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

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Over the last century, amicus participation in oral argument at the Supreme Court has become common, but only for one litigant: the Office of the Solicitor General of the United States ("OSG"). Between the 2010 and 2017 Terms, the Court granted only 8 of 26 motions for amicus oral argument by litigants other than OSG. During that time, it granted 252—all but 1—of such motions by OSG. Since the early 2000s, OSG has often argued more frequently in a Term as an amicus than as a party.

This Article presents the first history of amicus oral argument and how OSG came to dominate this practice. Drawing on an original database of every motion for amicus oral argument filed from 1889 through 2017, we offer the first quantitative history of the practice of amicus oral argument before the Court. We supplement this with a qualitative account of the historical and modern use of amicus oral argument based on archival research and interviews with frequent Supreme Court litigators, including current and former members of OSG. We find that the Court grants OSG virtually unlimited access to amicus oral argument without regard to the strength of the federal interest or the political nature of a given case.

The Court's special solicitude towards OSG has profound consequences. The Solicitor General already occupies a special role at the Court as the "Tenth Justice." We argue that OSG's seemingly unlimited ability to appear before the Court systematically biases the perspectives heard at the Court and therefore undermines due process principles and the adversarial process. We conclude with a proposal for reform.

I. Introduction

Over the last forty years, a quiet revolution has taken place at the United States Supreme Court. Each Term, one litigant argues in sixty to seventy-five percent of the Court's cases: the Office of the Solicitor General of the United States ("OSG"). OSG has always been a frequent litigant at the Court, at times representing a party in more than half the cases argued.[2] But as the Court's docket shrank in the 1980s and 1990s, multiple Solicitors General ("SG") decided to petition for

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[2] *See infra* Figure 8.

certiorari less frequently.[3] Today, OSG represents a party in only twenty-five to thirty percent of the Court's argued cases each Term. OSG has more than made up for this decline, however, by requesting and receiving permission to argue in a manner expressly "not favored" by the Rules of the Supreme Court: as amicus curiae.[4]

Amicus oral argument at the Court is a rare occurrence for every litigant—except OSG. Between the 2010 and 2017 Terms, the Court granted only 8 of 26 motions for amicus oral argument by litigants other than OSG. During that time, it granted 252—all but 1—of such motions by OSG. In recent years, OSG has argued as an amicus in forty to fifty percent of the Court's cases each Term. Since the early 2000s, it has often argued more frequently before the Court as an amicus than as a party in a given Term. Its ability to receive argument time as amicus, moreover, appears to be virtually unlimited. The last time the Court denied an OSG motion for amicus oral argument was in 2011.

Discussing OSG's participation as an amicus and as a party in roughly eighty percent of the Court's cases, then-Judge (and former Principal Deputy Solicitor General) John G. Roberts remarked, "If you asked me as an abstract proposition whether I would be troubled by the idea that the executive branch was going to file something in every case before the Court explaining its views, as a sort of super law clerk, my answer would be yes, I would find that very troubling. Eighty percent is pretty close to every case."[5] Chief Justice Roberts is one of four current Justices who previously worked at OSG.[6]

The Court's amicus oral argument practice has vast procedural and substantive consequences for the Court and the parties that appear before it. Amicus oral argument distorts the adversarial process by taking argument time from one of the parties and allocating it elsewhere. In addition, amici are encouraged to offer legal arguments not advanced by the parties and may undermine or derail a party's arguments.

Amici who argue at the Court also have an opportunity to influence the substantive development of the law. Some instances in which the Court has granted amicus oral argument appear clearly to be motivated by this thought—particularly when the amicus supported neither party.[7] The SG's choice to participate more frequently as an amicus than as a party indicates that he[8] believes he can affect substantive outcomes as an amicus.

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[3] Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1338 (2010).
[4] SUP. CT. R. 28.4 & 28.5.
[5] John G. Roberts, *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 79 (2005).
[6] *Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx. The four Justices are Elena Kagan (SG, 2009-10), John G. Roberts (Principal Deputy, 1989-93), Samuel Alito (Assistant to the SG, 1981-85), and Brett Kavanaugh (Bristow Fellow, 1992-93).
[7] *See, e.g.*, Ortiz v. United States, 138 S. Ct. 576 (2018) (granting amicus oral argument to Professor Aditya Bamzai, whose brief presented a novel jurisdictional argument in support of neither party).
[8] With the exception of Elena Kagan, every Solicitor General has been male. *See About the Office*, Office of the Solicitor General, Dep't of Justice, https://www.justice.gov/osg/historical-bios. Therefore, we use the "he" pronoun to refer to the SG.

Scrutinizing OSG's special place at the Court seems particularly apt at this moment in history. SG Noel Francisco is widely perceived as testing the outer limits of the Tenth Justice reputation—through requests for extraordinary relief,[9] appeals to overturn precedent,[10] and position switches in individual cases.[11] The last time Court watchers were this concerned about OSG's commitment to the rule of law was during SG Charles Fried's tenure, to which Lincoln Caplan's biography of the office was a response.[12] One difference between the two SGs does stand out, however: while the Court often rebuked SG Fried's bolder stances, it has generally embraced SG Francisco's.[13]

Despite a substantial literature discussing OSG generally, little scholarship has examined its outsized presence at amicus oral argument. The OSG's dominance of amicus oral argument is particularly significant because of its special place at the Court. A large literature from the past generation documents the SG's reputation as the "Tenth Justice," a title that captures the unique duties and privileges he is thought to have at the Court. At the heart of this role is the SG's longstanding, self-proclaimed commitment to "justice"—to being "a voice that speaks on behalf of the rule of law"[14]—rather than to victory in any given case. Former SG Rex E. Lee boasted that the SG's office provides "advocacy which is more objective, more dispassionate, more competent, and more respectful of the Court as an institution than it gets from any other lawyer or group of lawyers."[15] Lee served as SG from 1981 to 1985 and SGs since then have made similar commitments.[16] The view of the office from the inside is widely mirrored by close observers of it from the outside. The credibility that follows this perception likely contributes to, but is also cause for concern about, OSG's seemingly unlimited ability to participate in amicus oral argument. As we show, the SG has increasingly used his amicus role to express the views of the President rather than advancing any objective notion of justice.

Our account of OSG's participation in amicus oral argument makes three novel contributions to the existing literature on the SG's influence at the Court. It offers the first quantitative and qualitative history of the practice of amicus oral argument before the Court. Using 129 volumes of the annual *Journal of the Supreme Court of the United States*, we constructed a dataset of every motion for amicus oral argument filed from 1889 to 2017, including the litigant who filed the motion and the Court's ruling on it. Using these data, we chart more than a century—and likely close to the entirety—of this practice.

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[9] *See, e.g.*, Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).
[10] *See, e.g.*, Robert Barnes, *Trump Administration Asks Supreme Court to Overrule Precedent Helping Unions*, WASH. POST (Dec. 6, 2017), https://www.washingtonpost.com/politics/courts_law/trump-administration-asks-supreme-court-to-overrule-precedent-helping-unions/2017/12/06/64794b1a-dabc-11e7-b1a8-62589434a581_story.html.
[11] *See, e.g.*, Adam Liptak, Trump's Legal U-Turns May Test Supreme Court's Patience, N.Y. TIMES (Aug. 28, 2017), https://www.nytimes.com/2017/08/28/us/politics/trump-supreme-court.html.
[12] *See* LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987).
[13] *See, e.g.*, Vladeck, *supra* note 9, at 29–30.
[14] Seth P. Waxman, *"Presenting the Case of the United States as It Should Be": The Solicitor General in Historical Context*, 2 J. SUP. CT. HIST. 3, 4 (1998).
[15] Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 597 (1986).
[16] *See infra* Section IV.C.

We also provide an original qualitative account of the historical and modern use of amicus oral argument. Building on existing databases, we identify the types of cases in which amici request oral argument from the Court and how they have changed over time. We further develop this analysis using original archival research on the Justices' papers and interviews with frequent Supreme Court litigators, including current and former members of OSG. This research underlies our account of when the Court grants amicus oral argument and why, when doing so, the Court has so often heard from OSG.

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

Finally, we offer the first normative account of when the Court should grant amicus oral argument to any litigant. We center this account in the Court's dual objectives of upholding due process for individual litigants while also "resolv[ing] public policy issues of national importance."[17] We suggest that the Court should grant argument to only two categories of amici: those who have a concrete interest in the litigation and have raised new legal reasoning; and those who, regardless of interest, have raised a completely new legal issue.

This paper proceeds in four parts. Part II explains why we use amicus oral argument as a lens through which to examine OSG and its relationship with the Court.[18] Substantively, oral argument is a significant component of Supreme Court practice. It is the only time an amicus is guaranteed to be heard by the Justices. Oral argument may inform and persuade in ways that a written brief may not, and many social scientists have demonstrated how oral argument may inform the Justices' thinking. Because total argument time is limited, the Court's decision to permit an amicus to argue also helps elucidate which litigants it values. We also provide an overview of the roles of amici and OSG before the Court.

Part III employs a mixed-methods approach to offer an original quantitative and qualitative history of the practice of amicus oral argument. Using our novel dataset of Supreme Court amicus oral argument motions practice, we show how the past 60 years have seen a dramatic rise in the number of requests for amicus oral argument, in raw numbers and as a percentage of the Court's docket. Most of this increase is attributable to OSG. We also draw on Supreme Court history from the late nineteenth century to today, to chart the evolution of amicus oral argument before the Court. By documenting the cases in which amici have asked, and been granted permission, to participate at oral argument, we trace how this practice has changed throughout history.

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[17] *See infra* text accompanying note 127.

[18] Although there are many facets of OSG's influence at the Court, including its exemption from the requirement of obtaining either party permission or leave of court to file an amicus brief, *see* SUP. CT. R. 37, this paper considers only amicus oral argument.

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

These explanations, however, do not justify the Court's current amicus oral argument practice. The development of the modern Supreme Court bar has dramatically improved the quality of oral argument at the Court in many cases and reduced OSG's historical advantage in this area. Additionally, OSG does not frequently present otherwise unavailable information about agency operations in its amicus briefs and arguments; and when it has done so, the information has not always been reliable. Finally, OSG's amicus positions do not always reflect the traditional Tenth Justice values. Absent legitimate reasons to give preference to OSG over other possible amici at oral argument, the Court should apply the same criteria for granting OSG and non-OSG amicus oral argument motions.

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

II. Understanding the Amicus Role, Oral Argument, and OSG

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

A. The Amicus Role

The term "amicus curiae" means "friend of the court."[19] At English Common law, amici were viewed as inimical to the adversarial system, and courts were strongly averse to advocacy by amici who had an interest in the litigation.[20] Thus, amicus participation was limited to non-litigants who helped the court avoid errors by giving impartial advice.[21] In the American system, the amicus curiae role quickly departed from a neutral error-checker to something resembling a traditional advocate, entering to lend weight to one side.[22]

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[19] Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 (2016).
[20] Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 696 (1963).
[21] Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. UNIV. L. REV. 58, 1244; Krislov, *supra* note 20, at 694–95.
[22] Krislov, *supra* note 20, at 697; Lowman, *supra* note 21, at 1244–45.

The Court implores organizations and individuals to file amicus briefs only if they "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties."[23] When an amicus writes in support of a party, the amicus can strengthen the party's position by fleshing out the party's arguments or offering new ones. When an amicus writes in support of neither party, it often hopes to help the Court by setting out an alternative path.

Most amici may file briefs only with the permission of both parties or else with leave from the Court.[24] OSG and other government entities, however, are exempted from this requirement.[25] They are also permitted 1,000 words more than other amici.[26] All amici must explain their "interest" in the litigation in their briefs.[27] The Court's attitude towards amici has varied over the years: sometimes it seeks to hear from them, and other times it castigates them for presenting repetitive and political arguments.[28]

Today, parties (including OSG) typically grant blanket consent to amicus briefs.[29] Nevertheless, the modern amicus brief is so carefully orchestrated by the parties in a case that practitioners have termed it the "amicus machine."[30] In *Hamdan v. Rumsfeld*,[31] for example, petitioners' attorney Neal Katyal handpicked thirty-seven amici and labeled each brief with the proposition it supported.[32]

Despite the time and resources that parties put into organizing and coordinating amici, the Justices very likely do not read all the amicus briefs in a given case. Justices often rely on their clerks to read the majority of briefs and personally examine a few.[33] Empirical evidence shows that although citations to amicus briefs are on the rise, those citations represent only a small fraction of the amicus briefs that are submitted in a case.[34] To guarantee that the Justices will hear its viewpoint, an amicus must argue before the Court.

B. Amicus Oral Argument

Amicus oral argument is significant both for its substantive value and because the decision to grant it reveals the Justices' preferences for certain amici. Despite its importance, few scholars have examined amicus oral argument in any depth.

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[23] SUP. CT. R. 37.1.
[24] *Id.* 37.2.
[25] *Id.* 37.4.
[26] *Id.* 33.1(g).
[27] *Id.* 37.5; 37.2(b); 37.3(b).
[28] *See infra* notes 350–352 and accompanying text.
[29] Larsen & Devins, *supra* note 19, at 1925.
[30] *Id.* at 1906.
[31] 548 U.S. 557 (2006).
[32] Larsen & Devins, *supra* note 19, at 1924–25.
[33] Kelly J. Lynch, *Best Friends - Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 43–46 (2004).
[34] Anthony Franze & Reeves Anderson, *Supreme Court Amicus Curiae Review: 'Friends of the Court' Roared Back in 2017–18 Term*, NAT'L L.J., Oct. 16, 2018, at 4, 4.

Serving on the D.C. Circuit, then-Judge Roberts said that "oral argument is terribly, terribly important" because it allows the judges to hear what their colleagues think of the case through questions they ask and comments they make.[35] Justice Anthony Kennedy, before retiring in 2018, saw oral argument as a means of communicating with his colleagues and believed that it made a difference to case outcomes.[36] Justices Ruth Bader Ginsburg,[37] Antonin Scalia,[38] and William H. Rehnquist[39] also believed that oral argument could have significant impact in some cases.

Over the years, a few Justices have maintained that oral argument is insignificant, but they are in the minority. For example, Justice Clarence Thomas famously said that "I don't see the need for all those questions. I think Justices, ninety-nine percent of the time, have their minds made up when they go to the bench."[40] Justice Samuel A. Alito, Jr. has said that "[o]ral argument is a relatively small and, truth be told, a relatively unimportant part of what we do."[41]

Empirical research suggests that oral argument does matter, subject to some disagreement over when and why. Several political scientists have used notes kept by former Justices Harry A. Blackmun and Lewis F. Powell, Jr. to conclude that, controlling for variables like the Justice's ideology and a case's complexity, the Justices' votes in a case depend significantly on the quality of the advocate appearing before the Court.[42] Others have looked to the content of the Justices' questions at oral argument to determine what role the practice might play for the Justices themselves. Using conference notes from several of the Justices, political scientist Timothy R. Johnson found that information discussed only at oral arguments constituted nearly half of the issues discussed at conference and over a quarter of the issues in case syllabi.[43]

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[35] Roberts, *supra* note 5, at 69; *see generally* James Phillips & Edward Carter, *Source of Information or Dog and Pony Show: Judicial Information Seeking during U.S. Supreme Court Oral Argument, 1963-1965 & 2004-2009*, 50 SANTA CLARA L. REV. 79, 88–92 (2010).

[36] DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 248 (7th ed. ed. 2005).

[37] Ruth Bader Ginsburg, *Remarks on Appellate Advocacy Art of Advocacy*, 50 S. C. L. REV. 567, 570 (1998–1999) (describing oral argument as a "hold-the-line operation" and noting that a bad oral argument swung a potential winner to a loser but rarely the reverse). .

[38] Timothy R. Johnson et al., *Oral Advocacy before the United States Supreme Court: Does It Affect the Justices' Decisions*, 85 WASH. U. L. REV. 457, 458 (2007–2008) ("Things . . . can be put in perspective during oral argument in a way that they can't in a written brief.").

[39] WILLIAM H. REHNQUIST, THE SUPREME COURT 243–44 (2007) (noting that oral argument made a difference to his decision in a "significant minority" of cases, especially when the case presented unfamiliar legal issues).

[40] Phillips & Carter, *supra* note 35, at 92.

[41] Terry M. Richman, *Alito: Prep More Important than Oral Arguments*, N.Y. DAILY REC., May 17, 2011, https://nydailyrecord.com/2011/05/17/alito-prep-more-important-than-oral-arguments.

[42] *See, e.g.*, Eve M. Ringsmuth et al., *Voting Fluidity and Oral Argument on the U.S. Supreme Court*, 66 POL. RES. Q. 429 (2013); Timothy R. Johnson et al., *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006); Johnson et al., *supra* note 38. *But see* Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 LAW & SOC'Y REV. 259, 260 (2007) (concluding that the quality of oral advocates affect case outcomes primarily "when the justices' informational needs are high and the intensity of their predispositions is low").

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

In addition to the substantive value of oral argument, the Court's decision to grant amicus oral argument is a meaningful signal from an otherwise opaque institution. When the Court grants certiorari in a case, each side automatically receives thirty minutes of argument time.[44] If there are multiple parties on one side, the parties may seek permission to divide the argument in a motion that "set[s] out specifically and concisely why more than one attorney should be allowed to argue."[45] But the Court stresses that "divided argument is not favored."[46]

Oral argument time is a limited resource at the Court, and the Justices must affirmatively allocate such time to amici. Memoranda from conference (when the Justices meet to discuss petitions for certiorari, motions, and other matters) and notes by Justice Blackmun suggest that five votes are necessary to grant amicus oral argument.[47] The Court's decision to permit an amicus to argue is an unusually direct signal that the Court is interested in the amicus's views. Because parties generally grant blanket permission for amici to file briefs,[48] and because the Court almost always grants leave to file a brief even when the parties do not give permission,[49] the filing of an amicus brief on its own is not a measure of influence. On the other hand, looking solely at whether an amicus brief is cited is too narrow a measure. Amicus briefs may be influential even without

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[44] SUP. CT. R. 16.2 & 28.3.
[45] *Id.* 28.4.
[46] *Id.*
[47] The Supreme Court Rules do not expressly state the number of votes required to grant a motion. But based on Justice Blackmun's papers, which contain many conference memoranda in which the motions for amicus oral argument were discussed, we believe five votes are required.

When five justices voted in favor of a motion for amicus oral argument, the motion was granted, as was the case in the ACLU's motion for amicus oral argument in *Solorio v. United States*. *See*, e.g., Memorandum for the Conference from Chief Justice at 8 (Aug. 29, 1986), Harry A. Blackmun Papers, Library of Congress, Box 458, Folder 11 [hereinafter Blackmun Papers] (showing a vote against on Motion 12); Memorandum from Justice White, *id.* (Sept. 9, 1968) (voting against); Memorandum from Justice Rehnquist, *id.* (Sept. 3, 1986) (voting against); Memorandum from Justice Marshall, *id.* (Sept. 3, 1986) (voting against); Memorandum from Justice O'Connor, *id.* (Sept. 8, 1968) (voting to grant); Memorandum from Justice Powell, *id.* (Sept. 4, 1986) (voting to grant); Memorandum from Justice Stevens, *id.* (Sept. 3, 1986) (voting to grant); Memorandum from Harry Blackmun, *id.* (Sept. 2, 1986) (voting to grant); Memorandum from Justice Brennan, *id.* (Sept. 9, 1986) (voting to grant).

