

Amicus Curiae Briefs in the United States Supreme Court

by

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## **Abstract**

The purpose of this research is to analyze and develop a narrative describing the relationships between amicus curiae briefs submitted to the United States Supreme Court, the opinions of the justices, and the outcome of the case. The Supreme Court cases selected for the statistical analysis come from the Washington University Law School's "Supreme Court Database" to narrow the results to cases relevant to state issues. Supreme Court cases included in the case study section of this report have unique or special characteristics that set them apart from other cases. Through our research, we gauged the ideological leanings of groups that submitted briefs to the Supreme Court and compared them to the ideologies of Supreme Court justices who wrote the opinions of the respective cases. We concluded that, in most cases, there is evidence that amicus briefs have a significant impact on the outcome of a case and that the ideology of the groups is the same as the justice that is referencing them.

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## Introduction

Amicus Curiae briefs have existed since early Roman law and are still used today. Translated, the term means “friend of the court,” or in its plural form *amici curiae*, “friends of the court” (Collins 2005). Briefs of Amicus Curiae serve several purposes to the Supreme Court of the United States. Briefs can provide alternative views to the court, by providing opinions discussing the implications of the court's decision, and briefs can attempt to persuade justices to rule a specific way. Many briefs submitted to the court are from political or professional groups that have an interest in a case under consideration by the Supreme Court. As a result of their vested interest in a case, they write persuasive briefs, citing academic articles, previous court cases, or any relevant material that they believe will convince a justice to agree. Briefs of Amicus Curiae are either written for the petitioners or the respondents of a case. The term “petitioner” refers to the “party who petitioned the Supreme Court to review the case.” The petitioner is also sometimes referred to as the appellant. Respondents, however, “refers to the party being sued or tried and is also known as the appellee” (Spaeth et al. 2019).

The court’s application of the information provided by Amicus Curiae is a factor that is difficult to quantify in the Supreme Court’s decision. Although some studies aspire to develop complicated statistical analyses or algorithms to determine the exact amount of influence briefs have on decisions, their influence is blatant in some decisions. In the opinions given by justices, there are instances of direct references to Amicus Curiae briefs in addition to shared language between the justices’ opinions and submitted briefs. Shared language is also reflected in amicus curiae briefs submitted by the United States, written by the United States Solicitor General. The Solicitor General represents the United States in the Supreme Court and determines the legal position the United States takes on certain supreme court case (Waxman 1998).

The opinions given by Supreme Court Justices are the concluding statements in a case's life. It takes a long time, sometimes several years, for a case to go through the several steps to make it to the Supreme Court of the United States. Yet, it is possible, although rare, for the Supreme Court to hear a case before any lower court, known as "Original Jurisdiction." Once a case is decided in a lower court, it is not finished with its process in the legal system yet. The decision is usually appealed by the "loser" of the case, which sends the case to an appeals court. This process applies to both state and federal level cases. At the state level, if a case is appealed, it moves to the state court of appeals which, depending on the state, is referred to as the State Supreme Court. The United States Supreme Court rarely hears cases that come from State Supreme Courts since they concern interpretations of state laws. However, there are instances where the United States Supreme Court will hear cases decided by State Supreme Courts, especially cases that involved interpretation or application of the United States Constitution (Longley 2019). A federal court case is more commonly heard by the United States Supreme Court. At the federal level, there are 94 judicial districts, divided into 12 regional districts, each with an individual court of appeals. After a federal case decision, it moves to the United States Court of Appeals level to determine if lower trial courts applied the law appropriately. Once this process is complete, the case is eligible for another appeal and review by the United States Supreme Court. (Longley 2019).

### **Types of Cases**

Supreme Court Cases researched in this research have implications on state or local government function and jurisdictional authority. We hypothesize that Supreme Court cases that pertain to state or local governments may garner a greater number of briefs since they would

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have increased and more direct effect on American citizens. The briefs would likely come from all over the nation from various special interests or lobbying groups. We believed that cases with greater amicus curiae brief participation would present a clearer picture of their effect on the opinion of the Supreme Court.

We used tools from the Spaeth et al. (2019) “Supreme Court Database” to identify state or local government involved Supreme Court cases. The database used spans from 1946 through 2018 and contains 8,966 Supreme Court cases. Applying filters to the database like federalism and interstate relations, among others, we were able to narrow our scope of cases to under 500. The methodology and tools used to determine the cases included in this paper’s research narrow the available cases to state or local issues. We then conducted a random sample of the quarried cases so that we could analyze 150 of the state and local related Supreme Court cases. The random sample of the filtered list of cases achieved several goals. It reduced the number of cases to a manageable number to include in a statistical analysis so that the data can be examined and analyzed with greater scrutiny. Additionally, a random sample also exhibits a generalized view of what the larger swath of cases looks like. The relevant cases were then included in a statistical analysis to measure significant patterns or correlations in the data. We performed these tests to see if there were any instances where these cases, with similar issues considered by the Supreme Court, had any other statistically significant correlations. Establishing in the statistical analysis a relationship between the ideological predispositions of justices and the votes of justices, we then decided to look for cases with Amici that could help establish how groups affect the Supreme Court and its decisions. Therefore, for the case analysis section, we selected cases that had significant identifiers. Cases with amici from predominately conservative groups, others with amici from predominately liberal, and some that were a split between the two. Through an

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examination of all three of these instances, we wanted to observe any instances where the Justices' references to groups' amici changed amid cross-pressures of ideology.

Furthermore, in the analysis, Justices' ideologies are compared to the ideology of groups that submitted Briefs of Amicus Curiae to the Supreme Court for that case, whether for the respondent or the petitioner. In the conclusion of each case study, we determine the impact of the group's amicus on the opinions of the court. We would like to research the impact the ideology of the group has on a Justice's ideology. Additionally, we would like to compare the opinions of justices to the amicus curiae briefs and analyze them for similarities. We will determine this not only by studying the court's opinion, but also the concurring or agreeing opinions written by other justices. We will also consider the dissenting or disagreeing opinions of justices to document any references to amici referenced. Finally, we will determine the effect that amici have on the outcome of a Supreme Court case, and their impact on the Justices' opinions.

### **Statistical Analysis**

Our objective is to determine the extent to which groups and the briefs they submit shape the decisions of Supreme Court Justices, not of Justices' own ideological predispositions of course. Our first strategy is to develop a statistical model that explores Justices' decisions on state and local conflicts. Toward this end, we build a dataset derived predominantly from the Spaeth et al. (2019) Supreme Court Database. We use their "Justice centered" database because it contains information on how each Justice voted, as well as other critical features of the case itself. From the universe of state and local cases, we include in our analysis approximately 150 cases before the Court, which involved nearly 1,000 votes by the Justices between 1946 and 2014. These 150 cases were selected randomly from over 500 cases in the state and local

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universe of cases. To be sure, the dataset contains 1,337 “decisions” by Justices. However, the Spaeth Supreme Court Database only provides the ideological direction in 971 of those decisions (395 conservative and 576 liberal). The researchers who built these data were unable to specify the remaining direction of 366 decisions.

