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Amicus Practice

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- successfully defending the constitutionality of the Texas Ten Commandments monument before the Fifth Circuit, and currently defending the same before the U.S. Supreme Court,
- authoring a U.S. Supreme Court brief on behalf of all fifty States and successfully defending the words “under God” in the Pledge of Allegiance,
- serving as lead counsel for the State and successfully defending the multiple state and federal litigation challenges to the 2003 Texas congressional redistricting plan,
- successfully defending the constitutionality of the Texas Sexual Violent Predator Civil Commitment law before the Texas Supreme Court,
- serving as lead counsel for the State on the pending appeal to the Texas Supreme Court of the 2003 school finance litigation, and
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Prior to his current position, Ted served as the Director of the Office of Policy Planning for the Federal Trade Commission, as Associate Deputy Attorney General at the U.S. Department of Justice, and as Domestic Policy Advisor to President George W. Bush on the Bush-Cheney 2000 campaign.

Ted is the son of a Cuban immigrant, was raised in Texas, and attended Princeton University and the Harvard Law School. At Princeton, he was Chairman of the University Undergraduate Council, U.S. National Speaker of the Year and Team of the Year in college debate, and the number-one ranked collegiate speaker in North America. At Harvard, he was a Primary Editor of the Harvard Law Review, an Executive Editor of the Harvard Journal of Law & Public Policy, and a founding Editor of the Harvard Latino Law Review. He graduated Harvard *magna cum laude* and was named a John M. Olin Fellow in Law and Economics. In 1995, he served as a law clerk to Judge J. Michael Luttig on the U.S. Court of Appeals for the Fourth Circuit, and in 1996 as a law clerk to Chief Justice William H. Rehnquist on the Supreme Court of the United States. He is the only Hispanic in history to have clerked for the Chief Justice of the United States.

**AMICUS PRACTICE
R. TED CRUZ**

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AMICUS PRACTICE¹

R. TED CRUZ

I. General Brief-Writing Points

An *amicus* brief, in many ways, is just like any appellate brief written on behalf of a party. One should be clear and direct; if your argument cannot be stated in one or two short declarative sentences, refine it some more. Brevity matters. Credibility matter even more; don't hide the ball, or misstate the facts or law. One must follow the rules of the court (the Rules of the Supreme Court in the United States Supreme Court, FRAP and the local rules in federal circuit courts, and TRAP and the local rules in state courts). One should be assertive in making an argument, but should not engage in hyperbole. One should write with a purpose: an *amicus* at the cert petition stage requires the writer to present the Court with reasons to take the case, whereas an *amicus* on the merits should set out the arguments supporting a particular conclusion the Court should reach.

There are some general aspects of *amicus* practice, however, bearing special mention:

- Usually, the Court must grant permission before one may file an *amicus* brief. Check the rules. Often, consent of the parties is required as well (or, alternatively, the Court may grant an opposed motion to file).
- Even though an *amicus* brief usually will be filed in support of one of the parties, it is important that an *amicus* be written with some objectivity, rather than merely a partisan argument in favor of the preferred party.
- Beware of repetition. In an *amicus* brief, the Interest of *Amicus Curiae*, Summary of the Argument, and introductory paragraphs to each section of the brief provide opportunities to summarize your arguments. Take care not to merely state the same thing several times throughout the brief.
- Because an *amicus curiae* does not find itself in the particular factual situation the parties are in, an effective *amicus* strategy can be to explain to the Court the broader effects a particular decision will have outside the context of the instant case.

II. The Many Purposes of an *Amicus* Brief

This article will focus principally on *amicus* briefs before the U.S. Supreme Court, but the precepts considered bear on *amicus* briefs before any court. The Texas Office of Solicitor General (OSG) routinely files *amicus* briefs before the U.S. Supreme Court, the Texas Supreme Court, and other state and federal courts. Typically, OSG files 1-2 *amicus* briefs per month, in addition to litigating cases on the merits. This article will survey a number of those briefs, in order to illustrate the principles being discussed.

¹ I am grateful to Adam Aston in the Office of Solicitor General for his careful and able assistance in the preparation of the article.

In General: Add Something New

No rule is more important than: Add Something New. Many *amicus* briefs border on the useless because they fail to follow this simple prescription. Merely saying “me too,” and echoing the argument of a party, is almost always a waste of time for the *amicus* and for the Court. Indeed, the Rules of the Supreme Court expressly so state. SUP. CT. R. 37.1 (“An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.”).

One can accomplish the goal of providing something new for a court to consider in a variety of ways. In rare instances, who writes the brief can make a difference. A brief filed on behalf of many organizations within the same industry can be more effective than if filed by only one. Similarly, if the brief argues a position not generally taken by the *amici* who file the brief, it can be more effective. A counter-intuitive voice provides additional credibility to the arguments set out in the brief.

Other *amicus curiae* briefs are effective because of the new analysis they provide. Briefs that compile additional factual information, especially when they contain data that the parties would have difficulty finding, can be of great help to the court. An *amicus* could also provide an alternative avenue for analyzing the issues. While the parties may articulate some of the ways the court may decide the case, an *amicus* brief that provides yet another set of options for the court to decide the case could serve as the basis for the court’s decision. An *amicus* brief could also urge the court to go further than the parties might urge. Whereas the party may ask the court to find in their favor based on the particular facts of the case, an *amicus* may suggest that the court adopt bright-line rules that would be applicable in a wider range of situations. Finally, an *amicus* brief could offer a different legal synthesis to the issues of the case. A brief of this type may look at the issues in a way the parties have not and provide the court with a different set of arguments.

Each of these types of *amicus* briefs will be discussed in turn, with examples of how to use the techniques to write an effective *amicus curiae* brief.

A. Who is Writing

An *amicus* brief may have varying degrees of effectiveness based on its author(s). Briefs written by those who participate frequently in cases before a particular court, or those by organizations with particular expertise in the issues before the court, may prove especially useful. So, too, briefs prepared by a collection of organizations or people may be more effective than those filed on behalf of only one.

Example 1

Elk Grove ISD v. Newdow, U.S. Supreme Court, No. 02-1624; 542 U.S. 1 (2004)

In 2003, Texas filed an amicus brief on behalf of all 50 States – the only instance of which we are aware where every State in the Union joined a single brief – defending the Pledge of Allegiance. Texas’s *amicus* brief noted that nearly every State had a statute providing for the Pledge to be used in public schools:

The State of Texas writes on behalf of all fifty States to urge the Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit and confirm that voluntary teacher-led recitation of the Pledge of Allegiance in public schools does not violate the Establishment Clause of the First Amendment to the United States Constitution. The *Amici* States have a significant interest in this case because adjudication of the issues presented may directly impact the validity of at least forty-three state statutes providing for the recitation or use of the Pledge of Allegiance by public schoolchildren.²

To get all 50 States to join a single brief, especially in a case concerning the Establishment Clause, required a brief that focused on broad principles of agreement, rather than any particular abstract theory of constitutional law:

America was formed by those fleeing religious persecution. Seeking to forge a land where each person could live and worship God as he or she believed best, the Framers established a country predicated on a simple, yet profound, postulate—declared in the document that gave birth to our Nation: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

From that day forward, the United States has fought to protect the freedom of conscience of all her citizens, while at the same time acknowledging the heritage behind our Nation’s founding. Abraham Lincoln, famously dedicating and consecrating that bloody Pennsylvania battlefield, put it this way:

“. . . that we here highly resolve that these dead shall not have died in vain, that this nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the

² Brief of Texas and 49 Other States as *Amici Curiae* in Support of Petitioners, *Elk Grove v. Newdow*, U.S. Supreme Court, No.02-1624, at 1.

earth.” Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

* * *

Despite decades of patriotic acknowledgment of our Nation’s religious heritage in the Pledge of Allegiance—and despite centuries of other similar historical and patriotic acknowledgments of religion by our government—Respondent Newdow successfully challenged the constitutionality of the Pledge of Allegiance’s recitation to and by schoolchildren in the State of California. *See Newdow v. U.S. Congress*, 292 F.3d 597, 607-12 (9th Cir. 2002), *cert. granted*, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 384 (2003). Because that decision by the Ninth Circuit Court of Appeals is contrary to this Court’s well-settled Establishment Clause jurisprudence, the *Amici* States respectfully request that the Court reverse the judgment below.³

A large number of States joining an *amicus* brief certainly gives a brief more force than if it is filed on behalf of only a few States—and having *every* State on this brief was no doubt helpful. In many ways, that was the critical message of this particular *amicus* brief—that the decision of the Ninth Circuit Court of Appeals was out of step with the reasoned judgment of every single State in the nation.