Because these votes were expressed through official memoranda, we can be confident in the split of votes. The requirement of five votes was also reflected in Blackmun's handwritten annotations. *See* Memorandum for the Conference from Chief Justice at 1, *id.* at Box 409, Folder 9 (Feb. 9, 1985) (including handwritten annotations from Blackmun that five justices voted in favor of the SG's motion for amicus oral argument in *Gould v. Ruefenacht*); Memorandum for the Conference from Chief Justice at 1, *id.*, at Box 485, Folder 12 (Sept. 10, 1987) (same but with respect to *Boos v. Berry*).

By contrast, when only four Justices voted to grant a motion, the motion was denied. Memorandum for the Conference from Chef Justice at 2-3, *id.*, at Box 485, Folder 12 (Dec. 10, 1987) (including handwritten annotations from Blackmun that four justices voted in favor of the SG's motion for amicus oral argument in *United States v. Providence Journal Co.*). In *Basic Incorporated v. Levinson*, the Chief Justice was recused form the case, and the Justices split four to grant and four to deny. The motion was denied. Memorandum from Chief Justice at 2, *id.*, at Box 458, Folder 12 (May 27, 1987).
[48] Paul M. Collins, *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 809 (2004).
[49] Eugene Volokh, *Should U.S. Supreme Court Litigants Decline Consent for Filing of Amicus Briefs?*, VOLOKH CONSPIRACY, Apr. 28, 2018, https://reason.com/2018/04/28/should-us-supreme-court-litigants-declin.

being cited.[50] The decision to allow an amicus to argue, by contrast, reflects the views of five Justices that the amicus will use that time in a way that is more useful to the Court than would the party the amicus supports.

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

> Counsel for an amicus curiae . . . may, with the consent of a party, argue orally on the side of such party . . . . In the absence of such consent, argument by counsel for an amicus curiae may be made only by special leave of court, on motion particularly setting forth why such argument is thought to provide assistance to the court not otherwise available. Such motions, unless made on behalf of the United States or of a State, Territory, Commonwealth, or Possession, are not favored.[51]

The 1954 Rule created a strong distinction between motions made with and without the consent of the party the amicus supports, noting that motions in the latter category were "not favored" unless they came from a government entity.[52] The 1980 Rules eliminated this preference and set a higher bar for *all* parties: without the consent of the party he supports, an amicus's motion for amicus oral argument "will be granted only in the most extraordinary circumstances."[53] This standard persists through the 2019 Rules.[54]

C. The Court's Foremost Amicus: OSG

As we discuss in Part III, OSG is by far the most frequent participant in amicus oral argument. OSG has a role in the federal government's litigation in lower courts,[55] but it is best known for representing the U.S. government before the Supreme Court.

The only federal officer required to be "learned in the law,"[56] the SG has traditionally held a dual allegiance. He is an executive officer appointed by the President and confirmed by the Senate who reports to the Attorney General (AG) and works within the Department of Justice (DoJ).[57] But he also has a second office, a few blocks away, at the Supreme Court.[58] His two offices reflect his two roles: the SG is an Executive Branch officer, but as the federal government's chief litigator, he has a close relationship with the Court. Together, they are emblematic of his role as the "Tenth Justice," a distinction we discuss further in Part IV.

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[50] *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 844–45 (2000) (describing flaws in using citations as a measure of an amicus influence).
[51] SUP. CT. R. 44.7 (1954).
[52] *Id.*
[53] SUP. CT. R. 38.7 (1980).
[54] SUP. CT. R. 28.7.
[55] 28 C.F.R. § 0.20(a)-(c) (2008).
[56] 28 U.S.C. § 505.
[57] *See* 28 U.S.C. § 505.
[58] Waxman, *supra* note 14, at 3.

OSG has long enjoyed special deference from the Court.[59] At the certiorari stage, the Court sometimes "calls for" the views of the SG (CVSG) on whether or not to grant certiorari in a case.[60] OSG and other governmental litigants may file an amicus brief without the parties' consent and have a higher permitted word count when they do so.[61]And as discussed in Part III, the Court almost always grants OSG's amicus oral argument motions, even though it almost always denies such motions from other parties.

These advantages are significant: OSG enjoys an unparalleled success rate before the Court. Since the 1950s, the Court has granted around seventy percent of OSG's certiorari petitions, compared with approximately three percent of other petitions.[62] According to political scientists Ryan C. Black and Ryan J. Owens, even the Justices who disagreed with the SG's policy preferences followed his recommendations thirty-five percent of the time.[63] The Justices follow the SG's lead "when they are ideologically distant from her, when they disagree with her on policy grounds, *and* when her recommendation contravenes the legal factors in the case—in short, when the only persuasive component of the SG's argument is that *it is being made by the SG*."[64]

OSG is similarly successful at the merits stage. In the second half of the twentieth century, OSG won sixty to seventy percent of the cases in which it represented a party.[65] The side that OSG supports as an amicus has historically won seventy to eighty percent of the time.[66] In a study of cases from the 1979 through the 2007 Terms, political scientists Black and Owens found that OSG lawyers were more likely to win than their opponents, even after controlling for the party's resources or the opposing attorney's experience.[67] Although similar research suggests that the politicization of OSG—defined as the percentage of briefs that match the ideology of the appointing President—decreases its success rate, the predicted probability of success on the merits is still sixty percent at a hypothetical maximum level of politicization.[68]

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[59] *See infra* Part IV.
[60] *See* Stefanie A. Lepore, *The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General*, 35 J. SUP. CT. HIST. 35 (2010).
[61] *See supra* notes 25-26.
[62] Cordray & Cordray, *supra* note 3, at 1333; *see also* Vladeck, *supra* note 9, at 126 (noting that the Court has generally granted "most" of SG Francisco's requests for emergency and extraordinary relief and that even the Court's denials have come with "no suggestion" that the SG "is abusing his unique position, taking advantage of his special relationship with the Court, or otherwise acting in a manner unbecoming the office he holds").
[63] Ryan C. Black & Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the U.S. Supreme Court*, 64 POL. RES. Q. 765, 772 (2011). The authors calculate specific votes by relying on Justice Blackmun's papers, which record individual votes to grant or deny *certiorari*. *Id.* at 769.
[64] Black & Owens, *supra* note 63, at 771.
[65] Cordray & Cordray, *supra* note 3, at 1134.
[66] *Id.*
[67] Ryan C. Black & Ryan J. Owens, *A Built-In Advantage: The Office of the Solicitor General and the U.S. Supreme Court*, 66 POL. RES. Q. 454, 461 (2013) ("[H]olding everything else equal, attorneys from the OSG can expect a 0.13 increase in the probability that their side will win the case [that] is attributable exclusively to the OSG's participation in the case.").
[68] Patrick C. Wohlfarth, *The Tenth Justice? Consequences of Politicization in the Solicitor General's Office*, 71 J. POL. 224, 231, fig.2 (2009).

Despite a substantial literature discussing the SG generally, few scholars have addressed his role in amicus oral argument. The most extensive treatment comes from prominent Supreme Court litigators, including now-Chief Justice Roberts and now-D.C. Circuit Judge Patricia Millet, offering advice to private litigants on how to gain OSG's support as amicus.[69] Scholars have often mentioned OSG's role in amicus oral argument in passing but have not discussed the practice or its historical development in any detail.[70] Even critics of OSG's amicus "activism" have not focused on the distinct advantages it has in not only filing briefs but *arguing* as an amicus.[71] This Article aims to fill that gap.

III. Documenting Amicus Oral Argument Practice at the Supreme Court

This Part documents how amicus oral argument has grown dramatically since the early nineteenth century and that the SG has been the main generator of this growth. We begin with quantitative analysis and proceed to a qualitative discussion of five periods of the Court's history, from 1889 to present.

A. Quantitative Account

Our analysis primarily relies on an original dataset of all motions for amicus oral argument. We constructed this dataset with records from the 129 annual volumes of the *Journal of the Supreme Court of the United States*, "the official minutes of the Court."[72] The *Journal* contains daily entries of actions taken by the Court, including case dispositions, bar admissions, oral arguments, and rulings on motions.

We examined all available volumes of the *Journal*s, which span the 1889 to 2017 Terms.[73] Volumes from this period are available in a scanned and digitized format on the Court's website. We applied optical character recognition software to each page to create a machine-readable version of the orders and other actions taken.[74] We identified instances of amicus oral argument through approximate string matches to terms such as "divided argument," "oral argument," and "amicus."[75] We then manually reviewed every match and excluded instances of amici appointed

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[69] *See* Patricia A. Millett, *We're Your Government and We're Here to Help: Obtaining Amicus Support from the Federal Government in Supreme Court Cases*, 10 J. APP. PRAC. & PROCESS 209 (2009); John G. Roberts, *Riding the Coattails of the Solicitor General*, L. TIMES (1993).

[70] *E.g.*, Cordray & Cordray, *supra* note 3, at 1331, 55–56; Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEORGETOWN L. J. 1478, 1519 n.140 (2008); Karen O'Connor, *The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation*, 66 JUDICATURE 256, 260–61 (1982–1983).

[71] Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court*, 45 ARIZ. ST. L.J. 1183 (2013).

[72] *Journal*, Sup. Ct. of the U.S., https://www.supremecourt.gov/orders/journal.aspx.

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

[74] We used FineReader (Abbyy Corporation), and Tesseract (Google). The *Journals* contain 500,000 such records across all years. On average, each volume has 3,916 records, but the exact number varies from 580 in 1889 to 10,107 in 2006.

[75] The full procedure is available in our accompanying data scripts.

by the Court to defend the judgment below.[76] Ultimately, our dataset included 2,235 motions for amicus oral argument across 1,945 cases.

1. The Rise of Amicus Oral Argument

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

In raw numbers, much of this growth occurred in the 1970s and the 1980s, when the average number of cases per Term with amicus oral argument jumped from 12 to 21.[77] Since then, the number of cases with amicus oral argument has continued to rise. In the last decade, the average number of such cases was 31 per Term.

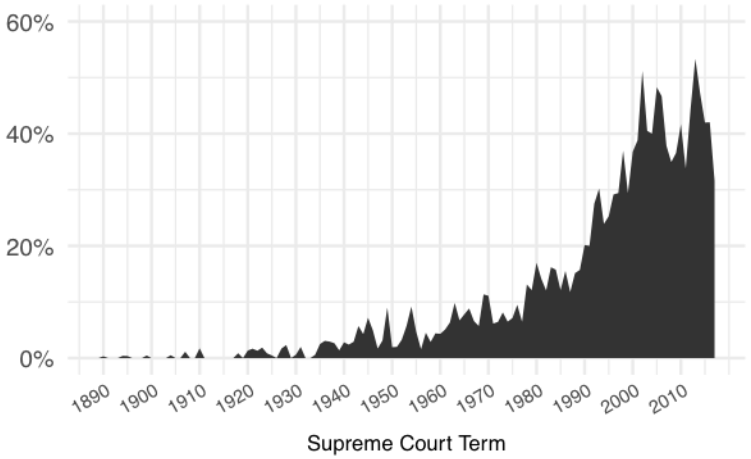

Figure 1: Amicus Oral Argument as Percentage of All Cases

[76] We performed two checks to ensure that our dataset of amicus oral argument incidences is accurate. First, we compared the cases that we flagged as including divided argument with the cases referenced in the 2013 edition of Shapiro et. al's *Supreme Court Practice*. Second, we randomly selected ten volumes of the *Journal*, manually reviewed them for entries about amicus oral argument, and compared them against our dataset.

[77] From 1965 to 1975, average number of cases per term was twelve. From 1976 to 1985, average number was twenty-one.

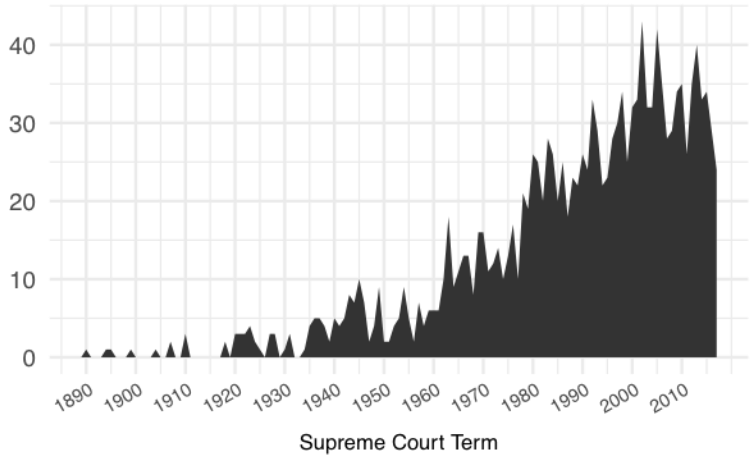

Figure 2: Amicus Oral Argument in Raw Numbers of Cases

Our data show that the Court has exercised substantial discretion over amicus oral argument motions. As Figure 3 illustrates, the Court has regularly denied such motions, especially between 1970 and 1990. Under the Rules of the Supreme Court, denials should be more common in cases where the party that the amicus supports has withheld consent for the amicus to participate.[78] However, we identified numerous instances in which the Court denied motions for amicus oral argument made with the relevant party's consent and even when the motion was made by the relevant party itself.[79]

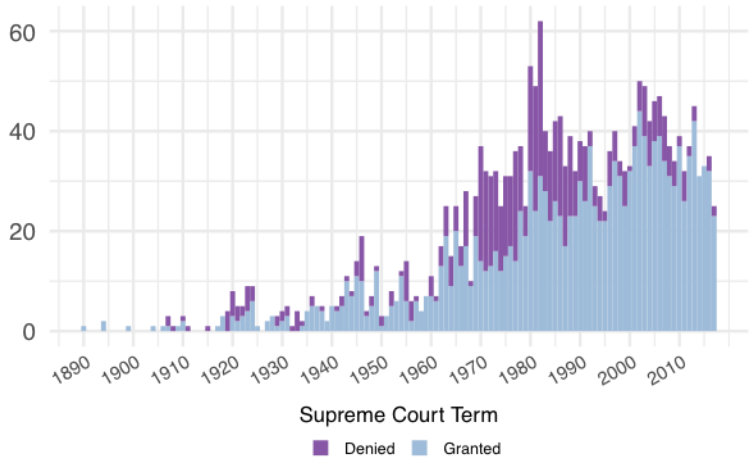

Figure 3: Motions for Amicus Oral Argument and Grant Rates

[78] *See supra* note 53.

[79] *See, e.g.*, Illinois v. Gates, 459 U.S. 1194 (1980) (Respondent's motion to permit American Bar Association to argue as amicus curiae); Kolstad v. Am. Dental Ass'n, 525 U.S. 1137 (1999) (Respondent's motion to permit Chamber of Commerce to argue as amicus curiae); Penn. State Police v. Suders, 541 U.S. 929 (2004) (Respondent and amicus curiae Lawyers' Committee on Civil Rights Under Law's motion to permit the latter to argue).

The rise of amicus oral argument coincided with the rise of amicus curiae filings more broadly. In 1946, the average number of amicus briefs per case was 0.5, and the median number of amicus briefs per case was zero.[80] In 2000, the average of amicus briefs per case was 6, and the median 4.5.[81]

Although amicus participation increased both through briefs and oral arguments, the two practices diverged significantly in who could make use of them. While amicus briefing is submitted by a wide variety of individuals and organizations,[82] amicus oral argument has been increasingly monopolized by one litigant: OSG.

2. OSG's Dominance of Amicus Oral Argument

In the 2017 Term, the Court heard twenty-three cases with amicus oral argument. In twenty-one of them, the amicus who argued was OSG. That Term is no exception. In every Term since 1980, OSG has participated in more than eighty-five percent of all cases involving amicus oral argument. In ten of those thirty-seven Terms, OSG was the *only* litigant permitted to argue as amicus.[83]

Amicus oral argument has comprised a core part of OSG's Supreme Court participation only in the last half-century. Our data show that amicus oral argument was almost non-existent until the 1920s, and until then it was used primarily by the federal government and individual lawyers, likely appearing on behalf of unnamed clients.[84] From 1920 through the end of the 1950s, there were no more than a handful of requests for amicus oral argument each Term. Even this small number of amicus oral argument motions regularly included parties other than the SG. In the 1964 Term, for example, the Court granted amicus oral argument in nine cases. While OSG participated in three, the amici in the other six cases were state governments, associations, and labor unions.[85] From 1920 through the 1960s, OSG argued as an amicus in only about half of all cases in which any amicus argued.

[80] Paul Collins, *The U.S. Supreme Court Amicus Curiae Database, 1941-2001* (2008).
[81] *Id.*
[82] *Id.*
[83] October Terms 1985, 1988, 1991, 1993, 1994, 1995, 2010, 2011, 2012, and 2016.
[84] *See* Krislov, *supra* note 20, at 703.
[85] *See* Journal of the Supreme Court 72, 91, 97, 133, 147, 171, 180, 230, 252 (1964).

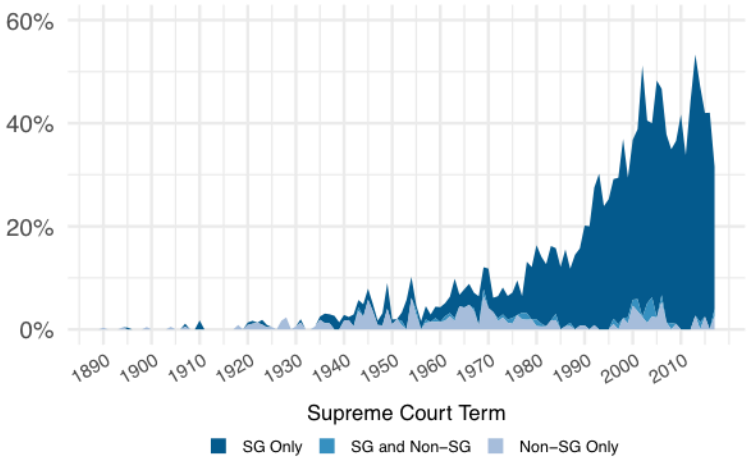

Figure 4: Percentage of Cases with Argument by Amici, By Amici Type

OSG's share of requests for amicus oral argument began rising after 1970—and continued despite a change in the 1980 Supreme Court Rules that required governmental entities to seek the consent of the party it supported when requesting amicus oral argument.[86] In the early 1970s, OSG made fewer than half of all motions for amicus oral argument. During the 2010s, OSG filed more than eighty percent of all amicus oral argument requests.

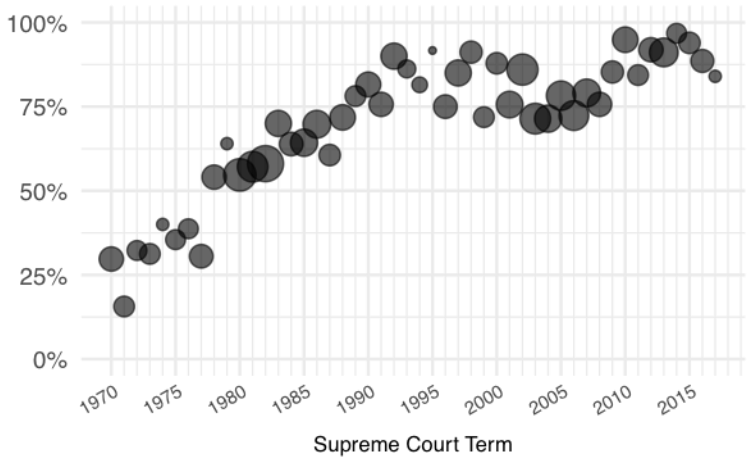

Figure 5: Motions by the SG as a Percentage of All Motions for Amicus Oral Argument

Despite the steady increase in motions by OSG for amicus oral argument, the rate at which the Court has granted these motions has varied over time. From the 1920s through the mid-1970s, most of OSG's motions for amicus oral argument were granted, save a few in the late 1960s and early 1970s. But beginning in the late 1970s and persisting through the early 1990s, the Court denied many more of OSG's amicus oral argument motions. The 1980 Rule revision eliminating the preference for government amici at oral argument appeared to signal a change in the Court's view toward OSG's amicus oral argument participation. From the 1981 through the 1988 Terms, under President Reagan's SGs, Rex Lee and Charles Fried, the Court denied twenty-one percent of OSG's motions, an average of four per Term. In five of those nine Terms, the Court denied

[86] *See supra* Section II.B.

more than twenty percent of OSG's motions. As we discuss in Section III.B.3, these denials appear to have reflected the Court's displeasure with OSG's participation in certain cases.

