

The Loudest Voice at the Supreme Court: The Solicitor General's Dominance of Amicus Oral Argument

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The Solicitor General (“SG”) is often called the “Tenth Justice,” a title that captures his unique relationship with the Supreme Court and his independence from the executive branch. No phenomenon better reflects this relationship than the Court’s practice of permitting amici to participate in oral argument. Although amicus oral argument is nominally available to all litigants, the modern Court grants this privilege almost exclusively to the SG. Scholars and Court watchers have long argued that this practice is justified because the SG uses it to pursue the rule of law and an objective sense of “justice.”

This Article challenges that account. The SG’s dominance of amicus oral argument is a relatively recent phenomenon. In the early 1900s, the SG requested amicus oral argument almost exclusively to defend federal statutes or federal agency action. During this time, the Court granted all his amicus oral argument requests. But, over time, SGs increasingly entered political cases with only tenuous connections to the federal government. During the late 1980s, the Court became skeptical of the SG’s political independence; in response, it denied seventeen percent of his amicus oral argument motions, and individual Justices criticized him in internal memoranda. Thirty years later, the Court permits the SG to argue as an amicus in almost any case he wants, even though he

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increasingly weighs in on politically charged cases with de minimis implications for the federal government.

This new equilibrium has profound consequences. By permitting the SG to be heard any time he asks, the Court systematically biases the perspectives that it hears. This bias undermines due process principles and the adversarial system, and it ignores the Court's own history and rules. We offer a proposal for reform.

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INTRODUCTION

In April 2020, the United States Supreme Court did something it had not done in nearly a decade: it denied a motion by the Office of the Solicitor General of the United States (“OSG”) to participate in oral argument as amicus.¹ While many litigants file amicus *briefs* at the Court, amicus *oral argument* is a rare occurrence for every litigant except the OSG. Between the 2010 and 2019 Terms, the Court granted only fifteen of forty-three motions for amicus oral argument by litigants other than the OSG.² During that time, it granted 306 amicus oral argument motions—all but one—by the OSG. April’s denial, which was for an argument set in the 2020 Term, was the first since 2011.

To most Supreme Court litigators and other Court watchers, the Solicitor General’s (“SG”) dominance of amicus oral argument is taken as a matter of course.³ The SG directs all appellate litigation involving the federal government and represents it before the Supreme Court.⁴ The SG’s relationship with the Court is so unique that he⁵ is often called the “Tenth Justice.”⁶ This title captures the SG’s long-standing, self-

1. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 140 S. Ct. 2665 (mem.) (2020).

2. Throughout this Article, we define a “motion” as a request to argue in a “case,” where cases are organized by citation rather than by docket number. In many instances, cases ultimately consolidated into a single opinion were also consolidated for oral argument. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (consolidating cases from Kansas, South Carolina, Virginia, and Delaware). As a result, counting each motion by docket number would artificially inflate the frequency of amicus oral argument. By the same token, if a party requests oral argument in multiple cases in a single motion, we consider that multiple motions (where the number of motions is equal to the number of resulting opinions).

3. *See, e.g.*, Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General’s Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1331 (2010) (suggesting that Supreme Court procedure encourages SG participation as amicus curiae); Patricia A. Millett, *We’re Your Government and We’re Here to Help: Obtaining Amicus Support from the Federal Government in Supreme Court Cases*, 10 J. APP. PRAC. & PROCESS 209, 227 & n.33 (2009) (discussing the role the OSG can play in advocacy).

4. Cordray & Cordray, *supra* note 3, at 1326.

5. With the exception of Elena Kagan, every SG has been male. *See* OFF. OF THE SOLIC. GEN., *About the Office*, DEP’T OF JUST., <https://www.justice.gov/osg/historical-bios> (last visited Feb. 4, 2021) [<https://perma.cc/4F5S-GHFC>]. Therefore, we use the pronoun “he” to refer to the SG.

6. *See generally* LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987).

proclaimed commitment to “justice”—“a voice that speaks on behalf of the rule of law”⁷—rather than to victory in any given case.

This Article challenges this conventional account. Far from being static, the SG’s relationship to the Court has evolved dramatically over the last century. No practice better reflects this dynamic than amicus oral argument, which provides a rare signal of which litigants the otherwise-opaque Court favors. Over the last twenty years, the OSG has argued in 69%–88% of the Court’s cases; over half of those arguments were as an amicus. Our comprehensive historical analysis of every motion for amicus oral argument demonstrates that the SG’s current rate of arguing as an amicus is a relatively modern phenomenon. As recently as the late 1980s, the Court refused 17% of the SG’s requests—reaching a high of 28% in the 1987 Term—and criticized him in private memoranda.

This often-ignored period challenges, as both a descriptive and normative matter, the conventional view that the SG’s outsized presence at amicus oral argument is benign. Descriptively, our analysis shows that the Court could—and once did—respond more critically to the SG’s attempts to use his influence to advance the president’s political objectives rather than the long-term interests of the federal government. Normatively, this period highlights the vast procedural and substantive consequences of permitting the SG to regularly argue as amicus.

Indeed, while discussing the OSG’s participation as an amicus and as a party in roughly 80% of the Court’s cases, then-Judge (and former Principal Deputy Solicitor General) John G. Roberts remarked:

If you asked me as an abstract proposition whether I would be troubled by the idea that the executive branch was going to file something in every case before the Supreme Court explaining its views, as a sort of super law clerk, my answer would be yes, I would find that very troubling. Eighty percent is pretty close to every case . . .⁸

Today, Chief Justice Roberts is one of four current Justices who previously worked at the OSG.⁹

Amicus oral argument distorts the adversarial process by taking argument time from one of the parties and allocating it elsewhere. In addition, amici are encouraged to offer legal arguments not advanced

7. Seth P. Waxman, “Presenting the Case of the United States As It Should Be”: *The Solicitor General in Historical Context*, J. SUP. CT. HIST., no. 2, 1998, at 3, 4.

8. John G. Roberts, Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 79 (2005).

9. *Current Members*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Dec. 21, 2020) [<https://perma.cc/2CHR-FRH6>]. The four Justices are Elena Kagan (SG, 2009–10), John G. Roberts, Jr. (Principal Deputy SG, 1989–93), Samuel A. Alito, Jr. (Assistant to the SG, 1981–85), and Brett M. Kavanaugh (Bristow Fellow, 1992–93).

by the parties, which may undermine or derail a party's arguments. Amici who argue at the Court also have an opportunity to influence the substantive development of the law. The SG's choice to participate more frequently as an amicus than as a party evidences that he recognizes this fact.

Scrutinizing the SG's special place at the Court seems particularly apt at this moment in history. Recently departed SG Noel Francisco is widely perceived as having tested the outer limits of the Tenth Justice reputation—through requests for extraordinary relief,¹⁰ appeals to overturn precedent,¹¹ and switches in position in individual cases.¹² The last time Court watchers were this concerned about the OSG's commitment to the rule of law was during SG Charles Fried's tenure, addressed in Lincoln Caplan's seminal account of the office, *The Tenth Justice*.¹³ One difference between the two periods, however, is that while the Court rebuked Fried's bolder stances, it generally embraced Francisco's.¹⁴

Despite a substantial literature discussing the SG generally, no scholarship has examined the OSG's outsized presence at amicus oral argument. Yet amicus oral argument is one of the rare signals the Court sends about whose opinions it values. Because the Justices must affirmatively allocate a scarce resource—argument time—amicus oral argument is a uniquely important lens through which to analyze the Court's behavior.

Our account of the OSG's participation in amicus oral argument makes three novel contributions to the existing literature on the SG's influence at the Court. First, it offers the first quantitative and qualitative history of the practice of amicus oral argument before the Court. Using 131 volumes of the annual *Journal of the Supreme Court*

10. See, e.g., Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124 (2019).

11. See, e.g., Robert Barnes, *Trump Administration Asks Supreme Court to Overrule Precedent Helping Unions*, WASH. POST (Dec. 6, 2017), https://www.washingtonpost.com/politics/courts_law/trump-administration-asks-supreme-court-to-overrule-precedent-helping-unions/2017/12/06/64794b1a-dabc-11e7-b1a8-62589434a581_story.html [<https://perma.cc/678E-VRTJ>].

12. See, e.g., Adam Liptak, *Trump's Legal U-Turns May Test Supreme Court's Patience*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/us/politics/trump-supreme-court.html> [<https://perma.cc/ZV5T-RDWH>] (describing how the Trump Administration abandoned positions previously held by the Obama Administration).

13. CAPLAN, *supra* note 6.

14. See, e.g., Vladeck, *supra* note 10, at 126 (noting that the Court granted “most” of SG Francisco's requests for emergency and extraordinary relief and that even the Court's denials have come with “no suggestion” that the SG “is abusing his unique position, taking advantage of his special relationship with the Court, or otherwise acting in a manner unbecoming the office he holds”).

of the United States, we constructed a dataset of every motion for amicus oral argument filed from the 1889 through 2019 Terms, including the litigant who filed the motion and the Court's ruling on it. Using these data, we chart more than a century—and likely close to the entirety¹⁵—of this practice.

Our qualitative account of this practice identifies the types of cases in which amici request oral argument from the Court and how they have changed over time. We develop this analysis using original archival research on the Justices' papers and interviews with frequent Supreme Court litigators, including current and former members of the OSG. This research underlies our account of when the Court grants amicus oral argument and why, when doing so, the Court has so often heard from the OSG.

Second, this Article synthesizes and rebuts the most common justifications for the OSG's outsized participation in this practice and the SG's reputation as the Tenth Justice more broadly. We argue, for the first time, that the SG's ability to perform the Tenth Justice role stems from a procedural abnormality: his lack of a readily identifiable client. This allows the OSG to ignore the ethical and professional rules that bind every other lawyer. The type of "independence" the OSG is thought to have is possible only because it does not have a client whose interests it must serve and defend.

Finally, we offer the first normative account of when the Court should grant amicus oral argument to any litigant. We center this account in the Court's dual objectives of upholding due process for individual litigants while also "resolv[ing] public policy issues of national importance."¹⁶ We suggest that the Court should grant argument to only two categories of amici: those who have a concrete interest in the litigation and have put forth new legal reasoning that is useful to the Court's decisionmaking process; and those who, regardless of interest, have raised a completely new legal issue the Court should address to decide the case.

This Article proceeds in four parts. Part I provides a brief overview of the relevant concepts and justifies the use of amicus oral argument as a lens through which to examine the OSG and its

15. See *infra* Section II.B.1 (describing the rarity of amicus oral argument through the 1930s).

16. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1273 n.29 (2001) (quoting Peter G. Fish, *Judiciary Act of 1925*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 476, 477 (Kermit L. Hall, Joel B. Grossman & William M. Wiecek eds., 1992)).

relationship with the Court.¹⁷ Substantively, oral argument is a significant component of Supreme Court practice. It is also the only time an amicus is guaranteed to be heard by the Justices.¹⁸ Oral argument may inform and persuade in ways that a written brief does not, and many social scientists have demonstrated how oral argument may inform the Justices' thinking.¹⁹ Because total argument time is limited, the Court's decision to permit an amicus to argue also helps elucidate which litigants it values.

Part II employs a mixed-methods approach to construct an original quantitative and qualitative history of the practice of amicus oral argument. Using our novel dataset of Supreme Court amicus oral argument motions practice, we show how the past sixty years have seen a dramatic rise in the number of requests for amicus oral argument. Most of this increase is attributable to the OSG. We also draw on Supreme Court history from the late nineteenth century to today to chart the evolution of amicus oral argument before the Court. By documenting the cases in which amici have asked for and received permission to participate at oral argument, we trace how this practice has changed throughout history.

Part III examines three possible justifications for the OSG's outsized access to amicus oral argument and evaluates them in the modern context. Drawing on interviews with top Supreme Court litigators and other original historical research, we identify three key advantages that the OSG is thought to possess over other litigants: a staff of skilled lawyers who are experts in Supreme Court litigation, an ability to collect and communicate information from federal agencies, and the Tenth Justice reputation.

These explanations, however, do not justify the Court's current amicus oral argument practice. The development of the modern Supreme Court bar has dramatically improved the quality of oral argument in many cases and reduced the OSG's historical advantage in this area. Additionally, the OSG does not frequently present otherwise unavailable information about agency operations in its amicus briefs and arguments, and when it has done so, the information has not always been reliable. Finally, the OSG's amicus positions do not necessarily reflect the traditional Tenth Justice values. Absent

17. Although there are many facets of the OSG's influence at the Court, including its exemption from the requirement of obtaining either party permission or leave of court to file an amicus brief, *see* SUP. CT. R. 37.4, this Article considers only amicus oral argument.

18. James L. Cooper, *The Solicitor General and the Evolution of Activism*, 65 IND. L.J. 675, 693 (1990).

19. *Infra* note 41 and accompanying text.

legitimate reasons to give preference to the OSG over other possible amici at oral argument, the Court should apply the same criteria for granting OSG and non-OSG amicus oral argument motions.

Part IV proposes criteria the Court should apply when deciding whether to grant an amicus oral argument motion. We argue that our framework would promote due process, sound substantive outcomes, pragmatism, and legitimacy better than the Court's current practice.

I. UNDERSTANDING THE AMICUS ROLE, ORAL ARGUMENT, AND THE OSG

The amicus curiae role at the Supreme Court, and especially amicus participation at oral argument, has changed markedly over the last century and a half. To contextualize those changes, we provide an overview of the amicus role, oral argument, and the OSG as an institution. We also explain why amicus oral argument is a useful lens for examining the OSG's influence at the Court.

A. *The Amicus Role*

The term “amicus curiae” means “friend of the court.”²⁰ At English common law, amici were viewed as inimical to the adversarial system, and courts resisted advocacy by amici who had an interest in the litigation.²¹ Thus, amicus participation was limited to nonlitigants who helped the court avoid errors by giving impartial advice.²² In the American system, the amicus curiae role quickly departed from a neutral error checker to something resembling a traditional advocate who sought to help one of the parties.²³

The Court implores organizations and individuals to file amicus briefs only if they “bring[] to the attention of the Court relevant matter not already brought to its attention by the parties.”²⁴ When an amicus supports a particular party, the amicus can strengthen the party's position by fleshing out its arguments or offering new ones. When an amicus writes in support of neither party, it often hopes to help the Court by setting out an alternative path.

20. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 (2016).

21. See Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 696 (1963).

22. Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1244 (1992); Krislov, *supra* note 21, at 694–95.

23. Krislov, *supra* note 21, at 697; Lowman, *supra* note 22, at 1244–45.

24. SUP. CT. R. 37.1.

Most amici may file briefs only with the permission of both parties, or with leave from the Court.²⁵ All amicus briefs must explain the author's "interest" in the litigation.²⁶ The Court's attitude towards amici has varied over the years: sometimes it seeks them out, and other times it castigates them for presenting repetitive and political arguments.²⁷

Today, parties (including the OSG) typically grant blanket consent to amicus briefs.²⁸ Nevertheless, the modern amicus brief is so carefully orchestrated by the parties that practitioners have termed it the "amicus machine."²⁹ In *Hamdan v. Rumsfeld*,³⁰ for example, Petitioners' attorney Neal Katyal handpicked thirty-seven amici and labeled each brief with the proposition it supported.³¹

Despite the time and resources that parties put into organizing and coordinating amici, the Justices very likely do not read all the amicus briefs in a given case. Justices often rely on their clerks to read most briefs, while personally examining only a few.³² Empirical evidence shows that although citations to amicus briefs are on the rise, those citations represent only a small fraction of the briefs submitted in a case.³³ To guarantee that the Justices will hear its viewpoint, an amicus must argue before the Court.

B. Amicus Oral Argument

Amicus oral argument is significant both for its substantive value and because the decision to grant it reveals the Justices' preferences for certain amici. Despite its importance, no scholar has examined amicus oral argument in any depth.

Serving on the United States Court of Appeals for the District of Columbia, then-Judge Roberts said that "oral argument is terribly, terribly important" because it allows the judges to hear what their colleagues think of the case through the questions they ask and

25. *Id.* 37.2, 37.4.

26. *Id.* 37.2(b), 37.3(b), 37.5.

27. See *infra* notes 354–356 and accompanying text.

28. Larsen & Devins, *supra* note 20, at 1925.

29. *Id.* at 1906.

30. 548 U.S. 557 (2006).

31. Larsen & Devins, *supra* note 20, at 1924–25.

32. Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 43–46 (2004).

33. Anthony J. Franze & R. Reeves Anderson, *Supreme Court Amicus Curiae Review: 'Friends of the Court' Roared Back in 2017–18 Term*, NAT'L L.J., Oct. 16, 2018.

comments they make.³⁴ Justice Anthony Kennedy, before retiring in 2018, saw oral argument as a means of communicating with his colleagues and believed that it made a difference to case outcomes.³⁵ Justices Ruth Bader Ginsburg,³⁶ Antonin Scalia,³⁷ and William H. Rehnquist³⁸ also believed that oral argument could have significant impact in some cases.

Over the years, a few Justices have maintained that oral argument is insignificant, but they are in the minority. Justice Clarence Thomas famously stated: “I don’t see the need for all those questions. I think Justices, 99 percent of the time, have their minds made up when they go to the bench.”³⁹ Justice Samuel A. Alito, Jr., has said that “[o]ral argument is a relatively small and, truth be told, a relatively unimportant part of what we do.”⁴⁰

Empirical research suggests that oral argument does matter, subject to some disagreement over when and why. Several political scientists have used notes kept by former Justices Harry A. Blackmun and Lewis F. Powell, Jr., to conclude that, controlling for variables like the Justice’s ideology and a case’s complexity, the Justices’ votes in a case depend significantly on the quality of the advocate appearing before the Court.⁴¹ Others have looked to the content of the Justices’

34. Roberts, *supra* note 8, at 69. See generally James C. Phillips & Edward L. Carter, *Source of Information or “Dog and Pony Show”? Judicial Information Seeking During U.S. Supreme Court Oral Argument, 1963-1965 & 2004-2009*, 50 SANTA CLARA L. REV. 79, 88–92 (2010).

35. DAVID M. O’BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 248 (7th ed. 2005).

36. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 570 (1999) (describing oral argument as a “hold-the-line operation” and noting that a bad oral argument can swing a potential winner to a loser but rarely the reverse).

37. Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices’ Decisions?*, 85 WASH. U. L. REV. 457, 458 (2007) (“Things . . . can be put in perspective during oral argument in a way that they can’t in a written brief.” (quoting Justice Antonin Scalia)).

38. WILLIAM H. REHNQUIST, THE SUPREME COURT 243–44 (Knopf Doubleday Publ’g Grp. 2007) (noting that oral argument made a difference to his decision in a “significant minority” of cases, especially when the case presented unfamiliar legal issues).

39. Phillips & Carter, *supra* note 34, at 92 (quoting Terry Rombeck, *Justice Takes Time for Q & A*, LAWRENCE J.-WORLD (Oct. 30, 2002), http://www2.ljworld.com/news/2002/oct/30/justice_takes_time [https://perma.cc/UHX5-74EG]).

40. Terry M. Richman, *Alito: Prep More Important than Oral Arguments*, N.Y. DAILY REC. (May 17, 2011), <https://nydailyrecord.com/2011/05/17/alito-prep-more-important-than-oral-arguments> [https://perma.cc/VXR5-9DFJ].

41. See, e.g., Eve M. Ringsmuth, Amanda C. Bryan & Timothy R. Johnson, *Voting Fluidity and Oral Argument on the U.S. Supreme Court*, 66 POL. RSCH. Q. 429, 434–35 (2013) (“As . . . the opposed attorney becomes more skilled, Blackmun and Powell’s probability of switching positions increases nearly 30 percent from the lowest vale of quality differential to the highest.”); Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs, II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 111–12 (2006) (using quantitative measures to

questions at oral argument to determine what role the practice might play for the Justices themselves. Using conference notes from several of the Justices, political scientist Timothy R. Johnson found that information discussed only at oral arguments constituted nearly half of the issues discussed at conference and over a quarter of the issues in case syllabi.⁴²

In addition to the substantive value of oral argument, the Court's decision to grant amicus oral argument is a meaningful signal from an otherwise-opaque institution. When the Court grants certiorari in a case, each side automatically receives thirty minutes of argument time.⁴³ If there are multiple parties on one side, the parties may seek permission to divide the argument in a motion that "set[s] out specifically and concisely why more than one attorney should be allowed to argue."⁴⁴ But the Court stresses that "[d]ivided argument is not favored."⁴⁵

Oral argument time is a limited resource at the Court, and the Justices must affirmatively allocate such time to amici. Although the Court does not make public how many votes are needed to grant amicus oral argument, our archival research suggests it takes five.⁴⁶ The

demonstrate that "justices are more likely to vote for the litigant whose attorney provided higher quality oral advocacy . . . even after controlling for ideological considerations"; Johnson et al., *supra* note 37, at 524 ("[E]vidence clearly indicates that the Justices' votes in a case depend substantially on the relative quality of the lawyers appearing before the Court."). But see Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 LAW & SOC'Y REV. 259, 260 (2007) (concluding that the quality of oral advocates affects case outcomes primarily "when the justices' informational needs are high and the intensity of their predispositions is low").

42. TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 80, 99 (2011).

43. SUP. CT. R. 16.2, 28.3.

44. *Id.* 28.4.

45. *Id.*

46. The Supreme Court Rules do not expressly state the number of votes required to grant a motion. But based on Justice Blackmun's papers, which contain many conference memoranda in which the motions for amicus oral argument were discussed, we believe five votes are required.

When five Justices voted in favor of a motion for amicus oral argument, the motion was granted, as was the case in the ACLU's motion for amicus oral argument in *Solorio v. United States*. See, e.g., Memorandum for the Conference from Chief Justice at 8–9 (Aug. 29, 1986), in Harry A. Blackmun Papers, Library of Congress [hereinafter Blackmun Papers], Box 458, Folder 11 (showing a vote against Motion 12); Memorandum from Justice White (Sept. 9, 1986), *id.* (voting against); Memorandum from Justice Rehnquist (Sept. 3, 1986), *id.* (voting against); Memorandum from Justice Marshall (Sept. 3, 1986), *id.* (voting against); Memorandum from Justice O'Connor (Sept. 8, 1986), *id.* (voting to grant); Memorandum from Justice Powell (Sept. 4, 1986), *id.* (voting to grant); Memorandum from Justice Stevens (Sept. 3, 1986), *id.* (voting to grant); Memorandum from Harry Blackmun (Sept. 2, 1986), *id.* (voting to grant); Memorandum from Justice Brennan (Sept. 9, 1986), *id.* (voting to grant). Because these votes were expressed through official memoranda, we can be confident in the split of votes. The requirement of five votes was also reflected in Blackmun's handwritten annotations. See Memorandum for the Conference from Chief

Court's decision to permit an amicus to argue is an unusually direct signal that the Court is interested in the amicus's views. Because parties generally grant blanket permission for amici to file briefs,⁴⁷ and because the Court almost always grants leave to file a brief even when the parties do not give permission,⁴⁸ the filing of an amicus brief on its own is not a measure of influence. On the other hand, looking solely at whether an amicus brief is cited is too narrow a measure. Amicus briefs may be influential even without being cited.⁴⁹ The decision to allow an amicus to argue, by contrast, reflects the views of five Justices that the amicus will use that time in a way that is more useful to the Court than would the party the amicus supports.