And, although the Supreme Court ruled on standing and did not reach the merits of the issue, the Court nevertheless unanimously vacated the decision of the Ninth Circuit. *Elk Grove ISD v. Newdow*, 542 U.S. 1 (2004).

Example 2

Grutter v. Bollinger, U.S. Supreme Court, No. 02-241; 539 U.S. 306 (2003)
Gratz v. Bollinger, U.S. Supreme Court, No. 02-516; 539 U.S. 244 (2003)

These cases dealt with the use of affirmative action program in determining admissions into the University of Michigan’s School of Law and the University of Michigan’s College of Literature, Science, and the Arts. Of the more than 100 *amicus* briefs filed in these cases, one *amicus* brief filed on behalf of twenty-nine former military leaders was particularly important.

That brief is widely viewed as one of the most important *amicus* filings in recent years. The role that brief played in the case was due, in large part, to the identity of the *amici*. The twenty-nine *amici* included fifteen 4-star officers, five other officers that retired 2- or 3-star, two Secretaries of Defense, three Chairmen of the Joint Chiefs of Staff, a National Security Advisor, six top administrators from the Military, Naval, and Air Force Academies, and five United States Senators. The *amici* included such well-known leaders as Generals Wesley Clark, Norman Schwarzkopf, and Hugh Shelton, Secretaries

³ *Id.* at 3-4.

of Defense William Cohen and William Perry, and Senators Carl Levin and Robert Kerrey; thus it was also viewed as a nonpartisan effort.⁴

The brief set out the perceived need for a racially diverse cadre of officers to lead the racially diverse military, and explained the efforts used to achieve these results over the past thirty years. Perhaps most importantly, the brief explained that the service academies and ROTC programs provide a majority of the officers for all branches of the military. For this reason, the military officers argued, the academies and universities with ROTC programs should be allowed to use affirmative-action-based systems to ensure a sufficient number of minority officers were available. They argued:

Based on decades of experience, *amici* have concluded that a highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks is essential to the military's ability to fulfill its principal mission to provide national security. The primary sources for the nation's officer corps are the service academies and the ROTC, the latter comprised of students already admitted to participating colleges and universities. At present, the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies. Accordingly, these institutions rely on such policies[.]⁵

At oral argument it quickly became clear that this was not an ordinary *amicus* brief. Soon after beginning his argument, Petitioners' counsel was asked to address the *amici*'s argument that the only way to achieve the necessary diversity in the military's officer corps, was to consider race in recruiting and admittance for service academies and ROTC programs. Oral Argument Transcript, *Grutter v. Bollinger*, U.S. Supreme Court, No. 02-241, at 7-10, 12-13. United States Solicitor General Ted Olson, arguing on behalf of the United States as *amicus curiae* in support of the Petitioners, was also questioned almost immediately about the military leaders' brief. *Id.* at 19-23. The unusual amount of attention given this *amicus* brief at oral argument was a clear indication that the Court had considered its arguments at great length.

Perhaps not surprisingly—considering the attention paid to the brief at oral argument—the military leaders' *amicus* brief also received attention in the Court's opinion. The Court noted the brief argued that “a ‘highly qualified, racially diverse officer corps is essential to the military's ability to fulfill its principle mission to provide national security.’” *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (quoting Brief of Lt. Gen. Julius W. Becton, Jr., et al. as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger*, U.S. Supreme Court, No. 02-241, at 27). The Court continued, “To fulfill its mission, the military ‘must be selective in admissions for training and education for the

⁴ See Brief of Lt. Gen. Julius W. Becton, Jr., et al. as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger*, U.S. Supreme Court, No. 02-241, at 1-4.

⁵ *Id.* at 5.

officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.’ We agree that ‘it requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.’” *Id.* (quoting Brief of Lt. Gen. Julius W. Becton, Jr., et al. as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger*, U.S. Supreme Court, No. 02-241, at 29).

In *Grutter* and *Gratz*, the *identity* of the *amici*, and the authority with which they spoke, made a real difference.

NOTE, however, it is extraordinarily rare for a brief to have impact based solely on who the *amicus* is. *Amicus* briefs are not like legislative lobbying; the objective is not to count noses and see how many are supporting one side versus the other. Rather, identity usually matters only if the *amicus*, by virtue of who it is, can speak with particular authority or credibility to an issue. Even so, if the only new thing you are adding is the identity of your client, it may be worth reconsidering filing.

B. Counter-Intuitive Voice

Often arguments raised in an *amicus* brief can be most effective when the brief is written by an organization that is not generally considered to hold the positions argued for in the brief. For example, a conservative organization that authors a brief arguing in favor of environmental regulations may be more effective than a liberal organization making the same arguments. A counter-intuitive voice can lead credibility to the arguments raised in the brief. This can be especially helpful when the party taking that position is an organization that has a history of taking positions similar to the arguments raised in their brief.

Example 1

Seegars, et al. v. Ashcroft, et al., DC Circuit, No. 04-5016; 396 F.3d 1248 (2005)

Though States often support one another when a constitutional challenge is brought against a statute, in this case Texas and 15 other States argued in favor of the rights of individual citizens. This case involves the handgun-ban in effect in the District of Columbia and the state *amicus* brief argued that the statutory scheme at issue violated the Second Amendment rights of those in Washington, DC.

The States explained that their interest in the case lay “because of its potential impact on the constitutional rights of their citizens,” and informed the Court that forty-four State Constitutions protect “[t]he individual right to keep and bear arms,” just as the United States Constitution does.⁶ The *amici* argued that the DC gun ban is “out of step with the

⁶ Brief of Texas and 15 Other States as *Amici Curiae* in Support of Appellants/Cross-Appellees, *Seegars, et al. v. Ashcroft, et al.*, DC Circuit, No. 04-5016, at 1.

judgment of the legislatures of all fifty states, all of which protect the right of private citizens to own handguns.”⁷

In arguing on behalf of individual rights, rather than the power of a State to legislate and regulate its citizens, *amici* took a position that is uncommon for States to support:

The Second Amendment guarantees all Americans the right to keep and bear arms. The district court’s holding that the Second Amendment does not confer an individual right, but rather confers only a collective right “to ensure the effectiveness of state militias as protectors of the states,” eradicates the Second Amendment for all practical purposes. The district court’s ruling contradicts the plain text of the Amendment, the Supreme Court’s construction of that Amendment, the history and purpose of the Amendment, and the majority of scholarly commentary.

* * *

Reasonable minds can differ about the scope of the protections of the Second Amendment, about which government regulations do and do not extend beyond the permissible sphere. But the district court’s holding in this case—that the Second Amendment protects no individual rights at all—abrogates those protections completely. This Court, like the Fifth Circuit in *United States v. Emerson*, should recognize the Second Amendment’s guarantee of a personal and individual right to keep and bear arms and reverse the incorrect judgment of the district court.

* * *

The D.C. Code provisions also fail the *Emerson* test because they are unreasonable in light of the experience of the fifty States concerning the regulation of firearms, as well as the actual effect of the D.C. Code provisions. The Legislatures of all fifty States are united in their rejection of bans on private handgun ownership. Every State in the Union permits private handgun ownership. Forty-six States go further, allowing private citizens to carry concealed handguns for self-defense, at least in some circumstances. Thus, the District’s sweeping firearm prohibitions are not only contrary to the Constitution, but, contrary to the reasoned judgment of every state legislature in the nation.⁸

⁷ *Id.* at 2.

⁸ *Id.* at 5-7, 27-28.

