

THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS A “FRIEND OF THE COURT” IN EDUCATION CASES

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This article applies a deliberative democracy framework to examine the American Legislative Exchange Council’s (ALEC) efforts to influence education policy. Specifically, we examine “friend of the court” briefs submitted in significant education cases. This exploratory study examines four major education cases heard by the U.S. Supreme Court. Cases address topics such as school choice, teachers unions and funding for English Learners. Findings reveal variance in the way the organization presents itself and its interests to the court. The analysis illustrates that this aspect of ALEC’s work undermines both the procedural and substantive elements of deliberative democracy.

INTRODUCTION	305
I. LITERATURE REVIEW	307
A. American Legislative Exchange Council	307
B. Amicus Briefs	313
II. ALEC’S PARTICIPATION AS AN AMICUS	317
A. Variance in Description of the Organization	318
B. ALEC’S Role in Case Law	324
III. ANALYSIS	327
A. Substantive Elements of Deliberative Democracy	329
B. Procedural Elements of Deliberative Democracy	332
IV. CONCLUSION	335
APPENDIX – CITATIONS FOR ALL BRIEFS FOR WHICH ALEC SERVED AS AN AMICUS CURAE	336
Briefs filed in US Supreme Court	336
Briefs filed in US Courts of Appeals	337
Briefs filed in State Supreme Courts	338

INTRODUCTION

Public education is the product of our system of democratic policy-making at all levels of government. All schools operate in the context of education law and policy. Though the federal government adopts educational policy, state educational policy largely drives the delivery of

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education in the United States.¹ State-level policies determine how public schools are organized, funded, and operated.² State policies also define whether and under what circumstances charter schools exist,³ and whether public funds are allocated to support private education.⁴

As representative democracies, all state governments provide a means for its citizens to elect their neighbors to represent their interests as policies are debated, written, revised, and retired. This democratic process presupposes that all citizens have access to their elected representatives and can affect policies by engaging in the political process.

In addition to legislation, judicial pronouncements in the form of case law also provide a significant source of legal authority for schools. Litigation both provides a check on policies that exceed federal and state constitutional boundaries and construes how statutes should apply to a given situation and set of facts.⁵ Plaintiffs challenge policies and defendants mount arguments to withstand those challenges. But it is not only the parties to a lawsuit that may try to influence the outcome of a judicial proceeding. Interested individuals and entities who are not parties to the litigation may file arguments in the form of *amicus curiae* (“friend of the court”) briefs in an attempt to sway judicial opinion.⁶ In this way, even courts are connected to the democratic political process.

Any entity that wishes to significantly affect education policy must therefore attend to both legislation and litigation. One such player is the influential American Legislative Exchange Council (“ALEC”).⁷ Despite operating largely outside the public eye for much of its existence, ALEC has gained increasing attention over the past few years.⁸ ALEC aims to “advance the fundamental principles of free-market enterprise, limited government, and federalism”⁹ through its efforts to change the law in a number of areas that impact Americans daily. Education is a particular target of ALEC’s influence. While some literature has discussed ALEC’s approach to influencing state-level legislation through the adoption and dissemination of model education policies,¹⁰ this article examines a lesser known approach the organization uses to shape education

¹ See generally, e.g., Kern Alexander & M. David Alexander, *American Public School Law* (2011); Julie F. Mead, *The Role of Law in Education Policy Formation, Implementation, and Research in Handbook of Education Policy Research*, 286, 291 (Gary Sykes, Barbara Schneider & David N. Plank, eds., 2009).

² See generally Alexander & Alexander, *supra* note 1; Mead, *supra* note 1.

³ Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes that Blur the Public/Private Distinction*, 40 *HARVARD JOURNAL ON LEGISLATION* 349, 350 (2003).

⁴ Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 *FORDHAM URBAN LAW JOURNAL* 703, 713-714 (2015).

⁵ Mead, *supra* note 1, at 292-95.

⁶ Sup. Ct. R. 37.

⁷ See generally American Legislative Exchange Council (2017), <https://www.alec.org/> [<https://perma.cc/4SX9-EYEB>].

⁸ See, e.g., *ALEC Exposed*, The Center for Media and Democracy (Jan. 3, 2016), http://www.alecexposed.org/wiki/ALEC_Exposed [<https://perma.cc/4DFV-7G8S>].

⁹ Brief on the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners at 1, *Horne v. Flores*, 557 U.S. 433 (2009) (No. 08294), 2009 WL 526204.

¹⁰ Gary L. Anderson & Liliana Montoro Donchik, *Privatizing Schooling and Policy Making: The American Legislative Exchange Council and New Political and Discursive Strategies of Education Governance*, 30 *EDUC. POLICY* 322, 323 (2014). See also Jessica Bulman-Pozen, *Partisan Federalism*, 127 *Harv. L. Rev.* 1077, 1104 (2014); Anthony S. Kammer, *Privatizing the Safeguards of Federalism*, 29 *J. Law & Pol.* 69, 120 (2013); Julie Underwood & Julie F. Mead, *A Smart ALEC Threatens Public Education*, 93(6) *PHI DELTA KAPPAN J.* 51, 51-52 (2012).

law and policy: ALEC’s attempts to influence judicial deliberations of education policy disputes through the filing of *amicus curiae* briefs. Accordingly, this article investigates the frequency of ALEC’s role as an *amicus*, the educational disputes for which the organization weighed in, and the relationship between ALEC’s arguments and the ruling in the case.

The first section of the article examines ALEC and reviews research about its influence on educational policy. Since this study examines ALEC’s participation in the judicial sphere, the next section provides a review of literature concerning *amicus curiae* briefs and courts’ use of them. Finally, the results of this first-of-its-kind investigation into ALEC’s role as a “friend of the court” are shared and discussed in relation to the implications for the democratic process for setting educational policy.

I. LITERATURE REVIEW

Before presenting ALEC’s activity in education case law, it is first necessary to review two important strands of literature: 1) scholarly discussions of ALEC and its interest in education, and 2) scholarship on the use and impact of *amicus curiae* briefs.

A. American Legislative Exchange Council

In operation since 1973, the American Legislative Exchange Council is a non-profit organization that seeks to protect free-market policies while limiting the size of the federal government. On its website, ALEC states that it is “America’s largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism.”¹¹ ALEC’s members include over 2,000 state legislators, as well as corporations, foundations, and think-tanks, thereby providing opportunities for lawmakers to collaborate with business leaders as they design model legislation, press briefings, and policy agendas for state and federal government.¹² Much of this work is conducted through ALEC’s ten task forces, each addressing a specific field such as education and workforce development, tax and fiscal policy, and civil justice.¹³ The task forces are jointly led by a lawmaker and a corporate leader, ensuring collaboration between the government and corporate membership of the organization.¹⁴ ALEC’s impact is significant, with the organization claiming responsibility for 20% of all legislative bills passed in recent years, including privatization of prisons and immigrant detention facilities, online charter schools, reduction of environmental protections, and “Stand Your Ground” gun laws.¹⁵

Although ALEC has extensive reach and influence on state and federal policymaking,

¹¹ *About ALEC*, American Legislative Exchange Council (Jan. 24, 2017), <https://www.alec.org/about>, [www.alec.org/about](https://perma.cc/V97F-AFG5) [https://perma.cc/V97F-AFG5].

¹² *See* American Legislative Exchange Council, *supra* note 7; *See also* Underwood & Mead, *supra* note 10.

¹³ *See Task Forces*, American Legislative Exchange Council (Jan. 24, 2017), www.alec.org/task-force/ [https://perma.cc/5TV4-EUQN].

¹⁴ Andrew Ujifusa, *Controversial Policy Group Casts Long K-12 Shadow*, Education Week (Apr. 20, 2012), http://www.edweek.org/ew/articles/2012/04/20/29alec_ep.h31.html [https://perma.cc/3VQP-6Y5T]; Underwood & Mead, *supra* note 10, at 52.

¹⁵ Anderson & Donchik, *supra* note 10, at 343; *see also* ALEC (1998), Common Cause, <http://www.commoncause.org/issues/more-democracy-reforms/alec/> [https://perma.cc/E47Y-GYRU]; Kammer, *supra* note 10, at 123; Mary Whisner, *There Oughta be a Law-A Model Law*, 106 LAW LIB. J. 125, 133 (2014).

relatively few publications – from either mainstream media or peer-reviewed journals – have been published about the organization.¹⁶ The group has had a legacy of extreme privacy for much of its tenure, enabling it to operate largely in secret until a 2012 whistle-blower complaint by Common Cause alleged that the organization lobbied lawmakers in violation of the rules associated with its status as a non-profit organization.¹⁷ Though a Minnesota ethics board ultimately ruled in favor of ALEC,¹⁸ the complaint apparently prompted the organization to release large numbers of documents and begin publishing its model bills on its website.¹⁹ Since then, ALEC has lost some corporate sponsorship, yet remains actively engaged in the political arena.²⁰

Within the educational context, ALEC plays a substantial role by creating model bills that are then proposed by state legislators, often in their entirety and without attribution to the organization.²¹ ALEC's model bills promote a neoliberal model of education that prioritizes privatization of nearly all aspects of public schooling in the United States.²² ALEC's model bills promote privatization of schools through charters, vouchers, and parent trigger laws; privatization of student data collection; expanding standardized testing; reducing the power of teacher unions; and increasingly privatizing the teaching workforce.²³

As of June 30, 2016, ALEC's website made available a total of 58 model bills related to education.²⁴ Table 1 lists each model bill by title and categorizes them by topic. Consistent with Dannin's²⁵ earlier findings, nearly half (23 out of 58) of the model bills address some aspect of parental choice, including homeschooling, charter schools, and voucher programs. As the titles imply, the organization provides several policy avenues to create publicly funded subsidies for private education. For example, the "Parental Choice Scholarship Program Act" provides a model bill for a traditional voucher program,²⁶ while the "Great Schools Tax Credit Program Act"²⁷ and

¹⁶ See Anderson & Donchik, *supra* note 10.

¹⁷ See Common Cause, *supra* note 15 <http://www.commoncause.org/issues/more-democracy-reforms/alec/whistleblower-complaint/>; see also *ALEC Exposed*, *supra* note 8 <http://www.commoncause.org/issues/more-democracy-reforms/alec/whistleblower-complaint/>.

¹⁸ See Peter Roff, *ALEC Wins Big in Ethics Case*, U.S. News and World Report (Feb. 20, 2015), <http://www.usnews.com/opinion/blogs/peter-roff/2015/02/20/alec-exonerated-in-minnesota-ethics-case> [<https://perma.cc/2H6U-3SK4>].

¹⁹ See, e.g., *Archives: Education / Model Policies*, American Legislative Exchange Council (July 2, 2016), <https://www.alec.org/issue/education/model-policy/> [<https://perma.cc/P837-QN4S>].

²⁰ See Common Cause, *supra* note 15; see also *ALEC Exposed*, *supra* note 8; Molly Jackman, *ALEC's Influence Over Lawmaking in State Legislatures*, Washington, D.C.: The Brookings Institute (Dec. 6, 2013), <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/> [<https://perma.cc/X5QM-XRBA>].

²¹ See Gary Anderson & Donchik, *supra* note 10. See also Underwood & Mead, *supra* note 10; see also Whisner, *supra* note 15.

²² Ellen Dannin, *Privatizing Government Services in the Era of ALEC and the Great Recession*, 43 U. Tol. L. Rev. 503, 509 (2012).

²³ See generally Franklin Barbosa, Jr., *An Unfulfilled Promise: The Need for Charter School Reform in New Jersey*, 39 Seton Hall Legis. J. 359 (2015). See also Dannin, *supra* note 22; Underwood & Mead, *supra* note 10 at 51-52.

²⁴ *Archives: Education / Model Policies*, American Legislative Exchange Council (July 2, 2016), <https://www.alec.org/issue/education/model-policy/> [<https://perma.cc/P837-QN4S>].

²⁵ See Dannin, *supra* note 22 at 521-22.

