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AMICUS CURIAE BRIEFS: A MESSAGE FROM THE 7TH CIRCUIT

DOUGLAS E. ABRAMS¹

ON APRIL 23, 2020, THE UNITED STATES SUPREME COURT DECIDED *COUNTY OF MAUI, HAWAII V. HAWAII WILDLIFE FUND*.² THE FUND AND OTHER ENVIRONMENTAL GROUPS ALLEGED THE COUNTY WAS VIOLATING THE FEDERAL CLEAN WATER ACT BY DISCHARGING EFFLUENT AT FOUR INJECTION WELLS WITHOUT SECURING THE REQUIRED PERMIT. THE COURT HELD, 6-3, THAT THE ACT REQUIRES A PERMIT WHENEVER POLLUTANTS ARE DIRECTLY DISCHARGED INTO NAVIGABLE WATERS, OR WHENEVER (AS ALLEGED HERE) THE FUNCTIONAL EQUIVALENT OF A DIRECT DISCHARGE OCCURS.

A total of 29 amicus curiae (Latin for “friend of the court”) briefs were filed in the case.³ Eighteen (including one by the U.S. solicitor general) were filed in support of the county; 11 were filed in support of the Fund and the other environmental groups. Writing for the *County of Maui* majority, Justice Stephen G. Breyer cited two of the 11 once each, plus the solicitor general’s brief five times. Dissenting Justice Samuel A. Alito cited three of the 18 once each.

Amicus curiae briefs frequently appear in high-profile cases, especially in the Supreme Court, but often also in the federal courts of appeals and in state supreme courts and state intermediate appellate courts. Would-be amici also

sometimes seek to file briefs in high-profile cases in federal and state trial courts.

An amicus brief is a brief filed by a non-party, usually in support of one party or another, but sometimes by court appointment as an ostensible neutral. Amici are typically advocacy groups, trade associations, businesses, bar associations, professors, legislators, or entities that might be affected by the court’s precedent. The brief is typically written by the amicus’ legal staff or in-house counsel, by a lawyer or law firm retained by the amicus or serving pro bono, or by some combination of these persons. Court rules generally provide that a would-be amicus may file a brief by written consent of all parties or by leave of court on motion. Specified government entities may file without consent or leave.⁴



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The Right to a Reader

Whether an amicus brief is filed by a private source or by a government entity, the brief’s potential persuasiveness and influence depend heavily on a foundation that underlies written advocacy generally: The advocate must “earn

the right to a reader.”⁵ As I have said before, “Just because a writer puts something down on paper does not necessarily mean that people will read it, wholly or even in large part.”⁶

Earning this right may be particularly critical for an amicus because judges, the prime intended audience, manage heavy dockets and hold discretion whether to read the amicus brief at all. *County of Maui* is one of several recent decisions demonstrating that the Supreme Court pays attention to well-crafted amicus briefs in majorities, concurrences, and dissents.⁷ So do lower federal courts and state courts. Indeed, a commentator recites “one study that between 1986 and 1995, the U.S. Supreme Court referred to at least one amicus brief in 37 percent of its opinions; another study revealed that state supreme courts acknowledged or cited amicus briefs in 31 percent of cases and discussed arguments made in amicus briefs in 82 percent of the cases sampled.”⁸

When a case generates a dozen or more amicus briefs, however, some may go unread where early paragraphs demonstrate little likelihood of contributing to the court’s decision making. The writer stands the best chance to “earn the right to a reader” – and thus the best chance to influence and persuade the court – with a brief whose factual and legal presentation meets the judicial reader’s circumstances and expectations.

The Supreme Court's rules set this standard, grounded in relevance and non-repetition: "An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored."⁹

The Supreme Court of Missouri Rules similarly emphasize relevance and non-repetition: "The motion for leave to file [an amicus curiae brief] shall concisely . . . set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case."¹⁰

Relevance and Non-Repetition

In an October 2, 2020 in-chambers order, Judge Michael Y. Scudder Jr. of the U.S. Court of Appeals for the 7th Circuit discussed amicus curiae briefs and accented relevance and non-repetition. The case is *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*.¹¹ The Network was appealing dismissal of its action against Dynegy, the owner of a power station, for allegedly releasing contaminants into groundwater in violation of the Clean Water Act.

