The Facts and Fictions of Amicus Curiae Practice in the Eleventh Circuit Court of Appeals

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I. INTRODUCTION

The proper role of an amicus curiae (or "friend of the court") in federal court practice has become a favorite topic for legal scholarship and debate. Particularly since Circuit Judge Richard Posner issued his decision in *Voices for Choices v. Illinois Bell Telephone Co.*[1]—espousing a narrow role for amici curiae—commentators, lawyers, and other judges have added their two cents to the discussion. Some, like Posner, are

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[1] Voices for Choices v. Illinois Bell Telephone Co., 339 F.3d 542 (7th Cir. 2003).

skeptical of amici curiae and their intentions. This camp says that amicus curiae briefs should serve their traditional limited purpose of assisting the court "by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs."[2] Others, like Judge Alito (now Justice Alito), recognized that today, amici curiae today have their own pecuniary or other interest in the litigation, and that "an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend."[3]

Often absent from this theoretical debate, however, are any real facts about the nature and scope of amicus curiae practice. Perhaps this is because the basic facts of amicus curiae practice in the federal courts as a whole—though often the subject of speculation and conjecture—are not readily available or well understood.[4] Several recent studies have used indirect methods in an attempt to determine the level and nature of amicus curiae involvement in the United States courts of appeals. One study used a survey mailed to all federal judges, who were asked, among other things, to give their opinion on the percentage of their cases that involved amicus curiae.[5] The survey received only a 23.8% response rate from Circuit Court Judges.[6] Seventy-nine percent of these judges responded "that 5% or less of their docket involve[d] amici curiae."[7] Another study examined Westlaw-reported decisions from the courts of appeals that listed cases with amicus curiae participation.[8] According to that study, amicus curiae participation in the courts of appeals has increased 14.6% from 1992 to 2002.[9] However, little information about amicus curiae practice, such as how many motions for leave are filed with the court and how many are denied, is ever presented in a reported decision.

This article, in contrast, takes a more pedestrian and focused approach: it presents basic quantitative data from only one circuit court, the court of appeals for the Eleventh Circuit. The Eleventh Circuit data

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[2] *Id*. at 545.

[3] Neonatology Assocs. v. Comm'r of Internal Revenue, 293 F.3d 128, 131 (3d Cir. 2002).

[4] In contrast, the facts of amicus curiae practice at the U.S. Supreme Court are well-known and documented. *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 751–62 (2000).

[5] Linda Sandstrom Simard, An Empirical Study of Amicus Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism, 27 REV. LITIG. 669, 684–87 (2008).

[6] *Id*. at 685.

[7] *Id*. at 686.

[8] John Harrington, Note, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RES. L. REV. 667, 677–82 (2005).

[9] *Id*. at 680.

presented in this article covers several variables over a five-year time span (2003-2007), including the number of amicus curiae briefs filed per year, the number of motions seeking leave of court to file an amicus curiae brief, and the court's disposition of those motions. These data are compared to the court's active caseload each year in an attempt to discern recent trends in amicus curiae participation.

This focused approach recognizes that each court of appeals may have a different approach to amicus curiae and that it may be useful to explore each separately. While all courts of appeals operate under the Federal Rules of Appellate Procedure, there are some differences, both in local circuit rules governing amicus curiae participation and in the published philosophies of the courts of appeals with respect to amicus curiae (or at least among certain vocal judges on those courts).

Before reading further, find a pen or pencil and write down two numbers in the margin here. First, write down the number of amicus curiae briefs that you think are filed each year with the Eleventh Circuit (*actually* filed, meaning that if a motion for leave was required, it was granted). Second, write down the percentage of motions for leave to file an amicus curiae brief that you think are granted by the court in recent years. By the end of this article, you'll see whether your perception of amicus curiae practice in the Eleventh Circuit matches the reality.

II. THE RULES GOVERNING AMICUS CURIAE BRIEFS

The rules governing the submission of amicus curiae briefs in the Eleventh Circuit differ slightly depending on the stage of the appeal. Rule 29 of the Federal Rules of Appellate Procedure governs the submission of amicus curiae briefs prior to the issuance of a panel decision.[10] The rule permits governmental parties—including the United States, its agencies, or a state—to file an amicus curiae brief as of right, *i.e.*, "without the consent of the parties or leave of court."[11] All other would-be amici curiae must obtain either consent of the all the parties or leave of court to file a brief.[12] Rule 29 further sets out the contents, length, time for filing, and other such matters regarding amicus curiae briefs.[13]

The Eleventh Circuit has further adopted local rules governing the submission of amicus curiae briefs in support of petitions for rehearing or rehearing en banc.[14] These rules were adopted effective April 1, 2007,

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[10] Fed. R. App. P. 29(a).
[11] *Id.*
[12] *Id.*
[13] *See generally* FED. R. APP. P. 29.
[14] 11th Cir. R. 35-6; 11th Cir. R. 40-6.

