AMICUS BRIEFS: FRIEND OR FOE OF FLORIDA COURTS?

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I. INTRODUCTION

Good amicus curiae briefs — supposedly "friend-of-the court" briefs — can impact the court's decision-making process, either with respect to the outcome of the case or the rationale expressed by the court for reaching that outcome. Yet appellate judges and appellate practitioners complain that, all too often, amicus briefs bring nothing new or of value to the court and instead merely reiterate the arguments advanced by one of the actual parties to the appeal. Those briefs are not truly amicus briefs and, unfortunately, they cause courts to be wary of the value of the amicus brief, even though — when properly written — it can be the court's best friend in reaching the right decision.

We will begin this Article by discussing amicus briefs in general and the specific use of them in the United States Supreme Court. We will then explore the Florida experience with amicus briefs, both by examining Florida decisional law and by reflecting on interviews with Florida appellate judges and practitioners. We will conclude by considering the possible need for changes in the Florida rule on amicus briefs.

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II. THE DEVELOPMENT OF AMICUS CURIAE AND HOW THEY ARE USED TODAY

It is generally believed that the participation of amicus curiae in legal disputes may be more than a thousand years old, beginning in ancient Rome.[1] Amici provided information, at the court's discretion, in areas of law in which the courts had no expertise or information. From this practice, the English common law developed the notion of amicus briefs as aids in helping judges avoid errors and in maintaining judicial honor and integrity by acting as "the judiciary's impartial friend," providing information beyond the court's expertise.[2]

The pervasive influence of the common law in the development of the American legal system led to the incorporation of the concept of amicus curiae into this country's jurisprudence.[3] It serves, to this day, important, useful, and sometimes critical functions in resolving legal disputes.[4] However, the historical concept of amicus curiae as a disinterested, neutral participant utilized to uphold the honor of the court did not provide an adequate vehicle for all needs faced in the developing nation. Many private-party disputes often involved clashes between state and national sovereignty with constitutional implications, and yet the national and state governments lacked standing to be heard.[5] Similarly, dis-

1. For extensive and useful discussions of the history of amicus curiae as a legal tool, see Samuel Krislov, *The Amicus Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 694–704 (1963), and Michael K. Lowman, Student Author, *The Litigating Amicus Curiae: When Does the Party Begin after the Friends Leave?* 41 Am. U. L. Rev 1243, 1247–1265 (1992). Other discussions of the historical development of amicus curiae include Allison Lucas, Student Author, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 Fordham Urb. L.J. 1605, 1607–1610 (1999); Gary F. Smith & Beth E. Terrell, *The Amicus Curiae: A Powerful Friend for Poverty Law Advocates*, Clearinghouse Rev. 772, 773–775 (Nov.–Dec. 1995); and Nancy Bage Sorenson, Student Author, *The Ethical Implications of Amicus Briefs: A Proposal for Reforming Rule 11 of the Texas Rules of Appellate Procedure*, 30 St. Mary's L.J. 1219, 1224–1229 (1999).

2. Lowman, *supra* n. 1, at 1248.

3. *See* Krislov, *supra* n. 1, at 700–701 (describing the first formal use of the common-law phrase "amicus curiae" by the United States Supreme Court in *Green v. Biddle*, 21 U.S. 1 (1823)).

4. *Infra* nn. 12–25 and accompanying text.

5. *E.g. Gibbons v. Ogden*, 22 U.S. 1, 46 (1824) (involving federal power to regulate interstate commerce in a dispute between rival steamboat operators over the right to use New York waterways); *Martin v. Hunter's Lessee*, 14 U.S. 304, 342–43 (1816) (involving the federal judiciary's power to review state-court decisions on constitutional matters in a dispute between two property owners claiming title to the same land); Lowman, *supra* n. 1, at 1251 n.44.

putes that typically involved two parties frequently implicated the interests of third parties, but in federal courts, strict diversity or standing requirements often precluded these interested parties from participating.[6]

Consequently, as the federal and state legal systems began to grow, supposedly private lawsuits in actuality presented public issues and public interests that lacked formal representation in the litigation process.[7] This lack of formal representation became an increasing concern to nonlitigants, as judicial review in these private lawsuits by the courts of last resort resulted in decisions of general applicability and great constitutional importance. There was a growing awareness that many court opinions were, in a very profound way, decisions with wide-ranging public-policy implications across the state or union.[8] Thus, nonlitigants had a compelling interest in the result of the litigation.

The inevitable result of third parties' desires to have input into how these controversies were decided resulted in a shift in the use of the amicus practice from one of neutrality to one of advocacy. Some amici attained status similar to that of actual parties and became in fact "acknowledged adversaries" or "litigating amicus."[9] Although the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU) have been among the most frequent amici on behalf of private litigants, the federal and state governments — represented by the Solicitor General and state attorneys general and

6. Lowman, *supra* n. 1, at 1252–1253. The rule requiring complete diversity of state citizenship among all plaintiffs and defendants, as held by *Strawbridge v. Curtiss*, 7 U.S. 267 (1806), had the practical effect of excluding "an indeterminate number of persons, with protectable interests, from having a voice in judicial proceedings." Lowman, *supra* n. 1, at 1253.

7. *Id.*

8. For example, in *McCulloch v. Maryland*, 17 U.S. 316 (1819), a case that originated as an attempt by the State of Maryland to collect a tax from the cashier of a branch of the Bank of the United States, the United States Attorney General was permitted to appear on the cashier's behalf because the "case involv[ed] a constitutional question of great public importance, and the sovereign rights of the United States and the state of Maryland." *Id.* at 326 n. 3. Thus, the Court "dispensed with its general rule, permitting only two counsel to argue for each party." *Id.* Generally, in response to the needs of nonlitigants, courts developed early methods by which parties could participate in proceedings to which they were not named parties. Krislov, *supra* n. 1, at 698–699. Courts allowed the United States to intervene in admiralty suits "by way of 'a suggestion,'" and granted leave to "quasi-parties" to intervene in equity suits. *Id.* These early methods, however, did not fully satisfy the needs later served by "litigating" amici curiae. *Id.*

9. *Id.* at 704.

solicitors general — also became involved as amici in many cases.[10] "Judicial lobbying" has become an important part of participation in major court decisions by amicus parties.[11]

Governmental amicus parties have made extensive use of amicus briefs over the years. The first formal appearance of an amicus curiae in the United States Supreme Court was on behalf of the State of Kentucky in 1821.[12] Since then, the Supreme Court has increasingly granted leave to state attorneys general to assert state interests as amici curiae.[13] Occasionally, federal agencies, as well as other organized groups of government officials, have appeared independently as amici curiae.[14] By far, the Department of Justice, from its formation in 1871 through the use of the Office of Solicitor General in the present, has been the most frequent and successful amicus litigant before the U.S. Supreme Court.[15]

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10. *See generally* Joseph D. Kearney & Thomas Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743 (2000) (offering empirical analysis of the amicus curiae participation in the United States Supreme Court by the Solicitor General and institutional litigants such as the ACLU from 1946 to 1995); Krislov, *supra* n. 1, at 699–704 (tracing the development of amicus curiae representation of private and government interests from the early 1800s through the mid-twentieth century).

11. *See* Kearney & Merrill, *supra* n. 10, at 774–787 (describing three theories explaining how amicus curiae briefs influence the High Court, including a theory that amicus briefs operate in the same fashion as interest-group lobbying in legislatures); Krislov, *supra* n. 1, at 705 (crediting the United States Department of Justice as the first to use consistently the amicus brief for "judicial lobbying").

Not all judges embrace the idea of an amicus curiae as a partisan participant. *See* Luther T. Munford, *When Does the Curiae Need an Amicus?* 1 J. App. Prac. & Process 279, 279–280 (1999) (responding to Chief Judge Richard A. Posner's admonition "that an amicus curiae should be a 'friend of the court, not [a] friend of the party'"); *infra* pt. VII (discussing disfavorable opinions of some Florida judges). Justice Antonin Scalia, dissenting in a case in which fourteen amicus briefs supported the prevailing respondents, lamented, "Not a single amicus brief was filed in support of petitioner. That is no surprise. There is no self-interested organization out there devoted to pursuit of the truth in federal courts." Kearney & Merrill, *supra* n. 10, at 746 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 35–36 (1996) (Scalia, J., dissenting)).

12. The case, *Green v. Biddle*, 21 U.S. 1 (1823), involved a dispute over Kentucky lands without any representation of Kentucky's interests. Henry Clay sought leave to appear as amicus curiae and argued Kentucky's interests on rehearing. Krislov, *supra* n. 1, at 700–701.

13. *See* Kearney & Merrill, *supra* n. 10, at 801–802 (listing states among the most frequent amicus brief filers during the years 1946 to 1995); Krislov, *supra* n. 1, at 702 (describing how, in the mid- to late-nineteenth century, the United States Supreme Court began to allow state counsel to appear when the constitutionality of a state statute was at issue or when other states' rights were implicated).

14. *See* Krislov, *supra*, n. 1, at 702, 706 (providing examples of independent amicus participation by the Department of the Treasury and the National Association of Attorneys General).

15. *See* Kearney & Merrill, *supra*, n. 1, at 788 (ranking the Solicitor General first

Private parties have used amicus briefs to serve a range of purposes, including "self-protection or aggrandizement," or as a way to give groups a feeling of participation in decisions of national importance.[16] Among the first private amici were highly regulated groups from, most notably, the transportation and financial industries, which are controlled by legislative or administrative decisions as they are interpreted or enforced by the courts.[17] Similarly, amicus participation fostered minority-group activity and advanced their respective agendas, as litigation became the means to vindicate minority rights otherwise denied by the political process.[18] The amicus advocacy avoided the doctrine of res judicata in minority groups' efforts to establish new law,[19] and it was sometimes a means of rectifying weakness in the legal talent of the party with whose interest amicus was aligned.[20] Business and minority groups remain mainstays of amicus participation, together with labor organizations[21] and women's groups.[22]

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among amicus parties based on empirical analysis); Krislov, *supra* n. 1, at 705–706 (describing early participation by the Department of Justice, emphasizing the activity of Attorney General Charles J. Bonaparte as amicus curiae in litigation with broad social impact).

16. Krislov, *supra* n. 1, at 707, 721.

17. *Id.* at 707–708. Lightly regulated industries also become active amicus participants when the results of litigation have broad impact. *See e.g.* Lucas, *supra* n. 1, at 1615–1633 (describing an out-pouring of amicus briefs by media organizations in two cases in which First Amendment issues were in play).