With these data, we explore the ideological direction of Justices’ votes/decisions as to the outcome. Specifically, we use a dummy variable coded 1 for a conservative vote and 0 for a liberal vote. Because this variable is binary, we use logistic regression to explore explanations for Justices’ votes. One complication presented by these data is the fact that each observation is not independent of the others: the dataset contains nearly 1,000 votes, but only 36 Justices made those votes. In statistical parlance, votes in the dataset are clustered or nested in Justices. Left unaddressed, this complication could lead to invalid conclusions. Our strategy to handle this nuisance is to use cluster robust standard errors. Specifically, we use bootstrapped standard errors (Harden 2011) adjusted to each Justice. Our models use 200 bootstrap replications each.

To pursue our objective, our models require two essential independent variables. First, we need a measure that taps Supreme Court Justices’ ideological predispositions. For this purpose, we use Martin and Quinn's (2002) estimates of Justices’ ideology. Martin and Quinn measure Justices’ ideology through the use of item response models fit Justices' decisions on the universe of Supreme Court cases. Martin and Quinn's scores meet our needs in a few ways. First, scholars of the Supreme Court frequently use these measures in their projects. In fact, according to Google Scholar, nearly 1,300 peer-reviewed publications have cited Martin and Quinn’s article. This reveals these scores provide an acceptable measurement for people who research similar ideas. Second, these scores document for each Justice a single value that captures their



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ideological predispositions relative to each other. Finally, our analysis below demonstrates that these scores exert a strong effect on Justices' decisions, which provides some construct validity.

Next, we need a measure that contains information about the ideological predispositions of the groups who submit briefs. Toward this end, we include in our models' variables that capture the number of conservative groups who participated in briefs, and the number of liberal groups who participated in briefs on each case. To conclude the ideologies of these groups, each group was investigated. Through research of their websites, recent news articles, even other cases that a group has submitted a brief for, their ideology was gauged and determined. In order to discover which groups wrote briefs for a case, we used the "Amicus Curiae Networks" website, produced by the National Science Foundation. Through this resource, we were able to see how many amicus curiae briefs were submitted for a case, how many and which groups signed for each brief, and whether a brief was submitted for the Respondent or the Petitioner. Additionally, we used the University of California Merced's database of over 600 groups of ideological points as a reference for our determination of the group's ideology. Through the application of these tools, we were able to assign ideologies to groups and compare them to the ideologies of justices, as computed by Martin and Quinn.

Finally, our models include two additional control variables. First, we control for whether or not the solicitor general submitted an amicus. In prior research (e.g., Box-Steffensmeier, Christenson, and Hitt 2013), scholars have shown that this can shape Justices' votes. We also include a variable that captures the year in which Justices' decisions were made, 1946-2014. This variable is important for two reasons. First, it is possible that time itself has influenced Justices' votes, and that the effect groups have changed over time. Second, just like our data are clustered

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in Justices, our data are also clustered in time. By controlling for time in this way, we reduce any bias this clustering may have on our models.

We present our findings below in Table 1. We include two models in this table, M1 and M2. In the second model, we include interaction effects that help us learn whether or not the effect of groups on Justices' votes changes over time (e.g., year  $X$  # of liberal groups). The first column, M1, provides some evidence that the ideological predispositions of groups who write briefs affect Justices' votes. The coefficient for the number of liberal groups is negative and significant at the 0.05 level. This negative coefficient implies that as the number of liberal groups increases in number, the likelihood of a conservative decision by a Justice reduces, other things being equal. It is difficult to interpret the magnitude of this effect directly, so we have developed a figure to help us do so.

Figure 1 demonstrates according to M1 exactly how much the likelihood of a conservative decision changes as the number of liberal groups increases. Other variables are held to their mean values. The vertical, dashed bars in the graph represent the 90 percent confidence interval. This figure shows, other things being equal, that the likelihood of a conservative vote by a Justice is just above 40% (or .40) in situations where the number of liberal groups is near 0. As the number increases towards the sample maximum of 15, the likelihood reduces to just above 20% (or .20). Of course, the confidence intervals increase in size because the number of cases with such a large supply of liberal groups decreases. Nevertheless, this figure, and M1, provide compelling evidence that the number of liberal groups involved in a case can reduce the likelihood a Justice votes in a conservative direction, controlling for Justices' ideology.

It is worth mentioning that while M1 finds evidence that the number of liberal groups affects Justices' votes, we don't find robust evidence that the number of conservative groups

matters. What do we think explains this? We are not sure, and we encourage future researchers to explore it further. Maybe it has something to do with the issue area. For example, maybe we would find more evidence that the number of conservative groups matters if we looked at cases involving criminal rights or free speech. Ultimately, however, we cannot answer this given the data we have. This does mean that evidence in favor of our expectations is mixed. Yes, groups' ideological predispositions matter, but we can only confidently say so for liberal groups.

Table 1. Modeling Justices' Votes on State and Local Issues

Variable	M1	M2
Justice Ideology	0.0840*	0.0853*
	(0.0364)	(0.0340)
Year of Decision	0.0262**	0.0247**
	(0.0044)	(0.0046)
# Conservative Groups	-0.0058	-9.2157**
	(0.0134)	(3.0361)
# Liberal Groups	-0.0676*	16.6038**
	(0.0316)	(4.8391)
Solicitor General Participated	0.4785	0.4946
	(0.4034)	(0.3920)

Year X # Conservative Groups		0.0046**
		(0.0015)
Year X # Liberal Groups		-0.0084**
		(0.0024)
Constant	-52.0258**	-49.0624**
	(8.6702)	(9.1418)
N	971	971

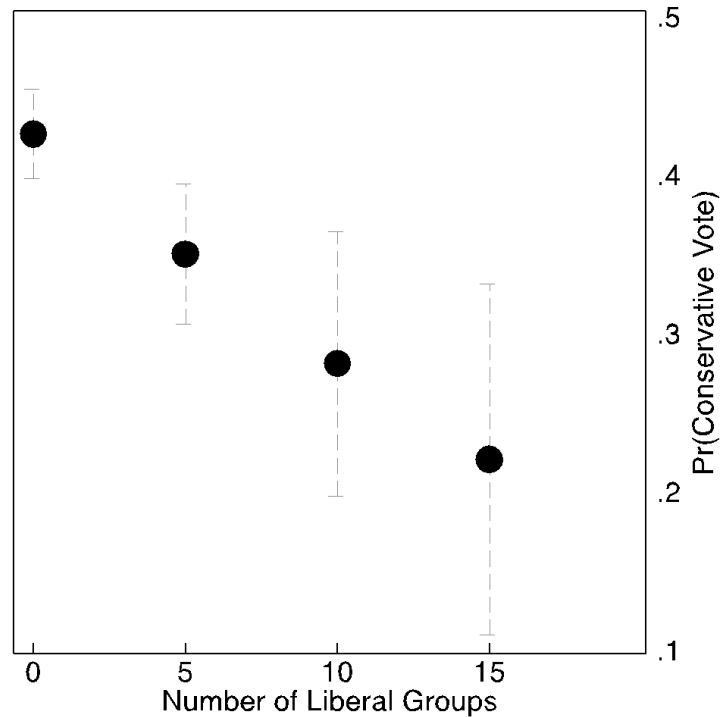
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Notes: Columns represent estimates from logistic regression.