Example 2

Bates, et al. v. Dow Agrosciences, LLC, U.S. Supreme Court, No. 03-388; 125 S.Ct. 1788 (2005)

In this case, Petitioners (29 Texas peanut farmers) claimed that their crops were damaged by the application of Respondent's newly marketed pesticide and filed suit under Texas Deceptive Trade Practices-Consumer Protections Act. One significant obstacle that Petitioners potentially faced was the possible perception that they were seeking a legal regime of over-broad tort liability. In this context, an amicus by the State of Texas—a State widely perceived not to be supportive of over-broad tort liability—had the potential to have particular credibility with the Court.

Texas and 16 other States supported the peanut farmers. The *amici* States agreed that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not pre-empt state-law claims for damages, arguing that the States have an interest in preserving their ability to regulate, and also that they have an independent interest in protecting their farmers:

The state *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Petitioners. The States have a vital interest in preserving their power to regulate traditional areas of state concern, such as the protection of consumers from unfair and deceptive practices. Nothing in the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. §§136-137, evinces an intent to eliminate the States’ longstanding role in protecting their citizens and preventing deceptive conduct. Thus, the States have an interest in ensuring that FIFRA’s preemption provisions are not construed more broadly than Congress intended.

The States have a further interest in defending state laws, and the court of appeals improperly held that FIFRA preempts the farmers’ claims under the Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”) and Texas common law.

The States also have a strong interest in matters affecting agricultural production and local farmers. The 2002 Census of Agriculture, prepared under the direction of the U.S. Department of Agriculture, showed that the United States has approximately two million operating farms, most of which are owned by individuals or families. The gross farm income in the United States for 2002 was \$228 billion, and the estimated value of U.S. agricultural exports in 2004 is \$61.5 billion. The value of U. S. peanut production in 2003 was nearly \$780 million, and the value of Texas’s peanut production in the same year was nearly \$150 million. Given the size and importance to the States of the

agriculture industry, they have an inherent interest in matters affecting their farmers and farm workers.⁹

Example 3

Spector, et al. v. Norwegian Cruise Line Ltd., U.S. Supreme Court, No. 03-1388

At issue in *Spector* is whether Title III of the Americans with Disabilities Act applies to companies operating foreign-flag cruise ships in United States waters. The *amici* States argued on behalf of Petitioners, noting they have “a strong interest in protecting their citizens with disabilities and ensuring that Title III of the ADA, 42 U.S.C. §12181 *et seq.*, is properly enforced within United States territory—especially when its nonenforcement not only denies those citizens their right to freedom from disability-based discrimination aboard a popular type of common carrier, but indeed puts their lives at risk in the event of an emergency.”¹⁰ The *amicus* brief urged the Supreme Court to reverse the court of appeals’s holding that the ADA was not applicable to foreign-flag cruise ships:

The plain text of the ADA protects Americans traveling on common carriers such as cruise ships, and this Court should give full effect to that unambiguous congressional intent.

In concluding that Title III of the ADA is inapplicable to foreign-flag cruise ships and the companies that operate them within United States territory, the court of appeals overlooked specific statutory language, this Court’s case law, legislative history, and two federal agencies’ opinions. In addition to these authorities, the absence of any other federal law aimed at preventing disability-based discrimination by cruise-ship operators further confirms Title III’s applicability.

It is fully within Congress’s authority to regulate foreign-flag cruise ships departing from United States ports and sailing in United States waters, and Congress chose to exercise that authority in Title III. The provision’s plain language demonstrates Congress’s intent to apply the statute to common carriers such as cruise ships. Although the court of appeals correctly observed that Congress is generally presumed not to intend to apply federal law outside of United States territory or to regulate the internal affairs of foreign vessels, the application of Title III to foreign-flag cruise ships in United States territory is entirely consistent with both of these presumptions.¹¹

⁹ Brief of Texas and 16 Other States as *Amici Curiae* in Support of Petitioners, *Bates, et al. v. Dow Agrosciences, LLC*, U.S. Supreme Court, No. 03-388, at 1-2.

¹⁰ Brief of Texas and 7 Other States as *Amici Curiae* in Support of Petitioners, *Spector, et al. v. Norwegian Cruise Line Ltd.*, U.S. Supreme Court, No. 03-1388, at 1.

¹¹ *Id.* at 2-3.

C. Providing Helpful Information

Often an *amicus* brief's most valuable function can be to provide the Court with additional information, not readily available otherwise. Because many cases affect more than just the parties involved, outside organizations can provide a different perspective that may be useful to the Court. Also, the parties may not be in the best position to provide certain types of information to the court. In that situation, an *amicus* brief filed on behalf of an organization with particular expertise in the area of law at issue, or with access to information that the parties may be unable to obtain, may prove useful.

Example

Veneman, et al. v. Livestock Marketing Ass'n, et al., No. 03-1164

Nebraska Cattlemen, Inc. v. Livestock Marketing Ass'n, et al., No. 03-1165

These consolidated cases address the issue of whether the Beef Promotion and Research Act of 1985 (the "Beef Act"), requiring beef producers and importers to pay assessments to fund research, education, and advertising conducted under the direction of the Secretary of Agriculture, violates the First Amendment. The party briefs focused on whether the speech at issue was government speech (and therefore does not implicate the First Amendment) or compelled private speech (and thus violates the First Amendment rights of the beef producers).

In *amicus* briefs at both the petition and the merits stages, Texas and 29 other States were able to provide the Court with extensive information not provided by the parties. First, the States detailed the magnitude of the impact beef production has upon state economies and the widespread participation of States in promotion under the Beef Act:

Beef production is the largest segment of the American agricultural economy, accounting for nearly one-fifth of total farm sales and over one million jobs. CHRISTA HARTSOOK, IOWA STATE UNIV., COMMODITY BEEF INDUSTRY PROFILE (June 2003). In 2002, the value of receipts from cattle and calves was approximately \$38 billion. ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., U.S. STATE FACT SHEET (2004). And on a global scale, the United States remains the world's largest producer of beef. See *World Beef Trade Overview*, LIVESTOCK & POULTRY: WORLD MARKETS & TRADE (Foreign Agric. Serv., U.S. Dep't of Agric., Washington, D.C.), Mar. 2004, at 10.

The beef industry plays an equally important role in the economies of the several States. All States engage in beef production, and the economic impact of the industry "contributes to nearly every county in the nation." DAN OTTO & JOHN D. LAWRENCE, ECONOMIC IMPACT OF THE UNITED STATES BEEF INDUSTRY 1 (2001). In forty States, cattle and calves are among

the top five agricultural commodities in terms of gross receipts. *See* ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., STATE FACT SHEETS (2004). And in thirty-eight States, the annual value of those receipts exceeds \$100 million. *See id.* Thirty-one States have at least 10,000 beef-cattle operations. NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., AGRICULTURAL STATISTICS 2003, Table 7-22 (2003).¹²

Perhaps the most important contribution of the States' *amicus* briefs was alerting the Court to the great number of other state programs that could be in jeopardy if the Beef Act is invalidated on First Amendment grounds. The *amicus* brief on cert explained, "the ramifications of this case for the States extend beyond the Beef Act. Congress has established similar federal-state cooperative programs for other products, and almost all States have created their own commodity-marketing programs."¹³

The States' briefs also compiled an extensive list, complete with full citations, of other state-level commodity-marketing programs that could face similar First Amendment challenges: in total, over 200 programs established by statutes in 46 States.¹⁴ This information was not readily available to the Court otherwise, and the States' *amicus* brief was explicitly highlighted by the United States at oral argument:

And, as Justice O'Connor pointed out, to strike down this program would have drastic consequences. There are many, many agricultural promotion programs like this. There are 13 at the national level. This program has been in existence since 1988. One billion dollars has been collected, and promotions have been conducted under it. These promotional programs go back to the '50s, and even -- and even earlier. *And there are many programs on the state levels, as the amicus brief filed by the states in this case shows.* This Court would be striking down a lot to hold that this commonsense way of approaching things is unconstitutional.¹⁵

D. Supplying Needed Analysis

Because an *amicus* may have slightly differing views from the party he or she supports, a brief offering additional analysis of the issues can be effective. Also, when the party

¹² Brief of Texas, 32 Other States, and Puerto Rico as *Amicus Curiae* in Support of Petitioners, *Veneman v. Livestock Marketing Association, et al.*, U.S. Supreme Court, No. 03-1164, at 5.