18. Krislov, *supra* n. 1, at 710.

19. Advancing an argument that is not yet legally acceptable can be risky for a litigant who may wish to raise it in the future. For example, in 1941, amicus curiae for the NAACP strategically set forth the basis of a later-accepted argument when it advocated, as amicus, overruling the decades-old "separate but equal" rule of *Plessy v. Ferguson*, 163 U.S. 537 (1896), in *Henderson v. U.S.*, 314 U.S. 625 (1941), fourteen years before *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), finally accomplished that goal. Krislov, *supra* n. 1, at 712. If the Supreme Court had affirmed *Plessy* in 1941 in response to a premature argument raised by one of the main litigants, the later success of *Brown* might have been more difficult to obtain. As it happened, the early advancement of this argument by amicus helped lay the foundation for *Brown*'s success.

20. For example, in the heyday of civil-rights litigation, federal courts were known to invite or appoint government amici curiae to serve in important cases affecting constitutional or federal statutory rights. Without such amici, one judge reasoned, "[M]eritorious claims might fail for sheer lack of legal manpower." Smith & Terrell, *supra* n. 1, at 781 (quoting *In re Estelle*, 516 F.2d 480, 487 n.5 (5th Cir. 1975) (Tuttle, J., concurring)); *see generally* Krislov, *supra* n. 1, at 711.

21. For example, the American Federation of Labor-Congress of Industrial Organization (ALF-CIO) has appeared frequently and successfully before the United States Supreme Court since the 1920s. Kearney & Merrill, *supra* n. 1, at 788.

22. *E.g.* May-Christine Sungaila, *Effective Amicus Practice before the Untied States*

Private amici have stepped into cases when the interest of the amici is differentiated from that of the litigants, or where amici want to introduce subtle variations of the basic argument or to raise emotive or even novel arguments that might result in a successful outcome but that are too risky for the principal litigant to embrace.[23] Groups with specialized knowledge are sometimes invited by the court to file an amicus brief. Of course, solicitors general (or state attorneys general) frequently are asked to express the views of the government (or governmental agency) on the issue before the court.

Obviously, not all reasons for filing an amicus brief are useful from the court's perspective. Perhaps the most useful amicus brief — and the one that is the closest to the historical model — is one that suggests to the court the practical effect of its decision in contexts in which the actual parties may be uninterested or unaware, raises arguments or legal authorities that the parties may not have raised themselves, or proposes a different or intermediate position than that proposed by the parties.[24] Amici who are representative of those who actually could be impacted by the court's decision can bring a rare perspective to the court and pragmatically explain the real-world effect of a decision.[25]

Supreme Court: A Case Study, 8 S. Cal. Rev. L. & Women's Stud. 187 (1999) (analyzing the successful coordinated efforts of amici, including the National Organization for Women Legal Defense and Education Fund, in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)).

23. Krislov, *supra* n. 1, at 711–712; Smith & Terrell, *supra* n. 1, at 777.

24. As just one example, an amicus curiae brief on patent rights by the Institute of Electrical and Electronics Engineers of America (IEEE-USA) received prominent attention in oral arguments before the U.S. Supreme Court in the *Festo Corporation v. Shoketsu Kinzoku Kogyo Kabushiki Company* patent case. Oral Argument Tr., 2002 U.S. Trans LEXIS 1 at **5, 23–24, 34, *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 122 S. Ct. 1831 (2002). In *Festo*, the Court considered to what extent the holder of an amended patent is barred from asserting patent rights against another inventor whose design is substantially the same as the patented invention. *Festo*, 122 S. Ct. at 1835. As an alternative to the "flexible bar" and "absolute bar" standards advocated by the opposing sides in *Festo*, IEEE-USA asked the Court to consider a "foreseeable bar," under which patent holders who amended their applications during the prosecution would give up protection for particular equivalents when that abandonment was reasonably foreseeable at the time of the amendment. Oral Argument Tr., 2002 U.S. Trans LEXIS 1 at **5, 23–24, 34, *Festo*, 122 S. Ct. 1831. Justice Sandra Day O'Connor asked both sides to compare and contrast their position with that of IEEE-USA's, while other justices quizzed the parties on IEEE-USA's proposed "foreseeable bar" standard. *Id*. In the end, although the Court did not specifically cite the IEEE-USA amicus brief, its decision largely tracked the reasoning advanced in that amicus brief. *Festo*, 122 S. Ct. at 1837–1843.

25. Although this Article's focus is the amicus curiae experience in Florida specifically,

Based on his discussions with former law clerks on the United States Supreme Court, Stephen M. Shapiro, a former Deputy Solicitor General of the United States, concludes that,

> to be effective, an *amicus* brief must bring something new and interesting to the case. This might be better research, an explanation of the connection between the particular case and other pending cases, an improved discussion of industry practices or economic conditions, a more penetrating analysis of the regulatory landscape, or a convincing demonstration of the impact of the case on segments of society apart from the immediate parties. It also can be helpful to discuss the appropriate breadth of the Court's decision in light of such considerations.[26]

He also points out that "[t]he *amicus* brief . . . will not be effective unless it gives the impression of considering, comprehending, and carefully analyzing the interests and claims on both sides."[27] As he summarizes it, a good amicus brief should

> convey the impression that the *amicus curiae* is indeed a friend of the Court concerned with the development of the law and not just a partisan. Emphasize the correct articulation of legal rules of general applicability, not just the correct resolution of the particular case before the Court. The *amicus* brief should project a moderate tone. The brief should offer information and expertise about legal and policy issues, not myopic concern over a particular result in the case before the Court.[28]

In his view, a good amicus brief is especially useful when the parties themselves submit "poor briefs."[29]

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and the United States generally, it is worth noting that, in international law, the amicus curiae is experiencing parallel development. Once nonexistent, amicus curiae participation in disputes between sovereign nations is becoming more common by third parties whose interests could be impacted by the result of a case. *See generally* Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. Intl. & Comp. L. Rev. 235, 238–243 (2002).

26. Stephen M. Shapiro, *Amicus Briefs in the Supreme Court*, in ABA Sec. Litig., *Appellate Practice Manual* 342 (Priscilla Anne Schwab ed., ABA 1992). For additional guidance on drafting successful amicus briefs, including excerpts of briefs filed by, among others, former Solicitor General Kenneth Starr, see Reagan Wm. Simpson & ABA Tort & Ins. Prac. Sec., *The Amicus Brief: How to Write It and Use It Effectively* (ABA 1998).

27. Shapiro, *supra* n. 26, at 346.

28. *Id*.

29. *Id*. at 341.

Judge Chris W. Altenbernd of Florida's Second District Court of Appeal cogently summarized the most effective use of advocacy:

> Amicus briefs are best used where the court really does need an objective friend with some expertise. Appellate judges are about the only general practitioners remaining in Florida. We must study the law in all of its breadth. Ultimately, we must rule and possibly create precedent in fields where we have little personal experience or expertise. The lawyers representing the advocates have positions that they must argue. Sometimes those lawyers have only modest expertise in the field. In such a complex case, it is comforting to receive an amicus brief from a relatively neutral organization that can explain the law. Such an organization can often explain the effect of one outcome or another on other planes.
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> If an amicus truly wants to be a reasonably objective friend to help the court with a difficult case, then the nature of the argument and advocacy in the brief must be different than the argument received from a typical litigant. The argument needs to be more candid. It needs to assess the merits and demerits of both sides.
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> The amicus should try to write a brief that is similar to the memorandum that a good staff attorney or law clerk might write for his or her judge. It should give thought to the arguments on both sides, but ultimately advocate a position that is perceived to be the best outcome for the fabric of the law, as compared to the interests of the parties on one side or the other of the dispute.[30]

The least useful amicus brief — if it is even accepted — is one that does nothing more than repeat the same arguments advanced by one party, without bringing anything new to the court's attention. Virtually all commentators agree that "me too" briefs that simply tell the court that amicus agrees with one party or wants one result in a case are of no value to the court. By the same token, briefs that "are so one-sided that they fail to meet the counterveiling arguments" or "weigh [the] competing interests" do not help the court.[31]

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30. Interview with Hon. Chris Altenbernd, Judge, Fla. 2d Dist. Ct. App. (Apr. 17, 2002).

31. Shapiro, *supra* n. 26, at 341, 346.

All of this is consistent with the view expressed in interviews with various Florida appellate judges and lawyers. As Professor Bruce Rogow of the Shepard Broad Law Center at Nova Southeastern University puts it, "[A] few amicus briefs I have seen have been extraordinary and brought something different to the case; too many are meaningless vanity efforts."[32] Joel Eaton of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A. in Miami, Florida was equally blunt: "I have always suspected that amicus briefs are more of a nuisance than a help to the courts."[33] In the final analysis, our research, as well as other interviews, suggests that, while many amicus briefs filed in Florida cases may be valueless to the court, properly prepared amicus briefs were enormously useful to the court, exactly as they are supposed to be.

In describing the experience of the Florida Supreme Court with amicus briefs, Justice Charles T. Wells says there has been little dispute about accepting amicus briefs if they are timely filed.[34] If the amicus brief is nothing more than a repeat of a party's argument, however, leave to file may be denied.[35] In all events, and not surprisingly, a brief that is "just an echo" of a party's brief will not receive the Court's attention.[36] Unfortunately, "most" amicus briefs fall in that category.[37]

In Justice Wells' view, amicus briefs "need to be more explanatory of the problems created by a particular resolution of a case and written to explain the ramifications of a decision, rather than to advocate directly for that position."[38] The Florida Supreme Court "struggles to understand the broad consequences to the parties. . . . Amicus can and should be helping the court to reach that end."[39]

Amicus briefs are "most helpful to the court where they grapple with a policy issue that will have a ripple effect, such as Pub-

32. Interview with Bruce Rogow, Prof., Nova S.E. U. (Jan. 25, 2002).
33. Interview with Joel Eaton, App. Atty., Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A. (Jan. 25, 2002).
34. Interview with Hon. Charles T. Wells, J., Fla. Sup. Ct. (June 25, 2001).
35. *Id*.
36. *Id*.
37. *Id*.
38. *Id*.
39. *Id*.

lic Records Act cases."[40] Justice Wells mentioned *Halifax Hospital Medical Center v. News-Journal Corporation*[41] as a good example of such a case.[42] Amicus briefs likewise can be helpful in bringing to the court's attention how an issue, for example, a commonly occurring insurance coverage dispute, has been handled in other states or at the federal level, and whether that resolution elsewhere "has been satisfactory in actual application."[43] Briefs of amicus from states that already have resolved an issue can bring "an important perspective" to the court's attention.[44]

Like Justice Wells, Florida Supreme Court Justice Barbara J. Pariente lamented that

> all too often, amicus seem to believe that filing a brief to "weigh in" will help, and it does not; just adopting the view of one party, without any special information, does not help the court. If, however, amicus can come forward with "unique information" bearing on the issues, that is a "very valuable service to the court."[45]

Information that enables the court better to see the "big picture" and to "get a perspective on how the decision will impact the real world in the future" is "more helpful than weighing in for the sake of weighing in" on an issue.[46]

Amicus briefs can be particularly helpful to the court if the parties themselves have filed weak briefs or failed to address certain aspects of the issue on appeal.[47] Organizations or groups hav-

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40. *Id*. Consistent with that observation, amicus briefs frequently have been filed in public records cases. *E.g. Michel v. Douglas*, 464 S.2d 545 (Fla. 1985); *News-Press Publg. Co. v. Sapp*, 464 S.2d 1335 (Fla. Dist. App. 2d 1985); *News-Press Publg. Co. v. Gadd*, 388 S.2d 276 (Fla. Dist. App. 2d 1980); *Campus Commun., Inc. v. Earnhardt*, 2002 WL 1483806 (Fla. Dist. App. 5th July 12, 2002); *Douglas v. Michel*, 410 S.2d 936 (Fla. Dist. App. 5th 1982).