and are more restrictive than the rules governing briefs prior to issuance of the panel decision.[15] As under Rule 29, governmental parties may file an amicus curiae brief in support of a petition for rehearing or rehearing en banc as of right.[16] However, the court's rules treat amicus curiae briefs by any other entity or an individual differently at this stage of the proceeding. A non-governmental entity or an individual must obtain leave of court to file an amicus curiae brief in support of a petition for rehearing or rehearing en banc.[17] In other words, consent of the parties will not do at this stage; the court is the sole gatekeeper. These local rules also contain requirements on the contents, length, and time for filing of all amicus curiae briefs in support of a petition for rehearing or rehearing en banc.[18]

At the en banc stage, yet another local rule applies to amicus curiae briefs. Again, governmental parties may file as of right, and all others must seek leave of court.[19] The primary difference at this stage is the time for filing. An amicus curiae brief at the en banc stage must be filed "no later than the due date of the principal en banc brief of the party being supported" (or if no party is supported, "no later than the due date of the appellant's or petitioner's principal en banc brief").[20] In other words, the amicus curiae does not have the opportunity to review the brief of the party it is supporting prior to filing its own brief.

The Eleventh Circuit's local rules requiring leave at the rehearing and rehearing en banc stages are more restrictive than the vast majority of other circuits. The majority of circuits do not have specific local rules that limit the submission of non-governmental amicus curiae briefs at the rehearing or rehearing en banc stages to only those who obtain leave of court.[21] This means that the general requirements of Federal Rule of Appellate Procedure 29(a), which allows filing by consent, apply in those

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[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] 11th Cir. R. 35-9.
[20] *Id.*
[21] There is a practical reason for this Eleventh Circuit local rule. Reportedly, the Eleventh Circuit adopted this rule in order to prevent unnecessary recusals at the rehearing and rehearing en banc stages, a matter that some other circuits address directly in a local rule. *See, e.g.*, 2ND CIR. R. 29; 5TH CIR. R. 29.4. Recusal is not a significant issue at the panel stage. If the presence of an amicus curiae that files a brief with consent at the panel stage creates a recusal issue with a member of the panel, the case can be reassigned to another panel. However, the situation is different at the en banc stage, which involves all active judges on the court. Requiring an amicus curiae to seek leave of court at this stage allows the court to consider whether the brief would create a need for recusal of an active judge from the en banc court and, if so, whether the motion should be denied on that basis.

circuits. The Ninth Circuit's rules are more open and expressly provide that the parties' consent is sufficient for the filing of an amicus curiae brief at the rehearing and rehearing en banc stages.[22] The D.C. Circuit is the most restrictive circuit at the en banc stage, allowing amicus curiae briefs only by invitation of court.[23]

In the Eleventh Circuit, a motion for leave to file an amicus curiae brief "prior to issuance of a panel opinion" is a one-judge motion.[24] That decision by a single judge may be reviewed by the court—for example, upon a motion for reconsideration.[25] The rules also can be read to allow a single judge to rule on a motion for leave *after* the issuance of a panel opinion (*i.e.*, at the rehearing or rehearing en banc petition stage),[26] but the practice at the Eleventh Circuit is that such a motion for leave is considered by the panel as a whole.[27]

III. WHY AMICUS CURIAE BRIEFS ARE SOMETIMES ALLOWED AND SOMETIMES NOT

None of these rules directly set out any standards or criteria for a judge to use in deciding whether to grant leave for an amicus curiae brief to be filed. The decision is in the court's sole discretion. However, Rule 29 requires a motion for leave to state (1) "the movant's interest" and (2) "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case."[28] Presumably, judges use this information to decide whether to grant a particular motion.[29]

But, in fact, little is known in most cases about why motions for leave are granted or denied in the Eleventh Circuit. Usually, the decision is made in a one-sentence order: "The motion of XYZ Association for leave to file an amicus curiae brief is DENIED." This often leaves many would-be amici curiae and their lawyers scratching their heads and frustrated at their wasted time and effort. It is one thing to have your

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[22] 9th Cir. R. 29-2(a).

[23] D.C. Cir. R. 35(f).

[24] 11TH CIR. R. 27-1(d)(10).

[25] *Id*. 27-1(d); *Id.* 27-2.

[26] FED. R. APP. P. 27(c) ("A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding."); 11TH CIR. R. 27-1(d) ("Under FRAP 27(c), a single judge may, subject to review by the court, act upon any request for relief that may be sought by motion, except to dismiss or otherwise determine an appeal or other proceeding.").

[27] *See, e.g.*, Order by Judges Birch, Carnes, and Fay granting motion to file amicus curiae brief on rehearing in Sierra Club v. Tenn. Valley Auth, No. 04-15324-HH (11th Cir., Feb. 7, 2006)(on file with author).

[28] Fed. R. App. P. 29(b).

