INTERESTED IN THE LAW: EXAMINING PRE-MERITS, MERITS, AND POST MERITS INFLUENCE OF AMICUS CURIAE ACTIVITY IN THE U.S.COURTS OF APPEALS

by

BRYAN M. BLACK

(Under the Direction of Richard Vining)

ABSTRACT

The research presented in this dissertation analyzes interest group influence in the U.S. Courts of Appeals from 2003 through 2010. Specifically, it evaluates group influence via their participation as amicus curiae. This dissertation examines amicus activity as part of a three-stage process. The first stage is pre-merits influence. That is, when will groups participate as amicus curiae and why do groups participate as amicus curiae? I find that groups behave strategically, participating in cases that maximize their goals and aid in organizational maintenance. The second stage is merits influence. That is, once a group has decided to participate as amicus curiae, is the group effective at affecting judicial decision-making? I find that the quantity of the information presented to judges matters more than types of groups providing the information. The third and final stage is post-merits influence. That is, do groups receive benefits from amicus participation in circuit courts cases after the court has rendered its decision? I find that amicus activity in the Courts of Appeals increases the likelihood that the litigant petitions the Supreme Court for a writ of certiorari, providing an additional opportunity for a favorable legal outcome.

INDEX WORDS: Interest Groups, Amicus Curiae Briefs, U.S. Courts of Appeals, Judicial Decision-Making

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DEDICATION

To the support and encouragement provided by my family. I am especially thankful to my father who stimulated my interest in academics, government, and history.

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CHAPTER 1

INTRODUCTION

In the American political system, interest groups are ubiquitous. They operate at all levels (local, state, and federal) and lobby all the branches of government (executive, legislative, and judicial).[1] At the start of 2017, there were just over 9,000 registered lobbyist and interest groups spent roughly $1 billion to lobby the federal government (Kindy 2017). These statistics suggest that interest groups have an important role in the development and implementation of public policy.

An interest group is an organized collection of like-minded citizens that share a common policy goal and want to influence the decision-making of government officials. Groups want to use their collective power to pressure government officials to change policy or to preserve the status quo. Groups do this by engaging in a variety of political activities that allow the views of the public to be known to government officials. Interest groups help draft legislation, provide expert testimony before legislative committees, aid bureaucratic officials in writing federal regulations, provide campaign support and voter mobilization and organize protests (Truman 1951). A responsive and representative government requires a feedback loop in which the government takes action and is made aware of the how that action affects the public. The intensity of group activity can signal to legislators, judges, and bureaucrats a policy's popularity or the potential pitfalls to implanting certain policy proposals Therefore, the information

[1] For information on the interest group activity in state government see Whyte, E. Liz and Ben Wieder. (2016). *Who's Calling the Shots in State Politics: Amid Federal Government, Lobbying Rises in the States.* Washington DC. The Center for Public Integrity. For information on interest group activity in the federal government see Balcerzak, Ashley. (2017). *Fewer lobbyist, more money: What's going on?* Washington DC. Center for Responsive Politics.

provided by interest groups allows government policy to continue to be aligned with the interests and policy wishes of the public.

A second important role of groups is that they provide information to the public about the workings of government. If interest group influence is in their collective power to pressure government officials, groups need to have an informed and motivated citizenry behind them. Voters usually do not have the time and resources to remain engaged in the nuances of policy debate and to actively monitor the behavior of their elected officials. Instead, voters rely on information from interest groups. For example, groups help reduce the cost required to research information on candidates for elected office, provide opinion leadership on policy alternatives, and sound the alarm when legislators shirk their responsibilities (Lupia 1994).

Despite their contributions to American government, the interest group system does have its flaws. One of the most common criticisms of interest group politics is the presence of an upper class bias (Gilens 2012; Schattschneider 1960; Verba et al. 2012). That is, there tend to be more groups that represent the interest of economically advantaged citizens. The primary reason for this is that it is difficult to sustain an interest group. Effective groups require a leadership structure, housing, support staff, and resources to engage in public outreach and government lobbying. In short, it requires a politically active and aware membership that has the time and money to contribute to the maintenance and advocacy of the group. Middle and upper class citizens are most likely to have the skills, education, and economic background necessary to participate in interest groups. This does not mean that there are no groups representing the interest of citizens on the low end of the socio-economic ladder. Indeed, a number of social welfare groups, such as the Child Welfare League of America, the National Immigration Law Center, and the National Employment Law Project, fight for the interest of the working class and

vulnerable populations. However, these types of groups usually lack the resource capabilities and institutional prestige of groups representing the interest of middle and upper class citizens.

Another concern is that interest groups have a corrupting influence on public policy. Each new presidential administration seemingly makes the same promise to reign in powerful special interests (Gerstein 2015; Meyer 2017).[2] Presidents make this promise because many people believe the government disproportionally favors the interest of the wealthy. A 2016 Rasmussen public opinion poll found that 80 percent of likely voters believe that wealthy special interest groups have too much power and influence over elections.[3] Gilens (2005) finds that government policy is more responsive to preferences of the most affluent citizens. Gilens and Page (2014, 565), in their comprehensive study of interest group politics, write, "economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence."

The potential for one group or economic interest to control public policy was a central concern to the Framers of the U.S. Constitution. During the ratification debates, Madison, in *Federalist Number 10*, argued that the new system of government would be able to properly regulate competing interest (what Madison terms a "faction") over a large territory.

> the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction...By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest…The inference to which we are brought is, that the CAUSES of faction cannot be removed, and that relief is only to be sought in the means of controlling its EFFECTS... Those who hold and those who are without property have ever formed distinct interests in society. A landed interest, a

[2] Obama's First Day: Pay freeze, lobbying rules. (2009, January 21). Retrieved from http://www.nbcnews.com/id/28767687/ns/politics-white_house/t/obamas-first-day-pay-freeze-lobbying-rules/

[3] See Voters Say Money, Media Have Too Much Political Clout. (2016, February 16). Retrieved from http://www.rasmussenreports.com/public_content/politics/general_politics/february_2016/voters_say_money_media_have_too_much_political_clout

manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government[4]

For Madison there were two potential solutions to the regulation of factions. The first solution was to regulate the "causes" of factions. That is, limit the political freedoms necessary to give rise to factions, such as free speech and assembly as well as the right to petition the government. To Madison, this solution was a non-starter as it was "worse than disease." Curtailing political liberty to eliminate factions "would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."[5]

The second solution was to control the "effects" of factions. That is, to design a system of government which makes it difficult for any one group or interest to control all the levers of government. The separation of power system forces groups to compete for control over the administration of government the creation of public policy.[6] Therefore, Madison created a separation of power system with checks and balances in which a group's control of one branch of government does necessarily give it power over the other two branches.

Most work on interest group lobbying and influence tends to focus on the elected branches of government (Kollman 1997; Austen-Smith Wright 1993, 1994; Nelson and Yackee 2012; Yackee 2005). This is only natural because Congress and the Executive Branch are the two principle institutions tasked with writing and implementing legislation. Thus, these two

[4] James Madison, *Federalist* No.10, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), pg 77-84.
[5] Ibid.
[6] The idea that interest groups share or compete with each other for influence over government decision-making is known as pluralism. This competition produces small, moderate changes in government policy as groups must compromise with each other to achieve their policy goals. David Truman's (1951) *The Governmental Process* is one of the earliest studies of interest group pluralism. For other perspectives on the formation and behavior of interest groups see Olson (2009) and Walker (1983).

institutions have the most direct control over policy formulation. However, courts offer another venue for groups to compete over public policy. The judiciary is tasked with providing judicial review of the actions of Congress and executive branch agencies. Therefore, courts have the power to declare acts of Congress and the president unconstitutional, which in many instances gives the court final say as well as tremendous influence over public policy.[7]

The institutional design of the federal judiciary means interest groups have to use different lobbying strategies than those commonly deployed against the other two branches of government. Article III judges, such as those on the Supreme Court and lower federal courts, are nominated by the president and confirmed by the Senate. They have life tenure, which insulates them from electoral pressures.[8]

Interest groups can use their power to influence the types of individuals selected for the federal judiciary (Calderia and Wright 1998). Segal et al. (1992) find that a senator's vote on a Supreme Court nomination can be influenced by the amount of interest group support for the nominee. Maltese's (1988) influential work on Supreme Court confirmations provides several examples of groups using political and electoral pressure to prevent individuals they viewed as hostile to their interest from serving on the Court. One of the earliest confirmation battles with interest group activity involved the nomination of Stanley Matthews to the Supreme Court. The National Grange, a farmer's association opposed to railroad monopolies, used their political clout

[7] When the Court makes a ruling on statutory grounds, Congress can pass a new law reversing the Court's decision. However, when the Court bases its ruling on constitutional interpretation, Congress can only reverse the Court's decision by passing a constitutional amendment. Given the difficulty of amending the constitution, declaring a law unconstitutional gives the Court considerable power over the implementation of policy. See also Desilver, Drew. (2018). *Proposed Amendments to the U.S. Constitution seldom go anywhere.* Washington DC. Pew Research Center.

[8] Although Article III judges do not face electoral repercussions, these judges need external actors (Congress, the president, states, and the public) to enforce their decisions. Therefore, Article III judges, particularly those on the Supreme Court, are mindful of and responsive to public opinion on issues before them (Casillas et al. 2011; Clark 2009; Mishler and Sheehan 1993; Giles et al. 2008).

in a battle over Stanley Matthew's nomination to the Supreme Court. The Granger movement successfully lobbied state governments to pass more progressive legislation aimed at curbing the monopolistic tendencies of railroad companies, legislation that railroad companies had fought against in federal court. Therefore, if the Granger movement wanted their state laws upheld, they needed ideological allies on the Court. The Granger movement waged an intense lobbying campaign in the Senate that lead the Senate to eventually block the nomination of Stanley Matthews.

However, notwithstanding the Granger Movement's best efforts, Stanley Matthews was eventually confirmed to the Supreme Court. The best the National Grange could do was to delay Matthews' eventual confirmation. However, several decades later, groups had success defeating the nominations of John Parker (1930), Clement Haynsworth (1969), and Robert Bork (1986). For example, organized labor and the NAACP successfully blocked President Herbert Hoover's nomination of John Parker (Goings 1990; Maltese 1998; Watson 1963). The most recent example interest groups successfully preventing an individual from taking a seat on the Supreme Court was President Reagan's nomination of Robert Bork. Maltese (1988, 7) writes that Bork nomination was "unprecedented in the history of Supreme Court confirmation politics in terms of the breadth of involvement by organized interests (more than 300 groups publicly opposed Bork and more than 100 supported him)." The Bork nomination ultimately proved to be too politically controversial as the Senate voted against confirmation 42 to 58. President Reagan eventually nominated Anthony Kennedy who was unanimously confirmed by the Senate.

Despite these examples, it is very difficult to derail a Supreme Court nomination. Shipan and Shannon (2003) report that post-Civil War presidents have around a 90 percent success rate on Supreme Court nominations. If groups cannot control who sits on a federal bench, then they

have to influence the decisions those judges produce. Interest groups have two courses of action once a judge is on the court: litigation or participating as amicus curiae.

Litigation offers two possible strategies. First, groups can finance test cases, which means seeking out individuals harmed by a policy and funding their cases from beginning to end. Second, groups can initiate a suit on behalf of their members. Standing requires a group to show direct harm by the legislation, regulation, or executive action in which they are seeking to overturn. This often makes it difficult for groups to directly challenge legislation on behalf of their members. Furthermore, litigation is an extremely expensive strategy both in terms of money and manpower (Scheppele and Walker 1991). It often means tying up group resources, which might be used elsewhere, in a prolonged legal campaign with a mixed chance of success (Vose 1959).

To be sure, litigation has its benefits. There are several reasons why interest groups would decide to litigate. The first reasons is that winning in court can often solidify gains made in other venues (Olson 1990). The second reasons is that obtaining a favorable court verdicts can produce permanent policy change (Bailey and Malltzman 2011; Cowen 1976; Gonen 2003; Klarman 2006; Epstein and Knight 1997; O'Connor 1980; Rubin 1982; Vose 1959). Legislation can be changed and amended, court doctrine and precedent tends to be stable. For example, the Supreme Court's ruling in *Brown v. Board of Education* (1954) declared school desegregation to be unconstitutional. This prevented southern legislators from continuing to use the legislative process to deny equal rights to all citizens. The final reason is that litigation can allow politically disadvantaged groups to secure certain rights when they are excluded from other governing institutions (Cortner 1968; Truman 1951). Research on political disadvantage theory usually comes from case studies detailing the struggles of political marginalized groups as they fight for

economic or social change (Klarman 2006; O'Connor 1980; Sorauf 2015; Vose 1959). However, political disadvantage theory does have its critics (Epstein 1985; Olson 1990). For example, political disadvantage theory lacks generalizability because it focuses on the unique experience of one or two major interest groups at a certain point in time (Olson 1990; Sorauf 2015; Vose 1959). Research that examines interest group litigation across a wide number of issues finds that "advantaged" groups frequently lobby the court (Epstein 1985; Olson 1990). In fact, Schepple and Walker's (1991, 182) study of interest group litigation strategies finds that political disadvantage theory "captures only a fraction of interest-group litigation." Therefore, political disadvantage theory, as an explanation for group behavior in the judiciary, has to a significant degree been roundly rejected.

Despite the potential benefits of interest group litigation, it is a resource intensive strategy. This means that it is usually a viable strategy for only a select number of well-financed groups such as the NAACP and the ACLU. Groups with fewer organizational resources have to seek alternative means to influence judges.

Participating as amicus curiae provide groups with an alternative to litigation. Amicus briefs supply the court with supplemental information that is not always included in litigant briefs (Collins 2008; Kearney and Merill 2000; Spriggs and Wahlbeck 1997). An interest group might choose to submit an amicus brief for two reasons. First, groups submit an amicus brief to influence judicial decision-making in order to obtain a desired policy or legal outcome that advances their interest (Collins 2008; Krislov 1963).[9] Aaron Isherwood, a representative of the

[9] The policy goals of the group might determine which government institution they lobby. Scheppele and Walker (1991) note that courts generally stay away from foreign policy and national security issues. As a result, groups concerned with these goals are better off lobbying Congress and the president. Conversely, groups concerned about domestic economic and social policy are more likely to use the courts. Similarly, groups that work in unstable policy areas may prefer the permanence that comes with a court decision compared to the potential temporal nature of legislation or administrative action. That is, turnover in Congress and the White House can often lead to dramatic policy gains and losses. Member of Congress are free to vote their sincere policy beliefs on legislation (Poole and

Sierra Club, whom I interviewed for this project, stated that amicus brief influence "depends on providing useful information. Is there something we can tell the court that would lead to the outcome the group wants?"[10] To do this, groups use amicus briefs to inform judges about the political, social, or economic significance of their decision.[11] Second, groups participate as amicus curiae for organizational maintenance purposes, which is particularly important for membership based groups (Walker 1983; Hansford 2004b; Solberg and Waltenberg 2006). These groups exist to fight for specific benefits and policies for their members. Court cases provide clearly defined outcomes and groups can use amicus briefs to make their position on an issue known to the broader public and their members. As Hansford (2004b, 178) writes participating as amicus curiae "allows membership-based interest to participate in visible policy conflicts." Amicus participation sends a signal to members that the organization is actively seeking policy change, which might lead the group to attract new members, keep existing members, and increasing fundraising.

Amicus briefs are an effective and less expensive form of judicial lobbying than litigation.[12] Because of this, it is the primary means by which groups obtain policy change in the courts (O'Connor and Epstein 1981). However, this was not always the case. The importance of amicus briefs for groups has increased significantly over the past several decades. For example, for most of the post-World War II period groups submitted amicus briefs in less than 50 percent

Rosenthal 2000). Judges, on the other hand, are often constrained by legal principles, such as stare decisis (Epstein and Knight 1997).

[10] Isherwood, Aaron, the Phillip S. Berry Managing Attorney Sierra Club Personal Interview 31 August 2017. For information on methodology and process behind the elite interviews used in this dissertation see Chapter 1, section 5, subsection 2 entitled "Elite Interview Methodology" as well as Appendix A.

[11] Amicus participation could be part of a broader lobbing strategy that involves engaging with legislators, executives, and the public as well as the judiciary in order to produce policy change (Gonen 2003; Nejaime 2010, 2011; Klarman 2006). In this situation, groups with similar policy goals might coordinate with each other to engage different government institutions.

[12] The cost of an amicus brief can range from $15,000 to $60,000 (Caldeira and Wright 1988).

of Supreme Court cases. However, beginning in the early 1990s, around 90 percent of cases received amicus briefs (Collins 2008). Given its popularity as a lobbying tool, scholars have devoted considerable resources to understanding how amicus briefs influence judicial behavior. Most research on amicus influence focuses on the Supreme Court. For example, we know when amicus will submit a brief (Hansford 2004a, 2004b), the types of groups that participate (Caldeira and Wright 1990; Collins 2008), their effect on the Supreme Court agenda-setting (Black and Boyd 2010; Black and Owens 2009; Caldeira and Wright 1988; McGuire 1994; Perry 2009), the type of information amicus convey to Supreme Court judges (Krislov 1963; Spriggs and Wahlbeck 1997; Collins 2008), their effect on litigant success (Collins 2004; Kearney and Merrill 2000), and their effect on the articulation of legal principles (Collins et al. 2015; Stewart 1983).

Group participation in court cases is valuable because of the information it conveys to judges. That is, their participation sends a credible signal about the significance of the case. The credibility of their message is related to their frequency of their participation. Both litigation and amicus briefs impose cost on a group. For example, amicus briefs can exceed $60, 0000 and Supreme Court litigation can cost around one million dollars (Barnes 2013; Caldiera and Wright 1988). Resource cost can constrain group behavior, which forces groups to be strategic about when they pursue policy change in the courts. Caldiera and Wright (1988, 1112) argue that "only if the preparation filing of brief amicus curiae is costly can a brief function as a reliable signal to the court" because groups haphazardly participating in court cases "would communicate no discriminating information at all to the members of the Court." This was a point that Mr. Isherwood made clear in our interview. When I asked him whether amicus briefs influence

judicial decision-making, he stated that "in order to be effective, you need to be selective in the cases you participate in."

1.1 Amicus Curiae and the U.S. Courts of Appeals

Generally speaking, the federal judicial hierarchy is composed of three levels: district courts, the U.S. Courts of Appeals, and the Supreme Court. District courts are at the bottom of the judicial hierarchy. There are 94 district courts and these courts are widely considered to be the workhorses of the federal judiciary. This is because district courts have the largest caseload and their judges "preside over a complex, dynamic case environment that presents multiple decision-making opportunities per case" (Boyd 2015, 114). These courts serve as the entry point for the overwhelming majority of federal court cases. At the opposite end of the judicial hierarchy is the United States Supreme Court, which serves as the court of last resort. Supreme Court decisions set precedent for lower courts to follow and guide the decision-making of future justices. Unlike the district courts, the Supreme Court has a very small case load. Their discretionary docket allows justices to screen cert petitions and strategically select cases in which to review (Black and Owens 2009). Over the past several decades, the Supreme Court's docket has shrunk considerably (Owens and Simon 2011).

In between district courts and the Supreme Court is the U.S. Courts of Appeals. The United States Courts of Appeals, commonly referred to as circuit courts, are the primary appellate courts in the United States. These courts are the beating heart of the federal judiciary. They exist as courts of general jurisdiction and the "right of review" requires circuit courts to hear every appealed case from federal district courts regardless of merit. Although circuit courts do not sit atop the judicial hierarchy, these courts wield tremendous power over the development of the law and implementation of public policy. They are the courts most responsible for

exercising judicial oversight of municipalities, states, Congress, and the executive branch. A cursory glance at their docket illustrates its legal diversity and the national significance of their work. For example, in the past several years these courts have influenced food policy via menu labeling,[13] the scope of the establishment clause via public displays of religious items on county grounds,[14] Fourth Amendment protections for cellular devices,[15] the First Amendment rights of students[16] and prisoners,[17] immigration policy,[18] healthcare policy,[19] and workers' rights.[20] The importance of the Courts of Appeals is also reflected in how outside actors view the institution. This is best illustrated by the increasingly polarized and highly partisan confirmation process for circuit court judges (Everett 2015, 2018; Martinek et al. 2002; Nixon and Gloss 2001).

Given their importance, circuit courts exist as a viable forum for outside groups to seek policy change. Their decision to seek policy change through the courts depends not only on their own organizational capabilities and goals, but also on the larger political environment (Cortner 1968; Hansford 2004b; O'Connor 1980; Walker 1991). There are several reasons why groups may participate via amicus briefs in circuit court cases. First, circuit court judges have larger caseloads than Supreme Court justices. From 1990 to 2016, there were roughly 209 cases per circuit court judge.[21] This is roughly twice as many cases as the Supreme Court heard during this

[13] *New York State Restaurant Ass'n v. New York City Bd. of Health* 556 F.3d 114 (2d Cir. 2009)
[14] *Freethought Soc. of Greater Philadelphia v. Chester County* 334 F.3d 247 (3d Cir. 2003)
[15] *United States v. Kolsuz* 890 F.3d 133 (4th Cir. 2018)
[16] *Frederick v. Morse* 439 F.3d 1114 (9th Cir. 2006)
[17] Benning v. Georgia 391 F.3d 1299 (11th Cir. 2004)
[18] *Texas v. United States* 809 F.3d 134 (2015); *State of Hawaii v. Donald Trump* F.Supp.3d 1227 (9th Cir. 2017)
[19] *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services* 648 F.3d 1235 (11th Cir. 2011); *King v. Burwell* 759 F.3d 358 (4th Cir. 2014)
[20] *Sweeney v. Pence* 767 F.3d 654 (7th Cir. 2014).
[21] This number is based on the average number of merit and procedural terminations from 1990 through 2016 divided by the total number of authorized Courts of Appeals judgeships. From 1990 through 2016 the Courts of Appeals terminated an average of 30, 980 cases based on the merits and 6,533 cases on procedural grounds for a total of 37,513. There are 179 authorized judgeships. Data comes from Federal Judicial Center U.S. Courts of Appeals-Cases Commenced, Terminated, and Pending (Detail). The data also comes from the U.S. Courts of Appeals Additional Authorized Judgeships (see also Pub. L. No. 1001-650, December 1, 1990)

same time period.[22] A large caseload requires circuit court judges to hear more cases, review more briefs, conduct more research, sit on more panels, interact with more judges, consider more opportunities to craft good law, and have more opportunities to issue a separate opinion. Given all this, circuit court judges may be more open to the informational power of amicus briefs. That is, amicus briefs provide a cue, or informational short-cut, that judges use to help them manage their judicial responsibilities (Tanenhaus et al. 1963). For example, judges can use amicus briefs to reduce the time necessary to conduct independent research, as a starting point for opinion writing, or simply to highlight cases that deserve more of their attention (Caldeira and Wright 1988; Collins et al. 2015).

Second, circuit courts receive less amicus activity than the Supreme Court (Collins 2008; Martinek 2006). This means there is less potential for counter-active lobbying by opposing groups when a judge is deciding a case (Solowiej and Collins 2009). Therefore, without competing information, it makes the group's message all the more persuasive (Collins 2004; Collins and Martinek 2010; Kearney and Merrill 2000). Finally, circuit courts have recently emerged as de facto courts of last resort (Richman and Reynolds 2013; Federal Courts Study Committee, 1990). This results from their growing caseload and the decreasing number of cases reviewed by the Supreme Court. Furthermore, the docket changes between the Supreme Court and the Courts of Appeals have implications for the number and type of issues reviewed by each court. As noted above, the U.S. Courts of Appeals have a legally diverse docket. This means that there is a higher likelihood the Courts of Appeals rules on an issue of importance to an interest

[22] The number for the Supreme Court comes from the Supreme Court Database (http://scdb.wustl.edu/index.php). The Supreme Court heard 2,678 cases from 1990 – 2016 terms. This includes all opinions of the court (orally argued), per curiam (no oral argument), decrees, equally divided votes, per curiam (orally argued), and judgement of the court (orally argued). The unit of analysis is the docket. 27 terms divided 2,678 cases results in about 99 cases per term.

group than the Supreme Court. Consequently, circuit court judges increasingly have the last word on a wide range of legal and policy matters.

Most research on amicus curiae activity focuses on the Supreme Court (Box-Steffensmeier et al. 2013; Collins 2004, 2008; Hansford 2004a; Kearney and Merrill 2000; McGuire 1990, 1994; McGuire and Caldeira 1993; O'Connor and Epstein 1981; Songer and Sheehan 1993; Spriggs and Wahlbeck 1997). Comparatively, less research studies amicus activity in the U.S. Courts of Appeals (Martinek 2006; Collins and Martinek 2010, 2015). This is unfortunate because, as I discussed above, circuit courts are both a viable forum for policy change and conducive to amicus activity. If groups are using circuit courts to advance their interests, we need to know which groups pursue policy change though the Courts of Appeals as well as the source their influence.

1.2 The Purpose and Scope of this Dissertation

This dissertation examines interest group litigation in the United States Courts of Appeals from 2003 through 2010. More specifically, it examines interest group influence via amicus curiae participation. The dissertation investigates amicus activity at three different stages of a circuit court case: the pre-merit, merit, and post-merit stages. The pre-merit stage is amicus activity before the circuit panel issues a ruling in the case. More specifically, what causes interest groups to participate as amicus curiae? The merit stage is when the outcome of a case is determined. I examine whether amicus briefs influence judicial decision-making. Finally, the post-merits stage refers to benefits the group receives from participation after the circuit panel has made their decision. I determine whether amicus participation in circuit courts has an effect on Supreme Court agenda–setting. The remainder of this section briefly discusses and summarizes the theory as well as the findings for each empirical chapter.

Chapter 2 examines amicus activity at the pre-merits stage, which is prior to the case's outcome. The chapter investigates the determinants of amicus participation in the Courts of Appeals. I argue that an interest group's decision to participate as amicus curiae is a function of group resources, organizational maintenance, and policy goals. I develop and test a number of hypotheses about which groups participate and when groups take part as amicus curiae. I find groups that value organizational maintenance, such as trade associations and public advocacy groups, submit more amicus briefs than other types of groups. I also find that that policy goals of the group matter to amicus participation. For example, trade associations participate as amicus more frequently in cases raising economic legal issues and unions participate more frequently in cases raising labor issues. Furthermore, I find case salience factors prominently in the decision to participate as amicus curiae. For example, First Amendment cases comprise only a small fraction of circuit court cases, yet receive a disproportionate share of amicus activity. Finally, I find that amicus briefs are important to groups and judges because of their informational value. Specifically, groups submit are more likely to submit an amicus brief when the legal complexity of a case increases.

Chapter 3 examines the influence of amicus curiae briefs on the decision on the merits. That is, did amicus participation influence litigant success? This chapter investigates two competing sources of amicus influence on judicial decision-making. The first potential source of influence is based on the number of amicus briefs submitted in the case. It suggests that amicus briefs are influential because of the *amount of information* they provide to the judge. The second potential source of influence is based on the *type of group* of submitting the amicus brief. It extends party capability theory to interest groups and suggest that well-resourced groups compose more legally persuasive amicus briefs to advance their interest. I find evidence that the

amount of information provided by interest groups to judges matters to the appellant's legal success, but not the resource capabilities of the groups providing the information.

Chapter 4 examines amicus influence at the post-merit stage, after the circuit court case has been decided. I argue that groups have goals from amicus participation that extend beyond the decision on the merits. These goals include organizational maintenance, litigation experience, and the development of the law. Interest groups value future litigation on an issue, especially at the Supreme Court. Therefore, I argue that a benefit from participating as amicus curiae in a circuit court case is that it sends a signal to litigants and Supreme Court justices about the legal and political importance of the case. I find that amicus support for the losing litigant in a circuit court case increases the likelihood that the litigant petitions the Supreme Court for a writ of certiorari. Chapter 5 provides concluding remarks, final thoughts, and offers a way forward on future research.

1.3 Contribution to the Literature

This dissertation makes three primary contributions to the study of judicial politics, generally, and interest group litigation more specifically. First, it provides a more detailed accounting of the types of groups using the Courts of Appeals. Second, this dissertation empirically test for evidence of interest group power in the Courts of Appeals. Third, I develop a new measure of case complexity. In the remainder of this section, I discuss in more detail the three main contributions of this dissertation to the law and courts literature.

1.3.1 Types of Groups Participating as Amicus Curiae

The level of detail in regards to circuit court amicus participation provided in this study currently does not exist. The data I have collected allows scholars to conduct research on the types of groups participating as amicus curiae in circuit courts over an extended period of time

and by circuit. Examining group activity over an eight year period compared to one or two years provides a more comprehensive analysis of amici behavior. This approach allows us to evaluate variations in types of groups participating as amici curiae. As a result, this data allows us to answer a number of questions regarding amici activity in the Courts of Appeals.

We can use this data to examine group strategies behind amicus activity. For example, we can examine the policy advocacy strategies and successes of groups using amicus briefs. We can investigate whether groups engage in forum shopping when deciding to participate as amicus curiae, in which groups only participate in ideologically friendly circuits. That is, do groups pay attention to the ideological composition of the circuits when deciding to participate as amici? We can examine the ideological advocacy of the amicus briefs as well as the ideological leanings of groups participating as amicus curiae. For example, are conservative and liberal groups participating as amicus curiae in equal numbers? Does an increase in the number of conservative circuit court judges produce an increase in the number of conservative leaning groups to participate as amicus curiae? We can also examine the extent to which group use amicus briefs to further their organizational maintenance goals. Do interest groups selectively decide to participate in cases that raise specific legal issues for organizational maintenance purposes? For example do trade associations participate more frequently in cases involving labor and economic activity? Do smaller, more local interest groups, such as the Virginia Wineries Association, only participate cases within their geographic region or do these groups monitor the Courts of Appeals for cases raising salient policy issues regardless of the circuit. This data can also be used to examine coalitional activity among amici. For example, do judges respond to amicus briefs submitted by several groups representing the same industry? Alternatively, are amicus briefs

with groups from different industries more powerful? Are states more successful when they join together and present a united front?

Most of the work examining the types of groups participating as amicus curiae focuses on the Supreme Court. One approach scholars have used is to examine the types of groups participating as amici curiae in small, condensed time periods. For example, Caldeira and Wright (1990) examine the types of groups participating as amici curiae during the Supreme Court's 1982 term. The authors classify groups based on membership characteristics (i.e. public advocacy groups, trade associations, corporations, public interest law firms, etc.). The authors find that over 1,400 distinct organizations participated as amici curiae during the Court's 1982 term. The authors further investigate which groups participate as amici curiae, the amount of coalitional activity between groups on amicus briefs, and the competition between different types of groups as amici curiae. For example, the authors find that 27 distinct union organizations and 179 distinct public advocacy organizations participated as amici curiae. They also find that peak associations and public interest law firms were least likely to engage in coalitional activity (i.e. cosigning amicus briefs).

Collins (2008) goes one step further in the investigation of group activity in the Supreme Court. He examines amici participation in four different Supreme Court terms (1950, 1968, 1982, and 1995) across four different Natural Courts (Vinson, Warren, Burger, and Rehnquist). He uses a similar group typology as Cladeira and Wright (1990). He finds that corporations and public advocacy groups comprised 8 percent and 16 percent of amici curiae and participated in 69 and 98 Supreme Court cases respectively during those four terms.

O'Connor and Epstein (1983) study interest group activity during the Burger Court. Specifically, the authors examine group participation during the Court's 1969-1980 terms.

Rather than categorize groups based on membership characteristics, the authors classify groups based on their ideological leanings, either liberal or conservative. The authors find that almost half the cases during this time period had participation from either liberal or conservative groups. Interestingly, the authors find a steady rise in the number of conservative groups participating as amici curiae over this time period, but no similar increase for liberal groups. The authors also find that conservative groups participate more frequently in cases involving issues of economic activity whereas liberal groups participate more frequently in cases involving civil liberties.

The benefit of looking at a small number of terms is that it allows the researcher to more thoroughly analyze the different types of groups participating as amici curiae. The drawback is that is prevents any analysis of the changes that occur over time in the types of groups participating as amici curiae. For example, the types of legal issues reviewed by the Supreme Court have changed over time. In 1946, the Supreme Court reviewed 48 cases involving the issue area of economic activity. This number decreased to 13 in 2016. In between, the number of cases involving the issue area of economic activity ebbed and flowed (1958 had 40 cases, 1962 had 32 cases, 1977 had 29 cases, 1982 had 32 cases, 1991 had 27 cases, and 2009 had 19 cases).[23] Therefore, the types of legal issues being reviewed by the court potentially influences the types of groups participating as amici curiae. It could be that fewer cases involving the issue area of economic activity leads to less participation from fewer the trade associations. Therefore, if the legal issues being reviewed by the Court have changed over time, the types of groups participating as amici curiae might have changed as well. Box-Steffensmeier et al. (2013) work

[23] The data in the parenthesis represents the year in each decade that had the most cases involving the issue area of economic activity. Data comes from the Supreme Court Database based on an analysis of the modern Supreme Court (1946-2016). The data reflects the number of orally argued opinions of the Supreme Court organized by case citation. See Harold J. Spaeth, Lee Epstein, et al. 2017 Supreme Court Database, Version 2017 Release 1. URL: http://Supremecourtdatabase.org.

on interest group activity in the Supreme Court makes this clear. The authors find substantial variation in the types of groups that wield influence over judicial decision-making. Specifically, they find that that railroads were the most powerful amici during the 1930s, but by the 1980s unions were among the most powerful amici.

An alternative approach scholars use to study the types of groups participating as amicus curiae is to examine the success rate of a select number of institutionalized amicus curiae, such as the ACLU, AFL-CIO, Chamber of Commerce, NAACP, state governments, and the federal government. For example, Kearney and Merrill (2000) look at changes in litigant success at the Supreme Court when the appellant and the respondent is supported by the ACLU, AFL-CIO, and the Solicitor General as amicus curiae over a five decade period. The authors find that the Solicitor General is the most powerful institutionalized amicus curiae. Specifically, the appellant's win rate before the Supreme Court nearly doubled with the support of the Solicitor General as amicus curiae and decreased by roughly 50 percent when the Solicitor General supported the respondent. The power of the Solicitor General as amicus curiae is one of the most consistent findings in the interest group litigation literature (Bailey et al. 2005; Box-Steffensmeier et al. 2013; Collins 2008; Epstein et al. 2012; Lynch 2004). In regards to other institutionalized amicus curiae, the authors find that ACLU amicus support helps appellants, but not respondents. Conversely, the authors find considerable evidence that the presence of AFL-CIO as amicus curiae aids in the legal success of respondents.