41. 724 S.2d 567 (Fla. 1999). Four amicus briefs were filed in that case — two for the media and two for the hospital/health-sciences industry; there is no specific mention in the decision of any of the amicus briefs or positions.

42. Interview, *supra* n. 34.

43. *Id*.

44. *Id*.

45. Interview with Hon. Barbara J. Pariente, J., Fla. Sup. Ct. (Feb. 22, 2002).

46. *Id*.

47. Judge Altenbernd notes that his court rarely asks for amicus help because of the logistics of an appeal. Interview, *supra* n. 30. "The court rarely knows anything about the appeal until the briefs have already arrived. Thus, by the time we could make a decision to invite amicus briefing, our act would slow down the appeal and perhaps even compel rebriefing of the case. In the last thirteen years, I think I have taken that step only once or

ing specialized expertise can assist the court greatly. For example, according to Judge Altenbernd, sections of The Florida Bar have filed helpful amicus briefs on technical issues falling within their areas of expertise.[48] Justice Pariente similarly mentioned that sections of the Bar and other groups, as well as the Florida Solicitor General, can provide specialized input.[49]

Justice Pariente noted that the Florida Supreme Court often considers cases of great significance to future litigation, such as issues arising from offers of judgment, in which no amici are involved.[50] "The parties are interested in their case, not on the effect of their case on the law in the future."[51] That is where amicus briefs could be very helpful to the court. Tracy Raffles Gunn, an attorney with Fowler White Boggs Banker who is board-certified in Appellate Practice, points out that amicus briefs also can be helpful when they address "tangential issues that need to be raised but would disrupt the flow and emphasis of the main brief."[52]

Amicus briefs can be of particular importance in Florida district courts, especially when those courts are deciding a case of

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twice." *Id*. The same constraint does not exist when the court decides to hear a case en banc. *See e.g. State v. Famiglietti*, 2002 WL 879409 at *1 (Fla. Dist. App. 3d May 8, 2002) (en banc) (expressing "appreciation for the amicus briefs submitted by the Florida Association of Criminal Defense Lawyers and the Florida Psychological Association, at the invitation of the court"); Notice of Rehearing En Banc, *Long v. Swofford*, 805 S.2d 882 (Fla. Dist. App. 3d 2001) (inviting amicus briefs from the Academy of Florida Trial Lawyers and the Florida Defense Lawyers Association on rehearing en banc).

48. Interview, *supra* n. 30. Sections of The Florida Bar frequently have filed amicus briefs, as the Family Law Section did in *Acker v. Acker*, 2002 WL 1021361 (Fla. Dist. App. 3d May 22, 2002). *E.g. May v. Ill. Natl. Ins. Co*., 771 S.2d 1143 (Fla. 2000); *Chi. Title Ins. Co. v. Butler*, 770 S.2d 1210 (Fla. 2000); *Alexdex Corp. v. Nachon Enter.*, 641 S.2d 858 (Fla. 1994*); Rainey v. Guardianship of Mackey*, 773 S.2d 118 (Fla. Dist. App. 4th 2000); *Sasha & Sasha, Inc. v. Stardust Marine S.A*., 741 S.2d 558 (Fla. Dist. App. 4th 1999); *City of Gainesville v. Englert*, 716 S.2d 817 (Fla. Dist. App. 1st 1998).

49. Interview, *supra* n. 45. Judge Altenbernd stated that he has

> never seen a motion requesting that we invite amicus briefing. It might be a risky step by a lawyer, but if the lawyer is comfortable that a rather neutral legal organization would support his position and the lawyer cannot convince the organization to appear, I see nothing wrong with the lawyer moving the court to invite amicus briefs. For example, if the lawyer has a technical probate or tax issue, he or she might suggest that the appropriate section of The Florida Bar be invited to appear as amicus. Such a motion would need to be filed early in the case to avoid delay.

Interview, *supra* n. 30.

50. *Id*.

51. *Id*.

52. Interview with Tracy Raffles Gunn, App. Atty., Fowler White Boggs Banker (Feb. 13, 2002).

first impression. Given the Florida Supreme Court's limited jurisdiction, the district courts in Florida are often the decision-makers on important issues of Florida law. Unfortunately, as Tracy Raffles Gunn pointed out, people often

> do not get excited enough about a case to get amicus help until the district court has issued an opinion they do not like. But they cannot submit an amicus brief on jurisdiction and, if the Florida Supreme Court denies jurisdiction, the amicus's views "are never heard."[53]

Justice Pariente, a former district court judge, stressed that, if an issue is important, amicus briefs could be filed at the district-court level.[54] Those briefs will be available to the Supreme Court if the case goes up but, more importantly, they may help the district court "get it right in the first place."[55] Accordingly, it may be vital for amicus to explain the policy implications of a case at the district court level, because the case may never reach the Florida Supreme Court and the district court's decision may then constitute the law in Florida.[56]

Importantly, an amicus brief necessarily will have to be prepared in a different manner for a district court addressing the issue than for the Florida Supreme Court. As Justice Wells explained, "when cases are winnowed by the district courts, there are decisions already in place and the Supreme Court has the benefit of the conflicting views of the district courts; amici func-

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53. *Id*.

54. Interview, *supra* n. 45.

55. *Id*. On the other hand, in *Florida Department of Agriculture and Conservation Services v. Haine*, 2002 WL 1465712 at *3 n. 2 (Fla. Dist. App. 4th July 9, 2002), the Fourth District declined to allow unnamed amicus curiae to appeal in a case which it certified to the Florida Supreme Court because the issues "are of great public importance or will have a great effect on the proper administration of justice throughout the state." The court stated it "seems more appropriate" for the "motion for leave to appear as amicus . . . to be decided by the court passing on the merits." *Id*.

56. Interview, *supra* n. 45. In commenting on the United States Supreme Court's jurisdiction, Professors Kearney and Merrill make an additional point. They observe that

> most litigants in the lower courts and most groups interested in issues being litigated in the lower courts will never be able to secure a direct ruling on their issue from the Supreme Court. This situation may create great pressure for litigants and groups to try to influence the way the Court writes opinions in the cases it does decide, in order to secure broad rulings or dicta that may influence the disposition of other matters in the lower courts in a favorable manner. One obvious way to do this would be to file amicus briefs in the most directly relevant cases.

Kearney & Merrill, *supra* n. 10, at 826.

tion differently there than they would do in the district court in the first instance."[57] Consequently, amici cannot and should not simply file the same brief with the Florida Supreme Court that they filed with the district court;[58] rather, amici should tailor their briefs to address the jurisprudential policy concerns facing the court of last resort in Florida.

Unlike the United States Supreme Court,[59] the Florida Supreme Court generally does not permit amicus briefs to be filed at the jurisdictional level.[60] Justice Wells expressed the strong view that because the court's "jurisdiction is so limited, amicus briefs on that issue would not advance the court's knowledge."[61] Justice Pariente contrasted the United States Supreme Court, which takes cases on a purely discretionary basis so that understanding the policy implications can be helpful there, with the Florida Supreme Court, which has a far more limited jurisdiction.[62] When a question is certified, no jurisdictional briefs are allowed at all, even by the parties; when a party asserts that conflict exists, that is a "very strict legal issue and amicus would not help on that discrete issue."[63]

III. THE AMICUS EXPERIENCE IN THE UNITED STATES SUPREME COURT

Today, amicus briefs commonly are filed in the United States Supreme Court. A seminal University of Pennsylvania study of amicus activity in the United States Supreme Court during the fifty-year period from 1946–1995, found that the Court received

57. Interview, *supra* n. 34.

58. Fla. R. App. P. 9.120(d) (2002).

59. Amicus briefs at the petition for certiorari stage at the United States Supreme Court usually are accepted. *See e.g. Va. v. Barry Black*, 122 S. Ct. 2288 (2002) (stating that the "[m]otion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae [is] granted" and granting the petition for a writ of certiorari). Further, Stephen Shapiro stresses that amicus briefs at this stage "can help a petition for *certiorari* that might otherwise be overlooked" by emphasizing "the considerations that the Supreme Court will focus on in granting *certiorari*" such as "conflicts among the circuits, conflicts with Supreme Court decisions, the recurring nature of the legal issue, and the practical importance of the case to a substantial number of people." Shapiro, *supra* n. 26, at 347. In contrast, amicus should not oppose certiorari since "[t]hat merely highlights the importance of the case." *Id*.

60. Interview, *supra* n. 34.

61. *Id*.

62. Interview, *supra* n. 45.

63. *Id*.

531 briefs in the first decade (1946–1955) of this period, while it received 4,907 briefs in the last decade (1986–1995), an increase of more than 800%.[64] Thirty-four cases in this fifty-year period involved the filing of twenty or more amicus briefs; most of these cases "involve[d] controversial social and political issues such as abortion, affirmative action, free speech, church–state relations, and takings of property."[65] Eighty-five percent of the Court's argued cases had at least one amicus brief filed.[66] This is a significant change in the Supreme Court practice, with "cases without amicus briefs . . . [now being] nearly as rare as cases with amicus briefs were at the beginning of the century."[67]

According to the survey, "[t]he all-time record-setter in terms of amici participation is *Webster v. Reproductive Health Services*, an abortion case which drew seventy-eight briefs."[68] But the

> phenomenon of certain cases attracting extraordinarily large numbers of amicus briefs. . . is not entirely new; earlier landmark decisions such as *Brown v. Board of Education*, *Baker v. Carr*, and *Furman v. Georgia* also drew above-average numbers of amicus filings.[69]

In an effort to measure the impact of amicus briefs on the Supreme Court's decisions, the study's authors noted first that "amicus briefs are often referred to by the Justices."[70] They found "a total of 316 decisions in which one or more amicus arguments were quoted by the Court."[71] Moreover, "the rate of such cases with quoted amici jump[ed] in the most recent decade [studied] to over 15%, which is more than double the rate of the first three decades and almost double the rate of the fourth."[72] Finally, "the frequency of the Court's citation of the Solicitor General as amicus rises each decade, roughly doubling between the first decade of our study and the most recent decade."[73] Indeed, it is not

