Amicus Practice in the Supreme Court

# Answering Hypotheticals Before They Are Asked

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Amicus curiae briefs have a long and storied history in American courts. Recent years have witnessed marked changes in the frequency, approach, and substance of amicus filings, most noticeably in the U.S. Supreme Court. One study calculated that amicus briefs are now filed in 98 percent of Supreme Court merits cases and that the volume of Supreme Court amicus filings is now 800 percent greater than in the 1950s, with substantial increases in the last two decades alone. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901, 1902 (2016). This growth has not gone unnoticed. Scholars and the media have undertaken efforts to explain the reasons for this dramatic upsurge and to assess the effect on the Court's decisions.

Some analysts have focused on the evolution from a disinterested "friend-of-the-court" archetype to a more partisan "friend-of-party" model. Other commentators offer explanations for the remarkable growth, ranging from the emergence of Supreme Court "specialists," to the launch of self-identified "appellate" practice groups by major law firms, to the recognition of the role of amici in informing or lobbying government decision makers.

For better or worse, the burgeoning role of amici is now an accepted fixture. In the transformed reality of appellate litigation, lawyers, parties, and potential friends of the court face new challenges in an environment inhabited by "amicus wranglers" and "amicus whisperers" of the private bar's "Amicus Machine." *See id.* at 1919, 1924. Whether you are the wrangler or the one being wrangled, a few simple steps provide practical guidance for traversing today's amicus landscape efficiently and effectively.

A convenient way to start is by acknowledging the amicus's inherently ambiguous status: It has the freedom to participate voluntarily in litigation in which it will not technically be bound, yet it is largely limited to the record generated and issues framed by the parties. If the amicus wanders far afield from the record, it risks being ignored as irrelevant; yet if it merely repeats points and arguments presented by a party, it risks being ignored as redundant.

Appellate courts—especially courts of last resort—are often curious about larger questions than simply which party should win this case. They explore why the party wins. Their opinions explain how, and to what extent, the party wins. They chart a course for decisions in future cases. These areas should be prime real estate for amici to develop. How will a decision regulating the mining of mineral A affect the mining of mineral B? If we decide how this search of a sedan's trunk fares under the Fourth Amendment, how will that affect searches of hatchbacks, station wagons, or SUVs? If we interpret statutory section X.2(a) in this way, how will that affect section X.2(b)? If we accept your

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standard for granting summary judgment in this antitrust case, how will that affect summary judgment in employment discrimination cases? Amici can offer valuable contextual perspectives on broader questions that are surely of interest to judges. By alerting the Court to the ramifications—practical as well as doctrinal—of various results, good amicus briefs can serve an intensely useful role.

Think of it this way: The amicus brief can answer hypothetical questions before they are asked. So long as judges pose the hypotheticals that force counsel for the parties to stifle the temptation to respond "that's not my case," amici will have a key role in the judicial decision-making process.

## The Petitioner's Perspective

First, let's consider the amicus landscape from the vantage point of the petitioner seeking certiorari. I have several recommendations.

**Start early.** Among the principal impediments to amicus participation, especially at the cert. stage, is lack of time. With a 90-day deadline for filing the petition (unless extended) and supporting amicus briefs typically due 30 days later, much must be accomplished in a short time. Aside from deciding on the most compelling question or questions to present and then drafting the petition, the party's counsel is often called upon to design a strategy for communicating with potential amici. Time is fleeting. Unless they have already been following the case closely, amicus groups generally need reasonable lead time. They must learn enough about the case to determine whether the issue is important to them, whether the case is an attractive vehicle for resolving the issue, and whether the petition stands a reasonable prospect of being granted. When an amicus decides to participate, it must select counsel to draft a brief sufficiently in advance of the deadline for the amicus's decision makers to review and approve. Each step takes time. Parties that fail to get a quick start on the process will find amicus prospects fading as the deadline approaches.

**Develop an amicus strategy.** A groundbreaking study by Professors Kearney and Merrill examined the statistical benefit of amicus support at the petition stage. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Briefs Curiae on the Supreme Court*, 148 U. Pa. L. Rev. 743 (2000). Up to a point, amicus participation enhances the prospect for cert. to be granted, but beyond that point (around three or four supportive filings), the added value of each additional amicus brief diminishes.