Bootstrapped, cluster robust standard errors presented in parentheses. The dependent variable represents the ideological direction of Justices' votes (1=conservative, 0=liberal). Higher values of Justice ideology = more conservative. Year of decision varies annually from 1946 to 2014.

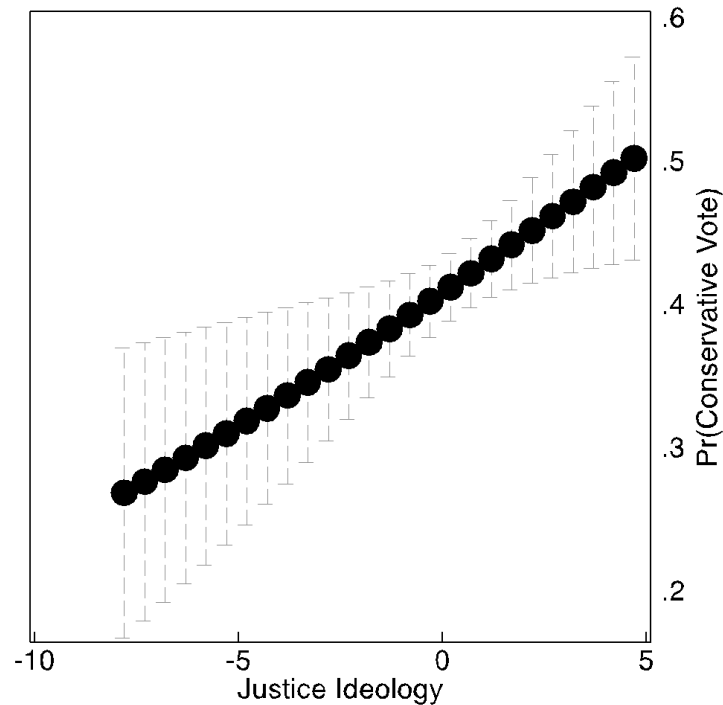
Legend: \* p<0.05, \*\*p<0.01

Figure 1. Justices' Votes and the Number of Liberal Groups



The findings in Table 1 allow us to discuss two other issues. First, how much do Justices' ideological predispositions matter independent of briefs? Second, does the effect of groups on the direction of Justices' votes change over time? To answer the first question, we generate another plot, Figure 2, that reveals the probability a Justice votes in a conservative direction depending on the Justices' ideological predispositions. In this figure, derived again from M1, other variables in the model are held to their mean values, and vertical lines capture the 90 percent confidence interval. This figure reveals that the effect of Justices' ideology on their decisions is quite strong. The most conservative justices are roughly twice as likely to vote in a conservative direction than the most liberal justices.

Figure 2. Justices' Votes and their Ideological Tendencies

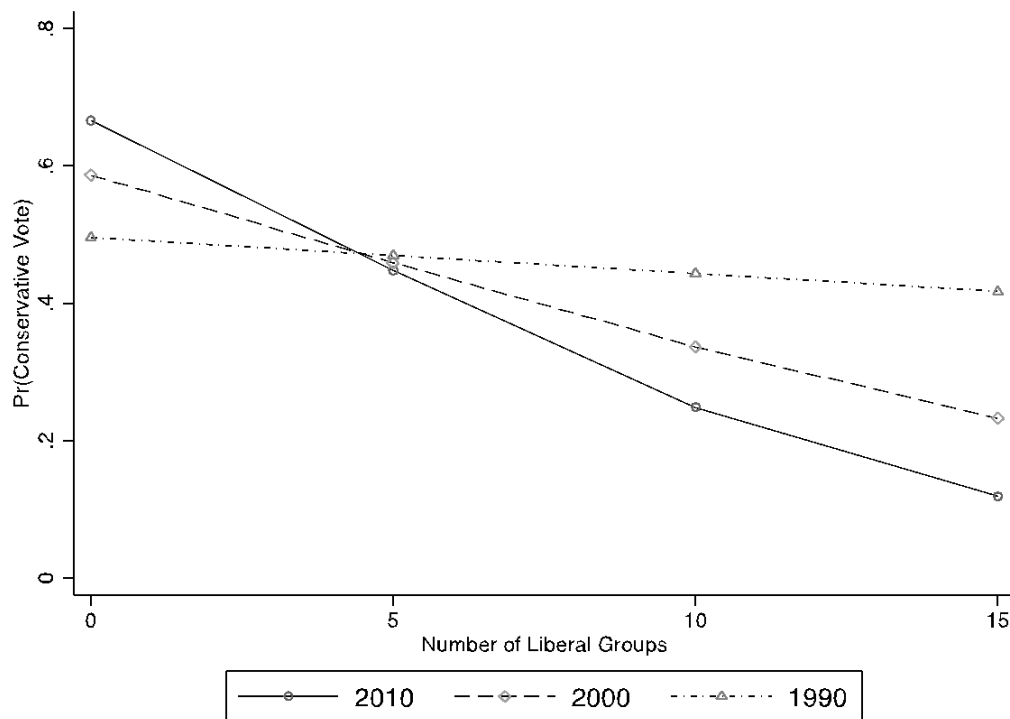


To answer the second question, our interaction effects in M2 reveal that the effect groups have on Justices' votes changes over time. Interaction effects are difficult to interpret, so we choose to discuss these findings with reference to marginal effects – i.e., the effect of one variable on the outcome depending on the values of the other variable. These findings show that the marginal effect of the number of liberal groups on Justices' votes becomes more negative (and stronger) as the year increases. Put simply, evidence in favor of our hypothesis – that groups and their briefs matter – is stronger in more recent years. The same is true for the number of conservative groups. The findings reveal that this effect becomes stronger and more positive as the year increases.

We provide one more figure to elaborate on this finding. Figure 3 below, derived from M2 in Table 1, plots the probability a Justice votes conservatively depending on the number of liberal groups who participated in briefs. This figure, however, includes three separate lines, each based on a different year. Other variables are held to their mean values. This figure reveals that

the number of liberal groups exerts the strongest effect (in a negative direction) in 2010. In fact, in 1990 the relationship is only modestly negative has begun to resemble nearly a flat line. A plot for conservative groups looks almost identical but reversed.

Figure 3. Justices' Votes, the Number of Liberal Groups, and Time



What do we make of this trend over time, that groups seem to matter more in recent years than in the past? Again, unfortunately, we are not sure. We strongly encourage future scholars to review this finding and, in particular, investigate the extent to which it generalizes to other types of cases. Groups may have become more vocal and visible on state and local issues over time, increasing the likelihood that they matter to Justices on these issues. We would be particularly interested to see if this finding differs by issue area because it is possible that the increasing vocalization of groups, if true, is common across all areas of litigation, not just state and local issues. We certainly hope future scholars look further into it because we have been able to find no peer-reviewed publications that engage this idea.