The case study approach allows us to track the influence of powerful, repeat players as amicus curiae. Knowing the success of institutionalized amicus is important because lawyers will actively recruit powerful interest groups to support their cause before the Supreme Court (McGuire 1994). The draw back to this approach is that it ignores the roughly 90 percent of other

interest groups that participate as amici. Collins (2008) shows that there is broad range of group participation in the Supreme Court, ranging from Native American tribes to churches to corporations, such as Mobil Oil, to public interest law firms, such as Trial Lawyers for Public Justice, to trade associations, such as the American Sociological Association. Therefore, given the diversity of groups that participate as amici, we need to have a better understanding of which groups' exert power and influence over judicial decision-making.

A third, and the most comprehensive, approach is to use network analysis to examine the frequency with which certain groups form amicus brief coalitions. This is the approach used by Box-Steffensmeier et al. (2013) in their study on interest group power and Supreme Court decision-making. Network analysis allows the authors to track the changes in group coalitions over time, which allows them evaluate changes in the relative power of interest groups. For example, the authors find that public utilities were powerful amici in the 1970s and farm associations were powerful amici in the early 2000s. Moreover, the authors find that the ACLU was one of the most powerful amicus curiae since 1946. The ACLU reached peak power in 1980, but their power slowly decreased in the 1990s and 2000s. Their study not only provides an incredible amount of detail on the types of groups participating as amicus curiae, but also assesses how the influence of groups has evolved over time.

1.3.2 An Investigation of Interest Group Power

Second, and relatedly, this dissertation advances our understanding of interest group power by examining the impact that different types of groups have on judicial decision-making. Current work on amicus activity in circuit courts does not examine the influence that different types of groups have on judicial decision-making. Current work treats all groups as equal, even though we know that judges do not value the work of all amici equally (Lynch 2004). For

example, Collins and Martinek (2010) and (2015) examine the influence of amicus briefs on litigant success and the ideological direction of a judge's vote respectively. However, both studies only examine the impact of amicus briefs instead of looking at the types of groups submitting the amicus briefs. To be sure, there is considerable value in studying only amicus briefs. An amicus curiae brief supplies the court with extra information about the case under review. Therefore, this is a sensible approach when looking for evidence of the informational value of amicus briefs on judicial decision-making. However, groups vary in the credibility of their legal arguments. Groups with more resources have the ability to hire better legal representation to write their amicus briefs and can more frequently participate as amicus curiae. This allows certain groups to develop repeat player status, which allows them to make more credible legal arguments in the eyes of judges (Galanter 1974; McGuire 1995). Therefore, judges may place more weight on the legal arguments being advanced by the federal government, institutionalized amicus, or national trade associations rather than public interest law firms or corporations. The current approach to studying amicus activity in the Courts of Appeals does not capture the potentially disproportionate impact that certain groups have over judicial decision-making.

This dissertation moves us beyond simply looking at amicus brief influence. Rather, the data collected for this dissertation allows us to examine whether variations in group power exist. That is, do litigants benefit more from the support of powerful amici or do judges pay more attention to the number of amicus briefs in the case? Past research has found variations in group power at the Supreme Court (Box-Steffensmeier et al. 2013). Therefore, it is reasonable to assume that similar group power dynamics exist in the Courts of Appeals. However, to date, data availability has made studying the variations in group power over judicial decision-making in

federal circuit courts very difficult. For this dissertation, I collected data on the types of groups participating as amici curiae. This allows us to begin studying how the presence of different types of groups as amici curiae affects the behavior of circuit court judges. For example, we can use this data to examine whether judges are more heavily influenced by arguments advanced by unions, trade associations, or corporations in cases involving economic regulation and labor issues. Similarly, does the presence of the ACLU or the NAACP exert more influence over judicial decision-making in cases involving privacy or civil rights issues? Do powerful interest groups participate as amici in the Courts of Appeals with the same frequency as the Supreme Court? If so, do powerful interest groups experience similar success? If powerful groups experience less success, why might this be the case? Relatedly, if powerful groups experience less success, does this mean circuit courts exist as an institution that allows smaller groups to successfully compete with larger groups over the development of the law and legal policy?

Furthermore, the data provided in this dissertation can be used to study counter-active lobbying in circuit courts. To date, this was an approach primarily reserved for amici activity in the Supreme Court (Solowiej and Collins 2009). For example, when a case pits multiple interest groups as amici against each other, are powerful groups more likely to prevail? Alternatively, can a litigant supported by several smaller interest groups as amici prevail against a litigant supported by a single powerful interest group, such as the ACLU? Alternatively, we can use this data to study whether judges are more likely to incorporate information from the amicus briefs of institutionalized amici compared to other amici.

Investigating group success as amicus curiae is important because there are reasons to believe that Courts of Appeals judges should rely heavily on amicus briefs when deciding cases. This is because circuit court judges face considerable workload pressures and resource

constraints (Epstein et al. 2013; Federal Courts Study Committee 1990; Richman and Reynolds 2013). More cases require judges to sit on more panels, write more opinions, and conduct more legal research. Therefore, judges may look for cues to lessen their workload burden. One such cue is the presence of amicus briefs from groups with enhanced legal credibility. Judges may be more likely to differ to the legal arguments articulated by institutionalized amici. Moreover, judges may be more likely to rely on amicus briefs from powerful groups when writing their opinions in order to reduce part of their workload burden and free up resources to pursue other judicial or non-judicial responsibilities. Therefore, having data on the individual groups that participate as amicus curiae furthers our understanding of the relationship between amici and judicial behavior.

1.3.3 A New Measure of Case Complexity

Finally, I develop a new measure of legal complexity for the study of judicial behavior in the Courts of Appeals. Research on circuit court decision-making largely suffers from an appropriate measure of a case's legal complexity. Scholars typically measure a case's legal complexity using the number or types of legal arguments raised in the majority opinion (Martinek 2006; Hettinger et al. 2007, Ch. 3). However, using characteristics of the opinion to measure a case's complexity is problematic. This is because it is difficult to untangle the casual mechanism driving the relationship between judicial behavior and case complexity. I construct a measure of a case's complexity prior to the decision on the merits, which removes the endogenity inherent in the previous approach. The measure of legal complexity I develop is based on the complexity of a case's litigation environment. This a priori measure allows us to assess the legal complexity of a case independent of the opinion. As I explain in more detail in Chapter 1, section 5 "A Note on the Data," I use a case's docket sheet to measure the complexity

of a case prior to circuit panel's decision on the merits. This provides a more accurate representation of legal complexity compared to the current approach of relying on opinion characteristics. While I originally constructed this measure to examine amicus participation in the Court of Appeals, it can be used to study other aspects of judicial behavior, such as the decision to dissent, reverse a lower court decision, or whether case complexity influences ideological decision-making.

I will provide two examples of how measures of legal complexity currently used in the literature are endogenous to the dependent variable, which potentially affects the results of their study. For example, Martinek (2006) studies group participation via amicus briefs in the Courts of Appeals from 1960 through 1996. She theorizes that groups should avoid legally complex cases because the policy implications of the case are not clear. One of her measures of legal complexity is based on aggregating "a set of variables contained in the U.S. Courts of Appeals Database to related to legal provisions to derive a summary measure of the number of issues raised" (Martinek 2006, 814). She admits this approach is an imperfect measure, but until now it was the only complexity measure that existed in the Multi-User Courts of Appeal Database (Songer 1997). She writes that the "best measure would be a straight forward count of the number of issues disposed of in a case. Unfortunately, the U.S. Courts of Appeals database only provides only a very imperfect way to get at the number of issues raised" (Martinek 2006, 821). However, even a counting of the legal raises raised in the opinion would create similar endogenity issues to the measure she uses. Martinek (2006) finds that more groups submit more amicus briefs in legally complex cases, which is the opposite of her theoretical expectation. It is possible that she finds opposite results because her measure of complexity is endogenous to amicus participation. That is, the majority opinion is more legally complex because amicus briefs

were submitted in the case. The amicus briefs presented legal information to the judges about the case and the majority opinion felt it necessary to address the legal concerns raised by the amicus briefs. In short, did groups participate as amici because the case was legally complex or did the case become legally complex due to participation of amici?

Another example is a judge's decision to write a separate opinion. One of the most authoritative works on the judicial behavior of circuit court judges is the book by Hettinger et al. (2007) *Judging on a Collegial Court: Influences on Federal Appellate Decision Making.* In Chapter 3 the authors assess the various factors influencing a judge's decision to write a separate opinion. One of the control variables is the complexity of a case, in which "more opportunities exist for judges to part company as to the appropriate resolution and / or legal rationale" (Hettinger et al. 2007, 59). The authors capture case complexity by relying on the number of legal issues raised in the case. The authors recognize that this approach may be problematic and that is was difficult to measure the number of legal issues because no straight forward counting exists in the Multi-User Courts of Appeals Database (Songer 1997). Instead, the authors combine a set of variables from the database that together "reflects the number of different references in the headnotes set forth at the beginning of the majority opinion in West's *Federal Reporter"* (Hettinger et al. 2007, 134). The authors find that their measure of legal complexity leads to more concurring opinions, but not dissents.[24]Yet, similar to amicus participation, it is possible that majority opinions are legally complex because a dissenting opinion was issued in the case. This is because the majority opinion felt it necessary to address the legal arguments raised by the

[24] In Hettinger et al. (2007), the baseline value for separate opinion authorship is the decision to join the majority opinion. They authors find that legally complex cases increases the likelihood of writing a concurring opinion compared to joining the majority opinion, all else equal. However, the legal complexity variable does not reach conventional levels of statistical significance for the decision to write a dissenting compared to a joining a majority opinion, all else equal (see Hettinger et al. 2007, Chapter 3 Appendix, Table 3 pg. 71).

dissenting opinion, thus increasing the length or complexity of the majority opinion. This would not be an issue with an a priori measure of legal complexity.

1.4 A Typology of Interest Groups

Interest groups come in all shapes and sizes. Some groups, like the ACLU, represent a broad array of interests. Others, such as the Virginia Wineries Association, pursue policies targeted at a narrow membership group.[25] Some groups have economic or professional barriers to entry, such as the Bar of the City of New York[26] or the National Association of Chain Drug Stores.[27] Other groups have no barriers to entry and are available to all citizens, such as the Center for Science in the Public Interest[28] or the American Association of Retired People (AARP).[29] Given the variety of organizations that exist, I had to use a typology in order to properly classify the different types of interest groups. Developing a typology was not an easy task given that there is no universally accepted definition of an interest group (Baroni et al. 2014). Past research has defined an interest group based on their policy area, organizational

[25] The Virginia Wineries Association "is a trade association for wineries in the Commonwealth of Virginia, with 140 members. Its mission is to encourage and support the production, quality, promotion and appreciation of Virginia wines" (Amicus Brief, *Family Winemakers of California v. Jenkins* 592 F.3d 1 (1 Cir. 2010). The ACLU is a "nationwide nonprofit, non-partisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution" (Amicus Brief, *In re Application of U.S. for an Order Directing a Provider of Electronic Communication Service to Disclose Records to Government* 620 F.3d 304 (3 Cir. 2010)

[26] Bar of the City of New York "members include over 22,000 attorneys practicing in the New York state courts who share a profound commitment to ensuring that the judges before whom they appear are empowered and supported to uphold the highest standards in the profession" (Amicus Brief, Torres v. New York State Board of Elections 462 F.3d 161 (2d Cir. 2006).

[27] The National Association of Chain Drug Stores is a "non-profit association of nearly 200 pharmacy retail chains" (Amicus Brief, *Arkansas Carpenters Health and Welfare Fund v. Bayer AG, Bayer Corp*. 604 F.3d 98 (2d Cir. 2010).

[28] Center for Science in the Public Interest is a "nutrition and science advocacy organization and a leading advocate of the National Labeling Education Act and state and local menu labeling legislation" (Amicus Brief, *New York State Restaurant Ass'n v. New York City Bd. of Health* 556 F.3d 114 (2d Cir. 2009)

[29] The AARP is a "nonpartisan, nonprofit membership organization of nearly 40 million people, age 50 and older, dedicated to addressing the needs and interest of older persons" (Amicus Brief, *Arkansas Carpenters Health and Welfare Fund v. Bayer AG, Bayer Corp*. 604 F.3d 98 (2d Cir. 2010).

characteristics, or their lobbying tactics (Baumgartner et al. 2009; Baroni et al. 2014; Salisbury 1984; Truman 1951; Walker 1983).[30]

Table 1.1 Categories of Interest Groups

Type	Amici (Group) Example
Trade Associations	American Association of Law Libraries, Oregon Wineries Association
Public Advocacy	American Civil Liberties Union (ACLU), Public Citizen
Individual	Law Professors, Members of Congress Scientist
State Government	Alabama, Pennsylvania Department of Corrections
Corporations	ABC, Inc., Bank of American, Sazerac Company
Public Interest Law	Legal Aid Society of New York City, Washington Legal Foundation
Other	Mississippi Band of Choctaw Indians, Society for Humanistic Judaism
Peak Associations	Chamber of Commerce, National League of Cities
United States	Equal Employment Commission, Securities and Exchange Commission
Local Governments	County of Allegany New York, South Coast Air Quality Management Districts
Unions	Teamsters Local 75, United Transportation Union

Note: Interest group examples are listed in alphabetical order

I follow the literature (Calderia and Wright 1988, 1990; Collins 2008; Hansford 2004ab) and apply a broad definition to interest groups, which are a "variety of organizations that seek joint end through *political* action" (Schlozman and Tierney 1986, 11). Based on this definition, terms such as "organized interest," "pressure groups," organization," and "group" are used interchangeably throughout the dissertation. This broad definition of interest group encompasses the following the entities: corporations, public advocacy groups, public interest law firms, governments, trade associations, individuals, and unions (Collins 2008). This definition also includes amicus briefs filed by groups of individuals, or what Collins (2008, Ch. 2) terms "ad

[30] For a comprehensive review of the interest group literature as well as an empirical analysis of the various typologies scholars use to study interest groups see (Baroni et al. 2014).

hoc organizations" because a group is pursuing their goals through government institutions. Also, included in this definition is an amicus filed by an individual, but composed of by a team of lawyers. Collins (2008, 19) writes, "Simply put, because such a group of individuals is pursuing political action, it can be thought of as an interest group under Schlozman and Tierney's theory."

I list the categories for the different type of interest groups and provides examples for the type of groups considered for that category in Table 1.1. Based on the information I collected from Public Access to Court Electronic Records (PACER), Lexis, and Westlaw, I classified interest groups into one of ten possible categories. This coding procedure that has been used to study amicus participation at the Supreme Court (Collins 2008). The coding procedure differentiates between governmental institutions, such as local, state and federal governments, and private organizations, such as trade associations, public interest law firms, and public advocacy groups.[31] To be sure, this is a simplified approach to understanding interest groups. For example, public advocacy organizations vary in size, such as the American Civil Liberties Union (ACLU) and the Prairie Rivers Network.[32] However, this simplified approach has its benefits. According to Collins (2008, 57),

> by reducing the types of amici into basic categories, much can be learned about the characteristics of participating organizations…it can easily be discerned if amicus activity is dominated by corporations or whether public advocacy groups find an equal voice in the Court.

[31] The categories for individuals, corporations, United States government, state governments, local governments, and unions have straightforward classifications. To categorize groups into public advocacy, public interest law firm, trade association, peak association, and other, I relied on the framework put forward by Collins (2008). See Collins (2008, Chapter 2) for a general explanation of the typology used to classify groups and the benefits of using this approach to classifying the amici.

[32] The Prairie Rivers Network is a "not-for-profit organization concerned with river conservation and water quality issues throughout Illinois" (Amicus Brief, *Waterkeeper Alliance Inc., v. United States Environmental Protection Agency* 399 F.3d 486 (2d Cir. 2005).

Although the categories for individuals, corporations, United States government, state governments, local governments, and unions have straightforward classification, I will briefly elaborate on the classification strategy of the other categories. To categorize groups into public advocacy, public interest law firm, trade association, peak association, and other, I relied on the typology framework put forward by Collins (2008) in his book on interest group participation in the Supreme Court. Public advocacy organizations are groups whose goals are primarily political, not economic, and have open memberships. That is, there is not a professional or occupational status necessary to become a member of the group. For example, Trust for America's Health is a "non-profit, non-partisan organization dedicated to saving lives by protecting the health of every community and working to make disease prevention a national priority."[33]

I considered a group a public interest law firm if they provided legal assistance to individuals or bring test cases on behalf of their members in order to further their goals.[34] According to Collins (2008, 59), public interest law firms "focus on providing individuals with attorneys" and their membership is based on their type of staff (i.e. attorney). The overwhelming majority of groups in this category identified themselves as public interest law firms in their amicus briefs. For example, the National Lawyers Guild is a "65-year-old national organization of lawyers, law students, legal workers and jailhouse lawyers dedicated to using the law as a force for positive social change."[35] Another example is the New England Legal Foundation which describes itself as a "is a nonprofit, public interest law firm, incorporated in Massachusetts

[33] See amicus curiae brief for U.S. Congressman Henry Waxman et al., *New York State Restaurant Ass'n v. New York City Bd. of Health* 556 F.3d 114 (2nd Cir. 2009)

[34] Collins (2008) describes public interest law firms as "nonprofit legal organizations that either provide counsel to individuals to further litigation consistent with the group's jurisprudential philosophies or initiated litigation themselves on behalf of their members' interest" (59).

[35] See amicus curiae brief for the Center for Constitutional Rights et al., *U.S. v. Hammoud* 378 F.3d 426 (4th Cir. 2004).

in 1977…mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights."[36]

I classified groups as trade associations if their membership is based on occupational status and are focused on providing primarily economic benefits to their members (Collins 2008). In other words, there are professional barriers to becoming a member of a trade association. For example, WineAmerica, Inc., "is the National Association of American Wineries, with 800 member wineries located in 48 states. Its mission is to encourage the dynamic growth and development of American wineries through the advancement and advocacy of sound public policy."[37]

Groups are considered peak associations if their membership is comprised of "organizations of organizations" and "represent the interest of other institutions, such as labor unions and businesses" (Collins 2008, 59). For example, the Federation of German Industries "is a German industrial organization with a membership of 37 industrial sector associations, which in turn represent individual member companies."[38]

1.5 A Note on the Data

There are two sources of data for this project. The first data source is the most recent extension of the Multi-User Courts of Appeals Database (Songer 1997). The second data source comes from elite interviews. In this remainder of this section, I briefly explain these two data sources.

1.5.1 Phase III Courts of Appeals Database

[36] See amicus curiae brief for New England Legal Foundation and Associated Industries of Massachusetts, *S.E.C. v. Tambone* 597 F.3d 436 (1st Cir 2010).
[37] See amicus curiae brief for Wine Institute et al, *Family Winemakers of California v. Jenkins* 592 F.3d 1 (1st Cir. 2010).
[38] See amicus curiae brief for Federation of German Industries, *In re Automotive Refinishing Paint Antitrust Litigation* 358 F.3d 288 (3rd Cir. 2004).

The data I use to investigate and analyze amicus activity come from *Phase III of the U.S. Courts of Appeal Database,* which covers 2003 through 2010. This is the most recent extension of the Courts of Appeals data initiative (Songer 1997; Hurwitz and Kuersten 2012). Phase I covered 1925 through 1996 and Phase II covered 1997 through 2002. This is the most widely used data source to study judicial behavior in the Courts of Appeals (Collins and Martinek 2015; Cross 2003; Hettinger et al. 2007). Phase III of the database consists of 2,880 randomly sampled circuit court cases from the twelve geographic circuits, which is 30 cases per year per circuit.[39] This database has not been publicly released as it was still under development during the early stages of this dissertation. Dr. Susan Haire, one of the principal investigators on the Courts of Appeals Database, was generous enough to allow me access to the unfinished product. All of the variables used to conduct empirical analysis were coded by me, except for the presence of a constitutional issue, the presence of a dissent, and reversals. The latter two are only in Chapter 4 while the constitutional issue variable is important to all three empirical chapters. I coded the variables by reading the opinions located on Lexis and using the coding procedures outlined in previous iterations of the database.

The most significant piece of the database, at least in terms of the dissertation, is the information on amicus activity. The original Phase III version only included an indicator variable for the presence of amicus curiae activity. I expanded on this by creating variables to capture the number of amicus briefs in the case, the number and types of groups participating as amicus curiae, their resource capabilities, the ideological direction of their brief and which litigant the

[39] I exclude the U.S. Courts of Appeals for the Federal Circuit because it is has institutional structure that is completely different from the geographic circuits. The Federal Circuit has a nationwide jurisdiction over specific areas of law, such as patent and trademark law, veterans' benefits, claims against the United States, etc. Congress created the Federal Circuit to improve the quality of adjudication and more efficiently handle cases related to specialized areas of the law (Dreyfuss 2003).

group supported. The information on amicus activity came from three sources: Public Access to Court Electronic Records (PACER), Lexis, and Westlaw. The bulk of the information came from PACER, which is a fee based service. Therefore, I requested and was subsequently granted a PACER fee exemption from all twelve circuits. A docket sheet captures the case's litigation environment. Every development of the case from the submission of party briefs to motions to petitions for writ of certiorari is indicated in the docket sheet. Most importantly for my purposes, the docket sheet contains a list of all groups that participated as amicus curiae and when that participation occurred.

Cases often have byzantine legal histories. Cases move up and down the judicial hierarchy, often several times, before a case is finally resolved. There are numerous opportunities along the way for a group to participate as amicus curiae. The data in this dissertation only captures amicus activity that occurs prior to the decision on the merits. In other words, if a case is on remand from the Supreme Court, I only capture amicus activity that occurs between remand and the circuit courts post-remand decision. I do not account for amicus activity that occurs at earlier points in time. The reason for this is because I am interested in what aspects of the current case on appeal motivate a group to participate as amicus curiae. As a case progresses through the legal system, legal issues are likely to change as well as its complexity. Therefore, in order to precisely capture the determinants of amicus activity, I only focus on amicus participation prior to the date of the Courts of Appeals decision listed in the Database.

1.5.2 Elite Interview Methodology

This research benefits greatly from three interviews I conducted with interest group representatives. In this sub-section, I explain the interview process – gaining access, conducting the interview, and following up from interviews.

Gaining Access

The first step to gaining access is deciding which interest groups to contact. I tried to select interest groups that operate in different policy areas. I requested interviews from a mix of civil rights and liberties groups, business associations, labor groups, and environmental groups. It was extremely easy to identify the contact information for these groups as it was listed on their websites. I sent an email to the point of contact for each group requesting an interview. In my email request, I identified my name, my position, briefly explained my research project and the purpose for the interview. I made it known that I would offer complete anonymity for their participation and volunteered to provide them with the interview topics and / or research questions in advance. Additionally, I offered to conduct a phone interview if meeting in person was not an option. I got three types of responses to my email requesting an interview: a non-response, a polite decline, and an acceptance of my interview request. Three groups responded to my interview request and agreed to meet for an in-person interview. I interviewed a representative from three different groups: two public advocacy organizations and one trade associations. Although I offered each interest group representative complete anonymity for their interview, each representative decided to go on the record and consented to public attribution of their quotes. The three groups are the Sierra Club (represented by Aaron Isherwood, the Phillip S. Berry Managing Attorney), the Gun Owners of California (represented by Sam Paredes, Executive Director), and the National Federation of Independent Business (NFIB) Small Business Legal Center (represented by Luke Wake, Senior Staff Attorney).

Preparing and Conducting the Interviews

Before I could conduct any interviews, I first had to receive permission from the University of Georgia Institutional Review Board (IRB). The IRB is the research oversight committee

charged with ensuring that human subjects' research is conducted in compliance with the applicable federal, state, and institutional policies and procedures. My interview questions were vetted and approved by the IRB.

I developed a list of twelve questions that I thought were pertinent for my research project. The interview questions can be found in Appendix A. The questions were designed to gain information about why interest groups file amicus curiae briefs. All the interview questions were open-ended and designed to be exploratory in nature. I wanted to get their candid opinion regarding the motivations for participating as amicus curiae, the role of organizational resources on the decision to participate as amicus curiae, when they decide to cosign an amicus brief versus solo authoring a brief, their expectations for filing an amicus brief (e.g. recruitment of new members, influence judicial decision-making, etc.). Although none of the groups requested the interview questions in advance, upon their request I provided the groups with more detailed information about the purpose of my research project and the interview. Initially, all three representatives agreed to an in-person interview. However, a scheduling conflict forced my interview with Sam Paredes to be changed to a phone interview. I conducted the first interview with Sam Paredes, the Executive Director for Gun Owners of California on the morning of August 31. I conducted the second interview with Aaron Isherwood, the Phillip S. Berry Managing Attorney for the Sierra Club in his office in the afternoon of August 31, 2017. I conducted the third interview with Luke Wake, a Senior Staff Attorney with the National Federation of Independent Business Small Business Legal Center, at a Starbucks around midday on September 1, 2017.

Post Interview Follow-up

None of the interviews were video or tape recorded. I wrote down by hand the responses each interest group representative provided to my questions. At the conclusion of each interview, I promised to provide each representative my notes and a write-up of their responses to my questions in order to ensure accuracy in their remarks. As promised, I emailed each representative the interview questions and their recorded response. A couple interview subjects chose to edit my quotations. Eventually, all of the interview subjects approved their responses and agreed to public attribution of their remarks.

CHAPTER 2

THE STRATEGIC NATURE OF INTEREST GROUP ACTIVITY IN THE U.S. COURTS OF APPEALS

Interest group participation influences judicial decision-making and case outcomes (Box-Steffensmeier et al. 2013; Collins 2004, 2008; Collins and Martinek 2015; Kearney and Merrill 2000). Yet, before groups can achieve policy success in courts, they must first decide which cases warrant their attention. Consider two cases from the Third Circuit Court of Appeals: *J.S. ex rel. Snyder v. Blue Mountain School District* 593 F.3d 286 (3rd Cir. 2010) and *S.G. ex rel. A.G. v. Sayreville Bd. of Education* 333 F.3d 417 (3rd Cir. 2003). Both cases involved students receiving suspensions, one from kindergarten and one from middle school, for conduct that was perceived to be threatening to the peace, safety, and order of the school. Parents for the suspended students filed civil lawsuits against the school boards for violating their child's constitutional rights in regards to free speech, equal protection, procedural and substantive due process.[40]

Despite their similarities, only *J.S. ex rel. Snyder* attracted amicus curiae participation. Two interest groups filed a joint brief in support of the parent of the suspended student. One group was the Pennsylvania Center for the First Amendment (PFCA), a public advocacy group established in 1992 that "promotes awareness and understanding of the principles of free expression to scholarly community and the general public." The second group was the Student Press Law Center (SPLC), which was established in 1974 as a nonprofit "legal assistance agency

[40] More specifically, the parents for the suspended children brought 42 U.S. 1983 actions against the school districts. 42 US 1983 is a federal law that provides a method, usually in the form of civil lawsuits, for the violation of constitutional rights by individuals acting under the color of state law. For a more expansive discussion of 1983 claims see Mead (1986) and Newman (1978).

devoted exclusively to educating high school and college journalist about the rights and responsibilities embodied in the First Amendment." PFCA and SPLC only participated in *J.S. ex rel. Snyder*, even though both cases had similar appellants and legal issues.

The purpose of this chapter is to examine interest group participation in the U.S. Courts of Appeals. This chapter explains why interest groups, such as PFCA and SPLC, participate in some cases, such as *J.S. ex rel. Snyder*, and not others, such as *S.G. ex rel. A.G.* Understanding the determinants of interest group participation is important because it influences judicial decision-making. If amicus activity in circuit courts is limited only to groups with the resource capabilities to participate, this influences the types of outside information being presented to judges and the effect of that information on judicial decision-making. This has implications for the law because it could potentially influence the development of legal doctrine in manner that is beneficial for resource advantageous groups or interests. Therefore, we need to know how group characteristics and goals influence amicus participation.

This chapter proceeds as follows. First, I briefly discuss the two main reasons groups participate as amicus curiae, which are policy advocacy and organizational maintenance. I then use descriptive statistics on amicus participation to test two hypotheses regarding group participation in circuit courts. The first hypothesis is based on organizational resources. I argue that because membership groups need to maintain their organizational capabilities in order to successfully lobby government institutions, membership groups should be most likely to participate as amicus curiae. The second hypothesis is based on the ideological advocacy goals of interest groups. I argue that policy advocacy incentivizes groups to engage in venue shopping by participating as amicus curiae in ideologically friendly circuits.

I conclude by empirically testing whether groups strategically participate as amicus curiae in order to further their policy goals. The emergence of circuit courts as de facto "courts of last resort" makes them an attractive venue for interest groups to seek policy change (Richman and Reynolds 2013). However, the combination of case volume and the resource constraints faced by interest groups make it difficult for them to participate in every case that furthers their goals. Therefore, I argue that interest groups strategically participate as amicus curiae in cases that offer them the most informational leverage over judge's decision-making process, which are legally complex cases. I test this theory using a new measure of legal complexity specifically constructed for this dissertation.

The study is important for several reasons. First, past research finds that amicus briefs influence judicial behavior. Amicus briefs have been found to shape judicial decision-making on the merits of the case, opinion content, and Supreme Court agenda-setting (Caldeira and Wright 1988; Collins 2008; Collins and Martinek 2015; Collins et al. 2015; Comparato 2003; Kearney and Merrill 2000). For example, Collins (2004) finds that the number of amicus briefs in support of the petitioner increases the likelihood of success before the Supreme Court, rather than the total number of interest groups in the petitioner's corner. Hettinger et al. (2007) find that presence of amicus briefs increases separate opinion writing in courts of appeals. Black and Boyd (2010) find that amicus curiae briefs can increase the likelihood that the Supreme Court grants an under-resourced litigant's petition for cert. Given all this, we need to understand when interest groups will use their influence via amicus briefs.

Second, this study speaks to the strategic behavior of interest groups (Hansford 2004b; Schattschneider 1960; Truman 1951). Interest groups are focused on lobbying government institutions, including political parties, in order to produce changes in public policy. Submitting

an amicus brief is one of several lobbying strategies available to interest groups. Therefore, it is important to understand when groups will rely on amicus briefs as a means for obtaining policy change.

Finally, government institutions have historically been subject to lobbying efforts by interest groups and courts are not an exception (Burstein and Linton 2002; Grossman 2012). Over the past several decades, there has been a steady increase in the number of state and federal court cases receiving amicus participation (Epstein 1992; Kearney and Merrill 2000; Songer and Kuersten 1995). For example, Collins (2008) finds that the percent of Supreme Court cases with amicus participation has increased from roughly 30 percent in the early 1960s to over 90 percent in 1998. Likewise, the average number of amicus briefs for a Supreme Court case advocating a liberal position increased from less than one in the early 1960s to over three in the mid-1990s. O'Connor and Epstein (1983) find that the frequency with which conservative leaning interest groups participate as amicus curiae increased significantly starting in the 1980s. This suggests that groups are increasingly relying on amicus briefs to influence public policy.[41] Therefore, the findings from this study provide insights into the types of groups using the circuit courts to advance their policy interest.

I test my hypotheses of interest group participation using an original data set of randomly sampled circuit court cases covering all twelve geographic circuits from 2003 through 2010. Additionally, I conducted interviews with representatives from three different interest groups (Gun Owners of California, Sierra Club, and the National Federation of Independent Business

[41] O'Connor and Epstein (1983) suggest that the increase in conservative amicus briefs results from federal courts becoming more ideologically friendly to conservative causes and the increased acceptance of conservativism more broadly with the election of President Reagan. Another explanation for the growth of amicus briefs is due to the increased policy role of the Supreme Court specifically and all courts more generally (Casper 1976; McGuire 2004). As the Supreme Court takes more responsibility for shaping public policy, groups have made it a priority to advance their policy interest by influencing judicial decision-making.

[NFIB] Small Business Legal Center) in order to gain insight into the strategy behind their use of amicus curiae briefs.[42] My findings generally support my theoretical expectations. I find that groups are strategic in their case selection processes. First, groups that value organizational maintenance benefits, such as trade associations and public advocacy groups, file more amicus briefs than other groups. Second, I find limited evidence that groups selectively participate in cases that take place in ideologically friendly circuits. Finally, I find that groups participate as amicus curiae to maximize their informational influence over judicial decision. Specifically, groups are more likely to submit amicus briefs in legally complex cases, especially cases raising a first impression issue.

2.1 Why Participate as Amicus Curiae

Interest groups have two important goals: issue advocacy and organizational maintenance (Solberg and Waltenberg 2006; Truman 1951; Walker 1983, 1991). Courts are a particularly attractive venue to pursue these two goals. The first reason is the function that amicus briefs serve for groups. Along with litigation, an amicus brief is the primary means by which groups achieve policy change in the courts (Collins 2008; Ivers and O'Connor 1987; Kearney and Merrill 2000; O'Connor and Epstein 1983).[43] An amicus ("friend of the court") brief is submitted by an individual or group that is not a party to the litigation, but has a strong interest in the outcome of the case.[44] Groups submit an amicus brief to provide additional information to the court with the goal of influencing a judge's decision in order to obtain a desired policy outcome

[42] For information on methodology and process behind the elite interviews used in this dissertation see Chapter 1, section 5, subsection 2 entitled "Elite Interview Methodology" as well as Appendix A.
[43] For more on interest group litigation strategies see Epstein (1985), Klarman (2006), Olson (1990), Truman (1951) Cowan (1976), and Vose (1959).
[44] The Federal Rules of Appellate Procedure govern the submission of amicus briefs in circuit courts. Agencies of the United States, state governments, the District of Columbia, and federal territories can file an amicus brief without the consent of the court or the parties. While all other interested groups must obtain permission, courts rarely deny outside groups the opportunity to submit an amicus brief (Harrington 2005, Tigar and Tigar 1999).

(Collins 2008; Krislov 1963). Groups that participate as amicus curiae tend to be subject-matter experts in the legal and policy areas raised in the case. Therefore, groups use amicus briefs to supply the court with supplemental information that is not always included in litigant briefs (Collins 2008; Camparato 2003; Kearney and Merill 2000; Spriggs and Wahlbeck 1997). Litigant briefs might focus on the specific legal issues or rules in the case, while amicus briefs highlight the social and economic impact of the court's decision. Most importantly, amicus briefs are not neutral. Rather, amicus briefs advocate for a specific outcome or course of action (Krislov 1963). Collins (2008, 31) writes that interest groups use amicus briefs to "argue their position for the primary purpose of shaping the Court's policy output as it will affect others in a similarly situated position." Therefore, an amicus brief is a tool an interest group can use to advocate for policy change in state and federal courts.

Appellate practitioners (i.e. judges, lawyers, and law clerks) strongly believe that amicus briefs are most effective when they present new information to the court (Flango et al. 2006). Based on his interviews with law clerks (Shapiro 1984, 22) writes, "to be effective, an amicus brief must bring something new and interesting to the case. This might be better research…improved discussion of industry practices or economic conditions…or a convincing demonstration of the impact of the case on segments of society." Walbolt and Lang (2002) interview a number of Florida appellate judges regarding the value of amicus briefs. They find amicus briefs that merely "echo" litigant briefs receive little attention from judges. Rather for amicus briefs to be effective, groups must "come forward with 'unique information' bearing on the issues" (Walbolt and Lang 2002, 278). Furthermore, the informational values of amicus briefs is reflected in the behavior of judges themselves. Collins et al. (2015) find that Supreme Court justices often incorporate arguments from amicus briefs into their opinions. Specifically,

justices are more likely to use amicus legal arguments in their opinion when the justice agrees with the ideological advocacy of the amicus brief.