Beginning in 1988, however, OSG's grant rate steadily rose every year to nearly one hundred percent. Since 2011, the Court has granted all of OSG's amicus oral argument motions.

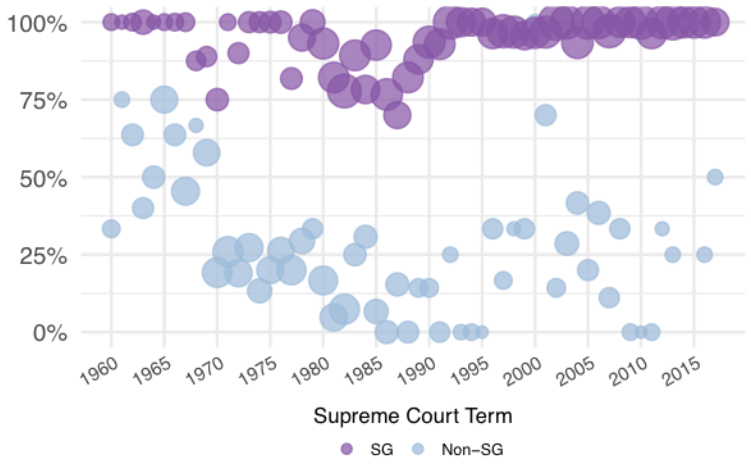

Figure 6: Grant Rates of Motions for Amicus Oral Argument

The Court has not been nearly as receptive to other parties' amicus oral argument requests. As Figure 7 shows, the Court grants OSG's motions at significantly higher rates than even other governmental entities—the types of organizations that the Rules previously also favored for amicus oral argument participation. Since 1960, the Court has granted less than half of amicus oral argument motions made by other government entities (including states, municipalities, and foreign governments) and an even smaller percentage of those made by organizations and individuals.

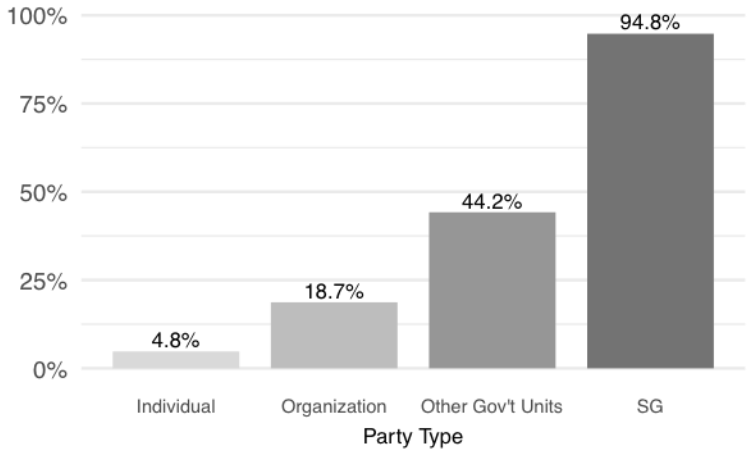

Figure 7: Grant Rates by Party Type, Since 1960

Even in the 1980s, when OSG's grant rate was at its lowest, OSG still participated in amicus oral argument at far high rates than did other litigants. Over the last three decades, rejections were few and far between and then stopped entirely. The denials of the 1980s appear to have caused

no lasting changes in how the Court perceives its relationship with OSG. In the late 1990s, when Seth Waxman served as President Clinton's SG, the Court granted more than ninety percent of his amicus oral argument motions. The first time he experienced one of the rare denials, Waxman recounted how Lawrence Wallace, then a career OSG attorney, explained to him these denials happened with some regularity, but that he should not read significance into them: "every once in a while," Wallace said, "they show us that they are the Supreme Court and we are not."[87]

As Figure 8 shows, amicus oral argument has occupied an increasing proportion of the SG's role before the Court over time. A few decades ago, OSG argued before the Court more frequently as a party than as an amicus. But in thirteen of the seventeen Terms since 2000, the reverse has been true. Between its amicus and party cases, OSG has argued in seventy to seventy-five percent of cases each Term since 2001.

At the beginning of the 1986 Term, in a harbinger of things to come, Justice Thurgood Marshall remarked in a memorandum circulated to the Justices that "the Solicitor General is about to take over our calendar."[88]

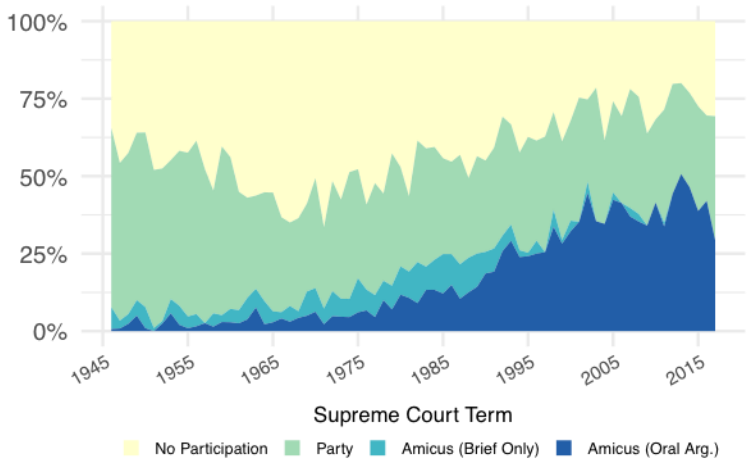

Figure 8: SG Role Over Time

By statute, the SG represents the "interests of the United States" in litigation.[89] This interest is often called the "federal interest."[90] DoJ has never issued guidance or rules that articulate precisely what this interest is. Multiple SGs have defined it as something akin to the Executive interest.[91] The only time it addressed the issue, the Court articulated a broad conception.

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[87] Interview with Seth Waxman (Apr. 18, 2019).
[88] Memorandum from Thurgood Marshall to Chambers (Sept. 3, 1986), Blackmun Papers, *supra* note 47, at Box 458, Folder 11.
[89] 28 U.S.C. §§ 517–18.
[90] *See, e.g.*, Cordray & Cordray, *supra* note 3, at 1332.
[91] *See* Interview with Former Senior OSG Attorney (Apr. 22, 2019) (stating that there is rarely a difference between the interests of the Executive Branch and those of the federal government as a whole); Interview with Donald B. Verrilli (Apr. 18, 2019) (noting that the Executive Branch's influence would be "diluted" if Congress also argued); Interview with Gregory Garre (Apr. 22, 2019) ("In cases involving the constitutionality of statutes, you are filing a brief on behalf of the Executive Branch, but you have a responsibility by tradition and by statute to Congress to

The 1988 case *United States v. Providence Journal Co.*[92] concerned a civil injunction against a newspaper. The district court appointed a special prosecutor to pursue criminal contempt charges against Respondents. When the special prosecutor sought to appeal to the Supreme Court, SG Fried denied him permission.[93] Based on this denial, Respondents argued that the writ had to be dismissed. But both the special prosecutor and SG Fried argued the case could go forward. In their view, it was not necessary for the SG to grant permission because the case did not concern an "interest of the United States."[94] Rather, it concerned the "power of the Judicial Branch."[95]

The Court found this view "startling."[96] "It seems to be elementary," Justice Blackmun wrote for the 6-2 majority, "that, even when exercising distinct and jealously separated powers, the three branches are but co-ordinate parts of one government."[97] Writing in dissent, Justice Stevens adopted the SG's view and noted that when the SG is called to represent two branches, he "faces a conflict of interest that undeniably would be intolerable if encountered in the private sector."[98]

Given the Court's broad interpretation of what constitutes the "interests of the United States," we sought to understand how the SG conceives of that interest. We chose one Term each in the tenures of six SGs—three appointed by Democratic and three by Republican Presidents[99]—and examined the "interest" section in all of their amicus briefs.[100]

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

But these justifications do not necessarily signal variations in the degree to which the federal government is affected. For example, when OSG is an amicus in Title VII cases, it frequently cites EEOC's enforcement authority as its interest.[101] While the EEOC is statutorily authorized to

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defend legislative acts . . . ."); Interview with Charles Fried (Apr. 5, 2019) ("The Court's holding in *Providence Journal* ignores separation of powers issues. Where Congress trenches on what the SG believes are the constitutional powers of the executive, the SG has not hesitated to press that concern. *Bowsher v. Synar* and *Morrison v. Olson* are two such cases."). *But see* Interview with Senior OSG Attorney (May 7, 2019) ("We think of the United States as an entity that is composed of three branches, and normally we can craft positions that are aligned on them").

[92] 485 U.S. 693 (1988).

[93] *Id.* at 698.

[94] *Id.* at 700-01.

[95] *Id.* at 701.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 714 (Stevens, J., dissenting).

[99] Noel Francisco, Rex Lee, Ted Olson, Drew Days, Donald Verrilli, and Seth Waxman.

[100] All amici are required to include such a section in their briefs. *See* SUP. CT. R. 37.5.

[101] *See, e.g.*, Brief of the United States as Amicus Curiae, O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996); Brief of the United States as Amicus Curiae, Robinson v. Shell Oil Co., 519 U.S. 337 (1997).

enforce employment discrimination laws, it brings less than two percent of employment discrimination enforcement actions while private parties litigate the other ninety-eight.[102]

In a small number of cases, OSG mustered little or even no justification for its amicus participation. In 1984, in *Reed v. Ross*,[103] concerning the availability of federal habeas corpus relief when a defendant has failed to comply with a state's procedural rules, OSG's brief stated no interest.[104] In other cases, OSG has cited only the issuance of a CVSG as its interest.[105] While CVSG reflects the Court's interest in hearing from OSG, it is unclear how CVSG is an "interest[] of the United States."

Our analysis suggests that the SG defines the "interest of the United States" through norms rather than rules; and below, we offer a more detailed qualitative account that also supports this view. Although OSG's interest in a case is often the defense of federal statutes and agency action, it is also willing to articulate broader and more nebulous interests. Between protecting general constitutional principles and defending practices from across the federal bureaucracy, it is difficult to conceive of any case that would not raise a federal interest. As former SG Fried said, "it's not hard to cook one up."[106]

B. Qualitative Account

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

We divide the Court's history into five phases based on our analysis of how OSG has employed amicus oral argument. We rely both on our own analyses of each case as well as the issue classifications in the Supreme Court Database.[107] During the first phase, from 1889 to the 1930s, we show that the early amicus oral argument practice was used by a small number of litigants and that OSG requested amicus oral argument almost exclusively in cases involving a federal statute. From the 1940s through the 1960s, OSG began defending federal agencies and, increasingly, civil rights and political interests.

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

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[102] J. Maria Glover, *The Structural Role of Private Enforcement Mechanism in Public Law*, 53 WM. & MARY L. REV. 1137, 1149 (2011–2012).
[103] 468 U.S. 1 (1984).
[104] *See* Brief of the United States as Amicus Curiae, Reed v. Ross, 468 U.S. 1 (Feb. 1984).
[105] *E.g.*, Brief for United States as Amicus Curiae, Comptroller of the Treasury of Maryland v. Waynne, 135 S. Ct. 1787 (2015); Brief for the United States as Amicus Curiae, Shell Oil Company v. Iowa Dep't of Rev., 488 U.S. 19 (1988).
[106] Interview with Fried, *supra* note 91.
[107] Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2019 Supreme Court Database, Version 2019 Release 01, http://supremecourtdatabase.org.

since 2011, has granted all of OSG's motions to be heard—regardless of whether the case is political.

1. 1889 through the 1930s

In the early nineteenth century, oral argument at the Court was very different from what it is today. Advocates could speak as long as they wished and the Justices asked no questions and paid limited attention. [108] As the Court's docket grew, the Court in 1849 limited argument time to two hours for each side and began to closely question counsel rather than listening passively.[109] By the early 1900s, the Court had cut argument time to thirty minutes for each side.[110] These changes increased the stakes of oral argument and the importance of having a high-quality oralist for litigants and the Court alike.

Before the 1920s, the practice of amicus oral argument was virtually nonexistent. It became only slightly more prevalent in the following two decades. Despite the limited frequency, the federal government was the second-most frequent mover for such participation—behind individual lawyers, likely filing on behalf of unnamed clients[111]—and its requests were never denied.[112] Local governments, Congressional committees, and foreign sovereigns made few requests to appear at oral argument as amici, but these requests were also always granted.[113] On the other hand, the Court denied many such requests on behalf of individual lawyers and all those made by companies.

OSG requested amicus oral argument primarily in cases where a federal interest was clear and its position intuitive. Its most common position was defending the constitutionality of a federal statute.[114] OSG also entered cases to advance federal supremacy over state law[115] and to represent quasi-party interests[116] on behalf of the Executive Branch.[117] OSG entered only one case not involving a federal statute.[118]

OSG did not request oral argument in most cases in which it filed an amicus brief.[119] When the interests of the United States arose out of a particular department of the federal government, a

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[108] Stephen M. Shapiro, *Oral Argument in the Supreme Court: The Felt Necessities of the Time*, 1985 YEARBOOK 22, 23 nn.15–16 & accompanying text.
[109] *Id.* at 26 nn.49, 54–56 & accompanying text.
[110] *Id.* at 26 n.76 & accompanying text.
[111] *See* Krislov, *supra* note 20, at 703.
[112] Before the 1950s, the Journals appear to be somewhat incomplete. For example, some motions are noted as having been submitted but no decision as to their disposition is evident.
[113] *E.g.*, Dillon v. Strathearn S.S. Co., 248 U.S. 182 (1918).
[114] *See, e.g.*, Stanton v. Baltic Mining Co., 240 U.S. 103 (1916) (income tax).
[115] *See, e.g.*, State of Missouri ex rel. Burnes Nat. Bank of St. Joseph v. Duncan, 265 U.S. 17 (1924).
[116] We use this term to refer to a person or entity who is a party "in the guise of an amicus curiae," or who is a party in all but name. *See* Krislov, *supra* note 20, at 701. A "quasi-party" has a concrete, and often pecuniary or sovereign, interest in a case.
[117] *See, e.g.*, Ex parte Grossman, 267 U.S. 87 (1925) (defending the President's pardon power).
[118] Bailey v. Alabama, 219 U.S. 219 (1910) (regarding whether an Alabama law that made the failure to perform labor contracted for without compensation violated the Thirteenth Amendment).
[119] *See, e.g.*, Caldwell v. Parker, 252 U.S. 376, 381 (1920) (noting that the United States filed an amicus brief, although no representative of the United States appeared at oral argument).

representative of that department often appeared at argument instead of an OSG attorney.[120] In other cases, an OSG lawyer argued on behalf of an agency but in the agency's name.[121]

Other amici who requested oral argument used the role to pursue quasi-party interests. For example, the City of Oakland requested oral argument time in a case involving a dispute over its borders.[122] One state was permitted to argue on behalf of twenty-six others in a case regarding the federal taxation of state employees.[123] The British Embassy sought argument in a case about whether U.S. courts had jurisdiction over a British vessel engaged in business on behalf of the British government.[124]

But by the end of this period, the Court began to shift away from simply resolving disputes between parties or quasi-party interests. The Judiciary Act of 1925—lobbied for by Chief Justice William H. Taft—gave the Court plenary power over all but a few classes of cases.[125] No longer the mere "vindicator of all federal rights"[126] for the particular litigants before it, this new Court largely chose its docket and was "a constitutional tribunal that resolved public policy issues of national importance."[127] As a result, it was much more important that each of the Court's opinions be correctly decided and carefully reasoned, and many more entities stood to gain or lose from each decision.

Following backlash to several decisions striking down popular legislation, the Court also became more sensitive to its role in public policy. In the 1920s, after the Court struck down several child labor laws, Senator William E. Borah proposed legislation requiring at least seven votes on the Court to declare a federal or state statute unconstitutional.[128] This proposal was a feature of the 1924 presidential campaign,[129] and several of the Justices' letters from this period indicate that they were affected by this attack.[130] A little over a decade later, the Court again came under criticism when it invalidated several parts of New Deal legislation.[131] Frustrated with the Court's obstruction and emboldened by a sweeping reelection victory,[132] President Franklin D. Roosevelt launched his court-packing plan. This threat is widely understood as having motivated Justice

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[120] *See, e.g.*, R.R. Comm'n of California v. Pac. Gas & Elec. Co., 302 U.S. 388 (1938) (argued by a lawyer for the Federal Power Commission); *see also* Robert L. Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A. J. 154, 155 (1960) (noting that lawyers outside OSG argued around half the cases in which the SG's office was involved).
[121] *See* Consol. Rock Prod. Co. v. Du Bois, 312 U.S. 510 (1941) (arguing for SEC as amicus).
[122] *See* State of California v. S. Pac. Co., 157 U.S. 229 (1895).
[123] *See, e.g.*, Helvering v. Gerhardt, 304 U.S. 405, 408 (1938).
[124] *See In re* Muir, 254 U.S. 522 (1921).
[125] Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA 1, 13 (2011).
[126] Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1272 (2001) (quoting FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 260-61 [1928]).
[127] *Id.* at 1273 n.29 (quotation omitted).
[128] Steven F. Lawson, *Progressives and the Supreme Court: A Case for Judicial Reform in the 1920s*, 42 HISTORIAN 419, 425 (1980).
[129] *Id.* at 430–42.
[130] Post, *supra* note 126, at 1317–18.
[131] *See* S. REP. NO. 112-9, at 2340-44 (2017) (listing thirteen federal statutes).
[132] Elizabeth C. Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 SYRACUSE L. REV. 139, 157 (1998).

Owen Roberts' "switch in time"[133] and having permanently changed the Court's approach to reviewing the constitutionality of legislation.

The Court's new approach treated legislative solutions to social problems as motivated by the will of the people and thus meriting a more restrained form of judicial review.[134] Footnote four of the *Carolene Products*[135] opinion, which laid out guidelines defining rational basis review for certain legislation, captures this sentiment.[136] The Court's new deferential standard of review applied not only to Congress, but also to the newly created agencies that administered, interpreted, and enforced the new federal programs Congress created.[137]

2. 1940s through 1960s

From the 1940s through the 1960s, amicus participation at oral argument grew significantly. Amici filed fewer than fifty motions requesting oral argument each decade at the Court through the 1940s. By the 1960s, that number had nearly doubled.[138] Across this period, OSG accounted for approximately thirty-five percent of the motions for amicus oral argument while states and associations accounted for most of the remaining growth.

From the 1940s through the 1960s, the Court continued to grant all of OSG's motions. It also granted more than eighty percent of states' motions for amicus oral argument, ninety percent of those by local governments, and all of those by segments of the federal legislative and judicial branches. On the other hand, it granted only around half of such motions made by companies and associations, roughly forty percent of those made by non-profits, and less than twenty percent of those made by individuals.