## Case Analyses

### *Rice et al. v. Santa Fe Elevator Corp. et al.*

#### Overview of Case

The Supreme Court Case *Rice et al. v. Santa Fe Elevator Corp et al.*, decided on May 5, 1947, is a peculiar case because it is the oldest case in this analysis. As seen in our research, it was atypical for cases of this era to have amicus curiae briefs written for them since the practice was not yet widespread. *Rice et al. v. Santa Fe Elevator Corp. et al.* found its way to the Supreme Court based on the legal provisions of federalism and federal preemption of state regulation. In 1944, Rice, a warehouseman, claimed that the respondents, the Chicago Board of Trade along with the Santa Fe Elevator Corp., maintained “unjust, unreasonable, and excessive rates and charges...” that were noncompliant with the Illinois Public Utilities Act (Court listener n.d). The petitioners further alleged the rates charged were discriminatory. They believed storage rates were crafted in favor of the Federal Government and its agencies and against other customers. The discrimination or the use of preference when providing adequate grain storage violated the Public Utilities Act and the Grain Warehouse Act of Illinois. The respondents, however, wagered that they were acting per the United States Warehouse Act, a federal law that superseded the authority of the Illinois Commission to regulate (Court listener n.d). Thus, the disagreement over which law or act held supremacy over the other eventually moved this case towards the Supreme Court to decide which law had the highest authority.

#### Types of Amicus Submitted

In *Rice et al. v. Santa Fe Elevator Corp. et al.* there were only two briefs submitted to the Supreme Court. The National Association of Railroad and Utilities Commissioners and the



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Railroad Commission of the State of California authored the two amici written for this case, both for the respondents. Through these group's principles and ideology, it is clear these two groups wanted the court to decide in favor of Santa Fe Elevator Corp. et al. One can surmise that the pro-business nature of these groups and the desire for favorable regulation would make these groups more conservative ideologically.

### The Opinion of the Court

The opinion of the court for this case was delivered by Justice William Douglas and announced by Justice Hugo Black. In a 7 – 2 decision, the court held that when Congress creates legislation in an area or field where the states have typically set rules and regulations, then the “police powers of the United States [are] not superseded by the Federal Act unless that was the clear and manifest purpose of Congress” (Court Listener n.d.). In other words, the police powers of the States are not necessarily preempted, so long as Congress provides a clear and manifest purpose when writing the new legislation. According to the Supreme Court Database, this case's decision direction was liberal. The two dissenting Justices, Frankfurter and Rutledge, were not divided by ideology to rationalize their dissent. According to their ideology score, compiled and computed by Martin and Quinn (2002), Frankfurter leaned more conservative while Rutledge was more liberal. Alternatively, the Justices at the helm of the Court's opinion, Douglas and Black, carried strong liberal scores.

### Evidence of Relationship between Opinion and Amicus

Contained within the opinion of the court are no direct or overt references to the two submitted amicus curiae briefs. Therefore, it is unclear how much weight the Vinson Court allowed the briefs to have on their decisions. In *Rice et al. v. Santa Fe Elevator Corp. et al.* there is no clear evidence that the ideology of groups had any effect on the Justices, of different or

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similar ideologies, or on the outcome of this Supreme Court case. This case serves as a great example of how the opinion writing of Justices has changed. Today, it is quite common for the opinion of the court to include direct references to amici, especially for dissenting Justices who are searching for greater justification of their dissent.

#### Conclusion Regarding the Amici Influence on this Case

In *Rice et al. v. Santa Fe Elevator Corp. et al.* it is difficult to discern the exact impact the amicus curiae briefs had on the case's outcome. There were no references made in the court's opinion to the two-amicus submitted, and the decision direction of the case was opposite to the ideology of the two groups. It is possible that the groups believed that the decision direction of the case would be liberal and against their desires. Which could serve as the possible motive why The National Association of Railroad and Utilities Commissioners and the Railroad Commission of the State of California submitted briefs for this case, to persuade the court to rule in their direction. Nevertheless, for this case, there is not enough evidence to conclude that the ideology of the amicus groups impacted the outcome of this case.

#### ***Humana Inc. et al. v. Mary Forsyth et al.***

##### Overview of Case

Supreme Court case *Humana Inc. et al. v. Forsyth et al.*, decided on January 20, 1999, was a landmark case that resulted in a unanimous decision from the Supreme Court. The issues or legal provisions involved in this case were federalism and infrequently litigated statutes based on the subject matter of the case. In this case, the defendant, Humana Insurance, was responsible for paying 80% of its beneficiaries' (the petitioners) medical expenses after visiting a hospital-owned by Humana Inc. After Humana Insurance paid its designated 80% of the charges, the insured patrons were responsible for covering the remaining 20% of the total costs (Justia n.d.).

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Uncovered during the case, was that the hospital owned by Humana Inc. was giving massive discounts to Humana Insurance, thus reducing the overall cost of their allotted 80%. To the detriment of the petitioner, Humana Insurance paid significantly less than 80%, while the beneficiaries paid considerably more than 20% of the total cost (Justia n.d.). The beneficiaries sued in Federal Court, arguing that Humana Insurance and Humana Inc. violated the federal Racketeer Influenced and Corrupt Organizations Act (RICO), which led this case to the Supreme Court.

#### Types of Amicus Submitted

There was a total of six amicus curiae briefs written for this case, with two in support of the petitioners, Humana Inc. and the rest written for the respondents, Forsyth et al., urging affirmance of the lower court's decision (Amicus Curiae Networks n.d.). In total, twelve groups signed on to amicus briefs for this case. Groups that submitted briefs for the respondents each had a single group authoring them. These groups were the National Fair Housing Alliance, Trial Lawyers for Public Justice, United Policy Holders, and the National Association of Insurance Commissioners (Amicus Curiae Networks n.d.).

Amicus Curiae submitted for the petitioners were co-signed by several groups amounting to more groups writing for the petitioners than for the respondents. The Consumer Credit Insurance Association submitted a separate brief urging reversal of the lower court's decision. Signing on a single brief together, were the following groups: Blue Cross and Blue Shield Association, National Association of Independent Insurers, Health Insurance Association of America, Alliance of American Insurers, Reinsurance Association of America, American Council of Life Insurance, and National Association of Mutual Insurance Companies.

There is a divide between the ideologies of the groups that wrote briefs for the respondents and the petitioners. More liberal groups, like the National Fair Housing Alliance and Public Justice, wrote and submitted briefs for the respondents whereas more conservative groups, like the American Council of Life Insurers and the Health Insurance Association of America, submitted briefs for the Petitioners. The division between the ideologies clearly shows what each side wants the outcome of the case to be. More conservative groups would like the court to rule in favor of the petitioner, Humana Inc. Whereas more liberal groups would like the case affirmed for the respondents Mary Forsyth et al.

