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## **MEMORANDUM**

**TO:** Kathleen Jamieson, Annenberg Foundation Trust

**FROM:** Allison Orr Larsen, Professor of Law, William & Mary

**DATE:** January 24, 2019

**RE:** Research Results to present at *Protecting Science in the Courts: Amicus Briefs and the Law*, Sunnylands Retreat Feb 2019

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I am honored to participate in the 2019 Annenberg Sunnylands retreat to discuss my research in connection with the mission of protecting science in the courts. You have generously funded an update to my research on factual submissions in Supreme Court amicus briefs. I plan to present the following information at the February retreat; I believe it will generate a rich discussion.

### **I. SCOPE OF RESEARCH & METHODOLOGY**

We collected every decision of the U.S. Supreme Court made from October 2013 (the start of the 2013 Term) through the end of 2018.<sup>1</sup> This resulted in 383 cases over the five-year period. Using Westlaw and searching every one of those cases for “amicus” or a variant thereof resulted in a total of 548 citations to amicus briefs in Supreme Court opinions over the last five terms. (These citations are collected in the first attached spreadsheet entitled “All Amicus Citations.”) We then read each of those citations and separated them into “fact-y” and “non fact-y” authorities.<sup>2</sup> I used the definition of “fact” that I have used in my prior work: an observation about the way the world works that can be theoretically falsified and is accompanied by evidence. To keep it consistent and recognizing this definition can be subjective, I went through and sorted all 548 citations personally.

The result of the sorting exercise generated 277 instances when a Justice cites an amicus brief to support a factual claim – this is approximately 50% of citations to amicus briefs generally (attached in the second spreadsheet entitled “Fact-y Citations”). For the sake of comparison, in

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<sup>1</sup> A Supreme Court Term runs from October of the named year to June of the following year. This means our data begins in October 2013 and ends December 31, 2018. Most Supreme Court decisions are decided in the spring which means our research does not include the majority of cases from the 2018 term.

<sup>2</sup> My working definitions of “fact” and “fact-y” are fleshed out in my previous work. I will elaborate on those definitions at the retreat. See Larsen, *The Trouble with Amicus Facts*, 100 Va Law Rev 1757 (2014) and Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 NYU Law Rev 75 (2018).

my prior study I found one in every five citations to amicus briefs was used to support a statement of fact (using the same definition). This growth over the past five years is consistent with work by other scholars who have documented that the Justices are citing the amicus briefs with greater frequency generally.<sup>3</sup> Indeed, last year the Justices cited amicus briefs in 59% of the cases they decided, which is part of a steady climb over the past seven terms.<sup>4</sup> Based on my research I can say with confidence that not only are the Justices increasingly relying on amicus briefs generally, but they are using them to support factual claims on a more frequent basis than they have in the past.

Using this smaller dataset of 277 citations we went through each citation individually and coded it to learn more details about how the Justices are using amicus briefs to support their factual assertions. The most amazing statistic – and the one I think will require the most discussion at the retreat – is the almost non-existent check from the traditional adversarial system. Of the 277 citations to amicus briefs for “fact-y” claims, 93% of them were uncontested by the parties to the litigation. We calculated that number by going through the party briefs in each case where an amicus brief was used to support a factual claim and searching for the name of the amici and the name of the authority / keywords about the factual claim. The implications from this finding are significant: it means the Justices are using amicus briefs to support factual claims largely without any reliability checks from the main levers of the adversarial system. Put differently, the “safety net” that is generally said to catch dubious evidence in the legal system is absent 93% of the time a Justice cites an amicus brief for a factual claim.

## II. SUMMARY OF RESULTS

I will present this research at the retreat in a more user-friendly way (using graphs and charts) but below are some highlights. Two complete spreadsheets with all the data are also attached here as an appendix.

### a. *Which Justices use amicus briefs the most in their opinions?*

Justice Alito and Justice Breyer led the pack of amicus citers generally, but all of the Justices engage in the amicus citation practice fairly regularly. As for the use of such briefs to support factual claims, Justice Breyer and Justice Ginsburg are the most frequent users for this reason, but Chief Justice Roberts is not far behind them. Consistent with my earlier research it is important to note that Justices appointed by Presidents of both parties frequently cite amicus briefs.

<b>Justice by Justice Citations of Amicus Briefs Generally</b>	
Alito	67
Breyer	84
Ginsburg	80
Kennedy	63
Kagan	50

<sup>3</sup> See Anthony Franz & Reeves Anderson, *Supreme Court Amicus Review 2017-18*, National Law Journal (Oct 2018)

<sup>4</sup> Id.

