The *Court's* Friends

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The practice of inviting and allowing amici curiae — so-called friends of the court — to submit briefs opining and providing expertise for the court's consideration is time-honored.[1] Unlike many of the Latin phrases that pepper the Anglo-American legal vocabulary, the history of the amicus curiae actually does arise in Roman law, from the 14th century. "[T]he amicus curiae was not a party to the litigation, but served as an impartial assistant to the judiciary, providing advice and information to a mistaken or doubtful court."[2] As with any adopted practice, it has become its own entity in our legal system. And now, the mechanism of the amicus curiae gives voice to third-party interests potentially affected by ongoing litigation.[3] The nature and contours of the amicus curiae mechanism continue to evolve; regardless, it has become a firmly ensconced institution in our practice of law.

Of course, the practice is not without its detractors. Many claim that amici curiae often submit briefs produced from no particularized expertise; rather, the amici curiae are just seemingly sophisticated parties who commission lawyers to produce briefs from whole cloth, with little input from the actual amici curiae.[4] Others complain that amici curiae effectively coordinate with

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1 Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 Am. U. L. Rev. 1243, 1243 (1992) (providing an excellent history of the amicus curiae mechanism).

2 *Id.* at 1244.

3 *Id.*

4 *See* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757, 1763 (2014) (questioning the reliability of amicus briefs); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 Harv. L. Rev. 31, 48 (2005) (observing that amicus briefs are just "advocacy documents").

their aligned party so that the amicus briefs are simply a way to sidestep the party's page limits.[5] Some worry that amici curiae unnecessarily increase litigation costs.[6] And still others are concerned that our amicus curiae system allows for the inappropriate circumvention of standing requirements, both constitutional and prudential.[7]

In the wake of such complaints, courts sometimes refer to amici curiae as being attached to the parties beyond just their legal positions and assertions. In other words, courts and judges sometimes use language suggesting that the amici curiae are *the party's* friends rather than the court's friends. Consider some examples.

In *Evenwel v. Abbott*,[8] voters challenged Texas's state senate map, claiming that it had been impermissibly drawn on the basis of total population instead of voter-eligible population.[9] The Supreme Court, in an opinion by Justice Ginsburg, rejected this argument, holding that total population was an appropriate basis on which to draw a voter map.[10] In so doing, the Court considered and rejected the appellant voters' argument that the constitutional history of legislative districting applies to apportionment between states and not within states.[11] In describing this argument, the Court wrote, "The Framers selected total population for the former, appellants and *their amici* argue, because of federalism

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5 Jonathan Alger & Marvin Krislov, *You've Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J.C. & U.L. 503, 503 (2004) (quoting Judge Richard Posner as stating that amicus briefs "increase litigation costs, evade page limitations, and promote 'interest group' politics in the judicial process").

6 *Id.* (quoting Judge Richard Posner).

7 Lowman, 41 Am. U. L. Rev. at 1281.

8 136 S. Ct. 1120 (2016).

9 *Id.* at 1123.

10 *Id.* at 1132–33.

11 *Id.* at 1129.

concerns inapposite to intrastate districting."[12] The possessive pronoun *their* is fleeting yet noteworthy.

Similar language appeared in the Fifth Circuit's recent opinion in *Alvarez v. City of Brownsville*,[13] which concerned the aftermath of a prisoner's wrongful conviction for assaulting a police officer. After Alvarez's conviction was overturned, he sued the City of Brownsville for § 1983 violations, principally relating to the prosecution's *Brady*-disclosure violations.[14] He won a $2.3 million judgment at trial, but a Fifth Circuit panel reversed, holding that he'd waived his § 1983 claim by pleading guilty.[15] The case went en banc, and the Fifth Circuit again overturned the verdict, though on other grounds.[16] Writing in concurrence, Judge James C. Ho addressed an alternative ground for overturning the verdict: that *Brady* does not apply to the plea-bargaining context.[17] In so doing, Judge Ho wrote:

> If the constitutional theory [that *Brady* applies to plea-bargaining] urged by George Alvarez and *his amici* had been an open question in this circuit, the district court could have attempted to justify its judgment on either the text or original understanding of the Constitution or on a faithful application of analogous Supreme Court or circuit precedent. But that is not this case.[18]

Again, we see a judge-penned pronoun suggesting a party's "possession" of aligned amici.

Still more examples are seen in *Levy v. Senate of Pennsylvania*,[19] in which the Pennsylvania Supreme Court considered the

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[12] *Id.* (emphasis added).