Consider carefully how a range of viewpoints from amici can amplify the core message of your cert. petition: why the Court should grant review. At the cert. stage, therefore, the principal benefits of amicus support are enhanced attention for your case and confirmation that the issue has practical importance far

Illustration by Phil Foster

beyond the parties. Don't expect much help from an amicus brief that simply echoes the cert. petition, e.g., spending too much space identifying or explaining a circuit conflict. If your petition hasn't made that point convincingly, you'll face an uphill battle that amici are not likely to win for you; if the petition *has* made that point convincingly, the amicus brief is essentially superfluous. And don't expect much help from an amicus brief that merely argues the decision below is wrong. The Court will already know your views on the subject. After all, doesn't every petition start from that premise?

**Avoid duplication.** Don't expect that multiple amici briefs parroting one another will all be read with the same care and attention. And there is certainly no guarantee that the best of the bunch will be read first. To avoid this situation, a gaggle of amici joining a single brief can provide the benefit of exhibiting broad-based support while minimizing the soporific effect of endless repetition.

**Think outside the box.** Amicus support from an unexpected source can be especially powerful. A brief from a prominent authority or entity that rarely participates as an amicus may garner extra attention. A brief from a group that would ordinarily be on the other side of the issue can be a real eye-opener. And imagine the impact of that rare gem—an amicus brief that agrees with the decision below but concludes that the importance of the issue and the need for national uniformity weigh heavily in favor of cert.

**Don't overlook the obvious.** One place to start your search for a list of potential amici is the Supreme Court docket. Find out who has filed amicus briefs in similar cases. Those earlier cases will help you identify organizations with subject matter expertise and established interest. Those organizations (and the lawyers who drafted the earlier briefs) may be in the best position to act quickly. And don't limit your search to cases decided on the merits. Amici who filed at the petition stage in prior cases may be an especially fertile source of support if they agree that your case is a viable cert. candidate.

An important cautionary note. Go beyond the docket sheet. The mere fact that an organization has filed in an earlier similar case doesn't mean that its views are compatible with your position in this case. And it doesn't mean that the earlier amicus effort was a first-rate brief. Take the extra step of reading the prior brief before befriending the organization for its support.

**Don't overdo it.** For a variety of reasons, many potential amici will choose not to participate at the petition stage. Among the most frequently mentioned reasons for nonparticipation are lack of time, lack of familiarity with the issue or the case, lack of institutional interest in the issue, lack of budgetary or personnel resources, lack of confidence that the petition has a reasonable prospect of being granted, and—even if review were obtained—lack of confidence that the case would be a promising vehicle for obtaining a favorable result on the merits. The pragmatic petitioner with hopes of having the support of two or three strong amicus briefs will ordinarily have to cast a wide net.

But an overly ambitious search can backfire. At one end of the spectrum, the amicus wrangler can be too successful: too many briefs, briefs that merely repeat clichéd tropes, and possibly some briefs that are less than stellar. At the other end of the spectrum, the process can result in an extremely skewed presentation. If no briefs are filed by the potential amici who are best suited to explain convincingly why review is warranted, the petitioner may be left with an odd assortment of outliers, fringe players whose interest in the issue is so attenuated or idiosyncratic that they are poor candidates for presenting the broad, pragmatic reasons for review.

To avoid these pitfalls, maintain an objective perspective of how the entire package (petition, amicus briefs, respondent's opposition) will look to the Justices. You won't get much help from repetitive briefs, weak briefs, and briefs that don't present a full perspective on the practical significance of the issue.

**Don't oversell.** We all know the statistics. The overwhelming majority of cert. petitions are denied. Even among petitions with reasonable prospects for success, most are denied. And no one would be surprised to learn that even among petitions filed by members of the "specialized" private Supreme Court bar, most are denied. So don't let yourself be "in denial" about the long odds you face. Expect potential amici to know the reality of the cert. docket.

Be prepared to address the concerns potential amici may express. Is the circuit conflict real or artificial? Hasn't the Court repeatedly denied cert. on this issue? Was the issue adequately preserved below? Isn't the procedural posture extremely disadvantageous? Is there a hidden jurisdictional defect? Aren't the facts terrible? Aren't the prospects that you will win on the merits miniscule? If you don't have convincing answers, neither potential amici nor the Justices are likely to be persuaded.

