GMSR
APPELLATE LAWYERS
GREINES, MARTIN, STEIN & RICHLAND LLP

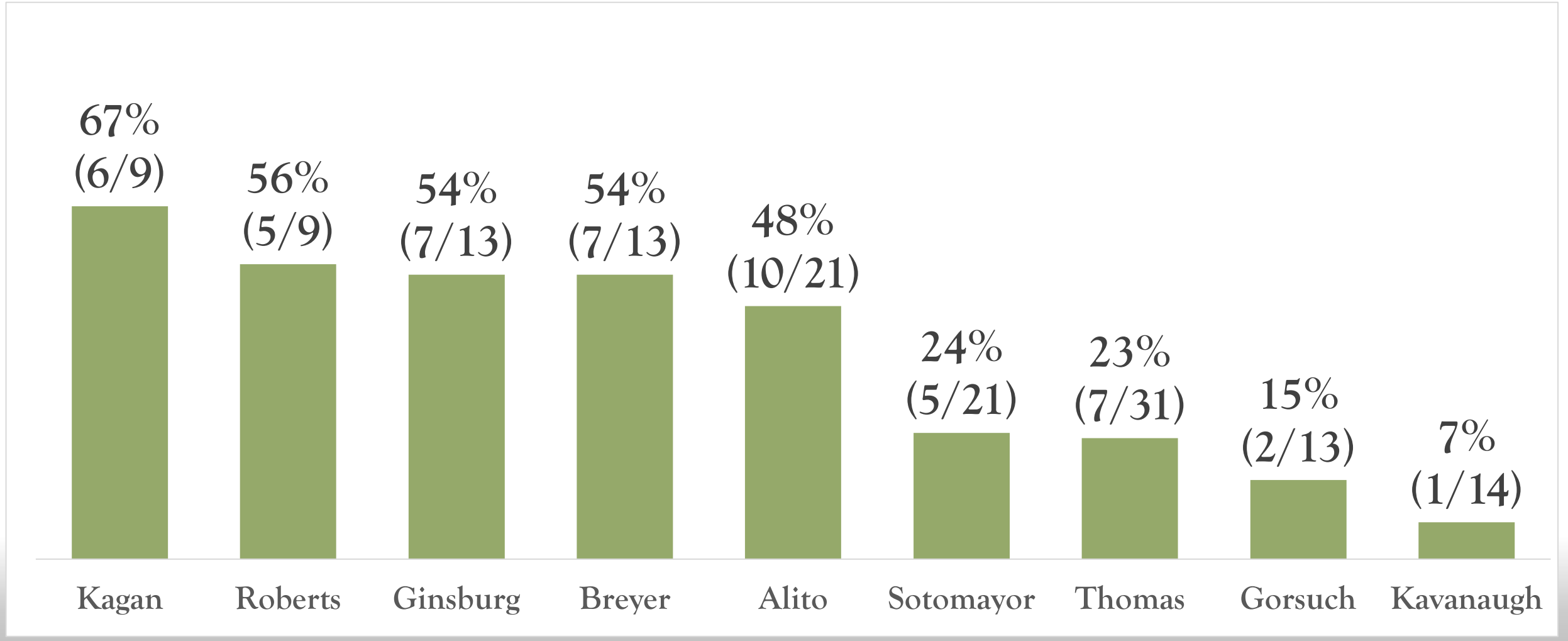
BE A GOOD FRIEND

A Guide To Amicus Briefs In Trial And Appellate Courts

Amicus Briefs Matter

- Justice Breyer: Amicus briefs "play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our decisions." The Associated Press, *Justice Breyer Calls for Experts to Aid Courts in Complex Cases*, Feb. 17, 1998.
- Justice Alito: "[A]n amicus brief may be *particularly helpful* when the party supported is unrepresented or inadequately represented . . . ." But "[e]ven when a party is well represented, an amicus may provide important assistance to the court" by collecting "background or factual references that merit judicial notice" or providing "particular expertise not possessed by any party to the case." *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002).

