

Function and Role of *Amicus* Briefs in Public Health Litigation

The Basic Function of *Amicus* Briefs

Amicus curiae (*amicus*)¹ or “friend-of-the-court” briefs are filed by someone with a strong interest in the subject matter of a lawsuit, but who is not a party to nor directly involved with the litigation.² *Amicus* briefs serve multiple purposes, including to: address policy issues; provide a more sympathetic advocate; supplement or bolster a party’s brief; provide historical perspective or technical assistance; endorse a party; or seek to mitigate or expand the effects of a potentially important prior court opinion, depending on whether the opinion is damaging or helpful.³ They may be filed by a person or an organization, or by a group of people or organizations.

Amicus briefs “are generally aimed at protecting the interests of individuals or organizations who are absent from the proceedings but whose interests are potentially jeopardized by the litigation.”⁴ Thus, an *amicus*’ interest in the case is both more removed and frequently broader—an *amicus* may have an interest in another case that could be affected by the court’s decision (but not so related that the *amicus* could actually intervene in the case).⁵ Or, the *amicus* may have “unique information or perspective that could help the court” going beyond what the parties can, or wish to, provide.⁶

Amicus briefs are filed most frequently in U.S. Supreme Court cases, and are often filed in federal or state appellate cases.⁷ *Amicus* briefs sometimes are filed at the trial court level – for example, in high-profile cases or cases involving novel legal issues.

The Role of *Amicus* Briefs in Shaping Public Policy

Amicus briefs have become a powerful and effective tool in developing public policy—including public health policy—through the courts.⁸ Particularly in cases involving significant constitutional or statutory policies, they are an important vehicle “for non-party participation in public law litigation affecting the body politic.”⁹ The mere filing of an *amicus* brief can signal to a court that a case is significant and implicates broader issues than just the litigants’ interests.¹⁰ For example, a public health *amicus* brief can speak volumes to the court about the health significance of the policies at stake, especially when multiple organizations participate.

Of particular relevance to the childhood obesity context, *amicus* briefs can present medical and social science evidence to a court that a party could not present because it was not included in the record on appeal. (These types of briefs are commonly referred to as “Brandeis briefs,” after an influential brief filed by Louis Brandeis—who became one of the most distinguished Justices in the Supreme Court’s history—in support of an Oregon law that limited the number of hours women could work in laundries for health reasons).¹¹ For example, the Tobacco Control Legal Consortium’s (TCLC) *amicus* briefs in support of smoke-free policies have cited the 2006 Surgeon General’s Report and economic data on the effects of smoke-free laws on restaurant and

bar revenue—data that, for various reasons, is frequently not part of the factual record created by the parties at the trial court level.¹²

Amicus briefs also can address policy or social issues outside the technical limits of the case or that were not addressed by the parties' briefs, due to page limits or other considerations. In doing so, an *amicus* brief can advise the court of a decision's unintended ramifications—which is typically an issue of significant concern to courts¹³—by providing the experience of the *amicus* relative to the issue being decided. For example, in the Supreme Court case *Grutter v. Bollinger*,¹⁴ the University of Michigan Law School's race-conscious affirmative action policy was challenged by a white female applicant who was wait-listed. A group of retired military officers became a nontraditional and highly influential set of allies for the law school when they submitted an *amicus* brief in support of the law school, informing the Court that the three main military service academies all had race-conscious affirmative action recruitment and admission policies, and that without such policies, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse" which is "essential" to the military's ability to provide national security.¹⁵ This brief was discussed at length during oral argument, and was prominently referenced in Justice O'Connor's decision upholding the law school's policy.¹⁶ In a 2007 telephone interview, Justice Ginsberg commented that this brief was one of the most valuable briefs submitted in the case.¹⁷