²⁶ *Parental Choice Scholarship Program Act*, American Legislative Exchange Council (July 22, 2015), <https://www.alec.org/model-policy/the-parental-choice-scholarship-program-act-means-tested-eligibility/> [<https://perma.cc/A7L3-W942>].

the "Education Savings Account Act"²⁸ accomplish the same goal through different funding mechanisms.²⁹ In addition to these broadly applicable or universal programs, ALEC also publishes model voucher bills for particular subgroups of students (e.g., the "Autism Scholarship Program Act,"³⁰ the "Foster Child Scholarship Program Act,"³¹ and the "Military Family Scholarship Program Act"³²). This attention to market-based approaches to education is, of course, consistent with ALEC's mission to "advance the fundamental principles of free-market enterprise [and] limited government."³³

Table 1: ALEC Model Legislation by Topic

Topic	Model Bill Titles
Choice/ Vouchers/ Charters	<ul style="list-style-type: none"> • The Parental Choice Scholarship Program Act (Universal Eligibility) • The Parental Choice Scholarship Program Act (Universal Eligibility, Means-Tested Scholarship Amount) • The Parental Choice Scholarship Program Act (Means-Tested Eligibility) • Military Family Scholarship Program Act • Foster Child Scholarship Program Act • Autism Scholarship Program Act • Special Needs Scholarship Program Act • Education Savings Account Act • Family Education Savings Account Act • The Great Schools Tax Credit Program Act (Scholarship Tax Credits) • Open Enrollment Act • Course Choice Program Act <p style="text-align: right;"><i>(cont. next page)</i></p>

²⁷ *Great Schools Tax Credit Program Act*, American Legislative Exchange Council (Jan. 1, 2005), <https://www.alec.org/model-policy/the-great-schools-tax-credit-program-act-scholarship-tax-credits/> [<https://perma.cc/ABJ8-Y3FT>].

²⁸ *Education Savings Account Act*, American Legislative Exchange Council (July 22, 2015), <https://www.alec.org/model-policy/the-education-savings-account-act/> [<https://perma.cc/6SN9-B8DR>].

²⁹ Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*. 42 FORDHAM URB. L. J. 703, 706 (2015) (discussion of the similarities and differences between vouchers, tax credit scholarships, and education savings accounts).

³⁰ *Autism Scholarship Program Act*, American Legislative Exchange Council (Amended Aug. 1, 2009), <https://www.alec.org/model-policy/the-autism-scholarship-program-act/> [<https://perma.cc/HXE9-D3JA>].

³¹ *Foster Child Scholarship Program Act*, American Legislative Exchange Council (Aug. 1, 2009), <https://www.alec.org/model-policy/the-foster-child-scholarship-program-act/> [<https://perma.cc/7XB8-SGD2>].

³² *Military Family Scholarship Program Act*, American Legislative Exchange Council (Amended Aug. 1, 2009), <https://www.alec.org/model-policy/the-military-family-scholarship-program-act/> [<https://perma.cc/WGU8-DHJS>].

³³ *See Archives: Education / Model Policies*, AMERICAN LEGISLATIVE EXCHANGE COUNCIL (July 2, 2016), <http://web.archive.org/web/20130609065805/http://www.alec.org:80/about-alec/> [<https://perma.cc/P837-QN4S>].

Topic	Model Bill Titles
Choice/ Vouchers/ Charters <i>(cont. from previous)</i>	<ul style="list-style-type: none"> • Parent Trigger Act • Public Charter School Authorizing and Accountability Act • Public Charter School Operations and Autonomy Act • Charter School Growth with Quality Act • The Next General Charter Schools Act • Amendments and Addendum: The Next Generation Charter Schools Act • Student and Family Fair Notice and Impact Statement Act • School Choice Directory Act • The Smart Start Scholarship Program • Resolution Supporting Homeschooling Freedom • Taxpayers' Savings Grants Act
Teachers/Employees	<ul style="list-style-type: none"> • Great Teachers and Leaders Act • Teacher Quality Assurance Act • Teacher Choice Compensation Act • Teacher Quality and Recognition Demonstration Act • Student Protection Act • Quality Education and Teacher and Principal Protection Act • Alternative Certification Act • National Teacher Certification Fairness Act • Career Ladder Opportunity Act
Technology and Learning	<ul style="list-style-type: none"> • Statewide Online Education Act • Online Learning Clearinghouse Act • Resolution Adopting the 10 Elements of High-Quality Digital Learning for K-12 • Virtual Public Schools Act • Early Intervention Program Act • Neutrality and Integrity in Software Procurement Act • Student Futures Program Act
Accountability	<ul style="list-style-type: none"> • Digital Teaching and Learning Plan • Student Data Accessibility, Transparency and Accountability Act • Resolution in Support of Student-Centered Accountability Systems • Assessment Choice Act • Student Achievement Backpack Act
Curriculum	<ul style="list-style-type: none"> • The Civic Literacy Act • Environment Literacy Improvement Act • Founding Philosophy and Principles Act • Free Enterprise Education Act • The Innovation Schools and School Districts Act

Topic	Model Bill Titles
Finance	<ul style="list-style-type: none"> • The Public School Financial Transparency Act • Public Charter School Funding and Facilities Model Legislation • The School Board Freedom to Contract Act • Resolution on Title 1 of the Elementary and Secondary Education Act • K-12 Efficiency Commission
Language	<ul style="list-style-type: none"> • Dual Language Immersion Program • K-12 Technology-Based Reading Intervention for English Learners Act
Omnibus Choice Plus	<ul style="list-style-type: none"> • A+ Literacy Act • Indiana Education Reform Package

Other topics addressed by ALEC model bills include: a) school teachers and employees (nine bills); b) technology and learning (seven bills); c) accountability (five bills); d) curriculum (five bills); e) school finance (five bills); f) language learning (two bills).³⁴ Two bills propose large multi-topic omnibus packages of measures that include some form of parental choice as well as other school “reforms” (e.g., the “A+ Literacy Act”³⁵ and the “Indiana Education Reform Package”³⁶). This varied group of model bills, too, evinces a commitment to limiting government and to forging public/private partnerships that open opportunities for for-profit vendors to be involved in the delivery of public education. For example, “[t]he School Board Freedom to Contract Act encourages the establishment of public/private partnerships between school boards and the private sector for outsourcing and delivery of ancillary services under the direction of school boards, when said services/programs can be executed more efficiently and more cost-effectively by the private sector.”³⁷

Underwood and Mead³⁸ provide a specific illustration of this model bill process. ALEC’s Education Task Force created the “Virtual Public Schools Act.”³⁹ K-12, Inc., a corporate member of ALEC with influence on the Education Task Force, had input into the production of the model bill.⁴⁰ ALEC’s Tennessee members introduced a bill with language nearly identical to that of

³⁴ Archives: Education / Model Policies, *supra* note 24.

³⁵ A+ Literacy Act, American Legislative Exchange Council (Jan. 7, 2011), <https://www.alec.org/model-policy/the-a-plus-literacy-act/> [https://perma.cc/3XXZ-VSH2].

³⁶ Indiana Education Reform Package, American Legislative Exchange Council (Aug., 5, 2011), <https://www.alec.org/model-policy/indiana-education-reform-package/> [https://perma.cc/LQN4-P7PV].

³⁷ The School Board Freedom to Contract Act, American Legislative Exchange Council (Amended Dec. 1, 1999), <https://www.alec.org/model-policy/the-school-board-freedom-to-contract-act/> [https://perma.cc/34QV-3DR3].

³⁸ Underwood & Mead, *supra* note 10.

³⁹ The Virtual Public Schools Act, American Legislative Exchange Council (JAN. 1, 2005), [HTTPS://WWW.ALEC.ORG/MODEL-POLICY/THE-VIRTUAL-PUBLIC-SCHOOLS-ACT/](https://www.alec.org/model-policy/the-virtual-public-schools-act/) [HTTPS://PERMA.CC/ME7G-NKWQ].

⁴⁰ Underwood & Mead, *supra* note 10 at 52.

ALEC's model legislation.⁴¹ The bill passed on a party line vote on June 16, 2011.⁴² Following its passage, K-12, Inc. received a no-bid contract to create the Tennessee Virtual Academy, guaranteeing K-12, Inc. income of \$5,300 per student upon enrollment.⁴³

ALEC also produces a document annually entitled the "Report Card on American Education," an examination of each state's education policies in relation to ALEC's core principles.⁴⁴ The 20th edition of the report card was published on November 10, 2015.⁴⁵ The National Education Policy Center (NEPC) also reviewed the 18th edition of the Report Card, published in 2013, calling the research "shoddy."⁴⁶ NEPC's authors concluded "[t]he report's purpose appears to be more about shifting control of education to private interests than in improving education."⁴⁷ Despite the questionable methods behind ALEC's annual Report Card on American Education, it is widely used to support and reinforce ALEC's educational agenda.⁴⁸ To further illustrate the reach of ALEC's influence, Vice President Mike Pence, once an active member of ALEC, wrote the foreword for the 2014 Report Card on American Education.⁴⁹ Former presidential hopeful and governor of Wisconsin Scott Walker wrote the most recent foreword for the ALEC's Report Card on American Education.⁵⁰ Both Pence and Walker applauded ALEC's work and emphasized ideologically consistent legislation in their respective states.

ALEC's expansive influence on policymaking in many regards is synonymous with a lobbying institution, a claim which ALEC itself denies.⁵¹ In their 2014 analysis, Anderson and Donchik explain:

ALEC represents a unique combination of "statework," corporate lobbying, and think tank. While ALEC is in many ways more in the tradition of a lobby group promoting corporate interests in education, it provides a legally legitimate space for corporations to

⁴¹ *Id.*

⁴² *Id.* at 52-53.

⁴³ *Id.* at 53.

⁴⁴ See generally *Archive: Report Card on American Education*, American Legislative Exchange Council, <https://www.alec.org/periodical/report-card-on-american-education/> [<https://perma.cc/9DKM-Q6SK>].

⁴⁵ Matthew Ladner, *Report Card on American Education: Ranking State K-12 Performance, Progress and Reform*, American Legislative Exchange Council (2015), <https://www.alec.org/app/uploads/2015/11/2015alecreportcardfinalweb-151110162215-1va1-app6891.pdf> [<https://perma.cc/KSW9-G89U>].

⁴⁶ Christopher Lubienski & T. Jameson Brewer, *Review of Report Card on American Education: Ranking State K-12 Performance, Progress, and Reform*, National Education Policy Center (MAY 9, 2013), <http://nepc.colorado.edu/thinktank/review-report-card-ALEC-2013> [<https://perma.cc/B425-4RC8>].

⁴⁷ *Id.*

⁴⁸ See, e.g., Lara K. Omps, *Holding Teachers Accountable and Rewarding Those Who Perform: Evaluating a Performance-Based Pay System for West Virginia*, 114 W. Va. L. Rev. 1053, 1055-56 (2012). See generally Patrick H. Ouzts, *School Choice: Constitutionality and Possibility in Georgia*, 24 Ga. St. U. L. Rev. 587 (2012).

⁴⁹ Matthew Ladner & David J. Myslinski, *Report Card on American Education: Ranking State K-12 Performance, Progress and Reform*, American Legislative Exchange Council (2014), https://www.alec.org/app/uploads/2015/12/19th_Report_Card.pdf [<https://perma.cc/J5C9-QJA9>].

⁵⁰ Ladner, *supra* note 45.

⁵¹ Allison Boldt, *Rhetoric vs. Reality: ALEC's Disguise as a Nonprofit Despite its Extensive Lobbying*, 34 Hamline J. Pub. L. & Pol'y 35, 61-62 (2012); see also Common Cause, *SUPRA* NOTE 15; Dannin, *supra* note 22; Kammer, *supra* note 10 at 120; Roff, *supra* note 18.

co-write (not merely influence) model bills that, in turn, insert a business and market logic, discourse and ideology into the public sector, promoting both the financial and ideological interests of the corporate sector.⁵²

In blurring the line between lobbying and policy-work, ALEC enables corporations to have greater access and voice in legislation, effectively bypassing the democratic process of governance.⁵³ Kammer writes,

Because partisan control varies by state, multistate advocacy efforts promise greater likelihood of success than pursuing those goals at the federal level. This strategy offers private interests not only more venues through which to pursue legislative change, but also allows them to circumvent the heightened legislative and legal barriers that exist at the federal level.⁵⁴

Boldt reaches similar conclusions about ALEC's circumvention of deliberative democracy, asserting that ALEC promotes the influence of private interests within the democratic process.⁵⁵

Although ALEC's legacy as a secretive organization has limited the research on its practices, the past four years have enabled greater understanding of the work and reach of this organization within education law and policy. ALEC has a significant impact on legislative policies and in providing direct access for corporate interests to state legislators, leading researchers to conclude that ALEC's efforts undermine democratic participation in the legislative process.⁵⁶ Less is understood, however, about ALEC's role in other aspects of shaping governmental policies, such as through judicial routes.

