

Appellate Toolkit: Amicus Briefs

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Amicus curiae briefs provide an extra way to help the Court's decision-making process. Whether pronounced "/uh-MEE-kuhs/" or "/AM-i-kuhs/," these friend-of-the-court briefs can serve as an important tool for appellate advocates. See Fed. R. App. P. 29; 5th Cir. R. 29.

In deciding whether to seek amicus support, parties should carefully consider if an amicus brief could truly help the Court. An effective brief will expand on an important-yet-underdeveloped point or add something new.¹ And it will do so concisely to grab the Court's attention and respect its busy docket. In contrast, an unhelpful brief will parrot the party it supports at great length.²

With that framework in mind, amici may add value by:

- explaining a decision's practical impacts;
- illustrating how a decision may affect nonparty interests;
- teasing out a legal issue that the merits brief lacked space to cover;
- offering expertise on a market or industry that may be unfamiliar to the Court;
- evaluating original intent or original public meaning on disputed statutory or constitutional provisions with well-vetted research;
- highlighting a case's widespread importance by unifying ordinarily adverse stakeholders; and
- supplementing the merits briefing when a small case presents an widely important issue.³

¹ Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 106 (2008); 5th Cir. R. 29.2.

² See *id.*

³ See *id.* at 102-06; see also Lydia Wheeler, *Fifth Circuit Judges Offer Tips for Litigating in Their Court*, <https://news.bloomberglaw.com/us-law-week/fifth-circuit-judges-offer-tips-for-litigating-in-their-court> (April 17, 2023); Stephanie Douglas (@Steph_A_Douglas), https://twitter.com/Steph_A_Douglas/status/1639287180588621825 (Mar. 24, 2023); Sean Marotta, <https://twitter.com/smmarotta/status/1257830186831282177> (May 5, 2020); Diane L. McGimsey, Expert Q&A on Best Practices for Amicus Briefing, *The Journal | Litigation*, https://www.sullcrom.com/files/upload/LIT_AugSep16_OfNote-Amicus.pdf (Aug./Sep. 2016).

Unlike parties, amici can go beyond the record and the arguments below. Without those restrictions, amici may play a strategic role in advancing a party's position. (Of course, counsel for amici must follow the disciplinary rules.)

If amici might help, they should not be an afterthought. Early on, parties should budget time to identify potential amici. In doing so, parties should consider whether potential amici can realistically make their points without thwarting the party's positions. If so, amici may also need time to obtain counsel, run conflicts, analyze the costs and benefits of weighing in, and to ask themselves if their briefs might ultimately harm the party that they want to support.⁴ These considerations can come into play at the merits and rehearing stages.

Although most cases do not need amici, they may make a difference in the right case. *See, e.g., Helix Energy Sols., Grp., Inc. v. Hewitt*, 143 S. Ct. 677, 678, 692, 214 L.Ed.2d. 409 (2023) (pointing to amicus briefs in Fair Labor Standards Act case).

⁴ Carl Cecere (@CecereCarl), <https://twitter.com/CecereCarl/status/1257821467108089864?s=20> (May 5, 2020).