ME TOO? AN INVESTIGATION OF REPETITION IN U.S. SUPREME COURT AMICUS CURIAE BRIEFS

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ABSTRACT

Academics, practitioners, and judges have debated for decades the extent to which amicus curiae briefs provide novel information or repeat arguments already available to courts. Despite the importance of this question for our understanding of the role and influence of interest groups in the judiciary, there has been little systematic research addressing this issue. Using plagiarism detection software, we compare the content of U.S Supreme Court amicus briefs to that of lower court opinions, litigant briefs, and other amicus briefs. We find that amicus briefs seldom contain language that is repetitious of other information sources, indicating that amicus briefs overwhelmingly provide justices with original argumentation. These findings strongly support the informational value of interest group amici curiae in Supreme Court litigation.

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A voluminous literature has demonstrated that amicus curiae ("friend of the court") briefs influence judicial behavior. At the U.S. Supreme Court, amicus briefs affect certiorari decisions (Caldeira and Wright 1988); litigation success (Collins 2004; Kearney and Merrill 2000); the ideological direction of the Court's decisions and justices' votes (Collins 2007; Collins 2008a); the frequency of separate opinion writing (Collins 2008b); and the content of the Court's opinions (Epstein and Kobylka 1992; Spriggs and Wahlbeck 1997). Similar findings have emerged in other judicial institutions, including state courts of last resort (Songer, Kuersten, and Kaheny 2000), the U.S. courts of appeals (Collins and Martinek 2010), and foreign high courts (Alarie and Green 2010).

Though these analyses differ in many ways, they share one common characteristic. That is, they posit that amicus briefs are influential because they provide judges with novel information that would otherwise not be available to them (see also Epstein and Knight 1998; Hansford 2004). Despite the ubiquity of this argument, the notion that amicus briefs supply judges with new information has not undergone extensive empirical analysis (but see Collins 2008a; Spriggs and Wahlbeck 1997). Consequently, we have limited evidence for the core assertion that motivates an entire body of scholarship.

This is far from merely a matter of academic concern, however. Rather, the extent to which amicus briefs provide judges with novel information sits at the heart of the debate among practitioners and judges as to the utility of amicus briefs. For example, Supreme Court Rule 37, widely adopted by other courts, speaks directly to this issue: "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." Former Supreme Court Justice Sandra Day O'Connor has reinforced this position, stating that amicus briefs are influential because they address "points of law, policy considerations, or other points of view that the parties themselves have not discussed"

(O'Connor 1996, 9; see also Breyer 1998, 26). While O'Connor spoke to the potential for original amicus briefs to benefit the Court, Seventh Circuit Court of Appeals Judge Richard Posner had harsh words for repetitious "me too" briefs in *Ryan v. Commodity Futures Trading Commission* (7th Cir. 1997): "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made by the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse." Similarly, former Supreme Court law clerks agreed that "amicus filers needed to complement the information supplied by the parties in order to earn anything beyond cursory consideration" (Lynch 2004, 42; see also Flango, Bross, and Corbally 2006). Thus, it should not be surprising that practitioners concur that, above all else, amici must avoid merely repeating the arguments of the direct parties to litigation (Ennis 1984; Lynch 2004; Sungaila 1999).

The purpose of this research note is to engage these debates by investigating repetition in amicus curiae briefs filed in the U.S. Supreme Court. Systematically analyzing the content of amicus briefs is important for a number of reasons. First, it contributes to our understanding of why amicus briefs influence judicial decision making. If we find that amicus briefs typically provide novel information, this reinforces the existing theoretical framework for understanding amicus influence. If, however, we find that amicus briefs are overwhelmingly repetitive, this indicates the need to revise our theoretical understanding of amici curiae. Second, this research brings new evidence to bear on the concerns expressed by practitioners and judges regarding the value of amicus activity. For example, if amicus briefs are highly repetitive, this suggests that judges may be wise to institute policies that limit their filing or exert more control over their content (e.g., Harrington 2005; Rustad and Koenig 1993). Conversely, if amicus briefs generally provide original argumentation, this indicates that judges may benefit from open-door policies regarding amicus activity. More broadly, this research is significant because it furthers our understanding of the primary method for

democratic input into the federal judiciary. Through the filing of amicus briefs, interest groups and other actors are provided with one of the only opportunities to actively engage an otherwise politically insulated federal court system (Collins 2008a; Garcia 2008).