As the *Grutter* case illustrates, an *amicus* brief can profoundly affect a court's decision. In recent years, state and federal courts at all levels have increasingly referred to or quoted from *amicus* briefs in their opinions, indicating that these briefs captured the court's attention.¹⁸ For example, although we were unable to sway the outcome, TCLC's *amicus* brief was quoted in the Supreme Court's recent decision on the limits of states' power to regulate Internet tobacco sales.¹⁹ In the federal government's landmark racketeering case against the tobacco industry, the presiding judge specifically noted that, collectively, the many *amici* (including eighteen national health organizations that had joined in the TCLC *amicus* brief) represented "enormous . . . knowledge and experience in the fields of public health, smoking and disease."²⁰ Because this kind of direct evidence is relatively rare, the impact of an *amicus* brief can be difficult to gauge. But even when *amicus* briefs are not expressly acknowledged, they are often influential. For example, courts' rulings often rest on grounds or information stressed by an *amicus* rather than a party.²¹

As the *Grutter* case further illustrates, while the message of a brief is central, there are times when the identity of the messenger can be almost as important. Thus, in selecting *amici* to invite to join its briefs, TCLC works with local officials to identify organizations whose voices are likely to carry particular weight with the court. For example, when TCLC submitted an *amicus* brief to Montana's Supreme Court supporting local authority to pass smoking-related policies, advocates felt strongly that the American Medical Association would be the most influential voice possible. Thus, TCLC recruited the AMA, along with Montana health organizations, to join the brief. While it is impossible to prove the impact of the AMA's participation, advocates believed it played a crucial role in the court's successful ruling in the case. Similarly, when TCLC filed a brief before Kentucky's Supreme Court in support of the first smoke-free policy in that tobacco-growing state, the City of Lexington asked TCLC's local counsel, who was also the president of the state bar association, to sit conspicuously beside the City's counsel during oral argument to call the court's attention to the support of the *amici*.

Finally, involvement of health organizations in amicus briefs not only benefits the legal case, but also benefits the public health community by providing opportunities to participate in important cases. This, in turn, builds community support and “buy-in” for the policy at issue. A list of health organizations and others that have chosen to join in *amicus* briefs prepared by TCLC is attached at the end of this memo.

What Cases Are Appropriate for *Amicus* Briefs?

Amicus brief filings have increased significantly within the past few decades, for several reasons—recognition that the consequences of a court opinion can reach far beyond a specific case; that *amicus* briefs can be a cost-effective way to make a legal pitch to a court; and even merely that *amicus* briefs can increase a public interest group’s visibility.²² That being said, cases dealing with issues of major importance to the public are probably most appropriate for *amicus* briefs; in these cases, *amicus* briefs can emphasize and expand on the public policy implications of the issue to be decided.²³ Additionally, *amicus* briefs are valuable in cases involving an emerging area of law or an issue in which controlling case law is controversial, not in harmony, or nonexistent (cases of “first impression”)—in such cases, an *amicus* brief may be a highly effective way to provide the court with the economic, social science, or political data necessary for an informed decision.²⁴ Finally, clerks for U.S. Supreme Court Justices have indicated that *amicus* briefs are “most helpful in cases involving highly technical and specialized areas of law, as well as complex statutory and regulatory cases.”²⁵

TCLC submits *amicus* briefs in key cases involving the tobacco industry and in cases involving the defense of significant tobacco control policies enacted by state and local governments. TCLC is committed to submitting *amicus* briefs that help defend governmental policies for several reasons. In some cases, a local attorney may have limited resources (including page limits) or not as much expertise or depth of perspective relating to the issues implicated by a tobacco-control policy. In addition, TCLC submits briefs to: address broader public health policy issues, such as those underlying smoke-free policies; provide additional information to the court on legal issues that have national implications (such as federal preemption, scope of local authority, etc.); and, similarly, to raise the awareness of a local court that a “mere” local ordinance is of broader importance or national interest. Obtaining *amicus* support is often a daunting and difficult process²⁶—TCLC provides a valuable service to local government attorneys by handling this process for them. TCLC also provides an important resource for local governments and tobacco control advocates because it can contract with attorneys to write *amicus* briefs at rates far below market rate, and can invite appropriate groups to join its briefs at no cost to the group. As is well known, public health interest groups typically have limited financial resources; thus, even when an issue is important to them, it can be difficult for them to find the funding to retain attorney to write and file an *amicus* brief for them.²⁷

Conclusion

In sum, an organization should be selective in deciding when to file an *amicus* brief, and should only do so when the case involves an issue of broad legal or public policy importance, and/or it has expertise, information, or a perspective to contribute to the case beyond what the parties can or are willing to contribute. In these cases, participating as an *amicus* can be a highly effective

way for public interest organizations, public health organizations, and others with limited resources, both to build community support for these policies, and to help local governments maintain the viability of important public health policies.