#### The Opinion of the Court

On January 20, 1999, the Supreme Court ruled unanimously the essential question presented to the court, in this case, asked if plaintiffs may use the federal anti-racketeering law to sue their health-insurance providers with allegations of fraud. The unanimous decision of the court, as delivered by Justice Ruth Bader Ginsburg affirmed the respondent's position. The court ruled that is plausible and reasonable to use federal-anti-racketeering laws to sue health insurance providers. According to Ginsberg's opinion, the ability to use RICO advances states' interests in preventing insurance fraud. The court also found that the McCarran – Ferguson Act did not block the respondents' recourse to RICO in this case.

#### Evidence of Relationship between Opinion and Amicus

Contained within Justice Ginsberg's opinion are several references to the Amicus Curiae briefs submitted to the supreme court. Justice Ginsberg specifically references the argument made in "Brief for the United States as Amicus Curiae 17..." where the brief called to the court's attention two examples from previous court cases that helped define terms in question in this case (FindLaw n.d.). This brief helped further define the terms "invalidate" and "supersede" for

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the court with specific references of how previous court cases used and interpreted these terms. This friend of the court submission helped shape the opinion of the court through the direct reference given to it in the opinion of the court. Without the further definition of previous courts' use of the terms in question, the case may have returned the opposite position. This, however, was not the only specific reference to a brief made by the Supreme Court. As a result of the second amici reference, "Amicus Curiae 24", Ginsberg concludes that Congress never intended to cede insurance regulation to the States, except for instances where Congress clearly expresses otherwise. Also contained in the last paragraph of Ginsberg's Opinion of the court was a direct reference to the amicus brief submitted by United Policyholders. It is plausible to assume that Ginsberg's assertion that "We further note that insurers, too, have relied on the statute (of RICO) when they were fraud victims" was an idea that was submitted and documented in the United Policyholders' brief (FindLaw n.d.). Perhaps, without this brief's submission to the Supreme Court, Justice Ginsberg may not have included this integral piece into her writing of the court's opinion. This is yet another example of the court utilizing an Amicus brief to support the Court's decision. However, there were some briefs that the court did not agree with and made a point to address this in the decision.

The Court directly opposed the opinion made in the brief submitted by The National Association of Insurance Commissioners, a more conservative-leaning group. Justice Ginsberg stated that "While we reject any sort of field preemption, we also reject the polar opposite of that view", which was the opinion made in the later referenced Amici. This brief raised the question of whether Congress intended to allow "federal regulation whenever the federal law does not collide head-on with state regulation" (FindLaw n.d.), and it is clear that the court took a more centrist position on this issue by not agreeing with either side of the argument.

### Conclusion Regarding the Amici Influence on this Case

In the Supreme Court Case, *Humana Inc. et al. v. Mary Forsyth et al.* the submission of Amicus Curiae briefs to the Supreme Court had a substantial impact on the outcome and decision of the case. There were several ideas and opinions included in the court's decision that was directly related or formulated to ideas on the amici submitted to this case. Furthermore, Justice Ruth Bader Ginsberg comments on areas where the court disagreed with positions or arguments presented in some of the amicus briefs. Through this Supreme Court case, we see evidence that the Justices not only read and consider the amicus briefs, but the information and the ideas of the briefs are also sometimes used to sway the opinion of the court.

Contained within this case are also examples of when the ideology of groups coincides with the ideology of the justices. Justice Ginsberg displayed several instances where she openly agreed with the liberal-leaning groups and directly opposed and referenced conservative groups' briefs.

In this court case, there is evidence that the ideology of the groups submitting amicus curiae briefs to the Supreme Court has some impact on Justices with similar or contrasting ideologies. There is also ample evidence to support the importance of amicus briefs to the Supreme Court, as many of the arguments and examples in the briefs are in the court's opinion.

### ***Watters v. Wachovia Bank***

#### Overview of Case

In the fall of 2006, the Supreme Court of the United States heard the case of *Watters v. Wachovia Bank*. Petitioner Linda A. Watters, Commissioner of the Michigan Office of Insurance and Financial Services sued by Wachovia Bank when Michigan attempted to use its regulatory power over Wachovia Mortgage. Wachovia Mortgage was a subsidiary of Wachovia Bank and

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was independently registered with the state of Michigan, which created a long list of special circumstances and case-specific characters that Wachovia Mortgage had to follow, acting as a subsidiary of a larger cooperation. The state argued that their right and act of regulation of Wachovia Mortgage was justifiable under the guise of the 10<sup>th</sup> amendment of the constitution which reserves to states all powers not delegated to the federal government (Oyez n.d.).

The lower district court ruled in favor of Wachovia Bank, and the Sixth Circuit United States Court of Appeals affirmed this decision. The Court of Appeals held that Congress maintained the power to regulate subsidiaries of national banks under the Commerce Clause and therefore the regulation did not fall under the 10<sup>th</sup> amendment.

#### Types of Amicus Submitted

There was a total of eight separate Amicus Curiae briefs submitted to the Supreme Court for *Watters v. Wachovia Bank*. This case was obscure and chosen for further review since there was an equal split of briefs written for both the Respondents and the Petitioner. Both sides had four briefs submitted for them. Although the number of Amicus briefs was equal, the Petitioner had a far greater number of groups sign in support of their briefs. The Petitioner garnered twenty different groups' support whereas the Respondent only elicited the support of nine.

Writing stand-alone briefs in support of the Respondents, Wachovia Bank, were the Clearing House Association LLC, National City Bank of New York, and the New England Legal Foundation. Co-signing a single amicus for the Respondents were the Financial Services Roundtable, Mortgage Bankers Association, Americas Community Bankers, Consumer Mortgage Coalition, American Bankers Association, and the Consumer Bankers Association. The political nature of these groups leans conservative for their ties to business and their desire for less regulation of business practice. Therefore, they wrote to affirm the lower court's decision

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to prevent the state of Michigan from further regulating a subsidiary. These groups consistently were more conservative, having strong leniencies towards advocating for banks, lesser stringent regulations, and more economic freedom. This was in stark contrast to many of the groups that supported briefs for the Petitioners.

In support of the State of Michigan's position and interpretation of the OCC's federal regulation were several groups considered more liberal for their tendencies to protecting the rights and interests of the people over the interests of business. Co-signing an amicus together were the Center for Responsible Lending, National Association Of Consumer Advocates Inc National Association Of Consumer Agency Administrators, Fair Housing Justice Center American Association Of Retired Persons, The Federation Of State Public Interest Research Groups (Pirgs), Public Justice, National Community Reinvestment Coalition, Consumer Federation Of America, Public Citizen Foundation, Consumers Union Inc, and the National Consumer Law Center. The other amicus brief with several cosigners consisted of the National Association of Counties, Conference of State Bank Supervisors, Council of State Governments, National League of Cities, National Conference of State Legislatures, United States Conference of Mayors, International City/County Management Association, and the National Governors Association. The other two briefs, written by a singular group, they were the Center for State Enforcement of Antitrust and Consumer Protection Laws and the National Association of Realtors (Amicus Curiae Networks n.d.). Groups that submitted amicus curiae briefs for the Petitioners held more liberal values. Overall, these groups were more in support of consumer rights and protections. These groups typically advocated for individuals, the citizens rather than corporations.