INVESTIGATING REPETITION IN AMICUS BRIEFS

Though there has been a great deal of research devoted to examining amicus influence, little attention has been dedicated to investigating the content of amicus briefs. Spriggs and Wahlbeck (1997) compared the arguments made in amicus briefs to those advanced in litigant briefs during the Court's 1992 term, based on the "Argument" section of the briefs. They found that 25% of amicus briefs exclusively added information; 33% exclusively reiterated information; and 42% both add and reiterated the arguments of the parties. Overall, 67% of amicus briefs provided some novel information to the Court. Collins (2008a) replicated and extended this approach to a smaller sample of amicus briefs. He found that 71% of amicus briefs provided some new information and 100% of amicus briefs contained authorities beyond those referenced by the parties to litigation.

These studies have shed some much needed empirical light as to the content of amicus briefs. However, they are limited in a number of regards. First, they focus solely on the main arguments made in amicus briefs, rather than the actual language used in the briefs. This is problematic as it is plausible that amicus briefs repeat the main arguments made by a litigant, but use novel language for doing so, such as introducing new precedents, legislative history, or social scientific research (Collins 2008a: 64). Second, these studies only consider repetition in amicus briefs relative to litigant briefs. Though this is the main concern of judges, litigant briefs are not the only information source available to courts that amici can repeat. In particular, Supreme Court justices also rely on the opinions of the lower courts who initially handled disputes in formulating their opinions (Corley, Collins, and Calvin 2011) and other amicus briefs (Epstein and Kobylka 1992; Kearney and Merrill 2000; Spriggs and Wahlbeck 1997). Consequently, a more complete

investigation must consider the informational content of amicus briefs relative to litigant briefs, lower court opinions, and other amicus briefs. Finally, these studies lack a baseline for understanding the extent to which amici supply judges with original arguments. Though Collins (2008a) and Spriggs and Wahlbeck (1997) provide evidence that approximately 70% of amicus briefs offer some original argumentation, it is not clear if this is a relatively large amount of new information or is a comparatively small contribution. Such is the case because some level of repetition is to be expected since cases are argued and decided based on their facts and a common body of relevant law.

We present an innovative method to investigate the content of amicus briefs that remedies these issues. To do this, we utilize plagiarism detection software, which has successfully been employed in studies of Supreme Court opinion content (Black and Owens 2012; Corley 2008; Corley, Collins, and Calvin 2011), media coverage of the president (Eshbaugh-Soha 2013), and the senate's agenda (Grimmer 2010). This allows us to contrast the actual language in amicus briefs to party briefs, other amicus briefs, and the opinions of the lower courts who previously handled the litigation. Moreover, by investigating the content of litigant briefs vis-à-vis lower court opinions and amicus briefs, we can establish points of comparison for evaluating the extent to which amicus briefs provide the Court with new information relative to the briefs of the parties. In addition, this application of computer assisted content analysis has the benefit of being able to analyze a large sample of briefs and opinions since it does not require hand coding the data (Owens and Wedeking 2012). For example, while Spriggs and Wahlbeck (1997, 372) explored the content of 450 pairs of litigant and amicus briefs, our analysis is based on 47,672 separate comparisons of documents presented to the Court.