The mechanics of amicus oral argument are governed by the Supreme Court Rules. Although the practice of amicus oral argument began much earlier, it first appeared in the Rules in 1954:

Counsel for an *amicus curiae* . . . may, with the consent of a party, argue orally on the side of such party In the absence of such consent, argument by counsel for an *amicus curiae* may be made only by special leave of court, on motion particularly setting forth why such argument is thought to provide assistance to the court not otherwise available. Such motions, unless made on behalf of the United States or of a State, Territory, Commonwealth, or Possession, are not favored.⁵⁰

The 1954 Rule distinguished between motions made with and without the consent of the party the amicus supports, noting that motions in the latter category were “not favored” unless they came from a government entity.⁵¹ The 1980 Rules eliminated this preference and set a higher bar for *all* parties: without the consent of the party it supports, an amicus's motion for amicus oral argument “will be granted

Justice at 1 (Feb. 9, 1985), *id.* at Box 409, Folder 9 (including handwritten annotations from Blackmun that five Justices voted in favor of the SG's motion for amicus oral argument in *Gould v. Ruefenacht*); Memorandum for the Conference from Chief Justice at 1 (Sept. 10, 1987), *id.* at Box 485, Folder 12 (same with respect to *Boos v. Berry*). By contrast, when only four Justices voted to grant a motion, the motion was denied. Memorandum for the Conference from Chief Justice at 2–3 (Dec. 10, 1987), *id.* (including handwritten annotations from Blackmun that four Justices voted in favor of the SG's motion for amicus oral argument in *United States v. Providence Journal Co.*). In *Basic Inc. v. Levinson*, the Chief Justice was recused from the case, and the Justices split four to grant and four to deny. The motion was denied. Memorandum from Chief Justice at 2 (May 27, 1987), *id.* at Box 458, Folder 12.

47. Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 809 (2004).

48. Eugene Volokh, *Should U.S. Supreme Court Litigants Decline Consent for Filing of Amicus Briefs?*, VOLOKH CONSPIRACY (Apr. 28, 2018), <https://reason.com/2018/04/28/should-us-supreme-court-litigants-declin> [https://perma.cc/C97P-DK2G].

49. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 844–45 (2000) (describing flaws in using citations as a measure of an amicus influence).

50. SUP. CT. R. 44.7 (1954) (repealed 1980).

51. *Id.*

only in the most extraordinary circumstances.”⁵² This standard persists through the 2019 Rules.⁵³

C. The Court’s Foremost Amicus: The OSG

As we discuss in Part II, the OSG is by far the most frequent participant in amicus oral argument. The OSG has a role in the federal government’s litigation in lower courts,⁵⁴ but it is best known for representing the U.S. government before the Supreme Court.

The only federal officer required to be “learned in the law,”⁵⁵ the SG has traditionally held a dual allegiance. He is an executive officer appointed by the president and confirmed by the Senate who reports to the Attorney General (“AG”) and works within the Department of Justice (“DOJ”).⁵⁶ But he also has a second office, a few blocks away, at the Supreme Court.⁵⁷ His two offices reflect his two roles: the SG is an executive branch officer, but as the federal government’s chief appellate litigator, he has a close relationship with the Court. Together, they are emblematic of his role as the “Tenth Justice,” a distinction we discuss further in Part III.

The OSG has long enjoyed special deference from the Court. At the certiorari stage, the Court sometimes “call[s] for the views” of the SG (“CVSG”) on whether to grant certiorari in a case.⁵⁸ The OSG and other governmental litigants may file an amicus brief without the parties’ consent.⁵⁹ They are also permitted one thousand words more than other amici.⁶⁰ And as discussed in Part II, the Court almost always grants the OSG’s amicus oral argument motions, even though it almost always denies such motions from other parties.

These advantages are significant: the OSG enjoys an unparalleled success rate before the Court. Since the 1950s, the Court has granted around 70% of the OSG’s certiorari petitions, compared with approximately 3% of other petitions.⁶¹ According to political scientists Ryan C. Black and Ryan J. Owens, even the Justices who

52. SUP. CT. R. 38.7 (1980).

53. SUP. CT. R. 28.7.

54. 28 C.F.R. § 0.20(a)-(c) (2020).

55. 28 U.S.C. § 505.

56. *Id.*

57. Waxman, *supra* note 7, at 3 n.4.

58. Stefanie A. Lepore, *The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General*, 35 J. SUP. CT. HIST. 35, 35 (2010).

59. SUP. CT. R. 37.4.

60. *Id.* 33.1(g).

61. Cordray & Cordray, *supra* note 3, at 1333.

disagreed with the SG's policy preferences followed his recommendations 35% of the time.⁶² The Justices follow the SG's lead "when they are ideologically distant from her, when they disagree with her on policy grounds, *and* when her recommendation contravenes the legal factors in the case—in short, when the only persuasive component of the SG's argument is that *it is being made by the SG*."⁶³

The OSG is similarly successful at the merits stage. In the second half of the twentieth century, the OSG won 60%–70% of the cases in which it represented a party.⁶⁴ The side that the OSG supports as an amicus has a historical win rate of 70%–80%.⁶⁵ In a study of cases in which the OSG participated as a party from the 1979 through the 2007 Terms, Black and Owens found that the OSG lawyers were more likely to win than their opponents, even after controlling for the party's resources or the opposing attorney's experience.⁶⁶ Although similar research suggests that the OSG's politicization—defined as the percentage of briefs that match the ideology of the appointing president—decreases its success rate, the predicted probability of success on the merits is still 60% at a hypothetical maximum level of politicization.⁶⁷

Despite a substantial literature discussing the SG generally, few scholars have addressed his role in amicus oral argument. The most extensive treatment comes from prominent Supreme Court litigators, including now-Chief Justice Roberts and now-D.C. Circuit Judge Patricia Millett, offering advice to private litigants on how to gain the OSG's support as amicus.⁶⁸ Scholars have often mentioned the OSG's role in amicus oral argument in passing but have not discussed the practice or its historical development in any detail.⁶⁹ Even critics of the

62. Ryan C. Black & Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the U.S. Supreme Court*, 64 POL. RSCH. Q. 765, 772 (2011). Black and Owens calculate specific votes by relying on Justice Blackmun's papers, which record individual votes to grant or deny certiorari. *Id.* at 769 & n.7.

63. *Id.* at 771.

64. Cordray & Cordray, *supra* note 3, at 1335.

65. *Id.*

66. Ryan C. Black & Ryan J. Owens, *A Built-In Advantage: The Office of the Solicitor General and the U.S. Supreme Court*, 66 POL. RSCH. Q. 454, 461 (2013) ("[H]olding everything else equal, attorneys from the OSG can expect a 0.13 increase in the probability that their side will win the case . . . [that] is attributable exclusively to the OSG's participation in the case.").

67. Patrick C. Wohlfarth, *The Tenth Justice? Consequences of Politicization in the Solicitor General's Office*, 71 J. POL. 224, 233 fig.2 (2009).

68. See Millett, *supra* note 3; John G. Roberts, Jr., *Riding the Coattails of the Solicitor General*, 15 LEGAL TIMES, Mar. 29, 1993, at 8.

69. E.g., Cordray & Cordray, *supra* note 3, at 1331, 1355–56; Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1519 n.140 (2008) (describing the development of OSG participation in a

OSG’s amicus “activism” have not focused on the distinct advantages it has in not only filing briefs but *arguing* as an amicus.⁷⁰ This Article aims to fill that gap.

II. DOCUMENTING AMICUS ORAL ARGUMENT PRACTICE AT THE SUPREME COURT

This Part documents how amicus oral argument has grown dramatically since the early nineteenth century and that the SG has been the main generator of this growth. We begin with quantitative analysis and proceed to a qualitative discussion of four periods of the Court’s history.

A. Quantitative Account

Our analysis primarily relies on an original dataset of all motions for amicus oral argument. We constructed this dataset with records from the 131 annual volumes of the *Journal of the Supreme Court of the United States*, “the official minutes of the Court.”⁷¹ The *Journal* contains daily entries of actions taken by the Court, including case dispositions, bar admissions, oral arguments, and rulings on motions.

We examined all complete volumes of the *Journals*, which span the 1889 through 2019 Terms (as of publication).⁷² Volumes from this period are available in a scanned and digitized format on the Court’s website. We conducted both an automated and manual review of the *Journals*, excluding instances of amici appointed by the Court to defend the judgment below. Ultimately, our dataset included 2,298 motions for amicus oral argument across 1,993 cases.⁷³

footnote); Karen O’Connor, *The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation*, 66 JUDICATURE 256, 260–61 (1983) (mentioning the OSG’s role in amicus oral arguments in only one sentence).

70. See Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court*, 45 ARIZ. ST. L.J. 1183, 1189 (2013) (outlining the article’s focus on briefs filed by the OSG rather than oral arguments made by the OSG).

71. *Journal*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/orders/journal.aspx> (last visited Dec. 19, 2020) [<https://perma.cc/M67W-BBEJ>].

72. After contacting the Supreme Court Public Information Office, the Library of Congress, and the National Archives, we were unable to locate earlier editions of the *Journal*.

73. This count excludes thirty-nine motions for amicus oral argument made in thirty-three cases that either did not result in an opinion (for example, because they were dismissed as improvidently granted) or did not ultimately have oral argument (usually cases decided per curiam).

1. The Rise of Amicus Oral Argument

Both in raw numbers and as a percentage of the Court's docket, the rise in amicus oral argument has been dramatic. As shown in Figures 1 and 2, amicus oral argument was very uncommon from 1889 through the 1950s. The practice grew steeply through the second half of the twentieth century and, by the late 2010s, occurred in 40%–60% of the Court's argued cases in a given Term.

Much of this growth occurred in the 1960s, 1980s, 1990s, and 2000s. In each of these decades, the percentage of cases featuring amicus oral argument rose by 50%–100% over the previous decade. Since then, the number of cases with amicus oral argument has continued to rise. In the last ten Terms, 47% of all cases have featured amicus oral argument.

FIGURE 1: PERCENTAGE OF CASES WITH AMICUS ORAL ARGUMENT

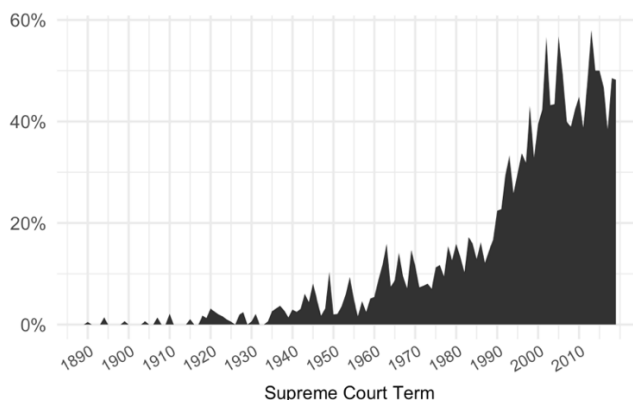
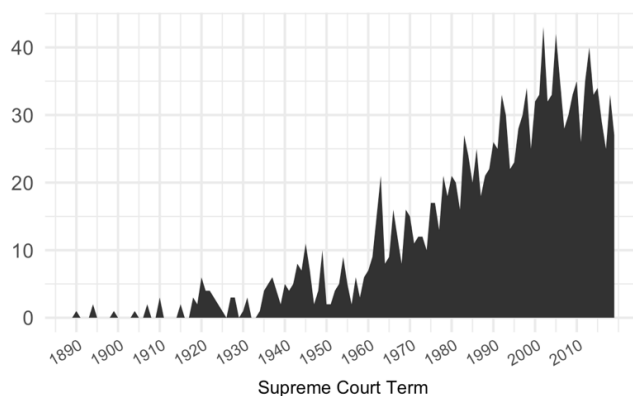


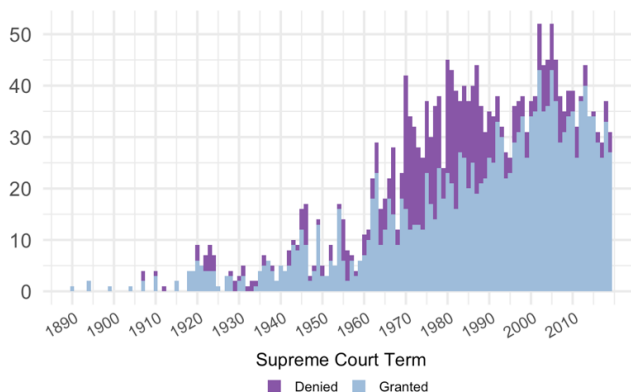
FIGURE 2: NUMBER OF CASES WITH AMICUS ORAL ARGUMENT



Our data show that the Court has exercised substantial discretion over amicus oral argument motions. As Figure 3 illustrates, there have been periods when the Court regularly denied such motions, especially in the 1980s. Under the Rules of the Supreme Court, denials should be more common in cases where the party that the amicus supports has withheld consent for the amicus to participate.⁷⁴ We identified numerous instances, however, in which the Court denied motions for amicus oral argument made with the relevant party's consent and even when the motion was made by the relevant party itself.⁷⁵

The rise in amicus oral argument coincided with the rise in amicus curiae filings more broadly. In 1946, the average number of amicus briefs per case was 0.5, and the median number of amicus briefs per case was 0.⁷⁶ In 2000, the average number of amicus briefs per case was 5.8, and the median was 4.⁷⁷

FIGURE 3: NUMBER OF MOTIONS FOR AMICUS ORAL ARGUMENT BY OUTCOME



Although amicus participation increased through both briefs and oral arguments, the two practices diverged significantly in who

74. See SUP. CT. R. 28.7 (noting that motions for amicus oral arguments without consent of the party the amicus supports “will be granted only in the most extraordinary circumstances”).

75. See, e.g., *Illinois v. Gates*, 459 U.S. 1194, 1195 (1983) (mem.) (Respondent’s motion to permit American Bar Association to argue as amicus curiae); *Kolstad v. Am. Dental Ass’n*, 525 U.S. 1137 (1999) (mem.) (Respondent’s motion to permit Chamber of Commerce to argue as amicus curiae).

76. Paul M. Collins, Jr., *The U.S. Supreme Court Amicus Curiae Database, 1941-2001* (2008), <https://blogs.umass.edu/pmcollins/data> [https://perma.cc/7D86-JLV7].

77. *Id.*

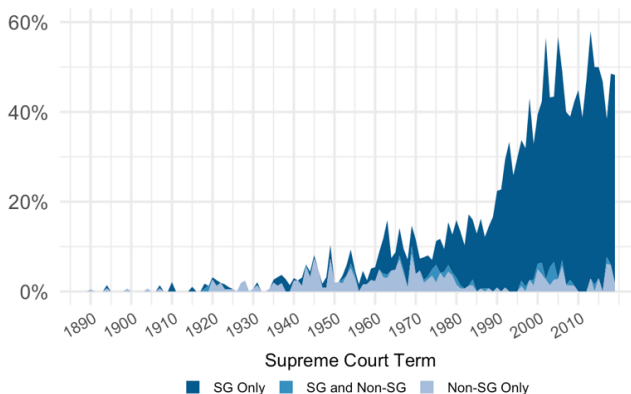
could make use of them. While amicus briefing is submitted by a wide variety of individuals and organizations,⁷⁸ amicus oral argument has been increasingly monopolized by one litigant: the OSG.

2. The OSG's Dominance of Amicus Oral Argument

In the 2019 Term, the Court heard twenty-seven cases with amicus oral argument. In all but one of them, the amicus who argued was the OSG. That Term is no exception. In every Term since 1980, the OSG argued as an amicus in at least 80% of all cases involving amicus oral argument. In ten of those thirty-nine Terms, the OSG was the *only* litigant permitted to argue as amicus.

Amicus oral argument has comprised a core part of the OSG's Supreme Court participation only in the last half century. Our data show that amicus oral argument was almost nonexistent until the 1920s, and until then it was used primarily by the federal government and individual lawyers, likely appearing on behalf of unnamed clients.⁷⁹ From 1920 through the end of the 1950s, there were generally no more than a handful of requests for amicus oral argument each Term. Even this small number of amicus oral argument motions regularly included parties other than the SG. From 1920 through the 1950s, the OSG argued as an amicus in a little over a third of all cases in which any amicus argued. It went entire Terms without arguing as amicus at all.

FIGURE 4: PERCENTAGE OF CASES WITH ARGUMENT BY AMICI,
BY AMICUS TYPE

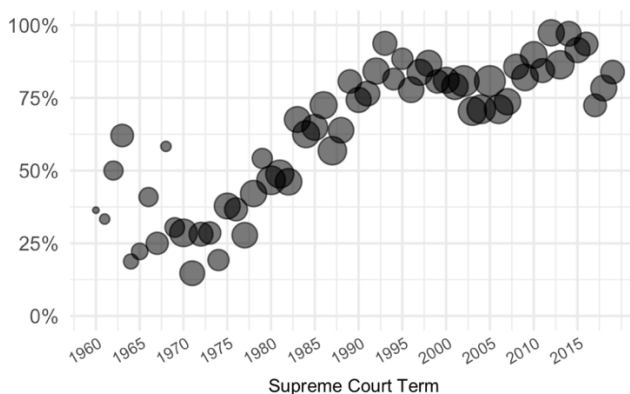


78. *Id.*

79. See Krislov, *supra* note 21, at 703.

The OSG's share of requests for amicus oral argument began rising in the late 1950s—and continued despite a change in the 1980 Supreme Court Rules that required governmental entities to seek the consent of the party it supported when requesting amicus oral argument.⁸⁰ In the early 1970s, the OSG made about a quarter of all motions for amicus oral argument. During the 2010s, the OSG filed almost 90% of all such motions.

FIGURE 5: MOTIONS BY THE SG AS A PERCENTAGE OF ALL MOTIONS FOR AMICUS ORAL ARGUMENT



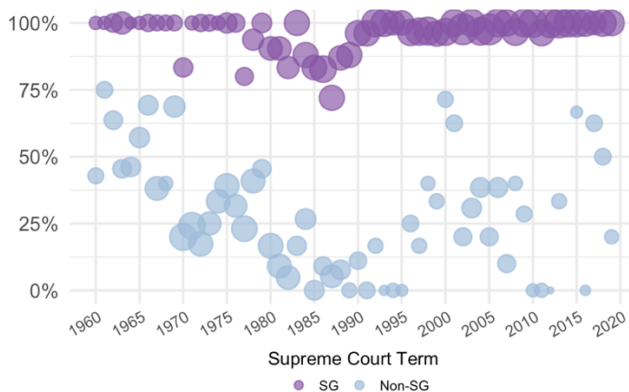
Despite the steady increase in motions by the OSG for amicus oral argument, the rate at which the Court has granted these motions has varied over time. From the 1920s through the mid-1970s, all the OSG's motions for amicus oral argument were granted, save one in 1958 and two in 1970. But beginning in the late 1970s and persisting through the early 1990s, the Court regularly denied the OSG's amicus oral argument motions. The 1980 Rule revision eliminating the preference for government amici at oral argument appeared to signal a temporary change in the Court's view toward the OSG's amicus oral argument participation. In the 1981 through 1988 Terms, under President Reagan's SGs, Rex Lee and Charles Fried, the Court denied 14% of the OSG's motions, an average of almost three-and-a-half per Term. In four of those eight Terms, the Court denied more than 15% of the OSG's motions. As we discuss in Section II.B.3, these denials appear to have

80. See *supra* Section I.B.

reflected the Court's displeasure with the OSG's participation in certain cases.

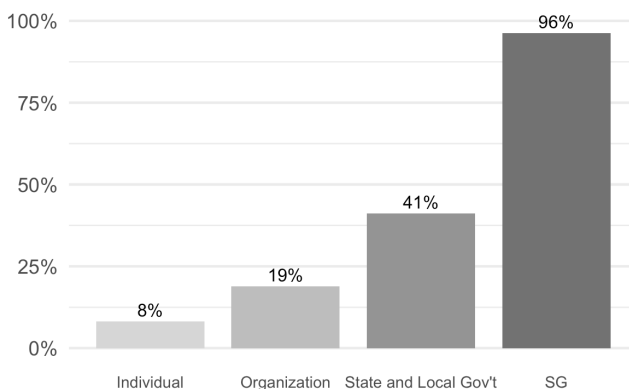
Beginning in 1990, however, the OSG's grant rate recovered to nearly 100%. From 2011 until April 2020, the Court granted all the OSG's amicus oral argument motions.

FIGURE 6: GRANT RATES OF MOTIONS FOR AMICUS ORAL ARGUMENT, BY AMICUS TYPE



The Court has not been nearly as receptive to other parties' amicus oral argument requests. As Figure 7 shows, the Court grants the OSG's motions at significantly higher rates than even other governmental entities—the types of amici that the Rules previously also favored for oral argument participation. Since 1960, the Court has granted about 41% of amicus oral argument motions made by states and local governments (including governors, state agencies, state legislatures, state judiciaries, local governments, and local agencies) and an even smaller percentage of those made by organizations (including associations, nonprofits, and companies) and individuals.