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The briefs submitted for this case were intriguing not only because it is unusual for cases to have so many groups co-sign for briefs, but it is also more peculiar that there was an equal number of briefs written for both the respondent and the petitioner. It is unclear if this was intentional, especially since the decision of this case would have far-reaching applications due to relation to the 10<sup>th</sup> amendment.

### The Opinion of the Court

Although argued in November of 2006, the opinion of the court for this contentious case was not delivered until April 2007. The Roberts Court decided 5 – 3 to affirm the judgment of the Sixth Circuit Court of Appeals. This decision concluded that state-sanctioned subsidiaries of national banks are subject to regulation by the federal office of the Comptroller of Currency and not by the states in which subsidiaries are located. Justice Ruth Bader Ginsberg delivered the majority opinion of the court. In her opinion, she wrote that a national bank has the power to engage in real estate through a subsidiary that manages the same legal terms and conditions that the national bank operates under. The decision direction of the court's majority was liberal, which fits with Justice Ginsberg's ideology as calculated by Martin and Quinn (2002).

The Dissenting opinion, written by Justice Stevens, joined by Chief Justice John Roberts, and Justice Scalia, stated that "Congress has enacted no legislation immunizing national bank subsidiaries from compliance with nondiscriminatory state laws regulating the business activities of mortgage brokers and lenders." They further wrote that the Court's majority opinion endorses an "agency's incorrect determination that laws of a sovereign State must yield to federal power"(Justia n.d.). This is the basis of the dissenting opinion's objection to the majority. Stevens and the other justices of dissent believe that the decision of the court would damage and drastically change the federal-state balance of the dual banking system in the United States.

Evidence of Relationship between Opinion and Amicus

In both opinions of the court, there are direct references and citations to the amicus curiae briefs submitted for this case. This is likely because of how impactful the decision of the court would be for this case. Many groups wanted to voice their opinion on the matter, and present justices with opinions of interested parties.

In Justice Ginsberg's opinion of the court, she cites amici for both petitioners and respondents when detailing the majority opinion. Ginsberg references sources on both sides to justify the Court's decision that national banks are not subject to the state's "investigative and enforcement machinery" as this would surely interfere with the Banks's federal authorization. Through these amicus curiae briefs, Justice Ginsberg has concluded that federal jurisdiction and regulation supersedes the state's when it comes to managing and authorizing national bank functions. Although this is the only reference Justice Ginsberg makes to the submitted amici, it is an integral and substantial reference that aided her decision. Justice Ginsberg used the basis of the arguments made in these briefs when formulating majority opinion of the court, while not using groups from one ideology exclusively. Ginsberg used both liberal and conservative groups to support the opinion of the court, not just liberal groups.

Justice Stevens' dissent also referenced amicus briefs to make a fundamental decision in his opinion. Through reference to a brief that quoted federal regulation, Justice Stevens concluded that there is no real need for a national bank to operate with state-registered subsidiaries. Instead, a national bank could utilize all the benefits of a localized subsidiary through dissolving the corporation and creating a department or division of the parent bank. Stevens states that the only advantage a subsidiary has over the alternative method is that a subsidiary "shields" the national bank from the subsidiaries' liabilities.

### Conclusion Regarding the Amici Influence on this Case

The significant consequences of this case elicited several amicus curiae briefs for the Supreme Court to consider. They were immensely helpful to both the majority and dissenting opinions of the court as detailed in Ginsberg's and Stevens' opinions. The ideas presented in the briefs and the citations made within them were highly influential in this case. In particular, the references made in Justice Ginsberg's opinion were used as the basis for the court's decision to affirm the lower court's decision, which only reaffirms the influence the briefs can have on a case's decision. This case's majority opinion presented the first time, in our research, that a justice of either ideology, referenced both liberal and conservative group briefs. This case also presented another example where justices use ideas included in submitted briefs to support their opinions, either majority or dissenting. This case supports the notion that amicus curiae briefs have a quantifiable impact on supreme court cases. However, the evidence that group ideology has an impact on justices' decision to use them in their opinion is inconclusive, based on this case.

### ***Federal Energy Regulatory Commission et al. v. Mississippi et al.***

#### Overview of Case

The issue, in this case, considers the constitutionality of the Public Utility Regulatory Policies Act (PURPA), designed and created to combat the nationwide energy crisis that the country was experiencing at the time. This case came to the Supreme Court after the State of Mississippi and the Mississippi Public Service Commission claimed that portions of that act are unconstitutional. Specifically, the act exceeds constitutional power under the Commerce Clause and violates state sovereignty through violation of the 10<sup>th</sup> amendment. The district court held that the challenged provisions of the act were void and not in violation of the constitution.

### Types of Amicus Submitted

*Federal Energy Regulatory Commission et al. v. Mississippi et al.* is a fantastic example of the power and influence that groups who write amicus curiae briefs wield. For this case, there were a total of 24 separate briefs submitted to the court, amounting to a total of fifty-one groups that either wrote or co-signed briefs (Amicus Curiae Networks n.d.). The sheer number of briefs was unprecedented, even when measured by today's standards, it was rare for cases during this time to have many, if any, amicus briefs written for them. Furthermore, the number of briefs written is a true testament to how important and controversial the decision of this case would be for the court.

For the Respondents, Mississippi et al., there were thirteen amici submitted for their cause, urging affirmance of the district court's decision. Interestingly, the groups that showed the most support for the respondent's position were power and companies from all over the United States. The nationwide support stems from the nationwide ramifications that the court's decision would have. Power companies wanted to show the court their overwhelming support for affirmance and the wide impact that affirmance would have. Groups that submitted briefs for the Respondents had conservative ideologies, as most of these groups were private companies such as the Montana Power Company or the Houston Lighting and Power Company (Amicus Curiae Networks n.d.). These companies sided with Mississippi in their claim that some of the provisions in PURPA were unconstitutional.

For the petitioner, the Federal Energy Regulatory Commission (FERC) there were eleven briefs submitted to argue the reversal of the lower court's decision. The types of groups that urged reversal were very intriguing as they came from dissimilar industries. For instance, the Solar Lobby and the National Consumer Law Center co-signed the same brief along with the

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Consumer Union Inc. It appears that many of the briefs and groups that support the respondent were renewable energy groups like Windfarms Ltd. and the Natural Resources Defense Council (Amicus Curiae Networks n.d.). These groups were more liberal on the ideological scale, primarily for their renewable energy affiliation and desire for greater regulation for energy companies.

