

## ARTICLES

# WHEN *AMICUS CURIAE* BRIEFS ARE *INIMICUS CURIAE* BRIEFS: *AMICUS CURIAE* BRIEFS AND THE BYPASSING OF ADMISSIBILITY STANDARDS

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*Amicus curiae* briefs are being submitted at historically high levels by a range of individuals and entities, and there is compelling evidence that these briefs are highly influential in judicial decision-making, including in the Supreme Court of the United States. Although *amicus curiae* briefs have been an ingrained aspect of the U.S. legal system for hundred-plus years, various legal scholars, researchers, commentators, and judges, including Supreme Court Justices, have raised concerns about their use, including that *amicus curiae* briefs contain redundant information and often function as advocacy tools. This Article addresses an aspect of *amicus curiae* briefs that has received little attention but that raises fundamental concerns—i.e., *amicus curiae* briefs often include expert information that has not been subject to the same procedural safeguards as expert evidence admitted at trial. Given the documented persuasiveness of

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*amicus curiae* briefs in judicial decision-making, the inclusion of unvetted and potentially inaccurate, misleading, or mischaracterized expert information is a significant concern. This Article: (a) discusses the historical development, governing rules, and current use and influence of *amicus curiae* briefs; (b) distinguishes between lay evidence and expert evidence, with a focus on the evidentiary rules that govern the admissibility of expert information; (c) describes how *amicus curiae* briefs bypass traditional admissibility standards for expert information; and (d) offers suggestions to regulate the use of *amicus curiae* briefs in an effort to prevent the submission of *amicus curiae* briefs in certain contexts, change how courts view *amicus curiae* briefs, and minimize the likelihood that *amicus curiae* briefs contain inaccurate or misleading expert information.

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## INTRODUCTION

The Supreme Court of the United States has a lengthy history of relying on *amicus curiae* briefs when determining whether to accept a case for review or deciding the merits of a case.<sup>1</sup> These “friend of the court” briefs have become an ingrained and arguably essential component of Supreme Court decision-making over the past seventy-plus years, with one study reporting that *amicus curiae* briefs were submitted in 98% of the cases before the Supreme Court in a recent term.<sup>2</sup> Given the increasing substantive complexity of some cases and

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1. See Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *Me Too? An Investigation of Repetition in U.S. Supreme Court Amicus Curiae Briefs*, 97 JUDICATURE 228, 228–29 (2014) (discussing the role of *amicus curiae* briefs in certiorari decisions and the outcome of litigation in appellate courts). Appellate courts at both federal and state levels permit the filing of *amicus curiae* briefs. See Paul M. Collins, Jr., *The Use of Amicus Briefs*, 14 ANN. REV. L. & SOC. SCI. 219, 224 (2018) (analyzing the use of *amicus curiae* briefs in federal appellate courts at both certiorari and merits stages); Victor E. Flango, Donald C. Bross & Sarah Corbally, *Amicus Curiae Briefs: The Court’s Perspective*, 27 JUST. SYS. J. 180, 183–85, 189 (2006) (considering the use and utility of *amicus curiae* briefs filed in state courts of last resort); Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 STETSON L. REV. 269, 298–307 (2003) (exploring the tendency of *amicus curiae* briefs submitted in Florida state courts to influence court decisions when used or receive some acknowledgement when not used by the courts). Although much less common, some trial courts at both state and federal levels also permit the filing of *amicus curiae* briefs. See Stephen G. Masciocchi, *What Amici Curiae Can and Cannot Do with Amicus Briefs*, COLO. LAW., Apr. 2017, at 23, 23 (noting that although the Federal Rules of Civil Procedure are silent on the filing of *amicus curiae* briefs, federal district court judges in Colorado accept and even solicit *amicus curiae* briefs); Eugene Temchenko, *Discovering the Truth Behind an Amicus Brief*, 94 N.D. L. REV. 95, 99–100 (2019) (observing that federal district courts permit filing of *amicus curiae* briefs, adopting a standard of “usefulness” to determine whether to allow appearance of *amicus curiae*). Despite the frequent use of *amicus curiae* briefs in state and federal courts at all levels, this Article will focus primarily on the use of *amicus curiae* briefs filed in the U.S. Supreme Court.