Most of all, remember that the ultimate objective at the cert. stage is for the Court to grant your petition. As helpful as getting amicus support may be, it is neither essential (many cases unaccompanied by cert. stage amicus briefs are granted review) nor sufficient (many petitions with solid amicus support are denied). The true measure of success is whether the order list says "Granted," not the number of amicus briefs you wrangled.

## The Amici Perspective

Having considered cert.-stage amicus practice from the petitioner's view, let's look now at the amici's perspective.

**Start early.** The advice to start early applies not only to petitioners but also to amici and their counsel. Frequent amicus filers, including litigation-oriented advocacy groups, understand

the time constraints and may already be anticipating a cert. petition because they monitor key cases in their areas of interest. That monitoring often includes identifying viable candidates for cert.-stage amicus briefs. Active amici generally maintain a pool of talented, dependable lawyers to whom they turn for drafting briefs. Having such built-in institutional advantages can make the decision to participate or not at the cert. stage more efficient.

Outside of this relatively small group of "regulars," an early alert from the petitioner can be crucial. Precisely because they rarely participate, these potential amici typically have slower, ad hoc processes for deciding whether to file. They are less likely to have amicus counsel on tap to jump into a case about which they know little. They are also less likely to have existing budgets or resources to devote to the project. And they may require additional time to complete the internal approval process and to screen a draft before it is finalized.

Infrequent and first-time amici may encounter a bumpy road, especially if unfamiliar with the process. I have heard of potential amici who thought they had to address all issues in the case even though they were interested in and would be affected by only one. And I have heard of potential amici who thought an amicus brief opposing cert. would be welcomed by the respondent. There is a reason you don't see private bottom-side amicus briefs at the cert. stage.

A further roadblock is that potential amici may first be learning about the case while the clock is ticking down to the filing deadline. In that short time, several key questions must be answered. These range from basic threshold decisions (Is the issue important to us? Is this case a good vehicle for resolving the issue?), to more nuanced considerations (Do we have something to say that won't replicate the petition and other amicus briefs? Will our perspective enhance the prospects for cert. to be granted?), to the most practical concerns (Do we have the time and resources to get the project authorized, select counsel, and have a brief written, reviewed, and approved before the deadline?). The earlier the start on addressing these items, the better.

For membership organizations (e.g., trade associations and industry, consumer, advocacy, or affinity groups), it is helpful to have a policy on whether to advocate a position as amicus that opposes a member. Some groups have a policy against such participation. Others employ an ad hoc method. Whatever approach you adopt, the decision in each case should be made and communicated as early as possible. I have seen and heard about amicus efforts that were scratched late in the day after the prospective amicus discovered that a member was a party or counsel on the other side of the case.

**Develop an amicus strategy.** The equation for determining whether to file should assess why participation would be advantageous to you (the amicus), what unique perspective or helpful insights you can bring to the case, and how you can most effectively communicate those points to the Court. The answers to several pivotal questions can help you decide on the best course to follow.

Is the case a good vehicle for your participation? Even apart from budgetary constraints and limits on resources, potential amici face a threshold decision about whether the case is one that warrants participation. In short, what is your objective in amicus participation? And will an amicus brief in this case help achieve that objective? At the cert. stage, one frequently dispositive factor is the likelihood that the Court will grant review. Just because a case presents an issue that is important to you doesn't mean you should enter the fray without more informed evaluation. Perceptive analysis will address two basic steps: prospects for cert. to be granted and prospects for success on the merits. After all, why encourage the Court to take a case that is likely to produce an adverse result?

A brief from a group that would ordinarily be on the other side of the issue can be a real eye-opener.

In assessing whether a case is a good vehicle for Supreme Court review, a useful starting point is jurisdiction. Is it clear that jurisdiction exists in the Supreme Court (and that jurisdiction existed in all the courts in which prior proceedings in the case were litigated)? And if the case is coming from a state court, pay close attention to the jurisdictional limitation in 12 U.S.C. § 1257. If the jurisdictional bona fides aren't immediately clear, dig deeper. Once you confirm that the jurisdictional requisites are satisfied, move on to assessing the factors listed in Supreme Court Rule 10 (e.g., decisional conflicts, especially on important questions of federal law). And don't overlook the rule's cautionary reminder that "certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." A related consideration: Has the issue been adequately preserved for review?