### The Opinion of the Court

The court split 5 – 4 in this case, however, it ultimately ruled in favor of FERC and reversed the lower court’s decision. The decision direction of this case was liberal. Justice Blackmun delivered the opinion of the court, while Justice Powell filed an opinion concurring in part and dissenting in part. Justice O’Connor filed a similar opinion, in which Justices Burger and Rehnquist joined. The majority believe that the “District Court’s analysis and appellee’s arguments are without merit so far as they concern the Commerce Clause” (Supreme Court database n.d.). Much of the disagreement and dissent developed from differing opinions on where the constitutionality of PURPA questioned. Justice O’Connor and her joining justices agree with the main decision of the court that the Commerce Clause supports Congress’ enactment of PURPOA, however, they disagree with the court’s analysis of the 10<sup>th</sup> amendment as it applied to this case. The various opinions and dissenting opinions in this case further represent how difficult this case was to deliberate and dispel the issues. Even though the decision was 5 – 4, justices support the decision, however, they each had issues with how the decision was made or an aspect of the court’s decisions. To support their individual opinions, justices made references to amicus briefs submitted for this case.

### Evidence of Relationship between Opinion and Amicus

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Despite the unusually high amount of amicus briefs submitted for this case. There is little evidence within the opinion of the court that the submitted amici had any influence on the justices. The only reference to the submitted amici in the opinion of the court does not even specifically name a brief. Justice Blackmun only referred that the appellants and some amici “argue that the procedural requirements simply establish minimum due process standards” (Supreme Court Opinions Volume 456 p.770). According to Martin and Quinn (2002), Justice Blackmun leaned slightly liberal but is considered very moderate. Perhaps this is the reason there was little reference to groups from either side of the political spectrum. Despite the case’s liberal decision direction, there is barely any reference to liberal groups’ amicus briefs within the court’s opinion.

#### Conclusion regarding the amici influence on this case

This case showed us that even though there can be an inordinate amount of amicus curiae briefs submitted for a case, the supreme court justices may not reference them in their opinions of concurrence or dissent. Although this is atypical with modern cases, where justices make references frequently, this case may be an outlier on its own. This case has several qualities that were atypical of the cases selected for this case study. There were briefs submitted from all over the country, and the most briefs out of any other case we researched. Still, despite a large number of cases, from both liberal and conservative groups, a moderate justice delivered the opinion of the court, with minimal reference to any groups. Therefore, this case presented inconclusive evidence that the ideology of groups, or the act of submitted briefs, has any major impact on the case.

*City of Columbus et al. v. Ours Garage and Wrecker Service Inc. et al.*

#### Overview of Case

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In April 2002, the Supreme Court heard a case from Columbus, Ohio where the city of Columbus sued by Ours Garage and Wrecker Service, Inc. joined by the Towing and Recovery Association of Ohio (TRAO), a trade association of tow-truck operators. Ours Garage sued the city and two city officials to enjoin enforcement of Columbus' tow-truck regulations. The City of Columbus extensively regulates tow-truck operation within the city limits. The city's regulations require that tow-truck operators obtain a license, agree to regular inspections, and maintain insurance and recordkeeping. The lower court ruled with the plaintiff, Ours Garage. Stating that Columbus' tow-truck regulations preempted and enjoined their enforcement. This case came to the Supreme Court since it pertains to Federal Preemption of State legislation or regulation as well as state regulation of business. *City of Columbus et al v. Ours Garage and Wrecker Service Inc. et al.* was chosen for this case study since the briefs submitted for it was majority conservative in nature since the groups signed on the briefs were pro-small business and less regulation. Similarly, the outcome of the case, according to the Supreme Court Database was conservative, under the Rehnquist court.

#### Types of Amicus Submitted

Amicus curiae briefs submitted for this case were nearly equal for the Respondents, Ours Garage, and the petitioner, City of Columbus, with five briefs submitted for the respondent and four submitted for the petitioner. Writing for Ours Garage was the Cargo Airline Association, American Trucking Associations Inc., California Trucking Association, Austin Towing Association, Houston Professional Towers Association, Visiting Respiratory Care LLC, Towing and Recovery Association of America and California Construction Trucking Association. The issues presented by Our Garage against the City of Columbus were shared by other organizations in other states. These professional associations wanted to support Our Garage's suit for less

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stringent regulation in the City of Columbus or regulation that is fair and agreeable. Groups writing for the Respondents were more conservative as they advocated for the rights of the businesses. These groups were workforce-related associations and organizations formed to promote their agencies.

Submitting briefs for the City of Columbus were the Coalition for Local Sovereignty, International City/County Management Association, International Municipal Lawyers Association, California State Association of Counties, National League of Cities, Council of State Governments, National Association of Counties, Ohio Municipal League, and the International Municipal Lawyers Association (Amicus Curiae Networks n.d.). Associations with strong ties to local governments were very supportive of the City of Columbus' intention to regulate the tow-trucks within city limits. This is likely because of the precedent a decision in favor of Columbus would set for municipalities all over the county. These groups were considerably more liberal than the groups that submitted for the Respondents. Groups supporting the Petitioners were staunch supports of individual rights and protection, along with the regulation of business in a city, in this case, a towing service.

#### The Opinion of the Court

Decided on June 20, 2002, in a 7 – 2 decision, Justice Ruth Bader Ginsburg delivered the opinion of the court, reversing the decision of the Sixth Circuit Court of Appeals. The decision direction of *the City of Columbus et al. v. Ours Garage and Wrecking Service Inc. et al.* was conservative. Contained within the opinion of the court, it reaffirmed that local governments can use or exercise powers that the state entrusts in them at the discretion of the state. The federal law that the respondent's based their argument on, 49 U. S. C. § 14501, which preempts prescriptions by "a State [or] political subdivision of a State . . . related to a price, route, or



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service of any motor carrier... with respect to the transportation of property,” did not to apply in this case. The court found that the basis of the respondents' argument did not prevent the State from delegating the authority to establish safety regulations governing motor carriers of property, including tow trucks (Supreme Court Opinions Volume p.472).

Dissenting were Justices Scalia, joined by Just O’Connor. The basis of the dissent is that there is a lack of clarity in the current wording of the decision. Scalia argues that the court is using an incorrect interpretation of the term “political subdivision” as it applies in the federal law used by the respondents. Through several pages of diatribe and rationale for how future misinterpretation from this decision could come, Justice Scalia concludes, “I believe the text and structure of § 14501(c) show plainly that “the safety regulatory authority of a State” does not encompass the authority of a political subdivision. For this reason, I respectfully dissent.”

Even though Justices Scalia and O’Connor dissented from the majority, they did not disagree with the basis of the court’s decision. Rather, specific wordings and definitions that the court used to determine the case. Justice Ginsburg referenced the majority and dissents’ stance that “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate include or exclusion” (Supreme Court Opinions Volume 536 p.433-434).

#### Evidence of Relationship between Opinion and Amicus

Even though several groups submitted amici briefs for this case, there were no direct references made in the opinion of the court, nor in the dissenting opinion. This fact alone does not mean that the submitted briefs did not have an impact on the outcome of the case. The overwhelming amount of state Attorney Generals from all over the country, urging reversal,

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made an impact on the justices' opinion. The reality of many law professionals, all over the country, advocating for one outcome, could have been the reason to not reference any specific amicus.