[29] Judge Alito (now Justice Alito) has encouraged judges to use Rule 29(b) as a guide to determining when an amicus curiae brief should be accepted. *See* Neonatology Assocs., 293 F.3d at 130–32.

arguments rejected by a court—all lawyers are accustomed to that. But it can be particularly frustrating that a single judge prevents your arguments from even being heard by the ultimate decision makers on the merits panel. The flipside is that judges on the court must dispose of many motions and other matters, and a motion to file an amicus curiae brief is the least of the court's concerns. Moreover, providing an explanation might invite a motion for reconsideration, which would create even more work for the court.

Some insight into why judges on the Eleventh Circuit grant or deny amicus curiae motions can be gleaned from a look at how such briefs, when allowed, are treated by the court in its decisions on the merits. Historically, the cardinal rule for amicus curiae has been that "[i]n the absence of exceptional circumstances, amici curiae may not expand the scope of an appeal to implicate issues not presented by the parties to the district court."[30] This rule has deep roots, and the Eleventh Circuit has invoked it to disregard arguments made by amici curiae.[31] A corollary principle to this rule is that an amicus curiae may not submit new evidence on appeal, nor will "the court consider the new factual material included" in an amicus curiae brief.[32] Courts have also said that an amicus curiae "cannot control the course of [the] litigation to the extent of requesting individual relief not requested by anyone else."[33] Presumably, judges assess motions for leave through these same lenses and deny motions for leave to file amicus curiae briefs that violate one or more of these general rules.

One recent unpublished order provides more detailed and contemporary insight into the court's thought process in considering motions for leave, or at least that of one judge. In *Friends of the Everglades v. South Florida Water Management District*,[34] Judge Ed Carnes issued a five page order that denied six amicus curiae motions and one motion to strike a governmental brief.[35] The appeal involved the statutory interpretation of certain terms in the Clean Water Act, and it drew the attention of water users from across the country, particularly

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[30] Richardson v. Ala. State Bd. of Educ., 935 F.2d 1240, 1247 (11th Cir. 1991) (citing McCleskey v. Zant, 499 U.S. 467, 523 n.10 (1991) (Marshall, J., dissenting)).

[31] *See*, *e.g.*, *id.*; *See also* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 840 n.13 (5th Cir. 1975) ("The other issues briefed by Amici were not raised in the district court, and for that reason we shall not consider them.").

[32] *See* Smith v. United States, 343 F.2d 539, 541 (5th Cir. 1965).

[33] Bing v. Roadway Express, Inc., 485 F.2d 441, 452 (5th Cir. 1973).

[34] *See* order by Judge Ed Carnes denying amicus curiae briefs in Friends of the Everglades v. South Fla. Water Mgmt. Dist., No. 07-13829 (11th Cir. Feb. 19, 2008) (On file with author, who was counsel of record to the National Hydropower Association, a would-be amicus curiae in the case whose motion for leave was denied in this order.).

[35] *Id.*

since an earlier case involving similar water uses in south Florida wound up making law in the U.S. Supreme Court.[36]

The order in *Friends of the Everglades* provides specific reasons for each of the six denials. The reasons included: (1) that the "brief addresses . . . a topic that is covered in the amici brief already filed" by several states as of right under Rule 29(a); (2) that the brief addresses arguments that "are adequately covered in briefs filed by the appellants and other amici whose briefs have already been accepted"; (3) that the arguments in the brief "adopt but also repeat those contained in the briefs filed by the appellants"; (4) that the brief addresses "a matter that is not closely related to the legal issues presented in this appeal"; (5) that the brief "adds no new arguments on the issues central to this appeal"; and (6) that the brief "presents no argument that is not already made several times over."[37] Only one of these reasons reflects the historic concern discussed above regarding amicus curiae briefs—that an amicus curiae may not expand the scope of the appeal. The remaining explanations reflect a concern with efficiency and workload—that the court should not be overloaded or distracted with repetitive amicus curiae briefs, even if they squarely address an issue on appeal.

Another reason that judges may deny amicus curiae status is, to put it bluntly, that they do not trust amici curiae in general or consider them reliable. This sentiment, rarely expressed but certainly present in the background, may be understandable. Amici curiae are less accountable to the court for the arguments they make—they generally do not appear at oral argument to defend their arguments,[38] and, unlike the parties, they cannot lose the appeal. Courts likely view many amici curiae as just a shill for the party it is supporting.

Judges seldom have occasion to express this latent mistrust of amicus briefs, and it most probably manifests itself more in the court ignoring amicus curiae than directly taking them on in its decisions. However, in one case, *Glassroth v. Moore*,[39] the court was squarely presented with this aspect of amicus curiae practice and explained part of the reason for this underlying sentiment.[40] The court in *Glassroth* was presented with the unique issue of whether a prevailing plaintiff in a civil rights case was entitled to recover attorney fees for time spent in

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[36] *See* South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004).

[37] *See supra* note 34.

[38] Under Rule 29(g), "[a]n amicus curiae may participate in oral argument only with the court's permission." FED. R. APP. P. 29(g).