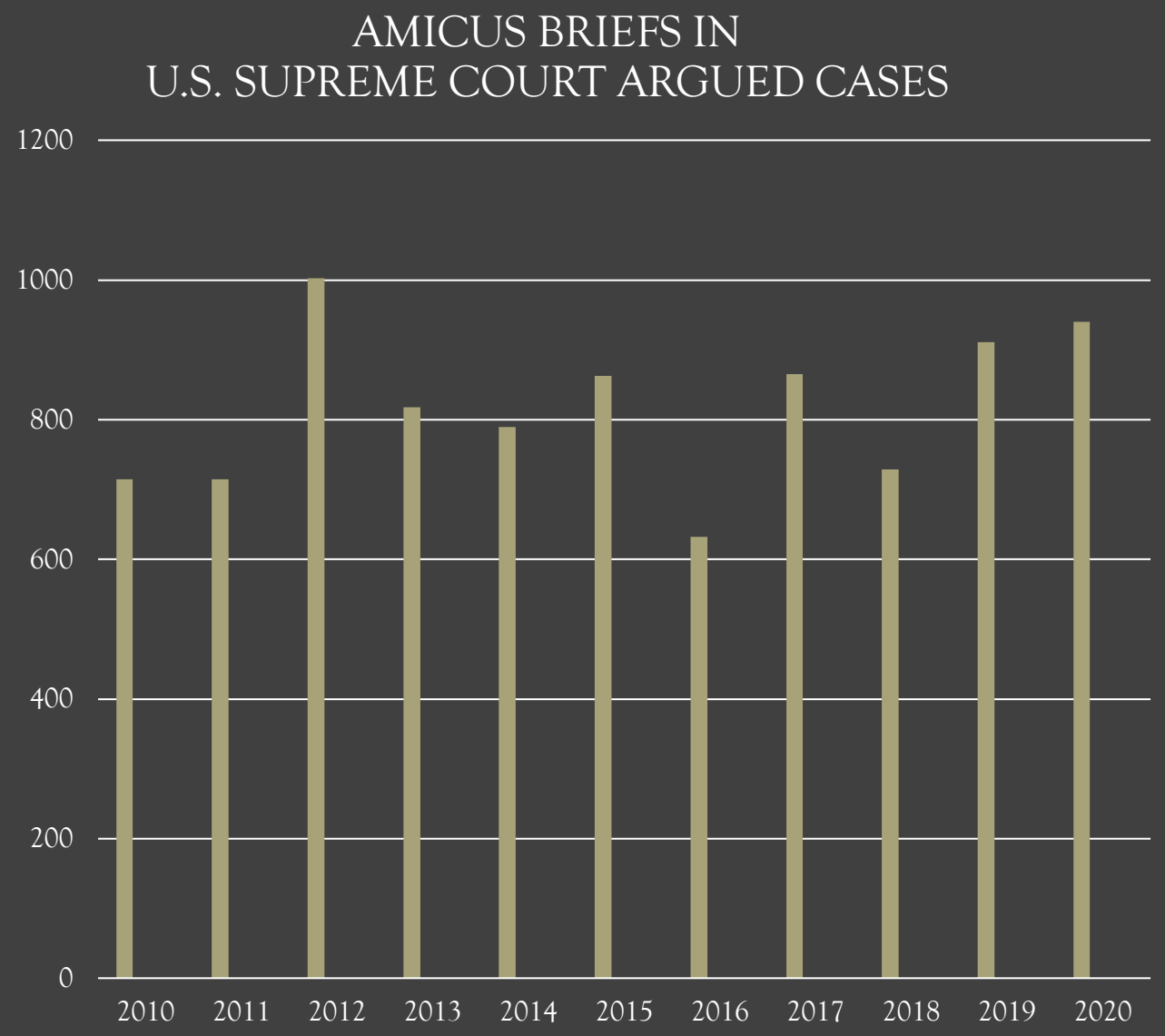




Amicus Curiae at the Supreme Court: Last Term and Decade in Review, The National Law Journal, November 18, 2020.