Judge Scudder granted permission to three organizations to file amicus briefs in support of Dynegy over the Network's objections that "each brief does nothing more than parrot Dynegy's arguments and waste the court's time."¹² The judge's helpful discussion underscored that "an *amicus curiae* brief should be additive – it should strive to add something different, new, and important."¹³ He observed, however, that "too many *amicus* briefs do not even pretend to offer value

and instead merely repeat (literally or through conspicuous paraphrasing) a party's position."¹⁴ "Nobody benefits from a copycat *amicus* brief. . . . Nor should *amicus* briefs serve only as a show of hands on what interest groups are rooting for what outcome."¹⁵

Judge Scudder explained that "a true friend of the court will seek to add value to our evaluation of the issues presented on appeal. To be sure, the fiction that an amicus acts as a neutral information broker, and not an advocate, is long gone. . . . But even a friend of the court interested in a particular outcome can contribute in clear and distinct ways."¹⁶ Judge Scudder provided eight illustrative ways, including these: (1) by "[o]ffering a different analytical approach to the legal issues before the court;" (2) by "[h]ighlighting factual, historical, or legal nuance glossed over by the parties;" (3) by "[e]xplaining the broader regulatory or commercial context in which a question comes to the court;" or (4) by "providing practical perspectives on the consequences of potential outcomes."¹⁷

Judge Scudder found that the three challenged amicus briefs met the requisite standards of relevance and non-repetition, and he granted motions to accept each one.¹⁸

Concise Writing

Judge Scudder also emphasized that "a good *amicus* brief does not have to be long. Indeed, shorter is often better," even though "it is more difficult to write a short, effective brief than a long, belabored brief."¹⁹

This guideline echoes perceptions of advocates and other judges about brief writing generally. For example, John W.

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Davis, perhaps the 20th century's greatest Supreme Court advocate, said that the most effective briefs are "models of brevity."²⁰ Mindful of the court's circumstances and expectations, he counseled the "courage of exclusion"²¹ because the court "may read as much or as little as it chooses."²²

"I have yet to put down a brief," reports Chief Justice John G. Roberts Jr., "and say, 'I wish that had been longer.' . . . Almost every brief I've read could be shorter."²³ Justice Benjamin N. Cardozo warned earlier that "[a]nalysis is useless if it destroys what it is intended to explain."²⁴ Years later, Justice Robert H. Jackson warned advocates that "legal contentions, like the currency, depreciate through over-issue."²⁵ Justice Elena Kagan attests that "[o]ften it takes longer to write shorter opinions."²⁶

Like other brief writers, the amicus brief's writer must heed the court's rules of practice and procedure, including rules that prescribe a brief's maximum page length. But a brief writer can meet the court's circumstances and expectations without going to the max. A few months before he ascended to the Supreme Court bench in 1943, D.C. Circuit Judge Wiley B. Rutledge advised advocates to strike a balance by being "as brief as one can be consistent with adequate and clear presentation of his case."²⁷

An amicus' prudent approach to concise brief writing is to adapt the advice delivered by opera singer Dorothy Sarnoff for success on the stage: "Make sure you have finished speaking before your audience has finished listening."²⁸ As they provide the court relevant new matter, amici should strive to make sure that they have finished writing before their judicial readers have finished reading. 

Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books, which have appeared in a total of 21 editions. Four U.S. Supreme Court decisions have cited his law review articles. His writings have been downloaded worldwide more than 32,000 times. His latest book is *EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS* (West Academic Publishing 2016).

Thank you to Sarah Walters (Mizzou Law School Class of 2022) for her skilled research on this article.

2 140 U.S. 1462 (2020).

