restricting amicus participation is justified not necessarily by caseload concerns, but also as an effort to provide an equitable forum and reduce interest group influence. Therefore, a factored approach that does not reduce the burden of amicus briefs

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rights of a criminal defendant).

[132] Nat'l Org. for Women v. Scheidler, 223 F.3d 615, 616-17 (7th Cir. 2000).

[133] Neonatology Assocs. v. Commissioner, 293 F.3d 128, 133 (3d Cir. 2002) ("a restrictive practice regarding motions for leave to file seems to be an unpromising strategy for lightening a court's workload. For one thing, the time required for skeptical scrutiny of proposed amicus briefs may be equal, if not exceed, the time that would have been needed to study the briefs at the merits stage if leave had been granted.").

[134] FED. R. APP. P. 29(b).

might still be desirable.[135] It would accomplish the important end of preventing certain undesirable amici from participation. Perhaps even the adoption of a restrictive approach, although initially time consuming, might deter potential amici from moving to file a brief and then, over time, result in a decreased burden on the courts.

If the approach advocated by Judge Posner resulted in a significant increase in workload, however, it is unlikely it would be embraced by already heavily burdened courts, regardless of possible benefits down the road. While there is support for the position that amicus participation should be curbed in the lower courts,[136] there is no indication that it is of such concern that courts would take on additional workload. Admittedly, the case for restriction made in this Note is not overwhelming or urgent. Rather, restricting amicus participation would be more of a fine tuning of the system.

The question, therefore, is whether Judge Posner's approach could be applied without resulting in additional workload. Two of the three situations in which the court would likely grant amicus participation do not appear to pose much of a problem. A court should be able to determine whether a party in the case is adequately represented without much work, and this is something a court should be doing anyway. A court should also be able to look at a proposed brief and decide whether there is information that will be of assistance to it. The last situation, when a direct interest in another case may be materially affected by a decision in the current case, is potentially more troublesome.

This last situation is not all that different from another one in which a third party can participate in a case, intervention. Under Federal Rule of Civil Procedure 24(a)(2), one can intervene "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest."[137] Although different from the requirement suggested by Judge Posner, certain simi-

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[135] Some states have adopted approaches using factors as well and have considered whether the litigation is of a general type where amicus participation would be more likely to be appropriate. *See* New York State Senator Kruger v. Bloomberg, 768 N.Y.S.2d 76, 83 (N.Y. Sup. 2003) (considering as a factor "whether the case concerns questions of important public interest"); State *ex rel.* Comm'r of Transp. v. Medicine Bird Black Bear White Eagle, 63 S.W.3d 734, 759 (Tenn. Ct. App. 2001) (considering, among other things, "the nature of the litigation and the issues presented").

[136] *See* sources cited *supra* note 21 (discussing judicial support for the restrictive approach advocated by Judge Posner).

[137] FED. R. CIV. P. 24(a)(2).

lar determinations would have to be made.[138] A court deciding whether to allow an amicus brief would have to determine exactly what type of interest is necessary and to what degree of certainty and severity it might be affected. These are questions that, in the context of Rule 24 intervention, have resulted in a great deal of litigation. There are several A.L.R. annotations collecting cases solely on these issues.[139] Although amicus participation at the appeals court level is not likely to be litigated to such a degree, formalization of Judge Posner's approach would have the potential to lead to this type of litigation. It is hard to imagine that the federal appellate judiciary would risk this to deal with problems resulting from amicus participation that, despite the concerns raised here, are probably not a high priority issue for most.

B. Changes to Rule 29: Barring Party Financing and Preparation

There is a simpler solution available that could reduce the use of amici briefs that merely extend a party's argument and avoid page limitations. It could also reduce perceptions of inequality. The Supreme Court's Rule 37(6) requires disclosures regarding whether counsel for a party played any role in authoring the brief as well as disclosures as to any person or entity, other than the amicus curiae, who made financial contributions for the preparation and submission of the brief.[140] At least one state requires similar disclosures in its appellate courts. The Texas Rules of Appellate Procedure require amicus briefs to identify who the brief supports and who paid for the brief.[141] That rule, as pointed out by one Comment, does not prevent ghost writing because a party can still prepare the brief, interests of the amici might not be disclosed, and indirect monetary contributions go undisclosed.[142]

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[138] *See* Sierra Club, Inc. v. EPA, 358 F.3d 516, 518 (7th Cir. 2004) (discussing the legal interest necessary for intervention under Federal Rule of Civil Procedure 24(a)(2) and stating that a mere political interest may not even justify amicus participation).

[139] *See, e.g.*, Eunice A. Eichelberger, Annotation, *General Considerations in Determining What Constitutes Impairment of Proposed Intervener's Interest to Support Intervention As Matter of Right under Rule 24(a)(2) of Federal Rules of Civil Procedure*, 74 A.L.R. FED. 632 (1985); Eunice A. Eichelberger, Annotation, *What Is "Interest" Relating to Property or Transaction Which Is Subject of Action Sufficient to Satisfy That Requirement for Intervention As Matter of Right under Rule 24(a)(2) of Federal Rules of Civil Procedure*, 73 A.L.R. FED. 448 (1985); Howard J. Alperin, Annotation, *Construction of Federal Civil Procedure Rule 24(a)(2), As Amended in 1966, Insofar As Dealing with Prerequisites of Intervention As a Matter of Right*, 5 A.L.R. FED. 518 (1970).