¹³ Brief of Texas, 29 Other States, and Puerto Rico, in Support of the Petition for Writ of Certiorari, *Veneman v. Livestock Marketing Association, et al.*, U.S. Supreme Court, No. 03-1164, at 1.

¹⁴ *Id.* at 15-18. *See also* Brief of Texas, 32 Other States, and Puerto Rico as *Amicus Curiae* in Support of Petitioners, *Veneman v. Livestock Marketing Association, et al.*, U.S. Supreme Court, No. 03-1164, at Appendix.

¹⁵ Oral Argument Transcript, *Veneman, et al. v. Livestock Marketing Ass'n, et al.*, U.S. Supreme Court, No. 03-1164; *Nebraska Cattlemen, Inc. v. Livestock Marketing Ass'n, et al.*, U.S. Supreme Court, No. 03-1165, at 63-64 (emphasis added).

briefs do not analyze each possible outcome by which a case could be won, additional briefing may point the Court to alternate avenues for ruling in a case. Such an *amicus* brief may result in the Court adopting a rule that is advocated by neither party.

Example

Price v. Vincent, U.S. Supreme Court, No. 02-524; 528 U.S. 634 (2003)

In this case, Respondent had been charged with murder. Following the close of the prosecution's case—and outside the jury's presence—the defense counsel moved for a directed verdict regarding first-degree murder. The judge stated he thought second degree murder was the appropriate charge, but agreed to allow the prosecutor to make a brief statement the next morning. When the prosecutor made the statement, defense counsel objected, arguing his motion had been granted and Double Jeopardy thus applied. The judge disagreed, stating that he had not actually directed a verdict. A charge of first-degree murder was submitted to the jury, and Respondent was convicted of first-degree murder. On appeal, the Michigan Supreme Court found Double Jeopardy had not attached. On federal habeas, the district court granted the habeas petition finding a Double Jeopardy violation and the Sixth Circuit affirmed.

At the Supreme Court, Petitioner (the warden of the prison) argued that the Michigan Supreme Court, in determining there was no order granting the motion for directed verdict, made a **factual** determination. Thus, the Michigan district attorney argued, the court was entitled to deference under section 2254(d)(2) of the AEDPA. Brief of Petitioner, *Price v. Vincent*, U.S. Supreme Court, No. 02-524, at 21-22.

The United States, as *amicus curiae*, offered a second approach. The United States' brief argued that—irrespective of the AEDPA—as a matter of substantive law there was no double jeopardy violation because the trial court was permitted to reconsider its mid-trial grant of a motion for acquittal once the prosecution has closed its case. Brief of the United States as *Amicus Curiae* Supporting Petitioner, *Price v. Vincent*, U.S. Supreme Court, No. 02-524, at 9-10.

Texas and 21 other States authored an *amicus* brief offering yet a third approach. Texas argued that the Michigan Supreme Court made a **legal** conclusion that the judge had not actually directed a verdict, and thus was entitled to the different level of deference under section 2254(d)(1) of the AEDPA. Because the federal court of appeals's *de novo* review was contrary to the AEDPA's requirement that state court legal decisions must be upheld unless found to be “objectively unreasonable,” the *amicus* argued, it should be reversed:

With the passage of the AEDPA, Congress redefined the scope of a federal court's review of a state criminal conviction. Specifically, under the standard of review set forth in 28 U.S.C. §2254(d), a federal court is barred from granting habeas relief without affording substantial deference to the state court's adjudication of the claims.

* * *

Inexplicably, the Sixth Circuit’s *de novo* review of the Michigan Supreme Court’s decision ignored the standard of review set forth in the AEDPA. Because it deemed the critical question to be legal in character, the Sixth Circuit believed it could simply set aside the Michigan Supreme Court’s conclusion and resolve the matter *de novo*. But, under the AEDPA, when a state court both identifies the governing rule of law and reasonably applies that rule, a federal habeas court cannot disregard that decision and come to its own independent conclusion. If the state court’s decision complies with the terms of the AEDPA—that is, the decision is not an objectively unreasonable application of clearly established federal law—then the federal court may not gainsay the state court’s judgment.¹⁶

The Supreme Court, in turn, unanimously agreed with Texas’s approach, holding that the Michigan Supreme Court’s determination that the judge’s comments did not direct a verdict was a **legal** conclusion entitled to deference under section 2254(d)(1) of the AEDPA. *Price v. Vincent*, 538 U.S. 634, 640-43 (2003).

Only the state *amici* had urged this approach. Petitioner had urged an altogether different legal theory, and Respondent had unwisely dismissed Texas’s theory in a footnote. And yet it supplied the basis for the unanimous judgment of the U.S. Supreme Court.

E. Urging a Broader Rule

Another useful *amicus* technique can be to urge a broader rule be adopted. The party whom the *amicus curiae* supports may be constrained to the specific facts of his particular case, or to his own specific interests, whereas an *amicus* is more free to argue that the Court should go even farther in deciding the case in that party’s favor.

Example

Groh v. Ramirez, U.S. Supreme Court No. 02-811; 540 U.S. 551 (2004)

This case presented two issues to the Court: whether a search that is otherwise constitutional is *per se* invalid due to a clerical error neglecting to indicate on the face of the warrant the items to be seized, and whether an officer conducting such a search should be denied qualified immunity for relying on the defective warrant. On both issues, the *amici* States urged the Supreme Court to adopt a broader rule than that suggested by the Petitioner.

¹⁶ Brief of *Amici Curiae* Texas and 21 Other States in Support of Petitioner, *Price v. Vincent*, U.S. Supreme Court, No. 02-524, at 1-2.

Petitioner, a federal agent who had conducted an investigation of Respondents following complaints that they were using unlawful weapons on their property, argued that though the warrant lacked particularity, the Fourth Amendment was not violated because the Petitioner sufficiently specified the particulars to the magistrate, Brief for Petitioner, *Groh v. Ramirez*, U.S. Supreme Court, No. 02-811, at 11, the Petitioner informed Respondents of the items to be seized, *id.* at 15-16, and that any violation of the Fourth Amendment was the responsibility of the magistrate in issuing the defective warrant, *id.* at 18-19.

Amici States urged a bolder interpretation of the Fourth Amendment requirements, suggesting that the court of appeals’s *per se* finding of unconstitutionality was contrary to Supreme Court precedents and that the search was reasonable, “under the totality of the circumstances”:

The starting point of constitutional analysis is and should be the text, and the text of the Fourth Amendment provides as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

The Amendment has two clauses, the first mandating that searches and seizures not be “unreasonable,” and the second that warrants issue only in certain circumstances. Notably, the Amendment lacks a third clause—one sometimes improperly assumed—linking the first and second and requiring that every search and seizure be preceded by probable cause and a warrant.

Amici States submit that the Amendment means what it says, that the test of constitutionality for searches and seizures is, plain and simple, reasonableness.

This Court has, in effect, said so on numerous occasions

* * *

To be sure, whether the two clauses of the Fourth Amendment are to be read independently—or as one—is a matter on which this Court has not always spoken with one voice. *See California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in judgment). (“[O]ur jurisprudence [has] lurched back and forth between imposing a categorical warrant requirement and looking

to reasonableness alone.”). But the better part of this Court’s Fourth Amendment case law focuses, as does the text of the Constitution, on reasonableness *vel non* as the dispositive measure of the constitutionality of a search or seizure.¹⁷

As to the issue of qualified immunity, Petitioner argued that immunity protects officers where the unlawfulness of their conduct is not “clearly established”, Brief for Petitioner, *Groh v. Ramirez*, U.S. Supreme Court, No. 02-811, at 26-27, and that officers who, in good faith, make reasonable mistakes of fact are entitled to immunity, *id.* at 35-39.

Amici States urged the Court to go further and adopt a clear rule that officers acting under a warrant issued by a magistrate judge are entitled to immunity:

The Ninth Circuit also erroneously concluded that Agent Groh’s actions were not protected by qualified immunity. *See id.*, at 1028. Agent Groh’s conduct was objectively reasonable under the circumstances; *a fortiori*, it did not violate clearly established law. Given that Agent Groh was acting pursuant to a warrant signed by a magistrate judge, and that officers should be entitled to rely on the legal determinations of judicial officers, his conduct should not, as a matter of law, have been deemed objectively unreasonable.