2. See, e.g., Allison Orr Larsen & Neil Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 (2016) (discussing the increasing frequency with which the Supreme Court receives *amicus curiae* briefs). In their comprehensive article, Larsen and Devins noted that the Supreme Court currently receives approximately 800 *amicus curiae* briefs per year. *Id.* Various commentators and scholars have discussed the proliferation of *amicus curiae* briefs over the past seventy-plus years. See, e.g., Peter Bills, Lawrence S. Rothenberg & Bradley C. Smith, *The Amicus Game*, 82 J. POL. 1113, 1113 (2020) (examining the recent proliferation of *amicus curiae* briefs filed in the Supreme Court); Aaron-Andrew P. Bruhl & Adam Feldman, *Separating Amicus Wheat from Chaff*, 106 GEO. L.J. ONLINE 135, 135 (2018) (discussing the Supreme Court’s reliance on *amicus curiae* briefs); Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 603–04 (1984)

the varied public and private interests that are often at stake,<sup>3</sup> *amicus curiae* briefs provide an opportunity for interested non-parties to the litigation to, *inter alia*, provide their subject matter expertise to the court, state their interest in the case, amplify or supplement legal

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(noting the dramatic growth in *amicus curiae* briefs in the Supreme Court from the mid-1960s to 1980s); Thomas G. Hansford & Kristen Johnson, *The Supply of Amicus Curiae Briefs in the Market for Information at the U.S. Supreme Court*, 35 JUST. SYS. J. 362, 373–74, 380 (2014) (analyzing the factors increasing the growth rate of *amicus curiae* brief filings in the Supreme Court); Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172, 1172 (1953) (flagging an increase in *amicus curiae* briefs during the 1948 Supreme Court term, in which seventy-five briefs were filed in fifty-seven cases); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 751–57 (2000) (reporting data regarding prevalence of *amicus curiae* briefs filed in the Supreme Court during the latter half of Twentieth Century); Richard L. Pacelle, Jr., John M. Scheb, II, Hemant K. Sharma & David H. Scott, *Assessing the Influence of Amicus Curiae Briefs on the Roberts Court*, 99 SOC. SCI. Q. 1253, 1254–55 (2018) (providing an analysis of the prevalence of *amicus curiae* briefs filed during the first ten terms of the Roberts Court from 2005 through 2014); George C. Piper, Note, *Amicus Curiae Participation—At the Court's Discretion*, 55 KY. L.J. 864, 864–65 (1967) (noting historical trend towards greater *amicus* participation in federal appellate courts); Ryan Salzman, Christopher J. Williams & Bryan T. Calvin, *The Determinants of the Number of Amicus Briefs Filed Before the U.S. Supreme Court, 1953–2001*, 32 JUST. SYS. J. 293, 301, 305–07 (2011) (analyzing the prevalence and trends of filing of *amicus curiae* briefs in the Supreme Court during the latter half of Twentieth Century and discussing the types of cases that may attract more *amici* participation). Although it is not a focus of this Article, it is interesting to note that the use of *amicus curiae* briefs has also increased in several countries outside of North America, including in several developing countries in Africa, Asia, Eastern Europe, and Latin America. See Shai Farber, *The Amicus Curiae Phenomenon – Theory, Causes and Meanings*, 29 TRANSNAT'L L. & CONTEMP. PROBS. 1, 5 (2019) (discussing recent increase in the adoption of *amicus curiae* briefs in legal systems across several continents). Farber attributes the increased use of *amicus curiae* briefs in other countries primarily to changes in the role of courts, including recognition by courts of their social role and their involvement in social change. *Id.* at 19–20.

3. See Flango et al., *supra* note 1, at 181 (examining the use of *amicus curiae* briefs as a mechanism for providing opportunities for non-parties with an interest in the litigation to offer their views to the deciding court). In 1954, Justice Hugo Black of the U.S. Supreme Court spoke in favor of liberalizing the rules that governed the filing of *amicus curiae* briefs in the Supreme Court:

I have never favored the almost insuperable obstacles our rules put in the way of briefs sought to be filed by persons other than the actual litigants. Most of the cases before this Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs.