FIGURE 7: GRANT RATES BY FOUR MOST COMMON AMICUS TYPES, SINCE 1960



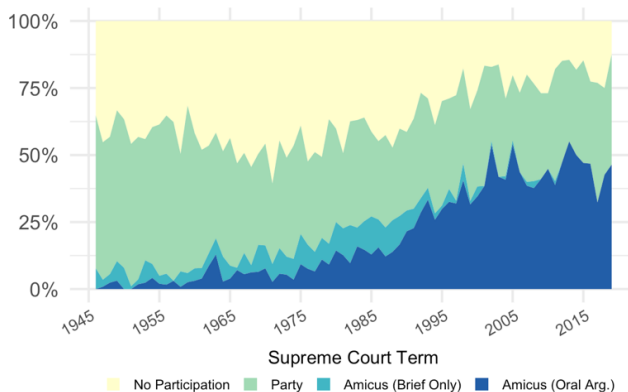
Even when the OSG's grant rate was at its lowest in the 1980s, it participated in amicus oral argument at far higher rates than other litigants. Over the last three decades, rejections were few and far between and then stopped entirely. The denials of the 1980s appear to have had no lasting impact on how the Court perceives its relationship with the OSG. In the late 1990s, when Seth Waxman served as President Clinton's SG, the Court granted more than 95% of his amicus oral argument motions. The first time Waxman experienced one of the rare denials, Lawrence Wallace, then a career OSG attorney, explained to him these denials happened with some regularity, but that he should not read significance into them: "[E]very once in a while," Wallace said, "they show us that they are the Supreme Court and we are not."⁸¹

As Figure 8 shows, amicus oral argument has occupied an increasing proportion of the SG's litigation before the Court over time. A few decades ago, the OSG argued before the Court more frequently as a party than as an amicus. But in recent terms, the reverse has been true. Between its amicus and party cases, the OSG has argued in 69%–88% of cases each Term since 2001, with most terms falling between 75%–80%. At the beginning of the 1986 Term, in a harbinger of things to come, Justice Thurgood Marshall remarked in a memorandum circulated to the Justices that "the SG is about to take over our calendar."⁸²

81. Interview with Seth P. Waxman (Apr. 2019).

82. Memorandum from Thurgood Marshall to Chambers (Sept. 3, 1986), *in* Blackmun Papers, *supra* note 46, at Box 458, Folder 11.

FIGURE 8: SG ROLE OVER TIME



By statute, the SG represents the “interests of the United States” in litigation.⁸³ This interest is often called the “federal interest.”⁸⁴ The DOJ has never issued guidance that articulates precisely what this interest is, though multiple SGs have defined it as something akin to the executive interest.⁸⁵

The only time it addressed the issue, the Court articulated a broad conception of the federal interest. The 1988 case *United States v. Providence Journal Co.* concerned a civil injunction against a newspaper.⁸⁶ The district court appointed a special prosecutor to pursue criminal contempt charges against Respondents. When the special prosecutor sought to appeal to the Supreme Court, SG Fried denied him permission.⁸⁷ Based on this denial, Respondents argued that the writ had to be dismissed. But both the special prosecutor and Fried argued

83. 28 U.S.C. §§ 517-518.

84. See, e.g., Cordray & Cordray, *supra* note 3, at 1332 (“[M]ost cases the Solicitor General enters involve legal issues that directly affect federal interests . . .”).

85. See Interview with Former Senior OSG Attorney (Apr. 2019) (stating that there is rarely a difference between the interests of the executive branch and those of the federal government as a whole); Interview with Donald B. Verrilli, Jr. (Apr. 2019) (noting that the executive branch’s influence would be “diluted” if Congress also argued); Interview with Gregory G. Garre (Apr. 2019) (“In cases involving the constitutionality of statutes, you are filing a brief on behalf of the executive branch, but you have a responsibility by tradition and by statute to Congress to defend legislative acts . . .”); Interview with Charles Fried (Apr. 2019) (“The Court’s holding in *Providence Journal* ignores separation of powers issues. Where Congress trenches on what the SG believes are the constitutional powers of the executive, the SG has not hesitated to press that concern. *Bowsher v. Synar* and *Morrison v. Olson* are two such cases.”). But see Interview with Senior OSG Attorney (May 2019) (“We think of the United States as an entity that is composed of three branches, and normally we can craft positions that are aligned on them.”).

86. 485 U.S. 693 (1988).

87. *Id.* at 698.

the case could go forward. In their view, it was not necessary for the SG to grant permission because the case did not concern an “interest[] of the United States.”⁸⁸ Rather, it concerned the “power of the Judicial Branch.”⁸⁹

The Court found this view “startling.”⁹⁰ “It seems to be elementary,” Justice Blackmun wrote for the 6-2 majority, “that even when exercising distinct and jealously separated powers, the three branches are but ‘co-ordinate parts of one government.’”⁹¹ Writing in dissent, Justice Stevens adopted the SG’s view and noted that when the SG is called to represent two branches, he “faces a conflict of interest that undeniably would be intolerable if encountered in the private sector.”⁹²

Given the Court’s broad interpretation of what constitutes the “interests of the United States,” we sought to understand how the SG conceives of that interest. We chose one Term in each of the tenures of six SGs—three appointed by Democratic and three by Republican presidents⁹³—and examined the “interest” section in all their amicus briefs.⁹⁴

Across the 141 briefs we reviewed, the most common interests asserted were that: the executive branch administers or has the authority to enforce the law at issue; executive enforcement action (such as criminal prosecutions) depends on the law at issue; and the Court issued a CVSG order at the certiorari stage. On the surface, these results broadly accord with what Supreme Court scholars and litigators have claimed: that the OSG is judicious in the cases it chooses to enter as amicus, often opining in those whose outcomes will affect the existing functions of the federal government.⁹⁵

But upon closer scrutiny, these justifications are less convincing. First, while a CVSG reflects the Court’s interest in hearing from the OSG, it is unclear how a CVSG is an “interest[] of the United States.” Second, some cases that implicate the federal government’s enforcement authority only do so to a limited extent. For example, when

88. *Id.* at 700–01.

89. *Id.* at 701.

90. *Id.*

91. *Id.*

92. *Id.* at 714 (Stevens, J., dissenting).

93. The Republican appointees are Noel Francisco, Rex Lee, and Theodore B. Olson, and the Democratic appointees are Drew S. Days III, Donald B. Verrilli, Jr., and Seth P. Waxman.

94. All amici are required to include such a section in their briefs. SUP. CT. R. 37.5.

95. See, e.g., Cordray & Cordray, *supra* note 3, at 1371 (“In virtually every case between private parties that the Solicitor General has entered, the interpretation of a federal statute has been at stake . . .”).

the OSG is an amicus in Title VII cases, it frequently cites the Equal Employment Opportunity Commission's ("EEOC") enforcement authority as its interest.⁹⁶ While the EEOC is statutorily authorized to enforce employment discrimination laws, it brings less than 2% of employment discrimination enforcement actions while private parties litigate the other 98%.⁹⁷

In a small number of cases, the OSG mustered little or even no justification for its amicus participation. For example, the OSG's brief in *Reed v. Ross*,⁹⁸ a case concerning the availability of federal habeas corpus relief when a defendant has failed to comply with a state's procedural rules, stated no interest.⁹⁹

Our analysis suggests that the OSG defines the "interests of the United States" through norms rather than rules. Our qualitative account in Section II.B also supports this view: although the OSG's interest in a case is often the defense of federal statutes and agency action, it is also willing to articulate broader and more nebulous interests. It is difficult to conceive of any case that would not raise a federal interest within the OSG's conception. As former SG Fried told us, "it's not hard to cook one up."¹⁰⁰

B. Qualitative Account

Having provided a macro-level overview of amicus oral argument, we now offer a more textured account of how the practice of amicus oral argument has evolved since 1889 and how the OSG has come to dominate it.

We divide the Court's history into four phases based on our analysis of how the OSG has employed amicus oral argument. We rely on our own analyses of each case as well as the issue classifications in the U.S. Supreme Court Database.¹⁰¹ During the first phase, from 1889

96. See, e.g., Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner at 1–2, *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996) (No. 95-354); Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner at 1–2, *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (No. 95-1376).

97. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1149–50 (2012).

98. 468 U.S. 1 (1984).

99. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Reed v. Ross*, 468 U.S. 1 (1984) (No. 83-218).

100. Interview with Fried, *supra* note 85.

101. Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, Version 2020 Release 01, SUP. CT. DATABASE (Sept. 21, 2020), <http://supremecourtdatabase.org> [https://perma.cc/J5MH-CQYG].

to the 1930s, we show that the early amicus oral argument practice was used by a small number of litigants and that the OSG requested amicus oral argument almost exclusively in cases involving federal statutes. From the 1940s through the 1960s, the OSG began defending federal agencies and, increasingly, civil rights and political interests.

In the 1970s and 1980s, the OSG requested amicus oral argument in cases in which the federal interest was increasingly tenuous and the political interest was great. For a brief period, the Court denied some of these requests. Archival research suggests that the Court strategically used denials to signal the Court's disapproval of the SG's increasingly politicized positions.¹⁰² Finally, from the 2000s to the present, the Court initially denied a handful of these motions and then, from 2011 until April 2020, granted all the OSG's motions to be heard—regardless of whether the case was political.

1. 1889 Through 1930s

In the early nineteenth century, oral argument at the Court was very different than it is today. Advocates could speak as long as they wished, and the Justices asked no questions and paid limited attention.¹⁰³ As its docket grew, the Court in 1849 limited argument time to two hours for each side and began to closely question counsel rather than listen passively.¹⁰⁴ By the early 1900s, the Court had cut argument time to thirty minutes for each side.¹⁰⁵ These changes increased the stakes of oral argument and the importance of having a high-quality oralist for litigants and the Court alike.

The practice of amicus oral argument was virtually nonexistent before the 1920s, and it became only slightly more prevalent in the following two decades. The federal government was the second-most frequent movant for such participation—behind individual lawyers, likely filing on behalf of unnamed clients¹⁰⁶—and its requests were never denied.¹⁰⁷ Local governments and foreign sovereigns made few requests to appear at oral argument as amici, but these requests were

102. See *infra* notes 229–230 and accompanying text.

103. Stephen M. Shapiro, *Oral Argument in the Supreme Court: The Felt Necessities of the Time*, Y.B.: SUP. CT. HIST. SOC'Y 22, 23 (1985).

104. *Id.* at 25–26.

105. *Id.* at 26.

106. See Krislov, *supra* note 21, at 703.

107. Before the 1950s, the editions of the *Journal* appear to be somewhat incomplete. For example, some motions are noted as having been submitted but no decision as to their disposition is evident.

also always granted.¹⁰⁸ On the other hand, the Court denied many such requests on behalf of individual lawyers and all those made by companies.¹⁰⁹

From 1889 through the 1930s, the OSG requested amicus oral argument primarily in cases where a federal interest was clear and its position intuitive. Its most common position was defending the constitutionality of a federal statute.¹¹⁰ The OSG also entered cases involving federal supremacy¹¹¹ and quasi-party interests¹¹² of the executive branch.¹¹³ The OSG only entered cases involving a federal statute or, in one instance, whether the Senate could reconsider the nomination of a federal official it had already confirmed.¹¹⁴

The OSG did not request oral argument in most cases in which it filed an amicus brief.¹¹⁵ When the interests of the United States arose out of a particular department of the federal government, a representative of that department often appeared at argument instead of an OSG attorney.¹¹⁶ In other cases, an OSG lawyer argued on behalf of an agency but in the agency's name.¹¹⁷

108. See, e.g., *Dillon v. Strathearn S.S. Co.*, 39 S. Ct. 495 (1919) (mem.) (granting motion for the British Embassy to participate in amicus oral argument).

109. The Court first invited a litigant to argue in 1926. See *J. SUP. CT. U.S.*, Oct. Term, 1924, at 182 (inviting George Wharton Pepper to argue in *Myers v. United States*, 272 U.S. 52 (1926)). It continued to issue such invitations until 1970, but fairly infrequently and only to the federal government and states. Grant rates discussed throughout this Article exclude those invitations, though the invitations themselves are noted in some instances.

110. See, e.g., Brief for the United States as Amicus Curiae, *Virginian Ry. Co. v. Sys. Fed'n* No. 40, 300 U.S. 515 (1937) (No. 324) (Railroad Labor Act); Brief for the United States as Amicus Curiae, *Ky. Whip & Collar Co. v. Ill. Cent. R.R. Co.*, 299 U.S. 334 (1937) (No. 138) (Ashurst-Sumners Act); Brief for the United States as Amicus Curiae, *Moor v. Tex. & New Orleans R.R. Co.*, 297 U.S. 101 (1936) (No. 49) (Bankhead Act).

111. See, e.g., *Missouri ex rel. Burnes Nat'l Bank of St. Joseph v. Duncan*, 265 U.S. 17, 20 (1924); *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 644 (1924); *Holyoke Water Power Co. v. Am. Writing Paper Co.*, 300 U.S. 324, 332 (1937).

112. We use this term to refer to a person or entity who is a party "in the guise of an amicus curiae," or who is a party in all but name. See Krislov, *supra* note 21, at 701. A "quasi-party" has a concrete, and often pecuniary or sovereign, interest in a case.

113. See, e.g., *Ex parte Grossman*, 267 U.S. 87, 108 (1925) (defending the president's pardon power); *United States v. Smith*, 286 U.S. 6 (1932) (arguing for the validity of a presidential appointment to the Federal Power Commission).

114. See *United States v. Smith*, 286 U.S. 6 (1932).

115. See, e.g., *Caldwell v. Parker*, 252 U.S. 376, 380 (1920) (noting that the United States filed an amicus brief, although no representative of the United States appeared at oral argument).

116. See, e.g., *R.R. Comm'n of Cal. v. Pac. Gas & Elec. Co.*, 302 U.S. 388, 389 (1938) (argued by a lawyer for the Federal Power Commission); *Smith*, 286 U.S. at 14 (argued by the Attorney General); see also Robert L. Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A. J. 154, 155 (1960) (noting that lawyers outside the OSG argued around half the cases in which the SG's office was involved).

117. See, e.g., *Consol. Rock Prods. Co. v. Du Bois*, 312 U.S. 510, 513-14 (1941) (arguing for the Securities and Exchange Commission as amicus).

Other amici who requested oral argument used the role to pursue quasi-party interests. For example, the City of Oakland requested oral argument time in a case involving a dispute over its borders.¹¹⁸ One state was permitted to argue on behalf of twenty-six others in a case regarding the federal taxation of state employees.¹¹⁹ The British Embassy sought argument in a case about whether U.S. courts had jurisdiction over a British vessel engaged in business on behalf of the British government.¹²⁰

But by the end of this period, the Court began to shift away from simply resolving disputes between parties or quasi-party interests. The Judiciary Act of 1925—lobbied for by Chief Justice William H. Taft—gave the Court plenary power over all but a few classes of cases.¹²¹ No longer the mere “vindicator of all federal rights”¹²² for the particular litigants before it, this new Court largely chose its docket and was “a constitutional tribunal that resolved public policy issues of national importance.”¹²³ As a result, it was much more important that each of the Court’s opinions be correctly decided and carefully reasoned, and many more entities stood to gain or lose from each decision.

Following backlash to several decisions striking down popular legislation, the Court also became more sensitive to its role in shaping public policy. In the 1920s, after the Court struck down several child labor laws, Senator William E. Borah proposed legislation requiring at least seven votes on the Court to declare a federal or state statute unconstitutional.¹²⁴ This proposal was a feature of the 1924 presidential campaign,¹²⁵ and several of the Justices’ letters from this period indicate that they were affected by this attack.¹²⁶ A little over a decade later, the Court again came under criticism when it invalidated several parts of New Deal legislation.¹²⁷ Frustrated with the Court’s obstruction

118. See *California v. S. Pac. Co.*, 157 U.S. 229, 254 (1895).

119. See *Helvering v. Gerhardt*, 304 U.S. 405, 407 (1938).

120. See *Ex parte in re Muir*, 254 U.S. 522, 524 (1921).

121. Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 13 (2011).

122. Post, *supra* note 16, at 1272 (2001) (quoting FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 260–61 (1928)).

123. *Id.* at 1273 n.29 (quoting Fish, *supra* note 16, at 476, 477).

124. Steven F. Lawson, *Progressives and the Supreme Court: A Case for Judicial Reform in the 1920s*, 42 HISTORIAN 419, 425 (1980).

125. See *id.* at 430–31.

126. See Post, *supra* note 16, at 1317–18 (describing comments made by Chief Justice Taft and Justice Brandeis).

127. See S. DOC. NO. 112-9, at 2340–43 (2017) (listing New Deal-era federal statutes struck down by the Court).

and emboldened by a sweeping reelection victory,¹²⁸ President Franklin D. Roosevelt launched his court-packing plan. This threat is widely understood as having motivated Justice Owen Roberts's "switch in time"¹²⁹ and having permanently changed the Court's approach to reviewing the constitutionality of legislation.

The Court's new approach treated legislative solutions to social problems as motivated by the will of the people and thus meriting a more restrained form of judicial review.¹³⁰ Footnote four of the *Carolene Products*¹³¹ opinion, which laid out guidelines defining rational basis review for certain legislation, captures this sentiment.¹³² The Court's new deferential standard of review applied not only to Congress but also to the newly created agencies that administered, interpreted, and enforced the new federal programs Congress created.¹³³

With this newfound sensitivity towards its role in setting public policy, the Court needed voices to describe the pragmatic interests at stake in the cases that came before it. In the coming decades, the dominant voice would be that of the SG.

2. 1940s Through 1960s

From the 1940s through the 1960s, amicus participation at oral argument grew significantly. Amici filed fewer than fifty motions requesting oral argument each decade before the 1940s. By the 1960s, that number had increased fivefold.¹³⁴ Across this period, the OSG accounted for approximately 31% of the motions for amicus oral argument, while states and associations accounted for most of the remaining growth.

The Court granted 84% of states' motions, over 80% of those by local governments, and all those by segments of the federal legislative

128. See Elizabeth C. Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 SYRACUSE L. REV. 139, 157 (1998) (noting the decisive wins of Franklin D. Roosevelt and Democrats in 1932).

129. *But see* LEONARD BAKER, BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT 175–76 (Macmillan 1967) (arguing that Justice Roberts began to change his interpretation of the Constitution before President Roosevelt announced his court packing plan).

130. See Alfred C. Aman Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1112 (1988) (discussing how Justice Frankfurter and others were "convinced of the primacy of the legislature in [solving] societal problems").

131. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

132. Aman, *supra* note 130, at 1112.

133. See *infra* Section II.B.2 (discussing Supreme Court amicus practice from the 1940s through the 1960s).

134. There were ninety-seven such motions in the 1940s, eighty-two in the 1950s, and 193 in the 1960s. See *supra* Figure 3.

and judicial branches. On the other hand, it granted only around half of such motions made by companies and associations, 36% of those made by nonprofits, and 11% of those made by individuals.

According to one contemporary perspective, the Court viewed the rise in amicus participation by individuals and other nongovernment entities as largely unhelpful.¹³⁵ Increasingly, amicus briefs were repetitive of the party briefs, seemed focused on an audience of clients and donors rather than the Justices, and treated the Court as though it were a political body that could be lobbied.¹³⁶ States, too, began asking to be heard at oral argument in cases where their interest was no stronger than any other state's.¹³⁷ The Court generally denied these types of requests but permitted (or invited) states to argue when they had a distinct interest in the case.¹³⁸

During this period, the Court continued to grant all the OSG's amicus oral argument motions, with one exception. In 1958, the Court issued its first denial of an OSG motion for amicus oral argument. The case was *United New York and New Jersey Sandy Hook Pilots' Association v. Halecki*, a maritime dispute arising out of a state negligence claim about the applicability of the warranty of "seaworthiness" to ships that are out of regular operation.¹³⁹ The OSG's brief justified its participation purely on economic grounds: the federal government was "the world's largest shipowner."¹⁴⁰

This denial prompted an unusual reaction from two Justices. Justices Frankfurter and Harlan noted that they would have granted the motion "in view of the important public interest with which the Government is charged in carrying out the congressional policy for a Government-owned merchant marine and in view of the confused state

135. Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172, 1172 (1953).

136. *Id.* at 1173–74.

137. *See, e.g.*, *Ry. Emps. Dep't v. Hanson*, 351 U.S. 225 (1956) (permitting Nebraska to participate in amicus oral argument in a labor union dispute arising under Nebraska law but denying requests by other states); *King v. United States*, 344 U.S. 254 (1952) (rates case involving Florida railroads); *see also* *J. SUP. CT. U.S.*, Oct. Term, 1952, at 11 (denying request by Montana and Board of Railroad Commissioners of the State of Montana to participate in amicus oral argument in *King v. United States*).

138. *See, e.g.*, *Lambert v. California*, 353 U.S. 979 (1957) (inviting Attorney General of California to file a brief and participate in oral argument); *Flournoy v. Wiener*, 321 U.S. 253 (1944) (permitting group of community property states to have one representative amicus at oral argument in case about federal tax treatment of community property); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) (permitting Virginia to participate in amicus oral argument in a dispute about the Federal Power Commission's ability to regulate on a body of water owned by Virginia under common law).

139. 358 U.S. 613 (1959).

140. *See* Brief for the United States as Amicus Curiae at 9, *Halecki*, 358 U.S. 613 (No. 56).

of the law dealing with the issues raised by this case.”¹⁴¹ In other words, at least two Justices believed the OSG’s participation was justified because it represented the federal government and its skilled lawyers would be of aid to the Court. For over a decade, the denial in *Halecki* remained an anomaly.

Compared to other amici, the OSG’s requests were likely granted more often because many of them came in cases involving executive agencies.¹⁴² Through the early decades of the twentieth century, courts deferred considerably to agencies on questions of fact, but not law.¹⁴³ Beginning in the 1940s, however, the Court deferred to agency interpretations even regarding questions of law.¹⁴⁴ During this period, the Court also invited the OSG to file amicus briefs and appear at oral argument in a small number of cases involving the interpretation of federal statutes.¹⁴⁵

But deference toward executive agencies cannot entirely explain the Court’s behavior. In 1948, the Court began granting the OSG amicus oral argument in a category of cases that had little to do with executive agencies but would occupy an increasingly large part of its Supreme Court practice: racial discrimination.

*Shelley v. Kraemer*¹⁴⁶ was the first civil rights case involving racial discrimination in which the federal government asked to argue as amicus.¹⁴⁷ It concerned the constitutionality of racial covenants on residential property. The Truman White House was involved in both the decision to participate and the writing of the government’s brief,¹⁴⁸

141. J. SUP. CT. U.S., Oct. Term, 1958, at 10.

142. See, e.g., Brief for the United States as Amicus Curiae at 4, *Bethlehem Steel Co. v. N.Y. State Lab. Rels. Bd.*, 330 U.S. 767 (1946) (Nos. 55, 76) (advancing the NLRB’s settled interpretation of the NLRA).

143. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 969 (2017). This deference was justified primarily on the basis of agency expertise. John J. Coughlin, *The History of the Judicial Review of Administrative Power and the Future of Regulatory Governance*, 38 IDAHO L. REV. 89, 114 (2001); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1193–94 (1986). During this period, even when a member of the OSG represented the government at oral argument (as is almost always the case today), its amicus briefs were often filed in the name of an executive agency. See, e.g., Brief for the NLRB as Amicus Curiae, *Int’l Union of United Auto. v. O’Brien*, 339 U.S. 454 (1950) (No. 456).