64. Kearney & Merrill, *supra* n. 10, at 752.
65. *Id.* at 755.
66. *Id.* at 753.
67. *Id.* at 744.
68. *Id.* at 755 (citing *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989)).
69. *Id.* at 754 (citing *Furman v. Ga.*, 408 U.S. 238 (1972); *Baker v. Carr*, 369 U.S. 186 (1962); *Brown*, 347 U.S. 483 (1954)).
70. *Id.* at 757.
71. *Id.* at 758.
72. *Id.*
73. *Id.* at 760.

uncommon for the Supreme Court to issue an order inviting the Solicitor General to file a brief "expressing the views of the United States."[74]

IV. THE FLORIDA SUPREME COURT AND THE FLORIDA SOLICITOR GENERAL

As in the United States Supreme Court, amicus curiae briefs are a common feature of Florida Supreme Court practice. Given the Florida Supreme Court's mandatory jurisdiction over many matters (thus making some appeals of little public interest even though important to the parties involved), compared to the United States Supreme Court's largely discretionary jurisdiction, one may expect the overall rate of amicus filings to be lower in Florida than in the High Court, but the filing rate is significant nonetheless. In 228 matters filed in the Florida Supreme Court during the calendar year 2001, one or more amicus curiae briefs were filed in forty-three cases, at a rate of just under nineteen percent.[75] The Association of Florida Trial Lawyers (AFTL) was the most frequent amicus participant, appearing twenty-one times.[76] Behind AFTL was The Florida Bar with nine amicus appearances.[77] No more than four amicus curiae briefs were filed in any one case.[78] In four cases, four amicus curiae briefs were filed.[79] And in four cases, three were filed.[80]

Intended to emulate the success of the United States Solicitor General's Office, the Office of the Solicitor General of Florida was

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74. Kearney & Merrill, *supra* n. 10, at 760 (citing *FIN Control Sys. v. Surfo Haw.*, 122 S. Ct. 1062 (2002)).

75. *See* Sup. Ct. of Fla., *Petitions and Brief on the Merits* <http://www.flcourts.org/sct/clerk/briefs/index.html> (last updated Aug. 27, 2002) (surveying briefs filed in cases numbered SC01-193 through SC01-2808, excluding matters on advisory opinions and Florida Bar disciplinary proceedings against single individuals, in which main litigants filed at least one brief each).

76. *Id*.

77. *Id.*

78. *Id*.

79. *Id*. Those cases were *Mazourek v. Wal-Mart Stores, Incorporated*, No. SC01-663; *North Florida Women's Health & Counseling Services v. State*, No. SC01-843; *Wal-Mart Stores, Incorporated v. Todora*, No. SC01-1130; *Warner v. City of Boca Raton*, No. SC01-2206.

80. Sup. Ct. of Fla., *supra* n. 75. Three amicus curiae briefs were filed in the following cases: *Florida Senate v. Florida Public Employees Council 79, AFSCME*, No. SC01-765; *Villazon v. Prudential Health Care*, No. SC01-1397; *Woodham v. Blue Cross & Blue Shield*, No. SC01-2160; *McIntyre v. Sun 'N Lake of Sebring Improvement District*, No. SC01-2849.

created in 1999 by Attorney General Robert Butterworth in conjunction with Florida State University (FSU) President Talbolt "Sandy" D'Alemberte.[81] The Solicitor General also holds the Richard W. Ervin Eminent Scholar Chair in Law at FSU.[82] Tom Warner was appointed Florida's first Solicitor General.[83]

The Office's functions and procedures are described by Solicitor General Warner in his recent article in the *Florida Bar Journal*.[84] His goal was for the Office to "become a resource that the courts will come to respect and rely on for exceptional legal work and to establish justice on behalf of the people of the State of Florida."[85] In that vein, General Warner starts his article with this quote from a United States Solicitor General:

> The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, [Solicitor General] Frederick William Lehman, that the Government wins its points when justice is done in its courts.[86]

In an interview with the Authors, General Warner made the same point about the Florida Office, emphasizing that

> [s]ome appeals involve issues that reach far beyond the parties to the case. When individual rights and personal freedoms are at stake, the courts should hear from the people, not just the litigants. Part of the Solicitor General's roles is to speak for the people of Florida in civil cases involving constitutional issues and to ensure that the courts make these important decisions with the benefit of the public's voice. [87]

The Office "has the authority to decide whether the state will file or join an amicus brief in state or federal court, primarily in cases pending in the Florida Supreme Court and United States

81. Tom Warner, *Office of the Florida Solicitor General: The Greatest Job for a Lawyer in Florida*, 75 Fla. B.J. 32, 32 (July 2001).

82. *Id*.

83. *Id*.

84. *Id*.

85. *Id*.

86. *Id*. (citing *Brady v. Md.*, 373 U.S. 83, 87 n. 2 (1963) (quoting former Solicitor General and then-judge Simon E. Sobeloff)).

87. Interview with Tom Warner, Solicitor Gen. of Fla. (Feb. 22, 2002).

Supreme Court."[88] Requests for amicus support from other states are channeled through the National Association of Attorneys General.[89] The Solicitor General has determined that the State of Florida should be more selective in joining other states' amicus briefs and more active in filing briefs when the State has a direct interest.[90] The following represents amicus review activity:

FY1999/2000: (Represents seven months of activity for newly established office)

	U.S. Sup. Ct.	Other Courts	Total
Amicus requests reviewed:	55	15	70
Joined (sign-on other state's brief):	17	4	21
Filed brief:	1	0	1
Did not join:	37	11	48

FY2000/01:

	U.S. Sup. Ct.	Fla. Sup. Ct.	Other Courts	Total
Amicus requests reviewed	78	8	31	117
Joined (sign-on other state's brief):	32	0	7	39
Filed brief:	4	7	1	12
Did not join:	36	0	23	59
Pending/Under Review:	6	1	0	7

Total Cases Reviewed (FY 00/01):	117
Cases Joined on Behalf of Florida:	51
Number of cases in which Solicitor General filed a brief:	12

[Report, Tab 4].[91]

As a rough measure of the success of the Florida Solicitor General since its inception through July 2002, the Solicitor General has appeared in eleven reported cases of the Florida Supreme Court[92] and has been specifically cited in four.[93] Significantly,

88. Warner, *supra* n. 80, at 33.

89. *Id*. at 35.

90. *Id*. at 36.

91. *Report of Solicitor General* tbl. 4 (Nov. 2001) (copy on file with *Stetson Law Review*).

92. *D.F. v. Dept. of Revenue ex rel. L.F.*, 2002 WL 1206757 (Fla. June 6, 2002); *Cook v. City of Jacksonville*, ___ S.2d ___, 2002 WL 1042295 (Fla. May 23, 2002); *Schreiber v. Rowe*, 814 S.2d 396, 396–397 (Fla. 2002); *Sjuts v. State*, 800 S.2d 235, 236 (Fla. 2001); *Amendments to Fla. R. Crim. P.*, 802 S.2d 298, 299 (Fla. 2001); *Amendments to Fla. R. Crim. P.*, 797 S.2d 1213, 1214 (Fla. 2001); *Fla. Sen. v. Fla. Pub. Employees Council 79, AFSCME*, 784 S.2d 404, 405 (Fla. 2001); *Amendments to Fla. Evid. Code*, 782 S.2d 339, 339 (Fla. 2000); *Kainen v. Harris*, 769 S.2d 1029, 1030 (Fla. 2000); *Armstrong v. Harris*,

Florida's amicus brief specifically was cited by the United States Supreme Court in *Zelman v. Simmons-Harris*.[94]

V. THE RULES GOVERNING AMICUS CURIAE BRIEFS

The federal and state courts have specific rules governing the participation of amicus litigants, as opposed to the more formalized third-party practice rules.[95] The predecessor of Florida Rule of Appellate Procedure 9.370, titled "Amicus Curiae," was originally implemented in 1973 by Florida Rule of Court 3.7(k).[96] That rule subsequently was amended and until recently provided as follows:

> RULE 9.370 AMICUS CURIAE:
>
> An amicus curiae may file and serve a brief in any proceeding with written consent of all parties or by order or request of the court. A motion to file a brief as amicus curiae shall state the reason for the request and the party or interest on whose behalf the brief is to be filed. Unless stipulated by the parties or otherwise ordered by the court, an amicus curiae shall be served within the time prescribed for briefs of the party whose position is supported.[97]

The Florida Supreme Court, however, has approved another amendment to this rule, which took effect at 12:01 a.m. on January 1, 2003.[98] Specifically, the Court wrote:

> We next note that there are substantial amendments to the rule governing the filing of briefs by amici curiae, rule 9.370, and we amend the rule as proposed by the Committee. In this regard, we retain the language that appears in rule 9.370, which also appeared in the predecessor rule, that the brief may be filed only "by leave of court or by consent of all parties," provided that the brief otherwise is in compliance with the time

773 S.2d 7, 9 (Fla. 2000); *Amendments to Fla. R. Crim. P.*, 772 S.2d 532, 532 (Fla. 2000). The list includes cases in which the Solicitor General has appeared as Amicus Curiae, for the Petitioner, for the Respondent, and Responding.

93. *Cook*, 2002 WL 1042295 at *5; *Amendments to Fla. R. Crim. P.*, 797 S.2d at 1217; *Armstrong*, 773 S.2d at 11 n.7; *Amendments to Fla. R. Crim. P.*, 772 S.2d at 534.

94. 122 S. Ct. 2460, 2470 (2002).

95. *Compare* Fla. R. App. P. 9.370 *with* Fed. R. App. P. 29, 32 (2002).

96. *See* Fla. R. Ct. (1973 ed.) (noting Rule 3.7(k) titled "Amicus Curiae").

97. Fla. R. App. P. 9.370.

98. *Amendments to Fla. R. App. P.*, 2002 LEXIS 1810 (Fla. August 29, 2002).

> requirements and page limitations of the rule. We are aware that despite the alternative language of the rule, courts do exercise their own inherent authority to decide if the brief should be permitted. The comments of the Florida Home Builders Association request that we clarify whether this rule authorizes the filing of an amicus brief solely on the written consent of all parties, or whether the rule always requires leave of court. Because the Committee has advised that it did not consider this precise issue when considering the revision of the rule, and in light of the concerns brought to light by the comments filed, we request that the Committee study this matter further and make recommendations to the Court on this issue after receiving input from all of the appellate courts as to their practice and policy.[99]

Notably, the Florida Supreme Court has requested the Appellate Rules Committee to consider whether district courts have inherent power to deny leave to file an amicus brief, or whether consent of all parties deprives the district courts of such power.[100] Under the current rule, it would appear to the Authors that consented-to amicus briefs are to be accepted, as long as the rules and law are followed. Thus, the courts would have authority under the rules to strike proposed amicus briefs, even if consented to, if they do not conform with the rules or the common law. Accordingly, proposed amicus briefs that exceed the new page-limit requirement or that fail to conform to the stylistic requirements of the rules can be stricken.[101] Also, proposed amicus briefs that violate the common-law doctrine precluding amicus parties from simply rearguing one party's brief can be stricken by the courts.[102] In practical effect, this allows the courts discretion to strike consented-to amicus briefs as being nothing more than reargument of a party's position.