According to one contemporary perspective, the Court viewed the rise in amicus participation by individuals and other non-government entities as largely unhelpful.[139] Increasingly, amicus briefs were repetitive of the party briefs, seemed focused on an audience of clients and donors rather than the Court, and treated the Court as though it were a political body that could be lobbied.[140] States, too, began asking to be heard at oral argument although their interest in a given case was

[133] *But see* LEONARD BAKER, BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT 175–76 (1967) (arguing that Justice Roberts began to change his interpretation of the Constitution before President Roosevelt announced his court packing plan).
[134] Alfred C. Aman Jr., *Administrative Law in a Global Era: Progress Deregulatory Change and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1112 (1988); John J. Coughlin, *The History of the Judicial Review of Administrative Power and the Future of Regulatory Governance*, 38 IDAHO L. REV. 89, 115 (2001).
[135] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
[136] Aman Jr., *supra* note 134, at 1112.
[137] *See infra* Section III.B.2.
[138] There were approximately 100 such motions in the 1940s, around 75 in the 1950s, and 185 in the 1960s.
[139] Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172, 1172 (1953).
[140] *Id.* at 1173–74.

no stronger than any other state's.[141] The Court generally denied these types of requests but permitted (or invited) states to argue when they had a distinct interest in the case.[142]

Compared to other amici, OSG's requests were likely granted more often because many of them stemmed from the growth of executive agencies.[143] Through the early decades of the twentieth century, courts deferred considerably to agencies on questions of fact, but not law.[144] Beginning in the 1940s, however, the line between law and fact became less doctrinally clear. At times, the Court deferred to agency interpretations of mixed questions of law and fact, and sometimes on questions of law.[145] During this period, the Court also invited OSG to file amicus briefs and appear at oral argument in a small number of cases involving the interpretation of federal statutes.[146]

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

Shelley v. Kraemer[147] was the first civil rights case in which the federal government participated as amicus.[148] It concerned the constitutionality of racial covenants on residential property. The Truman White House was involved in both the decision to participate and the writing of the government's brief,[149] which, unusually, featured the AG's name before the SG's.[150] The government extensively justified the "interest of the United States" in a section that spanned 25

[141] *See, e.g.*, Ry. Emp. Dep't v. Hanson, 351 U.S. 225 (1956) (permitting Nevada to participate in amicus oral argument in a labor union dispute arising under Nebraska law but denying requests by other states).
[142] *See, e.g.*, Lambert v. California, 353 U.S. 979 (1957) (inviting Attorney General of California to file a brief and participate in oral argument); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) (permitting Virginia to participate in amicus oral argument in a dispute about the Federal Power Commission's ability to regulate on a body of water owned by Virginia under common law).
[143] *See, e.g.*, Brief for the United States as Amicus Curiae at 4, Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (Nov. 1, 1946) (advancing the NLRB's settled interpretation of the NLRA).
[144] Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 969 (2017). This deference was justified primarily on the basis of agency expertise. Coughlin, *supra* note 134, at 114; Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1193 (1986). During this period, even when a member of OSG represented the government at oral argument (as is almost always the case today), its amicus briefs were often filed in the name of an executive agency. *See, e.g.*, Brief for the National Labor Relations Board as Amicus Curiae, Intern. Union of United Auto. v. O'Brien, 339 U.S. 454 (Mar. 1950).
[145] Bamzai, *supra* note 144, at 997–80.
[146] *See, e.g.*, Brief for the United States as Amicus Curiae at 6, Washington Terminal Co. v. Boswell, 319 U.S. 732 (Feb. 1943).
[147] 334 U.S. 1 (1948).
[148] *See* Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 817 (1987).
[149] *Id.* at 818.
[150] *See* Brief for the United States as Amicus Curiae at I, Shelley v. Kraemer, 334 U.S. 1 (Dec. 1947).

pages.[151] (Today, interest sections are often only a paragraph long.[152]) The interest statement referenced officials from agencies ranging from the Housing and Home Finance Agency to the State Department.[153] It began, "The Federal Government has a special responsibility for the protection of the fundamental civil rights guaranteed to the people by the Constitution and laws of the United States."[154]

The white property owners involved in the case wrote a reply brief that vilified the government's participation. By supporting Petitioners, they claimed, the government sought to elevate the rights of some of its citizens (Blacks) over those of others (Whites).[155] Although this argument is analytically questionable, it highlights that the government's interest in protecting constitutional rights did not dictate its position in a case deciding what those rights are—particularly because federal prohibitions on racial discrimination were then minimal.[156] OSG's position in race discrimination cases since *Shelley v. Kraemer* has generally varied depending on the party that controls the Executive Branch.[157]

OSG submitted another controversial brief in *Brown v. Board of Education*.[158] It again extensively justified the federal interest in the case, including by citing President Eisenhower's public statements.[159] The AG's office was the brief's primary author, President Eisenhower edited it, and the AG and his Special Assistant—rather than OSG—signed it.[160] Perhaps preempting allegations that its position was motivated by politics, the authors declared that "[r]ecognition of the responsibility of the Federal Government with regard to civil rights is not a matter of partisan controversy."[161] The school board did not bother to oppose the government's participation, perhaps because it perceived that the Court wanted to hear from various government actors.[162]

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[151] The federal government was not required to justify its interest in a given case during this period. *See* SUP. CT. R. 42 (1970); *see also* CAPLAN, *supra* note 12, at 196, 311 n.41. The entire brief was 123 pages long. *See* Brief for the United States as Amicus Curiae, Shelley v. Kraemer, 334 U.S. 1.

[152] *See, e.g.*, Brief of the United States as Amicus Curiae Supporting Petitioner at 1, City of Hays v. Vogt, 138 S. Ct. 55 (2017).

[153] *See* Brief for the United States as Amicus Curiae at 5, 13, 15, 19, Shelley v. Kraemer, 334 U.S. 1.

[154] *Id.* at 2.

[155] Brief for Respondents in Reply to Brief for United States as Amicus Curiae at 1-2, Shelley v. Kraemer, 334 U.S. 1 (Jan. 9, 1948).

[156] *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 447 (2000). The federal government had begun to bring actions against states to combat racial discrimination, however. *See, e.g.*, Henderson v. United States, 339 U.S. 816 (1950).

[157] *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondents, Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013) (supporting university in affirmative action lawsuit); Brief for the United States as Amicus Curiae Supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (supporting rejected applicant in affirmative action lawsuit); Brief for the United States as Amicus Curiae, Regents of the University of California v. Bakke, 434 U.S. 810 (1978) (supporting university in affirmative action lawsuit).

[158] 347 U.S. 483 (1952).

[159] Brief of the United States as Amicus Curiae at 2-8, *Brown v. Bd. of Educ.*, 347 U.S. 483 (Dec. 2, 1952).

[160] CAPLAN, *supra* note 12, at 31–32.

[161] Brief of the United States as Amicus Curiae at 2, *Brown*, 347 U.S. 483.

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

By the 1960s, civil rights cases were a significant portion of OSG's amicus oral arguments.[163] Between 1960 and 1969, OSG argued as amicus in more than thirty civil rights cases claiming that local ordinances,[164] state statutes,[165] and apportionment plans[166] violated the Equal Protection Clause while school board desegregation plans did not.[167] In these cases, and until the Reagan administration, OSG supported civil rights claimants regardless of the President's party.[168] The SG himself generally argued these cases.

OSG began to participate in oral argument in a small number of other cases in which the federal interest was tenuous as well. One of the most notable was *Baker v. Carr*,[169] the landmark case that allowed the Court to review redistricting decisions. OSG's brief listed the SG as its author and contained no justification for his participation.[170] In his memoir, then-SG Archibald Cox recounted having a "frankly political discussion with the White House about the position that the government would take."[171]

One explanation for why the Court was willing to hear from OSG on political cases is politics. During this period, Democrats controlled the White House—and thus OSG—almost exclusively.[172] The Court was newly liberal and political under Chief Justice Earl Warren.[173] And the Warren Court was the first to issue a CVSG order.[174] However, even prior to Chief Justice Warren's ascension, the Court had already been granting all of OSG's amicus oral argument motions. As a result, the Court's willingness to listen to OSG cannot be explained by politics alone.

3. 1970s through 1990s

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

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[163] *See e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950); *see also* Elman & Silber, *supra* note 148, at 821–22.
[164] *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1965).
[165] *See, e.g.*, Robinson v. Florida, 378 U.S. 153 (1964).
[166] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).
[167] *See, e.g.*, Calhoun v. Latimer, 377 U.S. 263 (1963).
[168] Brett W. Curry et al., *"An Informal and Limited Alliance": The President and the Supreme Court*, 38 PRES. STUD. Q. 223 (2008).
[169] 369 U.S. 186 (1962).
[170] *See* Brief for the United States as Amicus Curiae, Baker v. Carr, 369 U.S. 186 (Mar. 14, 1961).
[171] ARCHIBALD COX, THE COURT AND THE CONSTITUTION 297 (1987).
[172] President Eisenhower was the only exception, and he supported the government's participation in *Brown*. *See* Brief, *supra* note 159.
[173] *See generally* ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT (1973); PHILIP B. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT (1970).
[174] The first time the Court invited the SG to opine in this manner was in 1957 in *Tennessee Burley Tobacco Growers Ass'n v. Range*, 353 U.S. 981 (1957). For a different explanation of CVSG, see Lepore, *supra* note 60 (arguing members of OSG were friendly with some of the Justices).

During this time, OSG began to request oral argument more frequently when it filed a brief. Between 1970 and 1975, OSG requested amicus oral argument in forty percent of the cases in which it filed an amicus brief. From 1995 to 1999, it did so ninety-four percent of the time. In 1998, then-SG Drew Days testified to Congress that, as a matter of policy, OSG sought oral argument whenever it filed an amicus brief.[175]

The types of cases in which OSG requested amicus oral argument also expanded over this period. For the first time, OSG participated in several cases involving national policy issues including, in chronological order, habeas corpus review of a state conviction,[176] affirmative action,[177] abortion,[178] and the establishment of religion.[179] OSG has continued to participate in these types of cases today.

At the same time, the Court generally chose not to hear from companies, individuals, associations, and nonprofits.[180] And for the first time, the Court also denied more than two thirds of motions made by states, state agencies, and sovereignties. The Court was much more willing to grant states' motions in cases in which the state had a unique interest in the case, including those involving a quasi-party interest,[181] federal pre-emption of state law,[182] or a challenge to the constitutionality of a state law.[183] But the Court often denied states' motions to be heard in cases arising out of other states,[184] except when made on behalf of a large group of states.[185] Perhaps in response to the Court's steeply shrinking docket and its increased opposition to non-OSG motions for amicus oral argument, the number of such motions—which had risen fairly steadily since the 1930s—fell in the early 1970s, recovered in the early 1980s, and then fell steeply through the 1990s.[186]

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[175] Examining the Operation and Activities of the Office of the Solicitor General of the Department of Justice Before Sen. Comm. on the Judiciary, 104th Cong. 818 (1998) (statement of Drew Days, SG).
[176] *See* Wainwright v. Sykes, 433 U.S. 72 (1977) (Bork).
[177] *See* Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978) (McCree).
[178] *See* Cty. of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1982) (Lee).
[179] *See* Marsh v. Chambers, 463 U.S. 783 (1983) (Lee). The SG's motion to appear at oral argument in *Marsh v. Chambers* was denied, but his motion one year later to participate in *Lynch v. Donnelly*, 465 U.S. 668 (1984) was granted.
[180] It granted less than twelve percent of those made by companies and none of the almost forty motions made by individuals. Motions from associations and nonprofits were granted at a rate of sixteen and nine percent, respectively.
[181] *See, e.g.*, Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians, 469 U.S. 1204 (1985) (granting state of Montana's motion in a case involving an insurance dispute over an incident that occurred on Indian reservation on land owned by Montana).
[182] *See, e.g.*, Cty. of Burbank v. Lockheed Air Terminal Inc., 409 U.S. 1073 (1972) (AG of California).
[183] *See, e.g.*, Richardson v. Ramirez, 414 U.S. 1107 (1973) (AG of California). But *See, e.g.*, Goldstein v. California, 409 U.S. 976 (1972) (denying AG of California's motion to participate in a case in which the state was already represented by the Los Angeles City Attorney).
[184] *See, e.g.*, Wingo v. Wedding, 416 U.S. 934 (1974) (denying AG of California's motion in case arising out of Kentucky). *But see* Kirby v. Illinois, 405 U.S. 951 (1972) (granting AG of California's motion to participate in a case arising out of Illinois and under the federal constitution).
[185] *See, e.g.*, Brief for the State of New Jersey, Amicus Curiae, Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (July 15, 1971) (on behalf of New Jersey and joined by twenty-four other states' AGs).
[186] *See supra* Figure 6.

The most significant shift in the Court's amicus oral argument practice during this period was denying motions by OSG. The first denial occurred in 1970 in *Griggs v. Duke Power Company*, a case that defined the evidentiary standard under Title VII of the Civil Rights Act of 1964 as requiring proof of discriminatory effect in employment practices.[187] This was one of the first motions by OSG to appear at oral argument that the Burger Court considered, and it came in a case interpreting a federal statute administered and sometimes enforced by an executive agency.[188] The Court had issued a CVSG and followed OSG's recommendation to hear the case.[189] OSG's brief discussed, among other things, EEOC guidelines governing employment tests and screening devices like those at issue in the case.[190] The Court then denied OSG's request to argue as an amicus.[191] Meanwhile, the Chamber of Commerce, which supported Respondents and urged that the EEOC guidelines were "entitled to little deference,"[192] was permitted to argue as amicus.

It is not clear why the Court denied OSG's request.[193] The Court permitted OSG to argue in other civil rights cases during this Term and others.[194] And aside from Warren Burger's replacement of Earl Warren, no other personnel changes had occurred.

The Court also denied four amicus oral argument motions made by SG Wade H. McCree Jr. (appointed by Jimmy Carter). Two were civil rights cases, one under Title VII[195] and another about affirmative action;[196] one was a case concerning searches under the Fourth Amendment;[197] and the last was an eminent domain claim resolved on procedural grounds.[198]

During the Reagan administration, OSG's grant rate fell almost every year under SG Rex Lee, though when it bottomed out it was at the relatively high level of just under eighty percent. The rate recovered in the 1985 Term, fell again in the 1986 and 1987 Terms to a low of seventy-one percent, and began to gradually recover through the end of SG Fried's term to eighty-eight percent. Denials came in a variety of cases, including those considering the constitutionality of state statutes,[199] state action,[200] federal pre-emption cases,[201] and even construction of federal statutes administered and enforced in whole or in part by federal agencies[202]—including

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[187] 401 U.S. 424, 436 (1970).
[188] *See* Brief for the United States as Amicus Curiae at 4-5, *Griggs*, 401 U.S. 424 (Sept. 4, 1970).
[189] *See Griggs*, 398 U.S. 926; *see also* David J. Garrow, *Toward a Definitive History of Griggs v. Duke Power Co.*, 67 VAND 197, 221 (2014).
[190] *Id.* at 222.
[191] Griggs v. Duke Power Co., 400 U.S. 861 (1970).
[192] *See* Brief Amicus Curiae on Behalf of the Chamber of Commerce of the United States of America at i, *Griggs*, 401 U.S. 424 (Oct. 14, 1970).
[193] We reviewed the papers of Justices Blackmun and Marshall, but the conference memoranda prepared by the Chief Justice simply listed the motion. No reasoning for the denial is given.
[194] *See, e.g.*, Swann v. Charlotte-Macklenburg Bd. of Educ., 402 U.S. 1 (1970).
[195] *See* Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978).
[196] *See* Minnick v. California Dep't of Corr., 452 U.S. 105 (1981).
[197] *See* Franks v. Delaware, 438 U.S. 154 (1977).
[198] *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981).
[199] *See, e.g.*, Estate of Thornton v. Caldor, Inc., 467 U.S. 1258 (1984).
[200] *See, e.g.*, Graham v. Connor, 488 U.S. 1001 (1989).
[201] *See, e.g.*, Fort Halifax Packing Co. v. Coyne, 479 U.S. 1052 (1987).
[202] *See, e.g.*, Goodman v. Lukens Steel Co., 479 U.S. 1079 (1987).

sometimes when those agencies co-signed the brief.[203] During SG Fried's tenure, those denials also included cases in which the Court had issued CVSGs.[204] However, the Court always granted OSG's motions to be heard in cases deciding the constitutionality of a federal statute.

The Court issued denials for a variety of reasons. Some were mundane, including because OSG requested additional time for oral argument (i.e., a party did not agree to cede time to OSG, or OSG sought additional time beyond what the party ceded)[205] or sought argument before filing a brief.[206]

In other cases, the Justices seemed to deny OSG's motion on substantive grounds. For example, in a bankruptcy case,[207] Chief Justice Rehnquist recommended denying OSG's motion because its interest was no different from that of the party it supported and because OSG's arguments were "adequately presented in [its] amicus brief."[208] The Court offered similar reasoning in *Lowenfield v. Phelps*,[209] a habeas case.[210] The Court did not, however, consistently discuss whether OSG offered a distinct interest. In many criminal cases, the Court granted motions for divided argument without reference to whether OSG had an interest distinct from that of the party it supported, and in many cases, it did not appear to.[211]

In still other cases, the Court seemed skeptical that OSG had any interest in the case, distinct or otherwise. In one case, OSG submitted a late request for amicus oral argument on behalf of the EEOC, and the party it opposed responded that the federal interest was weak. The Chief Justice proposed that the Court deny the motion, and the Court did so.[212] The same was true in *Bethel v. Fraser*,[213] a case with strong political overtones but without, as the Chief Justice noted, "any strong federal interest."[214]

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[203] *See, e.g.*, Zipes v. Trans World Airlines, Inc., 454 U.S. 960 (1981) (denying SG's motion on brief co-signed by EEOC in a case interpreting Title VII).
[204] Patrick v. Burget, 484 U.S. 100 (1988) (denial); Patrick v. Burget, 480 U.S. 904 (1987) (CVSG). Because four votes are required to issue a CVSG and five to grant amicus oral argument, this trend suggests that one Justice may have made the difference in at least some of these denials.
[205] Memorandum for the Conference from the Chief Justice 1 (Mar. 23, 1978) (Furnco Construction Corp. v. Waters), Blackmun Papers, *supra* note 47, at Box 255, Folder 9; Memorandum for the Conference from the Chief Justice 2, *id*, at Box 255, Folder 9 (Jan. 18, 1978) (Franks v. Delaware); Memorandum for the Conference from the Chief Justice 2, *id.*, at Box 431, Folder 9 (Aug. 9, 1985) (Matsushita Electric Indus. Co. v. Zenith Radio Corp.).
[206] Memorandum for the Conference from the Chief Justice 4, *id.*, at Box 317, Folder 15 (Oct. 30, 1980) (Minnick v. Calif. Dep't of Corrections).
[207] Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988).
[208] Memorandum for the Conference from the Chief Justice (Jan. 9, 1986), Blackmun Papers, *supra* note 47, at Box 431, Folder 9.
[209] 484 U.S. 231 (1988).
[210] Memorandum for the Conference from the Chief Justice 4 (Sept. 10, 1987), Blackmun Papers, *supra* note 47, at Box 485, Folder 12.
[211] *See, e.g.*, Memorandum for the Conference from the Chief Justice 4 (Oct. 9, 1985), *id.* at Box 431, Folder 9 (Sielaff v. Carrier); Memorandum for the Conference from the Chief Justice 8 (Jan. 9, 1986), *id.* at Box 458, Folder 12 (Rose v. Clark). The conference memoranda do not discuss the similarity of interests, simply noting that the "views of the SG may be helpful."
[212] Memorandum for the Conference from the Chief Justice (Mar. 3, 1983), *id.* at Box 362, Folder 13 (Crown, Cork & Seal Co., Inc. v. Parker).
[213] 478 U.S. 675 (1986).
[214] Memorandum for the Conference from the Chief Justice 4-5 (Jan. 9, 1986), *id.*, at Box 431, Folder 9.