[13] 904 F.3d 382 (5th Cir. 2018).

[14] *Id.* at 385.

[15] *Id.* at 388–89.

[16] *Id.* at 390.

[17] *Id.* at 397 (Ho, J., concurring).

[18] *Id.* (emphasis added).

[19] 65 A.3d 361 (Pa. 2013).

relationship between the attorney-client privilege and Pennsylvania's Right-to-Know Law. The case involved a journalist's request for documents concerning the legal representation of Senate Democratic Caucus employees.[20] While addressing a number of arguments raised by the parties and supporting amici curiae, the court referred to "the Senate and *its amici*" and "Levy and *his amici*."[21]

It is unclear whether these opinions intended to convey anything beyond the fact that the amici curiae in question supported the legal position of the parties to which they were grammatically linked.[22] Regardless of the intention, these language choices could have the actual effect of suggesting that amici curiae have a stronger, extralegal relationship with parties. That, in turn, may operate as an ad hominem against the amici curiae. Indeed, to my eye, this close linguistic linking of amici and parties conveys the sense that the hypothesized "friendship" with the parties has some deeper significance, such that the amici's positions are understood to arise purely as a result of this friendship rather than the amici's independent wish to offer special expertise. This may denigrate the value of amici's views in future cases, suggesting, among other things, a lack of independence in those views.

But of course, more often than not the causal relationship is the other way around: the parties are "friends," for purposes of the case, because they have commonality of purpose — because they agree on some substantial aspect of the case. It could be that this is the generally understood meaning behind the courts' use of a possessive pronoun in this context. But even if everyone agrees with this generally understood meaning, there is still a problem: to lump together every person or entity who agrees with a party's

[20] *Id.* at 363.

[21] *Id.* at 382 (emphasis added).

[22] Indeed, my research reveals that the Pennsylvania Supreme Court uses the locution frequently, without any seeming judgment of the amici curiae.

position is to undercut one of the main purposes of the amicus brief. At their best, amicus briefs allow courts to hear a diversity of voices — voices uniquely positioned to explain the impact of a case's potential dispositions and how that impact should weigh in the court's decision. That is, a case ripe for amicus input is of such a nature that it may have reverberations beyond the parties, and so, the theory goes, the court wants to hear those other perspectives. Thus, labeling all who might agree with a party as *the party's* friends minimizes amici's potential contributions to a court's analysis and the value of hearing from sources with different perspectives.[23] And in that way, a court's seemingly offhand use of a possessive pronoun to link amici with a party has a dismissive and perhaps self-defeating quality.

Of course, there may be situations in which the possessive amici language is factually justified. Perhaps the briefing reveals that the amici are simply stand-ins for the party, that their briefs are highly coordinated, or that they have no significantly different perspective. Nevertheless, courts should exercise restraint in using this putatively denigrating language. If a court has concerns about amicus curiae practice in a case or with the behavior of particular amici, it behooves the court to address those specifically with the parties or the amici themselves — not by using language that shades amicus participation with a hue of disingenuousness.

What language choices might be better? The fix is pretty simple: courts should use "[the party] and amici curiae in support of [the party]" or "[the party] and supporting amici curiae." Courts could also use "[the party] and supporting amici," though this is less preferable because it is still ambiguous: with whom does the

[23] It is worth adding that amici curiae may not actually be friends at all. Imagine two fierce competitor corporations that happen to be on the same side against class plaintiffs, a market disruptor, or the government. If used then, the court's phrase may simply seem false.

friendship exist?[24] Principally, I suggest that courts avoid any locution that uses the term *amici* to explicitly suggest that amici curiae are, in fact, friends with the parties and not the court.[25]

I freely admit that this may strike others as pedantry. But for better or worse, our profession — and our calling — is to pay great attention to every linguistic detail, especially when the courts speak. And as we are perennially reminded, the courts are often our repository of rationality and last bastion of civility. That they continue to operate as such requires our persnickety vigilance.

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[24] This is in accord with Supreme Court Rule 37.2, which requires that the cover of an amicus curiae brief "identify the party supported." Thanks to Travis Wimberly for calling my attention to this point.

[25] One wrinkle occurs when amici curiae represent themselves as not supporting either party, but their arguments clearly support one party over the other. In particular, can courts look past the amici curiae's representations and state that the amici curiae support a particular party? My own predilection is that courts take at face value the representations of the amici curiae about whom they support and simply describe the argument as lending support to a particular party. Thanks to Travis Wimberly and Michael J. Stephan for raising this point.