A. *Amicus Briefs*

Scholars have long recognized the power of the Supreme Court in setting policy for the nation.⁵⁷ As special interest groups, including ALEC, expand their role in education politics,⁵⁸ it is not surprising that they seek to persuade those that work in both legislative and judicial

⁵² Anderson & Donchik, *supra* note 10 at 348.

⁵³ *Id.*; see also Underwood & Mead, *supra* note 10; Bulman-Pozen, *supra* note 10 at 1101; Kammer, *supra* note 10 at 125.

⁵⁴ See Kammer, *supra* note 10 at 137.

⁵⁵ See Boldt, *supra* note 51 at 54-55.

⁵⁶ See Joanne Barkan, *Plutocrats at Work: How Big Philanthropy Undermines Democracy*, 80 Soc. Res. 635 (2013) at 647-48; see also Boldt, *supra* note 51 at 58-60; Bulman-Pozen, *supra* note 10; see also Jackman, *supra* note 20; see also Kammer, *supra* note 10 at 120.

⁵⁷ See Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in US Supreme Court Litigation*, 38 LAW & SOC. REV. 807, 825 (2004); see also Thomas Hansford, *The Dynamics of Interest Representation at the US Supreme Court*, 64 Pol. Res. Q. 749, 751-54 (2011); Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. Pa. L. Rev. 1172, 1173 (1953); Lisa A. Solowiej & Paul M. Collins, *Counteractive Lobbying in the US Supreme Court*, 37 Am. Pol. Res. 670, 673 (2009).

⁵⁸ See Kammer, *supra* note 10 at 125; Tiina Itkonen, *Politics of Passion: Collective Action from Pain and Loss*, 113 Am. J. Educ. 577 (2007); Janelle Scott, Christopher Lubienski & Elizabeth DeBray-Pelot, *The Politics of Advocacy in Education*, 23 Ed. Pol'y 3, AT 6-7 (2009).

systems.⁵⁹ There are multiple methods groups can take to shape judicial decisions, ranging from pursuing court cases to influencing the election of judges.⁶⁰ The most common method of interest group participation, however, is through *amicus curiae* briefs.⁶¹

Amicus curiae briefs, Latin for “friend of the court,” are submitted by individuals or groups that are not directly involved with a case, but are nonetheless interested in influencing the outcome.⁶² Amicus briefs may provide valuable information to a court that is not available through other sources, such as background information on the case, the implications of potential rulings, or an explanation of broader public opinion on the case.⁶³ Demonstrating the relevance and power of amicus briefs, judges reference or directly quote some amicus briefs in their opinions.⁶⁴ Justice Breyer, advocating for the inclusion of scientific knowledge to inform court cases wrote, “In our Court, as a matter of course, we hear not only from the parties to a case, but also from outside groups that file amicus curiae briefs. These briefs help us become more informed, for example, about the relevant scientific ‘state of the art.’”⁶⁵ Further confirming the value of amicus briefs to the Supreme Court, Justice O’Connor wrote, “These *amicus* briefs invaluable aid our decision-making process and often influence either the result or the reasoning of our opinions.”⁶⁶ Amicus briefs therefore play a significant role in shaping decisions of appellate courts in both state and federal judicial systems, including the U.S. Supreme Court.

Although there are rules limiting amicus brief participation, the U.S. Supreme Court has maintained an open-door policy on accepting briefs since the 1960s, resulting in a significant increase in the number of briefs presented to the Court today.⁶⁷ For example, Collins observed

⁵⁹ Scott, et al, *supra* note 58. For example, see the following amicus briefs in various education cases: Brief for Amici Curiae Liberty Counsel and American Association of Christian Schools in Support of Petitioner, *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011) (No. 09-987), 2010 WL 3198845; Brief of American Educational Research Association as Amicus Curiae in Support of Respondents, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915), 2006 WL 2925967; Brief of the NAACP Legal Defense and Educational Fund, Inc. and the National Association For The Advancement Of Colored People As Amici Curiae in Support of Respondents, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1638648.

⁶⁰ See generally Paul M. Collins, Jr. & Wendy L. Martinek, *Friends of the Circuits: Interest Group Influence on Decision Making in the US Courts of Appeals*, 91 Soc. Sci. Q. 397 (2010).

⁶¹ *Id.* at 398; see also Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 Conn. L. Rev. 185, 192-208 (2009).

⁶² See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743 (2000) 743, 744.

⁶³ *Id.* at 748; Simmons, *supra* note 61 at 207-09.

⁶⁴ See Paul M. Collins, Jr., *Lobbyists Before the US Supreme Court Investigating the Influence of Amicus Curiae Briefs*, 60 Pol. Res. Q. 55, 56 (2007); see also Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, in *Supreme Court Decision-Making: New Institutional Approaches*, 215, 229 (Cornell W. Clayton & Howard Gillman, eds., 1999); Thomas G. Hansford, *Lobbying Strategies, Venue Selection, and Organized Interest Involvement at the US Supreme Court*, 32 Am. Pol. Res. 170 (2004); James F. Spriggs, II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 Pol. Res. Q. 365, 373 (1997) (Finding that “amicus briefs were more likely to have arguments accepted by the Court if they reiterated information in the party briefs” at 376).

⁶⁵ Stephen Breyer, *The Interdependence of Science and Law*, 82 *Judicature*, 24, 26 (1998).

⁶⁶ Sandra Day O’Connor, *Henry Clay and the Supreme Court*, 94 *Register of the Kentucky Historical Society* 353, 360 (1996).

⁶⁷ See Kearney & Merrill, *supra* note 62 at 765.

that "amicus briefs are filed in almost every case the Court accepts."⁶⁸ For any given case, multiple amicus briefs may be submitted. For example, in *Fisher v. University of Texas*,⁶⁹ the Supreme Court's most recent case addressing race-conscious college admissions policies, nearly 100 interested parties submitted amicus briefs. The Supreme Court has made few changes to amicus brief procedures over time, with the notable exception in 1997 of the addition of the inclusion of a statement of interest for the parties involved in the brief.⁷⁰ Kearney and Merrill explain:

Specifically, the amended rule now requires that each amicus brief disclose in the first footnote on the first page of text "whether counsel for a party authored the brief in whole or in part," as well as the identity of "every person or entity, other than the amicus curiae, its members or its counsel, who made a monetary contribution to the preparation or submission of the brief."⁷¹

Although the Court did not provide a rationale for the addition of the statement of interest, Kearney and Merrill hypothesize that it enables the Court to evaluate potential bias in submitted briefs.⁷² As briefs almost always endorse a specific outcome, they are ultimately more akin to tools for lobbyists, rather than neutral resources for justices.⁷³

Given the potential for amicus briefs to act as a lobbying tool, they play crucial roles for both their representative organizations and the Court. For sponsoring interest groups, submitting a brief gives the organization a voice in judicial decisions, enabling them to promote and lobby for decisions in their favor.⁷⁴ Furthermore, some groups use amicus briefs to bolster their membership by demonstrating their commitment and engagement in promoting a specific political, legislative, and judicial agenda.⁷⁵ Hansford found the extent of press coverage correlated with the quantity of amicus briefs submitted to the Supreme Court, suggesting some organizations submit amicus briefs to leverage media attention that could potentially bolster membership.⁷⁶ Amicus briefs therefore enable organized interests to not only promote their judicial agenda, but also to reinforce their membership and status as a central player in policy matters.

For courts, amicus briefs serve both symbolic and functional roles. First, the open door policy of amicus briefs enacted by the Supreme Court ensures that the courts retain democratic participation.⁷⁷ "Specifically, amicus curiae participation provides symbolic reassurance of the Court's receptiveness to the norm of democratic inclusion."⁷⁸ Second, amicus briefs help inform

⁶⁸ See Collins, *Friends*, *supra* note 57 at 807.

⁶⁹ *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016).

⁷⁰ Kearney & Merrill, *supra* note 62 at 766.

⁷¹ *Id.*

⁷² *Id.* at 766-767.

⁷³ See Collins, *Friends*, *supra* note 57 at ; see also Collins, *Lobbyists*, *supra* note 64 at 58; Thomas G. Hansford, *Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a US Supreme Court Case*, 57 Pol. Res. Q. 219, 220 (2004).

⁷⁴ See Collins, *Lobbyists*, *supra* note 64 at 55, 57; see generally Hansford, *Dynamics*, *supra* note 56.

⁷⁵ See generally Hansford, *Information*, *supra* note 73; SEE GENERALLY Solowiej & Collins, *supra* note 57; SEE ALSO Hansford, *Dynamics*, *supra* note 57 at 751; Kearney & Merrill, *supra* note 61 at 824-25.

⁷⁶ See Hansford, *Information*, *supra* note 73 at 8.

⁷⁷ See Simmons, *supra* note 61 at 189-90.

⁷⁸ Simmons, *supra* note 61 at 197.

the court about social, political, and legal arguments that can further inform each parties' case, as well as the potential outcomes for affected parties.⁷⁹ Amicus briefs enable justices to make sound decisions based on the insights presented from organized interests. Epstein and Knight compare this functional role to that of lobbyists for legislators, as amicus briefs enable external groups to shape judicial policy decisions through the information they present.⁸⁰ Epstein and Knight write:

We argue that organized interests - participating as amici curiae - play a role for justices similar to that lobbyists play for legislators: they provide information about the preferences of other actors, who are relevant to the ability of justices to attain their primary goal-to generate efficacious policy that is as close as possible to their ideal points. In other words, just as information permits legislators to make rational decisions, so too does it enable justices to make choices to maximize their preferences.⁸¹

One critical factor in the functional value of amicus briefs to the Court is their accuracy. Despite the significance of briefs providing accurate information to the Court, less attention is granted to briefs' veracity,⁸² whereas more attention is granted to the potential redundancy of information.⁸³ According to SUPREME COURT RULE 37.1, "An amicus curiae brief which brings

⁷⁹ See Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in US Supreme Court Litigation*, 38 Law & Soc. Rev. 807-8 (2004); see also Spriggs & Wahlbeck, *supra* note 64.

⁸⁰ See Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, in *Supreme Court Decision-Making: New Institutional Approaches*, 225-228 (Cornell W. Clayton & Howard Gillman, eds., 1999).

⁸¹ *Id.* at 215.

⁸² See Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in US Supreme Court Litigation*, 38 Law & Soc. Rev. 807, at 810 (2004); see also Simmons, *supra* note 61, at 209:

"Unlike other forms of evidence that have been presented and challenged throughout the litigation process, evidence contained in amicus briefs is not subject to cross-examination or expert testimony from either side. Amicus briefs lack the safeguards characteristic of other forms of evidence. Parties, however, do receive the briefs and have the opportunity to respond or rebut information, facts, and arguments contained in the briefs. Nonetheless, such a task may be unduly burdensome and drain resources. Furthermore, amici, unlike the parties, do not have to work from a trial record or preserve issues for appeal. These concerns, however, are mitigated via (i) disclosure requirements under Supreme Court Rules to identify potential bias; (ii) the conservation of judicial resources via information gathering; and (iii) the skill of the Justices and their clerks. In the absence of rules restricting access, the Court has developed its own filtering mechanisms for analyzing amicus briefs and, upon occasion, provided informal guidance to potential filers concerning the Court's (or Justices') preferences. Ultimately, the usefulness of findings and arguments presented in amicus briefs hinges on their adequate evaluation."

⁸³ Spriggs & Wahlbeck, *supra* note 64. In a study of party and amicus briefs filed in the 1992 Supreme Court term, the authors found:

"Amici submit supplemental information not contained in litigants' briefs 67.3 percent of the time, and they solely add new arguments in 25.1 percent of briefs. Amici, however, even more frequently reiterate information presented by litigants. Almost 75 percent of briefs reiterate a party brief, and 32.7 percent only provide information that already appears in the party brief. Second, scholars contend that the Court often adopts arguments that are unique to an amicus brief. Our findings show that the Court's majority opinions often accept arguments found in amicus briefs, using information from 54.2 percent of petitioner amicus briefs and 43.2 percent of respondent amicus briefs. Contrary

relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An amicus brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored." There is evidence that Justices use information and research from amicus briefs to shape their opinions.⁸⁴ However, research that critically examines the accuracy, rigor or motivation behind amicus briefs, in general, is limited.

Thus, it is clear that amicus briefs play a significant role as a lobbying tool for special interest groups in the judicial process, yet there appear to be few safeguards to ensure these briefs are accurate. Moreover, while much has been written to chronicle the organization's model bill strategy to influence state legislation, including education law, no existing research examines ALEC's attempts to influence education policy in the form of amicus briefs.