The Court even denied oral argument in cases that implicated executive power. The Chief Justice recommended denying OSG's motion for amicus oral argument in *Volkswagenwerk Aktiengesellschaft v. Schlunk*,[215] a case interpreting the Hague Convention. The Chief Justice's memorandum reported OSG's stated interest: that the United States was a party to and participated in the negotiation of the Hague Convention. On its face, cases affecting foreign relations are exactly the type in which OSG might be most helpful. But the Chief Justice's conference memorandum stated that OSG's interest was the same as that advanced by the party that it supported, so its participation at argument was unlikely to help the Court.[216]

Some denials were unmistakably intended to send a message. In *Thornburgh v. American College of Obstetricians and Gynecologists*,[217] then-SG Fried urged the Court to reverse *Roe v. Wade*.[218] OSG's brief was signed by only SG Fried himself and two senior members of the AG's office, without any of the OSG attorneys who typically write such briefs. In his personal notes about the brief, Justice Blackmun noted next to the list of the ostensible authors, "not written by any of these."[219]

Three years earlier, the Court had declined to reverse *Roe* in a case that Fried, who then occupied the Political Deputy position in OSG,[220] briefed and argued as amicus.[221] The Court denied OSG's motion for amicus oral argument in *Thornburgh*.[222] The first draft of Justice Blackmun's opinion read in part:

> Although appellants challenge the merits of the Third Circuit's decision solely on the ground that the Court of Appeals misapplied *Roe v. Wade* and its successors, the Solicitor General, appearing on behalf of the United States as *amicus curiae* in support of appellants, urges that we take this occasion to overrule those cases entirely. For the Solicitor General to ask us to discard a line of major constitutional rulings in a case where no party has made a similar request is, to say the least, unusual. We decline his invitation.[223]

This paragraph was not included in the final opinion,[224] apparently at Justice Powell's request. Agreeing that "it is indeed 'unusual' for the Solicitor General, as an amicus curiae, to ask us to overrule major constitutional decisions," Justice Powell urged Justice Blackmun to refrain from

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[215] 486 U.S. 694 (1988).
[216] Memorandum for the Conference from the Chief Justice (Jan. 6, 1988), Blackmun Papers, *supra* note 47, at Box 485, Folder 12.
[217] 476 U.S. 747 (1986).
[218] 410 U.S. 113 (1973).
[219] Brief of the United States as Amicus Curiae in Support of Appellants, *Thornburgh v. Am. College of Obstetricians and Gynecologists* (July 15, 1985), Record Group 267.3.2, File 84-495 (on file with the Nat'l Archives, Washington, D.C.).
[220] CAPLAN, *supra* note 12, at 62.
[221] *See* Akron Ctr. for Reprod. Health, Inc. v. City of Akron, 459 U.S. 814 (1982).
[222] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 473 U.S. 931 (1985).
[223] Draft Opinion, Justice Blackmun, Blackmun Papers, *supra* note 47, at Box 435, Folder 3.
[224] *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

"criticiz[ing] the Solicitor General specifically."[225] He added, "we have already rebuffed the Solicitor General to some extent by denying his request to argue orally."[226]

Similar rebukes of positions taken by SG Fried did make it into final opinions that same Term. For example, in a criminal case, the Court noted that it was again declining to adopt an argument advanced by the SG that it had "expressly rejected when the Solicitor General made it in [a previous case]."[227]

4. 2000 through 2017

In the last two decades, the number of motions for amicus oral argument filed by litigants other than OSG has continued to fall. No more than five such motions have been filed per Term since 2009. Grant rates for these litigants have remained steady and low, and the number of motions they filed has also been small. Not a single motion made by a company or non-profit has been granted. Only one of the ten motions made on behalf of individuals was granted: a motion made by a professor who presented a jurisdictional issue not otherwise raised in the litigation.[228] The four motions by associations the Court granted were all made by litigants who were either experts in the subject at issue[229] or a quasi-party.[230] They also advanced unique arguments and, in two cases, were represented by well-known lawyers.[231]

This pattern is consistent with the widespread impression among Supreme Court litigators that private amici are permitted to appear at oral argument only if they offer unique legal arguments or institutional interests.[232] With these litigants, the Court takes seriously its stated requirements with respect to the amicus's interest and that its argument "provide[s] assistance to the Court not otherwise available."[233] For private amici, the Court enforces its warning that motions for amicus oral argument, without permission of the parties, are "granted only in the most extraordinary circumstances."[234]

The situation has improved somewhat for states and sovereignties. Grant rates rose from around thirty percent to approximately fifty percent for motions made by states. As in earlier periods, the

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[225] Memorandum from Lewis F. Powell, Jr. to Harry A. Blackmun (Feb. 6, 1986), Lewis F. Powell, Jr. Papers, Supreme Court Subject Files, *Thornburg* File, Washington and Lee University School of Law Library, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1159&context=casefiles.
[226] *Id.*
[227] Maine v. Moulton, 474 U.S. 159, 176 n.11 (1985).
[228] *See* Note, *Ortiz v. United States*, 132 HARV. L. REV. 317, 319 (2018).
[229] *See* Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 1029 (2008) (American Antitrust Institute); Alabama v. Shelton, 534 U.S. 1110 (2002) (National Association of Criminal Defense Lawyers).
[230] *See* Arctic Slope Reg'l Corp. v. NextWave Pers. Commc'ns Inc., 536 U.S. 955 (2002); Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) (United Mine Workers of America Combined Fund).
[231] *Shelton*, 534 U.S. 1110 (Steven Duke); NextWave Pers. Commc'ns Inc., 536 U.S. 955 (Lawrence Tribe).
[232] Interview with Erin Murphy (Apr. 18, 2019) (discussing her experience representing states and noting "I think the Court is generally more receptive to hearing from an institutional party and thinking about institutional interests as something that can be distinct from the parties to the case"); Interview with Carter Phillips (Apr. 22, 2019) (discussing how his representation of the European Commission and the Chinese Ministry of Commerce as amici "were worth the Court's time because we really had a different perspective and point to make").
[233] SUP. CT. R. 37.2(b), 28.7.
[234] *Id.* 28.7.

successful motions often involve many affected states joining one amicus brief (particularly if there is not a group of states supporting the other side as amici).[235] Both motions made on behalf of sovereignties were granted. These were made only in cases where the sovereignties were quasi-parties and represented by Carter Phillips, an experienced member of the Supreme Court bar and former Assistant to SG Lee.[236] States, even those represented by sophisticated state SGs,[237] do not garner nearly the same respect as OSG. This suggests that the SG's special place at the Court is not driven solely by comity to a co-equal branch of government. Other practices at the Court, such as the restrictive standards imposed for legislative standing,[238] reinforce this conclusion.

The percentage of cases in which OSG requests amicus oral argument has continued to rise. Today, OSG files such motions in between a third and one half of the Court's cases,[239] which is almost every case in which it files an amicus brief.[240]

Several former members of OSG attribute this trend, in part, to the Court's shrinking docket and the SG's desire to give each of OSG's twenty-something lawyers argument time.[241] But that explains only so much. The SG has significant control over the number of cases in which he is a party, and SGs have chosen to petition the Court for certiorari at lower rates in recent decades.[242] If argument time were the driving factor, moreover, the SG could enter plenty more cases as amicus, but he declines to do so. And even if this theory did explain the SG's behavior, it fails to shed light on why the Court would indulge such a practice.

The rate at which the Court grants OSG's motions for amicus oral argument has entirely recovered to its pre-1970 level of one hundred percent. Through 2011, the Court continued to deny one or two of OSG's motions most Terms. Since 2011, however, it has granted all of them. When we asked Supreme Court practitioners what might explain this perfect grant rate, multiple people told us a similar story, apparently handed down within OSG's office, about a case where the Court denied a motion from OSG and later regretted it.[243]

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[235] *See, e.g.*, Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 549 U.S. 1263 (2007) (thirty-seven states); Kennedy v. Louisiana, 552 U.S. 1293 (2008) (nine states).
[236] *See* Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1543 (2018) (Ministry of Commerce of the Peoples Republic of China); Intel Corp. v. Advanced Micro Devices, Inc., 541 U.S. 901 (2004) (Commission of the European Communities).
[237] *See* Dan Schweitzer, *The Modern History of State Attorneys Arguing as Amici in the U.S. Supreme Court*, 22 GREEN BAG 2D 143, 145–50 (2019) (listing denials of amicus oral argument motions by states, including where counsel of record are state solicitors general Kevin Newsom, Ted Cruz, and Jeffrey Sutton).
[238] *See generally* David J. Weiner, *The New Law of Legislative Standing*, 54 STAN 205 (2001).
[239] *See supra* Figure 8.
[240] *Id.*
[241] Interview with Garre, *supra* note 91; Interview with Phillips, *supra* note 232; Interview with Former Senior OSG Attorney, *supra* note 91; Interview with Paul D. Clement (May 7, 2019).
[242] *See* Lee, *supra* note 15, at 598.
[243] *See* Interview with Sarah Harrington (May 8, 2019); *see also* Interview with Senior OSG Attorney, *supra* note 91; Interview with Former Senior OSG Attorney, *supra* note 91.

That case was *Rehberg v. Paulk*,[244] which concerned civil immunity from suit under 42 U.S.C. § 1983 for grand jury witnesses. OSG, led by then-SG Donald B. Verrilli Jr., filed a brief agreeing with Respondent that grand jury witnesses are immune from civil damages based on their testimony. It added, however, that grand jurors could be liable for other conduct, including instigating a malicious prosecution.[245] The brief argued also that the Court should vacate and remand the case even if it sided with Respondent because the lower courts had not evaluated Petitioner's claim that there was evidence of non-testimonial misconduct.[246] The Court denied OSG's amicus oral argument motion. At oral argument, the Justices questioned Respondent's counsel at length about the SG's position. [247] The Court ultimately unanimously affirmed the Eleventh Circuit's holding and did not address OSG's rationale for vacatur and remand.[248] But it has not denied an amicus oral argument motion by OSG since.

* * *

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

IV. Justifying OSG's Outsized Amicus Oral Argument Participation

Although the Court has strongly stated its dislike of divided argument, our data show that the Court nearly always permits OSG to participate in oral argument as an amicus. In our conversations with Supreme Court litigators, including current and former members of OSG, we consistently heard three explanations for this pattern. The first is technical: OSG lawyers are highly skilled advocates who are experts in Supreme Court litigation. The second is substantive: OSG is the only litigant who is able to communicate with all the federal agencies and convey relevant factual information to the Court. The final is normative: the SG is the so-called "Tenth Justice." As articulated in Lincoln Caplan's seminal book on the topic, the SG is unlike any litigant in his simultaneous commitment to litigating on behalf of the Executive Branch and helping the Court.[249] Although we find historical support for these rationales, we argue that

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[244] 566 U.S. 356 (2011).
[245] *See* Brief for the United States as Amicus Curiae Supporting Vacatur and Remand, *Rehberg v. Paulk*, 566 U.S. 356 (June 16, 2011).
[246] *Id.* at 29-31.
[247] Transcript of Oral Argument at 25, 29, 30, 34, *Rehberg*, 566 U.S. 356.
[248] *Rehberg*, 566 U.S. 356.
[249] CAPLAN, *supra* note 12, at 3–4.

developments at the Court and in the SG's practices have made it no longer justifiable to give preference to the SG at amicus oral argument on these bases.

A. OSG's Oral Argument Expertise

OSG's litigators would have given it a significant advantage at oral argument for much of the Supreme Court's history. The need for litigants who are skilled at oral argument became important in the early to mid-twentieth century, when the Court began aggressively questioning litigants at oral argument.[250]

In the early 1900s, there was some semblance of a Supreme Court bar because the difficulty of travel caused out-of-town private litigants to refer Supreme Court cases to the local bar.[251] But as travel became easier, arguments were spread out across more non-government advocates, who were less familiar with the Court.[252] While a quarter of the non-government advocates who appeared before the Court in the 1840 Term argued two or more cases, that number fell to seven percent by the 1940 Term.[253] During most of the twentieth century, members of the private bar simply did not appear nearly as regularly before the Court as did members of OSG.[254] OSG's lawyers, by contrast, continuously honed their oral advocacy by their regular appearances before the Court.[255]

The rise of the Supreme Court bar since the mid-1980s, however, has eroded that advantage. In the 1980s, several prominent members of OSG—including former SGs—went to private law firms. The first was former SG Lee, who left his position for Sidley Austin in 1985.[256] In the years that followed, several other OSG lawyers went to private practice.[257] Today, Supreme Court practices staffed by former members of OSG and other Supreme Court experts are a staple of many large law firms.[258] Some small law firms are dedicated to practicing in appellate courts, and in particular the Supreme Court.[259]

Non-profit organizations, law school clinics, and state solicitor general offices have also hired experienced and respected Supreme Court litigators. Organizations like the NAACP Legal Defense Fund,[260] ACLU, and Public Citizen all have an active Supreme Court practice,[261] as do associational groups like the Chamber of Commerce.[262] In the last fifteen years, many law schools have started successful pro bono Supreme Court clinics led by members of the Supreme Court bar.[263]

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[250] *See supra* notes 108-110 & accompanying text.
[251] Shapiro, *supra* note 108, at 26 n.76.
[252] Lazarus, *supra* note 70, at 1493 n.30.
[253] *Id.*
[254] *See supra* Part IV.
[255] Tony Mauro, *Appealing Practice*, LEGAL TIMES, Oct. 9, 2007, at 14.
[256] Lazarus, *supra* note 70, at 1498.
[257] *Id.* at 1499–1500.
[258] *Id.* at 1500.
[259] *Id.* at 1500–1501.
[260] *Id.* at 1501.
[261] *Id.*
[262] *Id.* at 1506–7.
[263] *Id.* at 1502.

Thirty-nine states have a solicitor general's office, and another seven have a similar position under the attorney general.[264] More than half of state solicitors general attended top-20 law schools, almost forty percent of them clerked on federal appellate courts, and eighteen percent of them clerked on the Court.[265]

From the 2011 through the 2017 Terms, around forty percent of advocates who argued before the Court were "expert" litigators from outside OSG.[266] Because these advocates appear regularly before the Court, they use many of the same credibility-building and -guarding techniques as the SG.

Their high success rate in petitioning the Court, although not achieved by every expert, suggests they perform a "filtering," or validating, function in the certiorari process that is similar to OSG's. In 2007, the Court granted more than half of petitions made by lawyers who were "experts"—defined as either having argued before the Court at least five times or being affiliated with a firm or organization with lawyers who, in the aggregate, argued at least ten times before the Court.[267]

These advocates have also been successful on the merits. Between 2013 and 2017, twenty-two groups outside OSG had at least four arguments before the Court and at least a fifty percent win rate.[268] These included eleven law firms, four state solicitors general, one state attorney general, three law school clinics, two nonprofits, and the Office of the Federal Public Defenders.[269] Six of these groups won more than three quarters of their cases.[270]

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

B. OSG's Access to Federal Agencies

OSG's ability to gather information from federal agencies and relay it to the Court was also a key advantage for most of the twentieth century. Beginning in the 1940s, a large amount of litigation centered on the legality of agency action, including interpretations advanced in regulations and policy documents, as well as agency licensing and adjudications.[271] Answering

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[264] Anthony Johnstone, *Hearing the States*, 45 PEPP. L. REV. 575, 601 (2018).
[265] Greg Goelzhauser & Nicole Vouvalis, *State Coordinating Institutions and Agenda Setting on the U.S. Supreme Court*, 41 AM. POL. RES. 819, 823 (2013).
[266] *SCOTUSBlog Stat Pack: October Term 2017: Oral Argument – Advocates*, SCOTUSBLOG (June 29, 2018), https://www.scotusblog.com/wp-content/uploads/2018/06/SB_argument-advocates_20180629.pdf.
[267] Lazarus, *supra* note 70, at 1502, 16; Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001-2015*, 61 VILL. L. REV. 795 (2016) (showing that from 2012 to 2015, the nine lawyers who filed the most certiorari petitions had between 20-50% granted).
[268] *Supreme Court All-Stars 2013-2017*, EMPIRICAL SCOTUS (Sept. 13, 2018), https://empiricalscotus.com/2018/09/13/supreme-court-all-stars-2013-2017.
[269] *Id.*
[270] *Id.*
[271] *Id.*

these questions implicated formal or informal deference to the agency—which required understanding the agency's reasoning and position—as well as policy and pragmatic concerns regarding federal government functioning. OSG was the only litigant who could provide these answers because it alone had access to the agencies.[272]

A related but distinct service that OSG performs is to filter out potentially discordant views within the federal government to present only one to the Court. In a series of cases from 1866 to 1888, the Court held that the AG had plenary power over all litigation conducted on behalf of the federal government unless that authority was statutorily placed elsewhere.[273] No federal court would hear from a representative of another department of the federal government if the AG or his representative (the SG) already represented the United States in the litigation.[274] When Congress later created administrative agencies, it took this cue and generally vested their litigation authority in DoJ.[275] The Court has emphasized the importance of hearing only "one voice" from the federal government—a voice, the Court clarified, "that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people."[276]

Because it is the clearinghouse for all federal government litigation and has a statutory duty to represent the "interests of the United States,"[277] OSG attempts to consider how every case may impact the interests of the different parts of the Executive Branch. OSG has developed a formal policy of soliciting the views of the agencies any time it considers entering a case as amicus. OSG receives written memoranda from agency attorneys articulating their legal position.[278] OSG then arranges a meeting with agency representatives and each of the litigants to hear the different interests at stake before determining its position.[279] Many former members of OSG have agonized about the predictable conflicts that arise between agencies, [280] which must be settled out of the view of the Court and which the SG has unilateral authority to adjudicate. (There is no indication the Court shares these concerns.)

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[272] Even when the SG declines to defend an agency's position, as in the 2019 case *Smith v. Berryhill*, No. 17-1606 (May. 28, 2019) the agency may be prohibited from assisting a court-appointed amicus in defending its own actions. *See* Interview with Deepak Gupta (Apr. 19, 2019). Gupta was the Court-appointed amicus in *Smith v. Berryhill*.
[273] *See* Sewall Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165, 185–87 (1938).
[274] *See id.*
[275] *See* James R. Harvey III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients' Note*, 37 WM. & MARY L. REV. 1569, 1575 (1996) (noting that the SG's office is "much less encumbered by the restrictions on litigating authority and loyalty toward an agency" than DoJ generally and that fewer than ten out of forty-one agencies can independently litigate before the Court).
[276] *Providence Journal Co.*, 485 U.S. 693.
[277] 28 U.S.C. §§ 517-518.
[278] Interview with Former Senior OSG Attorney, *supra* note 91.
[279] Interview with Joshua Rosenkranz (Apr. 12, 2019); Interview with Clement, *supra* note 241.
[280] Stern, *supra* note 120, at 217; Seth P. Waxman et al., *Panel of Former Solicitors General*, Solicitor General Conference BYU L. REV. 1, 12 (2003) (statement of Rex E. Lee: "the startling consequence of my making a decision in these circumstances is that the side that I rule against doesn't get represented at all"); *id.* at 73 (statement of John G. Roberts: "I have always been a little surprised at the prominence of the office in resolving those types of decisions"); Interview with Senior OSG Attorney, *supra* note 91 (explaining that OSG often gives greater weight to the lead agency, the soundness of legal arguments, and spillover effects while remarking that "[t]here is no formula, and that is what makes mediating conflicts between the different agencies one of the most interesting parts of the job").