Accordingly, *amici* States urge this Court to make clear a simple bright line: that a law-enforcement officer cannot be found liable—and denied qualified immunity—where the officer acts pursuant to a warrant issued by a magistrate judge. This Court should reverse the judgment of the court below, and hold that Agent Groh’s conduct was both constitutional and objectively reasonable under the circumstances.¹⁸

F. Presenting Different Legal Synthesis

Finally, an *amicus* brief can serve to provide the Court with a different set of principles to apply in its analysis. This type of *amicus* brief can offer the writer with an opportunity to explore a new legal theory and can be useful if the party’s arguments may not be sufficient to prevail.

¹⁷ Brief of Texas and 16 Other States as *Amici Curiae* in Support of Petitioner, *Groh v. Ramirez*, U.S. Supreme Court, No. 02-811, at 5-7.

¹⁸ *Id.* at 3-4.

Example 1

Locke v. Davey, U.S. Supreme Court, No. 02-1315; 540 U.S. 712 (2004)

In this case a student who had otherwise qualified for a state-sponsored scholarship was denied access to the program because he had chosen to major in theology from a religious perspective. The Ninth Circuit held that denying him his scholarship violated the First Amendment. Texas and two other States supported the student.

Most of the briefs on both sides of the case struggled with whether to characterize the case as one of free exercise, or of free speech, or of government funding. The *amici* States argued for a broader reading, irrespective of the characterization:

At base, the dispute in the court of appeals’s opinions reflects a disagreement over the category into which this case fits best: free speech, free exercise, or governmental funding. The *amici* States would submit that, in this case, the category does not matter. Constitutional adjudication should not be an exercise in deterministic taxonomy; what matters is not the “box” into which a particular case fits, but rather the constitutional principle that controls the outcome.

Irrespective of how the case is pigeonholed, the principle of governmental neutrality toward religion requires affirmance of the court of appeals. The neutrality principle itself emanates from several constitutional sources: the Free Exercise Clause, the Establishment Clause, the Equal Protection Clause, and the Free Speech Clause. U.S. CONST. amends. I, XIV. And the neutrality principle controls this case.

Neutrality has long been a fixed and constant star in the Court’s jurisprudence addressing religious discrimination under the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and the Free Speech Clause. These constitutional sources all converge in this case to demonstrate that Washington’s scholarship program impermissibly discriminates on the basis of the recipient’s religious choice. *Cf. Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 714-15 (1994) (O’Connor, J., concurring in part and in the judgment) (“We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship. . . . In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause, . . . and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one’s religion ought not affect one’s legal

rights or duties or benefits.”). Accordingly, the Court should affirm the Ninth Circuit’s decision holding Washington’s scholarship law unconstitutional.¹⁹

Example 2

Cutter, et al. v. Wilkinson, et al., U.S. Supreme Court, No. 03-9877

At issue in this case is whether the Religious Land Use and Institutionalized Persons Act (RLUIPA) violates the Establishment Clause by requiring States to implement religious accommodations in state prisons as a condition for receiving federal funds. Petitioners (inmates in Ohio) challenged the withholding of religious texts and ceremonial items. They argued that RLUIPA is constitutionally valid as it merely lifts burdens imposed on religious exercise, rather than providing improper benefits to religious adherents. Brief for Petitioners, *Cutter, et al. v. Wilkinson, et al.*, U.S. Supreme Court, No. 03-9877, at 11-18, and that RLUIPA was a legitimate exercise of congressional spending power, *id.* at 36-46.

Respondents argued the RLUIPA violates the Establishment Clause because it has the primary effect of advancing religion. Brief for Respondents, *Cutter, et al. v. Wilkinson, et al.*, U.S. Supreme Court, No. 03-9877, at 10-21. Respondents also argued that RLUIPA was not valid under the Spending Clause, *id.* at 35-42, nor was it valid under the Commerce Clause, *id.* at 42-50.

In an *amicus* brief, Virginia and seven other States argued that RLUIPA violated “the federalism purpose of the Establishment Clause,” suggesting that the States are free to make religious policy, subject only to the limitations imposed by the Constitution.²⁰ The state *amicus* brief argues that the Establishment Clause has two purposes, a libertarian purpose that limits the power of the Federal Government and the States as to the citizens, and a federalism purpose limiting the federal Government’s power to regulate what the States may do. *Id.* at 6-7. It is the latter purpose that Virginia argued is violated by RLUIPA. Although Texas did not join this particular brief, the legal theory introduced by Virginia and the *amici* States was both novel and creative. Even if the Court does not adopt that theory, an *amicus* such as this is likely to prove useful to the Court in thinking through the complicated issues raised by the case.

III. Stage of the Case

Another critical concern to keep in mind is the stage of the case. The purpose of an *amicus* brief is fundamentally different, depending upon the stage.

¹⁹ Brief of Texas and 2 Other States as *Amicus Curiae* in Support of Respondent, *Locke v. Davey*, U.S. Supreme Court, No. 02-1315, at 3-4.

²⁰ Brief of Virginia, 7 Other States and the Virgin Islands as *Amici Curiae* in Support of the Respondents, *Cutter, et al. v. Wilkinson, et al.*, U.S. Supreme Court, No. 03-9877, at 6-13.

A. Certiorari Stage

Because the United States Supreme Court grants certiorari so rarely, anything that makes a cert petition stand out from all the others can be of help, both to the Court and to the party filing cert. The chances that any particular petition for certiorari will be granted are extremely low: out of over 8,000 petitions in a given year, the Court will typically grant about 80. To get a case granted, it is almost never enough simply to argue that the appeals court was wrong. The Supreme Court, as a general matter, does not engage in “error correction”; it simply does not matter at the certiorari stage that the court below may have made a mistake.

The most critical aspect of getting a cert petition granted is to identify a split of authority among the federal circuit courts on an important issue of federal law. Ideally, the courts themselves will have acknowledged the split, and expressly disagreed with each other in the text of the relevant opinions. The principal role of the Supreme Court in the vast majority of cases is to address and resolve circuit splits so that there are uniform answers to important legal issues throughout federal law.

An *amicus* brief at the cert stage, using any of the techniques previously discussed, can provide the Court with a more complete picture prior to deciding whether to take the case. An *amicus* can highlight a split of authority. Or, an *amicus* can alert the Court to the broader effects of the court of appeals’s decision, helping explain why the case is important to individuals beyond the specific parties.

B. Brief in Opposition

While *amicus* briefs supporting a cert petition may be beneficial to the petitioner, an *amicus* brief supporting a brief in opposition generally does *not* assist the party the *amicus* desires to help. The purpose of a Brief in Opposition is to convince the Court that the petition is not one concerning issues that the Court needs to address. This can be accomplished by showing there is no conflict between the courts of appeals, arguing that the instant case includes certain facts that would prohibit the Court from fully addressing the issues in the case, or by merely showing that the issues in this case are not important enough for the Court to invest its time to decide them.

The bottom line is, an effective Brief in Opposition will convince the Court that there really is “nothing to see here,” and the Court should look elsewhere for certworthy cases. An *amicus* brief supporting a BIO can have the unintended effect of drawing additional attention to the case, making it somewhat more likely, rather than less likely, the Court may choose to get involved. For this reason, an organization that supports the position articulated by the Respondent should rarely file an *amicus* brief until the merits stage, should the case get that far.

C. Merits Stage

The great majority of *amicus* briefs are filed at the merits stage. Indeed most cases argued before the United States Supreme Court have at least a few, and sometimes dozens, of *amicus* briefs filed. As previously discussed, the general purpose of an *amicus* brief—to add new information or analysis for the Court to consider—can be accomplished in several ways. From the perspective of the parties to a case, *amicus* briefs provide several benefits. When a party effectively coordinates the *amicus* briefs that support his arguments, the briefs can be used to complement the party’s brief and present a comprehensive and cohesive set of arguments.