II. ALEC'S PARTICIPATION AS AN AMICUS

Between 1993 and 2015, ALEC submitted 33 amicus briefs: 8 briefs submitted to State Supreme Courts, 7 briefs submitted to U.S. Courts of Appeals and 18 briefs submitted to the U.S. Supreme Court (See Appendix A for a list of all briefs). In thirteen of those briefs, the organization filed as the sole amicus, while in the majority of briefs (20), ALEC was one of a number of signatories to the brief (*amici*). It is also interesting to note that in some instances, ALEC filed briefs at multiple stages in the process of a single case. For example, in *Zelman v. Simmons-Harris*,⁸⁵ ALEC first signed onto a brief filed on behalf of 15 organizations when the dispute was pending before the Sixth Circuit Court of Appeals⁸⁶ and subsequently submitted a solo brief when the case advanced to the U.S. Supreme Court.⁸⁷ Likewise, ALEC filed a brief in *Horne v. Flores*,⁸⁸ to persuade the Supreme Court to accept the appeal⁸⁹ and then submitted a second brief to opine on the merits of the dispute once the Court granted the petition to hear the case.⁹⁰ As such, the organization used the *amicus curiae* process to weigh in on a total of 29 cases.

to accepted understanding, however, the Court less frequently utilizes amicus briefs' arguments when they exclusively add information not contained in the party's brief. Using a pro bit model, we also show that this relationship between amici supplementing litigant briefs and the Court's use of their arguments persists even after controlling for alternative explanations." *Id.* at 382.

⁸⁴ See, e.g., Erica Frankenberg & Liliانا M. Garces, *Use of Social Science Evidence in Parents Involved and Meredith: Implications for Researchers and Schools*, 46 Univ. Louisville L. Rev. 703 (2007); Liliانا M. Garces, *Reflections on a Collaboration Communicating Educational Research in Fisher*, 42 Educational Researcher 174 (2013); Lisa A. Solowiej & Paul M. Collins, *Counteractive Lobbying in the US Supreme Court*, 37 Am. Pol. Res. 670, 675 (2009).

⁸⁵ *Simmons-Harris v. Zelman*, 536 U.S. 639 (2002).

⁸⁶ Brief for the Center for Education Reform et al., as Amici Curiae in Support of Appellants, *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000) (Nos. 00-3055, 00-3060, 003063), 2000 WL 35553799.

⁸⁷ Brief for the Center for Education Reform, et al. as Amici Curiae in Support of Petitioners, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1480661.

⁸⁸ *Horne v. Flores*, 557 U.S. 433 (2009).

⁸⁹ Brief on Behalf of the American Legislative Exchange Council as Amicus Curiae in Support of Petitioners, *Speaker of the Arizona House of Representatives v. Flores*, 555 U.S. 1092, (2009) (No. 08-294), 2008 WL 4496603.

⁹⁰ Brief on Behalf of the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners, *Horne v. Flores*, 557 U.S. 433 (2009) (No. 08294), 2009 WL 526204.

Of those cases, four cases and a total of seven briefs considered major issues affecting K-12 public education, all of which culminated in U.S. Supreme Court decisions: *Zelman v. Simmons-Harris* (the use of publicly funded vouchers for private school tuition),⁹¹ *Davenport v. Washington Education Association* (the power of teachers unions),⁹² *Ysursa v. Pocatello Education Association* (the power of teachers unions),⁹³ and *Horne v. Flores*, (funding for English Language Learners).⁹⁴ Table 2 lists those briefs. Turning to the content of the briefs themselves, analysis reveals variance in the way the organization presents itself and its interests to the court.

Table 2: Briefs filed in Four Major Education Cases

	Case Name	Year*	Court	Type of brief
1	<i>Simmons-Harris v. Zelman</i>	2000	6 th Circuit Court of Appeals	Arguing merits
	<i>Zelman v. Simmons-Harris</i>	2001	U.S. Supreme Court	Arguing merits
2	<i>Davenport v. Washington Education Association</i>	2006	U.S. Supreme Court	Arguing for court to accept case
	<i>Davenport v. Washington Education Association</i>	2006	U.S. Supreme Court	Arguing merits
3	<i>Ysursa v. Pocatello Education Association</i>	2008	U.S. Supreme Court	Arguing merits
4	<i>Speaker of the Arizona House of Representatives v. Flores</i>	2008	U.S. Supreme Court	Arguing for court to accept case
	<i>Horne v. Flores</i>	2009	U.S. Supreme Court	Arguing merits

*year the brief was filed with the court

A. Variance in Description of the Organization

Consistent with SUPREME COURT RULE 37, which requires amici to “set out in the brief the interest of the *amicus curiae*, the summary of the argument, the argument, and the conclusion,” each amicus brief begins with a description of ALEC’s interests.⁹⁵ As explained earlier, this statement allows judges and justices to put the arguments that follow into context and to discern the perspective from which the brief is written. This requirement, coupled with the general rule that attorneys act with “candor toward the tribunal,”⁹⁶ is intended to ensure that jurists have available the necessary information to judge both the source and quality of the

⁹¹ 536 U.S. 639, 645 (2002).

⁹² *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 180 (2007).

⁹³ *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 355 (2009).

⁹⁴ 557 U.S. 433, 438-39 (2009).

⁹⁵ SUP. CT. R. 37

⁹⁶ MODEL RULES OF PROF’L CONDUCT r. 3.3 (AM. BAR ASS’N 1983).

arguments presented to the court.

Interestingly, however, ALEC's statement of interest in the cases varies from brief to brief, both in what ALEC includes in its description and what it omits. Table 3 captures some of that variance and presents the patterns that appeared when examining all 33 briefs. Specifically, trends emerged regarding the description of legislative membership, corporate membership, the role of others and any references to ALEC's legislative work. For example, ALEC routinely describes itself as the "nation's largest" "individual membership association of state legislators."⁹⁷ However, it sometimes refers to itself as a nonpartisan organization (19),⁹⁸ while other times, it describes itself as a bipartisan organization (11).⁹⁹

Table 3: ALEC's Descriptions of the Organization in Amicus Briefs

Characteristics of the Organization	Number of Cases
Description of Legislative Members	
· "nonpartisan"	19
· "bipartisan"	11
· "Democratic and Republican"	1
· No specific description*	2
Mention of Corporations/Private Sector	
· "private"sector	8
· "private and corporate foundations"	4
· "large and small businesses"	1
· Only legislative members mentioned	18
· No specific description*	2
Mention of Others	
· "general public"	10
· Federal government	7
Mention of Model Legislation	
· Model bills mentioned	4
· A specific model bill described	5
(<i>cont. next page</i>)	

⁹⁷ See, e.g., Brief for the American Legislative Exchange Council as Amicus Curiae in Support of Respondent, Comptroller of the Treasury of Maryland v. Wynne, 134 S. Ct. 2660 (2014) (No. 13-485); Brief of the American Legislative Exchange Council as Amicus Curiae in Support of Petitioners, Espresso Casino Joliet Corp. v. Giannoulas, (2009) (No. 08-945); Brief of the American Legislative Exchange Council as Amicus Curiae in Support of Respondents, Department of Health and Human Services v. State of Florida, 2011 U.S. Briefs 393 (2012) (No. 11-398); Brief on Behalf of the American Legislative Exchange Council and the Lawyers Democracy Fund as Amici Curiae in Support of Respondents, Bartlett v. Strickland, 2008 U.S. S. Ct. Briefs LEXIS 709 (2008) (No. 07-689).

⁹⁸ See, e.g., Brief on the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners at 1, Horne v. Flores, 557 U.S. 433 (2009) (No. 08-294), 2009 WL 526204.

⁹⁹ See, e.g., Brief for the Center for Education Reform, et al. as Amici Curiae in Support of Petitioners at 1, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1480661.

Characteristics of the Organization	Number of Cases
<i>(cont. from previous)</i>	
· Mention of “policy” or “policy development”	4
· No mention of model bills	18
· No specific description*	2

* In two briefs, ALEC was one of many signatories and interest statement applied generally to all groups and did not include a specific description of ALEC.

In a little over half of the briefs (18), ALEC only discloses its legislative membership, leaving the fact that the organization has corporate or private members unknown to the reader of the brief. Even when the description includes some mention of the “private sector” or corporate foundations, the interest of the amicus statements do not disclose that these entities are in fact “members” of the organization.¹⁰⁰ Rather, the phrase is used in relation to the goal the organization seeks to advance. For example, the most recent description to appear in a brief submitted to the U.S. Supreme Court reads:

The American Legislative Exchange Council (ALEC) is the nation’s largest nonpartisan individual membership association of state legislators. It has approximately 2,000 members in state legislatures across the United States. ALEC works to advance limited government, free markets and federalism at the state level through a nonpartisan public-private partnership of America’s state legislators, members of the private sector and the general public.¹⁰¹

Notice that the phrase used is “members of the private sector,” not “private sector members of ALEC.”

Likewise, ALEC sometimes includes and sometimes omits from its description any mention of its role in producing model bills.¹⁰² Only nine cases contained any mention of model bills; four of these briefs mention this legislative activity generally and five of those eight described specific models bills impacted by the relevant case. Four other briefs, though not using the term “model bill,” referenced ALEC’s development of “policy.”¹⁰³ The majority of briefs (18/33) are completely silent about this major ALEC activity.

This variation is on display in the seven briefs related to the four education cases. As with the pattern reviewed above for all briefs, regardless of the topic of the case, each ALEC

¹⁰⁰ See Brief of Amici Curiae National Federation of Independent Business Small Business Legal Center et al., *Hickenlooper v. Kerr* at 4a, 135 S. Ct. 2927 (2015) (No. 14-460).

¹⁰¹ *Id.*

¹⁰² Two 2009 briefs provide an example. The organization mentions its model bill activity in: Brief of the American Legislative Exchange Council as Amicus Curiae in Support of Petitioners at 1, *Empress Casino Joliet Corp. v. Giannoulas*, 556 U.S. 1281 (2009) (No. 08-945), 2009 WL 527001. In contrast, no mention is made of this activity in: Brief on Behalf of the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners at 1-2, *Horne v. Flores*, 557 U.S. 433 (2009) (No. 08-294), 2009 WL 526204.

¹⁰³ See *e.g.*, Brief on Behalf of the American Legislative Exchange Council as Amicus Curiae in Support of Petitioners at 2, *Speaker of the Arizona House of Representatives v. Flores*, 555 U.S. 1092, (2009) (No. 08-294), 2008 WL 4496603. (U.S.).

depiction submitted in an education case understates the role of private interest groups and instead emphasizes its “nonpartisan” membership of state legislators. This is especially the case for ALEC’s briefs in *Horne v. Flores* and *Zelman v. Simmons-Harris*, which exclude any discussion of ALEC’s private interests altogether.¹⁰⁴ The amicus briefs submitted in *Davenport* and *Ysursa* describe the structure of ALEC as a “public-private partnership between America’s state legislators and concerned members of the private sector, the federal government, and the general public,”¹⁰⁵ which, though accurate, appears to downplay the influence that corporations have over ALEC’s policy and legal positions. Table 4 provides relevant excerpts from ALEC’s statements of interest, as presented in each amicus brief submitted in an education dispute. The table is organized according to each brief’s description of ALEC as an organization, its mission and interest in the case. The bold font highlights similarities and differences across the four Supreme Court briefs on the merits.

Table 4: Excerpts from Amicus Briefs Submitted in Education Cases

	Zelman (2001)	Davenport (2006)	Ysursa (2008)	Flores (2009)
Organization	Nation’s largest bipartisan association of state legislators	Nation’s largest individual membership association of state legislators, with more than 2,400 members.	Nation’s largest largest bipartisan, individual membership association of state legislators, with 2,000 members.	Nation’s largest non-partisan individual membership association of state legislators. ALEC has approximately 2,000 members in state legislatures across the United States.

¹⁰⁴ See, e.g., *Id.* at 1-2; Brief for the Center for Education Reform, et al. as Amici Curiae in Support of Petitioners, *Zelman v. Simmons-Harris* at 1-2, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1480661.

¹⁰⁵ Brief of American Legislative Exchange Council as Amici Curiae in Support of Petitioners at 1, *Davenport v. Washington Education Association*, 551 U.S. 177 (2007) (Nos. 05-1589, 05-1657), 2006 WL 3309497; Brief of Evergreen Freedom Foundation, American Legislative Exchange Council, and Independence Institute as Amici Curiae in Support of Petitioners at 1, *Ysursa v. Pocatello Education Association*, 555 U.S. 353 (2009) (No. 07-869), 2008 WL 2367230.