After satisfying yourself on these threshold factors, it's time for more strategic thinking. Is this case the right vehicle for resolution of the important questions presented? Among the relevant considerations are the following: Is the case in a satisfactory procedural posture? Was the lower court given a fair opportunity to weigh the best, strongest, most compelling arguments? (Look for something more than a technicality on which to base

the assertion that the issue was fully vetted in the lower court.) Does the case arise in a factual context that is most favorable to the side you want to support?

For example, suppose a defendant is challenging class certification under Federal Rule of Civil Procedure 23. The case turns on a question of law on which the circuits are in conflict. The cert. petition points out that the issue arises in many class action cases and urges the Court to grant review to resolve the conflict. Drawing on language from prior Supreme Court class action decisions, the petition reminds the Court that once a class is certified, the prospect of enormous litigation costs and the risk of a potentially catastrophic judgment create irresistible pressure on defendants to quickly settle even cases they deem to have little merit. But this case did not result in a settlement; it proceeded to trial and resulted in a modest recovery by the class. As a potential amicus, what do you decide? If your institutional interest favors class action defendants, you may well conclude this case is a poor vehicle for the Court to resolve the conflict. If your institutional interest favors class action plaintiffs, you may be tempted nonetheless to think the case is ideal (subject, of course, to your assessment of other factors). In either event, you are best served by avoiding knee-jerk reactions and assuming foregone conclusions. Once you have thought through what you want to say, it becomes easier to assess whether this case presents a suitable vehicle in which to say it.

**Expand your peripheral vision.** There may be other cases pending, or in the pipeline, that would be better vehicles. The choice of cases can be critical. Not only may the affirmance/reversal outcome be affected, but the scope of the Court's ruling, the guidance for future cases, and the clarity of the decisional line that is drawn can be heavily influenced by the circumstances of the case in which review is granted. I recall a case in which unique procedural circumstances limited the range of potential outcomes. For advocacy groups that would normally be aligned with the petitioner, there was no satisfactory result. Affirmance would create terrible precedent. And reversal would be only slightly less terrible (although the individual petitioner would benefit significantly). When potential amici requested consent to file, the respondent's counsel explained that the case was an extremely poor vehicle for topside amici and offered to provide a few pages from the record that demonstrated why the procedural posture precluded a favorable outcome on the legal issue amici wanted to address. Surprisingly, counsel for one of the amici refused the offer to learn more about the record. The amicus brief was filed. Certiorari denied.

Another example: I recall an issue on which the consensus of advocacy groups was that decades of litigation had swung the pendulum about as far in a positive direction as they reasonably could have hoped. In their view, it was time to take a lower profile, consolidate the past success, and chart a different path for the future. Consistent with that analysis, some parties chose not to seek Supreme Court review of unfavorable results. Along comes an adverse decision that solidifies an existing circuit conflict. Petition for cert. filed. Many groups with years of experience litigating the issue opted not to file cert.-stage amicus briefs, concluding that the prospects for reversal were virtually nonexistent. From their perspective, a Supreme Court decision on the merits was likely to undo years of progress. Better to live with a disappointing circuit ruling than risk an adverse nationwide precedent. As much as they agreed with the petitioner's substantive arguments, they cringed at the possibility that cert. might be granted. It wasn't.

Lesson: Much as you might like to see a party win on the merits, temper the impulse to file a cert.-stage amicus brief with a broader outlook. You may live to fight another day, with a stronger case and better prospects for success. The action point for potential amici is to realize that the petitioner's short-term interest may not be compatible with your long-term interest.

**Don't be a hermit.** Once the decision is made to participate at the cert. stage, it can be extremely useful to communicate with the party you will be supporting and with other amici. This avoids duplication and reduces the risk of being tripped up by misunderstanding the record. You have a few options. Remember that the primary point to be made at the petition stage is that the case merits review. The issue is cert.-worthy. A decision will have broad impact. A decision will provide clarity and uniformity on an important question. Each amicus can provide a unique perspective on how the issue in the case—and its ultimate resolution—will have wide-ranging consequences.

## The Merits Stage

Once the Court grants review, the equation changes. Amicus participation is now more of a two-way street, with briefs supporting both parties. At times, it is more like a cloverleaf interchange on a superhighway, as amici can support the petitioner, the respondent, or neither party. And at the merits stage—unlike the cert. stage, where briefs focus on the single pivotal yes/no question of whether review is warranted—the universe of amicus briefing can be much more varied and nuanced.