144. Bamzai, *supra* note 143, at 997–1000.

145. See, e.g., Brief for the United States as Amicus Curiae at 1, *Pac. Coast Dairy, Inc. v. Dep’t of Agric.*, 318 U.S. 285 (1943) (No. 275); Brief for the United States as Amicus Curiae at 7, *Wash. Terminal Co. v. Boswell*, 319 U.S. 732 (1943) (No. 28).

146. 334 U.S. 1 (1948).

147. This is based on our review of all pre-*Shelley* cases in which the federal government requested amicus oral argument.

148. Philip Elman & Norman Silber, *The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 818-19 (1987).

which, unusually, featured the AG's name before the SG's.¹⁴⁹ The government extensively justified the "interest[] of the United States" in a section that spanned twenty-five pages.¹⁵⁰ (Today, interest sections are often only a paragraph long.¹⁵¹) The interest statement referenced officials from agencies ranging from the Housing and Home Finance Agency to the State Department.¹⁵² It began, "The Federal Government has a special responsibility for the protection of the fundamental civil rights guaranteed to the people by the Constitution and laws of the United States."¹⁵³

The statement adopts an extraordinarily expansive view of the federal interest. Under this view, the federal government has an interest in *any* case involving constitutional interpretation of civil rights—even if federal law and administrative policy are silent on the issue. When *Shelley* was being litigated at the Supreme Court, federal prohibitions on racial discrimination were minimal.¹⁵⁴ Thus, the Truman Administration could support whichever side of the case it favored politically.

The white property owners involved in the case wrote a reply brief rebutting the government's participation. By supporting Petitioners, they argued, the government sought to elevate the rights of some of its citizens (Blacks) over those of others (whites).¹⁵⁵ While this analysis is analytically flawed, it demonstrates how the government's "interest" in protecting constitutional rights generally did not dictate its position in a case about what those rights in fact are. The OSG's position in race discrimination cases since *Shelley v. Kraemer* has generally turned on which party controls the executive branch.¹⁵⁶

149. See Brief for the United States as Amicus Curiae at 123, *Shelley*, 334 U.S. 1 (Nos. 72, 87, 290, 291).

150. The federal government was not required to justify its interest in a given case during this period. SUP. CT. R. 42 (1970) (repealed 1980); see also CAPLAN, *supra* note 6, at 196, 311 n.41. The entire brief was 123 pages long. See Brief for the United States as Amicus Curiae, *supra* note 149.

151. See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioner at 1, *City of Hays v. Vogt*, 138 S. Ct. 55 (2017) (No. 16-1495).

152. See Brief for the United States as Amicus Curiae, *supra* note 149, at 5, 13, 15, 19.

153. *Id.* at 1–2.

154. See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 447 (2000). The federal government had begun to support actions against states to combat racial discrimination, however. See, e.g., Brief for the United States, *Henderson v. United States*, 339 U.S. 816 (1950) (No. 25) (writing in favor of Plaintiff, who experienced racial discrimination on a railway dining car).

155. Brief for Respondents in Reply to Brief for United States as Amicus Curiae at 1–2, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87).

156. See, e.g., Brief for the United States as Amicus Curiae Supporting Respondents, *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013) (No. 11–345) (supporting university in affirmative action lawsuit); Brief for the United States as Amicus Curiae Supporting Petitioner, *Grutter v. Bollinger*,

The OSG submitted another controversial brief in *Brown v. Board of Education*.¹⁵⁷ The brief again extensively justified the federal interest in the case, even citing President Eisenhower's public statements.¹⁵⁸ The AG's office authored the brief, and the AG and his Special Assistant—rather than the OSG—signed it.¹⁵⁹ Perhaps preempting allegations that their position was motivated by politics, the authors declared that “[r]ecognition of the responsibility of the Federal Government with regard to civil rights is not a matter of partisan controversy.”¹⁶⁰ The school board did not bother to oppose the government's participation, maybe because it perceived that the Court wanted to hear from various government actors.¹⁶¹

By the 1960s, civil rights cases were a significant portion of the OSG's amicus oral arguments. Between 1960 and 1969, the OSG argued as amicus in more than thirty civil rights cases, claiming that local ordinances,¹⁶² state statutes,¹⁶³ and apportionment plans¹⁶⁴ violated the Equal Protection Clause while school board desegregation plans did not.¹⁶⁵ In these cases, and until the Reagan Administration, the OSG supported civil rights claimants regardless of the president's party.¹⁶⁶ The SG himself generally argued these cases.¹⁶⁷

The OSG began to participate in oral argument in a small number of other cases in which the federal interest was tenuous as well. One of the most notable was *Baker v. Carr*, the landmark case that allowed the Court to review redistricting decisions.¹⁶⁸ The OSG's brief listed the SG as its author and contained no justification for his

539 U.S. 306 (2003) (No. 02–241) (supporting rejected applicant in affirmative action lawsuit); Brief for the United States as Amicus Curiae, *Regents of the Univ. of Cal. v. Bakke*, 434 U.S. 810 (1978) (No. 76–811) (supporting university in affirmative action lawsuit).

157. 347 U.S. 483 (1954).

158. Brief for the United States as Amicus Curiae at 2–8, *Brown*, 347 U.S. 483 (Nos. 1, 2, 4, 10).

159. CAPLAN, *supra* note 6, at 26–28, 31–32.

160. Brief of the United States as Amicus Curiae, *supra* note 158, at 2.

161. *See Brown*, 347 U.S. at 495–96 (announcing that, on re-argument, “[t]he Attorney General of the United States is again invited to participate” and “[t]he Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so”).

162. *See, e.g., Evans v. Newton*, 382 U.S. 296 (1965); *Peterson v. City of Greenville*, 373 U.S. 244 (1962).

163. *See, e.g., Robinson v. Florida*, 378 U.S. 153 (1964).

164. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964).

165. *See, e.g., Calhoun v. Latimer*, 377 U.S. 263 (1964).

166. Brett W. Curry, Richard L. Pacelle, Jr. & Bryan W. Marshall, “*An Informal and Limited Alliance*”: *The President and the Supreme Court*, 38 PRESIDENTIAL STUD. Q. 223, 240 (2008).

167. *See, e.g., Sims*, 377 U.S. 533; *Peterson*, 373 U.S. 244.

168. 369 U.S. 186 (1962).

participation.¹⁶⁹ In his memoir, then-SG Archibald Cox recounted having a “frankly political discussion with the White House about the position that the government would take.”¹⁷⁰

One explanation for why the Court was willing to hear from the OSG on political cases is politics. During this period, Democrats controlled the White House—and thus the OSG—almost exclusively.¹⁷¹ The Court was newly liberal and political under Chief Justice Earl Warren.¹⁷² And the Warren Court was the first to issue a CVSG order.¹⁷³ But even prior to Chief Justice Warren’s ascension, the Court had granted all the OSG’s amicus oral argument motions. As a result, the Court’s willingness to listen to the OSG cannot be explained by politics alone.

3. 1970s Through 1990s

From the 1970s through the 1990s, the OSG’s amicus oral argument requests grew significantly. This period—especially the 1980s—also marked the first time that the Court denied these requests with any regularity.

During these three decades, the OSG began to request oral argument more frequently when it filed a brief. Between 1970 and 1975, the OSG requested amicus oral argument in 42% of the cases in which it filed an amicus brief. From 1995 to 1999, it did so 94% of the time. In 1995, then-SG Drew Days testified to Congress that, as a matter of policy, the OSG sought oral argument whenever it filed an amicus brief.¹⁷⁴

The types of cases in which the OSG requested amicus oral argument also expanded over this period. For the first time, the OSG entered cases involving habeas corpus review of a state conviction,¹⁷⁵

169. Brief for the United States as Amicus Curiae, *Baker*, 369 U.S. 186 (No. 6).

170. ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 297 (1987).

171. President Eisenhower was the only exception, and he supported the government’s participation in *Brown*. See CAPLAN, *supra* note 6, at 28.

172. See ALEXANDER M. BICKEL, *POLITICS AND THE WARREN COURT* (1973); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* (1970).

173. The first time the Court invited the SG to opine in this manner was in *Tennessee Burley Tobacco Growers Ass’n v. Range*, 353 U.S. 981 (1957). For a different explanation of CVSG, see Lepore, *supra* note 58 (arguing that members of the OSG were friendly with some of the Justices).

174. *Examining the Operation and Activities of the Office of the Solicitor General of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 5 (1995) (statement of Hon. Drew S. Days, III, Solicitor General, Department of Justice).

175. See *Wainwright v. Sykes*, 433 U.S. 72 (1977).

affirmative action,¹⁷⁶ abortion,¹⁷⁷ and the establishment of religion.¹⁷⁸ The OSG continues to participate in these types of cases today.

At the same time, the Court generally chose not to hear from companies, individuals, associations, and nonprofits.¹⁷⁹ It also denied two-thirds of requests made by foreign sovereigns and Native American tribes. And for the first time, the Court also denied a large majority of motions made by states, granting only 32% of such motions, down significantly from the previous period.¹⁸⁰ The Justices were much more willing to grant states' motions in cases in which the state had a unique interest in the case, including those involving a quasi-party interest,¹⁸¹ federal preemption of state and local law,¹⁸² or a challenge to the constitutionality of a state law.¹⁸³ But the Court often denied states' motions to be heard in cases arising out of other states,¹⁸⁴ except when made on behalf of a large group of states.¹⁸⁵ Perhaps in response to the Court's steeply shrinking docket and its increased opposition to non-OSG motions for amicus oral argument, the number of such motions—which had risen fairly steadily since the 1930s—began declining in the late 1980s and then fell steeply through the 1990s.¹⁸⁶

The most significant shift in the Court's amicus oral argument practice during this period was that it began denying motions by the OSG. At the same conference at the beginning of the 1970 Term, the

176. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

177. See *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1982).

178. See *Marsh v. Chambers*, 463 U.S. 783 (1983). The SG's motion to appear at oral argument in *Marsh v. Chambers* was denied, but his motion one year later to participate in *Lynch v. Donnelly*, 465 U.S. 668 (1984), was granted.

179. It granted about 8% of motions made by companies and none of the thirty-two motions made by individuals. Motions from associations and nonprofits were granted at a rate of 16% and 14%, respectively.

180. See *supra* notes 133–135 and accompanying text.

181. See, e.g., *Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 469 U.S. 1204 (1985) (mem.) (granting the State of Montana's motion in case involving an insurance dispute over an incident that occurred on Indian reservation on land owned by Montana).

182. See, e.g., *City of Burbank v. Lockheed Air Terminal, Inc.*, 409 U.S. 1073 (1972) (granting the Attorney General of California's motion in case about federal preemption of local ordinance).

183. See, e.g., *Richardson v. Ramirez*, 414 U.S. 1107 (1973) (mem.) (granting Attorney General of California's motion in case concerning constitutionality of state law). *But see, e.g.*, *Goldstein v. California*, 409 U.S. 976 (1972) (mem.) (denying the California Attorney General's motion to participate in a case in which the state was already represented by the Los Angeles City Attorney).

184. See, e.g., *Wingo v. Wedding*, 416 U.S. 934 (1974) (mem.) (denying the California Attorney General's motion in case arising out of Kentucky). *But see, e.g.*, *Kirby v. Illinois*, 405 U.S. 951 (1972) (mem.) (granting the California Attorney General's motion to participate in a case arising out of Illinois and under the federal constitution).

185. See, e.g., Brief for State of New Jersey, Amicus Curiae at i, *Zicarelli v. N.J. State Comm'n of Investigation*, 406 U.S. 472 (1971) (No. 69-4) (on behalf of New Jersey and twenty-four other states).

186. See *supra* Figure 2, Figure 5.

Court issued the first two denials in this period—the second and third ever. One was in *Griggs v. Duke Power Co.*, the landmark case that defined the evidentiary standard under Title VII of the Civil Rights Act of 1964 as requiring proof of discriminatory effect in employment practices.¹⁸⁷ This was one of the first motions by the OSG to appear at oral argument that the Burger Court considered, and it came in a case interpreting a federal statute administered and sometimes enforced by an executive agency.¹⁸⁸ The Court had issued a CVSG and followed the OSG’s recommendation to hear the case.¹⁸⁹ The OSG’s brief discussed, among other things, EEOC guidelines governing employment tests and screening devices like those at issue in the case.¹⁹⁰ The Court then denied the OSG’s request to argue as an amicus.¹⁹¹ Meanwhile, the Chamber of Commerce, which supported Respondents and urged that the EEOC guidelines were “entitled to little deference,”¹⁹² was permitted to argue as amicus.

The second denial that Term came in *James v. Valtierra*, which concerned discrimination based on wealth.¹⁹³ California voters had adopted a state constitutional amendment that prohibited the construction of low-rent housing projects—including federally assisted housing—unless approved by a community election.¹⁹⁴ Plaintiffs claimed that the amendment violated the Supremacy and Equal Protection Clauses.¹⁹⁵ The OSG’s brief agreed with the Equal Protection claim and thus declined to address the former.¹⁹⁶

It is not clear why the Court denied these requests. The Court permitted the OSG to argue in other civil rights cases during this Term and others.¹⁹⁷ And aside from Warren Burger’s replacement of Earl Warren, no other personnel changes had occurred.

187. 401 U.S. 424, 436 (1970).

188. Brief for the United States as Amicus Curiae at 4–5, *Griggs*, 401 U.S. 424 (No. 124).

189. See *Griggs v. Duke Power Co.*, 398 U.S. 926 (1970) (mem.); see also David J. Garrow, *Toward a Definitive History of Griggs v. Duke Power Co.*, 67 VAND. L. REV. 197, 221 (2014) (“The justices discussed the case on May 22, 1970, and decided to request from Solicitor General Erwin Griswold the executive branch’s view of whether *Griggs* should be heard.”).

190. Garrow, *supra* note 189, at 222.

191. *Griggs v. Duke Power Co.*, 400 U.S. 861 (1970) (mem.).

192. Brief Amicus Curiae on Behalf of Chamber of Commerce of the United States of America at 6, *Griggs*, 401 U.S. 424 (No. 70-124).

193. 402 U.S. 137 (1971).

194. *Id.* at 138–39.

195. *Id.*

196. See Memorandum for the United States as Amicus Curiae, *Valtierra*, 402 U.S. 137 (Nos. 154, 226).

197. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 400 U.S. 802 (1970) (mem.).

The Court also denied five amicus oral argument motions made by SG Wade H. McCree Jr. (appointed by Jimmy Carter). Two were civil rights cases, one under Title VII¹⁹⁸ and another about affirmative action;¹⁹⁹ one was a case concerning searches under the Fourth Amendment;²⁰⁰ and a fourth was an eminent domain claim resolved on procedural grounds.²⁰¹ The last was a securities case in which the Securities and Exchange Commission filed an amicus brief supporting the opposite side of the OSG and was permitted to argue.²⁰²

During the Reagan Administration, the OSG's grant rate fell under SG Rex Lee from a grant rate of 95% in the 1970s to 91% during the 1981 through 1984 Terms. The rate fell further during Charles Fried's tenure (1985 through 1988 Terms) to an average of 81%, even collapsing to 72% in the 1987 Term. Denials came in a variety of cases, including those considering the constitutionality of state statutes,²⁰³ state action,²⁰⁴ federal preemption,²⁰⁵ and even construction of federal statutes administered and enforced in whole or in part by federal agencies²⁰⁶—including in cases where the relevant agency cosigned the brief.²⁰⁷ Under Fried, those denials also included cases in which the Court had issued CVSGs.²⁰⁸ But the Court always granted the OSG's motions to be heard in cases deciding the constitutionality of a federal statute.

The Court's apparent reasons for these denials were varied. Some were mundane, including because the OSG requested additional time for oral argument (i.e., a party did not agree to cede time to the

198. *See* *Furnco Constr. Corp. v. Waters*, 435 U.S. 940 (1978) (mem.).

199. *See* *Minnick v. Cal. Dep't of Corrs.*, 449 U.S. 947 (1980) (mem.).

200. *See* *Franks v. Delaware*, 434 U.S. 1044 (1978) (mem.).

201. *See* *San Diego Gas & Elec. Co. v. City of San Diego*, 449 U.S. 946 (1980) (mem.).

202. *See* *Int'l Brotherhood of Teamsters v. Daniel*, 439 U.S. 890 (1978) (mem.).

203. *See, e.g.,* *Estate of Thornton v. Caldor, Inc.*, 467 U.S. 1258 (1984) (mem.); *Washington v. Seattle Sch. Dist. No. 1*, 454 U.S. 1138 (1982) (mem.).

204. *See, e.g.,* *Graham v. Connor*, 488 U.S. 1001 (1989) (mem.); *Lowenfield v. Phelps*, 483 U.S. 1055 (1987) (mem.); *Turner v. Safley*, 479 U.S. 808 (1986) (mem.); *Wygant v. Jackson Bd. of Educ.*, 473 U.S. 932 (1985) (mem.); *Marsh v. Chambers*, 459 U.S. 1143 (1983) (mem.).

205. *See, e.g.,* *Fort Halifax Packing Co. v. Coyne*, 479 U.S. 1052 (1987) (mem.).

206. *See, e.g.,* *Goodman v. Lukens Steel Co.*, 479 U.S. 1079 (1987) (mem.); *Landreth Timber Co. v. Landreth*, 469 U.S. 1187 (1985) (mem.).

207. *See, e.g.,* *Zipes v. Trans World Airlines, Inc.*, 454 U.S. 960 (1981) (mem.) (denying SG's motion on brief cosigned by EEOC in a case interpreting Title VII).

208. *See, e.g.,* *Patrick v. Burget*, 484 U.S. 1000 (1988) (mem.) (denial); *Patrick v. Burget*, 480 U.S. 904 (1987) (mem.) (CVSG); *Watson v. Fort Worth Bank & Tr.*, 484 U.S. 893 (1987) (mem.) (denial); *Watson v. Fort Worth Bank & Tr.*, 481 U.S. 1012 (1987) (mem.) (CVSG); *Norwest Bank Worthington v. Ahlers*, 484 U.S. 809 (1987) (mem.) (denial); *Norwest Bank Worthington v. Ahlers*, 479 U.S. 1081 (1987) (mem.) (CVSG). Because four votes are required to issue a CVSG and five to grant amicus oral argument, this trend suggests that one Justice may have made the difference in at least some of these denials.

OSG or the OSG sought additional time beyond what the party ceded)²⁰⁹ or sought argument before filing a brief.²¹⁰

In other cases, the Justices seemed to deny the OSG's motion on substantive grounds. For example, in a bankruptcy case,²¹¹ Chief Justice Rehnquist recommended denying the OSG's motion because its interest was no different from that of the party it supported and because its arguments were "adequately presented in its amicus brief."²¹² The Chief Justice offered similar reasoning in *Lowenfield v. Phelps*,²¹³ a habeas case.²¹⁴ The Chief Justice's recommendations did not, however, consistently discuss whether the OSG offered a distinct interest. For example, he recommended granting the OSG's motions for divided argument in many criminal cases even when its interest appeared to be the same as that of the party it supported.²¹⁵

In still other cases, the Court seemed skeptical that the OSG had any interest in the case, distinct or otherwise. In one case, the OSG submitted a late request for amicus oral argument on behalf of the EEOC, and the opposing party responded that the federal interest was weak. The Chief Justice suggested the Court deny the motion, and it did so.²¹⁶ The same was true in *Bethel School District No. 403 v. Fraser*,²¹⁷ a case with strong political overtones but without, as the Chief Justice noted, "any strong federal interest."²¹⁸

Some Justices even questioned the helpfulness of the OSG's participation in cases that implicated executive power. The Chief Justice recommended denying the OSG's motion for amicus oral

209. Memorandum for the Conference from the Chief Justice 1 (Mar. 23, 1978), in Blackmun Papers, *supra* note 46, at Box 255, Folder 9 (*Furnco Constr. Corp. v. Waters*); Memorandum for the Conference from the Chief Justice 2 (Jan. 18, 1978), *id.* (*Franks v. Delaware*); Memorandum for the Conference from the Chief Justice 2 (Aug. 9, 1985), *id.* at Box 431, Folder 9 (*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*).

210. Memorandum for the Conference from the Chief Justice 4 (Oct. 30, 1980), *id.* at Box 317, Folder 15 (*Minnick v. Cal. Dep't of Corrs.*).

211. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988).

212. Memorandum for the Conference from the Chief Justice (Sept. 24, 1987), in Blackmun Papers, *supra* note 46, at Box 485, Folder 12.

213. 484 U.S. 231 (1988).

214. Memorandum for the Conference from the Chief Justice 4 (Sept. 10, 1987), in Blackmun Papers, *supra* note 46, at Box 485, Folder 12.

215. *See, e.g.*, Memorandum for the Conference from the Chief Justice 4 (Oct. 9, 1985), *id.* at Box 431, Folder 9 (*Sielaff v. Carrier*); Memorandum for the Conference from the Chief Justice 8 (Jan. 9, 1986), *id.* at Box 458, Folder 12 (*Rose v. Clark*). The conference memoranda do not discuss the similarity of interests, simply noting that the "views of the SG may be helpful."

216. Memorandum for the Conference from the Chief Justice (Mar. 3, 1983), *id.* at Box 362, Folder 13 (*Crown, Cork & Seal Co., Inc. v. Parker*).

217. 478 U.S. 675 (1986).

218. Memorandum for the Conference from the Chief Justice 4–5 (Jan. 9, 1986), in Blackmun Papers, *supra* note 46, at Box 431, Folder 9.

argument in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, a case interpreting the Hague Convention.²¹⁹ The Chief Justice's memorandum reported the OSG's stated interest: that the United States was a party to and participated in the negotiation of the Hague Convention. On its face, cases affecting foreign relations are exactly the type in which the OSG might be most helpful. But the Chief Justice's conference memorandum stated that the OSG's interest was the same as the interest advanced by the party it supported, so its participation at argument was unlikely to help the Court.²²⁰

Some denials were unmistakably intended to send a message. In *Thornburgh v. American College of Obstetricians and Gynecologists*,²²¹ SG Fried urged the Court to reverse *Roe v. Wade*.²²² The OSG's brief was signed by only Fried himself and two senior members of the AG's office, without any of the OSG attorneys who typically write such briefs. In his personal notes about the brief, Justice Blackmun noted next to the list of the ostensible authors, "not written by any of these."²²³

Three years earlier, the Court had declined to reverse *Roe* in a case that Fried, who then occupied the Principal Deputy position in the OSG,²²⁴ briefed and argued as amicus.²²⁵ The Court denied the OSG's motion for amicus oral argument in *Thornburgh*.²²⁶ The first draft of Justice Blackmun's opinion read in part:

Although appellants challenge the merits of the Third Circuit's decision solely on the ground that the Court of Appeals misapplied *Roe v. Wade* and its successors, the Solicitor General, appearing on behalf of the United States as *amicus curiae* in support of appellants, urges that we take this occasion to overrule those cases entirely. For the Solicitor General to ask us to discard a line of major constitutional rulings in a case where no party has made a similar request is, to say the least, unusual. We decline his invitation.²²⁷

This paragraph was not included in the final opinion,²²⁸ apparently at Justice Powell's request. Agreeing that "it is indeed

219. 486 U.S. 694 (1988).