	Zelman (2001)	Davenport (2006)	Ysursa (2008)	Flores (2009)
Mission	To discuss, develop, and disseminate public policies that expand free markets, promote economic growth, limit government, and preserve individual liberty	To advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a nonpartisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government, and the general public.	To advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a non-partisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government and the general public.	To advance Jeffersonian principles of free markets, limited government, federalism, and individual liberty.
Interests		ALEC and its members have an acute interest in this case because of its federalism implications. ALEC has created Task Forces that draft model legislation in a wide variety of fields to advance the principles outlined above False The decision in this case may determine the permissible scope of judicially imposed constraints (<i>cont. next page</i>)	ALEC's Task Forces have approved several model bills that protect the First Amendment rights of workers represented by labor organizations.	ALEC's <i>Resolution on the Federal Consent Decree Fairness Act</i> (2006) sets forth ALEC's firm belief "that federal consent decrees [should be] narrowly drafted, limited in duration, and respectful of state and local interests and policy judgments." . . . ALEC's <i>Education Principles</i> state (<i>cont. next page</i>)

	Zelman (2001)	Davenport (2006)	Ysursa (2008)	Flores (2009)
		<p><i>(cont. from previous)</i></p> <p>on legislative freedom of action in the States, including any limitations on state laws designed to protect federal constitutional rights. The state legislators who craft and then seek to enact ALEC's model legislation have a particularly strong interest in ensuring that misapprehensions of federal constitutional principles do not unduly constrain state legislation that is designed to advance individual freedom.</p>		<p><i>(cont. from previous)</i></p> <p>its mission concerning public education: "To promote excellence in the nation's educational system by advocating education reform policies that promote parental choice and school accountability, consistent with Jeffersonian principles of free markets and federalism." ALEC members hold leadership positions in state Senate and House chambers, as well as State legislative committees for education, education finance and appropriations. These legislators must fulfill state constitutional obligations to provide for a public education and a determine how federal legal requirements shall be satisfied. . .</p>

In terms of its membership, ALEC is described as “bipartisan,”¹⁰⁶ “nonpartisan”¹⁰⁷ and an “individual membership association of state legislators.”¹⁰⁸ Each brief indicates the organization’s membership is comprised solely of state legislators. ALEC’s mission is consistently characterized as one that prioritizes “free markets, limited government, federalism and individual liberty.”¹⁰⁹ However, the description ends with these principles in both *Zelman* and *Flores*. Comparatively, the briefs in *Davenport* and *Ysursa* include a statement regarding a “nonpartisan, public-private partnership between America’s state legislators and concerned members of the private sector, the federal government, and the general public.”¹¹⁰ ALEC’s interests mirror the broad principles outlined in its mission: federalism (*Davenport*), protection of “First Amendment rights of workers represented by unions” (*Ysursa*); and judicial constraint upon the legislative process (*Flores*). No specific interest was identified in *Zelman*. Although public-private partnerships are mentioned in two of the briefs, the nature of corporate or private interests are not presented in any of the briefs.

From this table, it is evident that ALEC’s structure and interests are inconsistently represented. This directly impacts the court’s ability to understand the motivations behind ALEC’s positions and arguments.

B. ALEC’S Role in Case Law

Notably, in each of the education cases for which ALEC filed a brief, a majority of the Court decided in favor of ALEC’s position, and in one instance directly referenced ALEC in the majority decision.

Horne v. Flores,¹¹¹ a case involving funding for English Learners, had a long and procedurally complicated legal history. In 2000, a federal district court ruled that the State of Arizona’s funding for English Learners was arbitrary, thereby violating the Equal Educational Opportunities Act of 1974 (EEOA).¹¹² To remedy this violation, the district court ordered the

¹⁰⁶ Brief of American Legislative Exchange Council as Amicus Curiae in Support of Petitioners at 1, *Davenport v. Washington Education Association*, 551 U.S. 177 (2007) (Nos. 05-1589, 05-1657), 2006 WL 3309497.

¹⁰⁷ Brief on the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners at 1, *Horne v. Flores*, 557 U.S. 433 (2009) (No. 08-294), 2009 WL 526204.

¹⁰⁸ Brief of American Legislative Exchange Council as Amicus Curiae in Support of Petitioners at 1, *Davenport v. Washington Education Association*, 551 U.S. 177 (2007) (Nos. 05-1589, 05-1657), 2006 WL 3309497.

¹⁰⁹ Brief of American Legislative Exchange Council as Amicus Curiae in Support of Petitioners at 1, *Davenport v. Washington Education Association*, 551 U.S. 177 (2007) (Nos. 05-1589, 05-1657), 2006 WL 3309497; Brief of Evergreen Freedom Foundation, American Legislative Exchange Council, and Independence Institute as Amici Curiae in Support of Petitioners at 1-2, *Ysursa v. Pocatello Education Association*, 555 U.S. 353 (2009) (No. 07-869), 2008 WL 2367230; Brief on the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners at 1-2, *Horne v. Flores*, 557 U.S. 433 (2009) (No. 08-294), 2009 WL 526204. Brief on Behalf of the American Legislative Exchange Council as Amicus Curiae in Support of Petitioners at 1-2, *Speaker of the Arizona House of Representatives v. Flores*, 555 U.S. 1092, (2009) (No. 08-294), 2008 WL 4496603.

¹¹⁰ Brief of American Legislative Exchange Council as Amicus Curiae in Support of Petitioners at 1, *Davenport v. Washington Education Association*, 551 U.S. 177 (2007) (Nos. 05-1589, 05-1657), 2006 WL 3309497; Brief of Evergreen Freedom Foundation, American Legislative Exchange Council, and Independence Institute as Amici Curiae in Support of Petitioners at 1, *Ysursa v. Pocatello Education Association*, 555 U.S. 353 (2009) (No. 07-869), 2008 WL 2367230.

¹¹¹ 557 U.S. 433 (2009).

¹¹² *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1239 (D. Ariz. 2000).

state to address its funding for English Learners on a state-wide basis.¹¹³ Following a series of sanctions for failure to comply with the decision, the case found its way to the Supreme Court. In the *Flores* amicus briefs, ALEC argued that prior consent decrees or settlement agreements unnecessarily constrained legislators' ability to meet the needs of their constituents.¹¹⁴ As a part of the statement of interest in the brief on the merits, ALEC argued that "ALEC's Resolution on the Federal Consent Decree Fairness Act (2006) sets forth ALEC's firm belief 'that federal consent decrees [should be] narrowly drafted, limited in duration and respectful of state and local interests and policy judgments.'"¹¹⁵ The Court was persuaded by this argument and Justice Alito, writing for the majority, cited both to ALEC's Resolution on the Federal Consent Decree Fairness Act and the organization's amicus brief.¹¹⁶ Justice Alito also referenced ALEC's *Report Card on American Education* in a footnote to support the notion that "increased funding alone does not improve student achievement."¹¹⁷ While the Court agreed with ALEC's assertions about the scope of judicial authority when remedying a violation of federal law, it rejected ALEC's second assertion that compliance with the No Child Left Behind Act (NCLB) and its requirement that states measure the achievement of English Learners was sufficient.¹¹⁸ Instead, the Court held that compliance with the NCLB did not necessarily equate with compliance with the EEOA.¹¹⁹ It is also interesting to note that *Flores*, the decision where the evidence of ALEC's direct influence was most traceable, was also the case in which ALEC was the least forthcoming about its interests.

In other cases, ALEC's influence is less apparent. Nonetheless, it is helpful to examine the arguments found in ALEC's amicus briefs and draw comparisons to arguments that the Court found most compelling in reaching its decisions.

Given ALEC's agenda, it is not surprising that ALEC has participated in case law addressing school choice. More specifically, ALEC signed onto a brief in *Zelman v. Simmons-Harris*, a case which involved a challenge to Ohio's voucher program under the Establishment Clause of the First Amendment.¹²⁰ Because 82% of participating schools were religiously affiliated and 96% of the students in the program used the funding to attend religious schools, the question before the Court was whether Ohio's program had the effect of advancing religion in violation of the First Amendment.¹²¹ ALEC and other like-minded organizations argued that "[a]llowing the federal courts to strike down voucher programs in their infancy simply because a majority of students taking the cash option have chosen to attend religious schools will ensure that virtually no voucher program will survive long enough so that its educational effects can be

¹¹³ *Id.*

¹¹⁴ See Brief on the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners at 1a, *Horne v. Flores*, 557 U.S. 433 (2009) (No. 08-294), 2009 WL 526204; Brief on Behalf of the American Legislative Exchange Council as Amicus Curiae in Support of Petitioners at 5, *Speaker of the Arizona House of Representatives v. Flores*, 555 U.S. 1092, (2009) (No. 08-294), 2008 WL 4496603.

¹¹⁵ Brief on the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners at 1, *Horne v. Flores*, 557 U.S. 433 (2009) (No. 08-294), 2009 WL 526204.

¹¹⁶ *Home*, 557 U.S. at 449-50.

¹¹⁷ *Id.* at 464, n.17.

¹¹⁸ *Id.* at 462.

¹¹⁹ *Id.* at 462, 467.

¹²⁰ 536 U.S. 639, 644 (2002).

¹²¹ *Id.* at 644, 647.

measured—a result that is unsound as a matter of policy, as well as constitutionally incorrect.”¹²² ALEC maintained that those challenging the program failed to meet their burden in demonstrating that the program advanced religion, as required under Supreme Court precedent.¹²³ The Supreme Court agreed, finding that the program was religiously neutral and promoted the genuine private choice of individuals.¹²⁴

In light of ALEC’s legislative efforts pertaining to employees and unions, it is once again not surprising that ALEC weighed in on cases discussing the use of union dues for the purpose of political contributions. For example, *Davenport v. Washington Education Association*¹²⁵, involved a Washington law that permitted the use of nonmember fees for election-related activities only under circumstances where nonmembers expressly opt-in.¹²⁶ From ALEC’s perspective, the “First Amendment operates here only to protect dissenters’ rights not to have the state force them to fund political or ideological speech.”¹²⁷ The Court stated that the Washington Supreme Court mistakenly understood prior case law to assert that objecting nonmembers bore the burden of objecting to the use of fees for political purposes.¹²⁸ Although the Supreme Court did not directly reference ALEC in its opinion, ALEC was undoubtedly pleased when the Court clarified that opt-out policies were the minimum and nothing prevented the State of Washington from enacting policies that exceed the minimum standard.¹²⁹

ALEC presented its position in another union-related case, *Ysursa v. Pocatello Education Association*.¹³⁰ The case involved an Idaho law¹³¹ that allowed employees to choose to have a portion of their wages deducted to pay union dues. However, employees were not permitted to elect to have an amount used for the purpose of political activities.¹³² ALEC argued that state legislatures should be granted broad deference to address labor relations. Their brief stated that “[n]o constitutional obligation on the state exists. . . to assist, recognize, or enhance a public-sector union’s status. Accordingly, states have adopted, and courts have upheld, numerous restrictions on unions’ statutorily-conferred bargaining status.”¹³³ In support of ALEC’s position, the Court determined that “The *First Amendment* prohibits government from ‘abridging the freedom of speech’; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression.”¹³⁴

¹²² Brief for the Center for Education Reform, et al. as Amici Curiae in Support of Petitioners at 24, *Zelman v. Simmons-Harris* at 1-2, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1480661.

¹²³ *Id.* at 16-17.

¹²⁴ *Zelman*, 536 U.S. 639 at 662.

¹²⁵ See generally *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177 (2007).

¹²⁶ Wash. Rev. Code § 42.17.760 (1992) (current version at Wash. Rev. Code § 42.17A.550 (2012)).

¹²⁷ Brief of Am. Legis. Exch. Council as Amicus Curiae Supporting Petitioners at 8, *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177 (2007) (Nos. 05-1589, 05-1657), 2006 WL 3309497.

¹²⁸ See *Davenport*, 551 U.S. at 185.

¹²⁹ *Id.* at 185-86 (Referring to the court’s statement, “To the contrary, we have described *Hudson* as ‘outlin[ing] a *minimum* set of procedures by which a [public-sector] union in an agency-shop relationship could meet its requirements under *Abood*.’ *Keller v. State Bar of Cal.*, 496 U.S. 1, 17 (1990) (emphasis added.)”).

¹³⁰ See generally *Ysursa v. Pocatello Ed. Ass’n*, 555 U.S. 353 (2009).

¹³¹ See generally Idaho Code Ann. § 44-2004.

¹³² *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 355 (2009).