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

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

In *Clapper v. Amnesty International*,[288] which involved a constitutional challenge to the Foreign Intelligence Surveillance Act, a major issue was standing. At oral argument, then-SG Verrilli told the Court that the government had a practice of giving notice to criminal defendants when warrantless surveillance was the source of evidence against them, and thus those individuals would have standing to challenge the law. But he said that the reporters, lawyers, and human rights groups that wanted to challenge the law lacked standing because they could not show they had been harmed by the surveillance program—and they had no reason to think their communications were being collected.[289] The majority opinion parroted this point.[290] DoJ,

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[281] Interview with Senior OSG Attorney, *supra* note 91 ("We can be a repository of information about the federal agencies, and the Court counts on us to go out there and get it. The Court cannot get that information anywhere else."); Interview with Garre, *supra* note 91; Interview with Kannon Shanmugan (Apr. 22, 2019); Interview with Clement, *supra* note 241.

[282] Brief of the United States as Amicus Curiae 31, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (June 27, 2017). The SG's brief in *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018), arguably also contained new information, but this new information was DOJ's decision to change its position on whether the type of voter roll maintenance system used by Ohio was legally permissible. Brief of the United States as Amicus Curiae 14, *Husted*, 138 S. Ct. 1833.

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

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

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

[286] *Id.* at 1641.

[287] Letter from Michael R. Dreeben, Deputy Solicitor Gen., U.S. Dep't of Justice, to William K. Suter, Clerk, Supreme Court of the U.S. (Apr. 24, 2012), https://www.documentcloud.org/documents/346755-nken-v-holder-letter.html.

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

[289] *Id.*

[290] *Clapper*, 568 U.S. at 421-22.

however, had no such policy for giving notice.[291] Verrilli had apparently been unaware that he misled the Court. He later convinced DoJ to change its procedures to give such notice.[292]

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

The fact that OSG represented a party rather than an amicus in these cases might account for what Morawetz criticizes as "the work of an advocate."[297] But because OSG should be motivated by its credibility as a repeat player, there should be minimal differences in how it approaches party versus amicus cases. The problem with OSG's use of facts is that, in most cases, they cannot be verified.[298] The claim is not that OSG acts in bad faith; rather, it is that the appellate process is not designed for fact-finding.

This fact-finding can also increasingly be conducted by lawyers outside OSG. Since the 1960s and 1970s, agencies increasingly conduct their work in public.[299] Federal statutes like FOIA[300] and Office of Management and Budget bulletins[301] have created affirmative disclosure requirements for agencies. Scholarship has shown how the rise of citations to legislative history in the first half of the twentieth century was dominated by government lawyers, in part because they had access to better resources.[302] Today, a combination of greater litigation around agencies

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[291] Sandra L. Lynch, *Constitutional Integrity: Lessons from the Shadows*, 92 N.Y.U. L. REV. 623, 626 & n.19 (2017).
[292] Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES (Oct. 16, 2013), https://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html.
[293] Slip. Op. No. 18-966.
[294] *Id.* at 4.
[295] *Id.* at 27.
[296] *Id.* at 28.
[297] Morawetz, *supra* note 285, at 1654.
[298] *Id.* at 1654–55.
[299] *See generally* MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945-1975 (2015).
[300] 5 U.S.C. § 552(a)(2) (2018); *see also* Admin. Conf. of the U.S., Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions, Recommendation No. 89-8, https://www.acus.gov/recommendation/agency-practices-and-procedures-indexing-and-public-availability-adjudicatory.
[301] *See* J. Timothy Sprehe, *Federal Policy on Information Access and Dissemination*, 5 INFO. SOC. 19 (1987).
[302] Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 281 (2013).

coupled with growth in legal research technology has diminished the government's historical advantage—though admittedly has not eliminated it.[303]

Some of the most influential briefs about agency action have not been authored by OSG. In the 2003 affirmative action case *Grutter v. Bollinger*,[304] one of the arguments the Court found most persuasive came from an amicus brief on behalf of retired military officials. Counsel of record Carter Phillips argued that affirmative action was a national security issue and that the military required officers trained in diverse environments.[305] The brief was repeatedly cited at oral argument.[306] As a measure of the brief's influence, when the Court considered another constitutional challenge to affirmative action thirteen years later, OSG not only co-signed a brief with the Department of Defense,[307] but at oral argument, SG Verrilli proactively brought up the point.[308]

Finally, several Justices have recently expressed skepticism about judicial deference to administrative agencies in litigation.[309] If agencies' own policy and interpretive statements are not worthy of deference, agency operations, as synthesized through OSG, should not be held in any particular esteem.

C. The SG as the Tenth Justice

The conception of the SG as the "Tenth Justice" stems from a long history of OSG practice. It is not clear when the moniker originated, but it has been core to the perception of OSG at least since the 1930s.[310] It is rooted in OSG's service to at least two, and sometimes three, Branches of the government: to the Executive, by soliciting and presenting its views; sometimes to the Legislative, by defending federal statutes; and to the Judicial, by presenting the arguments and viewpoints that allow for the best development of American law. Because OSG is the quintessential repeat player at the Court, it best fulfills its role (as the representative of the Executive Branch) by maximizing its credibility before its audience (the Court).[311] This role is reinforced by the norm of the SG's "independence," a shield from the political pressures on the AG and other parts of DoJ in all but the most controversial of cases.[312]

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[303] *Id.* at 390, 360 n.446.
[304] 539 U.S. 306 (2003).
[305] Brief of Lt. Gen. Julius W. Becton et al. as Amici Curiae, *Grutter*, 539 U.S. 306 (Feb. 21, 2003). OSG also filed an amicus brief in the case but did not mention any military interest. Brief of the United States as Amicus Curiae, *Grutter*, 539 U.S. 306 (Jan. 17, 2003).
[306] Larsen & Devins, *supra* note 19, at 1905.
[307] Brief of the United States as Amicus Curiae, Fisher v. University of Tex. at Austin, 136 S. Ct. 2198 (2016) (No. 14-981).
[308] Transcript of Oral Argument at 87, *Fisher*, 136 S. Ct. 2198 (2016).
[309] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2425–48 (2019) (Gorsuch, J., concurring in the judgment).
[310] *See* Stern, *supra* note 120, at 155 (quoting Judges Thatcher speaking as SG in 1931 as saying "This duty brings with it a peculiar responsibility to the Court, in taking infinite pains to see that the cases presented are only such as are worthy of its review" and asserting himself that "[t]he Solicitor General regards himself-and the Supreme Court regards him-not only as an officer of the Executive Branch but also as an officer of the Court.").
[311] Cordray & Cordray, *supra* note 3, at 1337.
[312] *See* CAPLAN, *supra* note 12, at 17–18 (discussing how "it has been important for the SG to be 'independent' in order to fulfill his duty to both the Executive Branch and the Supreme Court").

The SG's ability to serve as "Tenth Justice" is possible only because of a professional anomaly: the SG, unlike virtually every other lawyer, does not have a readily identifiable client to whom he owes legal duties. Under the ethical rules governing lawyers, attorneys are bound to consider only what is in the interest of a given client and not how it will affect other clients or even the development of the law.[313] They cannot inform the Court that the court below erred in ruling for their clients.

Because OSG is unconstrained by these ethical requirements, it can serve partly as an advocate for its client and otherwise as an aid to the Court.[314] OSG is expected to maintain higher litigation standards than those of attorneys for private litigants. The "Tenth Justice" does not present legal arguments to the Court unless he finds them credible and believes the Court will also.

Every primary function associated with the "Tenth Justice" is premised on this unique ethical status. One of OSG's most important roles is in shaping the Court's docket by deciding whether to petition for certiorari and, if so, what position to take.[315] SGs have described this choice as motivated by an effort to meet the Court's expectations.[316] Over time, OSG has requested certiorari in fewer cases, and its petitions have become a smaller portion of the Court's activity.[317] The Court seems to value this filtering: since the 1950s, around seventy percent of OSG's petitions have been granted, compared with approximately three percent of other petitions.[318]

When OSG takes any position before the Court, it must reconcile the often-conflicting views of executive agencies.[319] The tempering of agencies' narrow interests is essential to the Tenth Justice role,[320] and it may take many forms, including a compromise position between those of two agencies, a toning down of an agency's view, or a refusal to present an agency's view to the Court.[321] Because no single agency is OSG's client, it has considerable latitude in deciding which views to represent. However, because it serves the Court as the "Tenth Justice" rather than the President's lawyer, OSG may offer a less self-interested perspective than other parties.

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[313] *See* Model R. Prof'l Conduct 1.3 cmt. 1 ("A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").
[314] *See generally* Francis J. Aul, Note, *Out of Many Clients, One: Conflict of Interest and the Office of the Solicitor General*, 31 GEO. J. LEGAL ETHICS 475 (2018).
[315] Erwin N. Griswold, *Office of the Solicitor General—Representing the Interests of the United States before the Supreme Court*, 34 MO. L. REV. 527, 532 (1969); Stern, *supra* note 120, at 155; Lee, *supra* note 15, at 598.
[316] Stern, *supra* note 120, at 155–56 (noting that "[t]he selfish reason for the Solicitor General's self-restraint in petitioning for certiorari is to give the Court confidence in Government petitions"); Lee, *supra* note 15, at 598–99.
[317] *See* Cordray & Cordray, *supra* note 3, at 1341–43.
[318] *Id.* at 1333. Former-SG Rex Lee speculated that the Court has a "decisional capacity" for the federal government such that if the SG petitioned for certiorari more frequently, the Court would grant a smaller percentage of its petitions. *See* Lee, *supra* note 15, at 598.
[319] Wade H. McCree Jr., *The Solicitor General and His Client*, 59 WASH. U. L. Q. 337, 340–41 (1981).
[320] Stern, *supra* note 120, at 155.
[321] Interview with Harrington, *supra* note 243; Interview with Senior OSG Attorney, *supra* note 91; Interview with Former Senior OSG Attorney, *supra* note 91; Interview with Waxman, *supra* note 87.

One of the most prominently proclaimed examples of this attitude is that the SG sometimes "confesses error," or contends that the lower court erred in siding with him.[322] Estimates suggest he does so around two to three times per year.[323] Scholars[324] and members of OSG[325] tout this as strong evidence of Tenth Justice-like behavior—although others have viewed it as little more than partisan politics.[326] Confessing error, absent permission from the client, would be flatly unethical for an attorney representing a private party.[327] Because the SG does not have a "client" in the traditional sense of the word, he is not bound by this rule.

The most central aspect of the Tenth Justice tradition is the notion that the SG is apolitical, or at least rarely political. This same neutrality is not demanded of other litigants, who are expected and required to advocate for the positions of their clients, political or otherwise. When OSG litigates on behalf of the "interests of the United States"—interests that the SG defines almost entirely in his discretion—OSG may represent one of two conceivable interests: the institutional interests of the United States, which should be relatively constant over time, or the President's interests, which shift across administrations. Historically, no SG has evinced a substantive limiting principle for what types of cases to enter or whose interests he may seek to vindicate.[328]

Although OSG has long proclaimed its independence from politics, the basis of this claim is questionable. The SG (and, after 1982, the Principal Deputy as well[329]) is a political appointee who works under another political appointee, the AG.[330] The President and the AG can fire the SG without cause.[331] And the President need not have direct discussions with the SG to influence him. Presidents often make public statements about their policy aspirations, and an SG who wanted to serve the President's wishes could use those as cues.

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[322] *See* Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 KY 485, 487–88 (1994).
[323] *See* David M. Rosenzweig, *Note, Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2080 (1994); Neal K. Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027, 3030 (2013).
[324] CAPLAN, *supra* note 12, at 9.
[325] *See* Days III, *supra* note 322, at 487–88; Stern, *supra* note 120, at 157; Interview with Harrington, *supra* note 243.
[326] When the government confesses error and refuses to defend the judgment below, the Court often appoints an amicus to do so. *See generally* Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORNELL L. REV. 1533 (2016). It is not clear that the Court respects refusals to defend the judgment below, and former Justices were open about disliking it. *See* CAPLAN, *supra* note 12, at 10 (discussing Justice Rehnquist's dislike of the practice). At other times, some of OSG's error confessions have been interpreted as political decisions, as was the Obama Administration's refusal to defend the Defense of Marriage Act. *See, e.g.*, Charlie Savage & Sheryl Gay Stolberg, *Obama Shifts Course on Defense of Marriage Act*, N.Y. TIMES, Feb. 23, 2011, https://www.nytimes.com/2011/02/24/us/24marriage.html. (DOMA). As Judge Learned Hand said, "It's bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General." Archibald Cox, *The Government in the Supreme Court*, 44 CHI. B. REC. 221, 225 (1963). Some of these "confessions" also come long after the case has been decided, such as when Neal Katyal "confessed error" in *Korematsu*—more than half a century after it was decided. *See* Katyal, *supra* note 323, at 3029.
[327] *See supra* note 313 & accompanying text.
[328] *See supra* Section III.A.2.
[329] CAPLAN, *supra* note 12, at 62.
[330] *See* Griswold, *supra* note 317, at 530–31; Days III, *supra* note 322, at 489.
[331] *See* REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 70 (1994) (noting that the SG "serve[s] at the pleasure of the president").

Dating back to the tenure of SG Philip Perlman—appointed by President Truman—at least, the SG has had conversations with the AG and sometimes with the President about the position he would take in a highly political case.[332] In *Brown*, OSG effectively transferred control of its amicus brief to the AG's office.[333] If OSG is to represent the views of the federal government, and more narrowly the Executive Branch, the President is unquestionably a client. Many SGs have stated openly that they believe they have a duty to serve the President's interests.[334]

At different points in OSG's history, politicization was a primary concern of Court watchers and some Justices.[335] That occurred most notably during the Reagan Administration. Reagan had run for President on an explicit agenda to rein in the excesses of the activist Warren Court.[336] Observers worried that he would pressure the Court and the SG to adopt positions out of political ideology rather than legal principle.[337]

A memorandum published by the Office of Legal Counsel in 1977 seeking to define the proper relationship between the SG and the White House explained the tradition of "independence" as a means of ensuring that OSG made legal decisions unclouded by political considerations: "If the independent legal advice of the Solicitor General is to be preserved, it should normally be the Solicitor General who decides when to seek the advice of the AG or the President in a given case."[338] A criticism of SG Fried was premised on this view. Caplan argued that a group of political appointees in the Justice Department, supported by the Reagan White House, put extraordinary pressure on SGs Lee and Fried. Lee largely resisted the pressure, saying when he resigned: "There has been this notion that my job is to press the Administration's policies at every turn and announce true conservative principles through the pages of my briefs. It is not. I'm the Solicitor General, not the Pamphleteer General."[339] Caplan argues that Fried allowed politics to guide him so strongly in some cases that it overrode his utility to the Court in some cases, by compromising either his judgment about what constituted an acceptable legal argument or his commitment to making one.[340]

Reflecting on his tenure, now-Professor Fried disagreed:

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[332] *See supra* note 147-154 & accompanying text; *see also* Days III, *supra* note 322, at 493 ("[G]iven the way that the decision-making process works, by the time a case has reached the point of possible appellate court or Supreme Court review, the policy concerns of the President have usually been fully presented to the Solicitor General by his appointees in the affected departments and agencies.").
[333] *See supra* note 160 & accompanying text.
[334] *See, e.g.*, Lee, *supra* note 15; Waxman et al., *supra* note 280, at 156, 57 (Starr, Dellinger, Days).
[335] *See generally* CAPLAN, *supra* note 12 (documenting the SG's usual independence from the President and reasons to believe that policy changed during the Reagan administration, and in particular during Charles Fried's tenure).
[336] Frank B. Cross et al., *The Reagan Revolution in the Network of Law*, 57 EMORY L.J. 1227, 1228 (2007–2008).
[337] *See* CAPLAN, *supra* note 12, at 270.
[338] Office of Legal Counsel, *Role of the Solicitor General*, Memorandum Opinion for the Attorney General 77–56, at 238 (Department of Justice), Sept. 29, 1977.
[339] CAPLAN, *supra* note 12, at 107.
[340] *Id.* at 235 (documenting instances in which Fried's positions during the 1985 Term appeared to be grounded in political considerations at the expense of strong legal reasoning).

> The idea of the SG as a "Tenth Justice" who does not have opinions about what the law should be is odd. It's not like the first nine don't have points of view. As long as the SG presents an objective and complete view of precedent and the record, he may ask the Court to develop the law to be consistent with his point of view.[341]

We do not argue that the SG's capacity to act as a Tenth Justice has eroded, but rather that he has strayed from this role over time with the Court's effective permission. Historically, the Court appeared sensitive to the distinction between the long-term federal interest and the President's interests. It rejected some of the SG's requests to participate in amicus oral argument when the federal interest was minimal.[342]

But from 2011 through the summer of 2019, the Court has rejected none of these requests.[343] The mere fact of granting oral argument does not imply that the Court necessarily agrees with OSG's position, and the Court has listened to both Republican and Democratic SGs. But its willingness to hear from OSG nonetheless suggests the Court welcomes OSG's participation in all the cases in which it has expressed an interest, seemingly without reference to its motives.

Current and former members of OSG told us that political cases were only a small part of the office's workload. This assessment appears largely correct: most of the cases OSG enters as amicus involve questions of agency administration or regulation.[344] But even those other cases may have political overtones,[345] and the minority of cases that are politically charged are the highest profile and shape the reputation of OSG.[346] As a sign of their importance, these cases are often the ones that the SG or the Principal Deputy SG argue.

Despite evidence of the SG's political overtones in at least some cases, the Court's behavior suggests it believes to a large extent in the Tenth Justice conception of the SG: unlike its treatment of any other litigant, the Court has perpetuated, shaped, and relied on OSG throughout history. The strongest indication that the Court views itself as having a special relationship with OSG is its issuance of CVSG orders.[347] Why this practice developed is unclear, but it suggests that the Court valued OSG's judgment even though—or perhaps because of—its lack of a client in the case.[348] Chief Justice Rehnquist stated openly that he gave OSG's petitions for certiorari "the benefit of the doubt."[349]

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[341] Interview with Fried, *supra* note 91.
[342] *See supra* notes 205-227 & accompanying text.
[343] *See supra* Figure 6.
[344] *See supra* Section III.A.2.
[345] *See, e.g.*, *Kisor*, 139 S. Ct. 2400.
[346] *E.g.*, Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Commn., 138 S. Ct. 1719 (2018); Hollingsworth v. Perry, 570 U.S. 693 (2013).
[347] Solimine, *supra* note 71, at 1186; Lepore, *supra* note 60, at 36.
[348] *Cf., e.g.*, Bench Memorandum, *Solem v. Bartlett* File, Powell Papers, *supra* note 225 (Dec. 5, 1983) ("I therefore see no way around a grant in this case, although it may be worthwhile to call for the views of the Solicitor General to see whether he suggests any good way of avoiding plenary review.").
[349] CAPLAN, *supra* note 12, at 266.