220. Memorandum for the Conference from the Chief Justice (Jan. 6, 1988), in Blackmun Papers, *supra* note 46, at Box 485, Folder 12. The Court ultimately granted the motion. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 484 U.S. 1000 (1988).

221. 476 U.S. 747 (1986).

222. 410 U.S. 113 (1973).

223. Brief of the United States as Amicus Curiae in Support of Appellants, *Thornburgh*, 476 U.S. 747 (Nos. 84-495, 84-1379), in Blackmun Papers, *supra* note 46, at Box 435, Folder 2.

224. CAPLAN, *supra* note 6, at 135.

225. See *Akron Ctr. for Reprod. Health, Inc. v. City of Akron*, 459 U.S. 814 (1982).

226. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 473 U.S. 931 (1985).

227. Draft Opinion, Justice Blackmun, in Blackmun Papers, *supra* note 46, at Box 435, Folder 2.

228. See *Thornburgh*, 476 U.S. at 747.

‘unusual’ for the Solicitor General, as an amicus curiae, to ask us to overrule major constitutional decisions,” Justice Powell urged Justice Blackmun to refrain from “criticiz[ing] the Solicitor General specifically.”²²⁹ He added, “we have already rebuffed the Solicitor General to some extent by denying his request to argue orally.”²³⁰

Similar rebukes of positions taken by Fried did make it into final opinions that same Term. For example, in a criminal case, the Court noted that it was again declining to adopt an argument advanced by the SG that it had “expressly rejected when the Solicitor General made it in [a previous case].”²³¹

4. 2000 Through 2019

In the last two decades, the number of motions for amicus oral argument filed by litigants other than the OSG has continued to fall. No more than fifteen such motions have been filed in a Term since 2000, and grant rates have remained steady and low. Only one motion by a nonprofit was granted during the entire period.²³² The only motions by an individual that were granted were by a professor who presented a jurisdictional issue not raised by the parties.²³³ The two motions by associations and one by a company that the Court granted were all made by litigants who were either experts in the subject at issue²³⁴ or quasi-parties.²³⁵ They also advanced unique arguments and, in two cases, were represented by well-known lawyers.²³⁶

229. Memorandum from Lewis F. Powell, Jr. to Harry A. Blackmun re *Thornburg v. American College* (Feb. 6, 1986), in Lewis F. Powell, Jr. Papers, Box 123, Supreme Court Case Files Collection 64, 64 (on file with the Washington & Lee University School of Law Library), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1159&context=casefiles> [<https://perma.cc/9RXK-4PFK>].

230. *Id.*

231. *Maine v. Moulton*, 474 U.S. 159, 175 n.11 (1985).

232. *See Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 1029 (2008) (mem.) (American Antitrust Institute).

233. *See Note*, *Ortiz v. United States*, 132 HARV. L. REV. 317, 319 (2018) (noting that Professor Aditya Bamzai argued the Supreme Court did not have appellate or original Article III jurisdiction to hear *Ortiz v. United States*); *see also Cox v. United States*, 138 S. Ct. 576 (2018) (mem.); *Dalmazzi v. United States*, 138 S. Ct. 576 (2018) (mem.); *Ortiz v. United States*, 138 S. Ct. 576 (2018) (mem.).

234. *See Alabama v. Shelton*, 534 U.S. 1110 (2002) (mem.) (National Association of Criminal Defense Lawyers).

235. *See FCC v. NextWave Pers. Commc'ns Inc.*, 536 U.S. 955 (2002) (mem.) (Creditors of NextWave Personal Communications Inc.); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002) (United Mine Workers of America Combined Fund).

236. *Alabama v. Shelton*, 535 U.S. 654, 657 (2002) (Steven Duke); *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 295 (2003) (Laurence Tribe).

The situation has improved somewhat for sovereignties and states. All three motions made on behalf of foreign countries—in each case, advancing quasi-party interests and represented by experienced members of the Supreme Court bar and former OSG attorneys²³⁷—were granted. A motion by the Narragansett Indian Tribe was denied.²³⁸ Grant rates for state motions rose from 32% between the 1970s and 1990s to 46% after 2000. As in earlier periods, the successful motions often involved many affected states joining one amicus brief (particularly if there was not a group of states supporting the other side as amici).²³⁹ States, even those represented by sophisticated state SGs, do not garner nearly the same respect as the OSG.²⁴⁰ This suggests that the SG's special place at the Court is not driven solely by comity to another branch of government. Other practices at the Court, such as the restrictive standards imposed for legislative standing,²⁴¹ reinforce this conclusion.

The Court's modern treatment of non-OSG amici is consistent with the widespread impression among Supreme Court litigators that these litigants are permitted to appear at oral argument only if they offer unique legal arguments or represent institutional interests.²⁴² With respect to these amici, the Court takes seriously its stated requirement that an amicus's argument "provide assistance to the Court not otherwise available."²⁴³ For private amici, the Court enforces its warning that motions for amicus oral argument, without permission of the parties, are "granted only in the most extraordinary circumstances."²⁴⁴

237. See *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1543 (2018) (mem.) (Carter Phillips for Ministry of Commerce of the People's Republic of China); *Spector v. Norwegian Cruise Line Ltd.*, 543 U.S. 1135 (2005) (mem.) (Gregory G. Garre for the Commonwealth of the Bahamas and the Bahamas Maritime Authority); *Intel Corp. v. Advanced Micro Devices, Inc.*, 541 U.S. 901 (2004) (mem.) (Carter Phillips for Commission of the European Communities).

238. *Carcieri v. Kempthorne*, 555 U.S. 807 (2008) (mem.).

239. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 549 U.S. 1263 (2007) (mem.) (thirty-seven states); *Kennedy v. Louisiana*, 552 U.S. 1293 (2008) (mem.) (nine states).

240. See Dan Schweitzer, *The Modern History of State Attorneys Arguing as Amici Curiae in the U.S. Supreme Court*, 22 GREEN BAG 2D 143, 146–50 (2019) (listing denials of amicus oral argument motions by states, including where counsel of record are state solicitors general Kevin Newsom, Ted Cruz, and Jeffrey Sutton).

241. See David J. Weiner, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205 (2001).

242. Interview with Erin Murphy (Apr. 2019) (discussing her experience representing states and noting "I think the Court is generally more receptive to hearing from an institutional party and thinking about institutional interests as something that can be distinct from the parties to the case"); Interview with Carter Phillips (Apr. 2019) (discussing how his representation of the European Commission and the Chinese Ministry of Commerce as amici "were worth the Court's time because we really had a different perspective and point to make").

243. SUP. CT. R. 37.2(b), 28.7.

244. *Id.* 28.7.

The percentage of cases in which the OSG requests amicus oral argument has continued to rise. Today, the OSG files such motions in between one-third and slightly over one-half of the Court's cases,²⁴⁵ which is almost every case in which it files an amicus brief.²⁴⁶

Several former members of the OSG attribute this trend, in part, to the Court's shrinking docket and the SG's desire to give each of the OSG's twenty-something lawyers argument time.²⁴⁷ But that explains only so much. The SG has significant control over the number of cases in which the OSG represents a party, and SGs have chosen to petition the Court for certiorari at lower rates in recent decades.²⁴⁸ If argument time was the driving factor, moreover, the SG could enter plenty more cases as amicus, but he declines to do so. And even if this theory did explain the SG's behavior, it fails to shed light on why the Court would indulge such a practice.

The rates at which the Court grants the OSG's motions for amicus oral argument have entirely recovered to their pre-1970 levels.²⁴⁹ Before 2000, the Court continued to deny one or two of the OSG's motions most Terms. From 2011 through April 2020, however, it granted all of them. When we asked Supreme Court practitioners what might explain this perfect grant rate, multiple people told us a similar story, apparently handed down within the OSG, about a case where the Court denied a motion for amicus oral argument by the OSG and later regretted it.²⁵⁰

That case was *Rehberg v. Paulk*, which concerned civil immunity from suit under 42 U.S.C. § 1983 for grand jury witnesses.²⁵¹ The OSG, led by then-SG Donald B. Verrilli Jr., filed a brief agreeing with Respondent that grand jury witnesses are immune from civil damages based on their testimony. It added, however, that grand jury witnesses could be liable for other conduct, including instigating a malicious prosecution.²⁵² The brief also argued that the Court should vacate and

245. See *supra* Figure 8.

246. *Id.* The rare cases where the OSG filed an amicus brief but did not seek oral argument are largely cases where the amicus brief is filed and argument is not set, e.g., *Montejo v. Louisiana*, 556 U.S. 778 (2009).

247. Interview with Garre, *supra* note 85; Interview with Phillips, *supra* note 242; Interview with Former Senior OSG Attorney, *supra* note 85; Interview with Paul D. Clement (May 2019).

248. See Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 597–98 (1986); Cordray & Cordray, *supra* note 3, at 1341–42.

249. See *supra* Figure 6.

250. See Interview with Sarah Harrington (May 2019); see also Interview with Senior OSG Attorney, *supra* note 85; Interview with Former Senior OSG Attorney, *supra* note 85.

251. 566 U.S. 356 (2011).

252. See Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 19, *Rehberg*, 566 U.S. 356 (No. 10-788).

remand the case even if it sided with Respondent because the lower courts had not evaluated Petitioner's claim that there was evidence of nontestimonial misconduct.²⁵³ The Court denied the OSG's amicus oral argument motion. At oral argument, the Justices questioned Respondent's counsel at length about the OSG's position.²⁵⁴ The Court ultimately unanimously affirmed the Eleventh Circuit's holding and did not address the OSG's rationale for vacatur and remand.²⁵⁵

For nine years after *Rehberg*, the Court granted every single OSG request for amicus oral argument. But in April 2020, the Court suddenly denied one of then-SG Francisco's motions²⁵⁶ following media coverage of the SG's extraordinary streak.²⁵⁷ It is too soon to tell whether this is the beginning of a trend or merely an aberration.

* * *

The OSG's amicus oral argument practice started out narrow and focused on cases that presented a strong and clear federal interest. Beginning in the 1940s, however, the OSG expanded the size and subject area of its practice. The Court granted every one of these motions until 1958, and its denials remained few and far between throughout the 1970s. These denials picked up under SGs Lee and Fried, peaking at a 28% denial rate in the 1987 Term. Most came in cases where the Court believed that the federal interest was tenuous or that hearing from the OSG would be unhelpful—either because its interest was no different than that of the party it supported or because its position was articulated sufficiently enough for the Court in its brief. After Fried left office, the Court returned to granting almost all the OSG's amicus oral argument motions, seemingly without regard to any of these factors. Today, the OSG continues to file these motions in almost every type of case.

253. *Id.* at 29–31.

254. Transcript of Oral Argument at 25, 29, 30, 34, *Rehberg*, 566 U.S. 356 (No. 10-788).

255. *Rehberg*, 566 U.S. 356.

256. See *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 140 S. Ct. 2665 (2020) (mem.).

257. See Adam Liptak, *The Supreme Court Has a Special 'Friend': The Justice Department*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/03/09/us/supreme-court-solicitor-general-amicus.html> [<https://perma.cc/NN6E-JMD9>].

III. JUSTIFYING THE OSG'S OUTSIZED AMICUS ORAL ARGUMENT PARTICIPATION

Although the Court has strongly stated its dislike of divided argument, our data show that the Court nearly always permits the OSG to participate in oral argument as amicus. In our conversations with Supreme Court litigators, including current and former members of the OSG, we consistently heard three explanations for this pattern. The first is technical: OSG lawyers are highly skilled advocates who are experts in Supreme Court litigation. The second is substantive: the OSG is the only litigant who can communicate with all the federal agencies and convey relevant factual information to the Court. The final is normative: the SG is the so-called “Tenth Justice.” As articulated in Lincoln Caplan’s seminal book on the topic, the SG is unlike any litigant in his simultaneous commitment to litigating on behalf of the executive branch and helping the Court.²⁵⁸ Although we find historical support for these rationales, we argue that developments at the Court and in the SG’s practices have made it no longer justifiable to give preference to the SG at amicus oral argument on these bases.

A. The OSG’s Oral Argument Expertise

The OSG’s litigators gave it a significant advantage at oral argument for much of the Supreme Court’s history. The need for litigants who are skilled at oral argument became important in the early to mid-twentieth century when the Court began aggressively questioning litigants at oral argument.²⁵⁹

In the early 1900s, there was some semblance of a Supreme Court bar because the difficulty of travel caused out-of-town private litigants to refer Supreme Court cases to the local bar.²⁶⁰ But as travel became easier, arguments were spread out across more nongovernment advocates, who were less familiar with the Court.²⁶¹ While a quarter of the nongovernment advocates who appeared before the Court in the 1840 Term argued two or more cases, that number fell to 7% by the 1940 Term.²⁶² During most of the twentieth century, members of the private bar did not appear nearly as regularly before the Court as did

258. CAPLAN, *supra* note 6, at 3–4.

259. See *supra* notes 103–105 and accompanying text.

260. Shapiro, *supra* note 103, at 28.

261. Lazarus, *supra* note 69, at 1493 n.30.

262. *Id.*

members of the OSG, who continuously honed their oral advocacy in this manner.²⁶³

The rise of the Supreme Court bar since the mid-1980s, however, has eroded that advantage. In the 1980s, several prominent members of the OSG—including former SGs—went to private law firms. The first was former SG Lee, who left his position for Sidley Austin in 1985.²⁶⁴ In the years that followed, several other OSG lawyers went into private practice.²⁶⁵ Today, Supreme Court practices staffed by former members of the OSG and other Court experts are a staple of many large law firms.²⁶⁶ Some small law firms are dedicated to practicing in appellate courts, and in particular the Supreme Court.²⁶⁷

Nonprofit organizations, law school clinics, and state solicitor general offices have also hired experienced and respected Supreme Court litigators. Organizations like the NAACP Legal Defense Fund,²⁶⁸ the American Civil Liberties Union, and Public Citizen all have active Supreme Court practices,²⁶⁹ as do associational groups like the Chamber of Commerce.²⁷⁰ In the last fifteen years, many law schools have started successful pro bono Supreme Court clinics led by members of the Supreme Court bar.²⁷¹ Thirty-nine states have a solicitor general's office, and another seven have a similar position under the attorney general.²⁷² More than half of state solicitors general attended top twenty law schools, almost 40% clerked on federal appellate courts, and 18% clerked on the Court.²⁷³

From the 2012 through the 2018 Terms, around 40% of advocates who argued before the Court were “expert” litigators—defined as either having argued before the Court at least five times or being affiliated with a firm or organization with lawyers that, in the aggregate, has argued at least ten times before the Court—from outside the OSG.²⁷⁴ Because these advocates appear regularly before the Court,

263. See Tony Mauro, *Appealing Practice*, LEGAL TIMES, Oct. 9, 2007, at 14.

264. Lazarus, *supra* note 69, at 1498.

265. *Id.* at 1499–1500.

266. *Id.* at 1500.

267. *Id.* at 1500–01.

268. *Id.* at 1501 n.69.

269. *Id.* at 1501.

270. *Id.* at 1506–07.

271. *Id.* at 1502.

272. Anthony Johnstone, *Hearing the States*, 45 PEPP. L. REV. 575, 601 (2018).

273. Greg Goelzhauser & Nicole Vouvalis, *State Coordinating Institutions and Agenda Setting on the U.S. Supreme Court*, 41 AM. POL. RSCH. 819, 823 (2013).

274. *Final Stat Pack for October Term 2018: Oral Argument – Advocates*, SCOTUSBLOG (June 28, 2019), https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_8_19-33-34.pdf [https://perma.cc/8UQ2-BXBG].

they use many of the same credibility-building and -guarding techniques as the OSG. Their high success rate in petitioning the Court, although not achieved by every expert, suggests they perform a “filtering,” or validating, function in the certiorari process that is similar to the OSG’s. In 2007, the Court granted more than half of petitions made by lawyers who were “experts.”²⁷⁵

These advocates have also been successful on the merits. Between 2013 and 2017, twenty-two groups outside the OSG had at least four arguments before the Court and at least a 50% win rate.²⁷⁶ These included eleven law firms, four state solicitors general, one state attorney general, three law school clinics, two nonprofits, and the Office of the Federal Public Defenders.²⁷⁷ Six of these groups won three quarters or more of their cases.²⁷⁸

Experienced Supreme Court advocates outside the OSG now appear frequently before the Court. These non-OSG experts increase the quality of oral argument while diminishing the Court’s need to hear from the OSG.

B. The OSG’s Access to Federal Agencies

The OSG’s ability to gather information from federal agencies and relay it to the Court was also a key advantage for most of the twentieth century. Beginning in the 1940s, a large amount of litigation centered on the legality of agency action.²⁷⁹ Answering these questions implicated formal or informal deference to the agency—which required understanding the agency’s reasoning and position—as well as policy and pragmatic concerns regarding the functioning of the federal government. The OSG was the only litigant who could provide these answers because it alone had access to the agencies.²⁸⁰

Many Supreme Court litigators, including current and former members of the OSG, told us that the office’s access to agencies gives it

275. Lazarus, *supra* note 69, at 1502, 1516; Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001-2015*, 61 VILL. L. REV. 795, 821 fig.11 (2016) (showing that from 2012 to 2015, the nine non-OSG lawyers who filed the most certiorari petitions had between 20%–50% granted).

276. Adam Feldman, *Supreme Court All-Stars 2013-2017*, EMPIRICAL SCOTUS (Sept. 13, 2018), <https://empiriscotus.com/supreme-court-all-stars-2013-2017> [<https://perma.cc/ES3G-7WNF>].

277. *Id.*

278. *Id.*

279. *See supra* Section II.B.2.

280. Even when the SG declines to defend an agency’s position, as in *Smith v. Berryhill*, 139 S. Ct. 1765 (2019), the agency may be prohibited from assisting a court-appointed amicus in defending its own actions. *See* Interview with Deepak Gupta (Apr. 2019). Gupta was the Court-appointed amicus in *Berryhill*.

an advantage over other litigants.²⁸¹ In practice, however, the OSG rarely cites nonpublic facts gathered from agencies. In our review of the OSG's amicus briefs, we found that the office almost never cited to facts about the government that were not publicly available. In the 2017 Term, for example, only one of the OSG's twenty-one amicus briefs did so.²⁸² Most arguments made by the OSG in amicus briefs are legal rather than factual. The low volume of federal legislation creating new agencies or giving new responsibilities to existing ones also reduces the volume of litigation to which agency information is relevant.²⁸³

The OSG also has an unfortunate recent history of offering inaccurate factual information about the federal government. Law professor Nancy Morawetz has documented how, in *Nken v. Holder*,²⁸⁴ the OSG misrepresented one of the core issues: whether the Department of Homeland Security ("DHS") had a policy to return persons if they won their deportation case in court.²⁸⁵ After the case was argued, Freedom of Information Act ("FOIA") litigation showed that the OSG "buried" DHS's lack of such a policy.²⁸⁶ The OSG wrote to the Court to "clarify and correct" its prior statement—several years after the Court issued its decision.²⁸⁷

In *Clapper v. Amnesty International*,²⁸⁸ which involved a constitutional challenge to the Foreign Intelligence Surveillance Act, standing was a central issue. At oral argument, then-SG Verrilli told the Court that the government had a practice of giving notice to criminal defendants when warrantless surveillance was the source of evidence against them, and thus those individuals would have standing

281. Interview with Senior OSG Attorney, *supra* note 85 ("We can be a repository of information about the federal agencies, and the Court counts on us to go out there and get it. The Court cannot get that information anywhere else."); Interview with Garre, *supra* note 85; Interview with Kannon Shanmugam (Apr. 2019); Interview with Clement, *supra* note 247.

282. Brief of the United States as Amicus Curiae Supporting Neither Party at 31, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (No. 16-499). The SG's brief in *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018), arguably also contained new information, but this new information reflected the DOJ's decision to change its position on whether the type of voter roll maintenance system used by Ohio was legally permissible. Brief of the United States as Amicus Curiae Supporting Petitioner at 14, *Husted*, 138 S. Ct. 1833 (No. 16-980).

283. Paul Clement has suggested that the low volume of federal legislation has contributed to the reduction in SG certiorari petitions in the last two decades. See Cordray & Cordray, *supra* note 3, at 1350 n.137.

284. 556 U.S. 418 (2009).

285. Nancy Morawetz, *Convenient Facts: Nken v. Holder, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600, 1602 (2013).

286. *Id.* at 1641.

287. Letter from Michael R. Dreeben, Deputy Solic. Gen., U.S. Dep't of Just., to William K. Suter, Clerk, Sup. Ct. of the U.S. 1 (Apr. 24, 2012), <https://www.documentcloud.org/documents/346755-nken-v-holder-letter.html> [https://perma.cc/32R8-TJZU].

288. 568 U.S. 398 (2013).

to challenge the law. But he said that the reporters, lawyers, and human rights groups that wanted to challenge the law lacked standing because they could not show they had been harmed by the surveillance program—and they had no reason to think their communications were being collected.²⁸⁹ The majority opinion parroted this point.²⁹⁰ The DOJ, however, had no such policy for giving notice.²⁹¹ Verrilli had apparently been unaware that he misled the Court. He later convinced the DOJ to change its procedures to give such notice.²⁹²

More recently, in *Department of Commerce v. New York*,²⁹³ a case about whether the Secretary of Commerce could add a citizenship question to the 2020 census, a majority of the Court concluded that SG Francisco’s representations to the Court were demonstrably false. The Secretary and the SG claimed that the citizenship question was necessary to better enforce the Voting Rights Act and that the Justice Department had requested that the Commerce Department add the question.²⁹⁴ Yet the record revealed that the Secretary decided on his own to add the question and that his policy director shopped around for an agency that would request citizenship data.²⁹⁵ The majority concluded that the SG presented “an explanation for agency action that is incongruent with what the record reveals about the agency’s priorities and decisionmaking process.”²⁹⁶

The fact that the OSG represented a party rather than an amicus in these cases might account for what Morawetz criticizes as “the work of an advocate.”²⁹⁷ But if—as the Tenth Justice concept assumes—the OSG is motivated to jealously guard its credibility because it is a repeat player, there should be minimal differences in how it approaches party versus amicus cases. The problem with the OSG’s use of facts is that, in most cases, they cannot be verified.²⁹⁸ The claim is not that the OSG acts in bad faith; rather, it is that the appellate process is not designed for fact-finding and therefore the OSG’s ability

289. Transcript of Oral Argument at 7–8, *Clapper*, 568 U.S. 398 (No. 11-1025).

290. *Clapper*, 568 U.S. at 421–22.