[39] Glassroth v. Moore, 347 F.3d 916 (11th Cir. 2003).

[40] *Id.*

connection with amicus curiae briefs supporting its position.[41] Specifically, the plaintiff's attorney sought fees for time spent "enlisting various organizations to appear as amici; suggesting potential signatories for the briefs; working on, supervising, and reviewing the amicus briefs; and seeing that they were mailed on time."[42]

This was a bold request, and, not surprisingly, the court did not allow the recovery of attorney fees for this work.[43] The court reasoned that since amicus curiae themselves are not entitled to fees, the court would "not allow that result to be changed by the simple expedient of having counsel for a party do some or all of the amicus work."[44] However, the court did allow recovery of a "reasonable amount of time spent reading and responding to opposing amicus briefs."[45] More interesting though was the court's discussion of amicus curiae practice in general. Citing Posner's famous *Voices for Choice* order, the court stated that

> [i]t comes as no surprise to us that attorneys for parties solicit amicus briefs in support of their position, nor are we shocked that counsel for a party would have a hand in writing an amicus brief. In fact, we suspect that amicus briefs are often used as a means of evading the page limitations on a party's brief. . . . To pay a party for such work would encourage the practice, which we are loathe to do.[46]

This valuable insight reflects a general skepticism of amicus curiae. But we should be careful not to read too much into the court's discussion—the court did not say that amici curiae were not welcome or helpful in the case, but only that the other party should not have to pay for their participation. Nevertheless, the tenor of the court's discussion about amici curiae briefs and its citation to *Voices for Choice* seem to plant the court more in the Posner camp, *i.e.*, skeptical of the usefulness and intentions of amici curiae.

IV. THE FACTS OF AMICUS CURIAE PRACTICE IN THE ELEVENTH CIRCUIT

Now to the facts and your pencil marks in the margin. It may surprise many to learn that the number of amicus curiae briefs filed with the Eleventh Circuit is quite small—both in absolute terms and as a

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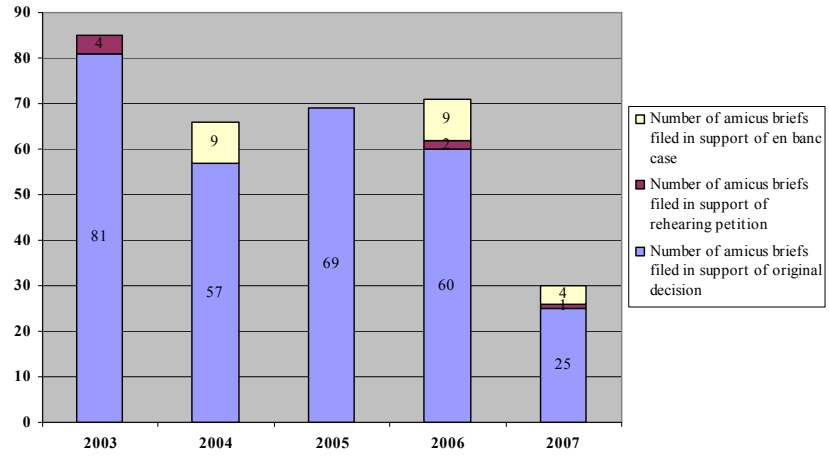
41 *Id*. at 918–19.
42 *Id*. at 919.
43 *Id*. at 920.
44 *Glassroth*, 347 F.3d at 919.
45 *Id.*
46 *Id*. (internal citation and quotation omitted).

percentage of the court's caseload. In 2007, only 30 amicus curiae briefs were filed with the court.[47] This includes briefs filed by a governmental entity as of right, by consent of the parties, or by leave of court. Looking back over the previous years, 71 amicus briefs were filed in 2006, 69 in 2005, 66 in 2004, and 85 in 2003. Figure 1 shows these numbers in graphical form.[48] As Figure 1 indicates, the vast majority of these briefs were filed at the panel stage in support of the original decision, and relatively few were filed in support of rehearing[49] or on the merits at the en banc stage after rehearing en banc was granted.

Figure 1: Number of Amicus Curiae Briefs Filed in the Eleventh Circuit



As a function of the court's caseload, the number of amicus curiae briefs seems even less significant. Figure 2 shows the total number of fully briefed cases before the court—that is, the number of cases in which at least one brief was filed by both the appellant and the appellee, based on the year in which the appellant's brief was filed.[50]

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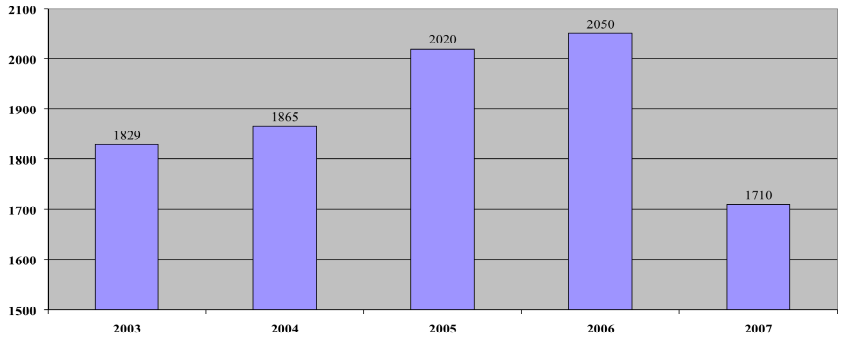
[47] The Eleventh Circuit data presented in Figures 1 through 7 are on file with the author.