DATA AND METHODS

To analyze the content of amicus briefs, we identified every orally argued Supreme Court case decided with a majority opinion during the 2002-2004 terms, based on information in the

Spaeth (2007) database.[1] For each case, we obtained the amicus curiae and litigant briefs filed on the merits in the Supreme Court, as well as all of the opinions (majority, concurring, and dissenting) from the lower federal and state courts who initially handled the litigation. These documents were acquired from Findlaw, Lexis-Nexis, and Westlaw, and were converted into a text format. The dataset includes 2,016 amicus curiae briefs, 520 litigant briefs, and 1,068 lower court opinions corresponding to 239 Supreme Court cases.

To compare these documents to one another, we used the plagiarism detection software WCopyfind 4.1.1, which allows us to analyze two (or more) text documents to determine the extent to which they share common words in phrases (Bloomfield 2012). Following existing social scientific applications (Corley 2008; Corley, Collins, and Calvin 2011; Eshbaugh-Soha 2013), we relied primarily on the default parameters of the program. We set the shortest phrase to match at six words, meaning that the program does not record matches of five words or less. To enable the program to find matches despite minor editing to the prose, we set the minimum percentage of matches that a phrase can contain at eighty; programmed the parameters to ignore letter case, numbers, and outer punctuation; and authorized WCopyfind to allow up to two imperfections. This latter setting allows the software to bridge its way across up to two non-matching words as it connects pieces of perfectly matched phrasing. Finally, the program was set to skip non-words (i.e., words that contain characters other than letters, with the exception of internal hyphens and

[1] We used the docket number as the unit of analysis to identify cases. We chose this time period as it is a relatively current period of the Court that exhibited no membership change, thus allowing us to account for any alterations in the content of amicus briefs, party briefs, and lower court opinions that would be attributable to the changing membership of the Court. See Corley, Collins, and Calvin (2011) corroborating the generalizability of findings corresponding to these terms.

apostrophes), which means that the reported matches do not contain case citations.

Because of the volume of texts under analysis, we automated WCopyfind to conduct the file comparisons. To do this, we stored all of the relevant documents (amicus briefs, lower court opinions, and litigant briefs) in separate file folders corresponding to each case. We then created software that ensured all $\frac{n}{k}$ ("n choose k") pairs of documents were compared to each other within each file folder. After making the file comparisons, WCopyfind generates a report that indicates the percentage of each document that incorporates language directly from another document. We use this percentage to investigate the extent to which amicus briefs provide novel information, or repeat information that would be otherwise available to the Court. Because WCopyfind does not report the results of file comparisons with no matching text, we identified these missing pairs with a Python script and inserted them into the data as observations containing zeros for the number of shared words in phrases (indicating that they contain no common language).

RESULTS

Figure 1 reports the percentage of petitioner amicus briefs, respondent amicus briefs, petitioner briefs, and respondent briefs that directly incorporate language from another information source.[2] The shaded boxes represent the 25th (lower hinge) to 75th (upper hinge) percentiles, with the black dot indicating the median percentage of each brief that shares language with another brief or

[2] To present a less cluttered depiction of the data, we have consolidated some document types. Lower court majority opinions include the majority opinions of multi-member courts and the opinions of trial court judges. Lower court concurring opinions include concurring opinions and those opinions that concurred in part, and dissented in part. In addition, we have excluded petitioner reply briefs and supplemental briefs filed by the litigants. Including these briefs in our analyses does not change the conclusions drawn from Figure 1.

opinion. The lines outside of the shaded box indicate the upper and lower adjacent values. Note that, because the documents under analysis are written or filed in a sequential fashion, not all document types appear in each figure. In particular, we have only included document types that temporally precede or coincide with the brief of interest in these figures.[3] For example, because respondent briefs and amicus briefs supporting the respondent are filed after amicus briefs supporting the petitioner, these briefs are absent from the upper left graph in Figure 1 since petitioner amici have no opportunity to view them before filing their own briefs with the Court.[4]

[Figure 1 About Here]

The upper left figure shows that petitioner amicus briefs directly incorporate the highest percentage of language from the petitioner's brief and other amicus briefs. The median percentage of petitioner amicus briefs that comes from those sources is 2% (25th percentile = 1, 75th percentile = 3). Petitioner amicus briefs incorporate less language from lower court majority opinions (median = 1, 25th percentile = 0, 75th percentile = 4), dissenting opinions (median = 1, 25th percentile = 0,