¹³³ Brief of Evergreen Freedom Found., Am. Legis. Exch. Council, and Indep. Inst. as Amici Curiae Supporting Petitioners at 3, *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353 (2009) (No. 07-869), 2008 WL 2367230.

¹³⁴ *Ysursa*, 555 U.S. at 355.

While it is interesting to examine those cases for which ALEC served as an amicus, there are important education cases where ALEC did not file a brief when it might have been expected. For example, given that ALEC encourages states to adopt tax credit scholarship programs,¹³⁵ one might have anticipated that the organization would weigh in on the challenge to the Arizona tax credit scholarship program when it reached the Supreme Court.¹³⁶ It did not. Likewise, given the group's activity in both *Davenport*¹³⁷ and *Ysura*,¹³⁸ it seems curious that the group did not advance an opinion in *Friedrichs v. California Teachers Association*,¹³⁹ a case that likewise considered the bargaining rights of teachers unions.¹⁴⁰ Once again, however, it elected to abstain from direct involvement.

Despite these anomalies, the amicus briefs reviewed for this study demonstrate that ALEC is active in the judicial arena. The organization weighed in on four significant Supreme Court decisions impacting education policy. In doing so, ALEC inconsistently characterized its membership, mission and interests in its descriptions to the Court. Topically, funding for English Learners, teachers unions and school choice appear to be consistent with the organization's agenda and ideology. Next we analyze these efforts in relation to principles of deliberative democracy.

III. ANALYSIS

"In state legislatures around the country, citizen groups foster ideas, participate in discussions and provide their points of view to lawmakers. This process is an important part of American democracy."¹⁴¹

This quotation, taken from the 2015 *Report Card on American Education*, illustrates ALEC's recognition of the influence of its work on our democratic system of governance. However, close inspection of ALEC's activity as a "friend of the court" suggests that its efforts undermine key elements of democracy.

As ALEC has sought to influence education policy through two sources of law – legislation and case law – we use deliberative democracy as the conceptual lens through which to view ALEC's activities. Deliberative democracy is a political theory that posits that for democratic government to work, citizens and their representatives must engage in a process of deliberating the relative merits of a policy in order to rationalize its adoption.¹⁴² As Gutmann and

¹³⁵ See e.g., *The Great Schools Tax Credit Program Act (Scholarship Tax Credits)*, AM. LEGIS. EXCH. COUNCIL (n.d.), <https://www.alec.org/model-policy/the-great-schools-tax-credit-program-act-scholarship-tax-credits/> [<https://perma.cc/4RLU-MRJR>].

¹³⁶ See generally *Arizona Christian School Tuition Org. v. Winn*, 563 U.S. 125 (2011).

¹³⁷ See generally *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007).

¹³⁸ See generally *Ysursa v. Pocatello Educ. Assoc'n*, 555 U.S. 353 (2009).

¹³⁹ *Friedrichs v. California Teachers Association*, 136 U.S. 1083 (2016).

¹⁴⁰ The Supreme Court, being equally divided on the issues presented, affirmed the judgment in favor of the teachers union regarding the propriety of agency or fair use fees charged to non-union members to compensate the union for representing all teachers (union and non-union) in contract negotiations. *Id.*

¹⁴¹ Ladner, *supra* note 45 at 110.

¹⁴² See Amy Gutmann & Dennis Thompson, *WHY DELIBERATIVE DEMOCRACY?* (2004); Amy Gutmann & Dennis F. Thompson, *DEMOCRACY AND DISAGREEMENT* (1998). Gutmann and Thompson are among a number of scholars to discuss deliberative democracy and in their 2004 volume they provide a review of the others' work with the same

Thompson explain:

[D]eliberative democracy [is] a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.¹⁴³

Deliberative democracy, therefore, combines both substantive and procedural principles as necessary predicates to a functioning democracy¹⁴⁴ (See Figure 1, *infra*). Substantively, all policies and the debates about them relate in some way to three general principles: (1) basic liberty, (2) basic opportunity, and (3) fair opportunity.¹⁴⁵ Basic liberty refers to those ideals enshrined in the Bill of Rights of the U.S. Constitution (e.g., freedom of religion, freedom of speech, freedom from unreasonable searches, etc.).¹⁴⁶ Basic opportunity captures the idea that all governmental actions seek to provide or to structure opportunity for its citizens, while the principle of fair opportunity recognizes that all in the society must have access to the opportunities created in order for democracy to thrive.¹⁴⁷ In order to ensure that deliberations on a proposal are truly democratic, the deliberative process must likewise be characterized by three features: (1) reciprocity, (2) publicity, and (3) accountability.¹⁴⁸ Reciprocity requires that those engaged in debates provide reasons for their support or opposition that can be understood by all and that evidence given be obtained by reasonable and recognizable forms of inquiry.¹⁴⁹ Publicity refers to what may be also called transparency. That is, that debates occur in public and that citizens have ample time to inform their representatives of their views and engage in the process.¹⁵⁰ Finally, accountability refers to the principle that both citizens and their representatives are responsible to each other for the policies adopted and for abiding by them. Further, accountability in process provides a check when constituents believe their representative is not adequately acting in their interests.¹⁵¹ Courts, of course, also provide a means for holding the system accountable when an individual or group alleges that policy makers have exceeded the scope of their authority.

concept (See WHY DELIBERATIVE DEMOCRACY? (2004), at 189, note 3). For the purposes of this discussion, we rely on their view of the theory.

¹⁴³ See Gutmann & Thompson (2004), *supra* note 142 at 7.

¹⁴⁴ See Gutmann & Thompson (2004), *supra* note 142 at 23-6.

¹⁴⁵ See Gutmann & Thompson (2004), *supra* note 142 at 137; Gutmann & Thompson (1998), *supra* note 142, at 8.

¹⁴⁶ See Gutmann & Thompson (2004), *supra* note 142 at 137.

¹⁴⁷ *Id.*

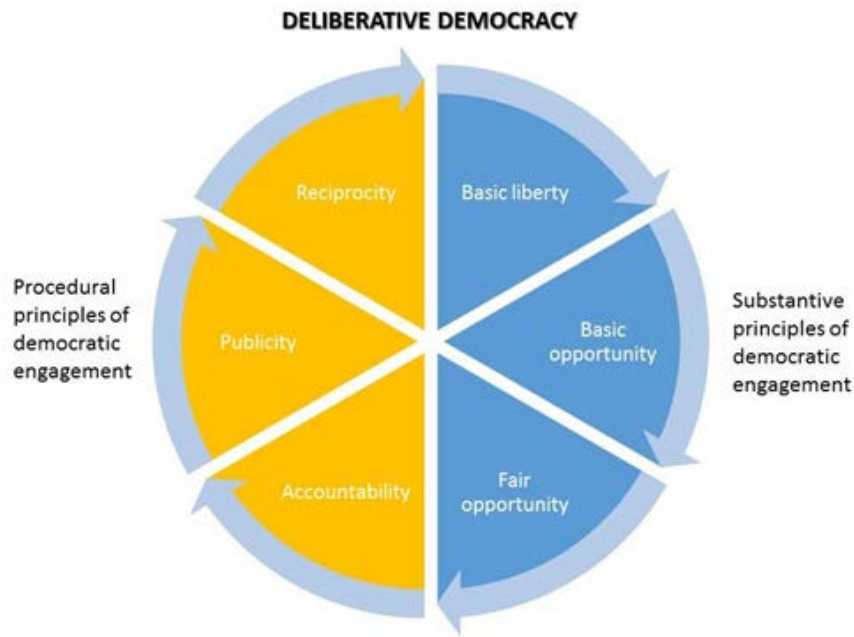
¹⁴⁸ *Id.* at 133.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 135.

¹⁵¹ *Id.*

Figure 1: The procedural and substantive principles of deliberative democracy



We first briefly examine ALEC’s work as an amicus in relation to the substantive elements of deliberative democracy (basic liberty, basic opportunity, and fair opportunity). Though, as the analysis will show, the greatest impact of ALEC’s advocacy appears to be on the procedural elements of deliberative democracy (reciprocity, publicity, and accountability).

A. Substantive Elements of Deliberative Democracy

It is not the intent of this study to debate the merits of the policy stances ALEC takes. We acknowledge that some will view ALEC’s positions positively and some will not. That said, it is interesting to note both the consistencies and contradictions in the substantive arguments ALEC made to the Court, particularly in relation to the organization’s espoused goals and to the substantive elements of basic liberty, basic opportunity, and fair opportunity.

The organization characterizes one of its primary goals to be the championing of the “Jeffersonian principle [] . . . of individual liberty.”¹⁵² As such, the organization often evokes liberty interests in its arguments. For example, in its brief in *Davenport v. Washington Education Association*, ALEC characterized the legal issue as follows: “Can a State that provides for union security contracts also impose innovative conditions that protect the expressive rights of

¹⁵² Membership, AM. LEGIS. EXCH. COUNCIL (n.d.), <https://www.alec.org/membership/> [https://perma.cc/X5P4-X87E].

nonmembers who are coerced into paying a union to represent them?”¹⁵³ Likewise, two years later it advised the Court in *Yursa v. Pocatello Education Association* that the matter before it required the justices to find “the desired balance of protecting the First Amendment rights of both workers and unions in the context of a collective bargaining agreement.”¹⁵⁴ In both instances, ALEC argued for what it characterized as the individual rights of union non-members, while discounting the basic liberties (association, speech, and petition) afforded and amplified by collective action. In addition, it is ironic that that an organization dedicated to smaller governmental control argued that state legislators should have the authority to set statewide policies that limit the authority of local policy makers to manage their own employee relations. By adopting that perspective, ALEC’s argument chose the side of state-level officials, whether or not they are in a better position than local school board members to discern where the balance should rest between any tension of rights that may arise between an individual teacher and a union that represents that class of employees.

This expansion of state authority at the expense of local authority illustrated in *Davenport* and *Yursa* is also apparent in some of the model bills disseminated by ALEC. For example, the Teacher Quality Assurance Act “prohibits a school district from utilizing a last-hired, first-fired layoff policy when reducing staff.”¹⁵⁵ If enacted, this model legislation limits the discretion of local policy-makers to weigh the merits and demerits of such a policy in their local community. Another way the authority of local elected school boards is diminished is through some of the model bills related to charter schools, such as the Next Generation Charter Schools Act.¹⁵⁶ This model bill outlines legislation that gives authority to create new public charter schools to state-wide, non-elected entities rather than local school boards.¹⁵⁷

Another substantive aspect of deliberative democracy is basic opportunity. ALEC’s advocacy for parental choice highlights the opportunities created by such policies. ALEC cast its support of the publicly funded private school vouchers in *Zelman* as “an innovative attempt by the State to utilize the private education market to help satisfy its obligation under State constitutional law to provide an adequate educational program for all of Cleveland’s children.”¹⁵⁸ ALEC’s approach also focuses on the state legislature as the body best suited to craft basic opportunities. In *Flores*, the organization’s critique of the judicial decree as an over-reach of authority contends that legislatures, not judges, are in the best position to discern how to provide the basic opportunity afforded through education.¹⁵⁹

¹⁵³ Brief of Am. Legis. Exch. Council as Amicus Curiae in Support of Petitioners at 3, *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177 (2007) (Nos. 05-1589, 05-1657), 2006 WL 3309497. (stating, “This Balkanization of labor relations will undermine a state’s ability to achieve the desired balance of protecting the First Amendment rights of both workers and unions in the context of a collective bargaining agreement.”).

¹⁵⁴ Brief of Evergreen Freedom Found., Am. Legis. Exch. Council, and Indep. Inst. as Amici Curiae in Support of Petitioners at 27-28, *Yursa v. Pocatello Educ. Ass’n*, 555 U.S. 353 (2009) (No. 07-869), 2008 WL 2367230.

¹⁵⁵ *Teacher Quality Assurance Act*, AM. LEGIS. EXCH. COUNCIL (n.d.), <https://www.alec.org/model-policy/teacher-quality-assurance-act/> [<https://perma.cc/D5WR-Y2P4>].

¹⁵⁶ See *The Next Generation Charter Schools Act*, AM. LEGIS. EXCH. COUNCIL (July 28, 2016), <https://www.alec.org/model-policy/amendments-and-addendum-the-next-generation-charter-schools-act/> [<https://perma.cc/X3CQ-CVZC>].

¹⁵⁷ See *id.*

¹⁵⁸ Brief for the Center for Education Reform, et al. as Amici Curiae in Support of Petitioners at 25, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1480661.