#### Conclusion Regarding the Amici Influence on this Case

Perhaps the large number of legal professionals, urging in unison, the reversal of the lower court's opinion sways the opinion of the court. Nevertheless, there was no reference to the amici in the opinions of the court, which makes it difficult to link the submission of amici to any change in the outcome of *City of Columbus et al. v. Ours Garage and Wrecker Service, Inc., et al.* This case is significant in our case analysis though, as it is the only Supreme Court case, we analyzed that had a conservative decision direction. Interestingly, Justice Ginsberg wrote the opinion of the court despite leaning liberally according to Martin and Quinn (2002).

***Lorillard Tobacco Company et al. v. Thomas F. Reilly Attorney General of Massachusetts et al.***

#### Overview of Case

Brought before the Supreme Court on March 26, 2001, *Lorillard Tobacco Company, et al. v. Thomas F. Reilly, Attorney General of Massachusetts et al.* was reviewed for the legal provisions of Federal Preemption of State legislation or regulation as well as state regulation of business, similar to *City of Columbus et al. v. Ours Garage and Wrecker Service Inc. et al.*

The Attorney General of Massachusetts instigated extensive regulations on the advertising and sale of cigarettes, smokeless tobacco, and cigars. In response, manufacturers and retailers of the affected tobacco products sued with the claim that the regulations violate federal law and the Constitution. The district court determined that the regulations were permissible and enforceable. In the First Circuit U.S. Court of Appeals, the decision was reversed, in part. The

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First Circuit concluded that the “regulations are not preempted by federal law and do not violate the First Amendment” (Justia n.d.).

### Types of Amicus Submitted

Considering the large impact and reach of this case, there were relatively very few briefs of amicus curiae submitted for this case. In total, four amici were submitted with two for the respondent, Attorney General Reilly, et al. and two for the petitioner, Lorillard Tobacco Company, et al. For Attorney General Reilly, urging affirmance, were the American Cancer Society Inc., American Heart Association, Center for Science in the Public Interest, American Lung Association, Massachusetts Medical Society, American Medical Association, and the Los Angeles County Tobacco Control Alliance on a separate brief. For Lorillard Tobacco Company et al. urging reversal, were the National Association of Convenience Stores and the Washington Legal Foundation (Amicus Curiae Networks n.d.). Many groups that submitted briefs for this case lean more liberal ideologically like the Center for Science in the Public Interest and the Los Angeles County Tobacco Control Alliance. Conversely, the National Association of Convenience Stores would be more conservative-leaning as they are more business-minded, and advocated for the Petitioners to work against further regulation of the tobacco industry

Through the types of organizations that submitted amici for the respondents, the original motivation of the Massachusetts Attorney General is clear. Through revised regulation of how tobacco can be advertised, the Attorney General wishes to limit or impinge the sale of tobacco products within his state. Therefore, organizations like the American Medical, Heart, and Lung associations want to ensure that the Supreme Court affirms the lower court’s decision.

### The Opinion of the Court

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In a 5 – 4 decision, the opinion of the Supreme Court delivered by Justice O’Connor was that the restrictions place by Attorney General Reilly on the sale of Tobacco products in Massachusetts was “unduly broad” (Supreme Court Opinions Volume 533 p. 563). This decision direction was liberal and was narrowly met, with many of the other justice writing dissenting or concurring opinions on the case. Justice Rehnquist joined Justice O’Connor, whereas Justices Kennedy and Thomas wrote concurring opinions. Justices Souter and Stevens wrote concurring in part, and dissent in part opinions; Justices Ginsburg and Breyer joined Justice Steven’s opinion.

#### Evidence of Relationship between Opinion and Amicus

Considering the ramifications of the court’s decision, there are several references to amicus curiae briefs submitted for this case in the opinions of the Justices. Justice Thomas referred to the brief submitted by the National Association of Convenience Stores when he made the statement that “...I doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech.” This idea that Justice Thomas referenced was also referenced in an article entitled *Who’s Afraid of Commercial Speech?* written by Alex Kozinski and Stuart Banner (1990). This same article was referenced in the brief submitted by the National Association of Convenience Stores ( Supreme Court Opinions Volume 533 p.575). Furthermore, Justice Thomas referenced several amici briefs for the respondents as they made the argument that “tobacco is in some sense sui generis – that it is so special... that application of normal First Amendment Principles should be suspended” (Supreme Court Opinions Volume 533 p.586). According to Martin and Quinn (2002), Justice Thomas leaned heavily conservative, which makes his reference to the National Association of Convenience Store’s brief very intriguing.

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Justice Thomas used the basis of a conservative groups' brief, the only conservative group for this case, to support arguments in his dissenting opinion.

In Justice Stevens' opinion, he concurred with Thomas in part yet, concurred in judgment. Stevens also referenced some of the amici submitted for this case. When Justice Stevens concludes that the "state's outdoor and point-of-sale advertising regulations for cigarettes are not pre-empted because they govern the location, and not the content, of advertising." ( Supreme Court Opinions Volume 533 p.548) He references the briefs submitted by the American Legacy Foundation and the City of Los Angeles where they document instances where advertisements for cigarettes and smokeless tobacco target underage smokers. (Supreme Court Opinions Volume 533 p.603) This is another instance where a more liberal justice, as rated by Martin and Quinn (2002), utilized the brief of a liberal group to support their dissenting opinion.

#### Conclusion Regarding the Amici Influence on this Case

In the opinions of *Lorillard Tobacco Company, et al. v. Thomas F. Reilly, Attorney General of Massachusetts et al.*, there were many direct references to the groups that submitted amicus curiae briefs. This case was very interesting because both the dissenting opinions were written by justices that were dissimilar ideologically, and both used the briefs of groups that were closely related to their ideology. Thus, this case provides evidence that the ideological leanings of groups matter to the justices, and the groups' ideas are then highlighted or featured in the justices' opinions.

#### **Conclusion**

Although it is unclear if the justices' held the opinions made within the briefs before a case was brought to the court, or if briefs made such a convincing argument that it changed a

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justice's opinion. The great ramifications of an amicus curiae brief cannot be understated or underestimated. In three of the six cases included in our case analysis, the amicus briefs had a major impact on the outcome of the case. These cases presented direct references to the briefs and represented influences that the group's briefs had on justices. Two of these cases even showed the impact that groups had on the dissenting and concurring opinions of justices.

Overall, our case analysis showed evidence that the ideology of groups is significant as it pertains to the ideology of the justice writing the opinion. In the six cases of our case analysis, there was only one instance where a Justice of a differing ideology referenced a group's brief of an opposing ideology to support their opinion. The remaining references to briefs were instances where the group and the justice shared a similar ideology when referring the brief to support their opinion.

The cases selected for our case analysis are a sample of Supreme Court cases. Therefore, the cases provide some insight into how effective amicus briefs are, yet there is a need for greater, more expansive research to fully understand and measure their impact. Further research could show the impact that amicus curiae briefs have on a variety of cases beyond issues of federalism, state sovereignty, etc. Still, our research concludes, that in most cases, there is evidence that amicus briefs have a significant impact on the outcome of a case and the ideology of the groups is typically the same as the justice that is referencing them.

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