291. Sandra L. Lynch, *Constitutional Integrity: Lessons from the Shadows*, 92 N.Y.U. L. REV. 623, 626 & n.19 (2017).

292. Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES (Oct. 16, 2013), <https://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html> [<https://perma.cc/R76W-WRZW>].

293. 139 S. Ct. 2551 (2019).

294. *Id.* at 2562.

295. *Id.* at 2575.

296. *Id.*

297. Morawetz, *supra* note 285, at 1654.

298. *Id.* at 1654–55.

to offer these facts is not necessarily valuable to the Court's decisionmaking process.

Some of this fact-finding may also be conducted by lawyers outside the OSG. Since the 1960s and 1970s, agencies increasingly conduct their work in public,²⁹⁹ and federal statutes like FOIA³⁰⁰ have created affirmative disclosure requirements for agencies. Scholarship has shown how the rise of citations to legislative history in the first half of the twentieth century was dominated by government lawyers, in part because they had access to better resources.³⁰¹ Today, a combination of greater litigation around agencies coupled with growth in legal research technology has diminished the government's historical advantage—though admittedly has not eliminated it.³⁰²

Some of the most influential briefs that offered information gathered from government officials were not authored by the OSG. In the 2003 affirmative action case *Grutter v. Bollinger*,³⁰³ one of the arguments the Court found most persuasive came from an amicus brief on behalf of retired military officials. Counsel of record Carter Phillips argued that affirmative action was a national security issue and that the military required officers trained in diverse environments.³⁰⁴ The brief was repeatedly cited at oral argument.³⁰⁵ As a measure of the brief's influence, when the Court considered another constitutional challenge to affirmative action thirteen years later, the OSG cosigned a brief with the Department of Defense,³⁰⁶ and SG Verrilli proactively brought up the point at oral argument.³⁰⁷

299. See MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945-1975* (2015).

300. 5 U.S.C. § 552(a)(2); see also Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions, 54 Fed. Reg. 53, 493, 53, 495 (Dec. 29, 1989) (to be codified at 1 C.F.R. pts. 305, 310) (providing guidance for agencies' public disclosures and indexing, as required under the FOIA).

301. Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 281 (2013).

302. *Id.* at 390 n.446.

303. 539 U.S. 306 (2003).

304. Brief of Lieutenant General Julius W. Becton et al. as Amici Curiae, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516). The OSG also filed an amicus brief in the case but did not mention any military interest. Brief for the United States as Amicus Curiae Supporting Petitioner, *Grutter*, 539 U.S. 306 (No. 02-241).

305. Larsen & Devins, *supra* note 20, at 1905.

306. Brief for the United States as Amicus Curiae Supporting Respondents, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (No. 14-981).

307. Transcript of Oral Argument at 87, *Fisher*, 136 S. Ct. 2198 (No. 14-981).

Finally, several Justices have recently expressed skepticism about judicial deference to administrative agencies in litigation.³⁰⁸ If agencies' own policy and interpretive statements are not worthy of deference, agency operations, as synthesized through the OSG, should not be held in any particular esteem.

C. The SG as the Tenth Justice

The conception of the SG as the “Tenth Justice” stems from a long history of OSG practice. It is not clear when the moniker originated, but it has been core to the perception of the OSG at least since the 1930s.³⁰⁹ The concept is rooted in the OSG's service to at least two, and sometimes three, branches of the government: to the executive, by soliciting and presenting its views; sometimes to the legislative, by defending federal statutes; and to the judicial, by presenting the arguments and viewpoints that allow for the best development of American law. Because the OSG is the quintessential repeat player at the Court, it best fulfills its role (as the representative of the executive branch) by maximizing its credibility before its audience (the Court).³¹⁰ This role is reinforced by the norm of the SG's “independence,” a shield from the political pressures on the AG and other parts of the DOJ in all but the most controversial of cases.³¹¹

The SG's ability to serve as the Tenth Justice is possible only because of a professional anomaly: the SG, unlike virtually every other lawyer, does not have a readily identifiable client to whom he owes legal duties. Under the standard ethical rules, attorneys are bound to consider only what is in the interest of a given client and not how a matter will affect other clients or even the development of the law.³¹² They cannot inform the Court that the court below erred in ruling for their clients.

308. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425–48 (2019) (Gorsuch, J., concurring in judgment) (arguing that current deferential precedent be overturned, which would allow courts to decide cases based on their own independent judgment).

309. See Stern, *supra* note 116, at 155 (quoting Judge Thacher speaking as SG in 1931 as saying, “This duty brings with it a peculiar responsibility to the Court, in taking infinite pains to see that the cases presented are only such as are worthy of its review” and asserting that “[t]he Solicitor General regards himself—and the Supreme Court regards him—not only as an officer of the Executive Branch but also as an officer of the Court”).

310. Cordray & Cordray, *supra* note 3, at 1337.

311. See CAPLAN, *supra* note 6, at 17–18 (“[I]t has been important for the SG to be ‘independent’ in order to fulfill his duty to both the Executive Branch and the Supreme Court.”).

312. See MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2020) (“A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”).

Because the OSG is unconstrained by these ethical requirements, it can serve partly as an advocate for its client and otherwise as an aid to the Court.³¹³ As a result, the OSG is expected to maintain higher litigation standards than those of attorneys for private litigants. The Tenth Justice does not present legal arguments to the Court unless he finds them credible and believes the Court will also.

Every primary function associated with the Tenth Justice is premised on this unique ethical status. One of the OSG's most important roles is shaping the Court's docket by deciding whether to petition for certiorari and, if so, what position to take.³¹⁴ SGs have described this choice as motivated by an effort to meet the Court's expectations.³¹⁵ Based on the OSG's grant rate compared to those of other litigants, the Court seems to value this filtering.³¹⁶

The OSG also filters through the potentially discordant views within the federal government to present only one to the Court.³¹⁷ In a series of cases from 1866 to 1888, the Court held that the AG had plenary power over all litigation conducted on behalf of the federal government unless that authority was statutorily placed elsewhere.³¹⁸ No federal court would hear from a representative of another department of the federal government if the AG or his representative (the SG) already represented the United States in the litigation.³¹⁹ When Congress later created administrative agencies, Congress followed the courts' lead and generally vested agencies' litigation

313. See Francis J. Aul, Note, *Out of Many Clients, One: Conflict of Interest and the Office of the Solicitor General*, 31 GEO. J. LEGAL ETHICS 475 (2018).

314. Erwin N. Griswold, *The Office of the Solicitor General—Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527, 532 (1969); Stern, *supra* note 116, at 155; Lee, *supra* note 248, at 598.

315. Stern, *supra* note 116, at 156 (“The selfish reason for the Solicitor General’s self-restraint in petitioning for certiorari is to give the Court confidence in Government petitions.”); Lee, *supra* note 248, at 598–99.

316. See Cordray & Cordray, *supra* note 3, at 1333 (noting that Court grants approximately 70% of the OSG’s petitions for certiorari); *Examining the Operation and Activities of the Office of the Solicitor General of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, *supra* note 174, at 4 (“[T]he Supreme Court has stated: This Court relies on the Solicitor General to exercise such independent judgment and to decline to authorize petitions for review in this Court in the majority of cases the Government has lost in the courts of appeals.”). Former SG Rex Lee speculated that the Court has a “decisional capacity” for the federal government such that if the SG petitioned for certiorari more frequently, the Court would grant a smaller percentage of its petitions. Lee, *supra* note 248, at 598.

317. Wade H. McCree, Jr., *The Solicitor General and His Client*, 59 WASH. U. L.Q. 337, 340–41 (1981).

318. See Sewall Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165, 185–87 (1938).

319. *Id.* at 185.

authority in the DOJ.³²⁰ The Court has emphasized the importance of hearing only “one voice” from the federal government—a voice, the Court clarified, “that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people.”³²¹

The OSG attempts to consider how every case may impact the interests of the different parts of the executive branch. To do so, it has developed a formal policy of soliciting the views of the agencies any time it considers entering a case as amicus. The OSG receives written memoranda from agency attorneys articulating their legal positions.³²² The OSG then arranges a meeting with agency representatives and each of the litigants to hear the different interests at stake before determining its position.³²³ The tempering of agencies’ narrow interests may take many forms, including a compromise position between those of two agencies, a toning down of an agency’s view, or a refusal to present an agency’s view to the Court.³²⁴

It is only because the OSG has no “client” that the Court can require it to perform this function, which is considered an essential part of the Tenth Justice role.³²⁵ Many former SGs have agonized about the predictable conflicts that arise between agencies, which must be settled out of the view of the Court and which the SG has unilateral authority to adjudicate.³²⁶ There is no indication the Court shares these concerns.

One of the most prominently proclaimed ways in which this function manifests itself is that the SG sometimes “confesses error,” or

320. See James R. Harvey III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1575 (1996) (noting that the SG’s office is “much less encumbered by the restrictions on litigating authority and loyalty toward an agency” than the DOJ generally and that fewer than ten out of forty-one agencies can independently litigate before the Court).

321. *United States v. Providence J. Co.*, 485 U.S. 693, 706 (1988).

322. Interview with Former Senior OSG Attorney, *supra* note 85.

323. Interview with Joshua Rosenkranz (Apr. 2019); Interview with Clement, *supra* note 247.

324. Interview with Harrington, *supra* note 250; Interview with Senior OSG Attorney, *supra* note 85; Interview with Former Senior OSG Attorney, *supra* note 85; Interview with Waxman, *supra* note 81.

325. Stern, *supra* note 116, at 155.

326. *Id.* at 217; Theodore B. Olson, Lecture, *The Advocate as Friend: The Solicitor General’s Stewardship Through the Example of Rex E. Lee*, 2003 BYU L. REV. 1, 12–13 (“[T]he startling consequence of my making a decision in these circumstances is that the side that I rule against doesn’t get represented at all.” (quoting Rex E. Lee)); Symposium, *Bush Panel*, 2003 BYU L. REV. 62, 73 (“I have always been a little surprised at the prominence of the office in resolving those types of decisions.” (quoting John G. Roberts)); Interview with Senior OSG Attorney, *supra* note 85 (explaining that the OSG often gives greater weight to the lead agency, the soundness of legal arguments, and spillover effects while remarking that “[t]here is no formula, and that is what makes mediating conflicts between the different agencies one of the most interesting parts of the job”).

contends that the lower court erred in siding with him.³²⁷ Estimates suggest this happens two to three times per year.³²⁸ Scholars³²⁹ and members of the OSG³³⁰ tout this as strong evidence of Tenth Justice-like behavior—although others have viewed it as little more than partisan politics.³³¹ Confessing error, absent permission from the client, would be flatly unethical for an attorney representing a private party.³³² Because the SG does not have a “client” in the traditional sense of the word, he is not bound by this rule.

The most central aspect of the Tenth Justice tradition is the notion that the SG is apolitical, or at least rarely political. This same neutrality is not demanded of other litigants, who are expected and required to advocate for the positions of their clients, political or otherwise. When the OSG litigates on behalf of the “interests of the United States”—as determined by the SG in his discretion—the OSG may represent one of two conceivable interests: the institutional interests of the United States, which should be relatively constant over time, or the president’s interests, which shift across administrations.

Although the OSG has long proclaimed its independence from politics, the basis of this claim is questionable. The SG (and, after 1982, the Principal Deputy as well³³³) is a political appointee who works under

327. See Drew S. Days III, Lecture, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 KY. L.J. 485, 487–88 (1994) (quoting REBECCA M. SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 119–20 (1992)).

328. See David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2080 (1994); Neal Kumar Katyal, Lecture, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027, 3030 (2013).

329. CAPLAN, *supra* note 6, at 9–10.

330. See Days, *supra* note 327, at 487–88; Stern, *supra* note 116, at 157; Interview with Harrington, *supra* note 250.

331. When the government confesses error and refuses to defend the judgment below, the Court often appoints an amicus to do so. See generally Katherine Shaw, Essay, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORNELL L. REV. 1533 (2016). It is not clear that the Court respects refusals to defend the judgment below, and former Justices were open about disliking it. See CAPLAN, *supra* note 6, at 10 (discussing Chief Justice Rehnquist's dislike of the practice). At other times, some of the OSG's error confessions have been interpreted as political decisions, as was the Obama Administration's refusal to defend the Defense of Marriage Act. See, e.g., Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES (Feb. 23, 2011), <https://www.nytimes.com/2011/02/24/us/24marriage.html> [<https://perma.cc/6T3L-G4VC>]. As Judge Learned Hand said, “It's bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General.” Archibald Cox, *The Government in the Supreme Court*, 44 CHI. BAR REC. 221, 224–25 (1963). Some of these “confessions” also come long after the case has been decided, such as when Neal Katyal “confessed error” in *Korematsu*—more than half a century after it was decided. See Katyal, *supra* note 328, at 3029.

332. See *supra* note 312 and accompanying text (considering ethical rules).

333. CAPLAN, *supra* note 6, at 62.

another political appointee, the AG.³³⁴ The president and the AG can fire the SG without cause.³³⁵ And the president need not have direct discussions with the SG to influence him. Presidents often make public statements about their policy aspirations, and an SG who wanted to serve the president's wishes could use those as cues.

Dating back at least to the tenure of SG Philip Perlman (appointed by President Truman), the SG has had conversations with the AG and the president about the position the OSG would take in highly political cases.³³⁶ In *Brown*, the OSG effectively transferred control of its amicus brief to the AG's office.³³⁷

Communication between the OSG and the president's office makes sense from a structural perspective. If the OSG is to represent the views of the federal government, and more narrowly the executive branch, the president will unquestionably shape those views. Many former SGs stated openly that they believed they had a duty to serve the president's interests.³³⁸

At different points in the OSG's history, politicization was a primary concern of Court watchers and some Justices.³³⁹ That occurred most notably during the Reagan Administration. Reagan had run for president on an explicit agenda to rein in the excesses of the activist Warren Court.³⁴⁰ Observers worried that he would pressure the Court and the SG to adopt positions out of political ideology rather than legal principle.³⁴¹

A memorandum published by the Office of Legal Counsel in 1977 seeking to define the proper relationship between the SG and the White

334. See Griswold, *supra* note 314, at 530–31; Days, *supra* note 327, at 489–95.

335. See REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 70 (1994) (“[The SG] serve[s] at the pleasure of the president.”).

336. See *supra* notes 146–153 and accompanying text (explaining the Truman White House's involvement in the decision to participate in *Shelley v. Kramer* and in drafting of government's brief); see also Days, *supra* note 327, at 493 (“[G]iven the way that the decision-making process works, by the time a case has reached the point of possible appellate court or Supreme Court review, the policy concerns of the President have usually been fully presented to the Solicitor General by his appointees in the affected departments and agencies.”).

337. CAPLAN, *supra* note 6, at 28–32.

338. See, e.g., Lee, *supra* note 248, at 599 (describing the practice of requesting certiorari in cases that “fall right at the core of the current administration's broader agenda”); Symposium, *Panel of Former Solicitors General*, 2003 BYU L. REV. 153, 155–59 (Starr, Dellinger, and Days discussing various levels of cooperation with and deference towards White House lawyers).

339. See generally CAPLAN, *supra* note 6 (documenting the SG's usual independence from the president and reasons to believe that policy changed during the Reagan Administration, and in particular during Charles Fried's tenure).

340. Frank B. Cross, Thomas A. Smith & Antonio Tomarchio, *The Reagan Revolution in the Network of Law*, 57 EMORY L.J. 1227, 1228 (2008).

341. See CAPLAN, *supra* note 6, at 270.

House explained the tradition of “independence” as a means of ensuring that the OSG made legal decisions unclouded by political considerations: “If the independent legal advice of the Solicitor General is to be preserved, it should normally be the Solicitor General who decides when to seek the advice of the Attorney General or the President in a given case.”³⁴² A criticism of SG Fried was premised on this view. Caplan argued that a group of political appointees in the Justice Department, supported by the Reagan White House, put extraordinary pressure on SGs Lee and Fried. Lee largely resisted the pressure, saying when he resigned: “There has been this notion that my job is to press the Administration’s policies at every turn and announce true conservative principles through the pages of my briefs. It is not. I’m the Solicitor General, not the Pamphleteer General.”³⁴³ Caplan argued that Fried allowed politics to guide him so strongly in some cases that it overrode his utility to the Court, by compromising either his judgment about what constituted an acceptable legal argument or his commitment to making one.³⁴⁴

Reflecting on his tenure, now-Professor Fried disagreed with even the premise of the Tenth Justice:

The idea of the SG as a “Tenth Justice” who does not have opinions about what the law should be is odd. It’s not like the first nine don’t have points of view. As long as the SG presents an objective and complete view of precedent and the record, he may ask the Court to develop the law to be consistent with his point of view.³⁴⁵

We do not challenge the Tenth Justice concept, nor do we argue that the SG’s capacity to conform to it has eroded. Instead, our claim is that he has strayed from this role over time with the Court’s effective permission.

Historically, the Court appeared sensitive to the distinction between the long-term federal interest and the president’s interests: it rejected some of the SG’s requests to participate in amicus oral argument when the federal interest was minimal.³⁴⁶ But from 2011 until April 2020, the Court rejected none of these requests.³⁴⁷ The mere fact of granting oral argument does not imply that the Court necessarily agrees with the OSG’s position, and the Court has listened to SGs

342. JOHN M. HARMON, OFF. OF LEGAL COUNS., 77-56 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL: ROLE OF THE SOLICITOR GENERAL 235 (1977), <https://www.justice.gov/file/21201/download> [<https://perma.cc/5X39-8PTA>].

343. CAPLAN, *supra* note 6, at 107.

344. *Id.* at 235–48 (documenting instances in which Fried’s positions during the 1985 Term appeared to be grounded in political considerations at the expense of strong legal reasoning).

345. Interview with Fried, *supra* note 85.

346. *See supra* notes 209–231 and accompanying text.

347. *See supra* Figure 6 (illustrating the grant rate of SG requests).

appointed by both Republicans and Democrats. But the Justices' nearly unlimited willingness to hear from the OSG nonetheless suggests they welcome the OSG's participation in all the cases in which it has expressed an interest, seemingly without reference to its motives.

Current and former members of the OSG told us that political cases were only a small part of the office's workload. This assessment appears largely correct: most of the cases the OSG enters as amicus involve questions of agency administration or regulation.³⁴⁸ But even those cases may have political overtones,³⁴⁹ and the minority of cases that are politically charged are the most visible and thus shape the OSG's reputation.³⁵⁰ As a sign of their importance, these cases are often argued by the SG or the Principal Deputy SG.

Despite evidence of the SG's political motivations in some cases, the Court's behavior suggests it believes to a large extent in the Tenth Justice conception of the SG. Unlike its treatment of any other litigant, the Court has relied on, and even shaped, the OSG throughout history.

The strongest indication of the Court's reliance on the OSG is its issuance of CVSG orders.³⁵¹ Why this practice developed is unclear, but it suggests that the Court valued the OSG's judgment even though—or perhaps because—it lacked an identifiable client.³⁵² Chief Justice Rehnquist stated openly that he gave the OSG's petitions for certiorari the “benefit of the doubt.”³⁵³

The Court has also continuously shaped the OSG's behavior. In 1949, the Court for the first time required that all nongovernmental parties who wanted to file an amicus brief either obtain the consent of the parties or else file a motion describing the applicant's interest and how it offered an argument not adequately covered by the parties.³⁵⁴ Following the rule change, the OSG flipped from almost always giving

348. See *supra* Section II.A.2 (discussing the most common governmental interests asserted in amicus briefs).

349. See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (upholding *Auer* deference, a doctrine with political implications for implementation of the president's agenda through administrative agencies).

350. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018); *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

351. Solimine, *supra* note 70, at 1186; Lepore, *supra* note 58, at 36.

352. Cf., e.g., Preliminary Memorandum, *Solem v. Bartlett* (Mar. 18, 1983), in Lewis F. Powell, Jr. Papers, Box 107, Supreme Court Case Files Collection 1, 5 (on file with the Washington & Lee University School of Law Library), https://law2.wlu.edu/deptimages/powell%20archives/82-1253_Solm_Bartlett.pdf [<https://perma.cc/H6P3-D8T7>] (“I therefore see no way around a grant in this case, although it may be worthwhile to call for the views of the Solicitor General to see whether he suggests any good way of avoiding plenary review.”).

353. CAPLAN, *supra* note 6, at 266.

354. Harper & Etherington, *supra* note 135, at 1173.

consent to almost always refusing it.³⁵⁵ Justice Frankfurter twice publicly reprimanded the OSG for this new practice.³⁵⁶ He complained that the OSG had improperly shifted the burden of sorting applications—properly assigned to it as a party—back onto the Court.³⁵⁷ When SG Fried advanced legal arguments the Court believed went too far, the Court denied his motions for amicus oral argument and even chastised him in opinions.³⁵⁸ When they believed he favored politics over the quality of legal argument, some Justices went on record and told journalist Lincoln Caplan so.³⁵⁹ Chief Justice Rehnquist said he began looking at the SG's certiorari petitions more closely.³⁶⁰ When SG Francisco reversed the OSG's position in several cases, some of the Justices questioned him about that at oral argument.³⁶¹

While the Court has given the OSG immense power over its docket, these targeted directives demonstrate how the Court also seeks to shape the OSG into the institution it wants. More concerning, this behavior suggests that the Court views these problems of politicization and overstepping as one-off and correctable. It indicates that some of the Justices believe they can discern when the OSG is acting in a manner of which they disapprove. If accurate, this view could justify a default view of the SG as the Tenth Justice. The Court's willingness to hear from the OSG at amicus oral argument in virtually any case it desires, however, suggests that the Court does not—and perhaps cannot—in fact detect when the OSG is motivated purely by politics.