Justices' Citation To Amicus Briefs (2019)

Average:
9-16 per case



Amicus Curiae at the Supreme Court: Last Term and Decade in Review, The National Law Journal, November 18, 2020.

The Explosion Of Amicus Practice

1946 – 1955:

Amici cumulatively filed 531 briefs in the U.S. Supreme Court, participated in

23% of argued cases.

Roe v. Wade [23 amicus briefs]

Brown v. Board of Education [6 amicus briefs]

2010 – 2020:

Amici cumulatively filed more than 8000 briefs, participated in

96% of argued cases.

Obergefell v. Hodges [149 amicus briefs]

NFIB v. Sebelius [136 amicus briefs]

Amicus Briefs Should Offer Something New

A true friend of the court adds value to the court's evaluation of the issues:



- Offers a ***different analytical approach***
- Highlights ***factual, historical, or legal nuance***
- Explains the ***broader regulatory or commercial context*** of a question
- Provides ***practical perspectives***
- Employs the ***tools of social science***
- Supplies ***empirical data***
- Instructs on ***highly technical, scientific, or specialized subjects***
- Identifies how ***other jurisdictions*** have approached a legal question

Prairie Rivers Network v. Dynegy Midwest Generation, LLC, 976 F.3d 761, 763 (7th Cir. 2020)

THE FIVE W'S

The Who, What, When, Where and Why of Amicus Briefs

What Kind Of Amicus Briefs Are There?



AMICUS BRIEFS IN SUPPORT OF REVIEW



MERITS-BASED AMICUS BRIEFS

Amicus Briefs At The Certiorari Stage



The U.S. Supreme Court receives approximately 7,000-8,000 petitions per year. Of those petitions, in recent terms, the Court grants and hears oral argument in about 80 cases. Nearly all petitions that are granted have at least one, and usually several cert-stage amicus briefs.

Amicus briefs signal:

- The stakes are high.
- The issue has broad impact.



Amicus Filings on the Merits

- During the most recent U.S. Supreme Court term, 940 merits briefs were filed in 58 argued cases. *Fulton v. City of Philadelphia* had the most (81).
- Hot-button issues generate the most briefs—affirmative action, marriage equality, abortion, the Affordable Care Act. So do patent cases, which often involve highly technical subject matters and are high stakes.
- Cases with 30 or more briefs are no longer particularly rare, and the highest profile cases see amicus filings reaching the triple digits.

What Kind Of Amicus Briefs Are There?



FACT-BASED



SCHOLAR BRIEFS



NEUTRAL BRIEFS

Just the Facts Ma'am



Provide real world information that contextualizes a difficult question



Explain broader context—historic, commercial, regulatory—including unintended consequences



Instruct the Court regarding scientific or technical issues



Participate in the policy debate



Amicus Briefs That Explain Esoteric Facts

Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, Brief for Cake Artists as Amicus Curiae in Support of Neither Party

- Cake design is an artistic and expressive activity
- Cake artists merit just as much protection for their expressive work as artists using other mediums

Synthesize Complex Information

Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1204 (2021) (Breyer, J.):

- Brief for Copyright Scholars as *Amici Curiae* 25 ("[T]he portions of Java SE that Google reimplemented may have helped preserve consistency of use within the larger Java developer community");
- Brief for Microsoft Corporation as *Amicus Curiae* 22 ("[A]llowing reasonable fair use of functional code enables innovation that creates new opportunities for the whole market to grow");
- Brief for 83 Computer Scientists as *Amici Curiae* 20 ("Reimplementing interfaces fueled widespread adoption of popular programming languages" (emphasis deleted);
- Brief for R Street Institute et al. as *Amici Curiae* 15–20 (describing Oracle's reimplementation of other APIs);
- Brief for American Antitrust Institute as *Amicus Curiae* 7 ("Copyright on largely functional elements of software that [have] become an industry standard gives a copyright holder anti-competitive power").