The Court has also shaped OSG's role in more subtle ways. In 1949, the Court for the first time required that all non-governmental parties who wanted to file an amicus brief either obtain the consent of the parties or else file a motion to the Court describing the applicant's interest and how it offered an argument not adequately covered by the parties.[350] Following the Rule change, OSG flipped from almost always giving consent to almost always refusing it.[351] Justice Frankfurter twice publicly reprimanded OSG for this new practice.[352] The Justice complained that OSG was improperly shifted the burden of sorting applications—properly assigned to him as a party—back onto the Court.[353] When SG Fried advanced legal arguments the Court believed went too far, the Court denied his motions for amicus oral argument and even chastised him in opinions.[354] When they believed he favored politics over the quality of legal argument, some Justices went on record and told journalist Lincoln Caplan so.[355] Chief Justice Rehnquist said he began looking at the SG's certiorari petitions more closely.[356] The same appears to have happened in the Trump administration. When SG Francisco reversed OSG's position in several cases, some of the Justices questioned him about that at oral argument.[357]

While the Court has given OSG immense power over its docket, these targeted directives demonstrate how the Court also seeks to shape OSG into the institution it wants. More concerning, this behavior suggests that the Court views these problems as one-off and correctable. It indicates that some of the Justices believe they can discern when OSG is acting in a manner of which they disapprove, but that nonetheless they default to viewing the SG as the Tenth Justice—despite evidence to the contrary.

V. Deciding Who Should Be Heard

We have argued that the traditional justifications for giving preference to OSG over non-OSG amici for participation in oral argument no longer hold. Standing alone, this conclusion does not explain who should be given this privilege and when. This Part aims to fill that gap.

We start with the observation that all amicus oral argument participation—particularly by OSG so frequently and to the almost-complete exclusion of others—creates procedural and substantive problems. First, amicus oral argument distorts the adversarial process. The due process concerns underpinning the American adversarial system presume that every party has a lawyer who will advocate zealously on their behalf.[358] Unlike most amici, the parties will be directly impacted by the Court's decision regardless of how narrowly it rules and on what grounds.

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[350] Harper & Etherington, *supra* note 139, at 1173.
[351] Krislov, *supra* note 20, at 714.
[352] Harper & Etherington, *supra* note 139, at 1176; Krislov, *supra* note 20, at 714.
[353] *Lee v. United States*, 343 U.S. 924 (1952).
[354] *See supra* Section III.B.3.
[355] *See* CAPLAN, *supra* note 12, at 264–67.
[356] *See id.* at 266.
[357] *See, e.g.*, Transcript of Oral Argument 34, *Janus v. AFSCME* ("Justice Sotomayor: Mr. -- Mr. General, by the way, how many times this term already have you flipped positions from prior administrations?").
[358] Brianne Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 3 (2011).

In many cases, amicus oral argument even further displaces the parties' rights as litigants. Divided argument is, as Justice (and former SG) Robert Jackson put it, "at best . . . somewhat overlapping, repetitious and incomplete and, at worst, contradictory, inconsistent and confusing."[359] He offered a blanket rule for litigators: "Never divide between two or more counsel the argument on behalf of a single interest."[360] At the Supreme Court, amici generally take argument time away from the party they support.[361] Granting amicus oral argument requests has the effect of depriving the lawyer representing that party of time she could use to advocate for her client.

In addition, amici are encouraged to offer legal arguments not advanced by the parties.[362] They may thus undermine or even derail a party's arguments. The lawyer for that party may have to spend some of her newly diminished time distinguishing the amicus's arguments. Even when an amicus adopts the same legal reasoning as the party it supports, his participation undermines the due process rights of the *other* side.[363] In some categories of cases the support of a sophisticated government litigant like the SG is only available to one party and not the other.[364]

Private litigants seldom oppose the SG's motions for amicus oral argument and often solicit them when the SG might be on their side. Several Supreme Court litigators told us they almost never, or had never, supported amicus oral argument by even other elite Supreme Court practitioners outside OSG.[365] One reason why parties almost never oppose these motions may be that they know the Court weighs arguments more heavily when they are advanced by OSG—not because the OSG attorney would more skillfully use the ten minutes of oral argument than they would. Another possible explanation is that these litigators do not want to appear to rebuke OSG because of its influence over the Court and its repeat player status.

Amicus oral argument may also affect the substantive development of the law. One of the most frequently cited rationales for permitting amicus oral argument is that the amicus may help the Court reach the correct legal rule in a given case. Some instances in which the Court has granted amicus oral argument appear clearly to be motivated by this thought—particularly when the amici supported neither party.[366] The shift in OSG's caseload at the Court from participating primarily as a party to appearing more frequently as an amicus suggests that the SG believes he can affect substantive outcomes as an amicus.

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[359] Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, A.B.A. J. 801, 802 (1951).
[360] *Id*.
[361] *See* SUP. CT. R. 37.7 (stating that, in the absence of a party's consent to share time, an amicus oral argument motion "will be granted only in the most extraordinary circumstances").
[362] SUP. CT. R. 37.1.
[363] *Cf.* Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. APP. PRAC. & PROCESS 523 (2003) (discussing the ways in which an amicus can greatly aid the party it supports).
[364] *See infra* text accompanying notes 420.
[365] Interview with Rosenkranz, *supra* note 279; Interview with Murphy, *supra* note 232; Interview with Verrilli, *supra* note 91.
[366] *See, e.g.*, Ortiz v. United States, 138 S. Ct. 576 (2018) (granting amicus oral argument by Professor Aditya Bamzai, whose brief argued in support of neither party that the Court lacked jurisdiction to hear the case).

The fact that it is OSG who dominates amicus oral argument is particularly significant because of the SG's reputation as the Tenth Justice. As discussed above, the Court defers to the SG in many areas and in all likelihood believes he fulfills that role. Some of OSG's amicus positions, however, do not warrant this confidence. Social science research suggests that it is difficult for decision-makers to discount any information given to them, and particularly information given by an otherwise reputable actor.[367] If the Justices are unable to distinguish between when OSG's judgment—and even citation of new factual information—is deserving of deference and when it is not, their decisions might give undue weight to OSG's views.

The Court's universal willingness to hear from OSG as an amicus at oral argument even when it acts politically is also a problem for the Court's legitimacy.[368] Over the last fifty years, the public has come to view the Court as a political body.[369] One reason for this is the Court's increased willingness to hear cases litigated by interest groups and motivated by ideology.[370] To counter this perception, the Court should avoid favoring actors who operate in a political capacity, particularly the federal government. If the Court regularly heard from the Republican or Democratic Party, Americans would rightly take note of the intrusion of politics in an ostensibly nonpolitical proceeding.

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

Aside from politics, allowing OSG to argue as an amicus so frequently also enables OSG to amplify its distinctly institutional viewpoint—that of the federal government—at the Court. The Court is naturally sympathetic to the Executive's institutional interests, and particularly with the government's ability to function effectively and enforce the law.[371] OSG's perspective is

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[367] Baruch Fischhoff, *Perceived Informativeness of Facts.*, 3 J. EXPERIMENTAL PSYCHOL. 349 (1977); Chanthika Pornpitakpan, *The Persuasiveness of Source Credibility: A Critical Review of Five Decades' Evidence*, 34 J. APPLIED SOC. PSYCHOL. 243, 244 (2004).

[368] *See* Curry et al., *supra* note 168, at 241 (concluding that, in part through OSG, "presidential policy preferences exerted an independent impact on the Supreme Court's decision making in civil liberties and civil rights cases between 1953 and 2000"); Barbara L. Graham, *Explaining Supreme Court Policymaking in Civil Rights: The Influence of the Solicitor General*, 1953-2002, 31 POL'Y STUD. J. 253, 266 (2003) (concluding based on study of civil rights cases between 1953 and 2000 that "the filing of liberal amicus briefs by the solicitor general is more likely to be influential *if* the Supreme Court is liberally predisposed toward that policy").

[369] Richard L. Hasen, *Polarization and the Judiciary*, 22 ANNUAL REVIEW OF POLITICAL SCIENCE 261 (2019); Brandon L. Bartels & Christopher D. Johnston, *Political Justice? Perceptions of Politicization and Public Preferences toward the Supreme Court Appointment Process*, 76 PUBLIC OPINION QUARTERLY 105 (2011). Richard L. Hasen, *Polarization and the Judiciary*, 22 ANNUAL REVIEW OF POLITICAL SCIENCE 261 (2019); Brandon L. Bartels & Christopher D. Johnston, *Political Justice? Perceptions of Politicization and Public Preferences toward the Supreme Court Appointment Process*, 76 PUBLIC OPINION QUARTERLY 105 (2011).

[370] Hasen, *supra* note 369; Carl Hulse, *Political Polarization Takes Hold of the Supreme Court*, N.Y. TIMES (July 5, 2018), https://www.nytimes.com/2018/07/05/us/politics/political-polarization-supreme-court.html.

[371] *See* Cordray & Cordray, *supra* note 3, at 1338 nn.68–69.

fundamentally institutionalist, and focused on federal power and federal issues. At times, it is at odds with the views of a majority of one or both houses of Congress.[372] This is a bias many of the Justices likely share[373] and one that is amplified by OSG's frequent oral arguments at the Court.

In light of the risks inherent in continuing the Court's current amicus oral argument practice, we suggest a framework for deciding which amicus oral argument motions to grant. Although there are many conditions under which an amicus's participation at oral argument is unjustified, there are also circumstances in which the value of divided argument might outweigh its costs.[374]

We recognize that the Court is likely cautious about granting amicus oral argument participation. When we asked expert Supreme Court litigators why, in their opinion, the Court did not grant more of these motions, several individuals told us they believed the Court did not want to be in the position of picking and choosing among amici.[375] In anticipation of this concern, we propose a standard for when amicus oral argument motions should or should not be granted and identify its benefits over the Court's current approach.

A. When Amici Should Be Heard

Oral argument at the Supreme Court must balance dual objectives. It must fulfill the due process principles underlying every exercise of judicial power in an adversarial system. It also must account, however, for the Supreme Court's distinct role in "resolv[ing] public policy issues of national importance."[376] Given these charges, we suggest the Court should allow amici to argue only if they fall into one of two narrow categories.

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

The first is a two-part test: an amicus who (1) has a concrete interest in the litigation and (2) provides new reasoning relative to the parties' presentation that advances this interest should be permitted to participate in oral argument. To have a "concrete interest," an amicus must have some type of pre-existing practice that would be disrupted by the case at issue and that the amicus seeks to defend. This establishes that the amicus would likely be affected by the

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[372] *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988) (in which OSG and the United States Senate filed briefs and argued as amici on opposite sides). Amicus oral argument motions by congressmembers are rare but often, though not always, granted. *See, e.g.*, Coleman v. Court of Appeals of Maryland, 565 U.S. 1091 (2011) (denying amicus oral argument motion of Senator Tom Harkin and other congressmembers).

[373] Every current Justice except Justice Kagan was a judge on a U.S. Court of Appeals before being nominated to the U.S. Supreme Court. Every Justice other than Justice Ginsburg has worked in the Executive Branch of the U.S. government. *See Current Members*, *supra* note 6.

[374] *See* Solimine, *supra* note 71, at 1204 ("The dangers of excessive politicization and disruption of the adversarial process might be said to attend the filing of any amicus brief by the SG. But those costs are tolerable or perhaps unavoidable when the SG is asserting a strong and direct federal interest. The costs loom larger when the federal interest asserted by the SG is attenuated.").

[375] Interview with David Frederick (May 8, 2019) ("A proposal that would spark more motions for amicus oral argument is not one that is going to be well received by the Justices."); Interview with Verrilli, *supra* note 91; Interview with Clement, *supra* note 241.

[376] *See supra* text accompanying note 127.

judgment. Merely stating that an amicus has an academic[377] or philosophical[378] interest in the outcome would be insufficient to demonstrate a concrete interest. To provide "new reasoning," an amicus must provide new legal reasoning (for example, offering an originalist analysis when the party has not done so).

Importantly, there is a category of arguments sometimes raised for the first time at the Court that this standard excludes: arguments principally offering new factual information. Because the Supreme Court is not a fact-finding court, new facts should be litigated in the trial court, not granted backdoor access through an amicus brief.[379] This lesson is reinforced by the factual errors from prior OSG briefs discussed in Section IV.B.

By requiring a concrete interest, this procedure protects the American adversarial system and parties' due process rights. The adversarial system presumes that every party has a lawyer who will advocate zealously on their behalf.[380] Granting amicus oral argument requests often has the effect of depriving the lawyer representing a party of time she could use to advocate for her client. Under our proposed rule, no amicus may interfere with a party's presentation of the case unless they demonstrate that they will also be affected by the judgment. Requiring that this amicus also present new reasoning both protects the Court's policymaking role and limits disruptions of the adversarial paradigm. Because participation by an amicus who meets these criteria would be permissive rather than as of right, the Court would maintain the discretion to deny such a motion on the basis that its new reasoning is not helpful to the Justices' decision-making.

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

In a very narrow set of cases, granting a second type of amicus oral argument motion might be justified: when the amicus presents an entirely new legal argument, even if it has no concrete interest in the case. Amici who fall under this standard include amicus briefs raising new jurisdictional, constitutional, and other claims.[381]

Because of the oddity of permitting anyone to raise an issue at the highest level of appellate review not litigated below, the Court should be very cautious in granting these motions. As the Justices frequently remind, the Supreme Court is "a court of review, not of first view."[382] As a result, the Court should strongly consider two other potential responses to an amicus who raises

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[377] *See, e.g.*, Brief of Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party at 1, Atlantic Marine Constr Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas, 571 U.S. 49 (June 24, 2013) ("[Amicus] teaches and writes about civil procedure and conflict of laws, and he has an interest in the sound development of these fields.").
[378] *See, e.g.*, Brief of Amici Curiae Faith and Action et al. in Support of Petitioner at 1, McCreary County v. American Civil Liberties Union of Ky., 545 U.S. 844 (Dec. 8, 2004) ("Amici contends the progressive withdrawal of God and his moral law from society through government action, particularly in our schools, has had an enormously detrimental effect on our culture . . . .").
[379] Gorod, *supra* note 358, at 4 n.9.
[380] *See supra* note 358.
[381] *See, e.g.*, Brief of Professor Aditya Bamzai as Amicus Curiae in Support of Neither Party, *Ortiz v. United States*, 138 S. Ct. 2165 (Nov. 2017) (arguing that the Court did not have Article III jurisdiction to hear the case).
[382] McWilliams v. Dunn, 137 S. Ct. 1790, 1801 (2017).

such an issue. The first is straightforward: in every case such case, the Court should require briefing from the parties on the novel argument presented by amicus. The second, more extreme response, would be to dismiss the case as improvidently granted ("DIG"). The decision to DIG a case is entirely at the Court's discretion, and several Justices have stated that the Court should do so only in very limited circumstances.[383] Firm application of these solutions is necessary to ensure that this standard does not simply invite arguments to the Court should overrule rather than apply the law or which sidetrack cases based on an issue raised only by the amicus.

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

B. Application to OSG

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

The federal interest has been described by former SG Seth Waxman as "elusive" and "difficult to discern."[384] In practice, OSG has often justified its interest in a case by referencing an executive agency's role in administering or enforcing a federal statute or the impact a case may have on DoJ's ability to engage in civil litigation or criminal prosecution.[385] Sometimes its justification is much more questionable.[386]

Most scholars who have evaluated whether OSG represents the federal interest have asked whether the interest touches on some function of the federal government.[387] This framework, however, could justify OSG's participation in almost any case, effectively leaving the decision whether to enter a case as an amicus to historical happenstance and the OSG's discretion. When asked why, for example, OSG has participated in constitutional claims over racial gerrymandering but not partisan gerrymandering, a senior OSG attorney told us it was

[383] *See* Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067 1082–95 (1988); *see also* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 426 n.3 (1987) (declining "to dismiss the writ of certiorari as improvidently granted" because "[t]he importance of the legal issue makes it appropriate for us to address the merits now").
[384] Waxman, *supra* note 14, at 17.
[385] *See supra* Section III.A.
[386] *See id.*
[387] Cordray & Cordray, *supra* note 3, at 1371.

"somewhat by accident."[388] The AG was a named party in the case that established the constitutional racial gerrymandering claim,[389] so OSG filed an amicus brief at the Court. Ever since, it has participated as amicus, "even though," as the OSG attorney noted, "they are Fourteenth Amendment cases on districting, in which the federal government now does not really have a role."[390]

More complex theories of the federal interest, as Michael Solimine has argued, might look to whether a case "may have a perceptible effect on the enforcement of federal law by some part of the Executive Branch, or where there has been a tradition of expertise centered in the Executive Branch (e.g., foreign affairs)."[391] But even this definition looks only to whether an interest *exists* rather than whether the SG *advances* those interests. In cases where OSG advances a theory that undermines, for example, an agency's enforcement policy,[392] OSG cannot be said to be advancing a concrete interest.

We do not suggest that OSG violates its statutory mandate when it lacks a concrete interest. Rather, we propose that in these cases, OSG—like any other litigant—should not be granted amicus oral argument time. Below, we highlight several types of cases where OSG's docket would be most affected.

1. Cases Without a Concrete Federal Interest

Every Term, the OSG participates as amicus in several "political" or "hot-button" cases. In many of them, OSG claims to defend the "federal interest" but cannot point to any pre-existing federal practice or regulation that would be disrupted by the upcoming ruling. OSG should not be granted amicus oral argument time in these cases unless they fall under Standard 2.

For example, the 2018 case *Janus v. American Federation of State, County, and Municipal Employees, Council 31*[393] (AFSCME) concerned the legality of agency fees. These fees are payments made by non-union members to public sector unions. Mark Janus brought a First Amendment claim against AFSCME and the State of Illinois, arguing the mandatory fees constituted compelled political speech. The United States was not a party, but SG Francisco filed an amicus brief supporting Janus. The principal federal interest stated was as the "nation's

[388] Interview with Senior OSG Attorney, *supra* note 91 ("We entered our first racial gerrymandering case somewhat by accident. There had been a Voting Rights Act claim at an earlier stage in the case, but by the time it got to the Court on the straight Fourteenth Amendment question, Janet Reno was still a party. If we had to make an original decision today about whether to enter those cases as an amicus, maybe we would not. But now there is an expectation that we are in these cases . . . .").
[389] Shaw v. Reno, 509 U.S. 630 (1993).
[390] Interview with Senior OSG Attorney, *supra* note 91.
[391] Solimine, *supra* note 71, at 1207–8.
[392] *See* Brief of United States as Amicus Curiae, *Bostock v. Clayton Cty.*, No. 17-1618 (2019) (adopting a position contrary to the EEOC's enforcement policy).
[393] 138 S. Ct. 2448 (2018).

largest public employer."[394] The federal government, however, has no practice of imposing agency fees, and a 1978 statute prevents it from doing so.[395] In filing the brief, OSG was defending a principle—not a federal practice.

Two year earlier, then-SG Verrilli had argued as amicus in *Friedrichs v. California Teachers Association*,[396] which presented the same question as in *Janus*. He was similarly unable to articulate a concrete federal interest, principally referencing federal statutes that regulate agency fees in the private sector. Unlike Francisco, then-SG Verrilli's brief supported the union against Friedrichs.

When SG Francisco argued in *Janus*, Justice Sotomayor asked him about the flip he had made in the position of the federal government.[397] And for good reason. In the two years between *Friedrichs* and *Janus*, no new facts or law had developed. The only thing that changed was the party of the President and, by extension, who he appointed as SG. This pair of cases illustrates how the lack of a concrete interest can enable the SG to take on political or ideological positions. By allowing the SG to participate in oral argument, the Court lets the SG—cloaked in a credibility based on his supposed commitment to "justice"—benefit one side or the other at the SG's discretion. Because the SG lacked a concrete interest in the public sector unions litigation, his motions for amicus oral argument in *Janus* and *Friedrichs* should have been denied.