Order Adopting Revised Rules of the Supreme Court of the United States, 346 U.S. 945, 947 (1954) (statement of Black, J.).

arguments made by the parties to the litigation, or inform the court of the potential implications of the court's decision.<sup>4</sup> Indeed, some scholars have referred to the use of *amicus curiae* briefs as “the clearest form of democratic participation by outside actors in the Supreme Court.”<sup>5</sup>

Although *amicus curiae* briefs have several potential benefits,<sup>6</sup> their use raises a number of noteworthy concerns.<sup>7</sup> Some scholars and judges have noted, for example, that *amicus curiae* briefs often provide needless repetition of legal arguments made by the parties to the litigation.<sup>8</sup> Other concerns regarding *amicus curiae* briefs focus on the

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4. See, e.g., Flango et al., *supra* note 1, at 181–82 (discussing various functions and goals of *amicus curiae* briefs filed in state high courts); Brandon D. Harper, Comment, *The Effectiveness of State-Filed Amicus Briefs at the United States Supreme Court*, 16 U. PA. J. CONST. L. 1503, 1505 (2014) (noting that various *amicus curiae* briefs filed in the Supreme Court enhance discourse through new perspectives and ideas); Patricia Marin, Catherine L. Horn, Karen Miksch, Liliana M. Garces & John T. Yun, *Uses of Extra-Legal Sources in Amicus Curiae Briefs Submitted in Fisher v. University of Texas at Austin*, EDUC. POL'Y ANALYSIS ARCHIVES, Mar. 19, 2018, at 7 (highlighting the policy discussions that extra-legal information in *amicus curiae* briefs create); Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 674 (2008) (noting *amicus curiae* briefs are typically filed to protect interests of individuals or entities who are not part of the legal proceedings but whose interests may be jeopardized by the litigation).

5. Salzman et al., *supra* note 2, at 294; see Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. STATE U. L. REV. 315, 317 (2008) (highlighting the importance of *amicus curiae* briefs in the practice of law generally and in the democratic judicial system more specifically).

6. See Salzman et al., *supra* note 2, at 294–95 (discussing the impact of *amicus curiae* briefs on judicial behavior, such as guiding Justices' decisions to cast votes and write separate opinions); see also Masciocchi, *supra* note 1, at 23–34 (discussing the many roles of *amicus curiae* briefs in the U.S. legal system, including their capacity to examine novel legal perspectives and fill in information and evidentiary gaps).

7. See Paul M. Collins, Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RSCH. Q. 55, 55, 57 (2007) (describing *amicus curiae* briefs as “adversarial” tools that frequently urge courts to adopt a particular policy outcome); Harper, *supra* note 4, at 1505 (noting *amicus curiae* briefs may be seen as lobbying a court for a particular outcome from a particular ideological perspective); Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 94–95 (1993) (highlighting that *amicus curiae* briefs are not subject to the same procedural safeguards as expert evidence offered during a trial); Gary Simms, *Amicus Briefs: “Friends” with Unfriendly Facts*, PLAINTIFF'S MAG., Dec. 2014, at 1, 1 (noting the party against whom an *amicus curiae* brief is filed has no meaningful opportunity to respond).

8. See, e.g., Bruhl & Feldman, *supra* note 2, at 135 (discussing the burden that the

potential ideological alliance between *amici* and litigants, with *amicus curiae* briefs essentially functioning as an advocacy or lobbying tool rather than as a brief intended to objectively inform a court.<sup>9</sup> Some scholars have also expressed concern that *amicus curiae* briefs, particularly ones that include scientific or technical data, may mislead courts for partisan purposes if they contain a cherry-picked, distorted, inaccurate, or misstated description of scientific or technical findings; such misrepresentations of scientific or technical data can have unintended consequences (or perhaps intended in some contexts) on a court's decision in a case.<sup>10</sup>

There is, however, another aspect of *amicus curiae* briefs—one that has received no more than passing attention from scholars and courts over the past seventy-five-plus years—that raises fundamental concerns about the use of these briefs—i.e., *amicus curiae* briefs often include scientific, technical, or other expert information that has not been subject to the same procedural safeguards as expert evidence admitted at trial.<sup>11</sup> For expert evidence to be introduced at a trial, a proffered