¹⁵⁹ Brief for the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners at 26-28, *Horne v. Flores*, 557 U.S. 433 (2009) (No. 08-294), 2009 WL 526204. “In short,

However, democracy necessitates that opportunities also be fair and equally accessible. What is "fair," of course, is often a matter of perspective. As such, both concerned citizens considering the merits of a model bill and judges trying to weigh the advice of an amicus need to know the provenance of the idea in order to ascertain its fairness. As will be discussed more thoroughly in the next section, ALEC's selective disclosure of its membership and the interests it represents compromises the ability of anyone trying to discern the fairness of its arguments.

ALEC also consistently insists upon a limited role for the judiciary, which seems to overlook the role courts play in ensuring fair opportunities. In its brief for *Horne v. Flores*, ALEC titled a subsection "Frustrated Political Factions Can Improperly Use Institutional Reform Litigation to Circumvent the Legislative Appropriations Process."¹⁶⁰ Specifically, ALEC argues that the lower court's ruling in *Horne v. Flores* "has enabled a particular political faction to circumvent the appropriations process entirely, and instead pursue its political agenda through the federal courts."¹⁶¹ ALEC portrays individuals seeking court intervention in an effort to protect federal statutory and constitutional rights as special interest groups. In that way, ALEC ignores the role courts play in ensuring that the opportunities provided by our democracy are equitably available.¹⁶² Ironically, ALEC's organizational structure allows for *political factions*, which are undisclosed for-profit entities, to *circumvent* the legislative process by giving priority to unknown financial beneficiaries of the laws rather than those children who should be the true beneficiaries of education legislation.

On a related note, ALEC consistently champions the cause of separation of powers, arguing that "Public Education Is Properly the Domain of State Policymakers—Not Federal Courts."¹⁶³ In fact, ALEC dedicated a whole section of a brief to this idea. To take this argument to its logical conclusion would render ALEC's approach to enacting legislation wholly inappropriate. Employing this logic, if public education is primarily the domain of state and local policymakers, those closest to the communities served by the policies are best positioned to identify needs and solutions to those needs. Private, for-profit entities that pursue their vested interests by contributing to the production of model bills are distant, not embedded in the communities ultimately impacted by the legislation. And yet, ALEC presents the model bills as solutions for every context, which seems to run counter to its approach to ensuring education policy is enacted in the proper "domain."

the Ninth Circuit has allowed the District Court to further its own educational agenda by inserting itself into an education policy dispute between the political branches of Arizona. This Court's long-standing precedent simply does not allow the federal courts to override state and local control of education absent a current and ongoing violation of federal law. As discussed below, it is ALEC's firm belief that to allow otherwise is both improper and inefficient, and ultimately will severely undercut the ability of Arizona's schools to best educate their ELL students." *Id.*, at 28 (internal citation omitted).

¹⁶⁰ Brief on the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners at 19, *Horne v. Flores*, 557 U.S. 433 (2009) (No. 08294), 2009 WL 526204.

¹⁶¹ *Id.* at 6.

¹⁶² See e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that segregated schools created inherently unequal educational opportunities); *Mills v. Board of Education of the District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972) (holding that children with disabilities could not be excluded from public schools); *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that children not fluent in English must be provided with equal educational opportunities); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that states may not deny access to public educational opportunities to the children of undocumented persons).

¹⁶³ *Id.* at 26.

B. Procedural Elements of Deliberative Democracy

The briefs reviewed in this study relied upon principles such as democratic accountability, federalism and separation of powers. The briefs reviewed in this study relied upon ALEC's espoused principles of democratic accountability, federalism and separation of powers. Cross-referenced with the procedural elements of deliberative democracy—reciprocity, accountability and publicity—each of these principles will be analyzed to illustrate the implications of ALEC's arguments and overall lack of transparency.

Recall that reciprocity refers to the arguments made when debating the rationale for a policy and that those engaged in the debate rely on evidence obtained in reasonable and recognizable forms. To support its argument in favor of federalism in its *Flores* brief, ALEC referenced one of its own articles, which stated that “[c]arefully designed local programs specifically tailored to solve community problems should not be displaced in favor of one-size-fits-all federal formulas.”¹⁶⁴ This argument is inconsistent with ALEC's one-size-fits-all promulgation and dissemination of model legislation. According to an archived version of ALEC's website,

ALEC's National Task Forces provide a forum for legislators and the private sector to discuss issues, develop policies and write model legislation. In the legislative sessions of 1996, there were 639 introductions which followed ALEC models. Of these, 132 were enacted, for a passage rate of more than 20 percent.¹⁶⁵

While many organizations use model legislation as a tool to guide policy change, the origin of ALEC-inspired legislation is unknown to the public. Instead, model legislation, sometimes verbatim, is proposed by legislators from states across the country, at the expense of “community problems” and for the benefit of corporate entities. Similarly, when ALEC omits corporate members from its description of the organization and fails to acknowledge such members' influence in the production of the policies it advocates, ALEC hampers the reciprocal relationship any *amicus curiae* enters when advising the justices on a pending dispute.

Relatedly, although ALEC sometimes refers to its inclusion of “concerned members” of the “general public” in its statement of interest, it is difficult to determine where public interests are considered. According to ALEC's website,

[w]ith over 2,000 members, ALEC is the nation's largest nonpartisan, individual membership association of state legislators. ALEC is one of America's most dynamic public-private partnerships with nearly 300 corporate and private foundation members. ALEC provides its public and private sector members with a unique opportunity to work together to develop policies and programs that effectively promote the Jeffersonian principles of free markets, limited government, federalism, and individual liberty.¹⁶⁶

¹⁶⁴ *Id.* at 8 (referencing Benjamin Barr, *The States' Struggle for Sovereignty: The Consequences of Federal Mandates*, ALEC Policy Forum (Sept. 2008), available at http://www.alec.org/am/pdf/apf/apf_federal_mandates.pdf).

¹⁶⁵ *About ALEC* (1998), American Legislative Exchange Council, <https://web.archive.org/web/19981212022635/http://www.alec.org/> [<https://perma.cc/26MM-RHDB>].

¹⁶⁶ *See* Brief on the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners at 1, *Horne v. Flores*, 557 U.S. 433 (2009) (No. 08294), 2009 WL 526204.

This structure and process appears to neglect public participation and access.

In *Ysursa*, ALEC emphasized the importance of granting deference to state officials to make state-wide determinations regarding the power of unions under state law.¹⁶⁷ ALEC's argument is misleading in that ALEC's structure encourages democratically elected officials to defer to corporate interest groups, rather than the interests of those individuals whom they are elected to represent. ALEC's argument in *Ysursa* also relied on the fact that "every state has set up a system suited to its particular public employment climate,"¹⁶⁸ an outcome that ALEC's approach to uniform model legislation undermines.

A fully functioning democracy also demands publicity so that all may judge the origin of any policy and gauge the persuasiveness of the arguments for and against it. Central to the notion of publicity is the concept of transparency, so that all engaged in the process can clearly assess the perspective of those trying to persuade them.

As illustrated in the earlier discussion, ALEC inconsistently characterizes its membership as either bipartisan or non-partisan. This variance does not correspond to chronological order of its filings or evolution within the organization. In fact, in a brief submitted on February 26, 2009, the organization described itself as "non-partisan,"¹⁶⁹ but submitted a brief one day later on February 27, 2009 describing itself as "bipartisan."¹⁷⁰

Neither word seems to accurately portray the nature of ALEC. Bipartisan is defined as "of, relating to, or involving members of two parties," while non-partisan is defined as "free from party affiliation, bias, or designation."¹⁷¹ However, as others have observed, ALEC's membership is overwhelmingly Republican and its policy stances align with those of the Republican Party.¹⁷² In fact, the last six editions of the *Report Card on American Education* have included forwards from Republican politicians including: William Bennet,¹⁷³ Jeb Bush,¹⁷⁴ Mitch Daniels,¹⁷⁵ Mary Fallin,¹⁷⁶ Mike Pence,¹⁷⁷ and Scott Walker.¹⁷⁸

¹⁶⁷ See Brief for Evergreen Freedom Foundation, American Legislative Exchange Council, and Independence Institute as Amici Curiae in Support of Petitioners, *Ysursa v. Pocatello Education Association*, 555 U.S. 353 (2009) (No. 07-869), 2008 WL 2367230.

¹⁶⁸ See *id.* at 28.

¹⁶⁹ Brief on the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners at 1, *Horne v. Flores*, 557 U.S. 433 (2009) (No. 08294), 2009 WL 526204.

¹⁷⁰ Brief for the American Legislative Exchange Council as Amicus Curiae in Support of Petitioners at 1, *Empress Casino Joliet Corp. v. Giannoulis*, 556 U.S. 1281 (2009) (No. 08-945).

¹⁷¹ See "Bipartisan", Merriam-Webster Online Dictionary, 2016, <http://www.merriam-webster.com/dictionary/bipartisan> [<https://perma.cc/3AN6-SEJ8>] (7 Aug. 2016); See "Nonpartisan", Merriam-Webster Online Dictionary, 2016, <http://www.merriam-webster.com/dictionary/nonpartisan> [<https://perma.cc/5W6S-YLSP>] (7 Aug. 2016).

¹⁷² See Anderson & Donchik, *supra* note 10; see also Bulman-Pozen, *supra* note 10; see also Kammer, *supra* note 10; see also Underwood & Mead, *supra* note 10.

¹⁷³ *Report Card on American Education: A State-by-State Analysis 15th Edition*, American Legislative Exchange Council (2008), https://www.alec.org/app/uploads/2015/12/15th_Report_Card.pdf [<https://perma.cc/5RVD-RTS6>].

¹⁷⁴ *Report Card on American Education: A State-by-State Analysis 16th Edition*, American Legislative Exchange Council (2010), https://www.alec.org/app/uploads/2015/12/16th_Report_Card.pdf [<https://perma.cc/94VU-HE5Z>].

¹⁷⁵ *Report Card on American Education: A State-by-State Analysis 17th Edition*, American Legislative Exchange Council (2012), https://www.alec.org/app/uploads/2015/12/17th_Report_Card.pdf [<https://perma.cc/6ZAT-FP9V>].

¹⁷⁶ *Report Card on American Education: A State-by-State Analysis 18th Edition*, American Legislative

Not only are the descriptions inconsistent with regard to the nature of the organization, but they also inconsistently describe the role of its corporate membership and its production and dissemination of model bills. Interestingly, while the interest statements in its amicus briefs appear to downplay ALEC's role in the articulation and adoption of legislation, the statements in its education report cards do just the opposite, lauding both the access to corporate leaders and the creation of model bills. For example, in ALEC's 2001 *Report Card on American Education*, released the same year the *Zelman* brief was submitted, ALEC stated that:

Each [Task Force] provides a unique vehicle for legislators to communicate across state lines, share experiences and ideas, and work in unison with the private sector to develop policies and write model legislation. ALEC's goal is to ensure that our legislative members are fully armed with the information, research and ideas they need to win in the legislative arena. Our publications keep members up-to-date on emerging trends and provide in-depth analyses of issues at the state level. Our conferences promote colleague to colleague communication by linking like-minded legislators together. ALEC provides the private sector with an unparalleled opportunity to have their voices heard and their perspectives appreciated. Through ALEC, legislators and the private sector work in a dynamic partnership to develop public policies that harness the immense power of free markets and free enterprise to encourage economic growth, increase the nation's competitiveness, and improve the quality of life for all Americans.¹⁷⁹

In the case of ALEC, accountability is closely tied to publicity. ALEC's lack of transparency makes it difficult for citizens to hold its legislative and corporate members accountable. The accountability that exists within ALEC's organizational structure is between its legislative and corporate members. As illustrated in the quotation above, corporations have an "unparalleled opportunity to have their voices heard and their perspectives appreciated." Corporations associated with ALEC have a clear financial interest in the adoption of ALEC's model legislation. Moreover, these corporations, which directly benefit from legislation the way that K-12, Inc. did in Tennessee, proceed to reinvest a portion of their profit in the form of ALEC membership fees.

However, both the model bill cycle and the limited disclosure of organizational interests hinder publicity and accountability. If citizens are not aware of the corporate interests that may benefit from passage of a model bill, they are robbed of their ability to fully vet the idea as part of the democratic process. Likewise, if ALEC provides only a partial disclosure of the nature of its interests, judges are denied the opportunity to decide whether or not there is bias present.

In *Horne v. Flores*, ALEC begins its brief by summarizing the purpose of its argument, which is "to reverse the lower courts' rulings, and by so doing vindicate principles of federalism,

Exchange Council (2013), https://www.alec.org/app/uploads/2015/12/18th_Report_Card.pdf [https://perma.cc/HL5U-EBG6].