[48] The vast majority of these amicus curiae briefs were filed in civil cases before the court. Over the five years from 2003–2007, only 12 amicus curiae briefs were filed in criminal cases.

[49] This includes both briefs filed in support of panel rehearing and briefs filed in support of rehearing en banc.

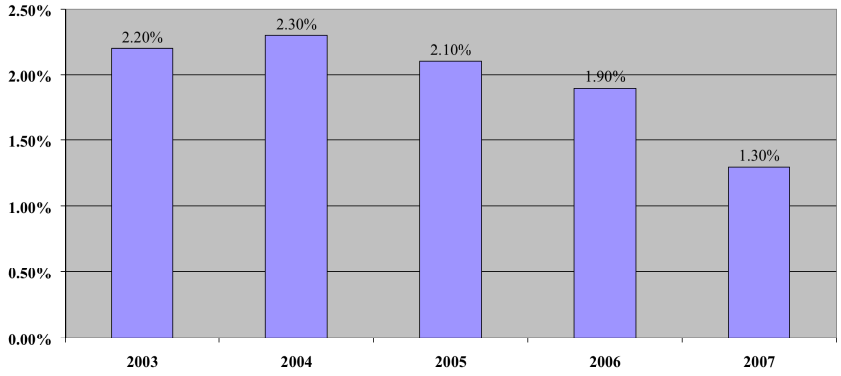
[50] The numbers in these figures generally *exclude* pro se cases, and they *include* cases on the court's miscellaneous docket. The court's miscellaneous docket includes petitions for permission to appeal an interlocutory order pursuant to 28 U.S.C. § 1292(c), appeals of a class action certification order pursuant to Fed. R. Civ. P. R.23(f), and petitions for permission to appeal a magistrate's order. If any of these requests are granted, the appeal is transferred to the court's general docket.

Figure 2: Number of Fully Briefed Cases in the Eleventh Circuit



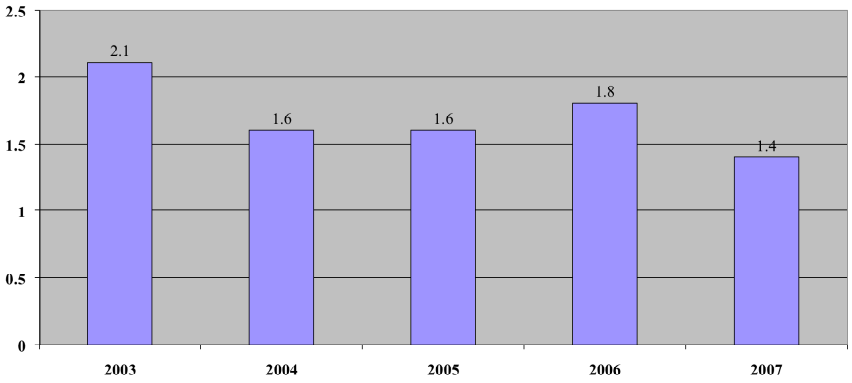
Amicus curiae briefs were filed in only a small percentage of these cases. In 2007, amicus curiae briefs were filed in 1.3% of the court's fully briefed cases (22 cases with amicus briefs out of 1,710 fully briefed cases). Figure 3 shows this percentage from 2003 through 2007.

Figure 3: Percentage of Fully Briefed Cases with an Amicus Brief



Moreover, in cases with amicus curiae briefs, the average number of amicus briefs per case has fallen from 2.1 in 2003 to 1.4 in 2007. Figure 4 illustrates this.

Figure 4: Number of Amicus Curiae Briefs Filed per Case



Therefore, not only is the number of amicus curiae briefs filed each year with the Eleventh Circuit small, it has shrunk over the last several years. What has caused this drop-off? In theory, the trend could be the result of several different variables or combinations of variables—for example, a decrease in the number of briefs filed without seeking leave (*i.e.*, those filed by a governmental entity or with consent), a decrease in the number of motions for leave that were filed, or an increase in the denial rate of motions for leave. The data for these variables are shown in Figures 5, 6, and 7, respectively, for the years 2003 through 2007.