Conclusion: "These and related facts convince us that the 'purpose and character' of Google's copying was transformative—to the point where this factor too weighs in favor of fair use."



Briefs That Cut Against Type

- Military Amicus Brief in ***Grutter v. Bollinger***, which argued that: (1) maintaining a highly qualified and diverse officer corps is critical for military effectiveness and national security; and (2) invalidating UM's race-conscious admissions policy would seriously disrupt the military's efforts to maintain military cohesion and effectiveness.







Deploy Humor

- Amicus Brief by The Cato Institute & political satirist P.J. O'Rourke, *Susan B. Anthony List v. Driehaus,* arguing an Ohio law that made it illegal to lie about politicians, for politicians to lie about each other, or for politicians to lie about themselves.
- "In modern times, 'truthiness' — a 'truth' asserted 'from the gut'" "without regard to evidence or logic" is a "key part of political discourse. . . . After all, where would we be without the knowledge that Democrats are pinko-communist flag-burners who want to tax churches and use the money to fund abortions so they can use the fetal stem cells to create pot-smoking lesbian ATF agents who will steal all the guns and invite the UN to take over America? Voters have to decide whether we'd be better off electing Republicans, those hateful, assault-weapon-wielding maniacs who believe that George Washington and Jesus Christ incorporated the nation after a Gettysburg reenactment and that the only thing wrong with the death penalty is that it isn't administered quickly enough to secular-humanist professors of Chicano studies."

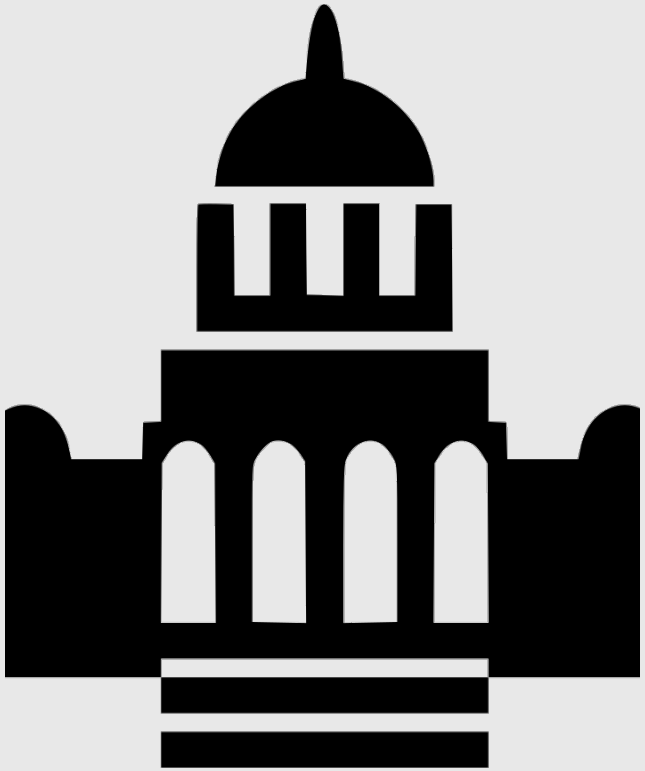
Provide Broader Context

Los Angeles Alliance for Human Rights v. County of Los Angeles (9th Cir. 2021), *Amicus Curiae* for Los Angeles Homeless Services Authority: The City & County appealed a district court injunction ordering them to temporarily house Los Angeles' homeless population within 60 days and place $1 billion of City funds in escrow. LAHSA was uniquely positioned to educate the Ninth Circuit about:

- Real-world impact of the injunction, and how it would harm the people it was intended to help.
- Data re interim housing, its shortcomings, and the need for a coordinated, regional response that appropriately invests in permanent housing.