I conducted interviews with three interest groups for this project in order to better understand the motivations for participating as amicus curiae. Sam Paredes, the Executive Director of Gun Owners of California stated, "We do not look to re-state the issues. We look to enhance and broaden."[45] Aaron Isherwood, the Phillip S. Berry Managing Attorney for the Sierra Club, stated that amicus briefs:

> address a legal issue in a particular way that is different, or perhaps elaborates upon, the arguments the parties are making…an opportunity to make different, or more nuanced or elaborate arguments about a legal issue in the case that is different in some way from what the parties are presenting and thus may aid the court's consideration of the issue.[46]

Groups understand the value of their subject-matter expertise and typically only file an amicus brief when they can add value to the court by bringing a unique perspective to the issues under review.

Participating as amicus curiae in a court case also allows groups to perform organizational maintenance, which typically refers the group's financial well-being (Walker 1983). Organizational maintenance is important because group resources, such as staff and financial support, determine "how much a group can accomplish" in the pursuit of their policy goals (Gais and Walker 1991, 105). Group maintenance contributes to the "funding for facilities, operating expenses, legal counsel, education programs, direct lobbying, advertising, direct mail, member recruitment and retention, and fundraising itself" (Vining 2011, 791). Groups can raise money through two channels. First, groups can receive funding from outside the organization, such as donations and grants from government agencies, individuals, businesses, or other private

[45] Paredes, Sam. Executive Director Gun Owners of California. Personal Interview 31 August 2017.
[46] Isherwood, Aaron, the Phillip S. Berry Managing Attorney Sierra Club Personal Interview 31 August 2017.

associations. Second, groups can fundraise from within the organization, such as membership payments and dues (Ainsworth 2002; Walker 1983). A court cases is a salient event that provides groups a fundraising opportunity. Court cases often provide clearly defined alternative outcomes. This allows groups to visibly stake out sides in the policy conflict thereby sending a signal to their members that they are fighting on behalf of their interest.

Sam Paredes, the Executive Director of Gun Owners of California, whom I interviewed as part this project, stated, "Filing [an amicus brief] is part of a reason you [the organization] exist. That is what the group promised their members."[47] Luke Wake, Senior Staff Attorney with the National Federation of Independent Business (NFIB) Small Business Legal Center, whom I interviewed, made a similar statement about the need for groups to look after their members' interest. Mr. Wake stated, "The national organization cares about growing its membership. The donor base is important. The group is mindful about caring out its pledge to its members. Good stewards of the people's money. Understands that the group has a mission and will do the work it promised its members it will do."[48] Since groups require money to engage in successful policy advocacy (e.g. campaign donations, hiring lobbyist, voter mobilization, etc.), organizational maintenance incentivize groups to submit an amicus curiae brief. An amicus brief, then, is a public signal a group can use to fundraise and expand the group's membership.

2.2 The Decision to Submit an Amicus Brief

Whereas policy goals and organizational maintenance incentivize amicus activity, resource cost and case volume constrain amicus activity. Unlike the Supreme Court, circuit courts cannot control their docket. Circuit courts operate under a "right of review" system, which means circuits have to review every appealed case. This means that circuit courts will review a

[47] Paredes, Sam. Executive Director Gun Owners of California. Personal Interview 31 August 2017.
[48] Wake, Luke. Senior Staff Attorney. NFIB Small Business Legal Center. Personal Interview. 1 September 2017.

wide range of cases raising a diverse set of legal and policy issues. As a result, this creates a massive workload for circuit court judges and offers a group a wide range of cases in which to participate as amicus curiae (Richman and Reynolds 2013).

Interest groups also face resource constraints such as limited time, money, and manpower (Scheppele and Walker 1991; Walker 1991). Submitting an amicus brief is expensive. According to Sam Paredes, putting together an amicus brief can range from "five to fifteen thousand dollars for a simple brief to twenty-five to thirty thousand dollars for complicated briefs."[49] Caldeira and Wright (1988) report that an amicus brief can cost $60,000. Paredes went on to state that "financial cost is always a consideration" when deciding to file an amicus brief because "groups often have to fundraise to participate and it can be difficult to raise money. Many organizations do not have a pot of money set aside for amicus participation."[50]

The combination of a case volume and organizational resources suggests that groups must be strategic about which cases they use as vehicles for policy change and organizational maintenance.[51] Luke Wake of the NFIB Small Business Legal Center, whom I interviewed, summarized the situation nicely, "the organization has limited resources; therefore, we have to be strategic about how we use those resources when looking for cases…Most of the time, there are cases that you would like to file in but have to decide if it is the best use of resources."[52]

[49] Paredes, Sam. Executive Director Gun Owners of California. Personal Interview 31 August 2017. According to Walker and Schepple (1991), the cost to file an amicus brief at the Supreme Court can exceed $15 thousand dollars. Caldeira and Wright (1988) report that an amicus brief can cost $60,000.
[50] Paredes, Sam. Executive Director Gun Owners of California. Personal Interview 31 August 2017.
[51] For example, in 2006 and 2007 an interest group that was concerned about the First Amendment had six cases to choose from at the Supreme Court. In that same time span, the group had at least 28 circuit court cases in which to participate. The circuit court case number comes from *Phase III of the Courts of Appeal Database* (2003 to 2010), which is a random sampling of 30 cases per year, per circuit. Since the 28 cases represents a sample of the total circuit court population, the actual number of First Amendment cases is likely higher.
[52] Wake, Luke. Senior Staff Attorney. NFIB Small Business Legal Center. Personal Interview. 1 September 2017.

I argue that policy goals, organizational maintenance, and resource constraints work together to drive amicus activity in the U.S. Courts of Appeals. This dynamic has implications for which groups will participate as amicus curiae, the frequency with which certain groups participate, and the types of cases receiving amicus participation. That is, certain types of groups will overpopulate the court of appeals system, which has implications for the type of legal arguments and policy issues being raised. In the next section, I outline a two hypotheses about the types of groups likely to participate as amicus curiae and when groups are going to participate.

2.3 Who Submits an Amicus Brief?

As I stated in Chapter 1, this dissertation defines an interest group in rather broad terms. Following Schlozman and Tierney (1986) as well as Collins (2008), I consider an interest group as encompassing an individual, corporation, government entity, public advocacy organization, non-profit law firm, trade associations and peak associations. Due to this expansive interest group definition, there are two types of groups in my study: membership and non-membership groups.

A group's organizational structure (e.g. membership or non-membership) is likely to influence how frequently a group participates as amicus curiae. There are two types of membership groups. The first type of membership group has an occupational barrier to entry. Within this first group, there are trade and professional associations. A trade association is typically a group that is supported by an industry or economic sector, such as the National Beer Wholesalers Association or the American Petroleum Institute. Trade associations usually benefit from government policy, such as regulatory changes; therefore, trade associations exist to fight for and provide private economic benefits to their members. Walker's (1983) classic essay on

interest formation and maintenance describes these types of associations as "profit-sector groups," because they tend to represent interest of for-profit businesses. There are also public sector trade associations, which represent "a certain type of government agency or nonprofit organization," such as National League of Cities and the National School Boards Association (Walker 1983, 393). There are also professional associations, such as the American Association of Bank Directors or the National Association of Criminal Defense Lawyers. A professional association has an occupational barrier to entry and provides private goods to their members. These private goods tend to be professional services, such as training, education, and development (e.g. certification programs) and are less focused on providing purely economic benefits. Then there are unions and labor organizations, which is a mix of a trade and professional association. Unions typically represent the interest of workers in a specific industry, such as the United Steel Workers or the Brotherhood of Locomotive Engineers and Trainmen or the American Federation of State, County and Municipal Employees, and exist to provide private economic benefits to their members through collective bargaining, such as higher wages.[53]

The second type of membership group is a public interest organization. A public interest group is available to all citizens, regardless of economic profession. Because there are no economic or professional barriers to entry, citizen groups tend to be organized "around ideas or causes" (Walker 1983, 393). Within in this second group, you have groups with a broad policy focus, such as the American Civil Liberties Union and the Sierra Club, and groups with a more

[53] Since a worker can free-ride off the unions work, it could be argued that unions provide a public good. However, argue unions provide a private good because there is a professional barrier to entry and you have to be a member of that profession to benefit from the union's activity, regardless of a worker's membership status with the union.

narrow and targeted focus, such as the Electronic Frontier Foundation[54] and the Government Accountability Project.[55]

Non-membership groups, on the other hand, are individuals, corporations, and government entities. These groups are not concerned with organizational maintenance because non-membership groups typically do not require outside funding to survive. Corporations are for profit enterprises, which means they can use their profits to finance their lobbying activities. Local and state governments have their own funding stream via tax dollars and federal grants while the federal government has unlimited resources. Because corporations and government entities do not need to fundraise or recruit members, these groups participate as amicus curiae mainly to further their policy goals and are less concerned about receiving potential organizational benefits.

Membership groups value *organizational maintenance* and *policy goals* whereas non-membership groups only value *policy goals*. Additionally, amicus briefs allow a membership groups to perform organizational maintenance by publicly taking a stand in a policy conflict. Therefore, membership groups should be more likely to file an amicus brief in circuit court cases compared to non-membership groups. This leads to the following hypothesis:

Organizational Benefits Hypothesis: Trade associations, public advocacy organizations, unions, and public interest law firms will file more amicus briefs than corporations, individuals, and government entities.

2.4 Group Participation and Circuit Ideology

[54] The Electronic Frontier Foundation (EFF) is a "nonprofit public interest organization dedicated to protecting civil liberties and free expression in a digital world…EFF represents the interest of technology users in court cases and the broader policy debates surrounding the application of law in the digital age." See amicus curiae brief for Electronic Frontier Foundation in *DirecTV, Inc., a California Company, v. Mike Treworgy* 373 F.3d 1124 (Cir. 11, 2004).

[55] The Government Accountability Project (GAP) is a "non-partisan, non-profit organization specializing in legal other advocacy on behalf of whistleblowers." See amicus curiae brief for Government Accountability Project et al. *David E. Welch v. Elaine L. Chao, Secretary of Labor (Cir. 4, 2008).*

I argue that interest groups are strategic about which cases should receive their participation. In this section, I link a group's decision-making to the ideological composition of circuit courts. Because groups use amicus briefs to advocate for a specific legal outcome (Krislov 1963), groups must consider their audience when submitting a brief. Collins (2008, 31) writes that interest groups use amicus briefs to "argue their position for the primary purpose of shaping the Court's policy output as it will affect others in a similarly situated position." Therefore, I argue that groups engage in a form of venue shopping to find the most ideologically receptive circuits for their arguments.

Interest groups participate in cases with an eye toward future litigation. Sam Paredes, Executive Director for Gun Owners of California, told me that groups want to "build on past legal success"[56] when they participate in a case. Because of this, a group's ability to litigate on the issue in the future should influence their case selection strategy. Aaron Isherwood, the Phillip S. Berry Managing Attorney for the Sierra Club, whom I interviewed stated that submitting an amicus brief can help their group "prevent a bad interpretation of the law that could undermine future litigation or the group's policy goals. Or secure a good interpretation of the law that will help with future litigation."[57] Groups can venue shop by seeking out ideologically friendly circuits that offer them a better opportunity to win on the merits and use amicus briefs to reinforce an outcome that advances their policy goals. According to Luke Wake of the NFIB Small Business Legal Center, "when Court dynamics are in our favor [judicial philosophy, judicial tendencies, prior record], we will push the issue."[58] Alternatively, groups might participate in an ideologically hostile circuit to limit the damage of a ruling that goes against

[56] Paredes, Sam. Executive Director Gun Owners of California. Personal Interview 31 August 2017
[57] Aaron Isherwood Phillip S. Berry Managing Attorney Sierra Club Personal Interview 31 August 2017.
[58] Wake, Luke. Senior Staff Attorney. NFIB Small Business Legal Center. Personal Interview. 1 September 2017.

their interest. Even though the group might lose the case on the merits, their participation in the case influences the court to produce a liberal (conservative) ruling instead of an extremely liberal (conservative) ruling.

Although groups do not know the exact judges on the panel, they know the prior records of certain courts as well as the judicial philosophy and tendencies of judges in those circuits (Epstein et al. 2007; Goldman 1975; Hettinger et al. 2004; Humphries and Songer 1999; Klein 2002). This prior information about circuit dynamics dictates when groups participate in circuit court cases. This leads to my second hypothesis:

Circuit Ideology Hypothesis: Groups will submit more amicus briefs advocating for a liberal (conservative) position in circuits that are more ideologically liberal (conservative).

According to this hypothesis, the combination of future litigation concerns and the ideological nature of amicus briefs lead groups to consider the ideological composition of circuit courts when participating in a case. Groups seek out ideologically amenable circuits to secure a win or participate in ideologically unfriendly circuits to limit the damage from a loss. Therefore, ideological compositions of circuits may force groups to be strategic about which cases receive their participation.

2.5 Examining Amicus Curiae Participation

In this section, I analyze the levels of amicus participation in the U.S. Courts of Appeals from 2003 through 2010. The descriptive data provided in this section will allow me to test the two hypotheses I outlined above. First, that groups strategically participate in cases for organizational maintenance purposes. Second, that groups strategically participate in cases that arise in ideologically friendly circuits. I test these two hypotheses by examining amicus participation by the types of group participating as amicus curiae, the frequency with which a group solo authors a brief versus co-signing a brief, the types of legal issues receiving the most

amicus participation, and ideological advocacy of the amicus briefs. A descriptive analysis of amicus participation is informative for three reasons. First, examining the frequency of amicus participation by circuit provides information on how often circuit judges see amicus briefs. Furthermore, it allows us to see the distribution of amicus activity. In other words, is amicus activity evenly spread out across the country or is it concentrated within certain circuits? Second, analyzing amicus activity by legal issue sheds light on amicus brief filing strategies used by interest groups. For example, do trade associations file more amicus briefs in cases involving economic activity because they want to the advance the economic interest of their members? Thus, it allows us to examine whether groups are using amicus briefs to purse organizational maintenance. Third, analyzing amicus activity by group type provides information on the frequency with which certain groups use circuit courts to advance their interest. The types of groups participating as amicus curiae has implications for the types of legal arguments being advocated before the court and possibly included in judicial opinions (Collins et al. 2015). Finally, examining the ideological advocacy of amicus briefs provides insights into whether liberal or conservative amici are evenly dispersed across the country or are concentrated in particular circuits.

First, I present information on the frequency with which groups participate as amicus curiae. To begin with Figure 2.1 presents information on the total number of amicus briefs filed across the twelve geographic circuits. As the data in Figure 2.1 indicates, amicus activity is not equally dispersed across the circuits. Rather some circuits, such as the Second Circuit, the Fourth Circuit, and Ninth Circuit, and D.C. Circuit (labeled as Circuit 12), receive a disproportionate amount of amicus activity. Those are the only circuits that receive more than 40 amicus briefs during the time period under review.

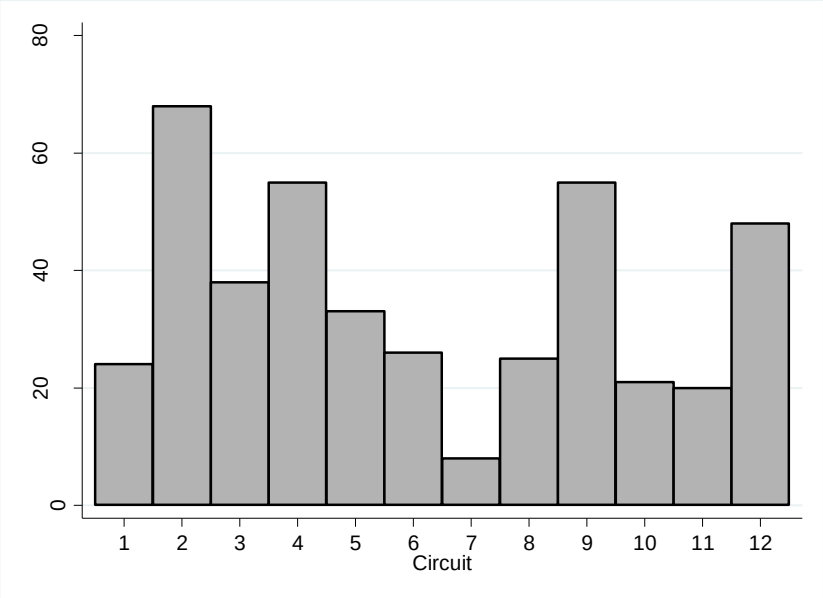

Figure 2.1 Total Number of Amicus Briefs by Circuit

The high level of amicus activity in these four circuits is not entirely surprising. First, the Ninth Circuit has the largest caseload of any circuit. During the time period, the Ninth Circuit reviewed over 108, 000 cases. Since they reviewed more cases, there is higher likelihood they ruled on issues that are important for interest groups. In other words, more cases means there are more opportunities for groups to participate as amicus curiae. Second, circuit characteristics, notably subject-matter jurisdiction, might influence the number of amicus briefs filed in a case. The D.C. Circuit and the Second Circuit have jurisdictions over significant policy areas. The Second Circuit resides in New York City and has jurisdiction over Wall Street, which might lead to more cases involving economic and financial regulations. These legal issues might be particularly salient to the federal government, corporations, trade associations, and peak associations. Additionally, The D.C. Circuit is responsible for reviewing decisions and regulations issued by federal agencies based in the District of Columbia. Compared to the other circuits, the D.C. Circuit hears more cases involving administrative law, which means their rulings tend to have broad ramifications for public policy (Fraser et al. 2013). Chief Justice John

Roberts (2006, 389) described the D.C. Circuit as a "court with special responsibility to review legal challenges to the conduct of the national government." As a result, the D.C. Circuit is widely considered the second most powerful court, only behind the U.S. Supreme Court. Due to the broad policy implications of their decisions, cases residing in the D.C. Circuit are likely to attract lots of attention from interest groups.

Table 2.1 Frequency of Amici Participation by Group Type

Type	Number of Total Amici*	Number of Solo Authored Amicus Briefs^
Individual	527 (32.9%)	11 (4.2%)
Trade Associations	238 (14.8%)	71 (27.1%)
Public Advocacy Orgs.	232 (14.5%)	78 (29.8%)
State Government	152 (12.0%)	12 (4.6%)
Corporations	143 (9.0%)	10 (3.8%)
Public Interest Law	91 (5.7%)	See Note 1
Other	60 (3.7%)	See Note 1
Peak Associations	57 (3.6%)	20 (7.6%)
Unites States	46 (2.9%)	44 (16.8%)
Local Government	40 (2.5%)	14 (5.3%)
Unions	15 (1.0%)	See Note 1

*Percentage of total amici located in the parenthesis.
^Percentage of total solo authored briefs located in the parenthesis.
Note 1: The number of amicus briefs for public interest firms and public advocacy organizations are combined because they are both public non-profits that share similar organization goals. The number of briefs for union and trade associations are combined because both are private associations whose goal is pursue labor and economic benefits for their members. Finally, the other category was broken up and placed into remaining nine categories based on how close the group's mission overlapped with the 8 other categories. For example, Native American Tribes were considered local governments and churches as public advocacy.
Note 2: For information on the coding strategy behind the typology of interest groups, see Chapter 1.

2.5.1 Testing the Organizational Maintenance Hypothesis

I list the total number of amici that participated and the total number of solo authored amicus briefs for all the groups in Table 2.1. The groups are listed in descending order from most to least frequent total amici participants. The number of amici that participated in circuit court cases from 2003 through 2010 is 1,601. It is important to note that these are not 1,601 unique participants. Rather, there are some groups that participated in multiple cases while other groups only participated in one case. At least one amicus brief was filed in 222 cases, which means that

roughly eight percent of circuit court cases had amicus participation.[59] While the number is significantly lower than Supreme Court amicus participation, it represents roughly the same level of amicus participation that existed from 1960 through 1996 (Collins 2008; Martinek 2006).

The types of groups using circuit courts for policy change and their strategies are described in Table 2.1. For example, individuals are by far the most frequent amici. However, individuals are most likely to participate by co-singing amicus briefs as individuals only produce a small number of solo authored amicus briefs. Similarly, state governments are more likely to co-sign a brief than solo author an amicus brief. This suggest that when states participate they try to seek out other states that have a similar policy interest in the case. It appears that states view their influence as strength in numbers. That is, the more states that are potentially affected by the outcome of the case, the more likely court is to rule in favor of the state's interest. Finally, when the U.S. government participates, they rarely co-sign a brief. This is not entirely surprising given that the U.S. government has nearly unlimited resources at its disposal.

The information from Table 2.1 supports the organizational maintenance hypothesis. According to the Organizational Maintenance Hypothesis, groups that value organizational maintenance benefits will participate more frequently than groups that do not put a premium on organizational maintenance. Trade associations and public advocacy organizations are groups that have a stated mission and require membership dues and outside donations to survive. Therefore, amicus activity sends a signal that they are actively working on behalf of their mission and members interest. The data is Table 2.1 indicates that trade associations and public

[59] Cases with court appointed amici are not included in the 222 number. There were nine cases with court appointed amicus curiae. Those nine cases each had one amicus curiae brief and 11 total amici. Of the 11 amici, nine were individuals and two were the federal government. The theory outlined above is based on a group's voluntary decision to participate as amicus curiae for organizational maintenance or policy advocacy purposes. Court appointed amicus do not voluntary decided to participate in a case. Furthermore, this number does not count hold over amicus briefs from earlier case dispositions.

advocacy organizations are more likely to solo author an amicus brief compared to the other types of groups. Since trade associations and public advocacy organizations receive potential policy *and* organizational benefits from submitting an amicus brief, this reduces the overall cost of submitting an amicus brief.

We can use the information in Tables 2.2, 2.3, and 2.4 to further investigate strategic decision making of amicus curiae activity. I list the total number of legal issues in the data along with the percentage of total issues for the data in Table 2.2. The total number and percentage of cases with at least one amicus brief are listed in columns 3 and 4.

Table 2.2 Amicus Briefs by Legal Issue

Legal Issue	Number of Legal Issues	Number of Amicus Briefs
Criminal	1018 (35.3%)	18 (8.1%)
Economic Activity	884 (30.7%)	96 (43.2%)
Civil Rights	581 (20.2%)	44 (19.8%)
Labor	159 (5.5%)	16 (7.2%)
Other	90 (3.1%)	15 (6.8%)
First Amendment	86 (3.0%)	26 (11.7%)
Due Process	54 (1.9%)	6 (2.7%)
Privacy	8 (0.3%)	1 (0.5%)
Total	2880 (100.0%)	222 (100.0%)

The descriptive statistics located in Table 2.2 provides evidence that groups strategically participate in policy salient cases. For example, only eighty-six cases in the data set raised a First Amendment issue, but 26 of those cases had at least one amicus brief filed in the case. Despite only comprising 3 percent of the data, First Amendment cases had about ten percent of amicus brief filings. This is not entirely surprising given the policy salience of First Amendment cases, with issues such as freedom of religion and speech hanging in the balance. The outcomes of these cases can have far reaching consequences on the behavior of American citizens. For another example, consider cases involving criminal issues. Criminal cases comprise one-third of

the data, but receive less than 10 percent of total amicus briefs filed. The circuit court's "right of review" prevents it from weeding out cases with and without merit. Criminal cases often involve routine appeals by criminal defendants or habeas petitions by prisoners. Consequently, these cases do not provide groups with enough policy benefits to justify the potentially high cost of filing a brief.

Table 2.3 Total Amici by Legal Issue

Type of Group	Criminal	Civil Right	First Am.	Due Proc.	Privacy	Labor	Econ. Activity	Total
Individual	6	8	5	2	0	0	11	32
Corporations	4	2	3	1	1	2	17	30
United States	1	12	0	0	0	8	19	40
State Governments	0	5	5	0	0	0	14	24
Local Governments	0	0	0	0	0	0	8	8
Public Advocacy	7	21	18	3	0	5	29	83
Trade Associations	11	19	8	2	1	6	46	93
Peak Associations	1	6	4	0	0	4	23	38
Public Interest Law	7	17	9	3	0	3	9	48
Unions	1	1	1	1	0	4	0	8
Total	38	91	53	12	2	32	176	404

Note: "First Am." is short for First Amendment, "Due Proc." is short for Due Process

The proposition that groups use amicus briefs for organizational maintenance purposes is supported by the data contained in Tables 2.3 and 2.4. I break down the total number of amici by legal issue for each type of group in Table 2.3. I list the total number of solo authored amicus brief by legal issue by group in Table 2.4. For example, consider the behavior of the one group most associated with business and economics, trade associations. Trade associations have barriers to entry as membership is based on economic industry or occupational status. Furthermore, trade associations "provide benefits to their members that are primarily economic in nature" (Collins 2008, 59). In order to fundraise off existing members and recruit new members, trade associations need to show their members they are working on their behalf and an amicus brief is a visible signal of policy advocacy. According to the data in Tables 2.3 and 2.4,

trade associations use amicus filings for organizational maintenance purposes. At least one trade association participated in 93 different cases, but roughly half of those were cases concerning economic activity and regulations. Similarly, trades associations authored 56 solo amicus briefs. However, over half of those solo authored amicus briefs were filed in cases involving economic activity and regulations.

Table 2.4 Solo Authored Amicus Briefs by Legal Issue

Type of Group	Criminal	Civil Right	First Am.	Due Proc.	Privacy	Labor	Econ. Activity	Total
Individual	1	3	2	1	0	0	3	10
Corporations	1	1	0	0	0	0	8	10
United States	1	12	0	0	0	9	16	38
State Governments	0	1	3	0	0	0	8	12
Local Governments	0	1	0	0	0	0	6	7
Public Advocacy	3	14	15	2	0	3	21	58
Trade Associations	5	8	3	1	0	7	32	56
Peak Associations	0	2	1	0	0	2	14	19
Total	11	42	24	4	0	21	108	210

Note: See the note associated with Table 2.1 for information on Public Interest Law Firms, Unions, and Other Amici category. "First Am." is short for First Amendment, "Due Proc." is short for Due Process.

Unions, another group with a membership base, also use amicus activity for organizational maintenance purposes, but not as frequently as trade associations. Unions participated in eight cases, but half of those were in labor related cases. Unions appear to use amicus activity to not only further policy goals but also to send signals to their membership. However, it worth noting the relatively small level of amicus activity displayed by unions. It could be that unions do not view courts as the best venue for policy change or organizational maintenance. Instead, unions may believe they can have more success lobbying elected branches of government, which is a more visible means of organizational maintenance and policy change. This suggest that groups behave strategically and choose lobbying venues based on the policy goals and needs of the group (Walker 1991).

2.5.2 Testing the Circuit Ideology Hypothesis

There has been very little work investigating the ideological positions advocated by amicus curiae in the U.S. Courts of Appeals. The work that does exist typically focuses on the Supreme Court. For example, O'Connor and Epstein (1983) track the number of liberal and conservative groups participating as either a sponsor or amicus curiae in Supreme Court cases over an eleven year period spanning the Court's 1969-1980 terms. The authors classify groups as "either as liberal or as conservative based on the socio-political status of their clientele group as well as on their professed ideological stance" (O'Conner and Epstein 1983, 480). The authors find at least one liberal group participated in roughly 40 percent of cases and one conservative group participated in about 19 percent of cases. Specifically, the authors find a marked increase in the number of conservative groups participating in Supreme Court cases as either sponsors or amicus curiae over the course of the 1970s. The authors find that conservative groups participated in only 9 percent of Supreme Court cases during the 1969 term and that the participation rate of conservative groups tripled during the 1980 term.

Collins (2008, 50-51) argues that while "this strategy captures the overall sense of an organization's positions, it is imprecise for those occasions in which traditionally a traditionally liberal organization makes a conservative argument or vice versa." Therefore, Collins suggests that a better approach is capture the ideological nature of the advocacy rather than a group's "general ideological proclivities." That is, did the group make a legal argument that advocated to a liberal or conservative position? When examining the ideological advocacy of the briefs, Collins (2008, 55) finds that "neither liberal nor conservative groups dominate amicus activity in the Supreme Court."

Following Collins (2008), I examine the amount of liberal and conservative amicus participation in the Courts of Appeals based on the ideological advocacy of the group's amicus brief. I read each circuit court opinion and identified the ideological advocacy of an amicus brief based on the ideological direction of the circuit panel's decision along with the outcome of the case.[60] Therefore, coding the ideological advocacy of an amicus brief is only based on cases in which there was a clear winner and loser (e.g. affirmances and reversals). I follow the conventions established in the Multi-User Court of Appeals database where votes are coded in terms of the policy content along a liberal-conservative dimension (Songer 1997). For example, a vote supporting the position of a litigant claiming a civil rights violation is coded as "liberal" whereas a vote against that position is coded as "conservative." In criminal cases, a vote supporting the position of the defendant (or prisoner) is coded "liberal" whereas a vote against is coded "conservative." In labor-economics cases, liberal votes include those in which judges supported the positions taken by unions, the federal government in regulatory and tax cases and individual plaintiffs in tort cases. Conservative votes include those in which judges supported the positions taken by management (against unions), opposed those taken by the federal government in regulatory and tax cases, and supported corporate defendants in tort and insurance cases filed by individuals.

I then used this information to identify the ideological advocacy of the amicus brief. I list the coding procedure for the ideological advocacy of the amicus brief in Table 2.5. For example,

[60] Occasionally, the court will produce a mixed outcome in which the both the respondent and the appellant win. This occurs when the circuit panel affirms in part or reverses in part a lower court decision. Thus, cases that had a treatment of affirmed in part and reversed in part (includes modified or affirmed and modified) or affirmed in part, reversed/vacated in part, and remanded were discarded. I also discarded cases in which the circuit court certified the question to another court. Finally, I discarded cases in which the panel's treatment of the case could not be ascertained. All told, 389 cases or 13.5 percent of the data set were discarded. This approach to examining litigant success is standard in the literature see (Collins and Martinek 2010).

if the amicus brief supported the appellant and the circuit court issued a conservative (liberal) decision reversing the lower court's decision, than I coded the ideological advocacy of the amicus brief as conservative (liberal). If the amicus brief supported the respondent and the circuit panel issued a conservative (liberal) decision reversing the lower court decision, I coded the ideological advocacy of the amicus brief as liberal (conservative).

Table 2.5 Coding Procedure for Amicus Brief Ideological Advocacy

Litigant	Panel Outcome	Panel Ideological Direction	Amicus Support
Appellant	Reverse	Conservative	Conservative
Appellant	Reverse	Liberal	Liberal
Appellant	Affirm	Conservative	Liberal
Appellant	Affirm	Liberal	Conservative
Respondent	Reverse	Conservative	Liberal
Respondent	Reverse	Liberal	Conservative
Respondent	Affirm	Conservative	Conservative
Respondent	Affirm	Liberal	Liberal

I break down the ideological advocacy of the amicus briefs by circuit in Table 2.6 The table presents the number of amicus briefs advocating a liberal or conservative position in each of the twelve circuits from 2003 through 2010 along with the ideology for each circuit. For liberal amicus briefs, the first column represents the number of cases with at least one amicus brief advocating a liberal position and the number in parenthesis represents total number of amicus briefs advocating a liberal position in that circuit. For conservative amicus briefs, the first column represents the number of cases with at least one amicus brief advocating a conservative position and the number in parenthesis represents total number of amicus briefs advocating a conservative position in that circuit. We can use Table 2.6 to investigate two claims. First, are there equal levels of liberal and conservative amicus participation in the Courts of Appeals? Second, is there a relationship between ideological advocacy and circuit ideology? In other

words, are groups' venue shopping by making ideological arguments in ideological friendly circuits?

In regards to the first question, there is more liberal amicus participation than conservative amicus participation. Overall, there were 109 case with at least one amicus brief advocating a liberal position compared to only 83 cases with at least one conservative group advocating a conservative outcome. Also, there were 159 amicus briefs with a liberal position compared to 129 amicus briefs with a conservative position.

Table 2.6 Number of Amicus Briefs Advocating a Liberal or Conservative Position

Circuit	Liberal Am. Briefs	Conservative Am. Briefs	Circuit Ideology
1	8 (10)	5 (8)	0.259
2	16 (33)	8 (14)	-0.252
3	13 (19)	8 (15)	-0.078
4	14 (19)	15 (26)	0.189
5	9 (11)	9 (13)	0.345
6	7 (12)	4 (4)	0.139
7	6 (6)	1 (1)	0.207
8	6 (7)	4 (6)	0.258
9	6 (6)	7 (15)	-0.236
10	9 (11)	6 (8)	0.203
11	3 (4)	3 (3)	0.297
12	12 (15)	13 (16)	0.469
Total	109 (153)	83 (129)	

Note: Circuit 12 refers to the U.S Courts of Appeals for the District of Columbia. The values for circuit ideology come from Judicial Common Space (Epstein et al. 2007). The scores range from -1 (liberal) to 1 (conservative). For Liberal and Conservative Amicus Briefs, the first row represents the total number of cases with a liberal or conservative amicus brief. The number in parenthesis indicates the total number of amicus briefs for each circuit that advocated a liberal or conservative position.

In regards to the second question, there is considerable variation in amicus activity by circuit. The Second Circuit had the most liberal and conservative amicus participation with a total of 47 amicus briefs, which was closely followed by the Fourth Circuit with 45 amicus briefs. The Seventh and Eleventh Circuits had the lowest levels of liberal and conservative participation with seven total amicus briefs. Additionally, the descriptive statistics located in

Table 2.6 provide limited support for the proposition that groups strategically file amicus briefs in ideologically friendly circuits in order to potentially maximize their impact over the judicial decision-making. I measure the ideology of each circuit using Judicial Common Space (Epstein et al. 2007). Judicial Common Space (JCS) provides a median ideology score for each circuit for each year from 2003 through 2010. The "Circuit Ideology" column is simply an average of the circuit median for each year. The JCS scores range from -1 (liberal) to 1 (conservative).

From 2003 through 2010, there were, on average, three liberal circuits: The Second, Third, and Ninth Circuit. Two of these three circuits, the Second Circuit and the Third Circuit, had high levels of liberal amicus participation compared to the other circuits. The Second Circuit also had the highest levels of liberal amicus participation. There were more cases with liberal amicus participation, sixteen, and more briefs advocating a liberal position, thirty-three, in the Second Circuit than any other circuit. The Third Circuit had thirteen cases with liberal amicus participation and nineteen liberal amicus briefs. Interestingly, the Ninth Circuit, which is commonly viewed as the most liberal circuit in the country received more conservative amicus briefs than liberal briefs. In regards to the behavior of groups advocating for a conservative outcome, the relationship between circuit ideology and group participation is less clear. On average, two of the most conservative circuits during this time period were the Fifth Circuit and the U.S. Courts of Appeals for the DC Circuit. Both of these circuits had highs levels of conservative amicus participation compared to the other circuits. For example, the DC Circuit had thirteen cases with at least one conservative amicus brief and sixteen total amicus briefs. However, the Fourth Circuit, which was the eighth most conservative circuit, had the highest levels of conservative amicus participation, with twenty-six conservative amicus briefs being filed in fifteen cases.