Figure 5: Number of Amicus Curiae Briefs Filed with and Without Leave

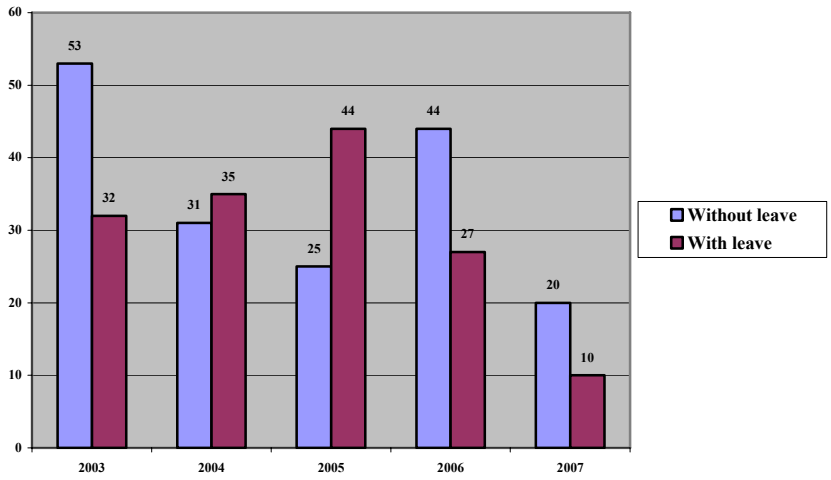


Figure 6: Motions for Leave and their Disposition

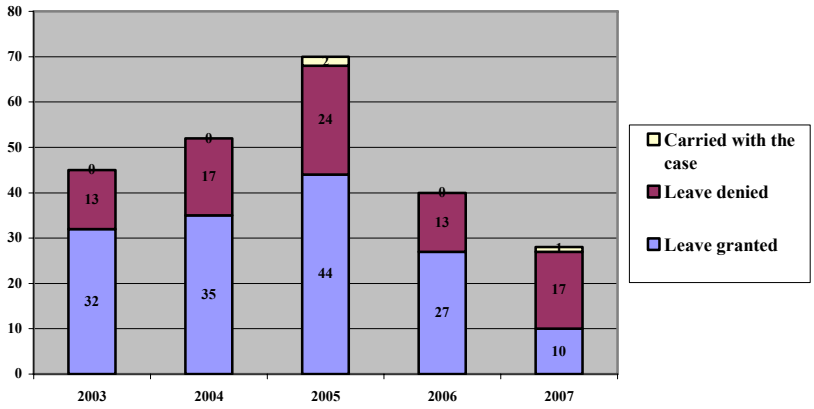
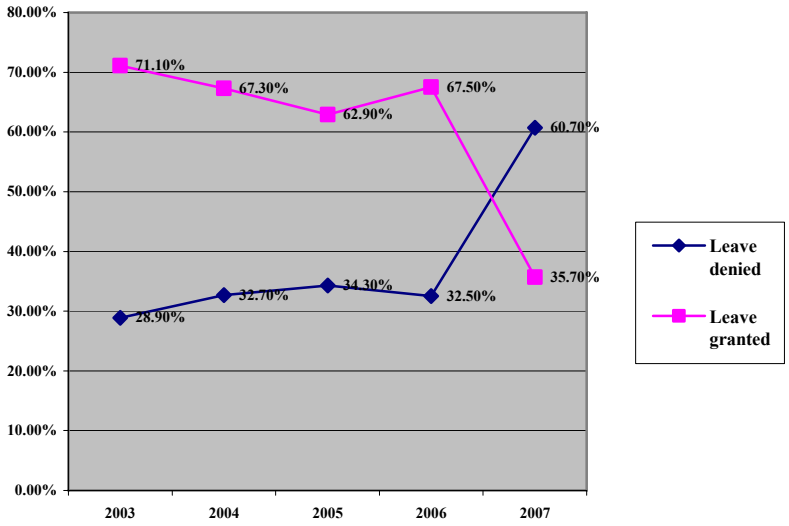


Figure 7: Percentage of Motions for Leave Granted and Denied



While the trend is not strictly linear, the data suggest that all of these variables are contributing to the drop-off in amicus briefs filed. The number of amicus briefs filed without leave was at its peak in 2003 (53) and its nadir in 2007 (20). The total number of motions ruled on by the court was at its peak in 2005 (70) and its nadir in 2007 (30). The most dramatic figure is the denial rate for motions for leave. From 2003 to 2006, the figure rose several percentage points and averaged around one-third of motions being denied. In 2007, there was a substantial increase

in the denial rate—in fact, the rate nearly doubled so that almost two-thirds of the motions filed were denied. This 2007 number could be an aberration. However, even excluding 2007, from 2003 to 2006 the data show a marked increase in the denial rate. Future years will need to be considered to see if the 2007 denial rate will hold (if the order in *Friends of the Everglades* denying six motions is any indication of the trend in 2008, it surely will).

V. SEPARATING FACTS FROM FICTIONS

With these data and background in mind, the conventional wisdom about amicus curiae practice in the courts of appeals can be put to the test, at least in the Eleventh Circuit.

Fiction: The courts of appeals are flooded with amicus curiae briefs.