[140] SUP. CT. R. 37(6).

[141] TEX. R. APP. P. 11, *available at* www.courts.state.tx.us/publicinfo/trap/rule11.htm.

[142] Sorenson, *supra* note 2, at 1251-54 (arguing that, in order to remain viable, amicus practice must be ethical, and proposing that courts adopt further disclosure requirements to prevent unethical amicus practices).

The federal appellate rules do require a statement of the identity of the amicus curiae and the source of its authority to file, but do not mention participation in authorship or monetary contribution.[143] Because a party might participate in the preparation and filing of an amicus brief in many ways, the appellate rules should be changed to prevent parties to the case from playing any part in preparation or financing of an amicus brief.[144] A ban on this type of activity is feasible in the appeals court because amicus briefs are not entrenched in that system yet. They are still relatively rare. And yet this sparse usage, combined with loose rules regarding participation, creates an environment where one party can, by financing or soliciting a sham amicus, gain an unfair advantage.

The courts would not be hurt by this approach. They still have the ability to appoint an amicus *sua sponte* when in need of information or desiring to protect an inadequately represented party. Outside parties could still appear as amicus if they had a direct interest in the case. In fact, it would be a much clearer indication of true interest if such a party appeared of its own volition and on its own dollar. Parties to the case would be the only ones truly hindered by such a rule, but they already have the right to be heard by the court and should not need to resort to additional help except in limited circumstances as discussed above.[145]

C. *Publication as a Deterrent*

For the amicus briefs which are independently financed and produced, the courts could look to the criteria applied in the Seventh Circuit, or they could announce a different approach. With an eye towards reduction of unhelpful and unfair briefs, individual courts can and should work out the parameters of appropriate amicus submissions. However, whatever approach is taken will be most effective at reducing unhelpful filings if opinions are published more frequently. Such publications are rare now.[146] Rule 29 requires that a motion for

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[143] FED. R. APP. P. 29(c)(3).

[144] *See, e.g.*, Glassroth v. Moore, 347 F.3d 916, 918-19 (11th Cir. 2003) (noting that attorney records indicated "she spent...time enlisting various organizations to appear as amici; suggesting potential signatories for the briefs; working on, supervising, and reviewing the amicus briefs; and seeing that they were mailed on time").

[145] Ethical duties of lawyers should be adequate to enforce this rule and therefore, judicial oversight of such a rule should, hopefully, be minimal. *See generally* Sorenson, *supra* note 2, at 1249-63 (discussing interrelations of ethical rules and amicus practice).

[146] Denying motions to file amicus briefs is rare, but not as rare as publication of a written explanation explaining rationale. When a denial is not published, potential amici will not be aware of it, and it will not effect their practices unless it is a rare high profile case with news coverage. *See, e.g.*, Jonathan Ringel, *Judges Cast Skeptical Eyes on Southern Co. Race Suit*, FULTON COUNTY DAILY REPORT, Jan. 28, 2004, *available at*

leave to file as amicus state relevancy and desirability, but unless the courts explain what this means these criteria serve no purpose in deterring filings.[147] Potential amici in the Seventh Circuit can look to a line of decisions explaining when a brief will not be accepted and see the types of situations when it would be futile to prepare and move to file a brief. Amici can then make decisions accordingly. In combination with Rule 29's requirement that the proposed brief accompany the motion for leave to file, a powerful deterrent situation is created.[148] Questionable amici will not spend the time and thousands of dollars preparing a brief with knowledge that it might not even make it before the court.[149] On the other hand, in a situation where almost all briefs are accepted and rejections go unnoticed, potential amici will not be deterred by this risk. The Seventh Circuit experience seems to lend support to this hypothesis. In recent years, the number of cases with amicus participation in the Seventh Circuit has dipped significantly below the average number of cases with amicus participation for a circuit court.[150] In 2002, only one circuit, the Eighth, had fewer cases with amicus participation than the Seventh Circuit.[151] This trend appears to support the proposition that the *Ryan* decision in 1997, the adoption of changes to Rule 29 in 1998, and the *National Organization of Women* decision in 2000 have deterred amicus filings.[152]

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http://www.law.com/jsp/article.jsp?id=1075219810167 (noting the rare denial of amicus requests by the NAACP Legal Defense and Education Fund and the U.S. Chamber of Commerce).

[147] FED. R. APP. P. 29(b)(1)-(2).