Government Briefs



Municipalities are ***uniquely positioned*** to educate courts on the real-world impact of an issue, and unintended consequences that may stem from a particular ruling.

Courts listen to government amici.

- *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020): Whether the Sixth Amendment establishes a right to a unanimous jury in criminal cases. The State of Oregon's amicus brief regarding the number of pending appeals that could be affected by the Court's decision.
- *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021): Brief for TX, AL, AK, LA, MO, NE, OH, OK, WV & KY argued that states are caught between: (1) groups advocating for LGBTQ interests and separation of church and state; and (2) faith-based organizations advocating for their religious freedom. Emphasized the value and importance of faith-based child-placing agencies in placing children in foster care.

The Caveat

"Supreme Court briefs are an inappropriate place to develop the key facts in a case. . . . An adversarial process in the trial courts can identify flaws in the methodology of the studies that the parties put forward; here, we accept the studies' findings on faith, without examining their methodology at all. . . ."

Sykes v. United States, 564 U.S. 1, 31 (2011) (Scalia, J., dissenting).

"[A]*mici* supporting HHS have suggested that the $2,000 per-employee penalty is actually less than the average cost of providing health insurance . . . . We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party . . . ."

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720-21 (2014) (Alito, J.).

Effective Amicus Briefs With A Legal Focus



Rescue a Petition for Certiorari that buries the lede.



Compile statutes, legislative material, and surveys of state law.



Scholar briefs.

Neutral Briefs

- Amici have no dog in the fight, <u>BUT</u> they want to educate the Court about a particular issue, warn of unintended consequences, or tell a court *not* to decide a certain issue.
- Such briefs are relatively common. During the Supreme Court's most recent term, *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 975 (2021) and *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021) each had four amicus briefs filed for neither party.



The Where

U.S. Supreme Court

State Supreme Courts

Circuit Courts & Intermediate Appellate Courts

Trial Courts

The Why

Should You Seek Amicus Support?

- Are there important legal issues that transcend the particular facts of a case?
- Does the case have a broad impact that needs amicus support to flesh out?
- Are there important arguments that the parties can't make or don't have the incentive to meet?
- Is the case the right vehicle? Are there political issues to consider?



The When



When To Get Involved

- ***If you're the one asking for amicus support:***
  EARLY!
  - Timing is crucial. The most common reason for getting turned down is insufficient time.
- ***If you anticipate weighing in as amicus:***
  Same rule, EARLY!
  - Consider briefing key issues in advance.
- ***Bottom Line:***
  Get Organized & Think Ahead

The Rules



Supreme Court Rules

- No leave to file required if there's written consent of all parties.
- Deadlines:
  - Cert stage:
    - For petitioner: 30 days after the case is placed on the docket or the Court calls for a response, whichever is later.
    - For respondent: Same as the deadline to file a brief in opposition.
    - Must provide notice to the parties 10 days before the deadline.
  - Merits stage: 7 days after the brief for the party supported.
- Contents:
  - State the interests of the amicus.
  - Disclose any financial contributions to the preparation of the brief, whether parties authored any portion of the brief.
  - For government entities, the word limit for amicus briefs at the cert stage is 6,000 words, and at the merits stage, 9,000 words.

Federal Circuit Courts: FRAP 29

Leave of court:

The U.S./agency/state may file an amicus brief without consent or leave of court. Anyone else can file with leave of court or all parties' consent.

Length:

One-half the maximum length authorized by the rules for a party's principal brief.

Deadline:

No later than 7 days after the principal brief supported. Neutral brief due 7 days after appellant's brief.

Participation in oral argument:

Only with the court's permission.

Rehearing:

2,600 words and if in support of petition, 7 days after petition is filed. Opposition amicus due at the same time as the response.

CHECK YOUR CIRCUIT'S LOCAL RULES!