This is clearly not the case in the Eleventh Circuit. As discussed above, the most amicus curiae briefs filed in one year over the 2003-2007 period was 85 (2003), and the least was 30 (2007). On average over this period, approximately 64 amicus briefs were filed each year. Assuming that every fully briefed case is decided on the merits by a three-judge panel of active Eleventh Circuit judges (which is not the case, given senior status judge participation and sittings by designation), each active judge on the court would read on average only sixteen amicus briefs per year.[51] Of course, if the 2007 numbers represent the trend, this number will continue to shrink.

Fiction: The courts of appeals freely grant leave to file amicus curiae briefs.

One commentator has postulated that "[t]he general practice in the federal courts of appeals is to grant leave to file an amicus brief in most situations."[52] Whether general statements like this are accurate is hard to know, since they are most often backed by only anecdotal evidence. What we do know is that the statement is not true in the Eleventh Circuit.

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[51] Estimates like this are tricky. This estimate assumes that amicus briefs are evenly distributed among three-judge panels and that each of the 65 (possibly 64?) amicus briefs is read by each panel member. Thus, 64 x 3 / 12 = 16. The actual number of amicus briefs read by each individual active judge undoubtedly varies from this average estimate. Since the court's case load is shared by senior status judges and other federal judges sitting by designation, the burden of reading and assessing amicus curiae briefs may actually be more widely distributed. On the other hand, some amicus curiae briefs are filed in en banc matters, as shown by Figure 1, so that more than three judges read them.

[52] Harrington, *supra* note 8, at 670.

In recent years, the general practice in the Eleventh Circuit is to deny leave to file an amicus brief.

The current practice at the Supreme Court is just the opposite. Today, the Supreme Court "grant[s] nearly all motions for leave to file as amicus curiae when consent is denied by a party."[53]

Fiction: Denying motions for leave will minimize unnecessary work by judges on the courts of appeals.

It is often said that amicus curiae filings should be limited in order to "minimize extraneous reading" by judges with already "heavy caseloads."[54] Even assuming that all or most amicus briefs are "extraneous," it is far from certain that denying motions for leave accomplishes the goal of minimizing work for Eleventh Circuit judges. First, the majority of the amicus curiae briefs filed with the Eleventh Circuit are done so with no gate-keeping by the court. On average, over the 2003 to 2007 period, approximately 54% of the amicus briefs filed at the Eleventh Circuit (173 of 321) were filed as of right by a governmental entity or with consent of the parties. So, the court has limited control over the number of amicus curiae briefs that are filed. Second, with respect to amicus curiae briefs that require a motion for leave, resolving the relevance and need for the amicus curiae brief at the motions stage does not necessarily reduce extraneous reading or reduce workload. Assuming all motions for leave are considered by only one judge, that one judge would need to read not only the amicus curiae brief, but the briefs of the parties to determine if the amicus curiae brief was duplicative, over-reaching, or otherwise unhelpful. Assuming each of these briefs was at its page limit, that is a total of 42,000 words to be read in order to rule on the motion on these grounds. If the decision were instead left to the merits panel (which would be reading the parties' briefs anyway), then three judges would each only read a single additional 7,500 word amicus curiae brief. This math does not hold up in every case. Sometimes, additional reading can be minimized by denying a motion for leave. For example, in *Friends of the Everglades*, Judge Carnes was able to dispense with six amicus curiae briefs in one motion and thereby eliminate eighteen "readings" by the three-judge merits panel.[55]

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[53] Kearney & Merrill, *supra* note 4, at 762.
[54] *Voices for Choices*, 339 F.3d at 544.
[55] *See supra* note 34.

Fiction: The courts of appeals are at risk of being unduly influenced by amicus curiae briefs from special interest groups.

One reason cited as justification for limiting amicus curiae participation at the courts of appeals is that amicus curiae briefs are "often an attempt to inject interest group politics into the federal appeals process."[56] The implication here is that "interest group politics"[57] is bad and that the federal courts—which decide only specific cases and controversies between parties with a concrete stake in the matter—should not wade into broad political debates or seek to make social change.

Few would argue that many amicus curiae briefs are filed specifically for the purpose of informing the court of the broader social and political impacts that a decision in the case may have on a particular group or segment of the population. Most amicus briefs do not simply offer a dispassionate, objective discussion of the points of law before the court. Though some bemoan it, the reality is that the romanticized view of an amicus curiae as the traditional "friend of the court" has long since ceased to be a reality. But federal judges are not duped by this. They know how to judge the credibility of legal arguments regardless of their source. The Eleventh Circuit knows how to do this with amicus curiae arguments.[58]

Moreover, the fact today is that many of the cases attracting amicus curiae participation are themselves so-called public policy or social change litigation. In these cases, one or more of the parties is a special interest group pursuing a broader agenda through litigation. Environmental cases are a prime example. Many environmental cases are brought by public interest groups with a particular agenda, often against regulatory agencies like the U.S. Environmental Protection Agency. These environmental cases seek more stringent environmental regulation, not just of one business or factory but also of entire industries. The parties that arguably will feel the weight of the court's decision the most—the individuals and businesses that must meet the more stringent regulations—are not actual parties to the case and their best chance for participation may be as an amicus curiae. In other words, the basic nature of federal court litigation has evolved, and amicus curiae participation

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[56] *Voices for Choices*, 339 F.3d at 544.