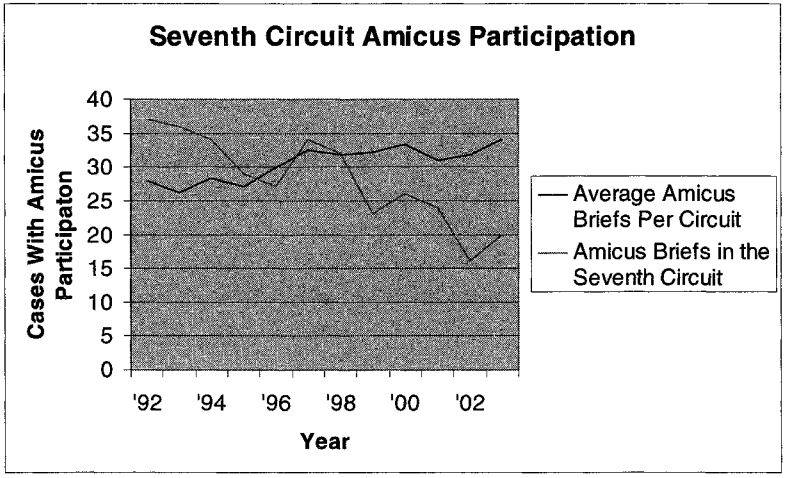
[148] FED. R. APP. P. 29(b).

[149] *See* Caldeira & Wright, *supra* note 57, at 800 (noting that the cost of a brief may exceed $10,000 to $15,000).

[150] *See infra* Figure 5.

[151] *See supra* Figure 2. This is despite the fact that the Seventh Circuit publishes more opinions than the average per circuit. In the 12 month period ending September 30, 2002, the Seventh Circuit published 613 opinions while the average number of published opinions per circuit was 450. *See* Judicial Business, Types of Opinions or Orders, *supra* note 79.

[152] *See infra* Figure 5. This trend is not conclusive as many other factors not controlled could contribute to it. Additionally, the numbers do not indicate whether publication of denials deters submissions or submissions are low because of frequent denials by the court.



*Based on Westlaw reported cases.

Figure 5

Regardless of how a court enunciates its criteria for amicus participation, it can accomplish a lot by publishing whatever rationale it has for denying motions for leave to file. The judicial resources necessary to accomplish this should be minimal. The Seventh Circuit, for example, published only three opinions since 1997, all relatively short and somewhat repetitive, and made its stance very clear. The effects in reduced filings would far outweigh this use of resources.[153]

CONCLUSION

"'The fundamental principle underlying legal procedure,' a court has observed, 'is that parties to a controversy shall have the right to litigate the same, free from the interference of strangers.'"[154] Although such thinking has clearly not guided the historical judicial acquiescence to broad amicus participation, the specific characteristics of the federal appellate courts and of current amicus practice in those courts requires rethinking this practice. Amici are now inter-

[153] The Seventh Circuit opinions are fairly short and repeat the same principles, but they get the point across. *See* Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542 (7th Cir. 2003), Nat'l Org. for Women v. Scheidler, 223 F.3d 615 (7th Cir. 2000); Ryan v. CFTC, 125 F.3d 1062 (7th Cir. 1997).

[154] Krislov, *supra* note 29, at 696 (quoting Consol. Liquor Corp. v. Scotello & Nizzi, 155 P. 1089, 1092 (N.M. 1916)).

ested participants rather than friends of the courts. At the federal appeals level, there is limited value in this role and potentially damaging effects. The system should be set up so that inappropriate submissions are rejected and deterred.

There are certainly many very complex appeals court cases where an amicus brief on one side or the other will be just and helpful. Amicus briefs may be of great value in a particular case. Amicus participation may be the only option for a third party to protect a significant interest, or it may bring material information to the courts attention that otherwise would have gone unnoticed. Fairness concerns are minimal in certain cases that already have multiple parties spending large amounts of money. Outside interests and financial strength play an inevitable role in our adversarial judicial system. However, rules are necessary to promote usage when valuable and to deter abuse.

Amicus participation is an addition to the heavy caseload of the federal courts of appeals. It is not an overwhelming burden, but it is not insignificant. While an amicus may be valuable in certain cases, these cases are rare. Most federal appeals apply settled standards of review to the facts before them and there will be limited third party effects. Courts rarely cite amici and do not decide their docket based on possible third party effects of a decision. Finally, there are harmful effects that result, including perceptions of an inequitable process and the real possibility of unfair results, increased costs of litigation, and abuse of amicus practice by parties. A broad policy of unchecked amicus participation in the federal courts of appeals is inappropriate for these reasons.

While the burden imposed by amicus participation is not insurmountable and the harmful effects will not result in grave injustices or the downfall of our legal system, these are concerns that should be addressed. A rule preventing parties from financing or participating in preparation of amicus briefs will reduce the burden and prevent a particularly harmful type of amicus participation. Further disclosure requirements will provide the court with a context to aid in the decision whether participation is appropriate. Finally, publication of opinions with rationale for denying participation, in combination with the existing requirement of filing the brief along with the motion for leave to file it, will create a powerful deterrent against potential amici who do not have a legitimate reason to be heard. An open door policy towards amicus submissions is based on the assumptions that amicus briefs are generally helpful and any other approach would not be worth the trouble. This proposal rejects these assumptions. It recog-

nizes the current approach is inconsistent with actual amicus practice and proposes rules in line with real usages of amicus curiae.

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