[3] Lower court opinions are written prior to the Supreme Court granting certiorari. In the terms under analysis, petitioner briefs, amicus briefs for the petitioner, and amicus briefs for neither party were due 45 days after certiorari was granted; and respondent briefs and amicus briefs for the respondent were due 30 days after the petitioner briefs were filed (Solowiej and Collins 2009). Note that we are not arguing that the various amici and the party they support will always coordinate their briefing efforts. Instead, our research design is premised on their ability to do so. For a discussion of coordination among amici and litigants see Ennis (1984), Lynch (2004) and Sungaila (1998).

[4] Appendix Table 1 presents the mean, standard deviation, and minimum and maximum values of the percentage of amicus and party briefs based directly on other information sources, along with the number of comparisons between each document type.

75th percentile = 5), and concurring opinions (median = 0, 25th percentile = 0, 75th percentile = 1). The upper right figure reports the comparisons of respondent amicus briefs to other information sources. This figure evinces little variation, with respondent amicus briefs directly incorporating a median of 1% of language from amicus briefs supporting the petitioner and respondent (25th percentile = 1, 75th percentile = 2), neither party (25th percentile = 1, 75th percentile = 3), as well as party briefs and majority opinions (25th percentile = 0, 75th percentile = 2). Amicus briefs supporting the respondent adopt a median of 0% of language from concurring and dissenting opinions (25th percentile = 0, 75th percentile = 1).

Thus, considering the extent to which amicus curiae briefs share language with other information sources, it is clear that they rarely repeat the content of other amicus briefs, litigant briefs, or lower court opinions. In fact, compared to all other information sources, only 2.6% of petitioner amicus briefs (standard deviation = 3.4) and 1.5% of respondent amicus briefs (standard deviation = 1.8) contain language that is otherwise presented to the Supreme Court. This corroborates the findings of more limited studies that demonstrate that amicus briefs most commonly provide the Court with original information (Collins 2008a; Spriggs and Wahlbeck 1997).

Though these figures indicate that amicus briefs overwhelmingly provide justices with novel argumentation, this conclusion can be further informed by comparing the extent to which amicus briefs adopt language from other information sources relative to litigant briefs. These data appear in the bottom graphs in Figure 1. Even a cursory glance at these figures reveals that party briefs incorporate substantially more language from other information sources than do amicus briefs. On average, 6.1% of petitioner briefs comes from other information sources (standard deviation = 5.9), and 4.7% of respondent briefs is adopted from other documents (standard deviation = 4.8). Thus, to the extent that Supreme Court justices are subjected to redundant information, most of the blame lies with the litigants, not the amici.

For example, petitioner briefs incorporate a median of 8% of language from dissenting opinions (25th percentile = 4, 75th percentile = 15), 6% from majority opinions (25th percentile = 2, 75th percentile = 10), and 5% from amicus briefs supporting the petitioner (25th percentile = 3, 75th percentile = 7). Respondent briefs adopt a median of 6% of content from majority opinions (25th percentile = 2, 75th percentile = 11), 5% from petitioner briefs (25th percentile = 4, 75th percentile = 9), and 4% from dissenting opinions (25th percentile = 2, 75th percentile = 7).

This indicates that, to a large degree, the party briefs focus their energies on trying to support or undermine the opinions of the lower courts, and attacking the briefs of their direct adversaries. To illustrate, consider the behavior of petitioners and respondents with respect to dissenting and majority opinions. Because petitioners are trying to convince the Supreme Court to reverse the immediate lower court decision, it makes good sense that they adopt the arguments found in the dissenting opinions of the lower courts since those dissents are authoritative sources that tend to support the petitioner's position. Conversely, respondents devote the most attention to lower court majority opinions, as they are generally advocating for the affirmance of those opinions. This novel finding supports the idea that the parties are most concerned about the outcome of the case as it relates to their immediate circumstances, while amici are more interested with the broader policy implications of a decision (e.g., Collins 2008a). Consequently, amici do not focus as much effort promoting or undermining the arguments of the lower courts and direct parties to litigation.