As to the newly approved rule, some of the noteworthy changes are: (1) requiring the amicus curiae to state the "particular issue to be addressed" and to articulate how its brief can assist the court in deciding the case,[103] (2) limiting the amicus brief to

99. *Id*. at **8–9.
100. *Id*.
101. *Id*.
102. *Id*. at *103.
103. *Id*. at **8, 102.

twenty pages,[104] and (3) permitting five additional days to serve the amicus brief on the court.[105] The new rule states as follows:

> RULE 9.370. AMICUS CURIAE
>
> (a) When Permitted. An amicus curiae may file a brief only by leave of court or by consent of all parties. A motion for leave to file must state the movant's interest, the particular issue to be addressed, and how the movant can assist the court in the disposition of the case.
>
> (b) Contents and Form. An amicus brief must comply with Rule 9.210(b) but shall omit a statement of the case and facts and may not exceed 20 pages. The cover must identify the party or parties supported and state whether the brief is filed by leave of court or by consent of all parties. An amicus brief must include a concise statement of the identity of the amicus curiae and its interest in the case.
>
> (c) Time for Filing. An amicus curiae must serve its brief no later than 5 days after the first brief of the party being supported is served. An amicus curiae that does not support either party must serve its brief no later than 5 days after the initial brief or petition is filed. A court may grant leave for later service, specifying the time within which an opposing party may respond. An amicus curiae may not file a reply brief.[106]

The federal rules governing the filing of an amicus brief differ in various respects from the Florida rule. For example, they expressly allow the United States, or a State, Territory, Commonwealth, or the District of Columbia to file an amicus brief without party consent or leave of court.[107] Although the federal rule, like the Florida rule, requires that all other amici have the consent of the parties or leave of the court,[108] unlike the Florida rule, the federal rule does not specify "written" consent.[109] But under the new rule in Florida, written consent is no longer necessary.[110] Both the Florida and federal rules require that a motion to file an amicus

104. *Id*. at *102.
105. *Id*.
106. *Id*.
107. Fed. R. App. P. 29(a).
108. *Id*. 29(a)–(b); Fla. R. App. P. 9.370.
109. Fed. R. App. P. 29(a)–(b).
110. *Amendments to Fla. R. App. P.*, 2002 LEXIS 1810 at *102.

brief articulate the reason for the request and the movant's interest.[111]

The current Florida rule requires that the amicus file its brief within the time period prescribed for the filing of briefs of the party whose position is being supported.[112] The new Florida rule sets the following filing deadlines:

> An amicus curiae must serve its brief no later than 5 days after the first brief of the party being supported is served. An amicus curiae that does not support either party must serve its brief no later than 5 days after the initial brief or petition is filed.[113]

The federal rule requires an amicus to file its brief no later than seven days after the principal brief of the party being supported is filed.[114] Under the federal rule, amicus may not file a reply brief or participate in the oral argument except by permission of the court.[115]

The United States Supreme Court has its own rule on amicus curiae briefs.[116] That rule sets forth specific guidelines for the filing of an amicus brief. For example, it states that an amicus brief that does not offer views in addition to those already presented by the parties "burdens" the Court, plainly suggesting that the Court frowns upon the filing of "me too" amicus briefs.[117] One notable part of the Supreme Court's rule is that it expressly disallows amicus participation in support of, or in opposition to, a petition for rehearing.[118]

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111. *See* Fed. R. App. P. 29(b)(2) (stating that motion for leave to file must include "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case"); *Amendments to Fla. R. of App. P.*, 2002 LEXIS 1810 at *102 ("A motion for leave to file must state the movant's interest, the particular issue to be addressed, and how the movant can assist the court in the disposition of the case.").

112. Fla. R. App. P. 9.370.

113. *Amendments to Fla. R. App. P.*, 2002 LEXIS 1810 at *102.

114. Fed. R. App. P. 29(e).

115. *Id.* 29(b)(9).

116. U.S. S. Ct. R. 37. In addition, various circuits have local rules regarding amicus briefs. The United States Court of Appeals for the Fifth Circuit, for example, specifically provides that an amicus brief must include a supplemental statement of all interested parties, must avoid repetition of facts or legal arguments contained in the main brief, and must focus on points not adequately made in the main brief. 5th Cir. R. 29.2.

117. U.S. S. Ct. R. 37(1).

118. *Cf. Tampa Elec. Co. v. Garcia*, 2000 LEXIS 1902 (Fla. Sept. 28, 2000) (granting "motion for leave to appear as amicus curiae on rehearing filed by Enron North America").

Rule 37(6) also requires amici to disclose to the Court in their brief whether the "counsel for the party authored the brief in whole or in part and shall identify every person or entity . . . who made a monetary contribution to the preparation or submission of the brief."[119] By requiring these disclosures, the court obtains information relevant to the true interests and motives of the amici; this information allows it to consider those interests when evaluating the positions and points advanced in the amicus briefs. Disclosure also prevents the regrettable practice sometimes experienced in Florida in which the parties in interest arrange to have a purportedly independent association formed ("Friends of _____") and then fund a supporting amicus brief by that association.

VI. JUDICIAL POLICIES GOVERNING AMICUS BRIEFS

In addition to the provisions of the procedural rules governing amicus briefs, Florida courts have developed certain constraints on amicus briefs. Importantly, amici may not raise issues unavailable to the parties, nor may they inject new issues not raised by the parties.[120]

Thus, in *Novartis Pharmaceuticals Corporation v. Carmoto*,[121] the court declined "to entertain the broad range of constitutional challenges to the trial court's order and Sunshine Act advanced in one of the amicus briefs filed in this court,"[122] finding those challenges to be "premature at best."[123] Similarly, the Florida Court of Appeal for the First District declined in *Michels v. Orange County Fire/Rescue*,[124] to consider issues raised by amici that were not raised by the parties and thus "were not properly before this court."[125]

At the same time,

119. U.S. S. Ct. R. 37(6).

120. *Lamz v. Geico General Ins. Co.*, 803 S.2d 593, 596 n. 3 (Fla. 2001); *Keating v. State ex rel. Ausebel*, 157 S.2d 567 (Fla. Dist. App. 1st 1963); *Turner v. Tokai*, 767 S.2d 494, 495 n.1 (Fla. Dist. App. 2d 2000); *Michels v. Orange County Fire/Rescue*, 27 Fla. L. Weekly D193 (Fla. Dist. App. 4th 2002); *Acton v. Ft. Lauderdale Hosp.*, 418 S.2d 1099, 1101 (Fla. Dist. App. 4th 1982), *approved*, 440 S.2d 1282 (Fla. 1983).

121. 798 S.2d 22 (Fla. Dist. App. 4th 2001).

122. *Id*. at 23.

123. *Id*.

124. 819 S.2d 158 (Fla. Dist. App. 1st 2002).

125. *Id*. at 159.

> [a] significant distinction is apparent as between "issues" and "theories" in support of a particular issue. [A]micus is not confined solely to arguing the parties' theories in support of a particular issue. To so confine amicus would be to place him in a position of parroting "me too" which would result in his not being able to contribute anything to the court by his participation in the cause.[126]

Although recognizing that "by the nature of things an amicus is not normally impartial,"[127] the Florida Court of Appeal for the Fourth District has held that "amicus briefs should not argue the facts in issue."[128] Rather, amicus briefs "should get right to the *additional* information which the amicus believes will assist the court."[129] On the other hand, the Florida Court of Appeal for the Fifth District has stricken from an amicus brief "all non-legal materials not part of the record below."[130] Thus, the court precluded amicus from coming forward with "additional information" to assist the court in reaching its decision, exactly what amicus is supposed to do.

In striking such information, the Authors submit that the Fifth District failed to appreciate the distinction between an amicus attempting to bolster the record evidence in the particular case by adding evidence regarding the specific dispute at issue and providing materials outside the record "only in analyzing general legal and policy issues."[131] As Mr. Shapiro explains, nonrecord facts relied on by amicus "should not relate to the facts of the particular case as between the parties, but should resemble the 'legislative' facts having 'relevance to legal reasoning and the law-making process.'"[132]

Indeed, precluding amicus from referring to any nonrecord materials would preclude amicus from ever filing a "Brandeis

126. *Keating v. State*, 157 S.2d 567, 569 (Fla. Dist. App. 1st 1963).

127. *Ciba-Geigy v. Fish Peddler, Inc.*, 683 S.2d 522, 523 (Fla. Dist. App. 4th 1996).

128. *Id*.

129. *Id*. at 524 (emphasis in original).

130. Order on Appellee's Mot. to Strike, *Betts v. ACE Cash Express, Inc.*, 827 S.2d 294 (Fla. Dist. App. 5th 2002). The State of Florida had filed an amicus brief in a so-called "payday loan" case, and had included various nonrecord materials relating to the adverse effect of this practice on the public interest. State's Response to Mot. to Strike, at ¶¶ 1–2, *Betts*, 827 S.2d 294.

131. Shapiro, *supra* n. 26, at 346.

132. *Id*. at 345 (quoting Robert Stern, *Appellate Practice in the United States* 340 (BNA 1981)).

brief,"[133] which "is a well-known technique for asking the court to take judicial notice of social facts."[134] Its "main contribution . . . [is] to make extra-legal data readily available to the court."[135]

As Judge Mary Schroeder of the United States Court of Appeals for the Ninth Circuit explained in her thoughtful article on *The Brandeis Legacy*,[136] the Supreme Court has relied on social science and empirical data in various cases, ranging from *Brown v. Board of Education*,[137] to *Roe v. Wade*,[138] to *Lee v. Weisman*.[139]

Judge Schroeder further notes that the Court has "acknowledged the role of empirical research in judicial decision making in death penalty cases."[140] She points to *Thompson v. Oklahoma*,[141] in which "Justice Stevens relied exhaustively on data very similar to that set forth in Brandeis's *Muller* brief — statutory schemes from various states, foreign death penalty laws, and learned treatises that discussed our experience with the death penalty."[142] "Interestingly, even the concurring and dissenting justices recognized the significance of those data on the outcome of the case, differing primarily in how they viewed the data."[143]

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133. This term comes from the brief that then-lawyer Louis Brandeis filed in *Muller v. Oregon*, 208 U.S. 412 (1908). In that case, the Supreme Court upheld an Oregon statute regulating the hours worked by women and, in so doing, specifically relied on the brief filed by Mr. Brandeis, stating, "[W]e take judicial cognizance of all matters of general knowledge." *Id*. at 421.

134. *McClesky v. Kemp*, 753 F.2d 877, 888 (11th Cir. 1985) (quoting *Sperlich, Social Science Evidence and the Courts: Reaching Beyond the Advisory Process*, 63 Judicature 280, 285 n. 31 (1980)).