3 *Id.*, *Filings* (available on Westlaw.com).

4 *See, e.g.*, U.S. SUP. CT. R. 37.4 ("No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, town, or similar entity when submitted by its authorized law officer."); FED. R. APP. P. R. 29(A) (2) ("The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court."); MO. SUP. CT. R. 26(3) ("Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented by the attorney general or by a state agency authorized by law to appear on its own behalf."); MO. CT. APP. E.D. LOCAL RULE 375(D) ("Leave for the filing of an *amicus curiae* brief shall not be necessary when the brief is presented by the Attorney General or a State entity authorized by law to appear on its own behalf."); MO. CT. APP. S.D. R. 15(c) ("Leave for the filing of an *amicus curiae* brief shall not be necessary when the brief is presented by the attorney general or by a state entity authorized by law to appear on its own behalf."); MO. CT. APP. W.D. R. 26(3) ("Consent to the filing of a brief as an *amicus curiae* need not be had when the brief is presented by the attorney general or by a state entity authorized by law to appear on its own behalf.");

5 DOUGLAS E. ABRAMS, *EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS* 15 (2016).

6 *Id.*

7 *See also, e.g.*, *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 U.S. 2183 (2020) (majority); *Department of Homeland Sec. v. Thuraissigiam*, 140 U.S. 1959

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(2020) (same); *Our Lady of Guadalupe v. Morrissey-Berry*, 140 U.S. 2049 (2020) (same); *Hernandez v. Mesa*, 140 U.S. 735 (2020) (same); *Espinoza v. Montana Dep't of Rev.*, 140 U.S. 2246 (2020) (concurrency); *Bostock v. Clayton County, Ga.*, 140 U.S. 1731 (2020) (dissent); *McGirt v. Oklahoma*, 140 U.S. 2452 (2020) (same); *Hernandez, supra* (same).

8 Mary-Christine (M.C.) Sungaila, *Amicus Briefs: How to Write Them, When to Ask for Them*, GPSOLO MAGAZINE (2015), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2015/september-october/amicus_briefs_how_write_them_when_ask_them/.

9 U.S. SUP. CT. R. 37.1 (2020).

10 Mo. S. CT. R. 26(2).

11 No. 18-3644 (7th Cir. 2020).

12 *Id.* at 2 (in-chambers order by Scudder, J.) (Oct. 2, 2020).

13 *Id.* at 4 (citation omitted).

14 *Id.* at 2-3 (citations omitted).

15 *Id.* at 3 (citations omitted).

16 *Id.* (citation omitted).

17 *Id.* Judge Scudder also recited these ways: (5) by "[r]elaying views on legal questions by employing the tools of social science"; (6) by "[s]upplying empirical data informing one or another question implicated by an appeal"; (7) by "[c]onveying instruction on highly technical, scientific, or specialized subjects beyond the ken of most generalist federal judges"; and (8) by "[i]dentifying how other jurisdictions – cities, states, or even foreign countries – have approached one or another aspect of a legal question or regulatory challenge." *Id.* at 4.

18 *Id.*

19 *Id.*

20 John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 895 (1940).

21 George Rossman, *Appellate Practice and Advocacy*, 16 F.R.D. 403, 47 (1955) (quoting Davis).

22 John W. Davis, *supra* note 20 at 897.

23 Bryan A. Garner, *Interviews with United States Supreme Court Justices: Chief Justice John G. Roberts, Jr.*, 13 SCRIBES J. LEGAL WRITING 35 (2010).

24 BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 127 (1921).

25 Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 803 (1951).

26 LawProse with Bryan A. Garner, *Hon. Elena Kagan, Associate Justice, Part 4 of 4*, YOUTUBE (Aug. 26, 2015). <https://youtu.be/Nl-SeVDOcaM>.

27 Wiley B. Rutledge, *The Appellate Brief*, 28 A.B.A. J. 251, 254 (1942).

28 WESTERN MAIL (Cardiff, Wales), May 20, 2008, at 17 (quoting Sarnoff).