In sum, there are two general takeaways from the data provided in Table 2.6. First, I find that liberal amicus participation exceeded conservative amicus participation both in terms cases participated and number of briefs filed. This suggests that circuit judges are being exposed to more liberal legal arguments than conservative arguments. This has implications for the long term development of the law. It could impact which precedents circuit panels decide to overrule or uphold. It could also impact type of legal rules and principles announced by the court to govern future cases. Second, there is limited, but not overwhelming, evidence that groups engage in ideological venue shopping when deciding to participate as amicus curiae. The amount of amicus participation is relatively equal across all circuits. The largest discrepancy between conservative and liberal amicus participation occurs in the Second Circuit. There were nineteen more liberal amicus briefs filed in the Second Circuit than conservative amicus briefs. Not coincidentally, the Second Circuit also happens to be the most liberal circuit during this time period. Therefore, this could suggest that groups advocating a liberal position are strategically selecting cases in the Second Circuit while groups advocating a conservative position are strategically avoiding the Second Circuit. However, the behavior of groups towards the remaining eleven circuits suggests ideological venue shopping is not prevalent. This is an important finding as it provides evidence that amici are not selectively filing amicus briefs in cases they are predisposed to winning. The fact that levels of liberal and conservative amici participation are relatively evenly matched for all the circuits indicates that groups are picking cases that appear to further their policy interests and are not limiting their amicus participation to ideologically friendly circuits.

2.6 An Empirical Test of Amici Activity

In the previous section, I examined the *types of groups* participating as amicus curiae in the Courts of Appeals. I provided two hypotheses explaining amicus participation. I then tested those hypotheses using descriptive statistics on amici activity in the Courts of Appeals. In this section, I put forward and empirically test a theory of amici participation to explain when groups will file an amicus brief in circuit courts. One of the reasons groups participate as amicus curiae is to advance their policy interest (Collins 2008; Krislov 1963). Given the diversity of circuit court cases, not all cases are great vehicles for policy change. Therefore, the presence of certain case characteristics makes some cases more attractive vehicles for policy change than others. Therefore, groups strategically participate only in those cases that allow them the best opportunity to achieve their policy goals.

In this section I argue that groups will strategically submit amicus briefs in those cases when circuit judges will be most inclined to rely on the information provided by the amicus brief (Hansford 2004a). Similarly, circuit judges should be most receptive to the information provided by an amicus brief in cases that are the most difficult to decide. Legally complex cases are usually the most resource intensive cases for a judge to adjudicate. A legally complex case often raises novel legal questions or involves highly technical statutory language, which can make resolving these cases difficult (Baum 2011; Breyer 1998; Lynch 2004). Therefore, legally complex cases provide interest groups prime opportunities to influence judicial behavior and obtain policy change.

The remainder of this section proceeds as follows. I first provide a case study on the relationship between case complexity and amici activity. I then outline a theory linking case complexity to the submission of amicus briefs. I then explain my research design, the

operationalization of variables, and the model used to test my theory. I finish with a discussion about the results of my model.

2.6.1 Legal Complexity, Amici Activity, and Health Policy – A Case Study

One example of the intersection of case complexity, amicus participation, and the policy influence of the Courts of Appeals is the Second Circuit's ruling in *New York State Restaurant Ass'n v. New York City Bd. of Health* 556 F.3d 114 (2d Cir. 2009). In 2016, the Food and Drug Administration (FDA) promulgated final guidance for the restaurant industry on regulations regarding menu labeling.[61] Menu labeling, often referred to as calorie count laws, requires chain restaurants to display calorie content and other nutritional information of their menu items. Federal calorie count regulations are modeled after similar laws at the state and local level.[62] However, menu labeling was politically controversial because of the added cost restaurants had to absorb in order to comply with the regulations.[63] Menu labeling was also legally controversial because of the First Amendment's protection for free speech.[64] Therefore, the long term viability of menu labeling as tool to tackle childhood obesity depended on surviving legal scrutiny.

The Second Circuit heard one of the earliest challenges to menu labeling in *New York State Restaurant Ass'n v. New York City Bd. of Health* 556 F.3d 114 (2d Cir. 2009). As early as 2006, The New York City Board of Health instituted a number of health codes aimed at promoting a healthy lifestyle and fighting the growing obesity epidemic.[65] Menu labeling

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[61] United States. U.S. Food and Drug Administration (FDA). *FDA Issues Final Guidance on Menu Labeling*. N.p., 29 Apr. 2016. Web. 23 Feb. 2017.
[62] Jalonick, Mary C. "FDA Punts Calorie Labels on Menus for Another Year _ Again." *US News and World Report*. Associated Press, 28 Mar. 2016. Web. 23 Feb. 2017.
[63] Bomkamp, Samantha. "Restaurants Prepare to Put Calories on Menus, after Years of Delays." *Chicago Tribune*. N.p., 20 May 2016. Web. 23 Feb. 2017. http://www.chicagotribune.com/business/ct-menu-calorie-labeling-0522-biz-20160518-story.html.
[64] *New York State Restaurant Ass'n v. New York City Bd. of Health* 556 F.3d 114 (2d Cir. 2009)
[65] See the Center for Disease Control and Prevention's Obesity in the United States, 1988—2008; https://www.cdc.gov/mmwr/preview/mmwrhtml/su6001a15.htm.

regulations were part of those health code changes. The New York State Restaurant Association (NYSRA), a non-profit association consisting of 7,000 restaurant members, filed suit in federal court challenging the constitutionality of menu labeling regulations. Appellant NYSRA argued that the regulations were preempted by federal law and infringed upon the First Amendment rights of its member restaurants by mandating that certain restaurants post calorie information. The three-judge panel for the U.S. Court of Appeals for the Second Circuit found for the New York Board of Health and concluded that the health code regulations survived both statutory and constitutional challenges.

According to the majority opinion, "the federal statutory scheme regulating labeling and branding of food is a labyrinth and interpreting the statute are a series of agency regulations that sometimes appear to conflict and are difficult to harmonize." The judges had consulted the history of statutory law regarding agricultural and food policy starting in the late 1930s with the Federal Food, Drug, and Cosmetic Act (the "FDCA") and continuing through the 1990s with the Nutrition Labeling and Education Act (the "NLEA"). In addition, the judges had to work their way through the regulatory framework promulgated by the Food and Drug Administration (FDA), which had the responsibility of enforcing the FDCA and NLEA. On top of the statutory issues, the judges had to resolve questions regarding the scope of commercial speech. That is, are laws regulating commercial speech subject to a "rational basis" test or deserve heightened scrutiny. Therefore, this case involved highly technical federal and state statutory law. It required circuit court judges to be well-versed not only in constitutional law but, more importantly, with the nuances of the regulatory law surrounding food and drug policy.

This case, by the judges' own admission, raised complex legal issues. Given the complexity of this case, a judge might prefer to spend time researching relevant case law, delve

into the subtleties of food and agricultural policy, and compose a well-researched and legally sound opinion that would serve as precedent for future cases in and outside the circuit or form the basis of a Supreme Court opinion (Corley et al. 2011). However, the growing docket of the court of appeals makes this difficult. *New York State Restaurant Ass'n v. New York City Bd. of Health* 556 F.3d 114 (2d Cir. 2009) is just one of the nearly 5,000 cases filed in the Second Circuit in 2009.[66] Given their large docket, judges have to divide their time among a couple hundred cases.

However, increased amicus participation in the case might have made the decision-making process of the judges easier. *New York State Restaurant Ass'n* had four amicus briefs and 38 total amici participated in the case, all of whom supported respondent New York City Board of Health. The case had participation from seven different public advocacy groups, such as Center for Science in the Public Interest and the California Center for Public Health Advocacy and six different municipal governments, including Philadelphia and San Francisco. Additionally, five different trade associations, such as the Medical Society of the State of New York and the American College of Preventive Medicine, participated in the case. Finally, the case had amicus participation from members of Congress, state legislators, and medical doctors.

This case study raises an interesting question. Did the legal complexity of the case incentivize groups to participate as amici curiae? Did groups understand the value of their subject-matter expertise on food regulations and calorie count laws to judges? It appears judges valued the expertise of interest groups in this case. The judges admitted that the case raised difficult legal issues and incorporated information from the amicus briefs into the judicial opinion explaining their reasoning. For example, the judges relied on information from the Food

[66] http://www.ca2.uscourts.gov/circuit_executive/Reports/09/Statistics.pdf

and Drug Administration's amicus brief to explain the statutory and regulatory implications of the case, writing in the majority opinion:

this regulation, even as parsed by NYSRA, does not change our reading of the statute, because we conclude that it does not address nutrition "information" on restaurant food, but rather on non-restaurant food. This conclusion is based both on the understanding, as explained by the FDA to us, that [**37] Regulation 101.13 was adopted with packaged food in mind, *see* ***FDA Amicus Br. 19***

The judges also incorporated language into the majority opinion from the amicus brief of the City and County of San Francisco et al. to help them understand the health policy implications of the case:

without nutrition information, consumers typically are unable to assess the caloric content of foods," that a smoked turkey sandwich at Chili's contains 930 calories, more than a sirloin steak, which contains 540, or that 2 jelly-filled doughnuts at Dunkin' Donuts have fewer calories than a sesame bagel with cream cheese. ***City and County of San Francisco, CA et al. Amicus Br. 13-14***"

If case complexity did play a role in interest groups submitting amicus briefs, could this occur in other cases? In the next section, I provide a theory that links case complexity to the submission of amicus curiae briefs.

2.6.2 Amicus Briefs and Case Complexity

As stated in section 2.2, interest groups face resource constraints, such as limited time, money, and manpower. Additionally, the large and legally diverse circuit court docket makes it difficult for groups to participate in all cases that further their policy goals. The combination of group resource constraints and case volume forces groups to be strategic in their case selection process when deciding to participate as amicus curiae.

Circuit court judges are also resource constrained actors. Judges have to balance their judicial and non-judicial responsibilities on the court (Epstein et al. 2013; Posner 1993, 2014).

Their judicial responsibilities entail sitting on panels, writing opinions, crafting law, researching cases, and overseeing their law clerks. In addition, judges value their non-judicial responsibilities, such as leisure time and academic writing.[67] Yet, judges only have so many hours in a day to devote to their responsibilities. Further straining their resources is the increasing number of cases on their docket. According to Richman and Reynolds (2013), "in 1960 there were 57 filings per judgeship, and today there are 327 filings per judgeship; in the intervening fifty years, judicial workload has increased by nearly 600 percent!" Therefore, a judge has to be mindful, if not strategic, in the allocation of their time and resources in the pursuit of their judicial activities.

Since interest groups and circuit judges are resource constrained actors, I argue that case complexity sends a signal to groups about the receptiveness of the court to their amicus brief. Complex cases require judges to invest more resources into finding the correct ideological or legal outcome – resources that a judge might prefer to spend on other judicial activities. Cases that raise complex legal issues are potentially the most difficult cases for judges to decide (Lynch 2004). Complex cases might involve issues with highly technical statutory language, require advanced expertise in a specialized legal area, raise novel legal questions, or involve matters of scientific inquiry. Given that most judges are legal generalist (Baum 2011; Breyer 1998);

[67] Law clerks and associated circuit staff can reduce the workload burden by helping a judge manage their caseload. Judge Richard Posner (1985, 103) writes, "the caseload per federal judge has risen to the point where very few judges, however able and dedicated, can keep the flow without heavy reliance on law clerks, staff attorneys, and externs too." Most judges typically have three law clerks that aid in drafting bench memorandums, legal research, writing opinions, and "serving as a sounding board for a judge's thoughts and arguments" (Cohen 2002, 91). While law clerks provide a valuable service, judges still have considerable workload burdens. First, judges can over delegate to their law clerks (Richman and Reynolds 2013). Therefore, the yearly turnover among law clerks can hurt judicial efficiency because there is a learning curve for new clerks (Baier 1973). This has implications for the quality of a clerk's work and the speed at which tasks get accomplished. Second, the mere presence of law clerks does not absolve judges of their responsibilities as judges provide rigorous oversight of their clerks and maintain significant ownership of their opinions. According to one circuit judge, "In the end, every opinion that comes out of these chambers has to be made my own. And sometimes that means writing the whole thing myself, sometimes it means heavy editing" (Cohen 2002, 1160).

complex cases might make their judicial decision-making more difficult.[68] Therefore, circuit judges should value the legal and policy subject-matter expertise of interest groups in difficult and complex cases.

Interviews with appellate practitioners indicate this to be true. Lynch (2004) interviewed several former Supreme Court law clerks to understand how Supreme Court justices treat amicus briefs. According to her interviews, amicus briefs were most useful to the in cases "involving specialized areas of the law as well as complex statutory and regulatory cases" as well as in "technical cases by industry experts having a familiarity with the specialized legal issues at stake" and when reviewing complex cases the "Court seeks the input of specialized experts to ascertain the effect of what a particular rule will be" (Lynch 2004, 41).

I consider two different dimensions for the concept of complexity. The first measure of case complexity involves the number of entries on a case's docket. A docket sheet contains the history of the case. The docket sheet has the name of the parties involved in the litigation, their attorney's information, and the nature of the suit. Most importantly, a docket sheet contains an entry that captures all the proceedings and filings in a case, such as litigant briefs, motions, and orders. Cases with more docket entries provide judges with more information about the case. That is, there might be more briefs for the judge to read, more motions for a judge to review, and more details about the case's history, such as previous rulings and judicial orders, for the judge to be familiar with. In short, the docket captures the case's litigation complexity. Cases with more docket entries indicate more complex litigation. Further, the more information a judge has

[68] Because judges are trained in wide variety of legal areas, it may be difficult to become specialized in any one particular area. To be sure, judges can come to the court with a background in particular legal or policy area. For example, Justice Breyer brought a well-known expertise on administrative law to the Supreme Court (Breyer 2009). However, generally speaking, the circuit courts' docket can make it difficult for circuit judges to become experts in all legal and policy areas (Wood 1996).

about the case, the more judicial resources that are required to decide the case (Epstein et al. 2013; Klein 2002). This leads to the following hypothesis:

Docket Entry Hypothesis: Groups will file more amicus briefs in cases that have more docket entries.

The second dimension of complexity involves the presence of a first impression issue. Walbolt and Lang (2002) interviewed several appellate judges in Florida for their view of amicus briefs. Based on the interviews, the authors write that "Amicus briefs can be of particular importance…when those courts are deciding an issue of first impression (Walbolt and Lang 2002, 279). A case of first impression involves a novel legal issue or question for which there is not higher court precedent. Groups may participate in first impression cases for two reasons. First, groups can leverage their subject-matter legal expertise over the judge's decision-making. Second, groups may participate in cases that raise novel legal issues for their precedential value in future litigation. This leads to the following hypothesis:

First Impression Hypothesis: Groups will file more amicus briefs in cases involving a first impression issue.

In sum, circuit judges can relieve the resource burdens that accompany legally complex cases by seeking out information contained in amicus briefs. Amicus briefs, then, serve as informational short-cuts that make it easier for judges to perform their judicial responsibilities, such as reducing the time required to research a case or write an opinion, which frees up resources to spend elsewhere (Crawford and Sobel 1982; Collins et al. 2015; Epstein et al. 2013; Tanenhaus et al. 1963; Ulmer 1972). Additionally, Groups can use their subject matter expertise to help judges make a more legal or ideologically informed decision (Klein 2002). Therefore, amicus curiae participation should be welcomed by circuit judges in legally complex cases. As a

result, interest groups will submit briefs strategically in those cases when circuit judges will be most inclined to rely on the information provided by the amicus brief.

2.7 Research Design

In this section, I explain the model used to test my theory of amicus participation. I use an original data set of U.S. Courts of Appeals cases covering the twelve geographic circuits from 2003 through 2010.[69] This is the *Phase III Court of Appeals Database*, which is the latest extension of Songer Courts of Appeals database (Songer 1997; Hurtwitz and Kuersten 2012).

The dependent variable is a count of the number of amicus briefs submitted in the case. Originally, the *Phase III Court of Appeals Database* only contained an indicator variable for the presence of amicus participation. Therefore, I collected information on the number of amicus briefs, number of amicus brief co-signors, and the type of groups participating in the case. To collect this information, I searched Lexis, Westlaw, and the case docket sheets in the Public Access to Court Electronic Records (PACER). My unit of observation is the case. My data has a hierarchical structure because cases are nested within circuits. Therefore, I estimate a random-effects negative binomial regression model to account for intraclass correlation. I use a negative binomial regression due to the presence of overdispersion in my data (i.e. the variance of my dependent variable is greater than the mean).[70] A Poisson model would impose the incorrect mean-variance equality restriction, which would lead me to underestimate my standard errors (Long and Freese 2006).

The first case characteristic is the legal complexity of the case. Past research has measured case complexity by relying on the number and types of issues raised in an opinion

[69] For a detailed discussion regarding the data set used in this chapter see Chapter 1 Section 5 "A Note on the Data."
[70] The variance of my dependent variable is 0.48, which is roughly 3.5 times larger than the mean. This suggests the distribution of the data is overdispersed. Since there is evidence of overdispersion, the negative binomial regression model is preferred to the Poisson model.

(Hansford 2004a; Hettinger et al. 2007; Martinek 2006). This measurement strategy is problematic to measure amicus participation prior to the oral argument, let alone before the writing of the opinion. For example, was the opinion legally complex because it had amicus participation and the court addressed the issues raised in the amicus brief? Thus, we need an a priori measure of case complexity that is absence of the influence of amicus activity.[71]

I constructed a measure of legal complexity that is independent of the court's opinion. To capture a case's legal complexity, I relied on the PACER docket sheets. The variable *Docket Entries* captures a case's complexity. The variable is a count of the number of docket entries in a case.[72] The counting of docket entries begins when the case is docketed and ends with the docket entry immediately before the date of the issuing of the court's opinion.[73] I expect increases in *Docket Entries* to increase the number of amicus briefs submitted in a case.

As a second measure of case complexity, I use the presence of a first impression issue. The *Courts of Appeal Database* does not include a variable for an issue of first impression. Therefore, I collected this information by performing a keyword search of the court's opinion to identify the presence of a first impression issue. The variable *First Impression* is coded as one if the case raised a first impression issue and zero otherwise. I expect the presence of a first impression issue to increase the likelihood that a case receives an amicus brief.

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[71] See section 1.3.3 "A New Measure of Case Complexity" for a more detailed discussion on this measure of case complexity.

[72] I was not able to access all the docket sheets for every case in the data set. Specifically, 35 of the 2,880 cases in the data set (or 1.2 percent) had docket sheets that were either incomplete, missing, or under seal. Therefore, I used the mean number of docket entries for these cases.

[73] I tested the docket entries variable against another a priori measure of legal complexity, the briefs of the litigants. A litigant's brief provides judges with the facts of the case, the party's legal arguments, the legal issues under review, and the relevant precedents, statutes, regulations, or constitutional provisions involved in the case. Circuit courts vary in their record keeping, which means that most circuits do not have accessible litigant briefs for all the cases in my study. Of all the circuits, the Eighth Circuit Court of Appeals had the most exhaustive collection of litigant briefs. More than 80 percent of cases in the Eighth Circuit had an appellant and respondent brief. The page length of the two litigant briefs were added together. There is a moderately strong positive correlation (0.67), which is significant at the 0.05 level. Therefore, the variable *Docket Entries* provides a good measure of a case's complexity that is independent of the court's opinion.

I also include a number of control variables in the model that are likely to influence amicus participation in the U.S. Courts of Appeals. The first control variable is the resource capabilities of the litigants. A long line of research has established the resource capabilities of the litigant significantly influences their legal success (Black and Boyd 2010; Galanter 1974; McCormick 1993; McGuire 1995; Songer and Sheehan 1992; Songer et al. 1999; Wheeler et al. 1987). Litigants with more resources can hire better, more experienced legal representation. Additionally, resourced advantaged litigants frequently use the courts, which allows them to make more credible legal arguments to judges. Therefore, interest groups may have fewer opportunities to provide the court with new and legally persuasive information in cases in which both litigants are well-resourced and can hire quality attorneys. Conversely, litigants with poor quality legal representation are most in need of the subject-matter legal expertise interest groups can provide. Walbolt and Lang (2002, 278) write, "amicus briefs can be particularly helpful to the court if the parties have weak briefs." Less experienced attorneys are less familiar with the legal issues in the case or make less persuasive legal arguments. Since groups have limited resources, they may strategically decide to use their influence to help litigants that lack quality legal representation. Therefore, these cases offer groups an opportunity to provide judges with new information that will aid their decision-making. Therefore, I expect groups to file more briefs in cases with resource disadvantaged litigants.

To account for litigant resources, I include a number of dichotomous indicator variables that capture the identity of the appellant and the respondent. Following Collins and Martinek (2010), I use the following categories: prisoner (*Appellant Prisoner, Respondent Prisoner*), minority (*Appellant Minority; Respondent Minority*), private association (*Appellant Private Organization, Respondent Private Organization)*, small business (*Appellant Small Business,*

Respondent Small Business), big business (*Appellant Big Business, Respondent Big Business*), local government (*Appellant Local Government, Respondent Local Government*), state government (*Appellant State Government, Respondent State Government*), U.S. Government (*Appellant U.S. Government, Respondent U.S. Government*).[74] The reference category for the variables corresponding to the identity of the appellants is natural person appellant and the reference category for the variables corresponding to the identity of the respondent is natural person respondent.

I also expect the policy salience of the case to affect amicus activity. Groups are more likely to participate in cases that raise significant policy issues. Determining the policy significance of a case to a group can be tricky because different groups have different policy goals. As Hettinger et al. (2003, 224) write, "The key question with regard to salience is, of course, salience or importance to whom?" Ideally, the policy salience of a case could be determined by the type of news coverage it receives (Collins and Cooper 2012; Epstein and Segal 2000). Cases receive media attention due to the perceived national importance of the case. However, this measure is problematic for two reasons. First, most circuit court cases receive little news coverage. Second, media-based measures tend to focus on the popular or political salience of a case, rather than the legal or policy salience of the case. Therefore, I follow the literature and use a number of different measures that serve as a reasonable proxy for salience (Hettinger et al. 2003). These measures capture the national and legal importance of the case.

First, I consider salience as those cases whose outcomes have broad policy and legal ramifications on society writ large. The court's power of judicial review allows it to rule on the

[74] Litigants were classified based on the first party listed. Information about the litigants came from their description in the majority opinion. "Minorities" typically included individuals challenging the government over immigration or citizenship. Following Black and Boyd (2010), "big business" only includes the following: railroads, bank, manufacturing, insurance company, airline, oil company.

constitutionality of federal legislation as well as actions of the president. A decision based on the court's constitutional interpretation means that elected branches of government can only overturn the decision through a constitutional amendment. Since constitutional decisions can have a long-lasting influence on the law and national policy, interest groups are likely to view these cases as good vehicles for policy change (Casper 1976). I read the opinions of the case to identify all the cases that raised a constitutional law issue. The variable *Constitution* is coded one if the case raised a constitutional issue and zero otherwise. I expect groups to submit more briefs in cases raising a constitutional law issue.

Additionally, I consider policy salience as those cases containing politically controversial issues that are likely to elicit an ideological response from judges. Civil rights issues are widely considered to be some of the most partisan and divisive issues in American politics (Carmines and Stimson 1989; Kinder and Sanders 1996; Klarman 2006; Rosenberg 2008). Furthermore, Hettinger et al. (2003, 224) write, "a case involving a civil rights or liberties claim is likely to elicit more strongly held ideological positions and, hence, is one means of evaluating salience or importance to judges themselves." Again, I read all the opinions in the data set to identify which cases raised a civil rights issue. The variable *Civil Rights* is coded one if the case raised a civil rights issue and zero otherwise.[75] I expect interest groups will file more amicus briefs when a civil rights issues is raised in a case.

[75] The general issue area of civil rights excludes First Amendment and due process cases. Also excludes claims of denial of rights in criminal proceedings or claims by prisoners that challenges their conviction or sentence. However, this issue area does include civil suits imitated by prisoners and non-prisoners alleging denial of rights by criminal justice staff.

Table 2.7 Summary Statistics

Variable	Mean	Std. Dev.	Min.	Max
Amicus Brief	0.14	0.69	0	16
Docket Entries	46.42	49.03	0	1124
First Impression	0.04	0.04	0	1
Constitutional Issue	0.29	0.45	0	1
Criminal Case	0.35	0.48	0	1
Civil Rights Issue	0.20	0.40	0	1
Case per Judge	233.50	104.34	81	491
Appellant Prisoner	0.09	0.29	0	1
Appellant Minority	0.07	0.25	0	1
Appellant Natural Person	0.52	0.50	0	1
Appellant Private Organization	0.04	0.19	0	1
Appellant Small Business	0.14	0.35	0	1
Appellant Big Business	0.04	0.20	0	1
Appellant Local Government	0.03	0.17	0	1
Appellant State Government	0.03	0.18	0	1
Appellant U.S. Government	0.04	0.20	0	1
Respondent Prisoner	0.02	0.13	0	1
Respondent Minority	0.00	0.01	0	1
Respondent Natural Person	0.11	0.31	0	1
Respondent Private Organization	0.02	0.13	0	1
Respondent Small Business	0.15	0.35	0	1
Respondent Big Business	0.08	0.26	0	1
Respondent Local Government	0.06	0.24	0	1
Respondent State Government	0.10	0.30	0	1
Respondent U.S. Government	0.47	0.50	0	1

The circuit courts' mandatory dockets are particularly important for criminal cases. The circuit court's "right to review" incentivizes criminal defendants to appeal their cases regardless of the case's merits or frivolousness of their claim. As a result, a large percentage of the circuit court docket is comprised of criminal procedure cases. Because these cases often lack merit, they are routine and easily disposed of by the court. Moreover, Martinek (2006) argues that cases involving criminal appeals and habeas petitions are "poor candidates for policy making" (811). I read all the cases in the data set to identify all the criminal cases. The variable *Criminal Cases* is

coded one if the case involved a criminal issue and zero otherwise.[76] This also included habeas petitions. I expect interest groups will file fewer amicus briefs when a case raises criminal issues.

Finally, I account for the judge's workload. Judges can relieve their workload burdens by looking for informational cues that make it easier to perform their judicial responsibilities (Caldeira and Wright 1988; Crawford and Sobel 1982; Tanenhaus et al. 1963; Ulmer 1972). The variable *Cases per Judge* is the number of cases heard by the judge in the circuit. It is calculated based on the number of cases heard in the circuit divided by the number of active and senior judges in the circuit. Higher values indicate more cases per judge.[77]

2.8 Results and Discussion

In this section, I empirically examine whether groups submit amicus briefs in order to further their policy goals. Before I present the results from the negative binomial regression model, I briefly discuss the descriptive statistics of the variables in the model. The descriptive statistics for the variables in the model are located in Table 2.7. Amicus filings are a rarity in the U.S. Courts of Appeals. Interest groups filed amicus briefs in 222 cases[78], which is roughly 8 percent. Although this number is significantly lower than the 90 percent of Supreme Court cases receiving amicus briefs, it is in line with historical amicus activity in the circuit courts (Collins 2008; Martinek 2006). Additionally, the average number of amicus briefs submitted in a case is relatively low. When interest groups decide to participate as amicus curiae, circuit courts typically receive no more than two amicus briefs. For example, of the 222 cases with amicus activity, 180 cases (or 82 percent) had either one or two amicus briefs. Therefore, it takes a

[76] The general issue area of criminal cases includes appeals of conviction, petitions for post-conviction relief, habeas corpus petitions, and other prisoner petitions that challenge the validity of their conviction or sentence.
[77] This data comes from the United States Courts Federal Judicial Caseload Statistics, circuit websites, the federal judge biographical data base.
[78] Court appointed amicus curiae are not included in the 222 number. See footnote 59 for the explanation behind their exclusion. See also Appendix B.

significant legal issue or public saliency to generate large scale amicus activity in a circuit court case.

Table 2.8 Negative Binominal Regression of the Number of Amicus Briefs Submitted in a Case in the U.S. Courts of Appeals

Independent Variables	Estimate (Std. Error)	IRR (Percent Change)
Case Complexity		
Docket Entries	0.004 (0.000) ***	1.004 (+1%)
First Impression	0.714 (0.280)*	2.041 (+104%)
Policy Salience		
Constitutional Issue	0.544 (0.160) ***	1.723 (+72%)
Criminal Case	- 2.009 (0.293) ***	0.134 (-87%)
Civil Rights Issue	0.274 (.204)	
Cases per Judge	0.000 (0.000)	
Litigant Resources		
Appellant Prisoner	- 0.325 (0.407)	
Appellant Minority	- 0.785 (0.480)	
Appellant Private Organization	1.257 (0.235) ***	3.390 (+239%)
Appellant Small Business	0.136 (0.218)	
Appellant Big Business	0.435 (0.307)	
Appellant Local Government	0.355 (0.331)	
Appellant State Government	1.468 (0.262) ***	4.340 (+334%)
Appellant U.S. Government	1.144 (0.304) ***	3.138 (+213%)
Respondent Prisoner	- 1.267 (0.601) *	0.281 (-72%)
Respondent Private Organization	- 0.184 (0.369)	
Respondent Small Business	- 0.320 (0.234)	
Respondent Big Business	- 0.690 (0.319) *	0.501 (-50%)
Respondent Local Government	- 0.144 (0.282)	
Respondent State Government	- 0.031 (0.294)	
Respondent U.S. Government	- 0.280 (0.241)	
Constant	- 2.563 (0.348) ***	
Circuit Intercept (Sd. Dev.)	0.407	
AIC	1,904.687	
Number of Obs.	2874	

Note: IRR stands for incident rate ratio. Dependent variable is a count of the number of amicus briefs filed in a case. I estimate a multilevel, random effects negative binomial model with intercepts varying around each circuit. The reference category for appellant and respondent variables is individual appellant and individual respondent. The percent change is associated with a one unit increase in a continuous variable or moving from zero to one for a dichotomous variable.
* p<0.05, ** p<0.01, *** p<0.001

The results of the random-effects negative binomial regression model are located in Table 2.8.[79] The first column contains the coefficient estimates and standard error for each variable. The second column contains the incident rate ratio and the percent change.[80] The incident rate ratio indicates the average increase or decrease in the expected number of amicus briefs, holding all other variables at their mean value.

In regards to a group's decision to file an amicus brief in order to provide helpful information to the judge, I find support for my hypotheses. Case complexity is an important determinant of amicus brief activity. Both variables associated with case complexity perform as expected. First, cases involving more complex litigation receive more amicus briefs, for a given circuit, on average, and all else equal. Specifically, a one-unit change (i.e. an increase of an additional docket entry in the case) results in a 1 percent increase in the expected number of amicus briefs, for a given circuit, on average, and all else equal. More substantively, going from the 25th to the 75th percentile, results in a 39 percent increase in the expected number of amicus briefs, for a given circuit, on average, and all else equal.[81] Second, the presence of a first impression issue in circuit court cases increases the number of amicus briefs submitted in a case, for a given circuit, on average, and all else equal. Specifically, a case containing a first

[79] Five cases in the data set involved ex parte litigation. This means the case had an appellant but no respondent. The cases involving ex parte litigation were dropped from the model. Additionally, only one case had a minority respondent, which was dropped from the model. Finally, nine cases in the data set had court appointed amicus curiae briefs. In Appendix B, I estimate a random-effects negative binomial regression model that includes the six missing cases as well as the nine court appointed amicus briefs included in the dependent variable. The exclusion of the six missing cases and inclusion of the court appointed amicus briefs does not substantively influence the results of the model.

[80] In Appendix C, I estimate the same random-effects negative binomial regression model without the 25 cases remanded from the Supreme Court. An alternative theory to interest group participation is that groups strategically decide to participate in remanded cases. A case on remand typically has clear instructions from the Supreme Court about the appropriate legal issues the circuit court should consider. Therefore, the clarity of the Court's instructions makes it easier for groups to identify the cases that advance their policy interest and aid in organizational maintenance. Excluding the 25 remanded cases does not substantively alter the results of the model.

[81] The number of docket entries for the 25th percentile is 25 and the number of docket entries for the 75th percentile is 49, which is a difference of 24 [exp (24 × 0.014) = exp(0.336) = 1.39].

impression issue produces an average increase in the expected number of amicus briefs of about 104 percent compared to other cases, for a given circuit, on average, and all else equal. This finding suggest that interest groups pay attention to the precedent setting value of a case. These groups have an opportunity to influence the development of new legal issues, which helps them with future litigation.

Turning to the role of policy salience, I find mixed results for my hypotheses. The presence of a constitutional law issue is associated with an increase in the expected number of amicus briefs in a given circuit court case compared to case without a constitutional issue, for a given circuit, on average, and all else equal. Specifically, a case containing a constitutional issues issue is associated with an average increase in the expected number of amicus briefs of about 72 percent compared to other cases, for a given circuit, on average, and all else equal. This suggests that groups are mindful of the significant policy implications involved with constitutional interpretation. Conversely, criminal cases decrease the expected number of amicus briefs in a given court of appeals case, for a given circuit, on average, and all else equal. Criminal cases are associated with an average decrease in the expected number of amicus briefs if about 87 percent compared to other cases, for a given circuit, on average, and all else equal. This finding aligns with the existing literature on amicus activity (Martinek 2006). Groups recognize that criminal cases are often meritless appeals, thus providing groups little opportunity to achieve policy change.

I find that the types of litigants in the case matters to amicus participation. The results indicate that groups strategically avoid or seek out cases involving certain types of litigants. For example, cases in which a private organization, state government, or federal government is the appellant increase the expected number of amicus briefs compared to cases involving a natural

person as the appellant, for a given circuit, on average, and all else equal. Specifically, cases with a private organization as the appellant is associated with an average increase in the expected number of amicus briefs of about 240 percent compared to when the appellant is a natural person, for a given circuit, on average, and all else equal. Similarly, cases in which a state government or the federal government is the appellant saw an average increase in the expected number of amicus briefs of about 334 percent and 213 percent compared to when a natural person is the appellant, for a given circuit, on average, and all else equal. Conversely, the presence of certain types of respondents decreases amicus participation. In particular, case with a prisoner as the respondent have an average decrease in the expected number of amicus briefs of about 72 percent compared to when a natural person is the respondent, for a given circuit, on average, and all else equal. Cases with a big business as the respondent saw an average decrease in the expected number of amicus briefs of about 50 percent, for a given circuit, on average, and all else equal.