135. *Id*.

136. Mary Murphy Schroeder, *The Brandeis Legacy*, 37 San Diego L. Rev. 711, 722 (2000).

137. *Id*. (citing *Brown*, 347 U.S. 483 (supporting its "conclusion that segregation generates a feeling of inferiority among African Americans by citing several social science publications")).

138. *Id*. (citing *Roe v. Wade*, 410 U.S. 113 (1973) (relying on medical, religious, and scholarly sources while discussing the safety of abortions at different stages of pregnancy, fetal viability, and religious and medical beliefs regarding the beginning of life)).

139. *Id*. (citing *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that religious prayers at public-school graduations, in which objecting students were induced to participate, violated the Establishment Clause, and relying on "three articles from psychological journals for the proposition that 'adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.'")).

140. *Id*.

141. 487 U.S. 815 (1988).

142. Schroeder, *supra* n. 136, at 722.

143. *Id*.

The point is, of course, a "Brandeis" brief is exactly the type of amicus brief that can be of the most help to a court. Yet too strict a limitation upon amicus's use of extra-record materials or data would preclude this useful tool. This recognition must be tempered, of course, with a demand that attorneys filing amicus briefs present unimpeachably accurate information in a professional manner, as opposing parties may have little ability to respond. After all, the brief is supposed to serve as a "friend of the court," which can be accomplished only if the information presented to the court is correct.[144]

It is not unprecedented for a Florida appellate court to go outside the trial record to find facts to support its conclusions on de novo review. The *Brim v. State*[145] saga provides just such an example. There, the Florida Supreme Court conducted a *Frye*[146] review of DNA evidence.[147] In doing so, it consulted scientific materials that were not in the trial record, observing that any procedure other than the one it employed would be impracticable:

> [Any other] standard would prohibit an appellate court from considering any scientific material that was not part of the trial record in its determination of whether there was general acceptance within the relevant scientific community.[148]

In saying this, the Court also cited observations by Chief Justice Mary Ann G. McMorrow of the Supreme Court of Illinois as to why the high court must look at such admissibility determinations with a critical eye:

> There are good reasons why the determination of general acceptance in the scientific community should not be left to the discretion of the trial court. Foremost is the fact that the general acceptance issue transcends any particular dispute. As one court put it, "[t]he question of general acceptance of a scientific

144. Indeed, amicus briefs that lack credibility actually could disserve the party they try to help by proving too much or casting doubt on the argument being advanced.

145. 695 S.2d 268 (Fla. 1997).

146. *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923). Under the rule of *Frye*, expert scientific evidence must be based on principles that "have gained general acceptance in the particular field in which it belongs." *Id.* at 1014. The Florida Supreme Court adopted the *Frye* standard in *Stokes v. State*, 548 S.2d 188, 193 (Fla. 1989). Charles W. Ehrhardt, *Florida Evidence* § 702.3, 608–609 (2002 ed., West 2002); *see* Fla. Stat. §§ 90.702, 90.704–90.705 (2001) (describing the requirements and limitations on expert testimony).

147. *Brim*, 695 S.2d at 269–270.

148. *Id.* at 274.

> technique, while referring to only one of the criteria for admissibility of expert testimony, in another sense transcends that particular inquiry, for, in attempting to establish such general acceptance for purposes of the case at hand, the proponent will also be asking the court to establish the law of the jurisdiction for future cases." Application of less than a *de novo* standard of review to an issue which transcends individual cases invariably leads to inconsistent treatment of similarly situated claims.[149]

After this opinion was issued, the Second District had occasion to issue an order in the same case.[150] In that order, Judge Altenbernd expressed concern about district courts consulting materials outside the record:

> As we explained at the beginning of this order, we have struggled for nearly a year with our authority and competence to make a *de novo* "determination" regarding the general acceptance of a very technical, complex scientific procedure within some unspecified scientific community. We do not quarrel with the need for a healthy and thorough independent review by an appellate court of a *Frye* determination made by a trial court. However, both due process and the limited technical competence of the judiciary require that this review take place with certain safeguards that we have not yet provided. Our relinquishment in this case is necessitated in significant part, not by an error on the part of the trial court, but by our decision that we cannot conduct an independent and undisclosed investigation to determine what some scientific community may or may not have decided about the calculation techniques used in determining and reporting DNA population frequencies.[151]

At the same time, the Second District acknowledged that the Florida Supreme Court might properly consider such new scientific literature:

> We note that the supreme court has rule-making authority and is the final arbiter on issues of Florida law. To the extent that a *Frye* determination establishes a new rule of evidence of gen-

149. *Id.* (citing *People v. Miller*, N.E.2d 721, 739 (Ill. 1996) (McMorrow, J., specially concurring) (internal citations omitted)).

150. *Brim v. State*, 779 S.2d 427, 435 (Fla. Dist. App. 2d 2000) (Order Relinquishing Jurisdiction).

151. *Id.*

> eral applicability, it may be that the supreme court can and should look beyond its record. The same cannot be argued for a district court. This may be a reason to consider certifying major *Frye* issues to the supreme court pursuant to Florida Rule of Appellate Procedure 9.125.[152]

Finally, the Second District stated that even it would allow the supplementation of the trial record to account for scientific developments since trial:

> Thus, when this case returns to us following the relinquishment, the parties may supplement the record with updated scientific literature, but only for the purpose of measuring levels of acceptance or disagreement within the relevant scientific community. We will then conduct a new examination of the same legal issues presented to the trial court at the *Frye* hearing, restrained only by our absence from the trial courtroom when the live testimony was presented.[153]

To the extent that these *Frye* determinations by appellate courts are based upon scientific literature, and in at least some instances based on scientific literature not argued or presented by the parties, amicus briefs from scientific organizations obviously can be beneficial and should be encouraged.[154]

In the end, appellate courts should take a contoured and reasoned approach to the use of extra-record facts in amicus briefs. There is a time and a place for extra-record facts when they are of the scientific, legislative, or social variety. On the other hand, amicus briefs should not be used to bolster the specific record evidence of one of the parties, much less to bolster with extra-record facts. The United States Court of Appeals for the First Circuit made that point in *Banerjee v. Board of Trustees of Smith College*:[155]

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152. *Id*. at 435 n. 20.

153. *Id*. at 436.

154. It has been suggested that special disclosure requirements may be necessary to deter amici from submitting biased social-science data to the court. *See* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Service: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91, 157–158 (1993). Of course, submitting slanted data is not confined to the social sciences, nor is it confined to amici. To the contrary, amici may be able to help the court in recognizing that data or views relied upon by a party are not complete or sound.

155. 648 F.2d 61 (1st Cir. 1981).

> At the same time we remark that the prime, if not sole, purpose of an amicus curiae brief is what its name implies, namely, to assist the court on matters of law. While, presumably, an amicus' position on the legal issues coincides with one of the parties, this does not mean that it is to engage in assisting that party with its evidentiary claims. After properly arguing the sufficiency of defendant's articulation, over half of the EEOC's 25 page brief is directed to discussing the facts favorable to plaintiff, and much of the balance simply repeats the leading Supreme Court cases and our own opinions with which we are thoroughly familiar. Regardless of whether filed with the consent of the parties, the first was improper; the second unnecessary.[156]

A particularly problematic use of extra-record facts would be in the participation of private amicus interests in criminal cases. There, the introduction of extra-record facts by a private party could raise significant due-process concerns.[157] In this respect, it is notable that the Florida rule does not distinguish between civil and criminal cases.[158] Although our research indicates that most amicus briefs filed in Florida criminal cases are filed in support of a defense position, it is not inconceivable to imagine victims' rights groups filing amicus briefs supporting the prosecution. If such amicus briefs referenced nonrecord evidence, we believe that due-process concerns would be implicated. If and when this ever becomes an issue, Florida may have to revise its rule to reflect the different nature of criminal appeals.

VII. THE ROLE OF AMICUS BRIEFS IN FLORIDA COURTS AND THE COURTS' VIEW OF THEM

Amicus briefs are supposed to assist the court in resolving cases of general public interest or aid in resolving difficult issues that have an impact beyond the parties to the litigation.[159] They

156. *Id.* at 65 n. 9 (citing *New England Football Club, Inc. v. U. of Colo.*, 592 F.2d 1196, 1198 n. 3 (1st Cir. 1979)).

157. *See generally Stumbo v. Seabold*, 704 F.2d 910, 911–912 (6th Cir. 1983) (granting a writ of habeas corpus for depriving defendant of due process when the private prosecutor referenced facts and arguments to the jury that were not supported by record evidence).

158. Fla. R. App. P. 9.370.

159. *Ciba-Geigy Ltd.*, 683 S.2d at 523.

"should not be used to simply give one side more exposure than the rules contemplate."[160]

The Florida Court of Appeal for the Third District was even more aggressive in criticizing amicus briefs when it denied altogether a motion for leave to file an amicus brief in *Rathkamp v. Department of Community Affairs*.[161] Chief Judge Alan R. Schwartz based the Court's unanimous decision on the principles stated in Chief Judge Posner's opinion in *Ryan v. Commodities Trading Commission*[162] and added that the Third District "fully endorse[s] and adopt[s]" these principles.[163]

In *Ryan*, Chief Judge Posner declared, "After 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions [to appear as amici] in a more careful, indeed a fish-eyed, fashion."[164] Chief Judge Posner went on to acknowledge that American courts have moved beyond the original concept of amicus as a "friend of the court, not friend of a party," and "an adversary role of an amicus curiae has become accepted."[165] He explained that, nonetheless, an amicus brief should be accepted only

> when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.[166]

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160. *Id.* (striking amicus brief that "appears to be nothing more than an attempt to present a fact specific argument of the same type as is contained in the appellants' 50-page brief"); *see Sumter Citizens Against v. Dept. of Community Affairs*, 813 S.2d 299 (Fla. Dist. App. 5th 2002) (striking amicus, citing *Ciba-Geigy*, in which opposing party argued amicus brief set forth essentially "same factual arguments" as appellants' briefs and was "being filed simply to give additional exposure to Appellants' argument on standing by expanding the length of Appellants' brief").

161. 730 S.2d 866 (Fla. Dist. App. 3d 1999).

162. 125 F.3d 1062 (7th Cir. 1997).

163. *Rathkamp*, 730 S.2d at 866.

164. *Ryan*, 125 F.3d at 1063.

165. *Id*. (citing *U.S. v. Mich.*, 940 F.2d 143, 164–165 (6th Cir. 1991)).

166. *Id*. (citing *Miller-Wohl Co. v. Commr. of Lab. & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) (per curiam)).