IV. DECIDING WHO SHOULD BE HEARD

We have argued that the traditional justifications for giving preference to OSG over non-OSG amici for participation in oral argument no longer hold. Standing alone, this conclusion does not explain who should be given the privilege of amicus oral argument and when. This Part aims to fill that gap. We begin by cataloging the concerns posed by amicus oral argument: its challenge to due process in the adversarial context, its potential to unduly

355. Krislov, *supra* note 21, at 714.

356. Harper & Etherington, *supra* note 135, at 1176; Krislov, *supra* note 21, at 714.

357. On Lee v. United States, 343 U.S. 924 (1952) (mem., Frankfurter, J.).

358. See *supra* Section II.B.3 (discussing the period during which Fried served as SG).

359. See CAPLAN, *supra* note 6, at 264–67.

360. See *id.* at 266 (Chief Justice Rehnquist stating that he lost “the feeling that every case is presented squarely” in the SG's certiorari petitions).

361. See, e.g., Transcript of Oral Argument at 34, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (No. 16-1466) (“Justice Sotomayor: Mr.—Mr. General, by the way, how many times this term already have you flipped positions from prior administrations?”).

influence the development of law, and its threats to the Court's institutional legitimacy.

We start with the observation that all amicus oral argument participation—but particularly by the OSG so frequently and to the almost complete exclusion of others—creates procedural and substantive problems. First, amicus oral argument distorts the adversarial process. The due process concerns underpinning the American adversarial system presume a contest between two parties, each with lawyer who advocates zealously on their behalf.³⁶² Unlike most amici, the parties will be directly impacted by the Court's decision regardless of how narrowly it rules and on what grounds.

In many cases, amicus oral argument displaces the parties' rights as litigants. Divided argument is, as Justice (and former SG) Robert Jackson put it, "at best . . . somewhat overlapping, repetitious and incomplete and, at worst, contradictory, inconsistent and confusing."³⁶³ He offered a blanket rule for litigators: "Never divide between two or more counsel the argument on behalf of a single interest."³⁶⁴ At the Supreme Court, amici generally take argument time away from the party they support.³⁶⁵ Granting amicus oral argument requests therefore has the effect of depriving the lawyer representing that party of time she could use to advocate for her client.

In addition, amici are encouraged to offer legal arguments not advanced by the parties.³⁶⁶ They may thus undermine or even derail a party's arguments. The lawyer for the party the amicus supports may even have to spend some of her newly diminished time distinguishing the amicus's arguments. Even when an amicus adopts the same legal reasoning as the party it supports, his participation undermines the due process rights of the opposing party (who lacks the opportunity to have a second voice buttress its arguments). In some categories of cases, especially criminal cases, the OSG's support is only reasonably available to one party.³⁶⁷

Private litigants seldom oppose the SG's motions for amicus oral argument and often solicit them when the SG might be on their side. Several Supreme Court litigators told us they almost never, or had

362. Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 3 (2011).

363. Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 802 (1951).

364. *Id.* at 801–02.

365. See SUP. CT. R. 28.7 (stating that, in the absence of a party's consent to share time, an amicus oral argument motion "will be granted only in the most extraordinary circumstances").

366. *Id.* 37.1.

367. See *infra* text accompanying note 430.

never, supported amicus oral argument by even other elite Supreme Court practitioners outside the OSG.³⁶⁸ This suggests that parties may want the OSG on their side because they believe the Court weighs arguments more heavily when they are advanced by the OSG—not because the OSG attorney would more skillfully use the ten minutes of oral argument than they would. Another possible explanation is that these litigators do not want to appear to rebuke the OSG because of its influence over the Court and its repeat player status.

Amicus oral argument may also affect the substantive development of the law. One of the most frequently cited rationales for permitting amicus oral argument is that the amicus may help the Court reach the correct legal rule in a given case. Some instances in which the Court has granted amicus oral argument appear clearly to be motivated by this thought—particularly when the amici supported neither party.³⁶⁹ The shift in the OSG's caseload at the Court from participating primarily as a party to appearing more frequently as an amicus suggests that the SG believes the OSG can affect substantive outcomes as an amicus.³⁷⁰ In some cases, its impact is clear.³⁷¹

The fact that it is the OSG who dominates amicus oral argument is particularly significant because of the SG's Tenth Justice reputation. As discussed above, the Court defers to the SG in many areas and likely believes he fulfills that role. Some of the OSG's amicus positions, however, do not warrant this confidence. But social science research suggests that it is difficult for decisionmakers to accurately discount information, and particularly that from an otherwise reputable actor.³⁷² If the Justices are unable to distinguish between when the OSG's judgment—and even citation of new factual information—is deserving

368. Interview with Rosenkranz, *supra* note 323; Interview with Murphy, *supra* note 242; Interview with Verrilli, *supra* note 85.

369. See, e.g., *Ortiz v. United States*, 138 S. Ct. 576 (2018) (mem.) (granting amicus oral argument by Professor Aditya Bamzai, whose brief, in support of neither party, argued that the Court lacked jurisdiction to hear the case).

370. Cf. Linda Greenhouse, *An Old Supreme Court Dream*, N.Y. TIMES (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/opinion/supreme-court-immigration.html> [<https://perma.cc/DB8J-9GP5>] (describing a memorandum that then-Special Assistant to the AG John Roberts wrote to the AG that lamented the SG's failure to enter *Plyler v. Doe*, 457 U.S. 202 (1982), and noted that a brief by OSG “could well have . . . altered the outcome”).

371. See, e.g., Megan McCracken, *Legally Indefensible: Requiring Death Row Prisoners to Prove Available Execution Alternatives*, 41 CHAMPION 46, 47–48 (2017) (discussing how OSG's amicus position in *Hill v. McDonough*, 547 U.S. 573 (2006), influenced the legal standard adopted in *Baze v. Rees*, 553 U.S. 35 (2008)).

372. Baruch Fischhoff, *Perceived Informativeness of Facts*, 3 J. EXPERIMENTAL PSYCH.: HUM. PERCEPTION & PERFORMANCE 349, 349 (1977); Chanthika Pornpitakpan, *The Persuasiveness of Source Credibility: A Critical Review of Five Decades' Evidence*, 34 J. APPLIED SOC. PSYCH. 243, 244 (2004).

of deference and when it is not, their decisions may give undue weight to the OSG's views.

Outside of the procedural and substantive problems posed by amicus oral argument, the Court's indulgence of the OSG as an amicus at oral argument even when it acts politically also challenges the Court's legitimacy.³⁷³ Over the last fifty years, the public has come to view the Court as a political body.³⁷⁴ One reason for this is its increased willingness to hear cases litigated by interest groups and motivated by ideology.³⁷⁵ To counter this perception, the Court should avoid favoring actors who operate in a political capacity, particularly the federal government. If the Court regularly heard from the Republican or Democratic Party, Americans would rightly take note of the intrusion of politics in an ostensibly nonpolitical proceeding.

Court watchers may also be concerned about how this could affect the development of the law in the cases in which a majority of the Court and the SG were appointed by presidents of the same party. In these cases, it is not just that the Court listens to a political actor. Rather, some of the Justices may benefit from a political actor who makes sophisticated legal arguments that advance ideological interests while benefiting from a reputation for neutrality and independence.

Aside from politics, allowing the OSG to argue as an amicus so frequently also enables the OSG to amplify its distinctly institutional viewpoint—that of the federal government—at the Court. The Justices are naturally sympathetic to the executive's institutional interests, and particularly with the government's ability to function effectively and enforce the law.³⁷⁶ The OSG's perspective is also fundamentally focused on federal power, and executive power in particular. At times, it is at odds with the views of a majority of one or both houses of Congress.³⁷⁷

373. See Curry et al., *supra* note 166, at 241 (discussing political avenues of influence over the Court); Barbara L. Graham, *Explaining Supreme Court Policymaking in Civil Rights: The Influence of the Solicitor General, 1953-2002*, 31 POL'Y STUD. J. 253, 266 (2003).

374. See Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 262 (2019); Brandon L. Bartels & Christopher D. Johnston, *Political Justice? Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 PUB. OP. Q. 105, 112 (2011). Some scholars have even connected this trend directly to the Court's apparent favoritism towards the OSG. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 14–15 (1991) (describing the SG's "special role" at the Court and concluding that it "does not comport with" notions of independence and a judicial system able to defy legislative and political majorities).

375. Hasen, *supra* note 374, at 266–71; Carl Hulse, *Political Polarization Takes Hold of the Supreme Court*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/us/politics/political-polarization-supreme-court.html> [<https://perma.cc/239Q-QTN8>].

376. See Cordray & Cordray, *supra* note 3, at 1338 nn.68–69.

377. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (in which the OSG and the United States Senate filed briefs and argued as amici on opposite sides). Amicus oral argument motions by

This is a bias many of the Justices likely share³⁷⁸ and one that is amplified by the OSG's frequent oral arguments at the Court.

Given the risks inherent in continuing the Court's current amicus oral argument practice, we suggest a framework for deciding which amicus oral argument motions to grant. Although there are many conditions under which an amicus's participation at oral argument is unjustified, there are also circumstances in which the value of divided argument might outweigh its costs.³⁷⁹

We recognize that the Court is likely cautious about granting amicus oral argument participation. When we asked expert Supreme Court litigators why, in their opinion, the Court did not grant more of these motions, several told us they believed the Court did not want to be in the position of picking and choosing among amici.³⁸⁰ In anticipation of this concern, we propose a standard for when amicus oral argument motions should be granted and identify its benefits over the Court's current approach in Section A. In Sections B and C, we discuss the primary ways this standard would change the Court's current amicus oral argument practice as it relates to OSG and non-OSG litigants, respectively.

A. When Amici Should Be Heard

Oral argument at the Supreme Court must balance dual objectives. It must fulfill the due process principles underlying every exercise of judicial power in an adversarial system. It also must account, however, for its distinct role in "resolv[ing] public policy issues of national importance."³⁸¹ Given these charges, we suggest the Court should allow amici to argue only if they fall into one of two narrow categories.

members of Congress are rare, but often, though not always, granted. *See, e.g.,* *Coleman v. Ct. of Appeals of Md.*, 565 U.S. 1091 (2011) (denying amicus oral argument motion of Senator Tom Harkin and other members of Congress).

378. Every current Justice except Justice Kagan was a judge on a U.S. Court of Appeals before being nominated to the U.S. Supreme Court. Every Justice other than Justice Barrett has worked in the executive branch of the U.S. government. *See* SUP. CT. OF THE U.S., *supra* note 9 (providing biographical information of the Justices).

379. *See* Solimine, *supra* note 70, at 1204 ("The dangers of excessive politicization and disruption of the adversarial process might . . . attend the filing of *any* amicus brief by the SG. But those costs are tolerable . . . when the SG is asserting a strong and direct federal interest. The costs loom larger when the federal interest . . . is attenuated.").

380. Interview with David Frederick (May 2019) ("A proposal that would spark more motions for amicus oral argument is not one that is going to be well received by the Justices."); Interview with Verrilli, *supra* note 85; Interview with Clement, *supra* note 247.

381. Post, *supra* note 16, at 1273 n.29.

1. Standard 1: An Amicus with a Concrete Interest Who Provides New Legal Reasoning

The first standard has two criteria: an amicus who (1) has a concrete interest in the litigation, and (2) provides new reasoning (relative to the parties' presentation) that advances this interest should be permitted to participate in oral argument. To have a "concrete interest," an amicus must have some type of preexisting practice that would be disrupted by the case at issue and that the amicus seeks to defend. This establishes that the amicus would likely be affected by the judgment. Merely stating that an amicus has an academic³⁸² or philosophical³⁸³ interest in the outcome would be insufficient to demonstrate a concrete interest. "New reasoning" refers to legal analysis (for example, an originalist analysis) not provided by the parties.

Importantly, there is a category of arguments sometimes raised for the first time at the Court that this standard excludes: arguments principally offering new factual information. Because the Supreme Court is not a fact-finding court, new facts should be litigated in the trial court, not granted backdoor access through an amicus.³⁸⁴

By requiring a concrete interest, this procedure protects the U.S. adversarial system and parties' due process rights. The adversarial system presumes that every party has a lawyer who will advocate zealously on their behalf.³⁸⁵ Granting amicus oral argument requests often has the effect of depriving the lawyer representing a party of time she could use to advocate for her client. Under our proposed rule, no amicus may interfere with a party's presentation of the case unless the amicus demonstrates that it will also be affected by the judgment. Requiring that this amicus also present new reasoning balances the Court's policymaking role (in guiding the development of the law for many parties) with disruptions of the adversarial paradigm (in which each party must only address the opposing *party's* arguments). Because participation by an amicus who meets these criteria would be

382. See, e.g., Brief of Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party at 1, *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex.*, 571 U.S. 49 (2013) (No. 12-929) ("[Amicus] teaches and writes about civil procedure and conflict of laws, and he has an interest in the sound development of these fields.").

383. See, e.g., Brief of Amici Curiae Faith and Action et al. in Support of Petitioners at 1, *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005) (No. 03-1693) ("Amici contends the progressive withdrawal of God and his moral law from society through government action, particularly in our schools, has had an enormously detrimental effect on our culture . . .").

384. See *supra* Section III.B.

385. See Gorod, *supra* note 362, at 4 n.9 (describing the adversarial system).

permissive rather than as of right, the Court would maintain the discretion to deny such a motion on the basis that its new reasoning is not helpful to the Justices' decisionmaking.

2. Standard 2: An Amicus Who Raises an Entirely New Legal Argument

In a very narrow set of cases, granting a second type of amicus oral argument motion might be justified: when the amicus presents an entirely new legal argument that the Court should considering in adjudicating the case, even if it has no concrete interest in the litigation. Amici who fall under this standard include those raising new jurisdictional, constitutional, and other claims.³⁸⁶

Because of the oddity of permitting anyone to raise an issue at the highest level of appellate review not litigated below, the Court should be very cautious in granting these motions. As the Justices frequently remind us, the Supreme Court is "a court of review, not of first view."³⁸⁷ As a result, the Justices should strongly consider two other potential responses to an amicus who raises such an issue. The first is straightforward: in every such case, the Court should require briefing from the parties on the novel argument presented by amicus. The second, more extreme response, would be to dismiss the case as improvidently granted. This action is entirely at the Court's discretion, and several Justices have stated that the Court should do so only in very limited circumstances.³⁸⁸ Firm application of these solutions is necessary to ensure that this standard does not simply invite arguments to the Court that seek to overrule rather than apply the law or that sidetrack cases based on an issue raised only by the amicus.

This standard serves due process interests by setting a high bar for participation at oral argument by amici who will not be affected by the ruling. It does so also by ensuring that amicus oral argument motions are granted under this standard only very infrequently. By requesting briefing from the party, the Court allocates the primary responsibility for developing the argument to the parties. Only when

386. See, e.g., Brief of Professor Aditya Bamzai as Amicus Curiae in Support of Neither Party at 2, *Ortiz v. United States*, 138 S. Ct. 2165 (2018) (Nos. 16-961, 16-1017, 16-1423) (arguing that the Court did not have Article III jurisdiction to hear the case).

387. *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

388. See Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1082-95 (1988); see also *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 426 n.3 (1987) (declining to dismiss the writ of certiorari as improvidently granted because "[t]he importance of the legal issue makes it appropriate" to address the merits).

the Court views the parties' briefing or oral argument as insufficient should it grant the amicus's oral argument motion.

* * *

The Court's April 2020 denial of the OSG's amicus oral argument motion in *Ford Motor Co. v. Montana Eighth Judicial District Court* is consistent with our proscription. The case concerns state court personal jurisdiction. The OSG's interest statement reveals an interest that is tenuous and muddled. The brief first noted the United States' interest in "ensuring that private plaintiffs have access to efficient forums" to sue companies, suggesting it supported broader jurisdiction.³⁸⁹ But then it stated that the United States "often defends federal officials" and seeks to prevent "risks to . . . commerce" posed by expansive state court jurisdiction.³⁹⁰ SG Francisco ultimately decided to support Ford, though the OSG's brief does not explain why.

In the same order, the Court denied a similar motion made on behalf of Minnesota, thirty-eight other states, and the District of Columbia.³⁹¹ Although those states had a more concrete interest in the litigation than did the OSG, their brief did not advance unique reasoning or arguments.³⁹² Thus, this motion also would have been denied under our proposed standards.

B. Application to the OSG

Under our proposal, the OSG's amicus oral argument motions would likely be granted much less frequently, primarily because the threshold for a concrete interest (justifying amicus oral argument participation) is intentionally higher than that for an "interest[] of the United States." We are concerned only with the narrow question of when the OSG should be granted the privilege of being heard as amicus at oral argument, but we wish to briefly distinguish between the two standards.

The federal interest has been described by former SG Seth Waxman as "elusive" and "difficult to discern."³⁹³ In practice, the OSG

389. Brief for the United States as Amicus Curiae Supporting Petitioner at 1–2, *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, No. 19-368 (S. Ct. Mar. 6, 2020).

390. *Id.* at 2.

391. See *supra* note 1 and accompanying text.

392. See Brief for Minnesota, Texas, 37 Other States, and the District of Columbia as Amici Curiae in Support of Respondents, *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, No. 19-368 (S. Ct. Apr. 2020).

393. Waxman, *supra* note 7, at 17.

has often justified its interest in a case by referencing an executive agency's role in administering or enforcing a federal statute or the impact a case may have on the DOJ's ability to engage in civil litigation or criminal prosecution.³⁹⁴ Sometimes its justification is much more questionable.³⁹⁵

Most scholars who have evaluated whether the OSG represents the federal interest have asked whether the interest touches on some function of the federal government.³⁹⁶ This framework, however, could justify the OSG's participation in almost any case, effectively leaving the decision whether to enter a case as an amicus to historical happenstance and the SG's discretion. When asked why, for example, the OSG has participated in constitutional claims over racial gerrymandering but not partisan gerrymandering, a senior OSG attorney told us it was "somewhat by accident."³⁹⁷ The AG was a named party in the case that established the constitutional racial gerrymandering claim,³⁹⁸ so the OSG filed an amicus brief. Ever since, it has participated in these cases as amicus, "even though," as the OSG attorney noted, "they are Fourteenth Amendment cases on districting, in which the federal government now does not really have a role."³⁹⁹

More complex theories of the federal interest, as Michael Solimine has argued, might look to whether a case "may have a perceptible effect on the enforcement of federal law by some part of the executive branch, or where there has been a tradition of expertise centered in the executive branch (e.g., foreign affairs)."⁴⁰⁰ But even this definition looks only to whether an interest *exists* rather than whether the SG *advances* those interests. In cases where the OSG advances a theory that undermines, for example, an agency's enforcement policy,⁴⁰¹ the OSG cannot be said to be advancing a concrete interest.

We do not suggest that the OSG violates its statutory mandate when it lacks a concrete interest. Rather, we propose that in these cases,

394. See *supra* Section II.A (finding that the most common interests asserted in OSG amicus briefs concerned existing federal functions).

395. See *supra* Section II.A (listing examples).

396. See, e.g., Cordray & Cordray, *supra* note 3, at 1371.

397. Interview with Senior OSG Attorney, *supra* note 85 ("We entered our first racial gerrymandering case somewhat by accident. . . . If we had to make an original decision today about whether to enter those cases as an amicus, maybe we would not.").

398. *Shaw v. Reno*, 509 U.S. 630 (1993).

399. Interview with Senior OSG Attorney, *supra* note 85.

400. Solimine, *supra* note 70, at 1206.

401. See Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623 at 9, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623) (adopting a position contrary to the EEOC's enforcement policy).

the OSG—like any other litigant—should not be granted amicus oral argument time. Below, we highlight three categories of cases where the OSG’s docket would be most affected: cases without a concrete federal interest, cases against the federal interest, and cases without new reasoning.

1. Cases Without a Concrete Federal Interest

Every Term, the OSG participates as amicus in several politically salient cases. In many of them, the OSG claims to defend the “federal interest” but cannot point to any preexisting federal practice or regulation that would be disrupted by the upcoming ruling. The OSG should not be granted amicus oral argument time in these cases unless they fall under Standard 2.

For example, the 2018 case *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (“AFSCME”) concerned the legality of agency fees.⁴⁰² These fees are payments made by nonunion members to public sector unions. Mark Janus brought a First Amendment claim against AFSCME and the State of Illinois, arguing the mandatory fees constituted compelled political speech. The United States was not a party, but SG Francisco filed an amicus brief supporting Janus. The principal federal interest stated was as the “nation’s largest public employer.”⁴⁰³ The federal government, however, has no practice of imposing agency fees, and a 1978 statute prevents it from doing so.⁴⁰⁴ In filing the brief, the OSG was defending a principle—not a federal practice.

Two years earlier, then-SG Verrilli had argued as amicus in *Friedrichs v. California Teachers Association*, which presented the same question as in *Janus*.⁴⁰⁵ He was similarly unable to articulate a concrete federal interest, principally referencing federal statutes that regulate agency fees in the private sector. Unlike Francisco, Verrilli’s brief supported the union.

402. 138 S. Ct. 2448, 2459–60 (2018).

403. Brief for the United States as Amicus Curiae Supporting Petitioner at 1, *Janus*, 138 S. Ct. 2448 (No. 16-1466). Other federal interests that the United States discussed were equally unpersuasive. It cited federal statutes addressing the legality of agency fees in the *private* sector (which implicates a separate theory of state action under the First Amendment) and past amicus participation in similar cases. *Id.*

404. 5 U.S.C. § 7102.

405. Brief for the United States as Amicus Curiae Supporting Respondents at 1, *Friedrichs v. Cal. Tchrs. Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915).

When SG Francisco argued in *Janus*, Justice Sotomayor asked him about the change in the OSG's position.⁴⁰⁶ And for good reason. In the two years between *Friedrichs* and *Janus*, no new facts or law had developed. The only thing that changed was the party of the president and, by extension, the SG. This pair of cases illustrates how the lack of a concrete interest can enable the SG to take on political or ideological positions. By allowing the SG to participate in oral argument, the Court lets the OSG—cloaked in a credibility based on its proclaimed commitment to “justice”—benefit one side or the other at the SG's discretion. Giving the OSG a megaphone through which to voice its purely political position undermines the Court's legitimacy. Because the SG lacked a concrete interest in the public sector unions litigation, his motions for amicus oral argument in *Janus* and *Friedrichs* should have been denied.

A similar juxtaposition appeared in the 2019 Term. In 2016, then-SG Verrilli entered *Whole Woman's Health v. Hellerstedt* as an amicus on the side of the abortion provider.⁴⁰⁷ That case concerned regulations on abortion providers very similar to those at issue in *June Medical Services v. Gee*, a case SG Francisco entered as an amicus on the opposite side.⁴⁰⁸ The OSG's brief not only cited the office's participation in *Whole Woman's Health* as justifying its participation in *June Medical Services*, but it also argued that the precedent be “narrowed or overruled.”⁴⁰⁹

In many cases, however, the OSG's position at amicus oral argument has advanced a concrete federal interest. Examples include cases concerning federal preemption,⁴¹⁰ *Bivens* actions,⁴¹¹ and the constitutionality of federal statutes.⁴¹² In those types of cases, its participation in amicus oral argument is justified if it provides new legal reasoning.