The schedule is also very different. Amicus briefs are due seven days after the brief filed by the party that is being supported (or, for amicus briefs supporting neither party, seven days after the petitioner's brief). Sup. Ct. R. 37.3. At certain times of the year, the parties are not going to get deadline extensions, so the timing will be tight. The rules governing advance notice to the parties and consent for filing amicus briefs also differ from the cert. stage.

But the major practical change for purposes of amicus planning is that the great uncertainty—and the principal obstacle

to amicus participation—has been removed. Review has been granted. The Court will consider the merits. And everyone who has been following the issue, or who monitors the Court's docket, knows this. In high-profile, hot-button cases, the flow of amicus participation can become a torrent that poses new challenges. In many cases, amicus participation remains modest; and some cases still proceed to decision on the merits without any amicus briefs. Overall, however, cases typically attract more amicus briefs at the merits stage than at the cert. stage.

Despite the significant change in circumstances that comes with a grant of review, counsel for the parties are well advised to heed the same advice that applied to the cert.-stage amicus process: Start early, develop an amicus strategy, and avoid or minimize duplication.

Your earlier alerts to interested groups means that gears are already turning by the time cert. is granted. Potential amici will not be starting from square one. They already know the basic contours of the case. And, if you were communicating with them before, you may already know which ones are inclined to file on the merits. If you conclude that additional amicus voices would be helpful—or if you had no prior communication with potential amici—time is now short, particularly for the petitioner.

For good reasons, respondents are generally less active on the amicus front in the pre-grant period. A few rare cases are such obvious grants that respondents may embark on the search for viable merits amici even before the cert. petition is filed. Most cases don't fall into that category. But if an objective assessment convinces you that the petition has a reasonable chance, you don't want to be entirely dormant at the early stages. Outline an amicus strategy you think would be helpful on the merits. Make potentially supportive amici aware of your case. Think about the amicus barrage you expect from the petitioner (the identities of cert.-stage amici provide a good starting point), and consider an effective response.

For all the planning, all the wrangling and whispering, recognize that aspects of the amicus process are beyond your control. You won't be writing or subsidizing the amicus briefs. You may not even see some supportive amicus briefs until after they are filed. Some of your "friends" may have views or interests that pointedly differ from yours. Some may press arguments that are far more extreme than you think the Court needs to, or should, accept.

There is no one-size-fits-all amicus strategy. A few cases may present neat categories into which groups of amici can fit comfortably, write briefs that dovetail nicely with minimal overlap, and present a compelling comprehensive overview of why your side should win. In most cases, the amicus process is less tidy. Nonetheless, counsel for the parties can help make the process more effective and efficient. The simplest way is by encouraging amici to avoid duplicative efforts. If you know that amici (advocacy groups, trade associations, commercial entities, and individual citizens) share similar views and are likely to advance compatible arguments, a suggestion that they consider joining in a single brief might be well received—by the amici and the Court.

Within the bounds of appropriate communication, a dialogue between counsel for the parties and their supporting amici can be productive in additional ways. Parties may learn about potential ramifications about which they were previously unaware. As amici learn more about the case, they may realize that their interest is more attenuated than they initially thought.

A final thought for parties and their counsel: Don't forget to decide whether any points raised in amicus briefs supporting your opponent need to be addressed in your next brief. You have no obligation to respond to everything that amici submit. Some points may already have been addressed (by you or the amici supporting you). Some points don't warrant any response. But some do.

Amici also have new considerations at the merits stage, though whether this case is an ideal vehicle for review isn't one of them. If you supported cert., you will almost always want to file a brief now that the Court will hear the case. You had sufficient interest in the issue to advocate to the Court *why* the issue was important enough to warrant review; presumably, your interest extends to explaining *how* the Court should analyze and resolve the issue. True, there may be instances in which your principal motivation at the cert. stage was to urge the Court to provide nationwide uniformity and certainty by resolving a circuit conflict, yet you are agnostic on how the conflict is resolved. But those instances should be extremely rare.