Emphasizing that courts are helped "by being pointed to considerations germane to our decision of the appeal that the parties for one reason or another have not brought to our attention,"[167] Chief Judge Posner declared that the amicus briefs filed in the Seventh Circuit "rarely do that."[168] He concluded by stating that

> [i]n an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal.[169]

Despite Chief Judge Schwartz's enthusiastic adoption of Chief Judge Posner's dim view of the usefulness of amicus briefs, both the Florida Supreme Court and Florida district courts generally allow amicus briefs to be filed without the rigorous examination urged by Chief Judge Posner. Notably, no other Florida court has cited either Chief Judge Posner's decision in *Ryan* or Chief Judge Schwartz's opinion in *Rathkamp*. And, despite Chief Judge Schwartz's observation that amicus briefs "rarely" help that court, Florida courts — including the Third District —often have relied on amicus briefs in reaching their decisions. For example, in *Miller v. State*,[170] the Third District observed that it "had the benefit of extensive and able briefs on this issue from both parties and from amici curiae American Civil Liberties Union of Florida and the Florida Public Defenders Association; we congratulate all counsel on the professional excellence of their briefs and oral arguments before this court."[171]

Indeed, Florida courts on occasion have reached out themselves to invite amicus participation. The Third District itself, on rehearing en banc, acted on its own motion to invite the Academy of Florida Trial Lawyers and the Florida Defense Lawyers Association to file amicus briefs "concerning the issue of the standards of decision making below and of review in cases where it is al-

167. *Id*. at 1064.
168. *Id*.
169. *Id*.
170. 651 S.2d 138 (Fla. Dist. App. 3d 1995).
171. *Id*. at 139.

leged that a party has been guilty of fraudulent conduct during the course of litigation."[172]

A. Florida Cases in Which Amici Have Influenced the Outcome

R.M.P. v. Jones[173] provides an excellent example of the Florida Supreme Court relying on an amicus brief in reaching its decision. The petitioner, a juvenile, petitioned for a writ of habeas corpus after being sentenced to secure detention for contempt based on her violations of conditions set by the juvenile court.[174] The petitioner argued on appeal that, under the applicable Florida statute, the juvenile court could not place conditions of behavior on dependent children.[175] Remarkably, the respondent, the Superintendent of the Duval Regional Detention Center, agreed.[176] This left the Florida Attorney General, an amicus, as the sole voice arguing to uphold the juvenile court's order, and the Court accepted the Attorney General's interpretation of the statute.[177]

In *Askew v. Sonson*,[178] the Florida Supreme Court requested amici's input, received the requested input, and then accepted the amici's position by not deciding the broader issue as to which the court had requested briefs.[179] The question initially briefed was whether Marketable Record Title Act (MRTA), passed by the Florida Legislature in 1975, applied to lands designated for school purposes under an 1845 Act of Congress granting lands to the State of Florida.[180] The Court subsequently requested briefs on the broader issue whether the MRTA could be applied to state-owned lands in general.[181] The court then received numerous briefs from

172. Notice of Rehearing En Banc, *Long*, 805 S.2d 882.; *see Famiglietti*, 2002 WL 879409 at *1 (inviting amicus briefs from the Florida Association of Criminal Defense Lawyers and the Florida Psychological Association on question whether a defendant in a criminal case can invade the victim's privileged communications with her psychotherapist if the defendant can establish a reasonable probability that the privileged matters contain material information necessary to his defense).

173. 419 S.2d 618 (Fla. 1982).

174. *Id*. at 619.

175. *Id*.

176. *Id*.

177. *Id*.

178. 409 S.2d 7 (Fla. 1981).

179. *Id*. at 8.

180. *Id*.

181. *Id*.

amici who urged the court to reserve ruling until such questions could be presented in the context of a proper controversy.[182] The court agreed and confined its holding to lands designated for school purposes under Congress's 1845 Act.[183]

In *United Auto Insurance Company v. Rodriguez*,[184] the Florida Supreme Court reversed the district court's holding that the Personal Injury Protection statute required an insurer to obtain, within thirty days of a claim, a "medical report" providing "reasonable proof" that it is not responsible for payment.[185] The court noted that amici had pointed out that "this requirement of a medical report is not mentioned anywhere in section 627.736(4) and they contend it is erroneous. Amici are correct."[186]

Florida district courts likewise have relied on amicus briefs in rendering their decisions. For instance, in *Renee v. State, Agency for Health Care Administration*,[187] the plaintiffs challenged rules denying Medicare payments for medically necessary abortions.[188] In upholding the statute, the court quoted an amicus brief filed on behalf of certain Florida legislators: "[T]he existence of a constitutional right to engage in certain conduct does not carry with it an entitlement to sufficient state funds to enable one to exercise that right."[189] Another example is *Jacksonville Port Authority v. Alamo Rent-A-Car, Incorporated*,[190] in which a car-rental company alleged that a proposed six-percent charge by Jacksonville Port Authority was an unauthorized tax.[191] The district court reversed the trial court and held that the charge was an authorized user fee, not a tax.[192] Further, the court cited the City of Tallahassee's amicus in support of the proposition that, even if the charge were not authorized by the Port Authority's charter, it still would not follow a fortiori that the fee was a unlawful tax.[193]

182. *Id*.
183. *Id*.
184. 808 S.2d 82 (Fla. 2001).
185. *Id*. at 87.
186. *Id*.
187. 756 S.2d 218 (Fla. Dist. App. 1st 2000).
188. *Id*. at 219.
189. *Id*. at 222 (quoting the amicus brief filed on behalf of members of the Florida Legislature).
190. 600 S.2d 1159 (Fla. Dist. App. 1st 1992).
191. *Id*.
192. *Id*. at 1162.
193. *Id*.

B. Cases in Which a Court Has Expressed Special Interest in the Arguments of Amici

Even in cases in which the amici do not appear to have influenced the court's decision directly, courts often show interest in what the amici have to say. For example, in another case involving the court's authority over dependent children, the circuit court, at the request of the Department of Children and Family Services, had committed a dependent child to a locked mental-health treatment before holding a hearing.[194] As in *R.M.P. v. Jones*,[195] the child petitioned for habeas corpus.[196] Numerous parties filed amicus briefs.[197] The Florida Supreme Court specifically rejected points raised by two amici, upheld the procedure followed by the circuit court, and affirmed the district court's denial of habeas.[198] In addition, however, the Court ordered the Juvenile Court Rules Committee to propose procedures to be followed by the dependency court in subsequent proceedings.[199] The amicus brief filed by the Guardian ad Litem Program clearly influenced the court, because the court specifically instructed the Juvenile Court Rules Committee to look at the rules proposed in that amicus brief.[200]

Because of its subject matter, *Krischer v. McIver*[201] attracted a plethora of amicus briefs, some of which the Florida Supreme Court specifically referred to in its opinion.[202] The appellees in that case sought declaratory judgment that the Florida statute prohibiting physician-assisted suicide was unconstitutional.[203] The Court upheld the statute's constitutionality.[204] In addressing the controversial issue of physician-assisted suicide, the Court remarked that persons with serious disabilities have a "vital interest" in the subject and then pointed to the amicus brief filed by the Advocacy Center for Persons with Disabilities, Incorporated, a

194. *M.W. v. Davis*, 756 S.2d 90, 95 (Fla. 2000).
195. 419 S.2d 618.
196. *Davis*, 756 S.2d at 95.
197. *Id*. at 91.
198. *Id*. at 93 n. 5, 107, 109.
199. *Id*. at 109.
200. *Id*.
201. 697 S.2d 97 (Fla. 1997).
202. *Id*. at 98–99.
203. *Id*. at 99 (citing Fla. Stat. § 782.08 (1995)).
204. *Id*. at 104.

nonprofit corporation created by the Governor's executive order implementing federal legislation.[205] The quoted section of the amicus brief argued that acknowledging a right for doctors and others to assist in a patient's suicide would amount to discrimination based on a disability.[206] As the Court explained, the Advocacy Center and other amici provided evidence that persons with serious disabilities "strongly oppose" physician-assisted suicide.[207]

In addition to relying on the position espoused by the Advocacy Center, the Court also noted that "[w]hile not all healthcare providers agree on the issue, the leading healthcare organizations are unanimous in their opposition to legalizing assisted suicide."[208] Citing the American Medical Association's (AMA) support for "the ethical ban on physician-assisted suicide," the Court stressed that "[t]he same position is endorsed by the Florida Medical Association, the Florida Society of Internal Medicine, the Florida Society of Thoracic and Cardiovascular Surgeons, the Florida Osteopathic Medical Association, the Florida Hospices, Inc., and the Florida Nurses Association."[209] All of these Florida healthcare organizations, together with the AMA, joined in a single amicus brief advancing that position.[210] In the Court's view, "Who would have more knowledge of the dangers of legalizing assisted suicide than those intimately charged with maintaining the patient's well-being?"[211]

In *Saenz v. Alexander*,[212] a civil rape case, the victim–respondent sought to obtain the assailant–petitioner's psychotherapists' records and depose the psychotherapist.[213] The petitioner previously had to agree to disclose his medical records, including psychotherapist reports, to his probation officer under a "Deferred Prosecution Agreement."[214] The district court sought to resolve whether this release waived the psychotherapist–patient privilege.[215] The petitioner argued that answering the question in

205. *Id*. at 101–102.
206. *Id*.
207. *Id*. at 102.
208. *Id*. at 103.
209. *Id*. at 104.
210. *Id*.
211. *Id*.
212. 584 S.2d 1061 (Fla. Dist. App. 1st 1991).
213. *Id*. at 1062.
214. *Id*.
215. *Id*.

the affirmative would undermine the State's deferred prosecution program.[216]

In response, the Court requested an amicus brief from the State.[217] The State, in its amicus filed by the Attorney General, disagreed with the petitioner, explaining, "It is not the goal of deferred prosecution programs to protect the accused from legal responsibility for his conduct."[218] The Court accepted the respondent's and amicus's position, denied the petition for certiorari, and allowed the discovery.[219]

C. General Observations on the Role of Amici in Influencing Outcomes

The point raised in an amicus brief need not be particularly complex or innovative for it to influence a court. For instance, in *Buffy v. Brooker*,[220] the district court cited the Academy of Florida Trial Lawyers' amicus brief, which, in turn, quoted from *American Heritage Desk Dictionary* and *Black's Law Dictionary* for the purpose of interpreting language used in a statute.[221]

Sometimes the court seems influenced simply by the appearance of amici in a case. The Florida Court of Appeals for the Fourth District once observed, "[t]hat this is not a run-of-the-mill case is shown by the fact that the National Rifle Association (NRA) has submitted an amicus brief."[222] In *Alexander v. State*,[223] the accused sought to have concealed-weapons charges dismissed on the ground he carried his gun in a "zippered gun case" as permitted by statute. The trial judge had looked at pictures of the accused's pouch and ruled that the pouch was not a "zippered gun case."[224] The district court, citing the NRA's amicus in support of the proposition that the pouch might be a "zippered gun case," held that the trial judge should not have looked at pictures but should simply have determined, based on the motions, that there

216. *Id*. at 1063 n. 3.
217. *Id*.
218. *Id*.
219. *Id*. at 1064.
220. 614 S.2d 539 (Fla. Dist. App. 1st 1993).
221. *Id*. at 545.
222. *Alexander v. State*, 450 S.2d 1212, 1213 (Fla. Dist. App. 4th 1984).
223. 450 S.2d 1215, 1215.
224. *Id*.

remained a dispute of material fact to be resolved by the trier of fact.[225]

The district court specifically noted in *State v. Palmer*[226] that it agreed

> with the argument of the state and the Florida Bar, appearing as *amicus curiae*, that, because Article V, section 15, of the Florida Constitution does not preclude the legislature from criminalizing the unlicensed practice of law by a disbarred attorney, section 454.31 is not unconstitutional.[227]

In its opinion, the court repeatedly referred to the argument of the Bar in accepting the state's position in the case.[228]

Interestingly, even in cases in which amicus briefs do not directly appear to aid the court in reaching decisions, Florida courts nevertheless sometimes feel inclined to note them. For instance, in *Weiand v. State*,[229] the Florida Supreme Court was careful to point out that it had registered the amicus Center Against Spouse Abuse's objection to the term "battered woman's syndrome," but then nonetheless proceeded to use the term in discussing the case.[230] Similarly, the First District specifically noted, without comment, the argument of amicus regarding the effect of the insurance policy language challenged in *Kaklamanos v. Allstate Insurance Company*.[231]

Likewise, courts often acknowledge the participation and assistance of amici, even when the decision in no other way shows any impact by amici on the court's analysis and decision making.[232]

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225. *Id*.