State Supreme Court Rules

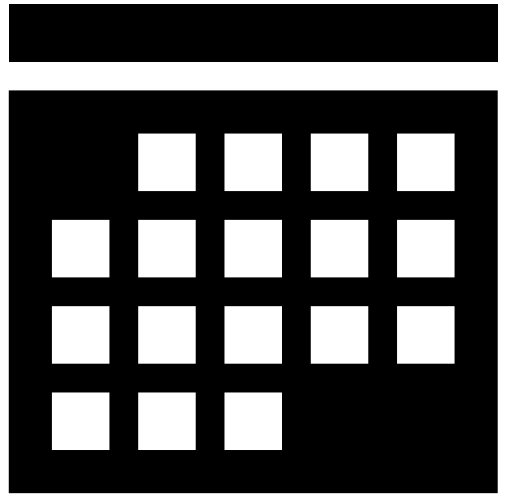
Minnesota: Must file request for leave no later than 14 days after the notice of appeal, the petition which initiates the appeal, or the court granting review. Brief is due 7 days after the brief of the party supported, or if in support of neither party, no later than the time allowed for filing the petitioner's brief.

California: 14 days after the last appellant's reply brief.

Illinois: On or before the due date of the initial brief of the party supported.

New York: No later than the Court session preceding the session in which argument or submission of the appeal is scheduled.

Texas: Same briefing rules as the parties.