Sotomayor	59
Roberts	49
Thomas	43
Scalia	26
Gorsuch	9

<b>Justice by Justice Rate of Citation for Amicus Briefs for “Fact-y” Claims</b>	
Breyer	43
Ginsburg	39
Roberts	35
Alito	36
Kagan	21
Kennedy	41
Sotomayor	28
Thomas	13
Scalia	10
Gorsuch	7

*b. Do amicus briefs appear in majority opinions, dissents or both?*

Perhaps surprisingly, the Justices cite amicus briefs more often in majority opinions than they do in separate concurrences or dissents over this time period. Of the 548 citations to amicus briefs generally (not limited to factual claims), 312 of those (56%) came from a majority opinion, while 170 of them came from dissents (31%) and 48 (8%) came from concurrences. The trend is the same for the sub-set of amicus citations to support factual claims. Of the 277 “fact-y” citations, 144 of them (51%) came from majority opinions, while 103 were in dissents (37%) and 26 (9%) in concurrences.

*c. Which types of cases generate the most frequent amicus citations?*

Consistent with my prior research, there is a wide variety of cases that inspire the use of amicus briefs to support factual claims. Of course this variety could just reflect the Court’s choices in the cases it chooses to hear, but it is worth observing that the top two subject areas in our search came both from public law (First Amendment) and from private law (employment disputes).

<b>Subject Matters of Cases with Fact-y Amicus Citations</b>	
<b>Basic Subject Area</b>	<b>Number of Cases</b>
First Amendment	11
Labor & Employment Law	11
Election Law	7
Criminal Law	8
Fourth Amendment	6
Immigration Law	6
Patent Law	5

Fourteenth Amendment	4
International Law	4
Sixth Amendment	4
Eighth Amendment	3
Fifth Amendment	3
Litigation	3
Administrative/Industry Regulation	2
Antitrust Law	2
Civil Rights (§1983 And Constitutional Torts)	2
Copyrights	2
Government Contracts	4
Health Law	2
Real Property	2
Taxation	2
Bankruptcy	1
Civil Procedure	1
Commercial Law	1
Family Law/Abortion	1
Securities Regulation	1

*d. What types of factual claims do the Justices use amici to support?*

As with the variety in case subject matter, there is also a large range in the type of factual claims the Justices use amicus briefs to support. Several patterns emerge, however. The most frequent factual claim supported by an amicus brief is a description of industry practice or an empirical claim about how common a practice is generally. An interesting sub-class of these claims are those in which the government is assuring the Court that a practice is common. Followed close behind this sort of claim are citations to amicus briefs to support history, and then claims about medicine and technology.

<b>Most Frequent Sorts of Factual Claim Supported by Amicus Briefs</b>	
Description of Common Practices	72
Industry Practice	37
Description of Common Practice Generally	25
Government Assurance of Prevalent Practice	11
Historical Claims	48
Empirical Claim on Likelihood of Something Happening	17
Technology	9
Medicine & Healthcare	8
Description of Common Practices	72
Industry Practice	37

*e. Who are the most frequently cited amici?*

By far the most widely cited amicus is the United States (filed by the Office of the Solicitor General). Because amicus activity is booming (the filing rate is up 800% over the last 50 years), the list of frequent amicus filers is long and varied. I assumed the most interesting subset to the audience at the retreat would be frequent amicus filers in cases involving science and technology. That list is below. Please note that these are all amici cited to support claims of fact in either technology, medicine, economics, healthcare, or mathematics.

<b>Amici cited to support claims of fact in scientific fields</b>
United States
American Psychological Association
Law Professors
Center for Democracy & Technology
Electronic Privacy Information Center
American College of Obstetricians and Gynecologists
Ovarian Cancer National Alliance
Guttmacher Institute
National Association of Health Data Organizations
Social Science Researchers
Costco Wholesale Corp.
Intel Corp.
Eric McGhee
Political Science Professors
eBay and Etsy
Technology Experts
CATO Institute

*f. Number of cases where the amicus brief is the only source of evidence presented (as opposed to record evidence or evidence from other sources)*

Finally, we wanted to track how many of these citations to amicus briefs were “bare” by which I mean unaccompanied by other evidence (either from the record or from other authorities within the briefs or from additional “see also” cites). This matters of course because it is another way to measure the extent to which amicus support is some-how fact-checked or compared with other sources of evidence.

The numbers here were rather startling. Of the 277 citations to amicus briefs for fact-y claims, 63 percent of them (so, 175) were completely bare – without complementary cites to record evidence or a “see also” cite to an additional authority or even accompanied by the authorities that are contained within the brief. And only 5% of the 277 citations to amicus briefs were accompanied by evidence from the record below (15 out of the 277). This confirms the conclusion I made in my prior work that the Justices are largely using the amicus briefs themselves as evidence – not as sources for evidence – which of course underscores the importance of the discussion we are going to have in February.

### **III. CONCLUSION**

In sum, I think this research strengthens and underscores the conclusions I drew in my prior work. The Justices are citing amicus briefs more frequently than ever before, and specifically doing so to support claims of fact at a more consistent rate. Justices of all ideological stripes do this, and they do it in cases of varied subject matter and for factual claims of all sorts. Most interesting / concerning to me are two observations: (1) there is a very feeble check from the adversarial system on the reliability of these amicus briefs and (2) the Justices seem to be using these amici as experts themselves, not as research tools that lead to other experts.

Once again, thank you for commissioning this study and for finding my prior work to be helpful.