Overall, the findings for litigant resources are particularly interesting. I expected groups to be more likely to file amicus briefs in cases with resource disadvantaged litigants. This is because groups can use their subject-matter expertise to aid litigants that lack the resources to hire quality representation. However, I find this not to be the case. Rather the results indicate that groups seek out well-resourced appellants and avoid under-resourced respondents.

These findings suggests that groups strategically participate as amicus curiae based on the presence (or absence) of certain litigants. Cases with resourced advantaged appellants, such as those involving states and the federal government receive more amicus briefs. However, the results of this study do not tell us is why groups are participating as amicus curiae in these cases or which litigant the amicus brief supports. There are three possible explanations for the behavior

of interest groups in these types of cases. First, states and the federal government have a well-known resource advantage in court cases (Galanter 1974). Therefore, interest groups could be submitting amicus briefs in order to help respondents in these cases, whom are presumably at a resource disadvantage compared to states and the federal government. Second, groups might be participating as amicus curiae in order to ride the proverbial coat-tails of well-resourced litigants to policy success. Under this scenario, groups want to show their members that they are not only publicly fighting for their success but also winning. Therefore, groups strategically pick out cases in which litigants have the best chance of winning. However, if this were the case, groups should participate more frequently on behalf of well-resourced respondents. This is because well-resourced respondents will be more likely to win on appeal. In short, the findings regarding litigant resources opens up avenues for future research.

2.9 Concluding Remarks

The courts, for a long period of time, received very little attention from interest groups. The attention circuit courts did receive from interest groups was usually in the form of litigation of behalf of its members or through test cases (Klarman 2006; Truman 1951; Vose 1959). However, over the past several decades groups have shifted their focus from litigation to amicus curiae activity (Collins 2008; Epstein 1992; Kearney and Merrill 2000). The majority of the research on interest groups amicus activity focuses on the Supreme Court (Box-Steffensmeier et al. 2013; Caldeira and Wright 1998, 1990; Collins 2004, 2008; Collins et al. 2015; Epstein 1985, 1992, Hansford 2004a; Spriggs and Whalbeck 1997). Only recently have scholars started an empirical investigation of interest group activity in the U.S. Courts of Appeals (Marinek 2006). Based on this research, for example, we know that the legal advocacy of amicus briefs can influence litigant success as well as have a mediating effect on judicial ideology (Collins and

Martinek 2010, 2015; Songer and Kuersten 1995). Furthermore, amicus activity can influence separate opinion writing and the content of judicial opinions (Collins et al. 2015; Hettinger et al 2007). Since amicus briefs can affect judicial decision-making, it is important to understand when groups decide to exercise their influence.

Prior work on amicus participation has found that groups use amicus briefs to obtain policy change (Hansford 2004a; Martinek 2006). I build on this existing work by adding two additional conditions to explain amicus activity: organizational maintenance and resource constraints. There are two implications from this study. First, it illustrates interest groups are strategic in choosing their lobbying strategies. Amicus curiae participation is not the only strategy interest groups have to influence policy change (Kollman 1998; Schattschneider 1960; Truman 1951). The cost to file an amicus brief can be prohibitively high for certain groups, especially those that are resourced challenged. Groups with the resource capabilities to absorb the cost and groups that require organizational maintenance to survive submit more amicus briefs than other groups. Martinek (2010, 818) writes "amicus curiae activity in the U.S. Courts of Appeals is not a random event, despite the sparseness with which we observe such briefs." By this she means that present of certain case characteristics drives amicus curiae activity. To this statement I add, the types of groups filing the amicus briefs are not random. That is, there are certain group characteristics that make amicus activity, particularly in the Courts of Appeals, a more viable strategy. The second implication is that groups believe amicus briefs have informational value for the judge. Groups view legally complex cases as an opportunity to use their subject-matter expertise as leverage over the judge's decision-making. Cases with complex litigation and cases with a legal issue of first impression both increase the expected number of amicus briefs in a case. The finding for a first impression issue is particularly noteworthy as it

suggests groups participate in cases with an eye toward future litigation. Sam Paredes of Gun Owners of California, whom I interviewed, stated that groups "try to build on past legal success" and that "the group has the attention of going all the way to the Supreme Court." First impression cases, then allow groups to shape the law at its earliest stages with the hopes of establishing legal principles and precedent that the group can use in future cases.

This study opens up avenues for future research on interest group activity in the Courts of Appeals. First, the findings from this study are limited due to the time period of this study. The time period for this analysis is short, eight years, and relatively recent. Future research should extend this research design to earlier time periods to see if the types of group participating as amicus curiae holds or have there been historical changes to the frequency with which certain groups use circuit courts.

Second, I collected information on each group that participated over the course of this study. We can use this data to examine how the types of groups participating as amicus curiae influence other aspects of judicial behavior. For example, does the resource capability of the group participating as amicus influence litigant success? Do judges differ to the position of the amicus curiae based on the types of legal issue raised in the case? For example, in cases involving economic activity, will judges incorporate more language from amicus briefs submitted by trade associations into the judicial opinions?

Third, findings indicate that groups submit amicus briefs in legally complex cases, but how judges use that information is beyond the scope of this study. For example, are judges more likely to use language from amicus briefs in their opinions in legally complex cases to a) reduce their workload burden and b) to make sure their opinion properly addresses the highly specialized, technical aspects of the case? Furthermore, the measure of case complexity

constructed for this chapter can be used to study other aspects of judicial behavior, such as separate opinion writing or ideological decision-making. For example, do legally complex cases make it more difficult for judges to identify the correct ideological decision in the case?

In sum, these findings deepen our understanding of the lobbying strategies of interest groups. By viewing amicus participation as a function of policy goals, organizational maintenance, and resource constraints, this chapter explained when groups participate, but more importantly, which groups will participate. We know have a better understanding of the specific types of groups using the circuit courts to advance their interest. Previously, this level of detail was only available for research on the Supreme Court (Collins 2008). Therefore, this study adds significantly to our understanding of interest group behavior.

CHAPTER 3

QUALITY VERSUS POWER: UNDERSTANDING AMICUS INFLUENCE ON LITIGANT SUCCESS

A strategy that has become increasingly popular for interest groups in order to seek policy change is the use of amicus curiae briefs in state and federal courts (Collins 2008; Epstein 1994; Martinek 2006). An amicus ("friend of the court") brief is submitted by an individual or group that is not a party to the litigation, but has a strong interest in the outcome of the case. One of the purposes for an amicus brief is to provide additional information to the court that may be omitted from litigant briefs with the hopes of achieving a desired policy outcome (Collins 2008; Krislov 1963).

However, a broader question remains. Do amicus briefs influence judges? Existing research on this question focuses on the Supreme Court (Box-Steffensmeier et al. 2013; Collins 2004, 2008; Collins et al. 2015; Epstein 1992; Ivers and O'Connor 1987; Kearney and Merill 2000; Lynch 2004; Songer and Sheehan 1993). Comparatively, less attention has been paid to amicus curiae activity in the U.S. Courts of Appeals (Collins and Martinek 2015; Hettinger et al 2015; Martinek 2006). This paucity of research on amicus curiae activity is unfortunate because "as court of appeals decisions increase in number" and the Supreme Court's docket shrinks in number, circuit courts are becoming "more and more the nation's courts of last resort" (Federal Courts Study Committee, 1990, 110; see also Richman and Reynolds 2010). Circuit courts operating as de facto "courts of last resort" mean that these courts wield significant influence over public policy and the development of case law, which makes them attractive forums for

interest groups. Therefore, it is important to understand which groups use circuit courts to advance their policy interest and how groups can find policy success.

In this chapter, I fill this gap in our understanding by investigating the influence of amicus briefs on the judicial decision-making. I do this by examining two competing hypothesis about the influence of amicus briefs on case outcomes: the information hypothesis and the power hypothesis. The information hypothesis states that amicus briefs are influential because of the amount of information they provide to judges (Collins 2004, 2008; Epstein and Knight 1997; Lynch 2004; Kearney and Merrill 2000). This is because judges are resource constrained actors that often operate in an information poor environment (Epstein et al. 2013; Hansford 2004a). Therefore, amicus briefs are informational short-cuts that judges can use to help them reduce the cost of deciding cases, thus freeing up resources to pursue other goals (Klein 2002). The power hypothesis states that amicus briefs are valuable because of the type of groups contributing the information. It applies party capability theory to interest groups (Galanter 1974). First, certain interest groups are more prestigious in the eyes of the court than other groups (Box-Steffensmeier et al. 2013; Lynch 2004). As a result, their legal arguments are likely to hold more influence over a judge's decision-making. Second, groups vary in their organizational resources (Olson 2009; Solberg and Waltenberg 2006; Walker 1983). Groups that have more resources should be able to attract more experienced lawyers and hire more staff in order to compose better, more informative, and legally persuasive briefs.

This study furthers our understanding of interest group activity in American politics in a number of ways. First, it has implications for democratic governance. This is because if judges respond to the power of the group supplying the information, then the policy interest of a select number of elite, well-resourced groups will be overly represented in the development of the law

compared to lesser groups (Schattschneider 1960). It will further reinforce that governing institutions respond to the interest of the wealthy and powerful rather than providing a level playing field in which the interest of all citizens can compete and be equally represented (Gilens 2005; Gilens and Page 2014).

Second, this study speaks to the strategic behavior of interest groups (Truman 1951). Organizational resources are important to groups because it affect their policy influence with government institutions (Gais and Walker 1991). An amicus brief is a costly lobbying strategy for a group to pursue. As has been previously stated, producing an amicus brief can cost as much as $60, 000 if not more (Caldeira and Wright 1988). As an alternative, a group may decide to cosign an existing amicus brief. Interest groups, particularly resourced disadvantaged groups, may decide to save resources by seeking out ideological allies in order to compose a coalitional amicus brief. Coalitional amicus briefs have value to interest groups because they allow an industry to speak with one voice and potentially save groups money. When I asked Luke Wake, Senior Staff Attorney with the National Federation of Independent Business Small Business Legal Center, about the likelihood of joining an amicus brief comprised of ideological allies, he stated the following:

> Might look for briefs with a coalition of industry groups. Speak with one industry voice. Members care about issues. Members like to see their group appear active. There is a money consideration. Join a brief for free, may make us more likely to join. Coalition briefs show how diverse and wide-spread the issue is, especially for the court. More groups on the brief help the court understand which issues are of national importance.[82]

However, there are drawbacks to cosigning an amicus brief. By cosigning an amicus curiae brief, the group relinquishes some control over the legal arguments and types of information contained in the brief (Gonen 2003). Therefore, if different groups have different policy agendas, this can

[82] Wake, Luke. Senior Staff Attorney. NFIB Small Business Legal Center. Personal Interview. 1 September 2017.

make it difficult for a specific group to bring about a specific type of policy change that is important to them or their members.

The decision to solo author an amicus brief versus cosigning an amicus brief requires groups to make a strategic decision about the best use of their resources. If the type of group on the amicus brief matters, then groups can pool their resources by forming ideological or policy-based coalitions. This allows under-resourced groups to conserve resources by riding the coattails of resourced advantage groups to policy success. However, if the number of amicus briefs matters, under-resourced groups have to make a strategic calculation about whether to solo author an amicus brief or use their resources on other lobbying tactics. Therefore, this study sheds insight into which types of groups will be successful in advocating for policy change in the U.S. Courts of Appeals.

I test the competing hypotheses regarding interest group influence using an original data set of randomly sampled circuit court cases covering all twelve geographic circuits from 2003 through 2010. Additionally, I conducted interviews with representatives from three different interest groups (Gun Owners of California, Sierra Club, and the National Federation of Independent Business Small Business Legal Center) in order to gain insight into the strategy behind their use of amicus curiae briefs.[83] I find limited support for the power hypothesis and broader support for the information. Specifically, both appellants and respondents benefit from the support of amicus briefs. However, I find that appellants benefit greatly from having a relative advantage in the number of amicus briefs over the respondent. In regards to the power hypothesis, I find that respondents, not appellants, benefit from the support of powerful,

[83] For information on methodology and process behind the elite interviews used in this dissertation see Chapter 1, section 5, subsection 2 entitled "Elite Interview Methodology" as well as Appendix A.

institutionalized amici, such as the states, the federal government, the ACLU, and national trade associations.

3.1 The Influence of Amicus Briefs

The study of judicial politics is largely driven by trying to understand how judges make their decisions (Epstein and Knight 1997; Segal and Spaeth 2002). I reexamine this question with a focus on how a judge's information environment has an effect on their decision-making. That is, does the amount of information provided by interest groups matter, or the type of groups providing the information? In the remainder of this section, I outline the two different theories of interest group influence over judicial decision-making: the information hypothesis and the quality hypothesis.

3.1.1 The Information Hypothesis

The information hypothesis argues that amicus briefs are valuable because of the amount and type of information they provide to the court (Collins 2004; Ivers and O'Connor 1987; Lynch 2004; Shapiro 1987; Walbolt and Lang 2002). Cases with more amicus briefs typically provide judges with more legal or policy arguments. The informational value of amicus briefs is reflected in the fact that litigants with more amicus support tend to have more success in the Supreme Court and U.S. Courts of Appeals (Collins and Martinek 2010; Kearney and Merrill 2000; McGuire 1990). This is because those litigants are presenting judges with more information, which can help a judge make a more informed decision. Additionally, amicus briefs have a mediating effect on a judge's ideology (Collins 2008; Collins and Martinek 2015; Segal and Speath 2002). This suggests that judges are receptive to arguments from amici that go against their policy preferences. Furthermore, interviews with appellate practitioners (judges, law clerks, and lawyers) suggest that the best way for amicus briefs to influence decision-making is

to present judges with new, interesting information and avoid repeating the arguments raised in litigant briefs (Flamingo et al 2006; Shapiro 1994; Walbolt and Lang 2002).

I conducted interviews with representatives from several interest groups in order to better understand the motivations for participating as amicus curiae. The takeaway from these interviews is that groups understand the value of their subject-matter expertise and only participate when they can contribute valuable information to the court. Sam Paredes, the Executive Director of Gun Owners of California stated, "We do not look to re-state the issues. We look to enhance and broaden."[84] Aaron Isherwood, the Phillip S. Berry Managing Attorney for the Sierra Club, stated that amicus briefs:

> address a legal issue in a particular way that is different, or perhaps elaborates upon, the arguments the parties are making…an opportunity to make different, or more nuanced or elaborate, arguments about a legal issue in the case that is different in some way from what the parties are presenting and thus may aid the court's consideration of the issue.[85]

The information hypothesis works in two ways. First, judges are legal generalists whereas amici are subject-matter experts in a given legal and policy area (Baum 2009, 2011; Breyer 1998). Therefore, amicus briefs allow judges to maximize their goals on the court by making a more legally or ideologically informed decision (Epstein et al. 2013; Klein 2002; Posner 1993, 2010). Second, judges are resource constrained actors and must balance judicial as well as non-judicial responsibilities on the court (Epstein et al. 2013).[86] Judges often lack the time and resources to perform all their responsibilities. As a result, judges look for easily recognizable cues or informational short-cuts to ease the decision-making process (Crawford and Sobel 1982;

[84] Paredes, Sam. Executive Director Gun Owners of California. Personal Interview 31 August 2017.
[85] Isherwood, Aaron, the Phillip S. Berry Managing Attorney Sierra Club Personal Interview 31 August 2017.
[86] Judicial responsibilities typically entail sitting on panels, researching cases, writing opinions, overseeing law clerks while non-judicial responsibilities entail leisure time and academic writing.

Tanenhaus et al. 1963; Ulmer 1972). The number of amicus briefs in support or against a litigant sends a signal to the judge about the merits of their position or the public's views on the matter.

3.1.2 The Power Hypothesis

The power hypothesis suggests that amicus briefs are influential because of the type of groups presenting the information to the judges (Box-Steffensmeier et al. 2013). This hypothesis simply extends party capability theory to interest groups (Galanter 1974; Songer and Sheehan 1992; Songer et al. 1999). Similar to litigants, interest groups have different resource capabilities (Scheppele and Walker 1991; Walker 1991). Organizational resources, such as staff and financial support, are important because resources "determines how much a group can accomplish" in the pursuit of their policy goals (Gais and Walker 1991, 105). Submitting an amicus brief is an expensive activity. Sam Paredes, Executive Director of the Gun Owners of California, stated in a personal interview that an amicus brief can range from "five to fifteen thousand dollars for a simple brief to twenty-five to thirty thousand dollars for complicated briefs."[87] The cost to file an amicus brief, then, might influence a group's decision to participate as amicus curiae. Sam Paredes went on to state that "financial cost is always a consideration" when deciding to file an amicus brief because "groups often have to fundraise to participate and it can be difficult to raise money. Many organizations do not have a pot of money set aside for amicus participation."[88]

Therefore, groups with more resources should a) be able to hire better quality legal representation to advocate for their interest and b) participate more frequently as amicus curiae than groups at resource disadvantage. As a result, resourced advantaged groups develop "repeat player" status, which increases their familiarity with the litigation environment, provides them with amicus experience they can use in future cases, and allows them to develop a certain level

[87] Paredes, Sam. Executive Director Gun Owners of California. Personal Interview 31 August 2017.
[88] Ibid

of prestige that they can use to make more credible legal arguments to the judges (Box-Steffensmeier et al. 2013; Kearney and Merrill 2000; Lynch 2004). Paredes indicates that groups achieve other goals besides merely winning on the merits when it files an amicus brief. Mr. Paredes stated,

> There is always a residual benefit to filing an amicus brief in the case. Filing an amicus brief gives them an opportunity to flush out the legal issues and their arguments. Even if they lose, they know another lawsuit will eventual be filled. Therefore, participating in prior cases allows them to refine their argument.[89]

The best example of amicus status mattering to the court is the out-sized influence that the Solicitor General wields over judges (Collins 2004; Kearney and Merrill 2000; Calderia and Wright 1988). Because of this influence, the solicitor general is commonly referred to as the "tenth justice" due to the frequency with which the office interacts with the Supreme Court (Bailey et al. 2005; Segal 1988). For example, Epstein et al. (2012) finds that when businesses receive amicus support from the solicitor general, business litigants are more likely to win at the Supreme Court. Lynch's (2004) interviews with former Supreme Court law clerks reveals that the Supreme Court pays more attention to the views and arguments of the Solicitor General than any other amici. The solicitor general's influence stems from the quality of the briefs. According to several law clerks, the solicitor general has "instant credibility and reputation for good legal work" because their amicus briefs are of "excellent quality; they provide an extremely reliable assessment" (Lynch 2004, 47). Box-Steffensmeier et al. (2013, 448) writes that the solicitor general is powerful amicus advocate because of the offices "information resources" and "enjoys higher credibility with the Court than the average filer."

Other research suggests that the prestige of non-government groups is important for judicial decision-making. For example, McGuire (1990) finds that lawyers actively recruit

[89] Ibid

prestigious interest groups to assist them with petitioning the Supreme Court for cert. Box-Steffensmeier et al. (2013) find that groups that participate more frequently as amicus curiae are more likely to receive the support of Supreme Court justices. Specifically, when a case is balanced in the number of amicus briefs for and against the petitioner, the litigant supported by more prestigious and powerful groups is more likely to prevail. Kearney and Merrill (2000) and Lynch (2004) find that "repeat advocates," such as the ACLU, NAACP and the AFL-CIO tend to enjoy more success than groups who often lack institutional prestige before the court.

3.2 Research Design

In this section, I explain the model used to test the competing hypotheses of amicus influence as well as the dependent and independent variables in the study. I test the two competing theories of amicus influence by examining their effect on litigant success in federal circuit courts. I use an original data set of U.S. Courts of Appeals cases covering the twelve geographic circuits from 2003 through 2010.[90] This is the *Phase III Court of Appeals Database,* which is the latest extension of Songer Courts of Appeals database (Songer 1997; Hurtwitz and Kuersten 2012).

In order to determine whether the type of group submitting the amicus brief or quantity of amicus briefs influences judicial decision-making, I estimate three separate models. The first model, named Information Model 1, examines appellant success based on the total number of amicus briefs filed in support of the respondent and the appellant. The second model, named Information Model 2, examines appellant success based on the relative advantage in amicus support that the appellant has over the respondent. The third model, named Power Model, examines litigant success based on the support of specific types of amici for the appellant and the

[90] For a detailed discussion regarding the data set used in this chapter see Chapter 1 Section 5 "A Note on the Data."

respondent. My unit of observation is the case. My data has a hierarchical structure because cases are nested within circuits. Therefore, I estimate a random-effects logistic regression model to account for intraclass correlation.[91]

The original version of the *Phase III Courts of Appeals* database contained only an indicator variable for the presence of an amicus brief. Therefore, I collected information on the number of amicus briefs, number of amicus brief cosigners, and the type of groups participating in the case. To collect this information, I searched LexisNexis, Westlaw, and the case docket sheets in the Public Access to Court Electronic Records (PACER).[92] Only amicus briefs in which the position of the amici (i.e. supporting the appellant or respondent) could be identified are included in the study. The position of the amicus brief is typically located on the front of the brief. The front of the brief typically identifies the group(s) on the brief and whether the decision of the district court should be reversed or affirmed. When a brief did not identify their position on the front of the brief, I read the brief's conclusion.[93]

The dependent variable in all three models is dichotomous where an appellant win is coded as one and respondent win is coded as zero.[94] To determine whether the appellant won on appeal, I read the all 2,880 circuit court opinions in the data set and categorized the outcome into one of four possible results: appellant win, respondent win, mixed, and not identifiable. I follow

[91] A logit model is appropriate because the effect of amicus briefs on judicial decision-making is non-linear (Collins 2004; Kearney and Merrill 2000; Long and Freese 2006).
[92] Only amicus briefs where the position of the amici could be clearly identified are included.
[93] Amicus briefs that did not clearly identify their position were coded as "other." Occasionally, an interest group submits a brief a states that they are not taking a position in the case. The group is submitting the brief for the sole purpose of providing the court with information about the case and does not advocate that court either reverse or affirm the lower court's decision. Furthermore, circuits vary in their record keeping. Most circuits did not have an electronic version of all the amicus briefs. If I could not access an electronic version of the amicus brief, I used Lexis opinion of the case and PACER to identify the position of the amicus brief. On occasion, when amicus briefs for a case could not be found, I identified amicus support based on oral arguments.
[94] See footnote 60 for an explanation of the coding procedure behind mixed outcome cases.

conventions established in the Multi-User Courts of Appeals database (Songer 1997) and code appellant success based on the panel's treatment of the case. I coded the circuit panel as affirming the lower court's decision (respondent win) when the treatment of the case was 1) affirmed, 2) affirmed and petition denied, 3) petition denied, or 4) appeal dismissed.

I coded the circuit panel as reversing the lower court's decision (appellant win) for treatments in which a 1) stay, petition, or motion was granted, 2) reversed (includes reversed and vacated), 3) reversed and remanded (includes remanded), 4) vacated and remanded (includes set aside and remanded, modified and remanded), and 5) vacated.

To determine the informational advantage that amicus briefs provide to the appellant's success, I utilize three variables. The variables *Appellant Amicus Briefs* and *Respondent Amicus Briefs* are simply counts of the number of amicus briefs filed in support of the appellant and the respondent. These two variables capture the amount of information provided by amicus curiae on behalf of each litigant. The idea being that the more information a litigant can provide to the court, the more successful the litigant should be at convincing the court of the merits of their argument. The benefit of this approach is that it allows us to examine if both appellants and respondents benefit from amicus activity.

However, this approach does not allow us to consider the net impact of amicus briefs on litigant success. In other words, the raw number of amicus briefs filed in support of the appellant is immaterial. What matters is the relative advantage in amicus support that the appellant enjoys over the respondent. For example, an appellant with nine amicus briefs wins against a respondent with eight amicus briefs. Did the appellant win because of the high number of amicus briefs submitted on their behalf? Conversely, did the appellant win because it had one more amicus brief (and thus one additional piece of information) on its side? To put it another way, is the

relationship between appellant success and amicus support based on having lots of amicus briefs in their corner or simply having more amicus briefs than the respondent.

Therefore, in order to accurately capture the informational value of amicus briefs on appellant success, we have to account for the relative number of amicus briefs filed in support of the appellant (Box-Steffensmeier et al. 2013; Kearney and Merrill 2000). For example, if five briefs are submitted in support of the appellant and three amicus briefs are submitted in support of the respondent, the appellant has a relative amicus brief advantage of two amicus briefs. The variable *Amicus Brief Advantage* is the total number of amicus briefs filed in support of the appellant minus the total number of amicus briefs filed in support of the respondent.

Whereas the counting of amicus briefs is a straightforward process, measuring the power of an amicus curiae is more difficult. Previous work that has examined the power of specific types of amicus curiae has generally proceeded along one of two tracks. The first track is the approached used by Box-Steffensmeier et al. (2013) in their analysis of interest group influence before the U.S. Supreme Court. They used network analysis to examine how frequently certain groups cosign amicus briefs with each other and how the composition of those networks have changed over time, by measuring "the relative position of the interest group within the network… as a measure of the group's power (Box-Steffesnmeier et al. 2013, 451). This approach allows the authors to identify the most powerful interest groups as amicus curiae across various decades. For example, the authors find that Railroad companies were the most powerful group in the 1930s, unions in the 1940s, electrical companies and cooperatives in the 1970s and the ACLU in the 1980s.

Table 3.1 Number of Cases with Amicus Participation

Number of Groups	Number of Cases	Percentage of Cases
1	79	36
2	34	15
3	26	12
4	4	2
5	13	6
6	12	5
7	6	3
8	4	2
9	1	0
10	3	1
11 or more	36	16

The second approach used to track interest group power as amicus curiae is via case studies (Lynch 2004; Gonen 2003; Kearney and Merrill 2000; O'Connor 1980; Vose 1959). This approach usually examines the power and behavior of a select number of institutionally prestigious groups or an industry of groups, such as women rights' organizations or environmental organization. For example, Kearney and Merrill (2000) track the success rate that the ACLU and the AFL-CIO have when participating as amicus curiae. Lynch (2004) interviewed several former Supreme Court law clerks about whether the identity of the amicus curiae mattered to judicial decision-making. Lynch's (2004) interviews indicate that clerks and justices give more credence to arguments made by powerful public interest organizations, such as the ACLU, NAACP, Chamber of Commerce, and AFL-CIO.

Unfortunately, these two approaches (network analysis and case studies) are not appropriate for my study. The first reason is the length of my study, which only covers an eight year period, whereas Box-Steffensmeier et al (2013) covered nearly eight decades. A longer time frame allows for more interest group participation. Second, there is a stark contrast in the levels of amicus participation between the Supreme Court and the Courts of Appeals (Collins 2008;

Martinek 2006). Roughly 90 percent of Supreme Court cases today receive amicus participation, whereas only eight percent of cases received amicus participation in my study. Even then, amicus participation is limited to one or two groups. I breakdown the total amount of amicus participation in my data in Table 3.1. The statistics in Table 3.1 indicate that nearly one-third of cases had amicus participation from one interest group. Furthermore, 63 percent of the cases had amicus participation from three or fewer groups. Finally, cosigning an amicus brief is not a common strategy when it comes to interest group participation in the U.S. Courts of Appels.

Table 3.2 Number of Cases with Cosigners

Nu. of Cosigners	Appel Cosigner Cases	Percentage	Resp. Consignor Cases	Percentage
0	152	68	165	74
1	15	7	15	7
2	13	6	8	4
3	5	2	5	2
4	7	3	6	3
5	4	2	5	2
6	1	0	2	1
7	2	1	2	1
8	2	1	0	0
9	1	0	1	0
10	3	1	1	0
11 or more	15	7	12	5

In Table 3.2, I provide descriptive statistics for the number cases in which groups cosigned an amicus brief in support of the appellant and the respondent along with percentage of cases. The statistics suggest that most amicus participation occurs without a cosigner. In my data, 68 percent of cases in which an amicus brief was submitted did not have any consigners in support of the appellant and 74 percent of cases with amicus briefs did not have cosigners in support of the respondent. Only 7 percent of cases in which an amicus brief was submitted had more than 11 cosigners on behalf of the appellant whereas only 5 percent of cases had more than 11 cosigners on behalf of the respondent. Given the statistics listed in Tables 3.1 and 3.2,

network analysis would not be a viable strategy due to the infrequency with which groups cosign amicus briefs. Moreover, the small time frame of my study makes it difficult to track the influence of a select number of institutionally powerful amici because a) groups do not participate frequently b) there is not a lone enough time period time to meaningfully evaluate the impact of their participation.

Therefore, I derived an alternative strategy to measure the power an interest group participating as amicus curiae. In a perfect world, given the constraints of my data, such as limited cosigning, I would survey a group of scholars that work in interest group politics as well as lawyers and have those individuals categorize my groups into different tiers of power and prestige. However, I lack the resources to pursue this strategy. Instead, I rely on a survey of lawyers undertaken by Lynch (2004) that investigated the influence of amicus briefs on Supreme Court judicial decision-making. Lynch (2004) interviewed 70 current and former Supreme Court law clerks in order to find out how Supreme Court justices viewed amicus curiae activity. Lynch asked the clerks six open ended questions: 1) when are amicus briefs most useful to the Court, 2) is every amicus brief read, 3) are briefs of any particular group considered more closely, 4) does the author of the amicus brief make a difference, and 5) is there an advantage to collaboration, 6) what is the impact of social science data. For the purposes of this dissertation, I am most concerned with the responses provided to question three – are briefs of any particular group considered more closely? It turns out that most law clerks have created a hierarchy of group power when it comes to amicus briefs. Table 3.3 contains the results of Lynch's (2004) interviews on group power and prestige. As indicated in Table 3.3, seventy percent of the law clerks stated that they would read amicus briefs from the Solicitor General more closely. Twenty-one percent of the respondents stated that state and local government amicus briefs

would be considered more closely. Among non-government groups, the ACLU clearly sits at the top of the group power structure. Thirty-three percent of the law clerks stated that would consider amicus briefs from the ACLU more closely than amicus briefs filed by other groups. Professional associations received sixteen percent followed by the NAACP at eleven percent. Finally, thirteen percent of respondents indicated that they gave no preferential treatment to amicus briefs filed by specific groups.

I use the results of Lynch's (2004) survey to construct a measure of interest group power for my study. Based on the survey results, I create four categories of interest group power. The first category is *institutional amici.* This category consists of two types of groups. First, I considered institutional amici as all the non-government groups specifically identified by the law clerks in Lynch's (2004) survey: ACLU, NAACP, Chamber of Commerce, AFL-CIO, Criminal Justice League Foundation, Washington Legal Foundation, Lambda Legal, and Brennan Center.

Table 3.3 Lynch (2004) Survey Results of Group Power

Group	Percentage of Law Clerks
Solicitor General	70%
ACLU	33%
States / Local Government	21 %
Professional Associations	16%
NAACP	11%
AFL-CIO	7%
Chamber of Commerce	7%
Criminal Justice Legal Foundation	4%
Washington Legal Foundation	4%
Brennan Center	3%
Lambda Legal	3%
No extra consideration to any group	13%

Note: The specific question is as follows: "Are the briefs of any particular groups always considered more carefully than others? Can you name specific groups? (70 respondents). This table comes from Table 3 of Lynch (2004).

Since the clerks mentioned that amicus briefs from professional associations received closer attention, I included national professional associations in the *institutional amici* category.

To be considered a national professional association that group had meet two criteria. First, the group had to be a professional / trade association. Professional / trade associations are groups that have occupational barriers to entry. That is, they are membership groups reserved only for individuals or entities that work or operate in a specific economic field or industry.[95] Second, the group had to be a national organization. Professional associations tend to be either national or local. Examples of national professional associations would be the Wine and Spirits Wholesalers of America, which is a "national trade organization founded in 1943 and is the voice of the wholesale branch of the wine and spirits industry" or WineAmerica, Inc., which is the "National Association of American Wineries with 800 members located in 48 states."[96] An example of a local professional association would be the Oregon Winegrowers Association, which is a "trade association for Oregon wineries with 360 members" or the Madera Vintners Association, which is a "trade association of Madera County & Madera AVA Wineries, 12 winery members and 20 Associate Members."[97] Therefore, organizations with "National" or "America" in their title were classified as institutional amici.

I consider national professional associations as institutional amici for two reasons. First, national professional associations represent more interest than local professional associations. Therefore, the presence of a national association should send a stronger signal to the court regarding the impact of the case to certain industries. Second, national associations, by virtue of having more members, should have more organizational resources than local associations. More resources allow a national association to hire better legal representation and compose better amicus briefs on behalf of their interest. Additionally, more resources allow a national

[95] See Chapter 1 Section 4 "A Typology of Interest Groups" for a more detailed discussion of the classification of different types of groups.
[96] Amicus Brief, *Family Winemakers of California v. Jenkins* 592 F.3d 1 (1 Cir. 2010).
[97] Ibid.

association to participate more frequently as amicus curiae, which allows them to develop repeat status.

The second category of interest group power is *government amici.* I classified federal and state government amici into this category. Studies on litigant success in federal courts typically place states and the federal government near the top of the litigant resources capability pyramid (Black and Boyd 2010; Galanter 1974; Sheehan et al. 1992; Wheeler et al. 1987). The third category of interest group power is *other amici*. This category consists of all amici that do not fall into the first or second categories. The groups that comprise the third category are individuals, corporations, public interest law firms, local government, public advocacy organizations, local professional / trade associations, peak associations, and unions. The fourth and final category is *multiple powerful amici.* This category consists amicus briefs that have multiple institutional amici or government entities on the amicus brief.

I create a series of dichotomous indicator variables to account for different types of group power and their litigant support: institutional amici *(Appellant Institutional Amici, Respondent Institutional Amici),* government amici *(Appellant Government Amici, Respondent Government Amici),* other amici *(Appellant Other Amici, Respondent Other Amici),* and multiple powerful amici *(Appellant Multiple Powerful Amici, Respondent Multiple Powerful Amici).* If any of the groups listed as institutional amici were on the amicus brief, I coded that amicus brief as being an institutional amicus brief. If an amicus brief contained a state / federal government or agency, I coded that amicus brief as being a government amicus brief. If an amicus brief had neither a government entity nor an institutional amici, I coded that amicus brief as being in the other amicus category. Finally, when an amicus brief had more than one institutional amici and / or government entity, I coded the brief as being a multiple powerful amicus brief. The reference

category for the variables corresponding to the different groups of amici is no amici present in the case.

I also control for a number of other variables that have been shown to influence litigant success. Foremost among those is judicial ideology (Segal and Spaeth 2002). I control for judicial ideology by creating an *Ideological Congruence* measure based on the judge's ideology and the liberal or conservative nature of the lower court's ruling. A circuit court panel is less likely to reverse a lower court decision when it agrees with the case outcome. First, I read the circuit court opinion and coded the ideological direction of the panel's decision. I follow the conventions established in the Multi-User Court of Appeals database where votes are coded in terms of the policy content along a liberal-conservative dimension (Songer 1997). For example, a vote supporting the position of a litigant claiming a civil rights violation is coded as "liberal" whereas a vote against that position is coded as "conservative." In criminal cases, a vote supporting the position of the defendant (or prisoner) is coded "liberal" whereas a vote against is coded "conservative." In labor-economics cases, liberal votes include those in which judges supported the positions taken by unions, the federal government in regulatory and tax cases and individual plaintiffs in tort cases. Conservative votes include those in which judges supported the positions taken by management (against unions), opposed those taken by the federal government in regulatory and tax cases, and supported corporate defendants in tort and insurance cases filed by individuals.

