

With Friends Like This...

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

This podcast begins with a riddle: “What do former California governor George Deukmejian, the Cleveland Choral Arts Association, and the NFL all have in common?”

Give up? The answer is that each was among the individuals and organizations filing “amicus” briefs (also known as “friend of the Court” briefs) over the last several years with the Supreme Court of the United States.

You’ll likely hear about amicus briefs as part of regular media coverage of the Court. So let’s shed some light on three key questions: Why does such a diverse array of litigants spend substantial time and money to submit amicus briefs? How do these amicus briefs seek to influence the Court’s perception of the issues? Do amicus briefs even “work?”

Public and private individuals and organizations file amicus briefs because they’re the only way to legitimately “lobby” the justices about whether to take a case – and then how to decide it. Compared to other branches of the federal government -- where individuals and organizations can directly contact the decision-makers -- the rules and traditions of judicial ethics make direct advocacy highly inappropriate. The president of the United States or the head of the U.S. Chamber of Commerce can’t just call a justice, or have their staffs contact judicial law clerks, to plead their case.

Some advocacy organizations even use amicus briefs to show their members that the organizations are acting on their behalf.

But how do amicus-brief filers seek to impact the justices individually and as a whole? After all, by the time cases reach the Court, there are two conflicting parties (and, sometimes, more). Their legal and policy views are represented by highly adept lawyers filing hundreds of pages of briefs in chief. What could amicus briefs seek to add to the mix?

In general, amicus briefs serve three different strategic goals. First, some briefs offer theories different from those the main parties provide. For example, at times parties may for strategic reasons portray their positions as requiring only modest legal adjustments. Amicus-brief filers, by contrast, may be the ones carrying the banner for broader legal and social change.

A second goal of some amicus briefs is to provide the justices with specialized expertise that the main parties may lack – or, given word limits, may de-emphasize or ignore. For example, several organizations representing the psychiatric and psychological professions filed briefs in the 2005 case testing the constitutionality of the death penalty

for juvenile offenders. A key issue in the case was one on which the amicus organizations had special streets creds: how juvenile brains process peer pressure and understand the consequences of criminal acts.

Many amicus briefs seek a third goal. They're less concerned with providing new arguments or data than with what I call "showing the flag" – that is, signaling to the justices which political officials, interest groups, private organizations, and governmental units are on which "side" of a case, and how they'll be impacted. That's likely why 152 amicus briefs on the merits were filed for the 2011 challenge to the Affordable Care Act.

Sometimes, the array of briefs shapes the perception of the issues by showing an unholy alliance of interests or that a particular position transcends party or ideology. That was the implicit message in one amicus brief filed in a presidential-power dispute a few years ago by a coalition of former Secretaries of State serving in Republican and Democratic administrations of varied ideological stripes.

Ultimately, do amicus briefs really "work" to accomplish the objectives sought by their filers? That's hard to say. True, the impact becomes clear in some Court opinions when a justice overtly uses arguments or data from amicus briefs. But despite some ingenuous studies looking into it, the influence of amicus briefs remains largely a matter of conjecture.

Still, the fact that so many friend-of-the-Court briefs are filed suggests that the legal and political communities certainly think that the Supreme Court justices are like Blanche DuBois in *A Streetcar Named Desire* – they "depend on the kindness of strangers."