IV. Coordinating *Amicus* Briefs From a Party’s Perspective

A party can be greatly served by effective *amicus* briefs filed in support of the party’s arguments. Though in some high-profile cases prospective *amici* approach the party, often the party will need to seek out *amici* support. Several reasons exist for parties to generate *amici* support. In complex cases, the page-limits may prevent the party from fully addressing every aspect of the case. Additional briefs will allow broader coverage of the issues, enabling the Court to receive the entire story. Also, parties do not necessarily have access to all the information that would benefit the Court’s analysis regarding the issues. *Amicus* briefs filed by experts in a particular area can provide the Court with information the party could not provide, and they may do so with additional credibility for their arguments, in light of their additional experience.

One important consideration is coordinating the *amicus* briefs if there are several being filed. Recall, it is important for an *amicus* to add something new, rather than just repeat the arguments made by a party. Likewise, it is important that each *amicus* brief contribute something unique to the analysis. Multiple *amicus* briefs that make identical arguments do not assist the Court or the parties. Organizations that wish to articulate the same points should file on *amicus* brief together, rather than individual *amicus* briefs. For complex cases in which many organizations wish to serve as *amici*, the coordination can take some effort, but it is well worth it. A comprehensive set of arguments presented by a party and its *amici* can be far more effective in persuading the Court than a set of overlapping *amicus* briefs.

Example

Medellin v. Dretke, U.S. Supreme Court, No. 04-5928

José Medellin was convicted of capital murder, for the brutal gang rape and murder of two teen-age girls in northwest Houston. He voluntarily confessed shortly after being arrested, was tried and sentenced to death.

Medellin was born in Mexico, but lived most of his life in the United States. Under the Vienna Convention on Consular Affairs, foreign nationals have a right to notify their

consulate of their arrest, and to receive any assistance provided by their consulate. Local officials failed to notify him of his Vienna Convention rights.

Despite having two appointed counsel, Medellin failed to raise any claim under the Vienna Convention at trial or on direct appeal.

On state habeas, Medellin raised for the first time his Vienna Convention claim. In 1998, the U.S. Supreme Court squarely held that Vienna Convention claims – just like most other claims of error in criminal proceedings, including constitutional claims – are waived if they are not raised at trial. *Breard v. Greene*, 523 U.S. 371 (1998). Pursuant to direct Supreme Court precedent, the state court held that Medellin’s claim was procedurally defaulted.

In 2003, the nation of Mexico sued the United States in the International Court of Justice (ICJ) (the World Court), and, in 2004, the ICJ ruled in favor of Mexico. In effect purporting to overrule the U.S. Supreme Court, the ICJ ordered the United States to review and reconsider the convictions and death sentences of 51 Mexican nationals on death row, including Medellin.

Medellin raised his claim on federal habeas, and it was denied. Following the Fifth Circuit’s denial of a certificate of appealability, Medellin filed a cert petition in the Supreme Court, which was granted.

Along with his Petitioner’s Brief on the merits, Medellin had nine *amicus* briefs filed on his behalf. These briefs were filed by the European Union, the Government of Mexico, other foreign sovereigns, former United States diplomats and ambassadors, the American Bar Association, and international law experts, among others. As a result, rather than the 50 pages of briefing allowed a party, Medellin had several hundred pages of briefing on his behalf, and many more arguments were raised than just those in Medellin’s brief.

Thus, one 50-page brief filed on behalf of Texas would ill-serve as a response to the many arguments made in favor of Medellin receiving habeas relief.

In the end, nine *amicus* briefs were filed on behalf of Texas. Texas spent substantial time coordinating these *amici*, and they substantially improved the collective argument. The *amici* included:

1. *United States*

The *amicus* brief of the United States offered the federal government’s interpretation of the habeas statute, complementing Texas’s arguments that the AEDPA did not permit a Certificate of Appealability based on an alleged violation of a treaty-based right and that, in any event, the Vienna Convention did not create individually enforceable rights to which Medellin could avail himself. Brief for the United States as *Amicus Curiae* Supporting Respondent, *Medellin v. Dretke*, U.S. Supreme Court, No. 04-5928, at 8-10. As the issues involved in the case are of federal statutory and treaty-based law, arguments made by the United States have special force.

2. *Alabama, et al.*

On behalf of 20 States, Alabama drafted an *amicus* brief in support of Texas. This brief focused on two additional aspects of the case. First, the brief argued that any judgment rendered by the ICJ was not self-executing. Brief for Alabama and 19 Other States as *Amici Curiae* in Support of Respondent, *Medellin v. Dretke*, U.S. Supreme Court, No. 04-5928, at 8-14. The brief also argued that the Supreme Court should defer to the political branches with respect to how the United States would choose to comply with ICJ judgments. *Id.* at 17-18.

3. *United States Senator John Cornyn*

The Senator's *amicus* brief focused on the constitutional problems with holding that the decisions of the ICJ were judicial decisions binding on the United States. First, the brief argued that vesting such power in the ICJ would amount to a violation of Article III of the Constitution because it would undermine the authority and the independence of the United States Supreme Court. Brief for *Amicus Curiae* Senator John Cornyn in Support of Respondent, *Medellin v. Dretke*, U.S. Supreme Court, No. 04-5928, at 5-13. Next, the brief argued that vesting such power in the ICJ would violate the Appointments Clause, which lays out the requirements for the appointment by the President of all Officers of the United States. *Id.* at 13-20. Importantly, the brief was authored by Chuck Cooper, a highly respected constitutional and Supreme Court litigator.

4. *Criminal Justice Legal Foundation*

This brief argued that the confession, which was the only prejudice asserted in the state habeas court, was not a result of a Vienna Convention violation as it occurred during a post-arrest interrogation following the voluntary waiver of *Miranda* rights. Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Respondent, *Medellin v. Dretke*, U.S. Supreme Court, No. 04-5928, at 7-10. The brief also argued that because the Vienna Convention claim was decided against Medellin on the merits by both the state trial court and the federal district court during habeas proceedings, Medellin was not entitled to appellate review of those decisions under AEDPA. *Id.* at 16-21.

5. *National District Attorneys' Association*

This *amicus* brief discussed the broader effects of the interpretation of the Vienna Convention urged by Medellin. Though Medellin focused on the foreign nationals sentenced to death (the nationals addressed by the ICJ) the NDAA *amicus* brief observed that the Vienna Convention applied to all criminal defendants, not just capital defendants, and so emphasized the major disruptions that could occur throughout the U.S. criminal justice system if Medellin's theory prevailed. Brief for the National District Attorney's Association as *Amicus Curiae* in Support of Respondent, *Medellin v. Dretke*, U.S. Supreme Court, No. 04-5928 at 1-7.

6. *Professors of International Law*

Several highly respected international law professors argued that none of the treaties at issue required United States courts to implement the decision of the ICJ in *Avena*, and highlighted that *no country in the world* accords binding weight to ICJ decisions in their

domestic courts, so that Medellin is arguing for a standard unprecedented in international law. Brief for Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States as *Amici Curiae* in Support of Respondent, *Medellin v. Dretke*, U.S. Supreme Court, No. 04-5928, at 8-20. Especially on complicated issues such as international law, the Court often gives great weight to the considered views of academics and experts in the field.

The many *amicus* briefs filed in *Medellin v. Dretke* in support of Texas demonstrate the multiple ways in which *amicus* briefs can be used effectively in a complex case. The different types of *amici*—governments, private organizations, individual people—provide a variety of perspectives on the case. And most importantly, a wide variety of issues and arguments were raised in the various briefs, articulating a range of avenues that exist by which the Supreme Court could affirm the court of appeals’s judgment denying a Medellin a COA. Because the *amicus* briefs addressed different and important issues, they all provide the Court with beneficial information rather than merely repeating each other. And that array did not occur by chance. Rather, as arguing counsel, the Office of Solicitor General spent enormous time coordinating and helping generate those *amici*.