CONCLUSIONS

This research note addresses a question of substantial importance to academics, judges, and practitioners: to what extent do amicus curiae briefs provide courts with new information? To answer this significant query, we collected an extensive amount of data, allowing us to systematically compare the content of amicus curiae briefs, litigant briefs, and lower court opinions. Our findings indicate that amicus curiae briefs overwhelmingly contain original information, rather than

reiterating the language found in party briefs and lower court opinions. In fact, amicus briefs supply judges with substantially more original information than party briefs, which incorporate a relatively large amount of the language found in lower court opinions and the briefs of the opposing litigant.

Our evidence substantiates existing theoretical accounts of amicus influence that stress the ability of amici to provide judges with new or reframed legal arguments, innovative policy and technical information, and original perspectives on the broad impact of a decision (e.g., Breyer 1998; Collins 2007; Collins 2008a; Ennis 1984; Epstein and Kobylka 1992; Hansford 2004; Lynch 2004; O'Connor 1996). It also indicates that the concerns expressed by judges, law clerks, and practitioners that amicus briefs may be overly repetitious are not supported by the data, lending further support for open-door policies toward amicus participation. Moreover, our findings regarding repetition in litigant briefs suggest that, while amici primarily argue outside of the case record by providing information that is absent from litigant briefs and lower court opinions, the parties argue within the case record by directing their attention to supporting or opposing lower court opinions and their adversaries' briefs. As a result, party briefs are typically more repetitive of other information sources than amicus briefs. A significant finding in its own right, this further corroborates the informational value of amici curiae.

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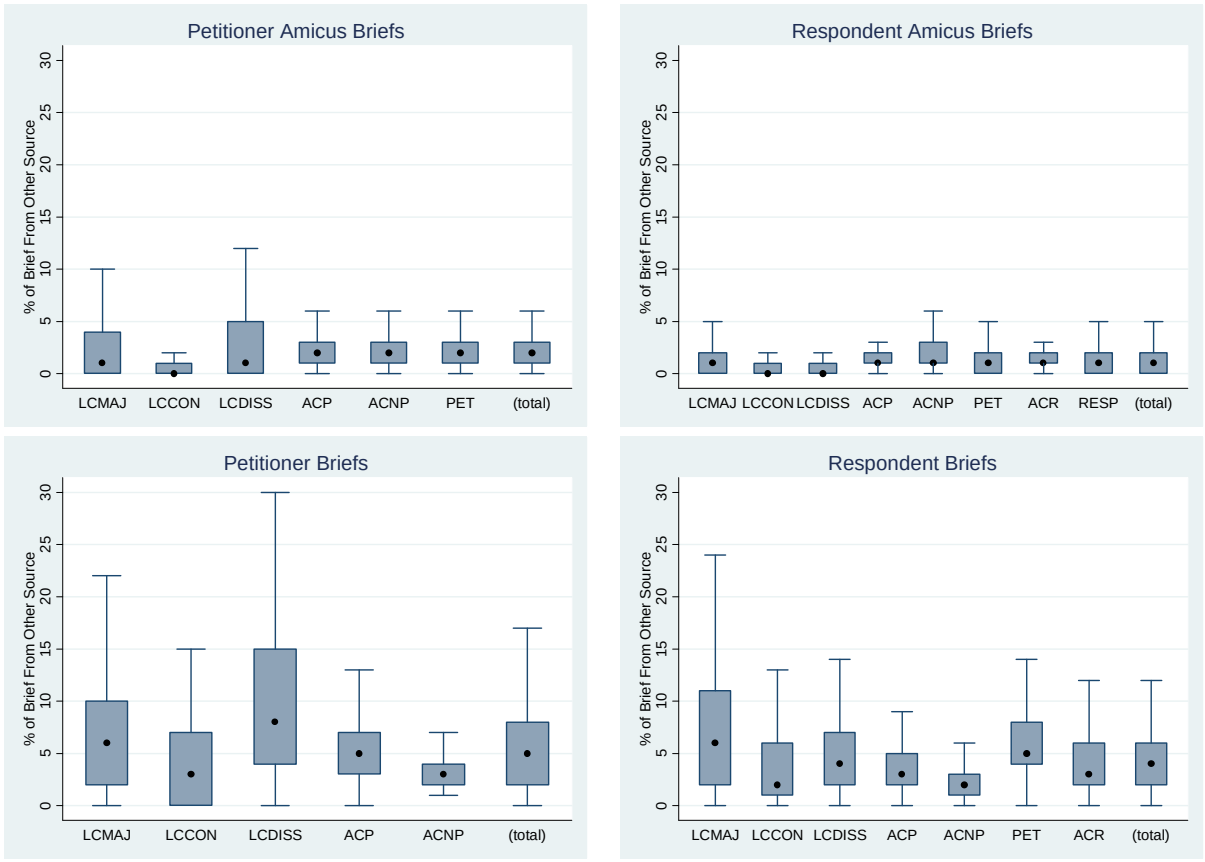
Figure 1. Percentage of U.S. Supreme Court Amicus Curiae and Litigant Briefs From Other Sources