¹⁷⁷ *Report Card on American Education: A State-by-State Analysis 19th Edition*, American Legislative Exchange Council (2014), https://www.alec.org/app/uploads/2015/12/19th_Report_Card.pdf [https://perma.cc/8ZME-R7ZX].

¹⁷⁸ *Report Card on American Education: A State-by-State Analysis 20th Edition*, American Legislative Exchange Council (2015), <https://www.alec.org/app/uploads/2015/11/2015alecreportcardfinalweb-151110162215-lva1-app6891.pdf> [https://perma.cc/BKG9-TZKW].

¹⁷⁹ American Legislative Exchange Council, REPORT CARD ON AMERICAN EDUCATION: A STATE-BY-STATE ANALYSIS, at 41976-2001 (2002).

separation of powers, and *democratic accountability*, and ultimately restore control over Arizona's educational system to the state and local authorities best suited to educate Arizona's youth."¹⁸⁰ However, ALEC's structure thrives on a lack of democratic accountability. From the secrecy of its membership and leadership structure to the privacy of its model legislation, lack of transparency has been an integral part of ALEC's design.

IV. CONCLUSION

It is not surprising that an organization with an interest in educational policy formation would attempt to influence legal proceedings. This article demonstrates that ALEC has actively used the *amicus curiae* brief process in four major education cases heard by the U.S. Supreme Court to assert some influence on judicial policy review. However, ALEC's overall lack of transparency hinders the judiciary's ability to sift through ALEC's legal arguments. Any group that seeks to sway opinion in both legislative and judicial spheres bears watching. Accordingly, it is important for judges, researchers, policy makers and practitioners to keep ALEC's work on their radar. Armed with all necessary information, individuals representing each of these groups may choose to support ALEC's position. However, the process through which this decision is reached is significant. Access to information and deliberation is necessary to promote democracy. We believe ALEC has as much right to a seat at the table of any policy debate as any other entity, whether that debate takes place in a state house or a court house. But when it takes a seat, either as a friend of the court or as the author of a model bill, everyone should have a full understanding of ALEC's membership and the interests, corporate and otherwise, the organization represents.

¹⁸⁰ Brief on the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners at 6, *Horne v. Flores*, 557 U.S. 433 (2009) (No. 08294), 2009 WL 526204.

APPENDIX – CITATIONS FOR ALL BRIEFS FOR WHICH ALEC SERVED AS AN AMICUS CURIAE

Briefs filed in US Supreme Court

1. Brief for National Federation of Independent Business, Tabor Foundation, American Legislative Exchange Council, National Taxpayers Union, Americans for Tax Reform, Citizens in Charge, Howard Jarvis Taxpayers Association, Citizens for Limited Taxation, Goldwater Institute, Freedom Center of Missouri, Cascade Policy Institute, Pelican Institute for Public Policy, Tax Foundation of Hawaii, Wisconsin Institute for Law & Liberty, Washington Policy Center as Amici Curiae, *Hickenlooper v. Kerr*, 135 S.Ct. 2927 (2015) (No. 14-460), 2014 WL 6657598.
2. Brief for the American Legislative Exchange Council as Amicus Curiae in Support of Respondent, *Comptroller of the Treasury of Maryland v. Wynne*, 135 S.Ct. 1787 (2015) (No. 13-485), 2014 WL 4804048.
3. Brief for the American Legislative Exchange Council as Amicus Curiae in Support of Petitioners, *Overstock.com, Inc., v. New York State Department of Taxation And Finance et al.*, 134 S.Ct. 682 (2013) (Nos. 13-252 and 13-259) 2013 WL 5316717.
4. Brief for the American Legislative Exchange Council as Amicus Curiae in Support of Respondents, *National Federation of Independent Business, et al., v. State of Florida*, 132 S.Ct. 2566 (2012) (No. 11-398), 2012 WL 504620.
5. Brief for American Legislative Exchange Council as Amicus Curiae in Support of Petitioners, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521), 2009 WL 4099519.
6. Brief for New England Legal Foundation Associated Industries of Massachusetts Associated Industries of Vermont Maine Merchants Association and American Legislative Exchange Council as Amici Curiae in Support of Petitioners, *IMS Health, Inc. v. Ayotte*, 557 U.S. 936 (2009) (No. 08-1202), 2009 WL 1155410.
7. Brief for the American Legislative Exchange Council as Amicus Curiae in Support of Petitioners, *Empress Casino Joliet Corp. v. Giannoulas*, 556 U.S. 1281 (2009) (No. 08-945), 2009 WL 527001.
8. Brief on the American Legislative Exchange Council and Certain Individual State Legislators as Amici Curiae in Support of Petitioners, *Home v. Flores*, 557 U.S. 433 (2009) (No. 08-294), 2009 WL 526204.
9. Brief on Behalf of the American Legislative Exchange Council as Amicus Curiae in Support of Petitioners, *Speaker of the Arizona House of Representatives v. Flores*, 555 U.S. 1092, (2009) (No. 08-294), 2008 WL 4496603. (U.S.)
10. Brief for the American Legislative Exchange Council and The Lawyers Democracy Fund as Amici

2017]

ALEC AS A "FRIEND OF THE COURT" IN EDUCATION CASES

337

- Curiae in Support of Respondents, *Bartlett v. Strickland*, 556 U.S. 1 (2009) (No. 07-689), 2008 WL 3874280.
11. Brief for Evergreen Freedom Foundation, American Legislative Exchange Council, and Independence Institute as Amici Curiae in Support of Petitioners, *Ysursa v. Pocatello Education Association*, 555 U.S. 353 (2009) (No. 07-869), 2008 WL 2367230.
 12. Brief for American Legislative Exchange Council as Amicus Curiae in Support of Respondent, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 317756.
 13. Brief for American Legislative Exchange Council as Amicus Curiae in Support of Petitioners, *Davenport v. Washington Education Association*, 551 U.S. 177 (2007) (Nos. 05-1589, 05-1657), 2006 WL 3309497.
 14. Brief for Evergreen Freedom Foundation and Twelve Leading Public Policy Organizations as Amici Curiae in Support of Petitioner, *Davenport v. Washington Education Association*, 548 U.S. 942 (2006) (No. 05-1657), 2006 WL 2401857.
 15. Brief for the American Legislative Exchange Council and Free Enterprise Coalition as Amici Curiae in Support of Appellees, *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, 05-439), 2006 WL 247771.
 16. Brief for the American Homeowners Alliance, American Legislative Exchange Council, Americans for Technology Leadership, Competitive Enterprise Institute, Consumer Alert, eBay, Inc., Information Technology Association of America, Internet Commerce Coalition, NetChoice, Pacific Research Institute, the Progress & Freedom Foundation, Software & Information Industry Association as Amici Curiae in Support of Respondent, *Granholtz v. Heald*, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120), 2004 WL 2155306.
 17. Brief for the Center for Education Reform, et al. as Amici Curiae in Support of Petitioners, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1480661 .
 18. Brief for the Washington Legal Foundation and American Legislative Exchange Council as Amici Curiae in Support of Petitioner, *State Farm Mutual Automobile Insurance Company v. Speroni*, 525 U.S. 922 (1998) (No. 97-2063), 1998 WL 34102849.

Briefs filed in US Courts of Appeals

1. Brief for the National Federation of Independent Business, Tabor Foundation, American Legislative Exchange Council, National Taxpayers Union, Americans for Tax Reform, Citizens in Charge, Howard Jarvis Taxpayers Association, Citizens for Limited Taxation, Goldwater Institute, Freedom Center of Missouri, Cascade Policy Institute, Pelican Institute for Public Policy, Tax Foundation of Hawaii, Wisconsin Institute for Law & Liberty, Washington Policy Center as Amici Curiae, *Kerr v. Hickenlooper*, — F. 3d — (10th Cir. 2016) (No. 12-1445), 2015 WL 4642371.
2. Brief of the American Legislative Exchange Council as Amicus Curiae in Support of Appellant, *The*

- State of Tennessee v. Federal Communications Commission*, No. 15-3291, 2015 WL 5693407 (6th Cir., September 25, 2015).
3. Brief for the American Legislative Exchange Council As Amicus Curiae in Support of Plaintiffs-Appellees, *State of Florida v. U.S. Department of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011)(Nos. 11-11021, 11-11067), 2011 WL 2530504.
 4. Brief for the Center for Education Reform et al., as Amici Curiae in Support of Appellants, *Simmons-Harris v. Zelman*, 234 F. 3d 945 (6th Cir. 2000) (Nos. 00-3055, 00-3060, 00-3063), 2000 WL 35553799.
 5. Brief for the Washington Legal Foundation, American Legislative Exchange Council, and Rep. George N. Katsakiores (New Hampshire), Rep. Howard L. Fargo (Pennsylvania), Assemblyman Clifford W. Crouch (New York) as Amici Curiae in Support of Plaintiff-Appellee, *National Foreign Trade Council v. Laskey*, 181 F.3d 38 (1st Cir. 1999) (No. 98-2304), 1999 WL 33911644.
 6. Brief for American Legislative Exchange Council (ALEC), The Empowerment Network Foundation (TENF), the Independent Women's Forum (IWF), and three individual recipients of AFDC in New Jersey: Bethsai Townsend, Tomikka Simmons, and Nicole Green as Amici Curiae in Opposition to Plaintiffs-Appellants' Appeal, *C.K. v. New Jersey Department of Health and Human Services*, 92 F.3d 171 (3rd Cir. 1996) (No. 95-5454), 1995 WL 17170798.
 7. Brief for the Citizens for A Sound Economy Foundation, American Legislative Exchange Council, and Competitive Enterprise Institute as of Amici Curiae in Support of Appellees Chesapeake and Potomac Telephone Company, et al., *United States of America v. The Chesapeake and Potomac Telephone Company of Virginia*, 42 F.3d 181 (4th Cir. 1994) (Nos. 93-2340, 93-2341), 1993 WL 13122286.

Briefs filed in State Supreme Courts

1. Brief for the Chamber of Commerce of the United States of America, National Association of Manufacturers, National Federation of Independent Business Small Business Legal Center, American Tort Reform Association, American Insurance Association, American Chemistry Council, and American Legislative Exchange Council as Amici Curiae in Support of Respondent/Cross-Appellant, *Bahena v. Goodyear Tire & Rubber Company*, 126 Nev. 606, 245 P.3d 1182 (Nev. 2010) (No. 49207), 2010 WL 8534179.
2. Brief for the American Legislative Exchange Council as Amicus Curiae, *Schnall v. AT&T Wireless Services, Inc.*, 163 Wash.2d 1022, 185 P.3d 1194 (Wash. 2008) (No. 80572-5), 2008 WL 6194030.
3. Brief for the American Legislative Exchange Council as Amicus Curiae, *Brown v. Owen*, 206 P.3d 310 (Wash. 2009) (No. 81287-0), 2008 WL 4727762.
4. Brief for the Washington Coalition for Open Government and the American Legislative Exchange Council as Amici Curiae, *Washington State Farm Bureau Federation v. Gregoire*, 174 P.3d 1142 (Wash. 2007) (No. 78637-2), 2006 WL 3910766.

5. Brief of the American Legislative Exchange Council as Amicus Curiae in Support of Appellants, *Stephenson v. Woodward*, 182 S.W.3d 162 (Ky. 2006) (Nos. 2005-SC-603-TG (2005-CA-1601-MR), 2005-SC-604-TG (2005-CA-1602-MR), 2005-SC-645-TG (2005-CA-1643-MR)), 2005 WL 5406234.
6. Brief for the Association of Commerce and Industry of New Mexico and the American Legislative Exchange Council as of Amici Curiae, *Hovet v. Allstate Insurance Company*, 89 P.3d 69 (N.M. 2004) (Nos. 27,969, 28,009), 2003 WL 24287347.
7. Brief for the American Tort Reform Association, National Association of Manufacturers, and American Legislative Exchange Council as of Amici Curiae in Support of Relators, *In re Bridgestone/Firestone North American Tire, L.L.C.*, cert. denied (Tex. 2003) (No. 02-0944), 2003 WL 22330742.
8. Brief for the National Conference of Insurance Legislators and the American Legislative Exchange Council as Amici Curiae in Support of Defendant-Appellant State Farm Mutual Automobile Insurance Company, *Avery v. State Farm Mutual Automobile Insurance Company*, 835 N.E.2d 801 (Ill. 2005) (No. 91494), 2002 WL 3300648.