I use the ideological direction of the circuit court's decision to code the ideological direction of the lower court decision. For example, if the circuit court issued a conservative decision and reversed the lower court decision, I code the lower court decision as *liberal*. If the circuit court issued a conservative decision and upheld the lower court decision, I coded the

lower court decision as *conservative.* If the circuit court issued a liberal decision and reversed the lower court decision, I coded the lower court decision as *conservative.* If the circuit court issued a liberal decision and upheld the lower court decision, I code the lower court decision as *liberal.* Conservative lower court case outcomes are coded as 1 and liberal lower court case outcomes are coded as -1.

Next, I measure the policy preferences of the circuit court panel. I capture the policy preferences of the panel judges by using their Judicial Common Space (JCS) Scores (Epstein et. al 2007). Judicial Common Space Scores are widely used in the judicial politics literature to measure circuit court preferences (Boyd et al. 2010). I then average the JCS scores of the individual judges on the panel to create an ideology measure for the entire panel. I multiply the lower court case outcome variable with the ideology of the circuit court panel. For the *Ideological Congruence* variable, positive scores indicate that the circuit court panel ideologically agrees with the lower court's decision. Negative values indicate that circuit court ideologically disagrees with the lower court ruling. The benefit of this approach is that it allows us to capture the intensity of the ideological agreement between the Court and the circuit court's decision as this score will vary by decision. As Lindquist and Solberg (2007, 78) explain, "Extreme liberals may be expected to react more vociferously to a conservative statute than a moderate liberal or moderate conservative." Therefore, the more ideological congruity between the circuit panel's decision and the Supreme Court median, the less likely a litigant is petition for cert.

A long line of research has established that a litigant's resource capabilities has an effect on his legal success (Black and Boyd 2010; Galanter 1974; McCormick 1993; McGuire 1995; Songer and Sheehan 1992; Songer et al. 1999; Wheeler et al. 1987). To account for litigant

resources, I include a number of dichotomous indicator variables that capture the identity of the appellant and the respondent. Following Collins and Martinek (2010), I use the following categories: prisoner (*Appellant Prisoner, Respondent Prisoner*), minority (*Appellant Minority*),[98] private association (*Appellant Private Organization, Respondent Private Organization),* small business (*Appellant Small Business, Respondent Small Business*), big business (*Appellant Big Business, Respondent Big Business*), local government (*Appellant Local Government, Respondent Local Government*), state government (*Appellant State Government, Respondent State Government*), U.S. Government (*Appellant U.S. Government, Respondent U.S. Government*).[99] The reference category for the variables corresponding to the identity of the appellants is natural person appellant and the reference category for the variables corresponding to the identity of the respondents is natural person respondent.

Since I am explaining appellant success, I include one additional variable that accounts for the Courts of Appeals decisions regarding criminal defendants. The circuit courts' mandatory dockets are particularly important for criminal cases. The "right to review" incentivizes criminal defendants to appeal their cases regardless of their merits or frivolousness of their claim. Therefore, a large percentage of the circuit court docket is comprised of criminal procedure cases. Often times, these cases lack merit. This is one of the reasons why circuit courts more often than not vote to affirm lower court criminal cases (Howard 1981; Songer et al. 1999). The variable *Appellant Criminal Defendant* is a dichotomous variable indicating whether the

[98] There is only one case in which a minority was the respondent. Because this case perfectly predicts the outcome, it was dropped from the model. See also Appendix B.

[99] Litigants were classified based on the first party listed. Information about the litigants came from their description in the majority opinion. "Minorities" typically included individuals challenging the government over immigration or citizenship. Following Black and Boyd (2010), "big business" only includes the following: railroads, bank, manufacturing, insurance company, airline, oil company.

appellant in the case was a criminal defendant. This variable is coded one for criminal defendants and zero otherwise.[100]

Table 3.4 Summary Statistics

Variable	Mean	Std. Dev.	Min.	Max
Appellant Win	0.30	0.46	0	1
Appellant Amicus Briefs	0.07	0.38	0	6
Respondent Amicus Brief	0.05	0.37	0	10
Appellant Institutional Amici	0.01	0.09	0	1
Appellant Government Amici	0.01	0.10	0	1
Appellant Other Amici	0.03	0.17	0	1
Appellant Multi. Power Amici	0.00	0.06	0	1
Respondent Institutional Amici	0.01	0.09	0	1
Respondent Government Amici	0.01	0.09	0	1
Respondent Other Amici	0.02	0.13	0	1
Respondent Multi. Power Amici	0.00	0.04	0	1
Appellant Prisoner	0.08	0.28	0	1
Appellant Minority	0.06	0.25	0	1
Appellant Natural Person	0.52	0.50	0	1
Appellant Private Organization	0.03	0.19	0	1
Appellant Small Business	0.13	0.34	0	1
Appellant Big Business	0.04	0.19	0	1
Appellant Local Government	0.03	0.16	0	1
Appellant State Government	0.03	0.17	0	1
Appellant U.S. Government	0.04	0.19	0	1
Respondent Prisoner	0.01	0.12	0	1
Respondent Minority	0.00	0.01	0	1
Respondent Natural Person	0.11	0.31	0	1
Respondent Private Organization	0.01	0.13	0	1
Respondent Small Business	0.14	0.35	0	1
Respondent Big Business	0.07	0.26	0	1
Respondent Local Government	0.06	0.24	0	1
Respondent State Government	0.10	0.30	0	1
Respondent U.S. Government	0.46	0.50	0	1
Appellant Criminal Defendant	0.26	0.43	0	1
Ideological Congruence	0.03	0.19	0.61	0.522

3.4 Results and Discussion

[100] I identify whether the case raised a criminal issue by reading the Lexis opinions of all the cases in the data set. If the case raise a criminal issue and a natural person was the appellant, the case was coded as *Appellant Criminal Defendant.*

I begin by reporting summary statistics in Table 3.4 for both the dependent and independent variables. There are several important takeaways from this table. First, interest groups rarely file amicus briefs in circuit court cases. Eight percent of the cases in the *Phase III Courts of Appeals Database* had amicus participation.[101] While the number is significantly lower than Supreme Court amicus participation, it represents roughly the same level of amicus participation that existed from 1960 through 1996 (Collins 2008; Martinek 2006). Second, and relatedly, institutional and government amici rarely participate is circuit court cases. Moreover, institutional and government amici, on average, provide the same amount of amicus support to both the respondent and the appellant.

Finally, interest groups submit, on average, the same number amicus briefs in support of appellants and respondents. A *t-test* for the difference in means based on the number of amicus briefs submitted in support of the appellant and the respondent is also not statistically significant ($t = 1.82$, $p = 0.07$).[102] This is interesting because if interest groups decided to participate more frequently in cases that they expected to win, we would expect the vast majority of amicus briefs and the quality of the amicus briefs to be filed on behalf of the respondent. This is because a circuit court panel very rarely reverses a district court decision. Hettinger et al (2007) find that as of September 2003, "the circuit reversed 9.1 percent of all cases heard on the merits, with a reversal rates per circuit ranging from a low of 1.1 percent in the Second Circuit to a high of 14.9 percent in the D.C. Circuit" (90). This means that the respondent enters the circuit case with a greater chance of success than the appellant. Therefore, the descriptive statistics indicate that

[101] There are 2,880 cases in the data set of which 231 had amicus participation. This number includes court appointed amicus curiae. Because Chapter 1 examined a group's decision to participate as amicus curiae voluntarily, court appointed amicus curiae were excluded from the analysis. Since this chapter examines the influence of amicus briefs on decision-making, it is important to capture the affect that court appointed amicus briefs have on case outcomes.

[102] The null hypothesis for the *t-test* is that the difference between the two groups is equal to zero. The *t-test* tests whether the difference between the two groups is not equal to zero. Therefore, I report the two-sided p-value.

groups are not strategically participating as amicus curiae in cases they are expecting to win. Rather, groups participate in equal numbers in support of the respondent and the appellant.

The results of the logistic regression model for appellant success are located in Table 3.5. The first two columns (Info. Model 1 and Info. Model 2) test the information hypothesis. The third column (Power Model) test the power hypothesis. All three columns contain the same control variables, but differ on the key independent variable(s) of interest. Information Model 1 examines appellant success based on the total number of amicus briefs in support of the appellant and the respondent. Information Model 2 examines appellant success based on the relative advantage that the appellant has over the respondent in terms of the number of amicus briefs. Power Model examines appellant success based on litigant support from different types of powerful amici. I will first discuss the results from Information Model 1and Information Model 2, then I will discuss the results from the Power Model.

Information Model 1 correctly predicts about 71 percent of the outcomes, for a percent reduction in error of 6.5 percent. More notably, Model 1 shows strong support for the information hypothesis. I find that the number of amicus briefs in support of the both the appellant and the respondent matters to appellant success. Increasing the number of amicus briefs in support of the respondent decreases the likelihood of the appellant winning on appeal, for a given circuit, on average, and all else equal. Similarly, increasing the number of amicus briefs in support of the appellant increases the likelihood of the appellant winning of appeal, for a given circuit, on average, and all else equal.

To better understand this effect, I calculate the predicted probability of appellant success, holding all other variables at their mean value and the circuit constant, across a range of amicus brief support for the respondent as seen in Figure 3.1. I also calculate the predicted probability of

appellant success, for a given circuit, on average, and holding all other variables at their mean value, across a range of amicus brief support for the appellant in Figure 3.2.

Table 3.5 Logistic Regression Likelihood of Appellant Wining on Appeal

	Info. Model 1	Info. Model 2	Power Model
Independent Variables	Est. (SE)	Est. (SE)	Est. (SE)
Appellant Amicus Briefs	0.274 (0.135) *		
Respondent Amicus Briefs	- 0.770 (0.207) *		
Amicus Brief Advantage		0.425 (0.117) *	
Appellant Institutional Amici			0.164 (0.479)
Appellant Government Entity			0.783 (0.447)
Appellant Other Amici			0.424 (0.287)
Appellant Multi. Power Amici			0.450 (0.760)
Respondent Institutional Amici			- 1.203 (0.525) *
Respondent Government Amici			- 1.554 (0.657) *
Respondent Other Amici			- 1.381 (0.445) *
Respondent Multi. Power Amici			- 1.219 (1.168)
Appellant Prisoner	0.391 (0.227)	0.409 (0.227)	0.379 (0.228)
Appellant Minority	0.211 (0.225)	0.235 (0.225)	0.214 (0.225)
Appellant Private Organization	0.343 (0.259)	0.295 (0.257)	0.343 (0.259)
Appellant Small Business	0.095 (0.155)	0.086 (0.154)	0.113 (0.156)
Appellant Big Business	0.113 (0.239)	0.102 (0.240)	0.134 (0.240)
Appellant Local Government	0.161 (0.282)	0.135 (0.281)	0.167 (0.284)
Appellant State Government	0.725 (0.311) *	0.624 (0.307) *	0.773 (0.316) *
Appellant U.S. Government	1.129 (0.260) *	1.066 (0.256) *	1.085 (0.258) *
Respondent Prisoner	0.343 (0.430)	0.426 (0.424)	0.317 (0.431)
Respondent Private Organization	- 0.397 (0.356)	- 0.430 (0.353)	- 0.442 (0.355)
Respondent Small Business	- 0.302 (0.189)	- 0.299 (0.188)	- 0.320 (0.190)
Respondent Big Business	- 0.199 (0.219)	- 0.186 (0.219)	- 0.214 (0.220)
Respondent Local Government	- 0.639 (0.258) *	- 0.659 (0.258) *	- 0.634 (0.259) *
Respondent State Government	- 1.039 (0.263) *	- 1.047 (0.263) *	- 1.032 (0.265) *
Respondent U.S. Government	- 0.595 (0.205) *	- 0.602 (0.204) *	- 0.611 (0.206) *
Appellant Criminal Defendant	- 0.222 (0.182)	0.199 (0.181)	- 0.216 (0.182)
Ideological Congruence	- 1.076 (0.238) *	- 1.066 (0.238) *	- 1.078 (0.239) ***
Constant	- 0.437 (0.198) *	- 0.459 (0.196) *	- 0.425 (0.198) *
Circuit Intercept (Sd. Dev.)	0.304	0.298	0.301
Proportional Reduction in Error	6.50	6.23	7.69
Percent Correctly Predicted	71.62	71.55	71.99
Number of Obs.	2485	2485	2485

Note 1: dependent variable = 1 if the appellant won on appeal. I estimate a multilevel, random effects negative binomial model with intercepts varying around each circuit. The reference category for appellant and respondent variables is natural person appellant and natural person respondent. The reference category for the different types of appellant and respondent amici are cases with no amicus briefs.
* $p<0.05$

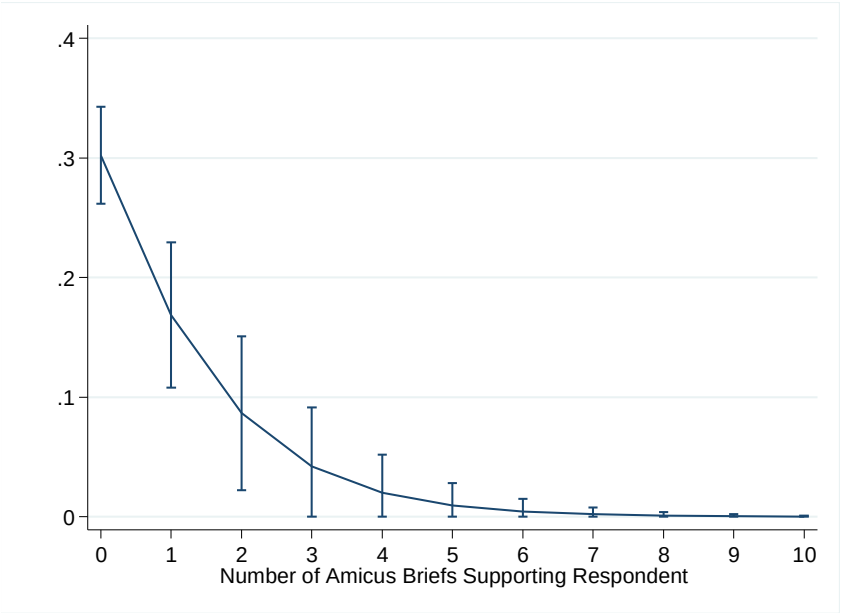

Figure 3.1 Predicted Probability of Appellant Success based on Respondent Amicus Brief Support, 95% Confidence Intervals

The graphs in both Figures 3.1 and 3.2 reveal that the influence of the number of amicus briefs on appellant success is substantively meaningful.[103] For Figure 3.1, increasing the number of amicus briefs in support of the respondent from zero to one decreases the predicted probability of an appellant win by roughly 15 percent (from 30 to 16 percent), for a given circuit, on average, and all else equal. Increasing the number of amicus briefs in support of the respondent from one to two decreases the predicted probability of appellant success by another 8 percent (from 16 to 8 percent), for a given circuit, on average, and all else equal. For Figure 3.2, when there are more than four amicus briefs in support of the appellant, the predicted probability of appellant success is greater than 50 percent, for a given circuit, on average and all else equal. Therefore, amicus support for the appellant has a substantial effect on their likelihood of success.

[103] The predicted probabilities graphed in Figure 3.1 and Figure 3.2 are based on the results from Information Model 1.

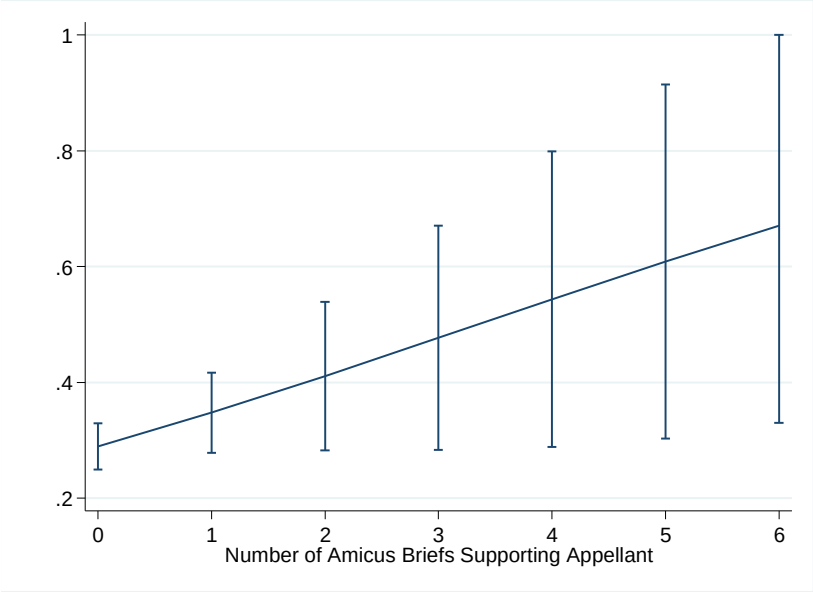

Figure 3.2 Predicted Probability of Appellant Success based on Appellant Amicus Brief Support, 95% Confidence Intervals

Additionally, the effect of increasing the number of amicus briefs on appellant success is different for each litigant. In particular, increasing the number of amicus briefs in support of the respondent has decreasing marginal returns on appellant success. For example, increasing the number of amicus briefs in support of the respondent from two to three decreases the predicted probability of appellant success by four percent, for a given circuit, on average, and all else equal. Increasing the number of amicus briefs in support of the respondent from three to four decreases the predicted probability of appellant success by one percent, for a given circuit, on average, and all else equal. Conversely, looking at Figure 3.2, the effect appears to be linear as the changes in predicted probability of appellant success steadily increase by about six to seven percent with each additional amicus brief. Increasing the number of amicus briefs from zero to one in support of the appellant increases the predicted probability of appellant success from 29 to 35 percent, for a given circuit, on average, and all else equal.

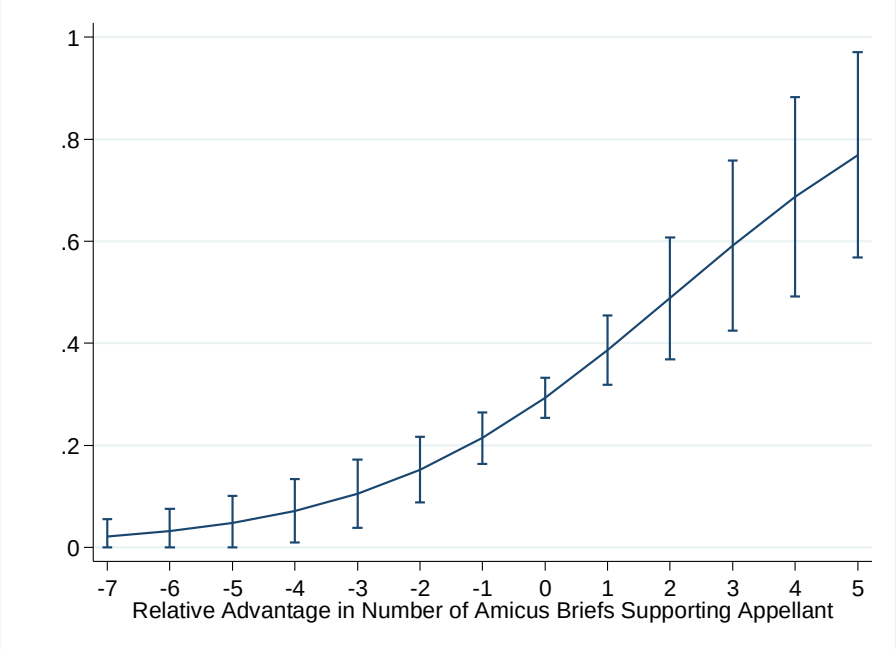

Figure 3.3 Predicted Probability of Appellant Success based on Relative Advantage in Amicus Brief Support for the Appellant, 95% Confidence Intervals

To better understand the relationship between amicus briefs and litigant success, I examine the relative advantage in amicus support for each litigant in Information Model 2. The variable *Amicus Brief Advantage* is positive and statistically significant. Therefore, when the appellant has a relative advantage in the number of amicus briefs submitted in the case, the appellant is more likely to win, for a given circuit, on average, and all else equal. In Figure 3.3, I graph the predicted probabilities of appellant success in order to better illustrate the relationship between the number of amicus briefs and appellant success.[104] The graph in Figure 3.3 is revealing in several respects. First, a significant disparity in the number of amicus briefs for either the appellant or respondent is very meaningful. Holding all other variables in the model at their mean value and the circuit constant, when neither party has a relative advantage in the number of amicus briefs, the baseline probability of appellant success is roughly 30 percent.

[104] The predicted probabilities graphed in Figure 3.3 are based on the results from the Information Model 2.

When the relative number of amicus briefs in support of the appellant increases from a four amicus brief disadvantage to a two amicus brief advantage, the predicted probability of appellant success increases from around seven percent to 48 percent.

Second, the appellant benefits more from increased amicus support than the respondent. A several amicus brief advantage for the appellant relative to the respondent increases appellant success to around 50 percent, for a given circuit, on average, and all else equal. While still a coin flip, it is 20 percent higher than when neither side has amicus support. Furthermore, the impact of the relative advantage is more meaningful for appellants compared to respondents. When the respondent, for example, has a three amicus brief advantage over the appellant, the probability of appellant success is around 11 percent, for a given circuit, on average, and all else equal. Increasing the respondent's amicus brief advantage over the appellant to five, decreases the probability of appellant success by six percent, for a given circuit, on average, and all else equal. However, when the appellant has a three amicus brief advantage over the respondent that predicted probability of appellant success is around 57 percent, for a given circuit, on average, and all else equal. Increasing the appellant's amicus brief advantage over the respondent to five, increases the appellant's predicted probability of success to roughly 75 percent, for a given circuit, on average, and all else equal. The impact of going from three to five amicus briefs in support of the appellant relative to the respondent is three times greater than the impact of going from three to five amicus briefs in support of the respondent relative to the appellant.

I now discuss the results from the Power Model. The results of the Power Model test the Power Hypothesis, which states that litigants benefit from the types of groups providing the information to the judges. The results of the Power Model indicate that respondents benefit from the support of prestigious amici, but not appellants. I provide the predicted probabilities for the

amici variables along with the statistically significant control variables in Table 3.6. Turning to the amici variables, the variable *Respondent Institutional Amici* is negative and significant. This means that the presence of an institutional amici, such as ACLU, NAACP, or a national trade association, on an amicus brief for the respondent, compared to no amicus support for the respondent, decreases the likelihood of the appellant winning, for a given circuit, on average, and all else equal. Specifically, when an institutional amici is on the amicus brief, the appellant's predicted probability of success decreases by 18 percent compared to no amicus support, for a given circuit, on average, and all else equal. Likewise, the results indicate that the presence of the state / federal government on an amicus brief in support of the respondent, compared to no amicus support, decreases appellant success, for a given circuit, on average, and all else equal. Specifically, when a state or federal government is on the amicus brief, the appellant's predicted probability of success is nine percent compared to when the respondent lacks amicus support, for a given circuit, on average, and all else equal. Finally, when an interest group that is neither an institutional amici or a state / federal government is on an amicus brief, the appellant's predicted probability of success is 10 percent compared to when the respondent lacks amicus support, for a given circuit, on average, and all else equal. Only the *Respondent Multiple Powerful Amici* variable is not significant. Therefore, it appears that there is no benefit to the respondent in having several different institutionalized amici in their corner.

In order to better understand the relationship between group prestige and litigant success, I tracked the success rate of one of the most powerful non-government amicus, the ACLU.[105] The ACLU was one of the most active non-government interest groups in the data set. During the time period of the study, the ACLU participated in 19 different cases, or less than one

[105] This includes the parent organization and affiliated state organizations, such as the ACLU of Pennsylvania.

percent. Of those 19 cases, the ACLU supported the appellant in eleven cases, the respondent in seven cases, and their position could not be identified in one case. The ACLU did not have a good success rate as amicus curiae. The litigant supported by the ACLU won only five cases, for a success rate of 33 percent.[106] This finding pales in comparison to the power and influence that the ACLU wields over Supreme Court justices (Box-Steffensmeier et al. 2013). I also compare the appellant's success rate with ACLU support compared to their overall winning percentage. Overall, the appellant had a success rate of 30 percent. Cases in which the appellant had the support of at least one amicus brief, the appellant's success rate was 29 percent. The ACLU's success rate supporting the appellant is 18 percent.

Although this is just one example, it has two interesting takeaways. First, institutionalized amici rarely participate in the Courts of Appeals. One of the largest, well-resourced, and well-known interest groups, the ACLU, participated in less than one percent of all cases in data set. Given this, it is difficult to properly assess the influence of prestigious amici on appellant success. Second, the ACLUs overall lack of success might be explained by the institutional design of circuit courts, which makes it difficult for powerful amici to develop repeat player status. Repeated interaction between the same group and judges creates a level of trust and familiarity. The judge learns to trust the information from the interest group and the interest group learns how to craft legal arguments designed to persuade certain judges. Developing trust and familiarity that comes from repeated interaction is difficult in the Courts of Appeals. This is because there is a rotating panel of over 100 circuit court judges compared to a fixed panel of nine Supreme Court justices. Moreover, there are twelve possible circuits in which to file. Therefore, a group that participates frequently as amicus curiae cannot be guaranteed an

[106] Of those 19 cases, three cases had a mixed outcome. This means that neither the appellant nor the respondent was the clear winner.

audience before the same panel of circuit judges in every case. Given the infrequency with which a group participates as amicus curiae and number of judges in the circuit courts, it might be difficult for a group to develop a reputation as credible legal actors.

Table 3.6 Predicted Probability of Appellant Success, Dichotomous Variables

Variable	Info. Model 1	Info. Model 2	Power Model
Respondent Institutional Amici			30 to 12%
Respondent Government Amici			30 to 09%
Respondent Other Amici			30 to 10%
Appellant State Government	26 to 42%	26 to 40%	26 to 43%
Appellant U.S. Government	26 to 52%	26 to 51%	26 to 50%
Respondent Local Government	40 to 26%	40 to 26%	40 to 26%
Respondent State Government	40 to 19%	40 to 19%	40 to 19%
Respondent U.S. Government	40 to 27%	40 to 27%	40 to 27%
Ideological Congruence	32 to 26%	32 to 26%	32 to 27%

Note: for continuous variables, the predicted probabilities reflect the change in the predicted probability of success moving from the 25th to the 75th percentile. For dichotomous litigant variables, the predicted probability of success is compared to the baseline category of a natural person appellant and a natural person respondent. The reference category for the different types of appellant and respondent amici are cases with no amicus briefs. All predictions are based on holding all other variables in the model at their mean value.

I now turn to the control variables. Across all three models, I find evidence that litigant resources matter to appellant success. This finding further supports that idea that "haves" are more likely to prevail over "have nots" (Galanter 1974). Across all three models, appellants and respondents with more resources are more likely to win on appeal. When the federal government is the appellant, compared to an individual appellant, the federal government is more likely to win on appeal, for a given circuit, on average, and all else equal. Specifically, when the federal government is the appellant, the appellant's predicted probability of success increases by roughly 25 percent compared to when an individual is the appellant, for a given circuit, on average, and all else equal. Similarly, when a state government is the appellant, the appellants predicted probability of success on appeal is around 40 percent compared to when an individual is the appellant, for a given circuit, on average, and all else equal. With regard to respondents, the results indicate that local governments, state governments, and the federal government have

more success in circuit courts compared to individual respondents, for a given circuit, on average, and all else equal. Specifically, the predicted probability of success for respondents, compared to when a natural person is the respondent, is 26 percent for local governments, 19 percent for state governments, and 27 percent for the federal government, for a given circuit, on average, and all else equal.

I also find evidence that ideological voting is alive and well in the U.S. Courts of Appeals (Cross and Tiller 1998; Hettinger et al. 2007; Klein 2002). The appellant's probability of success varies significantly depending whether the circuit panel is in strong ideological agreement or disagreement with the lower court ruling. For example, when the reviewing panel has a strong ideological disagreement with the lower court decision, the appellants predicted probability of success is close to 50 percent, for a given circuit, on average, and all else equal. However, when the circuit court panel strongly agrees with the ideological decision of the lower court (i.e. an extremely conservative panel reviewing a conservative lower court decision), the predicted probability of appellant success is around 20 percent. More realistically, going from the 25th (a panel that is in slight ideological disagreement with the lower court's decision) to the 75th (a panel that is fairly aligned with the lower court's decision) percentile lowers the appellant's predicted probability of success from roughly 32 to 27 percent, which corresponds to a change in the predicted probability of appellant success of roughly 5 percent, for a given circuit, on average, and all else equal.

3.5 Concluding Remarks

The influence of amici curiae has been thoroughly examined in the Supreme Court (Box-Steffensmeier et al. 2013; Collins 2004, 2008; Kearney and Merrill 2000; McGuire 1990). However, the influence of amicus on the Courts of Appeals is less well known (Collins and

Martinek 2010, 2015). This is especially true when amici curiae activity is examined through a lens of interest group power. Past research studies the influence of amicus briefs, but little research has examined whether the legal success of litigants varies based on the type of group support they receive.

In this chapter, I tested two different hypotheses regarding the influence of amicus curiae briefs on litigant success. The Information Hypothesis suggests amicus briefs are valuable because of the amount of information provided to the judge. Therefore, more amicus briefs produce more information about the case. The Power Hypothesis suggests that amicus briefs are influential due to the nature of groups providing the information. Therefore, the amount of information matters less than the legal credibility of the group providing the information. As a result, judges give more weight to the legal arguments articulated by prestigious amici. I find limited evidence for the power hypothesis and broad support for the information hypothesis.

The information theory of amicus influence works in two ways. The first way is the additional information provided by the judge. Judges, for the most part, are legal generalists whereas interest groups are subject-matter experts over a particular legal or policy domain (Baum 2009, 2011; Breyer 1998). Thus, groups can use their expertise to help judges make a more ideologically or legally informed decision (Klein 2002). Secondly, judges could be using the number of amicus briefs as a credible signal of the public's support for a particular outcome. Therefore, judges are not being influenced by the information contained in the brief. Rather, public opinion about the case is influencing the decision of judges (Mishler and Sheehan 1993).

While both appellants and respondents benefit from increased amicus brief support, appellants appear to benefit more. This based on two findings. First, respondents, unlike appellants, receive decreasing marginal returns for each successive amicus brief filed on their

behalf. While having a significant number of amicus briefs in the respondent's corner helps, the effect of each brief on the probability of their success decreases. This suggests that as more amicus briefs are filed, briefs are likely to re-iterate arguments already made by other interest groups, thus decreasing the informational value of each successive brief. Judges notice when groups make repeated arguments, which decreases how much time a judge spends reading the amicus brief.

Interestingly, the effect of increasing the number of amicus briefs in support of the appellant does not show similar decreasing marginal returns. The results of Information Model 1 and Model 2 along with Figure 3.2 and 3.3 indicate that increasing the number of amicus briefs in support of the appellant creates a level playing for the appellant. More often than not, appellants lose on appeal. There are a variety of reasons this occurs, such as circuit norms, the court's lack of docket control, and workload considerations (Epstein et al. 2013; Hettinger et al. 2007). Therefore, judges require extra convincing in order to reverse a lower court decision, which amicus briefs appear to provide.

The results of the Power Model reinforce this conclusion. Appellants did not receive any benefit from the support of institutionally powerful amici. This suggests that appellants benefit from the additional information provided by the amicus briefs, rather than the groups providing the information. Circuit judges have to be sufficiently convinced via information as to why the appellant should win. Simply having powerful amici in the appellant's corner is not convincing enough for the judge. Therefore, when appellants develop their legal strategy for the Courts of Appeals, they should focus on recruiting groups to submit amicus briefs, regardless of the group's power or resource capabilities.

This chapter also makes a methodological contribution to the study of amicus influence in the Courts of Appeals. I devise a research strategy to test empirically for interest group power as amicus curiae. I apply a variant of party capability theory to interest groups and evaluate the quality of amicus briefs based on the resource capabilities of the group supplying the information. I use the results of Lynch's (2004) law clerk interviews to develop a measure of amicus power based on the legal prestige of individual groups. Admittedly, this is an imperfect measure of quality. However, it is the best possible research strategy given the infrequency of amicus activity in the Courts of Appeals compared to the Supreme Court (Collins 2008; Matinek 2006). As the example of the ACLU illustrates, even powerful, institutional interest groups rarely participate as amicus curiae in the Courts of Appeals. This prevents more comprehensive measures of interest group power, such as network analysis, from being used.

Therefore, I should caution the reader regarding the utility of the power hypothesis as operationalized in this study. I have grouped a fair number trade associations and public advocacy organizations together and have grouped corporations together with individuals. Therefore, it is possible I have underestimated the influence of different types of amici on judicial decision-making. Yet, this study provides a good first step in beginning to untangle the link between interest group power and judicial behavior.

CHAPTER 4

MOVING BEYOND THE MERITS: AMICUS CURIAE ACTIVITY AND SUPREME COURT AGENDA-SETTING

Chapter 2 of the dissertation examined interest group activity in the circuit courts at the pre-merits stage. Specifically, it examined when an interest group would participate as amicus curiae. Chapter 3 examined interest group influence at the merits stage. Specifically, it found that the number of amicus briefs is more important to litigant success than the types of groups writing the amicus brief. This chapter examines interest group influence after the decision on the merits. Specifically, does interest group participation in a circuit court case via amicus briefs influence a litigant's decision to petition the Supreme Court for a writ of certiorari?

An amicus curiae is an individual or group that is not a party to the litigation, but has a strong interest in the outcome of the case. The number one reason a group participates as amicus curiae is to influence the decision on the merits. The primary purpose of an amicus brief is to provide additional information to the court that may be omitted from litigant briefs with the hopes of achieving a desired *policy* outcome (Collins 2008; Kearney and Merrill 2000; Krislov 1963). However, groups receive benefits from amicus participation that extends beyond the decision on the merits, such as organizational maintenance, litigation experience, and influencing the development of the law (Collins et al. 2015; Hettinger et al. 2003, 2007; Galanter 1974; McGuire 1995; Solberg and Waltenberg 2006; Walker 1983).

Amicus participation allows groups to perform organizational maintenance by publicly taking stands on issues for the benefit of their members. Participating frequently as amicus curiae

provides groups with litigation experience that they can use in subsequent cases. Interest groups, by becoming more familiar with the litigation environment, can increase their influence with judges. Finally, groups participate as amicus curiae in order to influence the development of the law. Groups are forward looking actors that consider future litigation when considering to the decision to participate as amicus curiae.