Note: LCMAJ = lower court majority opinion; LCCON = lower court concurring opinion; LCDISS = lower court dissenting opinion; ACP = amicus curiae brief for petitioner; ACNP = amicus curiae brief for neither party; PET = petitioner's brief; ACR = amicus curiae brief for respondent; RESP = respondent's brief; (total) = average across all sources.

Appendix Table 1. Summary Statistics of the Percentage of U.S. Supreme Court Amicus Curiae and Litigant Briefs From Other Information Sources

	Mean	Standard Deviation	Min.	Max.	Number of Comparisons
Petitioner Amicus Briefs					
LCMAJ	2.96	5.32	0	66	2,171
LCCON	1.25	2.63	0	23	857
LCDISS	3.21	4.78	0	42	484
ACP	2.55	2.52	0	65	6,386
ACNP	2.21	1.95	0	18	603
PET	2.45	2.37	0	16	1,019
(total)	2.53	3.35	0	66	11,520
Respondent Amicus Briefs					
LCMAJ	1.91	3.60	0	63	2,821
LCCON	0.74	1.50	0	20	1,511
LCDISS	0.99	1.78	0	12	715
ACP	1.48	1.40	0	18	7,279
ACNP	1.86	1.50	0	10	1,022
PET	1.26	1.53	0	13	1,242
ACR	1.62	1.54	0	21	14,828
RESP	1.43	1.72	0	14	1,266
(total)	1.55	1.84	0	63	30,684
Petitioner Briefs					
LCMAJ	7.22	6.81	0	58	639
LCCON	5.26	7.75	0	56	172
LCDISS	10.65	9.30	0	46	124
ACP	5.27	3.69	0	29	1,011
ACNP	3.49	2.09	1	9	75
(total)	6.15	5.85	0	58	2,021
Respondent Briefs					
LCMAJ	7.67	8.21	0	99	627
LCCON	4.15	5.50	0	41	171
LCDISS	5.23	5.39	0	27	128
ACP	3.46	2.61	0	20	914
ACNP	2.69	1.73	0	8	67
PET	5.95	2.99	0	16	293
ACR	4.04	3.18	0	36	1,247
(total)	4.75	4.85	0	99	3,447

Note: LCMAJ = lower court majority opinion; LCCON = lower court concurring opinion; LCDISS = lower court dissenting opinion; ACP = amicus curiae brief for petitioner; ACNP = amicus curiae brief for neither party; PET = petitioner's brief; ACR = amicus curiae brief for respondent; RESP = respondent's brief; (total) = average across all sources.