[57] *Id.*

[58] *See, e.g.*, Price v. Time, Inc., 416 F.3d 1327, 1340 n.5 (11th Cir. 2005) (disregarding an amicus brief because it took a "position that [was] rich with inconsistency and border[ed] on self-denial"); Evans v. Stephens, 407 F.3d 1272, 1284 (11th Cir. 2003) (Carnes, J., concurring) (finding some amicus briefs on a particular issue helpful).

followed with it. Saying that amici curiae interject politics into the case gets it backwards in many cases.

VI. MOVING FORWARD

To summarize, I submit that the data presented here compel this conclusion: Denying motions for leave to file amicus curiae briefs is not necessary to control the Eleventh Circuit's workload or to produce better decisional results. Although controlling workload and protecting the integrity of the law-making process are important goals, there are better ways to accomplish them. Here are a few suggestions, which could be implemented by a revision to Eleventh Circuit Rule 29.

First, to address the inherent mistrust of the motives of amicus curiae, the court should require more specific disclosures of non-governmental amici curiae. The Supreme Court does this. Under Supreme Court Rule 37, every amicus curiae brief filed by a non-governmental party must contain a disclosure about who funded and authored the brief.[59] Specifically, the disclosure must state:

> whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person, other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution.[60]

The disclosures must appear "in the first footnote on the first page of text" of the brief.[61] The content of this disclosure goes straight to the court's concern in *Glassroth* and would discourage the practice of "counsel for a party . . . [having] a hand in writing an amicus brief," which the court said it disapproved of.[62]

Second, to encourage more *deliberate* amicus curiae participation, the court should require upfront notification of an amicus curiae's intention to file a brief (or a motion for leave). The Supreme Court, for example, requires that an amicus curiae "ensure that the counsel of record for all parties receive notice of its intention to file an amicus curiae brief at least 10 days prior to the due date for the amicus curiae brief, unless the amicus curiae brief is filed earlier than 10 days before the due date."[63] The amicus curiae brief must indicate that such notice

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[59] Sup. Ct. R. 37.6.
[60] *Id.*
[61] *Id.*
[62] *Glassroth,* 347 F.3d at 919.
[63] Sup. Ct. R. 37.2(a).

was provided.[64] The D.C. Circuit also requires upfront disclosure of an amicus curiae's intent to participate. Under D.C. Circuit Rule 29, a non-governmental entity or an individual seeking to file an amicus curiae brief must file with the court, within sixty days of the docketing of the appeal, either a notice that all parties have consented to their participation or a motion for leave.[65] An amicus curiae, acting on behalf of the government, must file a notice of intent to participate within the same time frame.[66] This upfront notice allows the court to incorporate the amicus curiae's participation into the briefing schedule. On the one hand, the requirement for upfront notification is about fairness and scheduling—making sure all parties have a chance to respond to arguments raised by amici curiae. But it also has the practical effect of requiring amici curiae to consider their role early, and thus prevents last minute "piling on" of amici curiae briefs with duplicative and ill-conceived arguments.

Third, the court should require amici curiae advocating similar positions to join in a single brief to the extent possible, instead of filing multiple briefs. The D.C. Circuit requires that non-governmental amici curiae "on the same side must join in a single brief to the extent practicable."[67] An amicus curiae seeking to file a separate brief must explain "why the separate brief [wa]s necessary."[68] Such a requirement has several beneficial effects. First, it obviously reduces the number of amici curiae briefs that are filed. Second, requiring coordination among counsel for different amici curiae will likely lead to fewer questionable arguments being raised in the brief. If multiple lawyers and their clients are required to "sign off" on an argument to be presented in the amicus curiae brief, there will be some level of additional peer review and scrutiny of the brief. In other words, there will be compromise and accommodation among the amici curiae, resulting in a more streamlined and defensible brief.

These three recommendations are not particularly earth-shattering. They are simple changes to the rules and mostly procedural in nature. But they directly address the underlying concerns about amicus curiae practice in the Eleventh Circuit and elsewhere. The changes recognize that the court is in ultimate control of how and when an amicus curiae may appear before it. However, the changes also recognize that outright denial of participation by non-parties is not necessary to control the

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[64] *Id.*
[65] D.C. Cir. R. 29(b).
[66] *Id.*
[67] *Id*. at 29(d).
[68] *Id.*

court's workload or to foster accountability. With these or similar changes, the court can welcome the voices of affected persons into its decision making process without the fear that it will be overrun by frivolous and duplicative amicus curiae briefs.