A similar juxtaposition appears this Term. In 2016, then-SG Verrilli entered *Whole Woman's Health v. Hellerstedt*[398] as an amicus on the side of the abortion provider. That case concerned regulations on abortion providers very similar to those at issue in *June Medical Services v. Gee*,[399] a case SG Francisco has entered as an amicus on the opposite side. OSG's brief not only cites the office's participation in *Whole Woman's Health* as justifying its participation in *June Medical Services*, but it also argues that the precedent be "narrowed or overruled."[400]

In many cases, however, OSG's position at amicus oral argument has advanced a concrete federal interest. Examples included cases concerning federal preemption,[401] *Bivens* actions,[402] and the constitutionality of federal statutes.[403] In those types of cases, its participation in amicus oral argument is justified as long as it provides new legal reasoning.

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[394] Brief for the United States as Amicus Curiae Supporting Petitioner, *Janus*, 138 S. Ct 1 (2017). Other federal interests that the United States discussed were equally unpersuasive. The brief discussed federal statutes that address the legality of agency fees in the *private* sector (not raising constituting state action under the First Amendment) and past amicus participation in similar cases.
[395] 5 U.S.C. 7102 (2018).
[396] 136 S. Ct. 1083 (2016).
[397] *See, e.g.*, Transcript of Oral Argument 34, *Janus v. AFSCME* ("Justice Sotomayor: Mr. -- Mr. General, by the way, how many times this term already have you flipped positions from prior administrations?").
[398] 136 S. St. 2292 (2016).
[399] 140 S. Ct. 35 (2019) (granting certiorari).
[400] Brief for the United States as Amicus Curiae Supporting Vacatur for Lack of Third-Party Standing or Affirmance on the Merits at 1, 5, *June Medical Services*, Nos. 18-1323 & 18-1460 (Jan. 2020).
[401] *See, e.g.*, Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894 (2019).
[402] *See, e.g.*, Hui v. Castaneda, 559 U.S. 799 (2010).
[403] *See, e.g.*, Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).

2. Cases Against the Federal Interest

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

A case that illustrates this issue is *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[404] which presented a constitutional challenge to Colorado's public accommodations law. In its amicus brief, OSG noted that Colorado's public accommodations law has multiple analogues in federal statutes, such as the Civil Rights Act of 1964.[405] However, OSG's position was that the Colorado law was unconstitutional. Had the Court struck down the Colorado law, large parts of the federal anti-discrimination structure would have come under attack.[406] The other interest that OSG offered—the "substantial interest . . . in the preservation of constitutional rights of free expression"[407]—is also problematic under Standard 1. A general desire to protect constitutional rights is not a concrete interest. Because the SG did not advance an entirely new argument in *Masterpiece*, his motion for amicus oral argument would be denied under our rule.

3. Cases Without New Reasoning

When OSG considers whether to enter a case as amicus, the decision turns on the subject of the case, i.e., whether it implicates the federal government or is a topic on which the SG either wants to or believes the office should opine.[408] OSG does not consider, however, whether it will present arguments not previously raised by the parties when it decides whether to file an amicus brief. Because OSG has a policy of requesting oral argument in every case in which it files a brief,[409] OSG regularly participates in oral argument as an amicus although it does not make any novel legal arguments.

This phenomenon is most prevalent in cases where OSG's interest is not distinct from that of the party it supports. In our conversations with Supreme Court advocates, one in particular came up repeatedly: criminal prosecutions. Not only does OSG frequently enter criminal cases arising out of state convictions as an amicus in support of the state,[410] but OSG also has an informal policy

[404] 138 S. Ct. 1719 (2018).
[405] Brief for the United States as Amicus Curiae Supporting Petitioners at 1, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (Sept. 2017).
[406] Mark Walsh, *Speech, Religion and Bias All Weighed in Masterpiece Cakeshop Case*, ABA J. (Nov. 1, 2017), http://www.abajournal.com/magazine/article/speech_religion_bias_masterpiece_cakeshop/P1; Jeffrey Toobin, *Justices Ginsburg and Kagan Ask About the Artistry of Wedding Cakes*, New Yorker (Dec. 5, 2017), https://www.newyorker.com/news/daily-comment/justices-ginsburg-and-kagan-ask-about-the-artistry-of-wedding-cakes.
[407] Brief for the United States as Amicus Curiae Supporting Petitioners at 1, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (Sept. 2017).
[408] Cordray & Cordray, *supra* note 3, at 1332–33, n.46.
[409] *See supra* note 175.
[410] Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, MINN. L. REV. 58, 2016.

against opposing a state in a criminal case.[411] In these cases, OSG's interest is grounded in the federal government's role as prosecutor and is unlikely to be different from that of the state.

The similarity between OSG's amicus brief and Montana's merits brief in *Betterman v. Montana*[412] is illustrative. *Betterman* concerned whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal case. OSG's interest in the case was that "[t]he Court's resolution of that issue will apply to similar claims in federal prosecutions."[413] The SG made all the same legal arguments as Montana and justified them on the same bases.[414]

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

C. Application to Other Parties

Because of OSG's virtual monopoly on amicus oral argument, the Court rarely hears from other amici. Between the 2010 and 2017 Terms, the Court granted only eight amicus oral argument motions made by parties other than OSG. Three of these were made by members of the federal legislature,[415] one by a state legislature,[416] two by states,[417] one by a foreign sovereign entity,[418] and one by a law professor.[419]

Our framework would likely increase amicus oral argument participation by a variety of these litigants. Below, we highlight three types of cases in which the Court would likely hear more frequently from amici other than OSG and how this would improve the Court's decision-making process.

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[411] *See* Interview with Waxman, *supra* note 87 ("The office generally does not enter a criminal case as an amicus on the side opposite a state. If they do not want to support the state in a criminal case, they will just stay out of it."); Interview with Shanmugan, *supra* note 281 ("In criminal cases, the Solicitor General is only ever going to enter the case on one side. If you represent the criminal defendant, you usually do not even need to call."); Interview with Senior OSG Attorney, *supra* note 91 ("In criminal cases, we know that if we are going to enter the case as an amicus we will do so on a particular side.").

[412] 136 S. Ct. 1609 (2016).

[413] Brief for the United States as Amicus Curiae Supporting Respondent at 1, *Betterman*, 136 S. Ct. 1609 (Feb. 2016).

[414] *Compare id. with* Brief for Respondent, *Betterman*, 136 S. Ct. 1609 (Feb. 18, 2016).

[415] *See* United States v. Texas, 136 S. Ct. 1539 (2016) (Unites States House of Representatives); N.L.R.B. v. Canning, 571 U.S. 1092 (2013) (Senator Mitch McConnell et al.); McCutcheon v. Fed. Election Comm'n, 570 U.S. 944 (2013) (Senator Mitch McConnell).

[416] *See* Gill v. Whitford, 138 S. Ct. 52, (2017) (Wisconsin State Senate and Wisconsin State Assembly).

[417] *See* Sturgeon v. Frost, 139 S. Ct. 357 (2018) (Alaska); Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 884 (2014) (Kansas et al.).

[418] Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1543 (2018) (Ministry of Commerce of the Peoples Republic of China).

[419] Ortiz v. United States, 138 S. Ct. 576 (2018) (Professor Aditya Bamzai).

1. Criminal Cases

Under our proposed rules, the Court should more frequently grant amicus oral argument to associational amici who support the defendant in criminal cases.[420] There are two reasons why these amici may be helpful at oral argument. First, criminal defendants are more likely than other categories of parties to be represented before the Court by the same lawyer who represented them in the trial or lower appellate courts.[421] Even though many of these lawyers have limited appellate experience and perhaps no experience before the Court, they may refuse offers by expert Supreme Court litigators to take over as lead counsel.[422] While some of these lawyers do a terrific job at oral argument, others are less successful.[423] Regardless of the importance of skilled advocacy before the Court, it is inappropriate and unconstitutional[424] to force the appointment of new counsel. Allowing an amicus who has a concrete interest in the litigation—such as the National Association of Criminal Defense Lawyers—to argue in support of this lawyer may result in a fairer and more informed process.

A second reason why the Court should hear from amici in these cases is the same argument we frequently heard for why the Court might want to hear from the SG in these cases. According to Supreme Court litigators, OSG is concerned in criminal cases with the formulation of a sound rule rather than with—as the state usually is—the preservation of the criminal conviction at issue.[425]

An amicus supporting a criminal defendant can serve the same function. A lawyer who represents a criminal defendant is ethically obligated to advance the interests of that client, regardless of the impact the Court's decision may have on all her other clients or on the development of the law generally.[426] Because of the stakes, the differences in the law and practice across jurisdictions, and the fact-specific nature of criminal prosecutions, the risk that one criminal defendant's interest in the formation of law diverges from that of another is high. This may lead the lawyer to advocate for a rule that is undesirable when applied more broadly. An amicus may help the Court formulate a rule that is both legally sound and practically viable.

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[420] Others have argued that there should be a federal agency dedicated to advancing the interests of criminal defendants. *See generally* Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516181. Because the effect of OSG's outsized influence at the Court on criminal defendants is only on aspect of our critique, we advocate for "leveling down" rather than "leveling up." *Id.* at 4, 58–60.

[421] Lazarus, *supra* note 70, at 1561; Interview with Clement, *supra* note 243.

[422] *See* Crespo, *supra* note 410, at 2008 (finding that, from 2005 through 2015, 67% of criminal defendants were represented by lawyers making their first Supreme Court appearance, compared with 48% of civil litigants); Lazarus, *supra* note 70, at 1561.

[423] *See* William C. Kinder, Note, *Putting Justice Kagan's Hobbyhorse through Its Paces: An Examination of the Criminal Defense Advocacy Gap at the US Supreme Court*, 103 GEO. LJ 227, 228 nn. 1–2 (2014).

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

[425] Interview with Harrington, *supra* note 243.

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

2. State Interests

The Court should also hear more frequently from state amici is cases in which a state is not a party but has a quasi-party interest.[427] Recently, litigator Dan Schweitzer catalogued every case since 1996 in which a state requested amicus oral argument.[428] He concluded that, since 2014, the Court has granted these requests when the "states – based on their status as sovereigns – genuinely had a distinct perspective from the parties they were supporting."[429] Schweizer characterizes these as "precisely when states *ought* to be permitted to argue as amici."[430] These cases generally concerned the distribution of power between federal and state governments, double jeopardy, and state powers under the Constitution.[431] There were no requests during this period from states in cases where both federal and state governments enforce a federal law but may disagree on its interpretation, but Schweizer characterizes these as instances in which states should be permitted to argue as well.[432]

These amici would be permitted to argue under Standard 1 as long as they contribute reasoning not already presented by the parties. These quasi-party interests are exactly the type that the American amicus role has historically been used to accommodate,[433] as well as the interests the Court presumably honors by hearing from OSG in many instances. A state litigant that is able to offer a perspective that is truly distinct from the party it supports will likely present new reasoning that highlights that perspective.[434]

The Wisconsin State Senate and Wisconsin State Assembly's amicus oral argument in *Gill v. Whitford*[435] is illustrative. *Gill* was about the constitutionality of partisan gerrymandering in which the Petitioners were members of the Wisconsin Government Accountability Board.[436] Petitioners' arguments very much reflected their position: they were focused in reasoning and objective on the case at hand. For example, their brief opened by claiming the district court did not have jurisdiction over Respondents' claims.[437] It went on to explain that Respondents had not "stated a claim on which relief can be granted" based on the Court's precedent,[438] and that the redistricting plan at issue was permissible.[439]

In stark contrast, the Wisconsin legislature's arguments mirrored its interest in the case: asserting state legislatures' power over the redistricting process in the face of potential involvement by the

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[427] For an argument that hearing state perspectives would also address concerns about the Court's politicization, *see* Johnstone, *supra* note 264, at 598–622.
[428] *See* Schweitzer, *supra* note 237, at 147–50.
[429] *Id.* at 153.
[430] *Id.*
[431] *Id.* at 153–54.
[432] *Id.* at 154.
[433] *See supra* Section II.A.
[434] Research suggests that state amicus participation is most common and most effective in federalism cases. *See* Johnstone, *supra* note 264, at 602–03. When state positions conflict or states uniformly oppose a federalist position, however, the Court favors nationalization. *Id.* at 603.
[435] 138 S. Ct. 1916 (2018).
[436] Joint App., Vol I at 26, *Gill*, 138 S. Ct. 1916 (July 28, 2017).
[437] Brief for Appellants 26-41, *Gill*, 138 S. Ct. 1916 (July 2017).
[438] *Id.* at 41-59.
[439] *Id.* at 59-67.

federal judiciary. Its brief first argued that partisan gerrymandering lawsuits effectively reassigned the redistricting task from state legislatures to federal courts.[440] The brief went on to explain that all challenges to statewide gerrymandering rely on a flawed conception of the American electoral system as one that guarantees proportional representation and classifies candidates based on party affiliation.[441] Not all of the arguments raised in the brief were novel relative to Petitioners' brief, but they were aimed at the entire class of gerrymandering claims, rather than only the one at issue—which the legislature addressed only in the last five pages of its brief.[442] The Court's questioning of Ms. Erin Murphy, the legislature's advocate, focused primarily on the middle portion of the brief.[443]

3. Vindicating the Federal Interest

In some cases, OSG represents a party to litigation but has no intention of fully defending the federal interest, and an amicus would like to do so instead. These include cases in which, for example, the SG wants to defend a weaker reading of a federal statute than is legally defensible (for example, if the United States or a federal agency won below).

Hearing from an amicus who will offer a full-throated defense of the federal interest is likely to lead to better outcomes for two reasons. First, these types of positions are most likely to arise from political considerations rather than an objective legal analysis. For example, the timing of Presidential elections sometimes means that the SG who petitioned for *certiorari* is different from the one briefing and arguing the merits. Currently, the Court appoints an amicus to defend the government when OSG *entirely* declines to defend its client.[444] The decision to do so, rather than to dismiss the case for lack of a "Case or Controversy,"[445] suggests that the Court harbors some skepticism about these refusals to defend the federal interest. Our proposed standard does not invade the government's authority to take whatever position it desires; it simply allows an amicus to supplement it.

Second, appointing an amicus in these cases allows the Court to respond to a problem it had a part in creating. The Court has been one of the strongest forces pushing the federal government to speak in "one voice" even when it allows OSG to take these compromise positions.[446] Over the years, one of the ways in the Court has reaffirmed that it wants OSG to speak for the federal government is by denying motions for amicus oral argument made on behalf of one agency when the SG already represents a party.[447] The Court's behavior allows the SG to take middle positions without fear of the agency representing a contrary view. Allowing amici to argue in these cases

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[440] Brief for Amici Curiae Wisconsin State Senate and Wisconsin State Assembly in Support of Appellants at 4-16, *Gill*, 138 S. Ct. 1916 (Aug. 4., 2017).
[441] *Id.* at 17-31.
[442] *Id.* at 31-37.
[443] *See* Transcript of oral argument at 18-29, *Gill*, 138 S. Ct. 1916.
[444] Shaw, *supra* note 326, at 1548–49.
[445] U.S. Const. Art. III, § 2, cl. 1.
[446] *See supra* note 273-276 and accompanying text.
[447] *See, e.g.*, United States v. Parcel of Land, Bldgs., Appurtenances & Improvements, Known As 92-Buena Vista Ave., Rumson, N.J., 505 U.S. 1243 (1992) (Federal Home Loan Mortgage Corporation); Otter Tail Power Co v. United States, 409 U.S. 820 (1972) (Federal Power Commission).

would permit the vindication of those interests and might discourage the SG from taking these positions.

Kisor v. Wilkie[448] illustrates the value that an amicus could add. *Kisor* asked whether the Court should overrule precedent holding that courts must defer to agencies' interpretations of their own regulations under certain circumstances.[449] The long-term interest of the federal government was clear: the Executive's power is maximized if its agencies receive more deference from Courts. However, rather than defend the Court's precedent, SG Francisco argued that it was inconsistent with the Administrative Procedure Act and had "harmful consequences."[450] He argued that "the Court should impose and reinforce significant limits" on the deference regime.[451] The SG's "halfhearted" defense did not escape the Justices' notice.[452] At oral argument, the attorney for the Petitioner answered a question from Justice Kagan by first explaining that its position was no different than the government's on that point. She responded, "there might be a problem of a lack of adversarialness here."[453]

In *Kisor*, there was a clear candidate for an amicus who could offer a defense of the Court's precedent: former SG Verrilli. Verrilli was counsel of record on an amicus brief filed by administrative law scholars that offered a thorough rebuttal to Petitioner's argument.[454] When the opinions in *Kisor* were issued, Verrilli's brief was cited twice by the majority and twice by the dissent, which described the brief as an example of the deference regime's "fiercest defenders."[455]

Verrilli did not seek time at oral argument. When we asked Verrilli why not, he remarked, "Had the Justices felt like there was not a sufficient adversarial presentation, they could have asked for oral argument from amici or appointed someone to argue."[456] Of course, the Court could have asked. But if it developed a practice of hearing from amici in cases like *Kisor*, amici might be more willing to request to be heard.

VI. Conclusion

OSG is the most influential litigant that appears before the Court. It is more successful at the petition and merits stages than other litigants, and it is more successful when it is an amicus supporting a party than when it represents a party. This Article's account of OSG's dominance of amicus oral argument before the Court draws attention to a largely unexamined aspect of that influence. From our interviews with Supreme Court litigators, including current and former members of OSG, the industry recognizes and accepts this phenomenon. Supreme Court

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[448] 139 S. Ct. 2400.
[449] *Id.* at 2408.
[450] *See* Brief for the Respondent at 12, *Kisor*, 139 S. Ct. 2400 (Feb. 25, 2019).
[451] *Id.*
[452] Adam Liptak, *Limiting Agency Power, a Goal of the Right, Gets Supreme Court Test*, N.Y. TIMES, Mar. 0, 2019, https://www.nytimes.com/2019/03/27/us/politics/supreme-court-agency-power.html.
[453] *Id.*
[454] *See* Brief of Administrative Law Scholars in Support of Affirmance, *Kisor*, 139 S. Ct. 2400 (Mar. 4, 2019).
[455] *Kisor*, 139 S. Ct. at 2412, 2421; *id.* at 2435 n.59, 2445 n.109 (Gorsuch, J., dissenting).
[456] Interview with Verrilli, *supra* note 91.

litigators take the OSG's special place at the Court into account, trying to convince OSG to support their client as amicus when possible and otherwise trying to convince OSG to stay out of the case.

We suspect that the Court has not thought much about why it grants all of OSG's motions for amicus oral argument and denies almost all others. In fact, we imagine that the Justices—members of a government institution themselves, all of whom spent portions of their careers at other government institutions, including OSG[457]—have not seriously considered the special place they reserve for OSG. In 2014, Joan Biskupic and others interviewed eight of the nine sitting Justices as part of their reporting on the outsized success of former OSG members in seeking certiorari at the Court.[458] Each Justice interviewed believed that having these lawyers handle most of the cases before the Court was helpful and came "without any significant cost"[459]—despite the fact that almost all of their work at law firms catered to moneyed interests.

We acknowledge that reforming the Court's amicus oral argument practice would not wholly remove OSG's outsized influence at the Court. But such reforms would be one step in that direction. Like those who have called attention to the Court's unexamined practices in that and other areas,[460] we believe that the Court creates significant procedural and substantive problems by acquiescing to OSG's extensive use of amicus oral argument. We respectfully recommend that the Court reconsider this highly consequential practice.

[457] *See Current Members*, *supra* note 6.
[458] Joan Biskupic et al., *The Echo Chamber*, REUTERS, Dec. 8, 2014, http://www.reuters.com/investigates/special-report/scotus.
[459] *Id.*