In this chapter, I empirically test for the existence of post-merits amicus influence. Specifically, I test whether the presence of amicus activity in a circuit court case influences the likelihood that the decision is appealed to the Supreme Court. I argue that amicus participation in the Courts of Appeals increases the likelihood that the litigant files a writ of cert at the Supreme Court. Although a group may lose in the circuit court, the presence of amicus curiae incentivizes a litigant to take the legal battle all the way to the Supreme Court. This is because amicus support sends a signal to the litigant about the broad legal and policy importance of the case, which in turn, increases the likelihood that the Supreme Court grants cert (Caldeira and Wright 1988). In short, interest groups can win even by losing in the Courts of Appeals.

I test my theory of post-merits amicus influence using an original data set of randomly sampled circuit court cases covering all twelve geographic circuits from 2003 through 2010. This data set allows me to examine the behavior of a variety of litigants across a number of different legal issues, whereas past research on this topic has been limited to specific case facts or litigants (Max et a. 2013; Songer et al. 1995; Zorn 2002). Additionally, I conducted interviews with representatives from several different interest groups in order to gain insight into the strategy behind their use of amicus curiae briefs. My findings support my theoretical expectations. I find that interest group activity in the circuit court increases the likelihood that the case is appealed to the Supreme Court.

4.1 Why Petitioning for Cert Matters

In 1958, Associate Justice John Harlan II stated that "the factors making for certiorari must often appear elusive to the occasional practitioner in the Court" (Harlan 1958, 549). Thankfully, several decades later we know a great deal more about how the Supreme Court sets its agenda. We know, for example, that Supreme Court justices select cases in order to maximize their policy goals on the Court (Black and Owens 2009; Boucher and Segal 1995; Caldeira et al. 1999; Epstein and Knight 1997; Krol and Brenner 1990; Songer 1979; Ulmer 1972). We also know that a justice's decision to grant a writ of certiorari is influenced by outside actors, such as interest groups, the President, and Congress (Black and Boyd 2010; Black and Owens 2011; Caldeira and Wright 1988; Epstein et al. 2002; Thomson and Wachtell 2008). Our understanding of the cert process has also been advanced by book length treatments of the subject and interviews with Supreme Court justices (Perry 2009; Provine 1980; Rehnquist 2007).

The body of research that has emerged since Harlan spoke to the Bar of the City of New York is important because it provides valuable insight into the Court's decision-making process prior to the merits stage. The decision on the merits establishes the legal principles and precedents that lower and future courts will use when hearing cases. As such, it has received considerable attention from scholars (Bailey and Maltzman 2011; Epstein and Knight 1997; Hansford and Spriggs 2006; Segal and Spaeth 2002). However, by omitting the agenda-setting stage scholars potentially undervalue the role that certain case characteristics have on the merits decision. For example, ideological voting is prevalent on the Supreme Court (Segal and Spaeth 2002). This might be explained partially by the fact that justices strategically select cases for cert in which they have ideological disagreements (Cameron et al. 2000; Max et al. 2013; Songer 1979). Therefore, an understanding of a litigant's motives for petitioning for cert is important

because it influences the types of legal principles and doctrines announced by the Court. The Court is a national policy-making institution, but the types of policy it makes depends on the types of cases petitioned for review (Casper 1976; Dahl 2017). Therefore, the Court's role as legal arbiter and policy maker is contingent on a litigant's decision to seek cert.

4.2 Brief Overview of Rules and Norms of the Cert Petition Process

Supreme Court Rules 10 through 16 govern the cert petition process. A litigant has ninety days after entry of the lower court judgement to file a petition for a writ of certiorari with the Clerk of the Supreme Court. However, a Supreme Court justice can extend the time to file a cert petition for good cause.[107] Respondents have the option to submit a reply brief opposing cert, but it is not required.[108] A litigant can file a paid cert petition or an "in forma pauperis" petition. Paid cert petitions have to pay the relevant Supreme Court fees. For example, there is a $300 docketing fee.[109] Applicants that lack the financial means to pay these fees can proceed in forma pauperis with the litigant demonstrating to the Court that they lack the funds to pursue the cost of a normal lawsuit.

With roughly 8,000 petitions for certiorari filed every year, the Court has established a process by which it screens cert applications and assesses their worthiness (Black and Boyd 2012, 2013; Epstein et al. 2015; Smith 2001). The case selection process begins with all cert petitions placed in a "cert pool" and then the petitions are randomly assigned to a pool law clerk. The pool law clerk is responsible for summarizing the contents of the cert petition (known as a pool memo) and recommends a course of action for the cert petition, such as accept or reject.

[107] An application for a cert petition extension must be made at least ten days before the cert petition is due.
[108] A brief in opposition to cert is only required for capital cases.
[109] There is a two hundred dollar motion for rehearing fee and a one dollar charge per page for reproducing paper.

The pool memos are distributed to the chambers of the justices participating in the cert pool.[110] The Chief Justice then compiles and circulates a "discuss list," which contains a list of cases deemed worthy for the Court's attention. Cases can be added to the discuss list by other Justices, but cases cannot be removed. The justices then meet in conference to review the "discuss list" and determine which cases the Court should accept. Four justices must agree to hear a case (known as the "rule of four") in order for it to be placed on the Court's docket.

When the Supreme Court issues a decision on the case's merits, the Supreme Court typically publishes an opinion providing a legal justification for its decision. The opinion's purpose is to provide lower courts, appellate practitioners, and society with legal reasoning and standards. There is no equivalent document for the cert granting process. The Supreme Court rarely explains its legal reasoning for granting or denying cert. The Rules of the Supreme Court is the closest any document comes to explaining the Court's justification for granting cert. Rule 10 states that legal conflict among circuit courts or state courts of last resort is an important, but neither necessary nor sufficient, consideration when reviewing petitions for cert. Even the justices themselves disagree over the qualities that make a case certworthy. Chief Justice Rehnquist (2007, 238) looked for "cases involving unsettled questions of federal constitutional law or statutory law of general interest." Associate Justice John Harlan (1958, 549) stated that "the question whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules." The lack of clarity regarding the cert process leads to an influx of cert petitions, of which only a small percentage of petitioned cases actually warrant the Court's attention (Perry 2009). Justice Harlan (1958, 547) reflected this view writing, "Of the total

[110] The "cert pool" was established in the early 1970s at the recommendation of Justice Powell. At the time of its adoption, five justices participated in the cert pool. Overtime, the number of justices participating in the cert pool has generally increased (Palmer 2001; Revesz and Karlan 1987; Starr 2005). Currently, Justices Alito and Gorsuch do not participate in the cert pool (Liptak 2017).

petitions acted on, I think it must be said that more than one-half were so untenable that they never should have been filed."

Therefore, the Court provides little guidance to litigants and lawyers about when to petition for a writ of certiorari and which types of cases are likely to find a spot on the docket. Litigants, then, have to rely on other signals to determine the likelihood that their case will be granted cert (Baird 2004). I argue that amicus activity in the circuit court case is an important signal to both litigants and justices about the border legal and political significance of the case. Cases with interest group support are likely to capture the attention of justices, therefore litigants should consider these types of cases as prime suspects for Supreme Court review. In the following section, I explain the different types of goals that interest groups have beyond winning the case on the merits and how these goals can influence litigant behavior.

4.3 Interest Group Litigation Goals

Interest groups exist to lobby government institutions for policy change. An amicus brief is the primary means by which groups achieve policy change in the courts (Collins 2008; Ivers and O'Connor 1987; O'Connor and Epstein 1981). Most research on the influence of amicus briefs focuses on their impact on litigant success (Collins 2004, 2008; Collins and Martinek 2010; Kearney and Merrill 2000). This is sensible for a couple reasons. First, case outcomes determine the division of goods in society. The actions of any governing institution creates winners and losers. Courts are no different in this regard as their decisions reverberate across the large political, social, and economic landscape. Second, amicus influence has important implications for democratic governance. Governing institutions are supposed to represent the interest of all its citizens. However, not all interest are equally represented in society. Interests represented by well-resourced groups can use their advantages to change policy at the expense of

lesser groups (Schattschneider 1960). Therefore, the ability of groups to use the courts to further their goals has implications for the types of groups participating as amicus curiae as well as the policy and legal interest represented before the court. However, groups receive benefits from amicus participation that extends beyond the decision on the merits. In the remainder of this section, I briefly explain the benefits that groups receive from amicus participation besides influencing the case on the merits. The three most important non-merit benefits are organizational maintenance, litigation experience, and future litigation.

Organizational maintenance is crucial for a group's ability to engage in policy advocacy. Group maintenance ensures the financial health of the organization. Lobbying is expensive and a well-resourced war chest is necessary to exert influence over governing institutions. Organizational resources, such as staff and financial support, are important because those resources determine "how much a group can accomplish" in the pursuit of their policy goals (Gais and Walker 1991, 105). Courts are an attractive venue to engage in organizational maintenance because cases often provide clearly defined alternative outcomes. This allows groups publicly to stake out sides in the policy conflict thereby sending a signal to their members that they are fighting on behalf of their interest. Sam Paredes, the Executive Director of Gun Owners of California, who I interviewed as part this project, stated, "Filing [an amicus brief] is part of a reason you [the organization] exist. That is what the group promised their members."[111] Luke Wake, Senior Staff Attorney with the National Federation of Independent Business Small Business Legal Center, who I interviewed, made a similar statement about the need for groups to look after their members' interest. Mr. Wake stated, "The national organization cares about growing its membership. The donor base is important. The group is mindful about caring out its

[111] Paredes, Sam. Executive Director Gun Owners of California. Personal Interview 31 August 2017.

pledge to its members. Good stewards of the people's money. Understands that the group has a mission and will do the work it promised its members it will do."[112] Groups can use amicus brief filings as an opportunity to fundraise, recruit new members, and maintain the health of the interest group.

Additionally, groups can use amicus briefs to gain litigation experience. Litigation experience increases legal success (McGuire 1995). Participating frequently in courts cases allows a group to develop better appellate litigation strategies, craft more well-reasoned legal arguments, and compose more legally persuasive briefs. It allows a group to develop "repeat player" status, which provides the group with a certain level of legal prestige in the eyes of the court. This in turn allows a group to make more credible legal arguments (Box-Steffensmeier et al. 2013; Galanter 1974; Kearney and Merrill 2000; Lynch 2004). Paredes indicated that groups achieve other goals besides merely winning on the merits when it files an amicus brief. Mr. Paredes stated,

> There is always a residual benefit to filing an amicus brief in the case. Filing an amicus brief gives them an opportunity to flush out the legal issues and their arguments. Even if they lose, they know another lawsuit will eventual be filled. Therefore, participating in prior cases allows them to refine their argument.[113]

Interest group power is valuable legal currency. Research finds that amici can wield out-sized influence with judges based on their institutional prestige. For example, McGuire (1994) finds that lawyers actively recruit prestigious interest groups to assist them with petitioning the Supreme Court for cert. Box-Steffensmeier et al. (2013) find that groups that participate more frequently as amicus curiae are more likely to receive the support of Supreme Court justices. Specifically, when a case is balanced in the number of amicus briefs for and against the

[112] Wake, Luke. Senior Staff Attorney. NFIB Small Business Legal Center. Personal Interview. 1 September 2017.
[113] Paredes, Sam. Executive Director Gun Owners of California. Personal Interview 31 August 2017.

petitioner, the litigant supported by more prestigious and powerful groups is more likely to prevail. Kearney and Merrill (2000) and Lynch (2004) find that "repeat advocates," such as the ACLU, NAACP and the AFL-CIO tend to enjoy more success than groups who often lack institutional prestige before the court.

Finally, groups value the ability to litigate on the issue in the future. Based on interviews with interest group representatives, future litigation consist of three issues. First, groups care about the development of the law and how it can be used in future litigation. Aaron Isherwood, the Phillip S. Berry Managing Attorney for the Sierra Club, stated that the "outcome of the case is not the only thing that matters" and that groups want to "win on the issues." The groups may lose the case on the merits, but amicus activity allows the group to shape the legal principles or standards announced by the court (Collins et al. 2015; Hettinger et al. 2007). Isherwood stated that submitting an amicus brief can help their group "prevent a bad interpretation of the law that could undermine future litigation or the group's policy goals. Or secure a good interpretation of the law that will help with future litigation."[114] Similarly, Luke Wake, a Senior Staff Attorney with the National Federation of Independent Business Small Business Legal Center, whom I interviewed, commented that groups submit amicus briefs with the goal of "Limiting the damage and preventing the court from going too far against the interest of the organization." Second, dissenting opinions are valuable to future litigation. Dissenting opinions indicate the lack of legal clarity on an issue. Groups can use the legal arguments raised in the dissenting opinion in subsequent litigation or to petition a higher judicial body to review their case. Wake stated:

> Validating the group's argument is important. As long the court does not reject the group's issue, it can be considered a win. Getting a concurrence or dissent is key for future litigation. Dissents are helpful time. The Supreme Court can always look at cases later. Dissents allow the group to fight another day.[115]

[114] Isherwood, Aaron, the Phillip S. Berry Managing Attorney Sierra Club Personal Interview 31 August 2017.
[115] Wake, Luke. Senior Staff Attorney. NFIB Small Business Legal Center. Personal Interview. 1 September 2017.

Third, groups are mindful about future Supreme Court litigation. Groups understand that no issue is truly ever settled until the Supreme Court gives its interpretation of the law. Sam Paredes stated that a group "Cannot chalk up a victory until it goes to the Supreme Court. Salient policy issues will always involve appeals by the losing side. The group has the intention of going all the way to the Supreme Court." Similarly Luke Wake stated, "Losing is not the end of the fight. The more the group talks about the issue, the more likely the Supreme Court will look at the issue. We might lose the immediate case, but long-term planning for the Supreme Court." Therefore, even if the group suffers a legal set-back in the Courts of Appeals, there is always the opportunity to have the case reviewed (and reversed) by the Supreme Court. However, amici cannot petition the Supreme Court for a writ of certiorari. This is a right reserved for the losing party in the Courts of Appeals. Therefore, getting their issue on the Supreme Court's docket means convincing a litigant to take the case to the Supreme Court.

4.4 The Decision to Seek Cert

The existence of post-merits influence can be determined by investigating the relationship between circuit court amicus participation and a litigant's decision to petition the case for cert before the Supreme Court. Litigants are strategic in their decision to petition the Supreme Court for cert. Baird (2004) argues that litigants use Supreme Court decisions as cues for which policy areas might be important to justices. Thus, litigants petition cases for cert based on the Court's policy priorities. Songer et al. (1995) and Zorn (2002) find that litigants typically petition winnable cases. This because a Supreme Court litigation is very expensive and litigants do not want to waste resources fighting a losing battle (Barnes 2011; Hill 2013; Posner 2014). Therefore, litigants strategically petition for cert based on presence of certain case characteristics

that Supreme Court justice will find attractive. Interest group support is one of the best cues for litigants to capture the attention of Supreme Court justices.

Amicus influence works in two ways. First, amicus briefs serve an information role for justices. Since amici tend to be subject-matter experts in the legal and policy areas raised in the case, amicus briefs supply the court with supplemental information that is not always included in litigant briefs (Collins 2008; Camparato 2003; Kearney and Merill 2000; Spriggs and Wahlbeck 1997). My interviews with interest group representatives underscore the informational value of amicus briefs. Sam Paredes, the Executive Director of Gun Owners of California stated, "We do not look to re-state the issues. We look to enhance and broaden."[116] Aaron Isherwood, the Phillip S. Berry Managing Attorney for the Sierra Club, stated that amicus briefs:

> address a legal issue in a particular way that is different, or perhaps elaborates upon, the arguments the parties are making…an opportunity to make different, or more nuanced or elaborate arguments about a legal issue in the case that is different in some way from what the parties are presenting and thus may aid the court's consideration of the issue.[117]

Therefore, an amicus brief helps a justice make a more legal or ideologically informed decision by providing them with subject-matter expertise about the legal issues or policy ramifications of the case.

Second, justices can use amicus participation as informational short-cut to assess public sentiment about the case or its legal and policy significance (Baum 2009; Collins 2008; Caldeira and Wright 1998; Hettinger et al. 2007). The large number of petitions the court receives each year prevents the justices (or their law clerks) from thoroughly vetting the legal and policy merits of each case. Justices, then, look for certain "cues" or informational-short cuts to highlight a case's cert worthiness (Tanenhaus et al. 1963). Because of the cost associated with participating

[116] Paredes, Sam. Executive Director Gun Owners of California. Personal Interview 31 August 2017.
[117] Isherwood, Aaron, the Phillip S. Berry Managing Attorney Sierra Club Personal Interview 31 August 2017.

as amicus curiae, groups have to be strategic in their case selection process. Caldeira and Wright (1988) find that amicus briefs can range from $15,000 to $60,000. Luke Wake of the NFIB Small Business Legal Center, whom I interviewed, summarized the situation nicely, "the organization has limited resources; therefore, we have to be strategic about how we use those resources when looking for cases… Most of the time, there are cases that you would like to file in but have to decide if it is the best use of resources."[118] Therefore, costs limit how often groups participate. This in turn increases the credibility of their signal when they decide to participate (Caldiera and Wright 1988).

McGuire's (1994) study on interest group activity and Supreme Court agenda setting provides one of the most comprehensive accounts of the relationship between litigants, cert petitions, and amicus influence. McGuire interviewed a number of appellate practitioners about their strategies for gaining access to the Supreme Court. He finds that litigants petitioning for cert actively solicit interest group support on behalf of their case. One of the appellate practitioners that McGuire interviewed stated, "I think it makes a big difference in the perception of the case whether they are amici or not. And it's important to get them. I think it is somewhat less important at the merits stage." A different appellant litigator made a similar comment to McGuire, "Whenever I have a case that's going up to the Supreme Court on certiorari I look for amicus help. After it's granted, it's not as important. But [on certiorari] you want something that will flag the importance of your case." Empirical research on the value of amicus briefs to agenda-setting support the anecdotal evidence. Black and Boyd (2010) find that amicus support can help under-resourced litigants get on the Court's docket. Black and Owens (2009) find that

[118] Wake, Luke. Senior Staff Attorney. NFIB Small Business Legal Center. Personal Interview. 1 September 2017.

the presence amicus briefs increases the likelihood that a policy-minded justice grants cert to a case.

Since amicus activity is an important signal for justices, it should be an important signal for litigants that their case is worthy of the Court's time. Therefore, the losing litigants should petition for cert when they have interest group support in their Courts of Appeals case.

4.5 Research Design

In this section, I explain the model used to test my theory regarding the post-mertis influence of amici curiae. I use an original data set of U.S. Courts of Appeals cases covering the twelve geographic circuits from 2003 through 2010.[119] This is the *Phase III Court of Appeals Database,* which is the latest extension of Songer Courts of Appeals database (Songer 1997; Hurtwitz and Kuersten 2012). The dependent variable is whether a litigant in the case petitioned for cert, with cert petitions coded as one and the absence of a cert petition coded as zero. The *Phase III Courts of Appeals Database* did not have a variable to capture the presence of a cert petition. Therefore, I determined whether a litigant petitioned for cert based on the circuit court opinions available in Lexis.[120] I also cross-referenced the cert petitions from Lexis with the case's docket from the Public Access to Electronic Court Records (PACER).[121] The correlation between the Lexis opinion and the docket was 0.96, which is statistically significant ($p < 0.05$). My unit of observation is the case. My data has a hierarchical structure because cases are nested within circuits. Therefore, I estimate a random-effects negative binomial regression model to account for intraclass correlation.

[119] For a detailed discussion regarding the data set used in this chapter see Chapter 1 Section 5 "A Note on the Data."
[120] The Lexis opinion identifies the subsequent history of the case. The opinion's subsequent history heading identifies whether the Supreme Court granted or denied cert.
[121] A docket captures a case's litigation history. Every development in the case, whether it be a judicial opinion, order, litigant brief, motion, petition for cert, and grant / deny of cert is recorded as an entry on the docket.

The primary independent variable of interest is the presence of amicus activity in the circuit court case. The original version of the *Phase III Courts of Appeals* database contained only an indicator variable for the presence of an amicus activity. Therefore, I collected the number of amicus briefs participating in the case. To collect this information, I searched Lexis, Westlaw, and the case docket sheets in PACER.[122] Only amicus briefs in which the position of the amici (i.e. supporting the appellant or respondent) could be identified are included in the study. The position of the amicus brief is typically located on the front of the brief. The front of the brief identifies the group(s) on the brief and whether the decision of the district court should be reversed or affirmed. When a brief did not identify their position on the front of the brief, I read the brief's conclusion.[123] The variable *Litigant Amicus Support* captures the number of amicus briefs filed in support of the losing litigant in the circuit court case. I use amicus support for the losing litigant, rather than total number of amicus briefs in the case, because groups associated with the losing litigant have more policy interest at stake. Thus, there presence is more likely to send a signal to the Court about the broader policy ramifications of the case. I expect this variable to be positive, which indicates that increasing the number of amicus briefs in support of the losing litigant increases the likelihood of the litigant petitioning the case for cert.

The decision for a litigant to petition the Supreme Court involves more than amicus support. If litigants are strategic in the decision to seek cert, litigants should consider their own resources, the likelihood of getting on the docket, and the winnability of their case. Therefore, I

[122] Only amicus briefs where the position of the amici could be clearly identified are included. See Chapter 1 for a more thorough explanation of the amicus brief data collection process.

[123] Amicus briefs that did not clearly identify their position were coded as "other." Occasionally, an interest group submits a brief a states that they are not taking a position in the case. The group is submitting the brief for the sole purpose of providing the court with information about the case and does not advocate that court either reverse or affirm the lower court's decision. Furthermore, circuits vary in their record keeping. Most circuits did not have an electronic version of all the amicus briefs. If I could not access an electronic version of the amicus brief, I used Lexis opinion of the case and PACER to identify the position of the amicus brief.

control for a number of factors that are likely to influence a litigant's decision to seek cert. To determine what variables affect the decision to seek cert, I rely heavily upon the Supreme Court agenda-setting literature. The control variables fall into three categories based on the characteristics of the case: litigant resource capabilities, the policy goals of justices, and legal considerations.

4.5.1 Resource Capabilities

A long line of research has established that the resource capabilities of litigants significantly influences their legal success (Black and Boyd 2010; Galanter 1974; McCormick 1993; McGuire 1995; Songer and Sheehan 1992; Songer et al. 1999; Wheeler et al. 1987). Resource capabilities generally refer to the financial and legal resources available to the litigants. Litigant resources are important to the decision to petition for cert for two reasons. First, Supreme Court litigation is very expensive. A *Washington Post* article found that a victory in the Supreme Court can cost around $1.2 million dollars (Barnes 2011).[124] Second, resource capabilities affect a litigant's quality of legal representation. Groups with more resources should be able to hire better quality legal representation to advocate for their interest. Therefore, I create an indicator variable to capture the identity of the losing litigant in the Courts of Appeal case. I create an indicator variable for the following litigants: *Prisoner, Minority, Private Organization, Small Business, Big Business, Local Government, State Government, and U.S. Government*.[125] The reference category for the variables corresponding to the identity of the losing litigant is a natural person.

[124] The case was *Brown et al. v. Entertainment Merchants Association et al*. 564 U.S. 786 (2011). An association of video game companies brought legal action, under the First Amendment, against a California law that imposed labeling requirements on the sale or rental of "violent video games."

[125] Litigants were classified based on the first party listed. Information about the litigants came from their description in the majority opinion. "Minorities" typically included individuals challenging the government over immigration or citizenship. Following Black and Boyd (2010), "big business" only includes the following: railroads, bank, manufacturing, insurance company, airline, oil company.

4.5.2 Judicial Policy Goals

Supreme Court justices grant cert with policy goals in mind (Baucher and Segal 1995; Benesh et al. 2002; Brenner 1979; Caldeira et al. 1999; Epstein and Knight 1997; Songer 1979). That is, they vote strategically by considering the case's outcome on the merits. As Black and Owens (2009, 1072) write, justices "deny review when they prefer the status quo policy. Policy maximization…is a strong predictor of Supreme Court agenda setting." The most common strategy is for a justice to grant cert to a case with the expectation that the Supreme Court will reverse the decision. On occasion the justices use aggressive grants to affirm a circuit court decision in order to establish Supreme Court precedent. This a more perilous legal strategy because these justices "have more to lose if they miscalculate" (Black and Owens 2009, 1063). Therefore, the Supreme Court uses cert to enforce doctrinal compliance with its decisions (Cameron et al. 2000; Songer et al. 1994; Ulmer 1984). As a result, litigants increase their likelihood of winning on appeal by appealing cases in which the Supreme Court ideologically disagrees with the circuit court's ruling.

I use Judicial Common Space (JCS) scores to capture the policy preferences of the circuit panel and the Supreme Court (Epstein et. al 2007). Judicial Common Space scores are widely used in the judicial politics literature to measure circuit court preferences (Boyd et al. 2010). I average the JCS scores of the individual circuit judges on the panel to create an ideology measure for the entire panel. I capture the policy preferences of the Supreme Court using the JCS score for the median justice on the Supreme Court. Litigants petition for cert in order to have the Supreme Court rule in their favor. Therefore, the location of the median justice is instrumental to a litigant winning the case (Bonneau et al. 2007).

The variable *Supreme Court Distance* captures the ideological distance between the Supreme Court and the circuit court panel that made the decision. It represents the absolute distance between the circuit's panel ideology score and the Supreme Court median. Higher values indicate that the Supreme Court and the circuit panel are ideologically distant. I expect the impact of this variable to be positive, which indicates that litigants are more likely to petition a case for cert when the ruling comes from an ideologically distant circuit court panel.

Additionally, justices look for cases that have the "greatest practical significance" (Caldeira and Wight 1988, 1112). I consider significant cases those with outcomes that have broad policy and legal ramifications for society writ large. The court's power of judicial review allows it to rule on the constitutionality of federal legislation as well as actions of the president. A decision based on the court's constitutional interpretation means that elected branches of government can only overturn the decision through a constitutional amendment. Since constitutional decisions can have a long-lasting influence on the law and national policy, justices are likely to view these cases as good vehicles for policy change (Casper 1976; Epstein, et al. 2002).

I identified the presence of a constitutional issue by reading all the opinions in the data set. The variable *Constitution* is coded one if the case raised a constitutional issue and zero otherwise. I expect this variable to be positive, which indicates that litigants are more likely to petition the Supreme Court for cert when the circuit court case contained constitutional provision.

I also consider policy significant cases as those containing politically controversial issues that are likely to elicit an ideological response from judges. Civil rights issues are widely considered to be some of the most partisan and divisive issues in American politics (Carmines

and Stimson 1989; Kinder and Sanders 1996; Klarman 2006; Rosenberg 2008). Furthermore, Hettinger et al. (2003, 224) write, "a case involving a civil rights or liberties claim is likely to elicit more strongly held ideological positions and, hence, is one means of evaluating salience or importance to judges themselves." I identified the presence of a civil rights issue by reading the case's judicial opinion. The variable *Civil Rights* is coded one if the case raised a civil rights issue and zero otherwise.[126] I expect the sign for this variable to be positive, which indicates that the civil rights issues increase the likelihood a case is petitioned for cert.

4.5.3 Legal Considerations

The Supreme Court, above all else, is a legal institution. The judiciary has credible legal authority to the extent that outside actors, such as Congress, the president, and the public, enforce their rulings. Institutional legitimacy is the foundation of the court's power, which allows the court to translate its rulings into publicly accepted policies. This is derived from the perception that the Court bases its decision on the law (Gibson et al. 1998; Calderia and Gibson 1992). A number of studies find that justices are influenced by legal considerations when reviewing cert petitions (Perry 2009; Provine 1990). For example, Ulmer (1984) finds that the Supreme Court grants cert to cases involving lower court conflict with Supreme Court precedent. Black and Owens (2009) find that the legal norms have a mediating effect on a justice's policy views when deciding to grant or deny cert.

Perhaps the most important law-based characteristic is the need for legal clarity. Circuit court cases with a dissenting opinion indicate that the case lacks a clear legal outcome. This is because different judges have different interpretations to the laws at issue. Hettinger, et al.

[126] The general issue area of civil rights excludes First Amendment and due process cases. This also excludes claims of denial of rights in criminal proceedings or claims by prisoners that challenges their conviction or sentence. However, this issue area does include civil suits imitated by prisoners and non-prisoners alleging denial of rights by criminal justice staff.

(2003) write that dissenting opinions "disclose inconsistencies in the law or highlight a legal doctrine ripe for overruling." Circuit court judges use dissenting opinions as whistle-blowing opportunities to send signals to other actors about the legal issues of the case. Dissenting opinions can be used to outline legal principles and arguments that litigants or other judges may use in future cases (Ginsburg 2010). Furthermore, dissenting opinions indicate that differences over legal interpretation exist and these differences need to be settled by a higher judicial authority (Calderia et al. 1999; George 1999; Giles et al. 2006). Moreover, the rarity of dissenting opinions makes their presence all the more legally significant. This is because dissenting opinions consume judicial resources and upset collegial relations (Epstein et al 2013; Hettinger et al. 2007). As a result, circuit judges only write dissenting opinions when significant legal differences arise. Therefore, litigants are more likely to petition for cert in cases with a dissenting opinion than those without a dissenting opinion. *Dissent* is a dichotomous variable indicating the presence of a dissenting vote on the panel. This variable is coded one when panel judge cast a dissenting vote and zero for unanimous decisions.

Second, cases in which the circuit panel reverses a lower court decision indicate a lack of clarity in the law. Hettinger et al (2003) write, "reversal indicates the presence of legal issues that are ambiguous or indicates that the case involves an area of legal doctrine that is undergoing initial development." Therefore, reversals indicate ambiguity in the law, which needs to be clarified by a higher judicial authority. Litigants are more likely to petition for cert in cases when the circuit court panel reverses a lower court decision. *Reversal* is a dichotomous variable indicating whether the circuit panel overturned the lower court's decision. This variable is coded one for a reversal and zero otherwise.

The final legal consideration is the complexity of the case. Cases that raise complex legal issues are potentially the most difficult cases for judges to decide (Lynch 2004). A complex case might involve issues with highly technical statutory language, require advanced expertise in a specialized legal area, raise novel legal questions, or involve matters of scientific inquiry. Given that most judges are legal generalists, complex cases might make their judicial decision-making more difficult (Baum 2009, 2011; Breyer 1998). Therefore, litigants should be more likely to petition for cert in legally complex cases because there is a high likelihood that the circuit judge made a legal error. Therefore, the more legal issues raised in the circuit court opinion, the greater the likelihood that a litigant petitions for cert. *Legal Issues* is a count of the number of headnotes in the circuit court's majority opinion.[127]

4.6 Results and Discussion

I begin by providing descriptive statistics for my data. Table 4.1 contains summary statistics for both the dependent and independent variables. Cert petitions from the circuit courts occur relatively frequently. Nearly one-quarter of the cases in the data set (707 to be exact) had a cert petition. Two other takeaways are noteworthy. The first takeaway involves the amount of amicus participation for the losing circuit court litigant. Only 231, or roughly eight percent, of the cases in the data set had amicus participation. The losing litigant had amicus support in 98 cases, or roughly three percent. Given the rarity with which groups participate as amicus curiae in the Courts of Appeals, the presence of amicus support for the losing litigant might send a strong signal to the Supreme Court about the social, legal, and economic implications of the case. The second takeaway involves the types of litigants most likely to appeal their case to the Supreme Court. Natural persons are the most common types of losing litigants in the Courts of

[127] The headnotes come from the opinions located in Lexis.

Appeals. Roughly 38 percent of losing litigants are natural persons followed by the federal government and small businesses. Because of this, the results of the empirical model in Table 4.2, use natural person as the reference category for assessing the behavior of other losing litigants. That is, how do the other types of losing litigants behave when deciding to appeal their case for cert compared to a natural person litigant.

Table 4.1 Summary Statistics

Variable	Mean	Std. Dev.	Min.	Max
Cert Petition	0.245	0.43	0	1
Litigant Amicus Support	0.056	0.31	0	6
Judicial Policy Goals				
Constitutional Issue	0.288	0.45	0	1
Civil Right	0.201	0.40	0	1
Supreme Court Distance	0.176	0.12	- 0.0004	0.601
Legal Considerations				
Dissent	0.119	0.46	0	7
Reversal	0.303	0.46	0	1
Legal Issues	11.895	8.54	0	90
Courts of Appeals Losing Litigant				
Prisoner	0.06	0.25	0	1
Minority	0.04	0.20	0	1
Natural Person	0.38	0.48	0	1
Private Organization	0.02	0.15	0	1
Small Business	0.11	0.32	0	1
Big Business	0.04	0.20	0	1
Local Government	0.02	0.16	0	1
State Government	0.03	0.17	0	1
U.S. Government	0.11	0.32	0	1

I now turn to the results of the random-effects logistic regression model. The model results displayed in Table 4.2 represent the likelihood of a losing litigant petitioning the Supreme Court for a writ of certiorari. The first column contains the coefficients for the variables, the second column contains the standard errors, and the third column contains the predicted probabilities of the variables impact on the decision to seek cert. The model correctly predicts about 77 percent of the outcomes for a percent reduction in error of just over eight percent.

Table 4.2 Logistic Regression Likelihood of Litigant Petitioning for Cert

Independent Variables	Estimate	Std. Error	Predict Prob.
Litigant Amicus Support	0.540 ***	(0.150)	See Figure 4.1
Legal Considerations			
Dissent	1.142 ***	(0.166)	19 to 42%
Reversal	-0.547 ***	(0.146)	23 to 15%
Legal Issues	0.025 ***	(0.006)	19 to 22%
Judicial Policy Goals			
Constitutional Issue	0.648 ***	(0.113)	18 to 30%
Civil Rights	-0.824 ***	(0.162)	24 to 12%
Supreme Court Distance	0.021	(0.422)	
Courts of Appeals Losing Litigant			
Prisoner	0.347 *	(0.165)	31 to 38%
Minority	-0.691 *	(0.323)	31 to 18%
Private Organization	-1.437 ***	(0.351)	31 to 10%
Small Business	-0.712 ***	(0.164)	31 to 18%
Big Business	-1.144 ***	(0.295)	31 to 12%
Local Government	-1.164 **	(0.352)	31 to 12%
State Government	-0.693 *	(0.284)	31 to 18%
U.S. Government	-1.874 ***	(0.271)	31 to 06%
Constant	-1.087 ***	(0.133)	
Circuit Intercept (Std. Dev.)	0.11		
Proportional Reduction in Error	8.12		
Percent Correctly Predicted	76.80		
Number of Obs.	2488		

Note: dependent variable = 1 if the circuit court case was petitioned for cert. I estimate a multilevel, random effects logit model with intercepts varying around each circuit. For continuous variables, predicted probability indicates going from the 25th to the 75th percentile. For dichotomous variables, predicted probability indicates going from 0 to 1. The reference category for "Courts of Appeals Losing Litigant" is natural person. Therefore, the predicted probabilities for the losing litigant variables represent the predicted probability of moving from the reference category (natural person) to that specified losing litigant.
*p<0.05, **p<0.01, ***p<0.001

The results in Table 4.2 provide clear support for the post-merits influence of amicus curiae. The variable *Amicus Litigant Support* is positive and statistically significant. This means that when the when a losing litigant in a circuit court case has amicus support, the litigant is more likely to petition for cert, for a given circuit, on average, and all else equal.[128] I illustrate

[128] As a robustness check, in Appendix D I estimate the same random-effects logit model with the total number of amicus briefs in a circuit court case as the primary independent variable of interest. Using the total number of

this relationship by plotting the predicted probability of a litigant petitioning for cert across a range of amicus briefs values in Figure 4.1. As the graph illustrates, the predicted probability of petitioning for cert is about 20 percent when a losing litigant is without amicus support compared to 60 percent when the litigant has the support of three amicus briefs, for a given circuit, on average, and all else equal. This is an important finding for interest group lobbying strategies (Truman 1951). It suggests that interest groups can wield influence beyond the merits stage of a circuit court case. Even if an interest group loses in the Courts of Appeals, their presence positively affects a litigant's decision to seek cert. Even with a lower court loss, participating as amicus curiae in a circuit court case can increase the chances of getting their issue in front of the Supreme Court.