¹ Pronounced “uh-MEE-kus” or “AM-ih-kus.” See BLACK’S LAW DICTIONARY 32 (Pocket ed. 1996).

² Judge Neal Nettesheim & Clare Ryan, *Friends of the Court Briefs: What the Curiae Wants in an Amicus*, 80 WIS. LAW. , May 2007, at 11.

³ REGAN WM. SIMPSON & MARY R. VASALY, *THE AMICUS BRIEF: HOW TO BE A GOOD FRIEND OF THE COURT* 24 (2nd Ed. 2004).

⁴ Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 674 (2008).

⁵ *Ryan v. Commodities Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997). For example, in the recent restaurant industry legal challenges to menu labeling ordinances, the New York City Board of Health submitted an *amicus* brief in support of the City of San Francisco’s ordinance because New York City has a similar ordinance that is also being challenged.

⁶ *See id.*

⁷ SIMPSON & VASALY, *supra* note 3, at 8-10.

⁸ Simard, *supra* note 4, at 673-‘74.

⁹ *Id.*

¹⁰ Nettesheim & Ryan, *supra* note 2, at 11.

¹¹ The original “Brandeis brief” was filed in *Muller v. Oregon*, 208 U.S. 412 (1908), and presented a lengthy report of empirical data showing how long working hours negatively impacted women’s health. The brief, which was reportedly largely prepared by two female labor activists, (*see* Simard, *supra* note 4, at 670-’71), emphasized social science research rather than legal arguments, and became a model for the use of briefs, particularly for *amicus* briefs, in effecting social change through law. Nettesheim & Ryan, *supra* note 2, at 12. *See also* SIMPSON & VASALY, *supra* note 3, at 44.

¹² Of course, inclusion of non-record evidence must be done prudently, and only non-record evidence that is not disputed or indisputable (*i.e.*, of the type that could be subject to judicial notice by the court on its own) should be relied on.

¹³ SIMPSON & VASALY, *supra* note 3, at 41. *See also*, Kelly Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 67-68 (2004).

¹⁴ 539 U.S. 306 (2003).

¹⁵ Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as *Amici Curiae* in Support of Respondents, filed Feb. 21, 2003 in the case of *Grutter v. Bollinger*, 539 U.S. 306 (2003), at 5 (available on Westlaw at 2003 WL 1787554 and on file with the author).

¹⁶ JEFFREY TOOBIN, *THE NINE, INSIDE THE SECRET WORLD OF THE SUPREME COURT* 219-’20, and 224 (Doubleday 2007).

¹⁷ Simard, *supra* note 4, at 696. Indeed, one legal analyst asserts that it “may have been the most influential *amicus* brief in the history of the court.” TOOBIN, *supra* note 16, at 224.

¹⁸ *See* SIMPSON & VASALY, *supra* note 3, at 10-13.

¹⁹ *Rowe v. New Hampshire Motor Transport*, 128 S.Ct. 989, 999 (2008) (Ginsburg, J., concurring).

²⁰ *U.S. v. Philip Morris, USA, et al.*, 449 F. Supp. 2d. 1, 34 (D.D.C. 2006).

²¹ *See* SIMPSON & VASALY, *supra* note 3, at 13-14.

²² *Id.* at 17.

²³ Sharon Arkin, *Making Friends with the Court: Using Amicus Letters and Briefs to Help Your Case*, 49 ORANGE COUNTY LAW., March 2007, at 38, 39.

²⁴ Nettesheim & Ryan, *supra* note 2, at 11. *See also*, SIMPSON & VASALY, *supra* note 3, at 21.

²⁵ Lynch, *supra* note 13, at 41.

²⁶ Arkin, *supra* note 23, at 39-41 (noting that obtaining *amicus* support is often the “hardest part” of the process of getting an *amicus* brief filed and describing some of the work involved in obtaining *amicus* support).

²⁷ *See id.* at 41.