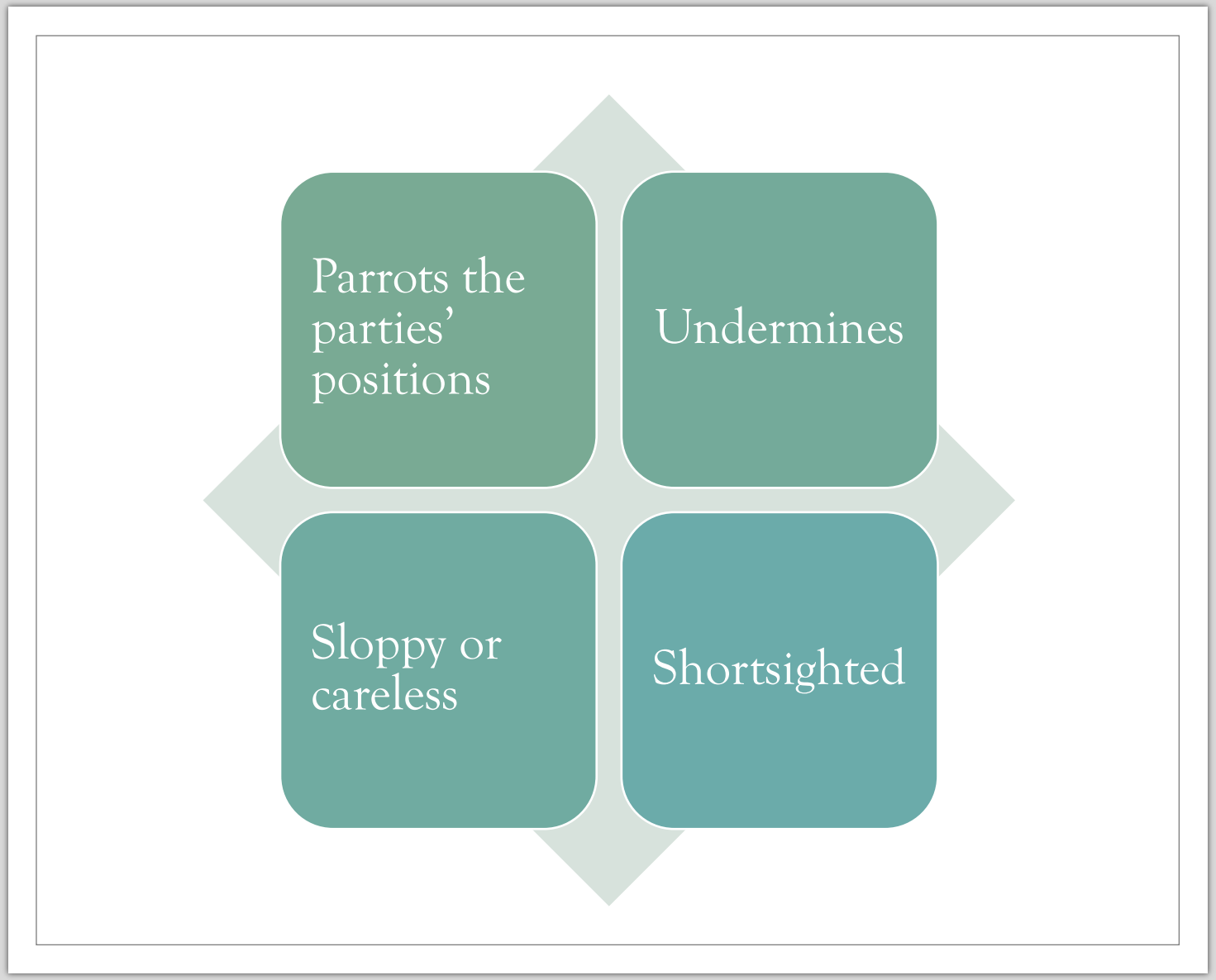
The Who



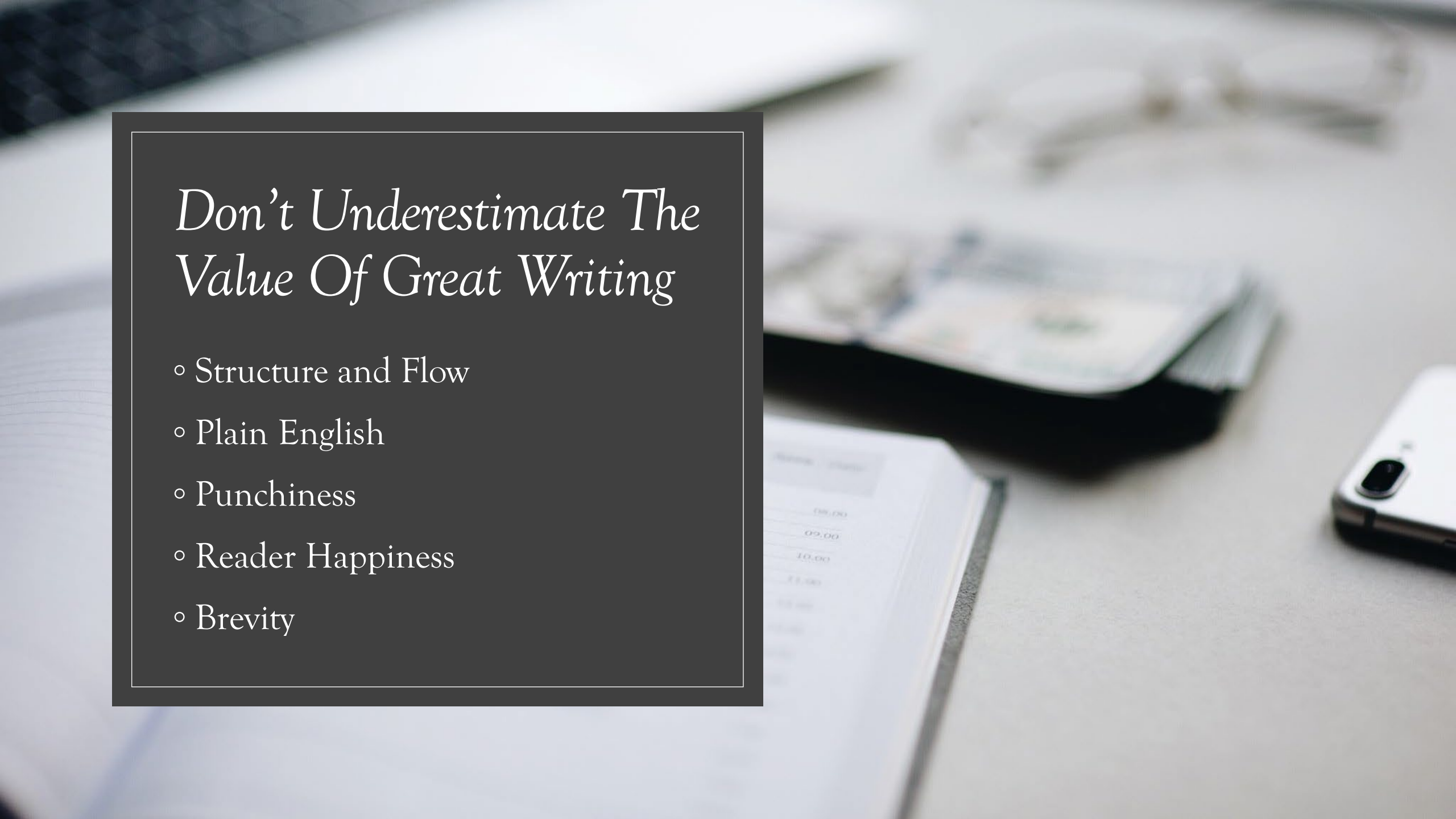
The Friends You Want

An appellate practitioner who:

- Knows what courts are looking for
- Can persuasively communicate and add something to your position
- Is respectful of your position
- Can anticipate what the other side's amici will be arguing, and respond effectively



The Friends You Don't Need



Don't Underestimate The Value Of Great Writing

- Structure and Flow
- Plain English
- Punchiness
- Reader Happiness
- Brevity


IMLA CAN BE YOUR BFF



IMLA's Amicus Program

IMLA files 30-40 amicus briefs per year at the Supreme Court, federal appellate and state supreme courts.

- Qualified immunity
- The public duty doctrine
- Fines and fees
- First Amendment issues
- Home rule authority & other issues of local autonomy
- Preemption

No. 20-1029

In the

Supreme Court of the United States

CITY OF AUSTIN, TEXAS,
Petitioner,

v.

REAGAN NATIONAL ADVERTISING OF TEXAS, INCORPORATED, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, MICHIGAN MUNICIPAL LEAGUE, TEXAS MUNICIPAL LEAGUE, LOUISIANA MUNICIPAL ASSOCIATION, KENTUCKY LEAGUE OF CITIES, AND TENNESSEE MUNICIPAL ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