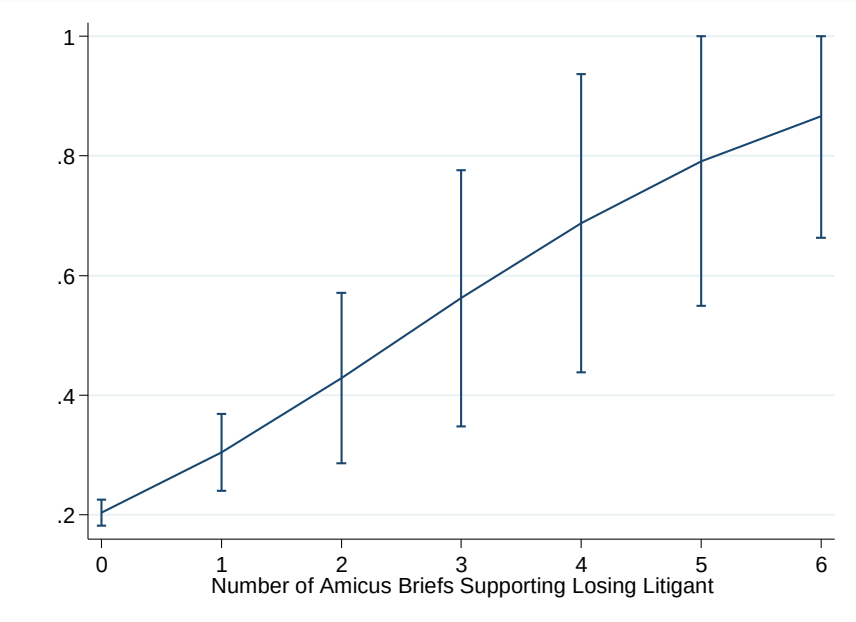

Figure 4.1 Predicted Probability of Cert Petition based on Amicus Support for the Losing Litigant in the Circuit Court Case with 95% Confidence Intervals

amicus briefs instead of the number of amicus briefs in support of the losing litigant does not substantively affect the results of the model.

Additionally, I find that all the legal factors influence the decision to seek cert in the Supreme Court. The variable *Dissent* is statistically significant and positive. Specifically, the presence of a dissenting vote increases the predicted probability of cert petition by about 20 percent, for a given circuit, on average, and all else equal. The influence of a dissenting vote works in several ways. First, a judge may feel motivated to write an opinion providing legal justification for their dissenting vote. A losing litigant can incorporate the legal arguments of the dissenting judge into their cert petition. Second, a dissenting opinion sends a signal that there is a substantive disagreement over the law, which the Supreme Court needs to clarify. Finally, for a variety of reasons, circuit court dissenting opinions are incredibly rare (Hettinger, et al. 2007; Epstein, et al. 2013). Therefore, their presence sends an important signal to the Supreme Court about the significance of the legal disagreement.

I also find that the complexity of the circuit court case influences decisions to file cert petitions, all else equal. Judges are legal generalists and complex cases often involve highly technical matters of law or lack proper legal precedent (such as first impression issues), which increases the likelihood of circuit judge making a legal mistake. As expected, the variable *Legal Issues* is positive and statistically significant. Therefore, litigants are more likely to petition legally complex cases for certiorari, for a given circuit, on average, and all else equal. Specifically, increasing the number of legal issues discussed in the circuit court case increases the likelihood of it getting petitioned for cert, for a given circuit, on average, and all else equal. More specifically, going from the 25^{th} (6 legal issues) to the 75^{th} (15 legal issues) percentile in the number of legal issues, increases the probability of filing a cert petition by roughly 3 percent, for a given circuit, on average, and all else equal.

I find mixed results for the influence of judicial policy goals. First, the policy characteristics of a case matter to filing a cert petition. The variable *Constitutional Issue* is positive and statistically significant. This means that, for a given circuit, on average, and all else equal, circuit court cases raising a constitutional issue are more likely to get petition for cert than cases not raising a constitutional issue. The predicted probability of a cert petition when a constitutional provision is discussed in a circuit court case is 30 percent, for a given circuit, on average, and all else equal. I find that the presence of a civil rights issue matters for seeking cert, but not in the direction I anticipated. Since civil rights issue are politically salient, I expected the presence of a civil rights issue to increase the likelihood of a litigant seeking cert because these cases send a signal about the ideological nature of the case. However, I find the opposite result. The variable *Civil Rights* is negative and statistically significant. This means a litigant is less likely to petition for a case for cert involving a civil rights issue compared to a case without a civil rights issue, for a given circuit, on average, and all else equal. Moving from a case that contains a civil rights issue to a case without a civil rights issue decreases the predicted probability of cert from 24 to 12 percent, for a given circuit, on average, and all else equal.[129]

One of the most interesting takeaways from the results in Table 4.2 is the finding regarding judicial ideology. I find no evidence that the ideological disagreement between the Supreme Court and circuit court panels matter to a litigant's decision to file for cert. Litigants are no more likely to petition cases for cert from ideologically distant circuit court panels than they are from ideologically proximate panels. If litigants were strategic, they would consider the case's outcome on the merits before petitioning for cert. Therefore, litigants would only petition cases from ideologically distant panels that they expected the Court to grant review and overturn.

[129] The correlation between the variables Constitutional Issue and Civil Rights is 0.062.

This is how justice themselves go about granting cert, but apparently not how litigants decide to petition for cert. One possible explanation for this finding is that litigants view the Court as a legal institution, rather than a policy-making institution (Caldeira and Gibson 1992; Gibson et al. 1998). From a litigant's perspective, the legal implications matter as much in the decision to seek cert as the ideological implications matter in a justice's decision to grant cert.

I finish with a brief discussion of the results related to the losing litigant's resource capabilities. The variable *Prisoner* is the only litigant variable that is positive and statistically significant. This indicates that the prisoners are more likely to petition their circuit court case for cert compared to natural persons, for a given circuit, on average, and all else equal.[130] Specifically, the predicted probability of a prisoner that loses in the Courts of Appeals filing a writ of cert is roughly seven percent greater than a natural person, for a given circuit, on average, and all else equal. There are a couple reasons for this. One possible explanation results from the resource discrepancy between prisoners and the opposition party in the Courts of Appeals case. Prisoners are typically the most under-resourced litigants in the Courts of Appeals (Galanter 1974). Moreover, prisoners often square off in court against well-resourced litigant, such as a state or federal government. Thus, there is higher likelihood of prisoners losing in the Courts of Appeals, which provides prisoners with more opportunities to file a writ of cert. A second possible explanation is that there are fewer resource barriers preventing a prisoner from filing a writ of cert. Because prisoners lack the financial resources to appeal their case, prisoners can proceed in forma pauperis. Conversely, other litigants have to pay the legal fees associated with filing for cert.

[130] Because of the frequency with which prisoners lose as appellants in the Courts of Appeals as well as the lack of resource barriers to petitioning a case for cert, the inclusion of prisoner litigants might be influencing the results. In Appendix E, I re-estimate the model from Table 4.2 but without the prisoner litigant variable. Removing the prisoner litigant variable does not substantively influence the results.

All the other losing litigants are less likely to file a writ of cert with the Supreme Court compared to natural persons, for a given circuit, on average, and all else equal. For example, a private organizationr is 20 percent less likely, a big business is 18 percent less likely, and the federal government is 25 percent less likely to petition their Courts of Appeal's case for cert compared to a natural person, for a given circuit, on average, and all else equal. One possible explanation for this is that resource disadvantaged litigants, which tend to be individuals, lose more frequently in the Courts of Appeals compared to other litigants (Galaenter 1974; Songer et al. 1999). As a result, they are the party most likely to file for cert. Because resourced advantaged litigants rarely petition for cert, their presence sends signal to the justice about the importance of the case (Tanenhaus et al. 1963). That is, well-resourced litigants compose better quality cert petitions and make more credible legal arguments to the justices. Well-resourced litigants are less likely to petition for cert, but their cert petition are more likely to be granted by the Court (Black and Boyd 2010).

4.7 Concluding Remarks

Interest group activity in the federal judiciary has been steadily increasing over the past several decades (Epstein 1992; Kearney and Merrill 2000; O'Connor and Epstein 1983). Collins (2008) finds that roughly 90 percent of Supreme Court cases received amicus participation in the 1990s compared to the 1950s in which only one-third of Supreme Court cases received amicus participation. Discussing this finding, Collins (2008, 46) writes, "Given this, amicus participation is clearly now a staple of interest group activity in the Court." As the findings of amicus activity illustrate, interest groups are turning more and more to courts to achieve their policy goals. Therefore, it is important to understand the types of groups using courts to advance their interest and the conditions upon which groups can find success. Scholars have devoted considerable

resources to understanding interest group influence on judicial-making. The bulk of this research focuses on the case's outcome on the merits (Box-Steffensmeier et al. 2013; Collins 2004, 2008; Collins and Martinek 2010; Kearney and Merrill 2000). More recently, researchers have shifted their focus to amicus influence at the pre-merits stage, such as their effect on Supreme Court agenda-setting and opinion writing (Black and Boyd 2010; Caldeira and Wright 1988; Collins et al. 2015; Hettinger et al. 2003, 2007; McGuire 1990;). However, until now, little research has focused on amicus influence after the circuit court panel has decided the case on the merits.

In this chapter, I argued that groups receive benefits from amicus participation that extends beyond the decision on the merits. Participating as amicus curiae allows groups to perform organizational maintenance, gain litigation experience, and shape the law for future litigation. This chapter empirically tested for the existence of post-merit amicus influence. I find that groups can increase the opportunity of getting their case before the Supreme Court by participating as amicus curiae in the Courts of Appeals. The pathway of amicus influence is twofold. First, amicus participation in circuit court cases sends a signal to both litigants and justices about the national significance of the case. Therefore, litigants are more likely to appeal because justices are likely to respond favorably to cases supported by outside interest. Second, justice can consult the amicus briefs from circuit court cases to help them learn about the legal policy implications of the case, thus making a more informed decision when deciding to grant cert. If justices consider the merits of the case when petitioning for cert, than amicus activity in the circuit court can help them make an ideologically informed decision.

Besides post merits influence, this study makes two other valuable contributions to the literature on Supreme Court agenda setting. Frist, the role of litigant resources on the decision to seek cert. A litigant's resource capabilities influence their legal success, with more well-

resourced litigants ("haves") winning more often than under-resourced litigants ("have nots") (Galanter 1974). However, I find that resource capabilities are not a barrier to a decision to seek cert. Rather, the litigant typically associated with being the most resourced disadvantaged, is the litigant most likely to petition their case for cert. This finding speaks to the role that litigants' resources have on circuit court case outcomes. Litigant resources influence the decision to seek cert in that under-resourced litigants lose more frequently in circuit court cases. As a result, the decision to appeal is primarily made by resource disadvantaged litigants.

Second, that litigants do not consider the ideological goals of justices when deciding to file a writ of cert. That is, litigants are not placing cases before the justices that they are likely to have ideological disagreements with. This (non)finding provides support to the strong influence of judicial ideology in the decision to grant cert. If litigants were strategically placing cases in front of justices that they expected the Court to overturn, the role of judicial ideology in the cert granting stage would be an artifact of the litigant's decision. However, litigants are not behaving in this way. Therefore, my finding provides additional support to the role of judicial ideology in agenda-setting. That is, justices look for ideological cues when deciding to grant cert (Cameron, et al. 2000).

The study advances our understanding of public law in several respects. First, it provides deeper insight into the Supreme Court's agenda-setting process. Studies on Supreme Court decision-making typically suffer from a selection bias. Black and Boyd (2010, 287) write, "Because the merits outcome is preceded by an agenda-setting decision, cases analyzed at the merits stage represent a nonrandom sample from the population of all cases." Therefore, understanding how the Court selects cases provides a more nuanced understanding of how the Supreme Court decides cases. This study goes one step further by examining the potential for

selection bias at the cert granting stage. Max et al (2013, 73) write, "considerations influencing the decision to decide are in fact conditional on the decision to appeal." For example, amicus activity and lower court conflict are important considerations for justices when granting cert (Caldeira and Wright 1998; Ulmer 1984). However, these two characteristics are important because litigants are strategically deciding to only put these types of cases before the Court. Until we understand the types of cases being placed before the Court, we will not fully understand the Court's agenda setting process.

Second, this study provides a more nuanced understanding of Supreme Court agenda-setting. Most work examines Supreme Court agenda-setting from the perspective of the individual justices (Benesh et al. 2002; Black and Boyd 2010; Black and Owens 2009, 2010). Previous research uses archival data, such as the private papers of Supreme Court justices, to identify the legal and policy influences on a justice's decision to grant cert. While these archival data has provided valuable insight into the motivations of justices, many of the studies are potentially time-bound. That is, the papers of Supreme Court justices only become available many years after the justice has left the Court. My study allows us to have a contemporary understanding of the cert process. I use a random sampling of circuit court cases in order to identify the factors that are important to a litigant's decision to seek cert. As such, this study moves us beyond a justice centered approach to agenda-setting and towards a litigant centered approach.

CHAPTER 5

CONCLUSION

The research presented in this dissertation illustrates and analyzes interest group influence in the U.S. Courts of Appeals from 2003 through 2010. Specifically, it evaluates group influence via their participation as amicus curiae. Amicus briefs are the primary means by which groups exercise their influence in the judiciary by presenting judges with information about the case that extends beyond the legal issues raised in the party briefs. These groups use their subject-matter expertise to inform judges about the social, political, and economic ramifications of their decision.

One of the most important goals of this research has been to understand the types of groups participating as amicus curiae. Focusing on groups rather than amicus briefs has two advantages. First, it allowed me to consider the role that organizational structure has on amicus activity. That is, do membership based groups behave differently than non-membership based groups? I find evidence that organizational structure matters for amicus participation. Trade associations and public advocacy organizations, two membership based groups, author more amicus briefs than other groups and are likely to target cases that raise relevant legal issues for their members. This allows them to perform organizational maintenance, which involves fundraising and recruitment, by taking a public stance in policy conflicts. The descriptive data on group participation combined with the empirical analysis indicate that groups participate as amicus curiae in the Courts of Appeals for organizational maintenance *and* to obtain policy change. This dual motivation for interest group behavior has been found to exist at the Supreme

Court, but it has yet to be fully explored in the Courts of Appeals (Caldeira and Wright 1990; Hansford 2004a, 2004b; Martinek 2006).

Second, a focus on individual groups is advantageous because it allowed me to examine the relationship between a group's resource capabilities and their legal success. A group's resource capabilities influences their ability to produce policy change (Box-Steffensmeier et al. 2013; Galanter 1974; McGure 1995). The relationship between group capabilities and legal success has important implications for democratic governance. If judges respond differently based on the types of groups providing the information, then it suggests that courts, similar to the elected branches over government, are venues for battles between the haves and haves nots (Schattschneider 1960). However, if the amount of information matters, then it suggests courts have the potential to even the playing field by allowing under-resourced groups the opportunity to make their case. I find that appellants benefit from the number of amicus briefs submitted on their behalf rather than the types of groups providing the information. In other words, it is the amount of information that matters to appellant success, not the institutional prestige or resource capabilities of the groups writing the amicus briefs.

A second goal of this research has been to better understand the motivations behind interest group litigation. Amicus briefs are only one weapon, albeit a powerful one, in the interest group lobbying arsenal (Collins 2008). Therefore, we need to understand why and when groups use amicus briefs. We currently know a lot about how judges and law clerks view amicus briefs, but little about the motivations or strategies behind their use from a group's perspective (Lynch 2004; Walbolt and Lang 2002). This dissertation provides first-hand accounts of the reasons for group participation and how groups view amicus activity. There are several important findings from the interviews I conducted with interest group representatives. First, groups are strategic in

their decision to participate as amicus curiae. For example, groups submit amicus briefs to expand upon the issues raised in the case, not to repeat the arguments of litigants. Aaron Isherwood, the Phillip S. Berry Managing Attorney for the Sierra Club, whom I interviewed stated, "Can our group add value to the court…can we provide a particular perspective on the legal issues…something to say that will benefit the court in deciding the case."[131] Another interest group representative I interviewed, Luke Wake, Senior Staff Attorney NFIB Small Business Legal Center, made a similar comment that groups use amicus briefs to "dig deeper into certain issues… Frame issues in a way that reflect the issues already in the court. Enhance issues, bring a unique perspective to the issues. Amicus briefs have value if they bring new information to the court. Amicus briefs lose value is they merely re-state the parties' issues."[132] Another example of strategic decision-making is their willingness to consider group resources when determining the cases that warrant their attention. Resource constraints force groups to prioritize certain cases and legal issues over others. Sam Parades of the Gun Owners Association of California stated that "financial resources affect the decision to participate."[133] Similarly Luke Wake stated, "Resources are always a paramount concern… Most of the time, there are cases that you would like to file in but have to decide if it is the best use of resources."[134]

Second, groups participate as amicus not solely to influence the judicial decision-making. Groups also use amicus briefs to perform organizational maintenance. Luke Wake stated that when deciding to participate as amicus curiae the group looks for cases that "raise issues that affect our members, such as regulatory issues that cut across industry lines…Take optics into

[131] Isherwood, Aaron, the Phillip S. Berry Managing Attorney Sierra Club Personal Interview 31 August 2017.
[132]Wake, Luke. Senior Staff Attorney. NFIB Small Business Legal Center. Personal Interview. 1 September 2017.
[133] Paredes, Sam. Executive Director Gun Owners of California. Personal Interview 31 August 2017.
[134] Wake, Luke. Senior Staff Attorney. NFIB Small Business Legal Center. Personal Interview. 1 September 2017.

consideration, both for members and the public."[135] More specifically, I asked Mr. Wake, as a representative of a trade association, how the need to keep or attract new members influences the type of cases their group participates in as amicus curiae. Mr. Wake responded:

> The group has a democratic approach to deciding which cases to join. The group might poll its members. The national NFIB organization cares about growing its membership. The donor base is important. The group is mindful about caring out its pledge to its members. Good stewards of the people's money. Understands that the group has a mission and will do the work it promised its members it will do.[136]

In addition, groups view amicus activity as a way to shape the future litigation environment. Sam Paredes stated that groups "try to build on past legal success" and participation with the understanding that "salient policy issues will always involve appeals by the losing side."[137] Therefore, if groups can participate in the litigation at an early stage, they might be able to influence the framing of the issues for the future courts. Aaron Isherwood stated that groups participate in order to "prevent a bad interpretation of the law that could undermine future litigation or the group's policy goals."[138] According Mr. Wake, **"**when Court dynamics are in our favor [judicial philosophy, judicial tendencies, prior record], we will push the issue."[139] Therefore, groups care as much about the development of the law and legal principles announced in a court decision as the case's outcome.

5.1 Final Thoughts

This dissertation traced amicus activity in circuit court cases as part of a three stage process. The first stage is pre-merits influence. That is, when will groups participate as amicus curiae and why do groups participate as amicus curiae. I found that groups behave strategically,

[135] Wake, Luke. Senior Staff Attorney. NFIB Small Business Legal Center. Personal Interview. 1 September 2017.
[136] Wake, Luke. Senior Staff Attorney. NFIB Small Business Legal Center. Personal Interview. 1 September 2017.
[137] Paredes, Sam. Executive Director Gun Owners of California. Personal Interview 31 August 2017.
[138] Isherwood, Aaron. Phillip S. Berry Managing Attorney Sierra Club Personal Interview 31 August 2017.
[139] Wake, Luke. Senior Staff Attorney. NFIB Small Business Legal Center. Personal Interview. 1 September 2017.

participating in cases that provide them informational leverage over judicial decision-making and aid in organizational maintenance. The second stage is merits influence. That is, once a group has decided to participate as amicus curiae, is the group effective at affecting judicial decision-making. I found that the quantity of the information presented to the judge matters more than the resource capabilities providing the information. Appellants have more legal success when they have an informational advantage over their respondent, rather than support of one or two highly capable, resource-advantaged groups. The third and final stage is post-merits influence. That is, do groups receive benefits from amicus participation in circuit courts cases after the court has rendered its decision? I find that amicus activity in the Courts of Appeals increases the likelihood that the litigant petitions the case for a writ of cert. Even if groups lose in the Courts of Appeals, their presence sends about the legal importance of the case and that the merits of their case are worth pursuing all the way to the Supreme Court.

It is important to mention there are limitations to these findings. First, the data I use for this project covers fairly limited time frame, eight years to be exact. The smaller time frame allows me to dig deeper into the determinants of amicus activity, but it came at the expense of generalizable results. It is entirely possible that the trends in amicus activity identified in the dissertation are contemporary phenomena. Therefore it is necessary to extend this study to earlier time periods to see if interest group behavior regarding amicus participation changed or stayed the same. Second, the three groups I interviewed, while informative, represent a tiny fraction of interest group activity in the United States. Furthermore, they all share similar organizational characteristics and represent specific, targeted interest. Moreover, these are groups that were willing to discuss their litigation strategies. Several groups I reached out to either never responded or politely declined my initial interview request. The reader should keep these

limitations in mind when reading the commentary from the interviews. However, the bulk of amicus participation in the Courts of Appeals, at least according to the data I collected, is from small groups that lack the name recognition or media salience of the NAACP or the ACLU. Therefore, it is important to understand the motivations of the smaller groups that actively participate in American politics, but often operate below the radar.

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APPENDIX A

Elite Interview Questions

This appendix contains the twelve questions I asked the three interest group representatives. All twelve questions are open-ended and exploratory in nature. For information on the methodology behind the elite interviews, see chapter 1, section 3, and subsection 2.

1) What does your group / organization look for when deciding to file amicus curiae brief in a courts of appeals case?
2) How does the group / organization decide which cases should receive amicus participation?
3) Does your group file amicus briefs with other appellate courts, such as state Supreme Courts and the U.S. Supreme Court? Which ones? On average, how often?
4) On average, how much does it cost to file an amicus curiae brief in the courts of appeals?
5) Does the cost to file an amicus brief influence your decision to file an amicus brief in a courts of appeals case?
6) Is your group more likely to join a brief if groups considered to be ideological allies are on the brief?
7) Is your group more likely to file amicus curiae brief if a group considered to be a traditional ideological opponent is filing an amicus brief in the case?
8) Besides winning the case on the merits, what other goals does your group hope to achieve by filing an amicus curiae brief in a courts of appeals case?
9) Is it still a "win" if your arguments are addressed / mention in the court's dissenting opinion, yet you still lose the case on the merits?
10) How often do you collaborate with the parties in the case when filing an amicus brief?
11) Do you think your amicus briefs influence the judicial decision-making of court of appeals judges?
12) For membership-based groups only (i.e. trade associations): Does the need to keep or attract new members influence the type of cases you participate in as amicus curiae?

APPENDIX B

Negative Binomial Regression with Court Appointed Amicus Briefs and Missing Data

This appendix contains alternative the model results for Chapter 2's Negative Binomial Regression Model, otherwise known as Table 2.8. This model contains six missing cases from the original model. Five missing cases result from ex parte litigation. An ex parte proceeding involves one party making an emergency motion to the court in order to stop an action likely to cause irreparable injury, usually to property. Due to the emergency, a party can petition the court for a temporary order without notifying the other party to the litigation, commonly known as an ex parte hearing. If the judge decides to grant the ex parte motion, the judge issues a temporary injunction against the impending action and schedules a full hearing on the issue, which will be attended by both parties. Therefore, these cases have an appellant but no respondent. I created a dichotomous indicator variable to indicate the presence of an ex parte litigant. The sixth missing case was the only case in the data set in which a minority was the respondent. This variable is a dichotomous indicator variable to indicate the presence of a minority respondent. Additionally, nine cases in the data set had court appointed amicus. These amicus briefs were excluded from the original model for a theoretical reason. The theory of amicus participation put forward in Chapter 2 is based on a group strategically deciding to participate in case to further their policy goals. Court appointed amici are not strategically participating as amicus curiae because they are forced to participate by a court order. However, in order to illustrate that the excluded court appointed amicus briefs were not biasing the results, I re-estimated the Random-Effect Negative Binomial Regression Model from Chapter 2 with the nine court appointed amicus briefs included in the dependent variable. The inclusion of the ex parte litigants and the respondent minority litigant does not substantively influence the results of the model. Furthermore, including the nine court appointed amicus briefs in the dependent variable does not influence the results either. The ex parte litigant variable does not reach conventional levels of statistical significance. The variable *Respondent Minority* is positive and statistically significant. This means that cases with a minority respondent are more likely to receive amicus briefs compared to cases with a natural person as a respondent, for a given circuit, on average, and all else equal. Furthermore, all the variables that were significant in Table 2.8 remain significant in the Appendix B Model.

B. 1.1 Negative Binominal Regression of the Number of Amicus Briefs Submitted in a Case

Independent Variables	Estimate (Std. Error)
Case Complexity	
Docket Entries	0.004 (0.001) ***
First Impression	0.703 (0.271) **
Policy Salience	
Constitutional Issue	0.478 (0.156) ***
Criminal Case	- 1.956 (0.278) ***
Civil Rights Issue	0.157 (0.196)
Cases per Judge	0.000 (0.001)
Litigant Resources	

Appellant Prisoner	- 0.111 (0.359)
Appellant Minority	- 0.966 (0.474) **
Appellant Private Organization	1.152 (0.228) ***
Appellant Small Business	0.099 (0.216)
Appellant Big Business	0.411 (0.305)
Appellant Local Government	0.314 (0.330)
Appellant State Government	1.449 (0.260) ***
Appellant U.S. Government	1.142 (0.293) ***
Respondent Prisoner	- 1.262 (0.602) *
Respondent Minority	3.377 (0.726) ***
Respondent Private Organization	- 0.168 (0.367)
Respondent Small Business	- 0.325 (0.234)
Respondent Big Business	- 0.685 (0.319) *
Respondent Local Government	- 0.148 (0.281)
Respondent State Government	- 0.091 (0.288)
Respondent U.S. Government	- 0.220 (0.236)
Constant	- 2.389 (0.348) ***
Circuit Intercept (Sd. Dev.)	0.383
AIC	1,978.024
Number of Obs.	2880

Note: dependent variable is a count of the number of amicus briefs filed in a case. I estimate a multilevel, random effects negative binomial model with intercepts varying around each circuit. The reference category for appellant and respondent variables is natural person appellant and natural person respondent.
* p<0.05, ** p<0.01, *** p<0.001

APPENDIX C

Negative Binomial Regression without Remanded Cases

This appendix contains the alternative model results for Chapter 2's Negative Binomial Regression Model, otherwise known as Table 2.8. One possible explanation for groups submitting amicus briefs is that groups behave differently when a case is on remand from the Supreme Court. A remanded case has clear instructions from the Supreme Court about the relevant legal issues at play. Therefore, the clarity of the legal issues makes it easier for groups to identify cases that b advance both their policy interest and aid in organizational maintenance. In the data, 25 cases were on remand from the Supreme Court. Of those 25, groups submitted at least one amicus brief in 11 (or 44 percent) of those cases. In the Appendix C model, I re-estimate the random-effects negative binomial regression model without the 25 cases on remand. The results contained in the Appendix C model indicate the likelihood that a group submits an amicus brief in a court of appeals case. Excluding the 25 remanded cases does not substantively affect the results of the model. As in Table 2.8, both case complexity variables remain statistically significant. Also, the constitutional issue and the civil rights issue variable keep the same sign and significance. Excluding the 25 remanded cases only changes two litigant variables. First, the variable *Appellant Minority* is now statistically significant. This indicates that groups are less likely to submit an amicus brief in a case with a minority appellant compared to a case with a natural person appellant, for a given circuit, on average, and all else equal. Also, the variable *Big Business* is no longer statistically significant.

C.1.1 Negative Binominal Regression of the Number of Amicus Briefs Submitted in a Case in the U.S. Courts of Appeals

Independent Variables	Estimate (Std. Error)
Case Complexity	
Docket Entries	0.004 (0.000) ***
First Impression	0.668 (0.293) *
Policy Salience	
Constitutional Issue	0.532 (0.165) ***
Criminal Case	- 2.124 (0.315) ***
Civil Rights Issue	0.255 (.208)
Cases per Judge	0.000 (0.000)
Litigant Resources	
Appellant Prisoner	- 0.274 (0.409)
Appellant Minority	- 1.119 (0.563) *
Appellant Private Organization	1.257 (0.235) ***
Appellant Small Business	0.158 (0.222)
Appellant Big Business	0.496 (0.309)
Appellant Local Government	0.331 (0.343)
Appellant State Government	1.477 (0.270) ***
Appellant U.S. Government	1.073 (0.326) ***

Respondent Prisoner	- 1.124 (0.604)
Respondent Private Organization	- 0.092 (0.373)
Respondent Small Business	- 0.265 (0.241)
Respondent Big Business	- 0.622 (0.323)
Respondent Local Government	- 0.046 (0.287)
Respondent State Government	- 0.111 (0.289)
Respondent U.S. Government	- 0.259 (0.251)
Constant	- 2.683 (0.360) ***
Circuit Intercept (Sd. Dev.)	0.419
AIC	1,814.383
Number of Obs.	2849

Note: dependent variable is a count of the number of amicus briefs filed in a case. I estimate a multilevel, random effects negative binomial model with intercepts varying around each circuit. The reference category for appellant and respondent variables is natural person appellant and natural person respondent.
* p<0.05, ** p<0.01, *** p<0.001

APPENDIX D

Total Amicus Briefs Model

This appendix contains alternative model results for Chapter 4's Likelihood of a Case Petitioned for Cert Logit Model, otherwise known as Table 4.2. An alternative theory to the one put forward in Chapter 4 is that the losing litigant is responding to the total number of amicus briefs in a case, not just the amount of their amicus support. Cases with more amicus briefs sends a stronger signal to the litigant and the Supreme Court justice about the national importance of the case. The results located in the Appendix D model test this theory. It represents the likelihood that a case is petitioned for cert based on the total number of amicus briefs in a circuit court case. The variable *Total Amicus Briefs* is a count of the total number of amicus briefs in the circuit court case. Similar to Table 4.2, I estimate a random-effects logit model with intercepts varying around the circuit. Including all amicus briefs does not substantively affect the results of the model. The variable *Total Amicus Briefs* is positive and significant. This means that increasing the number of amicus briefs in a case increases the likelihood of a litigant appealing their case to the Supreme Court, for a given circuit, on average, and all else equal. The results for the control variables maintain their sign and significance.

D.1.1 Logistic Regression Likelihood of Litigant Petitioning for Cert

Independent Variables	Estimate (Std. Error)
Total Amicus Briefs	0.338 (0.075) ***
Legal Considerations	
Dissent	1.155 (0.166) ***
Reversal	-0.536 (0.145) ***
Legal Issues	0.024 (0.006) ***
Judicial Policy Goals	
Constitutional Issue	0.643 (0.113) ***
Civil Rights	-0.839 (0.162) ***
Supreme Court Distance	0.009 (0.422)
Court of Appeals Losing Litigant	
Prisoner	0.356 (0.165) *
Minority	-0.68 (0.323) *
Private Organization	-1.568(0.363) ***
Small Business	-0.720 (0.163) ***
Big Business	-1.141 (0.295) ***
Local Government	-1.189 (0.351) **
State Government	-0.703 (0.283) *
U.S. Government	-1.984 (0.278) ***
Constant	-1.094 (0.132) ***
Circuit Intercept (Std. Dev.)	0.084
Proportional Reduction in Error	7.96
Percent Correctly Predicted	76.76

Number of Obs.	2488

Note: dependent variable = 1 if the circuit court case was petitioned for cert. I estimate a multilevel, random effects logit model with intercepts varying around each circuit. The reference category for "Courts of Appeals Losing Litigant" is natural person.
*p<0.05, **p<0.01, ***p<0.001

APPENDIX E

Petition for Cert Model without Prisoner Litigants

This appendix contains alternative model results for Chapter 4's Likelihood of a Case Petitioned for Cert Logit Model, otherwise known as Table 4.2. Because of the frequency with which prisoners lose as appellants in the Courts of Appeals as well as the lack of resource barriers to petitioning a case for cert, the inclusion of prisoner litigants might be influencing the results. In Appendix E, I estimate the same random-effects logit model as in Table 4.2, but I exclude *Prisoner* litigants from the model. As the results of the Appendix E model indicate, removing prisoner litigants does not substantively influence the results. The *Litigant Amicus Support* variable remains positive and statistically significant.

E.1.1 Logistic Regression Likelihood of Litigant Petitioning for Cert

Independent Variables	Estimate (Std. Error)
Litigant Amicus Support	0.550 (0.152) ***
Legal Considerations	
Dissent	1.253 (0.173) ***
Reversal	-0.617 (0.155) ***
Legal Issues	0.024 (0.006) ***
Judicial Policy Goals	
Constitutional Issue	0.540 (0.121) ***
Civil Rights	-0.769 (0.170) ***
Supreme Court Distance	0.032 (0.449)
Court of Appeals Losing Litigant	
Minority	-0.776 (0.327) *
Private Organization	-1.429 (0.351) ***
Small Business	-0.725 (0.165) ***
Big Business	-1.149 (0.297) ***
Local Government	-1.141 (0.353) **
State Government	-0.645 (0.285) *
U.S. Government	-1.850 (0.274) ***
Constant	-1.043 (0.137) ***
Circuit Intercept (Std. Dev.)	0.11
Proportional Reduction in Error	6.16
Percent Correctly Predicted	78.02
Number of Obs.	2289

Note: dependent variable = 1 if the circuit court case was petitioned for cert. I estimate a multilevel, random effects logit model with intercepts varying around each circuit. The reference category for "Courts of Appeals Losing Litigant" is natural person.
*p<0.05, **p<0.01, ***p<0.001