V. When Does Texas Participate as *Amicus Curiae*

The State of Texas will file an *amicus* brief in a variety of circumstances. When the constitutionality of a statute is at issue, the State has an interest in defending its statutes from challenge. Protecting sovereign immunity is also of paramount interest to the State. In several cases the State has filed *amicus* briefs urging courts not to find waivers of sovereign immunity where the Legislature did not so intend. The State has also filed *amicus* briefs in support of various state-law claims raised by its citizens, especially when arguments are raised that the citizens’ claims under state law are preempted by federal law. Some examples of cases in which the State has filed *amicus* briefs include:

A. To Protect the State’s Immunity

Example 1

Tooke v. City of Mexia, Supreme Court of Texas, No. 03-0878

In this case, the State of Texas filed an *amicus* brief urging the Texas Supreme Court to hold that statutory provisions allowing municipalities to “plead and be impleaded” do not constitute a waiver of immunity. Texas’s brief stated:

In this case, the Waco Court of Appeals held that §51.075 of the Local Government Code, which states that home-rule municipalities can “plead and be impleaded,” does not waive immunity from suit. *City of Mexia v. Tooke*, 115 S.W.3d 618, 624-25 (Tex. App.—Waco 2003, pet. granted). The court of appeals’s opinion and the parties both focus on *Missouri Pacific Railroad Co. v. Brownsville Navigation District*, 453 S.W.2d

812, 813-14 (Tex. 1970), which suggests that the Legislature waives a governmental entity’s immunity from suit when it provides that the entity may “sue and be sued.” The two phrases, “sue and be sued” and “plead and be impleaded,” are linked; for four hundred years, both have indicated that an entity has corporate capacity, not that an entity is amenable to suit. Many Texas state agencies, in addition to most municipalities, have “sue-and-be-sued” provisions in their enabling legislation and charter. Some have both a sue-and-be-sued clause and a plead-and-be-impleaded clause. By resolving the uncertainty regarding the effect of sue-and-be-sued clauses, the Court would allow governmental entities to predict reliably whether they will be subject to suit, allowing them to allocate their scarce resources more effectively. Moreover, if the Court were to confirm that a sue-and-be-sued provision does not satisfy the clear-and-unequivocal-waiver standard, these same governmental entities would be free to devote those resources to public services, rather than to the expense of prospective litigation. Because the Legislature intended the sue-and-be-sued provisions solely to confer corporate legal capacity, the Court should hold that neither sue-or-be-sued nor plead-or-be-impleaded language is *by itself* sufficient to meet the waiver standard established by the Legislature and articulated by the Court.²¹

Example 2

Reata Construction Corp. v. City of Dallas, Supreme Court of Texas, No. 02-1031; 2004 WL 726906

This *amicus* brief supporting a motion for rehearing also addressed the issues of immunity. Texas took considerable issue with the approach taken in the Court’s original *per curiam* opinion, fearing that it could lead to other statutes regarding immunity being called into doubt:

The State of Texas has an interest in the rehearing of this decision because—if it remains Texas law and if it is applied to *sovereign* immunity—it would have enormous practical implications for the State and its agencies. Under those circumstances, even when the State sets out to enforce the law, it arguably would be subjected to counterclaims from which it is otherwise immune.

In addition to those very practical concerns, *Reata* concerns the State because it calls into question the continuing efficacy not

²¹ Brief of *Amicus Curiae* The State of Texas in Support of the City of Mexia, Texas, *Tooke v. City of Mexia*, Supreme Court of Texas, No.03-0878, at 2-3.

only of the Texas Tort Claims Act (which is overlooked in the decision) but also of Chapter 2260 of the Government Code, the Whistleblower Act, and other statutes designed to regulate when the State waives immunity from suit. If the approach taken in the *per curiam*—imposing an equitable waiver contrary to the legislative command embodied in a statute governing immunity—is emulated by the courts of appeals, it could well undermine other statutes and throw substantial areas of law into disarray.²²

Example 3

Thomas v. Long, Supreme Court of Texas, No. 03-0204

At issue in this case was whether interlocutory appeal is available from a ruling on a motion for summary judgment that challenges subject-matter jurisdiction, even though the pleading was not styled “plea to the jurisdiction.” Texas filed an *amicus* brief urging the Court to hold that interlocutory appeal is available when the governmental unit files a pleading that otherwise could have been styled a plea to the jurisdiction:

The State and its agencies are governmental entities to which the Legislature has granted the right of interlocutory appeal from the grant or denial of a plea to the jurisdiction. TEX. CIV. PRAC. & REM. CODE §51.014(a)(8); *see also id.* §101.001 (defining “governmental unit” as “this state and all the several agencies of government that collectively constitute the government of this state”). When the State prevails on jurisdictional grounds, it is spared litigation costs for lawsuits in which the plaintiff can never recover. Most often, these cases involve the State’s retained immunity from suit, which entitles the State to avoid being sued in its own courts without its express consent. This Court’s interpretation of §51.014(a)(8) will necessarily affect the course of much of the State’s litigation, especially regarding tort liability under the Tort Claims Act and contract liability in cases where the Legislature has not waived immunity from suit.²³

²² *Amicus Curiae* Brief of the State of Texas in Support of the Motion for Rehearing, *Reata Construction Corp. v. City of Dallas*, Supreme Court of Texas, No. 02-1031, at 2.

²³ Brief of the State of Texas as *Amicus Curiae*, *Thomas v. Long*, Supreme Court of Texas, No. 03-0204, at 2.

Example 4

City of San Antonio v. Pollack, Supreme Court of Texas, No. 04-1118

In this case the State of Texas filed an *amicus* brief to urge the Supreme Court to reverse the court of appeals's judgment that the City's immunity from personal injury damages was waived by Article I, §17 of the Texas Constitution:

The State of Texas has an interest in this case because of its potential impact on the State's amenability to suit and liability for nuisance claims. The State of Texas enjoys sovereign immunity from suit and liability unless a plaintiff brings a cause of action that falls within the scope of a constitutional or legislative waiver of immunity. The Court has recently announced in *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 647 (Tex. 2004), that Article I, §17 can waive the State's sovereign immunity for nuisance-takings claims. In this case, the court of appeals erroneously held, without considering either the text of the Constitution or this Court's recent jurisprudence, that Article I, §17 of the Texas Constitution—which under certain circumstances allows plaintiffs to recover money damages from a governmental entity for damage to or destruction of *property*—waived the City of San Antonio's governmental immunity for *personal injury* damages. Based on the flawed reasoning applied by the court of appeals, the State could potentially be exposed both to suit and to liability for personal-injury claims that do not come within Article I, §17's waiver of immunity but instead should be governed by the Tort Claims Act. Accordingly, the State files this *amicus curiae* brief to urge the Court to reverse the court of appeals's judgment.²⁴

B. To Protect the Ability of the State to Legislate on Behalf of Its Citizens

Example 1

Aetna Health Inc. v. Davila, U.S. Supreme Court, No. 02-1845; 542 U.S. 200 (2004)

At issue in this case was whether in enacting ERISA §502(a) Congress clearly and manifestly intended to displace state-law tort claims for HMOs' negligent medical decisions (such as those provided under the Texas Health Care Liability Act) with such preemptive force as to transform those claims into federal actions under ERISA removable to federal court. Texas and 19 other States filed a brief supporting Respondents, asserting the States' interest in maintaining their ability to legislate on behalf of the health and safety of their citizens:

²⁴ Brief of *Amicus Curiae* the State of Texas in Support of the Petition for Review, *City of San Antonio v. Pollack*, Supreme Court of Texas, No. 04-1118, at 2.

The State *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Respondents. States have a vital interest in protecting their power to regulate traditional areas of state concern, such as the health and safety of their citizens. Nothing in the Employee Retirement Income Security Act of 1974 (ERISA) evidences an intent to eliminate the States' role in regulating health care. *N.Y. State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995). Thus, the States have an interest in ensuring that ERISA's preemption provisions are not construed more broadly than Congress intended.

Texas Health Care Liability Act §88.002(a) directly serves the State's interest in protecting the health and safety of its citizens. It provides a cause of action against a health maintenance organization (HMO) that breaches its duty to exercise ordinary care when making health care decisions that affect the quality of a patient's treatment. The State, in its role as regulator of health care, has determined that when an HMO assumes responsibility for making medical-necessity decisions involving the exercise of medical judgment, and that direction results in personal injury, the HMO should be held responsible for its erroneous medical judgment. Following Texas's lead, nine other States have passed managed care liability laws, others have passed some form of consumer protection from HMO actions, and an increasing number of state legislatures have contemplated new liability legislation.