226. 791 S.2d 1181 (Fla. Dist. App. 1st 2001).

227. *Id*. at 1182.

228. *Id*. at 1185–1186.

229. 732 S.2d 1044 (Fla. 1999).

230. *Id*. at 1048 n. 3.

231. 796 S.2d 555, 558 (Fla. Dist. App. 1st 2001); *see Malicki v. Doe*, 814 S.2d 347, 360 (Fla. 2002) (rejecting position of amicus in First Amendment church case); *Orange County v. Bellsouth Telecomm., Inc.*, 812 S.2d 475, 477 n. 3 (Fla. Dist. App. 5th 2002) (utilizing amicus brief filed in trial court in appellate court's dissent).

232. *See e.g. Mazourek v. Wal-Mart Stores, Inc.*, 831 S.2d 85, 88 (Fla. 2002) (noting that the plaintiff's "position is supported by numerous amicus filings by other Florida property appraisers, the property appraiser's association, the Association of Counties, Inc., and the association of County Attorneys, Inc. An amicus brief in favor of Wal-Mart was filed by the Florida Chamber of Commerce, Inc."); *Agency of Health Care Admin. v. Associated Indus., Inc.*, 678 S.2d 1239, 1246 (Fla. 1999) ("Numerous amici have been filed."); *Evergreen the*

In other cases, the court has directly addressed and rejected the concerns raised by amicus. In *Pinecrest Lakes, Incorporated v. Shidel*,[233] the court required the complete demolition and removal of newly constructed apartments when the development was inconsistent with the County's comprehensive plan.[234] In rejecting the argument that the equities augured against such relief, the court declared that the statute at issue would be rendered "meaningless and ineffectual" if developers could build in violation of a growth-management plan "and then escape compliance by making the cost of correction too high."[235] The court went on to conclude that "[a] clear rule is far more likely to erase the kind of legal unpredictability lamented by developer and amici."[236]

The Florida Supreme Court similarly addressed the concern raised by amici in *The Florida Bar v. Ray*.[237] Amici argued that the referee's recommendations would "severely limit" lawyers' ability to criticize the judiciary, but the court did not agree:

> Our resolution of this case does not limit an attorney's legitimate criticism of judicial officers; we simply hold that an attorney must follow the Rules of Professional Conduct when doing so.[238]

In *Sinclair v. Sinclair*,[239] Judge Stevan T. Northcutt wrote a specially concurring opinion noting that "[i]n their briefs, Ms. Sinclair and amicus curiae expressed concern that the circuit court's [custody] decision reflected disapproval of her same sex relationship."[240] Judge Northcutt stated that the court had "carefully explored this possibility, and our review of the record satisfied us that such was not the case," and he went on to explain why.[241]

Tree Treasures of Charlotte County, Inc. v. Charlotte County Bd. of County Commrs., 27 Fla. L. Wkly. D207 (Fla. Dist. App. 2d 2002) (noting the amici who filed in support of the petitioner's opposition to project that called for removal of twenty-seven heritage trees); *Miller*, 651 S.2d at 139 ("The court has since had the benefit of extensive and able briefs on this issue from both parties and from amici curiae. . . .").

233. 795 S.2d 191 (Fla. Dist. App. 4th 2001).
234. *Id*. at 209.
235. *Id*. at 208.
236. *Id*. at 209.
237. 797 S.2d 556 (Fla. 2001).
238. *Id*. at 560.
239. 804 S.2d 589 (Fla. Dist. App. 2d 2002).
240. *Id*. at 594.
241. *Id*.

In some cases there is no mention of the amicus brief, but it is possible that the brief nonetheless influenced the court in deciding the case. Amici also may have played a part in persuading a district court to certify the question to the Florida Supreme Court.[242] It bears noting, however, that the filing of an amicus brief in a case does not always help the party relying on them. The Fourth District has used a party's amicus to undercut the party's own argument: "[Appellant school board's] attack on the lack of definition for certain terms . . . appears to be hypercritical and disingenuous. The amicus of appellant, Palm Beach County, seems to have no problem understanding the statutory terms."[243] Moreover, the filing of an amicus brief in one case was actually used against the amicus when they were parties in another case.[244] In *Florida Department of Revenue v. Leon*,[245] the Third District specifically rejected the plaintiffs' position, noting, among other things, that they had filed an amicus brief in a case before the Florida Supreme Court "in which they advanced the same arguments they are now urging upon us for affirmance"[246] and the Supreme Court "evidently rejected this argument when it decided to enforce [a particular statute]."[247]

D. The Courts' Reliance on Amici Submitted in Separate Cases

Occasionally, amicus briefs in one case are cited by the court in another case. For example, a Florida Supreme Court Justice recently cited an amicus submitted in another case to support her dissent.[248] Justice Pariente referred to and quoted from the amicus submitted by 1,000 Friends of Florida, Inc. and the Florida Chapter of the American Planning Association in the case *Minnaugh v. County Commission*.[249] Interestingly, the *Minnaugh* decision, with

242. *See Am. Home Assurance Co. v. Plaza Materials Corp.*, 2002 WL 940144 at *9 (Fla. Dist. App. 2d May 10, 2002) (holding contrary to position urged by amicus The Surety Association of America but certifying question).

243. *Loxahatchee River Envtl. Control Dist. v. School Bd.*, 496 S.2d 930, 936 (Fla. Dist. App. 4th 1986).

244. *Fla. Dept. of Rev. v. Leon*, 2002 LEXIS 8555 at *10 (Fla. Dist. App. 3d June 19, 2002).

245. *Id*.

246. *Id*.

247. *Id*.

248. *Broward County v. G.B.V. Intl., Ltd.*, 787 S.2d 835, 850 (Fla. 2001) (Pariente, J., dissenting).

249. *Id*. (citing *Minnaugh v. County Comm.*, 783 S.2d 1054 (Fla. 2001)).

which Justice Pariente concurred, never referenced the amicus brief.[250]

Amicus briefs submitted in other cases do not always provide strong authority. The First District heard an appeal in a case in which a claimant for disability benefits had cited an amicus brief filed by the State of Florida, Division of Retirement, in another case,[251] and the Judge of Compensation Claims decided the case using language from the amicus brief.[252] Although the *Pascual* court never elaborated, it appears that the claimant's law firm had submitted a separate amicus in the *Pickard* case.[253] As in *G.B.V. International, Pickard* itself never addressed the issue raised by the amicus.[254] The First District declared that the Judge of Compensation claims had acted without "statutory or decisional" authority.[255] Compounding its concerns about the authority of the amicus brief, the First District also expressed doubts as to whether the amicus was even relevant, explaining that the Judge of Compensation Claims had acted

> [w]ithout relying on any statutory or decisional authority, but merely quoting from language from the Division's amicus curiae brief filed in *Pickard* concerning the possibility of double taxation in certain instances — instances which the record does not indicate are present in the case at bar.[256]

VIII. CONCLUSION

In Florida, the rule on amicus briefs should change again. The Authors submit, for instance, that to the extent a jurisdictional petition in the Florida Supreme Court contains an appeal to the Court's discretion to take a given case because it is of great public importance, amicus participation could be very valuable in highlighting for the Court that people or organizations in the State other than the litigants themselves view the case as one requiring a decision by the Supreme Court. An amicus party may

250. *Minnaugh*, 783 S.2d at 1054.
251. *HRS Dist II v. Pickard*, 778 S.2d 299 (Fla. Dist. App. 1st 1999).
252. *HRS v. Pascual*, 785 S.2d 509, 509 (Fla. Dist. App. 1st 2001).
253. *Id.*; *Pickard*, 778 S.2d at 229.
254. *Pascual*, 788 S.2d at 511 n. 2.
255. *Id.* at 511.
256. *Id.*

be able to articulate a case's public policy implications in a way that the main litigants may not. Without the input of amicus, important cases could be turned aside.

Accordingly, a new rule should be considered that would allow potential amici to submit, at the jurisdictional stage, a one-page notice of intent to file an amicus brief if jurisdiction is accepted, explaining the importance of the case to an amicus party. Through such notice, the Court would at least be aware that amicus participation would be available if jurisdiction is granted. This would not only alert the Court to the importance of the case beyond the actual litigants, it could also serve to give the Court comfort that the case would be thoroughly briefed if it exercises its discretion to review the case. In the end, such a procedure would not, we think, pose an additional burden to the Court.

The position of the Fifth District Court of Appeal, striking from amicus briefs all factual material not part of the record on appeal, should be overridden by a rule change delineating that amicus is precluded from submitting only extra-record facts of the particular case. Often a judge's best "friend" in achieving a just result is the broader societal perspective, supported by relevant facts outside the record.

Moreover, the rule should be changed to require greater disclosures regarding both who funded and who wrote the amicus brief. The disclosure rule of the United States Supreme Court provides a good starting point for a new Florida rule.

Effective amicus curiae briefs bring something new to the court's attention. Judges generally will welcome briefs that present an important perspective or legal argument that otherwise might be overlooked by the main litigants, and an extraordinary amicus brief can make the crucial difference. Conversely, "me too" briefs, briefs that are too one-sided, or briefs that belabor the positions of parties whose positions are already well represented, are of no value to judges and will be disregarded. Potential amici should carefully consider filing briefs in the district courts of appeal in important cases because they may not get another chance to be heard on the practical and policy implications of the case, given the Florida Supreme Court's limited jurisdiction.