Whether you filed at the cert. stage or not, the decision to submit a merits brief should weigh the reasons for participating and anticipate the points you plan to address. The factors that inform your decision will vary depending on the underlying legal issue. For example, when substantive standards of conduct are at issue (drawing lines that distinguish legal conduct from illegal conduct), individuals and individual companies may be reluctant to self-identify. When someone else is the party, who wants to become the poster child for "I do this too, and it shouldn't be illegal"? For such issues, larger organizations, affinity groups, and policy-oriented entities are more likely amicus prospects. One prime consideration is whether the increased visibility of amicus participation to champion a challenged business practice will heighten the probability that you will be targeted for future litigation. If the conduct at issue in the case is in fact widespread, an industry-wide amicus brief—for example, from a trade association—can make the point more effectively than an individual brief from a single market participant. Conversely, individuals and entities victimized by the challenged conduct may conclude that self-identifying recitations of personal experience add a powerful real-world insight for the Court's consideration. And

they may well conclude that a collection of such narratives in a single brief is the optimal presentation. The determination of how best to proceed will vary from case to case and from amicus to amicus. But the objective should always be to present the advocacy that is most effective in the circumstances.

The decision of whether to file individually or under the umbrella of a larger organization is often viewed differently when the case involves procedural and jurisdictional issues. Consider a defendant that has litigated multiple class action lawsuits. That defendant may be more willing to share its experience in an amicus brief addressing aspects of class action practice (e.g., burdens of proof and persuasion on class certification, awards of attorney fees, or availability and scope of review of interlocutory appeals from class certification decisions) than it would be when it comes to substantive conduct-specific issues (e.g., is this product dangerous, does this label provide sufficient warning of risk, or is this conduct subject to state or federal regulation?). Other examples that may fall into this category are cases involving public policy or political viewpoints. Indeed, the greater the name recognition of the amicus, the more value it may perceive in filing individually, whether it files alone or joins other individually named amici in a common brief.

Most important, figure out what you plan to say. Once you do, the next decision becomes simpler: whether to file an individual amicus brief or to sign on with a group of amici in a joint brief. Do you have a singular voice? Or specialized expertise? Can you draw on unique experience? If so, the most effective way to communicate these points is in your own brief. Why blunt a powerful individual message in a more general presentation? But if the real force of your participation comes from demonstrating the widespread impact of the issue on many groups, industries, or segments of the economy, consider joining a group of amici with a common interest.

One cautionary note. You may encounter the occasional prepackaged brief that is being shopped around to multiple potential amici. It may be an excellent brief that brilliantly articulates the points you want to advance. It may be just the brief you would have written yourself. If so, there may be no reason to decline. But some hesitation is warranted. Inquire about the provenance of the brief. Have other amici already rejected it? If so, who and why? Are other amici being invited to join? If so, who? If the brief will be filed jointly for multiple amici, will your requested edits be made? Will you be able to see all subsequent revisions proposed by others, including an opportunity to review the final before authorizing the filing?

Bear in mind that your merits brief will differ in significant ways from a cert.-stage filing. The Court has already granted review, so you don't have to revisit why review is warranted. Don't plan to just put a new cover on what is basically the same brief you filed earlier. But the core of your cert. brief can still have a home in your merits brief. You can explain to the Court the real-world impact of the various potential outcomes. You can answer the hypotheticals before they are asked.

One subject of current attention and controversy is how far an amicus brief may go beyond the factual record and beyond the arguments and issues raised by the parties. Be mindful of the limitations. Be mindful also of one area in which amici traditionally have greater latitude—jurisdictional issues. It sometimes happens that lurking jurisdictional issues—even nonwaivable ones—have gone unnoticed by the parties. As an amicus, you may have ample reason to alert the Court to the problem. Perhaps you support the respondent on the merits and would have preferred for review to be denied. Perhaps you are aligned with the petitioner but think this case is a flawed vehicle that is headed for a disastrous result. Perhaps you have no interest in the substantive legal issue but would be affected if this decision were cited as precedent for the existence of jurisdiction in the type of cases you litigate. As an amicus, you can address the issue in a brief that is limited to the predicate jurisdictional question or a brief that also argues the merits. My experience teaches that, although the opportunities are rare, briefs like these can make a profound difference.

> Just because a case presents an issue that is important to you doesn't mean you should enter the fray.

There is, of course, much more that can be said about modern amicus practice, such as dealing with governmental amici, filing amicus briefs in intermediate appellate courts and in state supreme courts, and understanding what is out of bounds for amicus briefs. But the changes wrought by the private "amicus machine" in the Supreme Court merit special attention. Despite these changes, it remains true that first-rate advocacy in good amicus briefs benefits the judicial process. I like to think that if you are properly presenting an enlightening argument, any court will regard you as a friend. ■