GMSR *Briefs for IMLA*

- *City of Hayward v. Stoddard-Nunez* (No. 20-1006)
- *City of Cleveland v. Jackson* (No. 19-409)
- *Peterson v. Franklin* (No. 17-1572)
- *Thompson v. Park* (No. 17-194)
- *People v. Superior Court (Venice Suites, LLC)* (Cal. Ct. Appeal B289705)

What's the process?



IMLA's legal staff reviews a member's request, makes a recommendation, and the legal advocacy committee votes to decide whether IMLA will participate.



IMLA solicits a pro bono author.



IMLA strategizes with pro bono counsel on the issues the City or County cares most about, and where IMLA can be most impactful.


NATIONAL
LEAGUE
of CITIES


DISTRICT ATTORNEYS ASSOCIATION
STATE OF NEW YORK


NATIONAL
ASSOCIATION
of COUNTIES
NACo


LEAGUE OF
MINNESOTA
CITIES


ABA
AMERICAN BAR ASSOCIATION


CALIFORNIA
PEACE OFFICERS
ASSOCIATION


NGA
NATIONAL GOVERNORS ASSOCIATION

Thank You!

- **Ted Xanders**
  exanders@gmsr.com

- **Nadia Sarkis**
  nsarkis@gmsr.com

Greines, Martin, Stein & Richland, LLP
310.859.7811





GMSR
APPELLATE LAWYERS

GREINES, MARTIN, STEIN & RICHLAND LLP