406. See, e.g., Transcript of Oral Argument at 34, *Janus*, 138 S. Ct. 2448 (No. 16-1466) (“Justice Sotomayor: Mr.—Mr. General, by the way, how many times this term already have you flipped positions from prior administrations?”).

407. Brief for the United States as Amicus Curiae Supporting Reversal, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274).

408. Brief for the United States as Amicus Curiae Supporting Vacatur for Lack of Third-Party Standing or Affirmance on the Merits, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460).

409. *Id.* at 5.

410. See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioners at 1, *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019) (No. 16-1275).

411. See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioners at 1–2, *Hui v. Castaneda*, 559 U.S. 799 (2010) (No. 08-1529).

412. See, e.g., Brief for the United States as Amicus Curiae Supporting Respondents at 1, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (No. 14-770).

2. Cases Against the Federal Interest

In some rare cases, the OSG's position not only fails to defend an existing practice but actually undermines it. In such cases, the OSG does not advance a concrete interest, and therefore its motion for amicus oral argument should be denied unless it satisfies Standard 2.

A case that illustrates this issue is *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, which presented a constitutional challenge to Colorado's public accommodations law.⁴¹³ In its amicus brief, the OSG noted that Colorado's public accommodations law has multiple analogues in federal statutes, such as the Civil Rights Act of 1964.⁴¹⁴ But the OSG's position was that the Colorado law was unconstitutional. Had the Court struck down the law, large parts of the federal antidiscrimination structure would have come under attack.⁴¹⁵ The other interest that the OSG offered—the “substantial interest in the preservation of constitutional rights of free expression”⁴¹⁶—would not meet Standard 1. A general desire to protect constitutional rights is not a concrete interest. Because the SG did not advance an entirely new argument in *Masterpiece*, his motion for amicus oral argument would have been denied under our rule.

3. Cases Without New Reasoning

When the SG considers whether to enter a case as amicus, the decision turns on the subject of the case—in other words, whether the case implicates the federal government or a topic on which the SG either wants to or believes the office should opine.⁴¹⁷ He does not consider, however, whether the office will present arguments not previously raised by the parties when it decides whether to file an amicus brief. Because the OSG has a policy of requesting oral argument in every case

413. 138 S. Ct. 1719 (2018).

414. Brief for the United States as Amicus Curiae Supporting Petitioners at 1, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

415. Mark Walsh, *Speech, Religion and Bias All Weighed in Masterpiece Cakeshop Case*, A.B.A. J. (Nov. 1, 2017), http://www.abajournal.com/magazine/article/speech_religion_bias_masterpiece_cakeshop/P1 [<https://perma.cc/SP8R-AB43>]; Jeffrey Toobin, *Justices Ginsburg and Kagan Ask About the Artistry of Wedding Cakes*, NEW YORKER (Dec. 6, 2017), <https://www.newyorker.com/news/daily-comment/justices-ginsburg-and-kagan-ask-about-the-artistry-of-wedding-cakes> [<https://perma.cc/FRV7-BXGH>].

416. Brief for the United States as Amicus Curiae Supporting Petitioners at 1, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

417. Cordray & Cordray, *supra* note 3, at 1332–33, n.46.

in which it files a brief,⁴¹⁸ it regularly participates in oral argument as an amicus although it does not make any novel legal arguments.

This phenomenon is most prevalent in cases where the OSG's interest is not distinct from that of the party it supports. In our conversations with Supreme Court advocates, one in particular came up repeatedly: criminal prosecutions. Not only does the OSG frequently enter criminal cases arising out of state convictions as an amicus in support of the state,⁴¹⁹ but the OSG also has an informal policy against opposing a state in a criminal case.⁴²⁰ In these cases, the OSG's interest is grounded in the federal government's role as prosecutor and is unlikely to be different from that of the state.

The similarity between the OSG's amicus brief and Montana's merits brief in *Betterman v. Montana* is illustrative.⁴²¹ *Betterman* concerned whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal case. The OSG's interest in the case was that "[t]he Court's resolution of that issue will apply to similar claims in federal prosecutions."⁴²² The SG made all the same legal arguments as Montana and justified them on the same bases.⁴²³ The Court nonetheless permitted the SG to participate as amicus.⁴²⁴

In cases where the OSG presents neither a distinct interest nor novel reasoning relative to the parties, the Court is unjustified in hearing from OSG attorneys at oral argument. The OSG's participation undermines the parties' adversarial interests, and there is no reason to believe OSG attorneys would offer any incremental help to the Court.

C. Application to Other Parties

Because of the OSG's virtual monopoly on amicus oral argument, the Court rarely hears from other amici. Between the 2010

418. See *supra* note 174 (statement of former SG Drew Days III).

419. Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 1989 (2016).

420. See Interview with Waxman, *supra* note 81 ("The office generally does not enter a criminal case as an amicus on the side opposite a state. If they do not want to support the state in a criminal case, they will just stay out of it."); Interview with Shanmugam, *supra* note 281 ("In criminal cases, the Solicitor General is only ever going to enter the case on one side. If you represent the criminal defendant, you usually do not even need to call."); Interview with Senior OSG Attorney, *supra* note 85 ("In criminal cases, we know that if we are going to enter the case as an amicus we will do so on a particular side.").

421. 136 S. Ct. 1609 (2016).

422. Brief for the United States as Amicus Curiae Supporting Respondent at 1, *Betterman*, 136 S. Ct. 1609 (No. 14-1457).

423. Compare *id.*, with Brief for Respondent, *Betterman*, 136 S. Ct. 1609 (No. 14-1457).

424. See *Betterman v. Montana*, 136 S. Ct. 1400 (2016) (mem.).

and 2019 Terms, the Court granted only fifteen amicus oral argument motions made by parties other than the OSG. Five of these were made by members of the federal legislature,⁴²⁵ one by a state legislature,⁴²⁶ five by states,⁴²⁷ one by a foreign sovereign entity,⁴²⁸ and three by a law professor.⁴²⁹

Our framework would likely increase amicus oral argument participation by a variety of these litigants. Below, we highlight three types of cases in which the Court would likely hear more frequently from amici other than the OSG—criminal cases, cases involving state interests, and cases vindicating the federal interest—and how this would improve the Court’s decisionmaking process.

1. Criminal Cases

Under our proposal, the Court should more frequently grant amicus oral argument to amici who support the defendant in criminal cases.⁴³⁰ There are two reasons why these amici may be helpful at oral argument. First, criminal defendants are more likely than other categories of parties to be represented before the Court by the same lawyer who represented them in the trial or lower appellate courts.⁴³¹ Although many of these lawyers have limited appellate experience and perhaps no experience before the Court, they may refuse offers by

425. *See* *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 991 (2020) (mem.) (United States House of Representatives); *Dep’t of Com. v. New York*, 139 S. Ct. 1543 (2019) (mem.) (United States House of Representatives); *United States v. Texas*, 136 S. Ct. 1539 (2016) (mem.) (United States House of Representatives); *NLRB v. Canning*, 571 U.S. 1092 (2013) (mem.) (Senator Mitch McConnell et al.); *McCutcheon v. FEC*, 570 U.S. 944 (2013) (mem.) (Senator Mitch McConnell).

426. *See* *Gill v. Whitford*, 138 S. Ct. 52 (2017) (mem.) (Wisconsin State Senate and Wisconsin State Assembly).

427. *See* *Tenn. Wine & Spirits Retailers Ass’n v. Blair*, 139 S. Ct. 783 (2019) (mem.) (Illinois et al.); *Gamble v. United States*, 139 S. Ct. 582 (2018) (mem.) (Texas et al.); *Sturgeon v. Frost*, 139 S. Ct. 357 (2018) (mem.) (Alaska); *Sturgeon v. Masica*, 577 U.S. 1047 (2015) (mem.) (Alaska); *Oneok, Inc. v. Learjet, Inc.*, 547 U.S. 1059 (2014) (mem.) (Kansas et al.).

428. *See* *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1543 (2018) (mem.) (Ministry of Commerce of the People’s Republic of China).

429. *See* *Cox v. United States*, 138 S. Ct. 576 (2018) (mem.) (Professor Aditya Bamzai); *Dalmazzi v. United States*, 138 S. Ct. 576 (2018) (mem.) (same); *Ortiz v. United States*, 138 S. Ct. 576 (2018) (mem.) (same).

430. Others have argued that there should be a federal agency dedicated to advancing the interests of criminal defendants. *See generally* Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. 1469, 1473 (2020) (arguing that a defender general can “move doctrine in defendant-friendly directions” to counteract the government’s advantages). Because the effect of the OSG’s outsized influence at the Court on criminal defendants is only one aspect of our critique, we advocate for “leveling down” rather than “leveling up.” *See id.* at 1474, 1536–38.

431. *Lazarus*, *supra* note 69, at 1561; Interview with Clement, *supra* note 247.

expert Supreme Court litigators to take over as lead counsel.⁴³² While some of these lawyers do a terrific job at oral argument, others are less successful.⁴³³ Regardless of the importance of skilled advocacy before the Court, it is inappropriate and unconstitutional to force the appointment of new counsel.⁴³⁴ Allowing an amicus who has a concrete interest in the litigation—such as the National Association of Criminal Defense Lawyers—to argue in support of this defendant may result in a fairer and more informed process.

A second reason why the Court should hear from amici in these cases is the same argument we frequently heard for why the Court might want to hear from the OSG in these cases. According to Supreme Court litigators, the OSG is concerned in criminal cases with the formulation of a sound rule rather than with—as the state usually is—the preservation of the criminal conviction at issue.⁴³⁵ An amicus supporting a criminal defendant can serve the same function. A lawyer who represents a criminal defendant is ethically obligated to advance that client's interests, regardless of the impact the Court's decision may have on all her other clients or on the development of the law generally.⁴³⁶ Because of the stakes, the differences in the law and practice across jurisdictions, and the fact-specific nature of criminal prosecutions, the risk that one criminal defendant's interest in the formation of law diverges from that of another is high. This may lead the lawyer to advocate for a rule that is undesirable when applied more broadly. An amicus may help the Court formulate a rule that is both legally sound and practically viable.

432. See Crespo, *supra* note 419, at 2008 (finding that, from 2005 through 2015, 67% of criminal defendants were represented by lawyers making their first Supreme Court appearance, compared with 48% of civil litigants); Lazarus, *supra* note 69, at 1561:

Many criminal defense attorneys, including counsel appointed at trial who may not themselves have significant criminal law expertise, not only insist on maintaining their status as lead counsel once it has become a Supreme Court case, but decline the offers of experts in Supreme Court advocacy for significant assistance in the preparation of briefs and the presentation of oral argument.

433. See William C. Kinder, Note, *Putting Justice Kagan's "Hobbyhorse" Through Its Paces: An Examination of the Criminal Defense Advocacy Gap at the U.S. Supreme Court*, 103 GEO. L.J. 227, 228 nn.1–2 (2014).

434. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006) (holding that there is a Sixth Amendment right to retain counsel of one's choice).

435. Interview with Harrington, *supra* note 250.

436. Lawrence J. Fox & Susan R. Martyn, *Monroe Freedman's Contributions to Lawyers: Engagement, Energy, and Ethics*, 44 HOFSTRA L. REV. 635, 645 (2016).

2. Cases Involving State Interests

The Court should also hear more frequently from state amici in cases in which a state is not a party but has a quasi-party interest.⁴³⁷ Recently, litigator Dan Schweitzer catalogued every case between 1996 and 2016 in which a state requested amicus oral argument.⁴³⁸ He concluded that, in the 2014 through 2016 Terms, the Court granted these requests when the “states—based on their status as sovereigns—genuinely had a distinct perspective from the parties they were supporting.”⁴³⁹ Schweitzer characterizes these as “precisely when states *ought* to be permitted to argue as amici.”⁴⁴⁰ These cases generally concerned the distribution of power between federal and state governments, double jeopardy, and state powers under the Constitution.⁴⁴¹ There were no requests during this period from states in cases where both federal and state governments enforce a federal law but may disagree on its interpretation, but Schweitzer argues these are instances in which states should be permitted to argue as well.⁴⁴²

These amici would be permitted to argue under Standard 1 as long as they contribute reasoning not already presented by the parties. These quasi-party interests are exactly the type that the American amicus role has historically been used to accommodate,⁴⁴³ as well as the interests the Court presumably honors by hearing from the OSG in many instances. A state litigant that can offer a perspective that is truly distinct from that of the party it supports will likely present new reasoning that highlights that perspective.⁴⁴⁴

The Wisconsin State Senate and Wisconsin State Assembly’s amicus oral argument in support of Petitioners in *Gill v. Whitford* is illustrative.⁴⁴⁵ *Gill* concerned the constitutionality of partisan gerrymandering, and Petitioners were members of the Wisconsin Elections Commission.⁴⁴⁶ Petitioners’ arguments reflected their positions as election administrators by focusing on the court’s power

437. For an argument that hearing state perspectives would also address concerns about the Court’s politicization, see Johnstone, *supra* note 272, at 598–622.

438. See Schweitzer, *supra* note 240, at 147–50.

439. *Id.* at 153.

440. *Id.*

441. *Id.* at 153–54.

442. *Id.* at 154–55.

443. See *supra* Section I.A.

444. Research suggests that state amicus participation is “most prominent, and most effective, in federalism cases.” Johnstone, *supra* note 272, at 603. When state positions conflict or states uniformly oppose a federalist position, however, the Court favors nationalization. *Id.* at 603.

445. 138 S. Ct. 1916 (2018).

446. *Id.* at 1920.

over redistricting and the merits of the redistricting plan. For example, their brief opened by claiming the district court did not have jurisdiction over Respondents' claims.⁴⁴⁷ It went on to explain that Respondents had not "stated a claim on which relief can be granted" based on the Court's precedent,⁴⁴⁸ and that the redistricting plan at issue was permissible.⁴⁴⁹

In stark contrast, the Wisconsin legislature's arguments mirrored its institutional interest in the case: asserting state legislatures' power over the redistricting process in the face of potential involvement by the federal judiciary. Its brief first argued that partisan gerrymandering lawsuits effectively reassigned the redistricting task from state legislatures to federal courts.⁴⁵⁰ The brief went on to explain that all challenges to statewide gerrymandering rely on a flawed conception of the U.S. electoral system as one that guarantees proportional representation and classifies candidates based on party affiliation.⁴⁵¹ Not all the arguments raised in the brief were novel relative to Petitioners' brief, but they were aimed at the entire class of gerrymandering claims, rather than only the one at issue—which the legislature addressed in the last five pages of its brief.⁴⁵² The Court's questioning of Erin Murphy, the legislature's advocate, focused primarily on the novel portion of the brief.⁴⁵³

3. Cases Vindicating the Federal Interest

In some cases, the OSG represents a party to litigation but has no intention of fully defending the federal interest, and an amicus would like to do so instead. These include cases where, for example, the SG presents a weaker reading of a federal statute than is legally defensible.

Hearing from an amicus who would offer a full-throated defense of the federal interest would likely lead to better case outcomes. An SG's decision to defend a federal statute, regulation, or policy only on limited grounds is most likely to arise from political considerations rather than objective legal analysis. These cases may arise when, for example, the timing of a presidential election means that the SG who petitioned for certiorari is different from the one briefing and arguing the merits. Currently, the Court appoints an amicus to defend the government

447. Brief for Appellants at 26–41, *Gill*, 138 S. Ct. 1916 (No. 16-1161).

448. *Id.* at 23, 41–59.

449. *Id.* at 59–67.

450. Brief for Amici Curiae Wisconsin State Senate and Wisconsin State Assembly in Support of Appellants at 4–16, *Gill*, 138 S. Ct. 1916 (No. 16-1161).

451. *Id.* at 17–31.

452. *Id.* at 31–37.

453. See Transcript of Oral Argument at 18–29, *Gill*, 138 S. Ct. 1916 (No. 16-1161).

when the OSG *entirely* declines to defend its client.⁴⁵⁴ The decision to do so, rather than to dismiss the case for lack of a “Case or Controversy,”⁴⁵⁵ suggests that the Court harbors some skepticism about these refusals to defend the federal interest. Our proposed standard does not invade the government’s authority to take whatever position it desires; it simply allows an amicus to supplement it.

Additionally, appointing an amicus in these cases would allow the Court to respond to a problem it had a part in creating. The Court has been one of the strongest forces pushing the federal government to speak in “one voice,” even when it allows the OSG to take these compromise positions.⁴⁵⁶ Over the years, one of the ways in which the Court has reaffirmed that it wants the OSG to speak for the federal government is by denying motions for amicus oral argument made on behalf of one agency when the OSG already represents a party.⁴⁵⁷ This position allows the OSG to take middle positions without fear of the agency representing a contrary view. Allowing amici to argue in these cases would permit the vindication of those interests and might discourage the OSG from taking these positions.

Kisor v. Wilkie illustrates the value that an amicus could add.⁴⁵⁸ *Kisor* asked whether the Court should overrule precedent holding that courts must defer to agencies’ interpretations of their own regulations under certain circumstances.⁴⁵⁹ The long-term interest of the federal government was clear: the executive’s power is maximized if its agencies receive more deference from courts. Rather than defend the Court’s precedent, however, SG Francisco argued that it was inconsistent with the Administrative Procedure Act and had “harmful practical consequences.”⁴⁶⁰ He urged that “the Court should impose and reinforce significant limits” on the deference regime.⁴⁶¹ The SG’s “halfhearted” defense did not escape the Justices’ notice.⁴⁶² At oral argument, Petitioner’s attorney answered a question from Justice

454. Shaw, *supra* note 331, at 1548–49.

455. See U.S. CONST. art. III, § 2, cl. 1.

456. See *supra* notes 318–321 and accompanying text.

457. See, e.g., *United States v. 92 Buena Vista Ave.*, 505 U.S. 1243 (1992) (mem.) (denying the Federal Home Loan Mortgage Corporation’s motion for leave to participate in oral arguments as amicus curiae); *Otter Tail Power Co. v. United States*, 409 U.S. 820 (1972) (mem.) (denying the Federal Power Commission’s motion for leave to participate in oral arguments as amicus curiae).

458. 139 S. Ct. 2400 (2019).

459. *Id.* at 2408.

460. Brief for the Respondent at 26–27, *Kisor*, 139 S. Ct. 2400 (No. 18-15).

461. *Id.* at 12.

462. Adam Liptak, *Limiting Agency Power, a Goal of the Right, Gets Supreme Court Test*, N.Y. TIMES (Mar. 27, 2019), <https://www.nytimes.com/2019/03/27/us/politics/supreme-court-agency-power.html> [<https://perma.cc/ZC57-GVJ4>].

Kagan by first explaining that its position was no different than the government's (the Respondent) on that point. She responded, "There might be a problem of a lack of adversarialness here."⁴⁶³

In *Kisor*, there was a clear candidate for an amicus who could offer a defense of the Court's precedent: former SG Verrilli. Verrilli was counsel of record on an amicus brief filed by administrative law scholars that offered a thorough rebuttal to Petitioner's argument.⁴⁶⁴ When the opinions in *Kisor* were issued, Verrilli's brief was cited twice by the majority and twice by the concurrence, which described the brief as an example of the deference regime's "fiercest defenders."⁴⁶⁵

Verrilli did not request amicus oral argument. When we asked Verrilli why not, he remarked, "Had the Justices felt like there was not a sufficient adversarial presentation, they could have asked for oral argument from amici or appointed someone to argue."⁴⁶⁶ Of course, the Court could have asked. But if it developed a practice of hearing from amici in cases like *Kisor*, litigators like Verrilli might be more inclined to request to be heard.

CONCLUSION

The OSG is the most influential litigant that appears before the Court. It is more successful at the petition and merits stages than others, and it is more successful when it is an amicus supporting a party than when it represents a party. This Article's account of the OSG's dominance of amicus oral argument before the Court draws attention to a largely unexamined aspect of that influence. From our interviews with Supreme Court litigators, the industry recognizes and accepts this phenomenon. These lawyers take the OSG's special place at the Court into account, trying to convince the OSG to support their client as amicus when possible and otherwise trying to convince the OSG to stay out of the case.

We suspect that the Court has not thought much about why it grants virtually all the OSG's motions for amicus oral argument and denies almost all others. In fact, we imagine that the Justices—members of a government institution themselves, all of whom spent portions of their careers at other government institutions, including the

463. *Id.*

464. See Brief of Administrative Law Scholars in Support of Affirmance, *Kisor*, 139 S. Ct. 2400 (No. 18-15).

465. *Kisor*, 139 S. Ct. at 2412, 2421; *id.* at 2435 n.59, 2445 n.109 (Gorsuch, J., concurring).

466. Interview with Verrilli, *supra* note 85.

OSG⁴⁶⁷—have not seriously considered the special place they reserve for the OSG. In 2014, Joan Biskupic and others interviewed eight of the nine sitting Justices as part of their reporting on the outsized success of former OSG members in seeking certiorari at the Court.⁴⁶⁸ Each Justice interviewed believed that having these lawyers handle most of the cases before the Court was helpful and came “without any significant cost”⁴⁶⁹—despite the fact that almost all their work at law firms catered to moneyed interests.

Reforming the Court’s amicus oral argument practice alone would not remedy the OSG’s outsized influence. We hope that this Article will inspire a broader re-examination of the OSG’s role at the Court, and we look forward to continuing to participate in this conversation.⁴⁷⁰ Like those who have called attention to the Court’s unexamined practices in other areas, we believe that the Court creates significant procedural and substantive problems by acquiescing to the OSG’s extensive use of amicus oral argument. We respectfully recommend that it reconsider this highly consequential practice.

467. See SUP. CT. OF THE U.S., *supra* note 9.

468. Joan Biskupic, Janet Roberts & John Shiffman, *The Echo Chamber: A Small Group of Lawyers and Its Outsized Influence at the U.S. Supreme Court*, REUTERS (Dec. 8, 2014, 10:30 AM GMT), <http://www.reuters.com/investigates/special-report/scotus> [<https://perma.cc/QE73-WEE4>].

469. *Id.*

470. The Supreme Court’s April 2020 denial of an amicus oral argument, the first in a nearly a decade, occurred about one month after New York Times coverage of this Article. See Liptak, *supra* note 257.