The HMO-petitioners in this case claim that their allegedly negligent medical decisions can be redressed only through the contractual remedies provided in ERISA §502(a). If this contention is correct, then HMOs enjoy immunity from any harm proximately resulting from their medical negligence by virtue of a statute that was not designed to regulate health care providers.

The State *amici curiae* ask the Court to hold that Congress did not clearly and manifestly intend that §502(a)'s remedies would completely preempt States' traditional role in regulating health care quality standards.²⁵

²⁵ Brief of Texas and 19 Other States and Puerto Rico as *Amici Curiae* in Support of Respondents, *Aetna Health Inc. v. Davila*, U.S. Supreme Court, No. 02-1845, at 1.

Example 2

Flores, et al. v. Millennium Interests, Ltd., Supreme Court of Texas, No. 04-1003

This case was before the Texas Supreme Court on certified questions from the Fifth Circuit regarding the construction of a provision of the Property Code. Texas filed an *amicus* brief arguing that the limited nature of the proceeding prevented the Supreme Court from answering the question whether the provision was constitutional and noting that the Fifth Circuit had declined to certify the question of the provision's constitutionality. Texas's brief also argued that, if the Court reached the question, it should hold that the statute was constitutional:

The State of Texas's interest in this case is in ensuring that a provision of the Texas Property Code intended to protect consumers is not struck down as unconstitutional under either the federal or the Texas Constitutions. The statute at issue is part of a larger legislative scheme that provides much-needed regulation of contract-for-deed transactions in Texas. The particular provision under review provides contract-for-deed purchasers with a means to collect liquidated damages when sellers fail to comply with its straightforward substantive requirements, which direct sellers to inform purchasers about the status of their contracts through annual statements.

Because the statute's constitutionality has been challenged not only in the underlying proceeding, but also in other suits throughout the State, the Attorney General has an interest in seeing that the Texas Legislature's objective is fulfilled. Although the Attorney General urges the Court not to expand its certified-question jurisdiction to reach an uncertified question that focuses, in part, on federal law, he provides briefing in support of the statute's constitutionality in case the Court reaches the constitutional issues that Millennium and the other *amici* have attempted to raise in this proceeding.²⁶

Example 3

Bates, et al. v. Dow Agrosciences, LLC, U.S. Supreme Court, No. 03-388; 125 S.Ct. 1788 (2005)

As previously discussed, the *amicus* brief filed in this case supported claims by Texas peanut farmers that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not pre-empt state-law claims for damages. The brief argued that the States have an

²⁶ Brief of *Amicus Curiae* the State of Texas, *Flores, et al. v. Millennium Interests, Ltd.*, Supreme Court of Texas, No. 04-1003, at xii.

interest in preserving their ability to regulate, and also that they have an independent interest in protecting their farmers.

C. To Protect Citizens and State Institutions

Example 1

Bunting, et al. v. Mellen, et al., U.S. Supreme Court, No. 03-863

For many decades, the Virginia Military Institute (VMI) conducted brief, voluntary suppertime prayers for its adult cadets. The Fourth Circuit held that these traditional prayers violated the Establishment Clause. Texas and 11 other States filed a brief supporting the cert petition in this case:

Texas and the other *amici* States have a strong interest in this case because they support public colleges and universities, some of which include brief, non-denominational prayers in traditional college ceremonies such as commencement and graduation functions. When such prayers are not intended to inculcate religious belief and cannot reasonably be perceived as coercive to adult students, who are not required to recite them or participate in any way, they do not violate the Establishment Clause. The court of appeals's contrary conclusion regarding VMI's prayer ceremony threatens the longstanding tradition in many public colleges and universities of using brief, non-denominational, and non-coercive prayers to solemnify official university ceremonies in a manner befitting the university's educational mission. Accordingly, Texas and the other *amici* States have a vital interest in this case.²⁷

Example 2

Spector, et al. v. Norwegian Cruise Line Ltd., U.S. Supreme Court, No. 03-1388

As previously discussed, Texas filed an *amicus* supporting citizens with disabilities in this case to urge the Court to hold that Title III of the Americans with Disabilities Act would be applied to foreign-flag cruise ships in United States waters.

²⁷ Brief of Texas and 11 Other States as *Amici Curiae* in Support of Petitioner, *Bunting, et al. v. Mellen, et al.*, U.S. Supreme Court, No. 03-863, at 1-2.

D. To Protect the Authority of Government Officials

Example 1

Brown v. de la Cruz, Supreme Court of Texas, No. 03-0703;
156 S.W.3d 560 (Tex. 2004)

In this case, the Eighth Court of Appeals held the Attorney General was not authorized to enforce a provision of the Property Code because the statute did not explicitly state the Attorney General could enforce it. On petition for review, the Supreme Court requested the Attorney General's Office to file an *amicus* brief. The brief argued:

The Eighth Court of Appeals concluded that the Attorney General was not authorized to enforce Texas Property Code §5.102 because the statute itself did not expressly charge the Attorney General with enforcement. The court of appeals, however, overlooked several sources of Attorney General authority, including the Texas Deceptive Trade Practices Act and article IV, §22 of the Texas Constitution. Moreover, the court of appeals misinterpreted §5.102 by not construing the Legislature's use of the term "penalty" as an express grant of authority to the Attorney General. Regardless of how the merits of this appeal are resolved, the Court should correct the court of appeals's erroneous restriction of the Attorney General's authority to enforce Texas law.

The State of Texas has an interest in this case because it concerns the scope of authority of the Office of the Attorney General. By letter dated February 27, 2004, the Court requested the Office of the Attorney General to file an *amicus curiae* brief regarding its interpretation of Texas Property Code §§5.102 and 5.079. In particular, the Court questioned whether the Attorney General may collect the liquidated damages and attorneys' fees provided in §5.079, whether it could have collected the penalties provided in the predecessor §5.102, and, if so, whether the Attorney General has ever exercised that authority under either statute. The Court also asked whether Local Government Code §232.037 authorizes the Attorney General to enforce either provision.²⁸

²⁸ Brief of *Amicus Curiae* the State of Texas, *Brown v. de la Cruz*, Supreme Court of Texas, No. 03-0703, at 1-2.

Example 2

Joe v. Two Thirty Nine Joint Venture, Supreme Court of Texas, No. 02-0218; 145 S.W.3d 150 (Tex. 2004)

In this case, the court of appeals held that a city councilman (an attorney with a large Dallas firm) had no legislative immunity from a suit filed by one of his private clients claiming that he acted against that client's interests while serving in his public capacity as councilman. Texas filed an *amicus* brief suggesting the potential harms that such a holding would have:

The State of Texas has an interest in this case because of its potential impact on part-time public officials who also happen to be practicing attorneys. Many practicing attorneys are members of the state legislature, members of state boards and commissions, and visiting judges. The court of appeals's reasoning threatens these officials' ability to continue serving the citizens of Texas.

Under the court of appeals's unprecedented holding, attorney-legislators have no legislative immunity from suits brought by private clients who believe that their personal interests—not the public interest—must be advanced by the officials in their public role. If this holding stands, attorney-legislators—and, potentially, other governmental officials—will be forced to choose between promoting private clients' interests or faithfully executing their public duties at the risk of exposing themselves to suit and liability for damages if those clients are displeased with their legislative actions. This dilemma could compel many officials to abandon public service altogether, depriving the State of the considerable benefits of their service.

This Court is not being asked to give attorney-officials free rein to disavow their legitimate duties owed to clients. But in circumstances where the attorney-official is acting in his public role, he should be given the same protection from lawsuits as other public officials. Accordingly, this Court should not allow the court of appeals's holding on immunity to stand. Even if the Court decides to reverse on some other basis, such as lack of duty or causation, the State respectfully requests that the Court explicitly disapprove the court of appeals's reasoning on immunity so that others do not rely on this damaging and erroneous precedent.²⁹

²⁹ Brief of Amicus Curiae the State of Texas in Support of the Petition for Review, *Joe v. Two Thirty Nine Joint Venture*, Supreme Court of Texas, No. 02-0218, at v-vi.

VI. Conclusion

An effective *amicus* brief can make a real contribution and can significantly affect the outcome of litigation. Understanding the process, and saying something new, is the best way as an *amicus* to represent your client well and be a true friend of the court.