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large influx of repetitive *amicus curiae* briefs force upon the Supreme Court); Collins et al., *supra* note 1, at 229 (raising concerns regarding duplicative legal arguments made in *amicus curiae* briefs that undermine their utility rather than complement the litigants' briefs); Walbolt & Lang, *supra* note 1, at 269 (emphasizing the importance of *amicus curiae* briefs in appellate courts when their legal arguments are proper or artful). In an often-quoted passage, Judge Posner of the U.S. Court of Appeals for the Seventh Circuit stated: "The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such *amicus* briefs should not be allowed. They are an abuse." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). In *Ryan*, Judge Posner also stated that *amicus curiae* briefs should not simply "duplicate the arguments made in the litigants' briefs" because the "term '*amicus curiae*' means friend of the court, not friend of a party." *Id.*

9. See Harper, *supra* note 4, at 1505 (raising concerns that *amicus curiae* briefs are often filed by ideological allies of one of the parties to the litigation); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 697 (1963) (discussing gradual shift of *amicus curiae* briefs in U.S. courts from neutrality to advocacy).

10. See Rustad & Koenig, *supra* note 7, at 94 (illustrating *amici* on both sides of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.* colored social science findings in an effort to advance their own interests).

11. *Id.* at 94–95 (noting *amicus curiae* briefs are not subject to the same safeguards, such as initial vetting and cross-examination, as expert witnesses who present expert scientific evidence at trial). The safeguards attendant to the presentation of scientific evidence at trial will be discussed later in this Article. *Amicus curiae* briefs that contain science or legislative facts (as opposed to purely legal arguments) are often referred

expert must be recognized as an expert by the court,<sup>12</sup> which involves a rigorous review of the proffered expert's education, qualifications, and experience, and the expert's proffered evidence must meet a stringent admissibility standard that assesses the validity and reliability of the evidence; proffered expert evidence that does not satisfy the admissibility standard is not admitted into the court proceedings.<sup>13</sup> Yet, *amicus curiae* briefs can include the same expert information that would have had to satisfy the stringent admissibility standard for expert testimony presented at trial, but with no check on the validity or reliability of the expert information and no formal vetting of the person or entity that submitted the *amicus curiae* brief.<sup>14</sup> The absence of any check on the validity and reliability of the expert information

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to as Brandeis briefs. See Gray L. Dorsey, *Brandeis Briefs as Jurisprudence Source Material*, 51 LAW LIB. J. 16, 17–18 (1958) (discussing the emergence of Brandeis briefs in the early Twentieth Century). The original Brandeis brief was submitted by attorney Louis Brandeis, who represented the State of Oregon in *Muller v. Oregon*. *Id.* at 17–18 (citing *Muller v. Oregon*, 208 U.S. 412 (1908)). The issue in *Muller* was whether women could be required to work more than ten hours per day, which would violate a state labor law intended to protect women from abusive working conditions. *Muller*, 208 U.S. at 416–17. Rather than focusing on legal issues, the brief submitted by Brandeis documented the harmful effects on women (and their children) when they are required to work long hours. Dorsey, *supra* note 11, at 18. Brandeis's brief in *Muller* ushered in a new era of submitting briefs that focused on science (particularly social science) to effectuate legal change. *Id.* at 19–20 (listing cases in which Brandeis briefs were prepared). After a successful career as a practicing attorney, Mr. Brandeis later became a Justice on the U.S. Supreme Court (1916–1939). Simms, *supra* note 7, at 2.

12. See FED. R. EVID. 702 (noting proffered experts must be qualified by virtue of “knowledge, skill, experience, training, or education” before they are permitted to offer an opinion in court).

13. In U.S. courts, the two primary admissibility standards for expert evidence are the *Frye* standard and the *Daubert* standard. In *Frye v. United States*, the U.S. Court of Appeals for the District of Columbia Circuit articulated the so-called “general acceptance” test, which stated that the thing from which scientific evidence is deduced “must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” 293 F. 1013, 1014 (D.C. Cir. 1923). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court held that Federal Rule of Evidence 702, not *Frye*, was the appropriate admissibility standard in U.S. federal courts. 509 U.S. 579, 597–98 (1993). The *Frye* standard and *Daubert* standard are discussed in detail later in this Article.

14. See Rustad & Koenig, *supra* note 7, at 128, 143–51 (examining the use of inaccurate science or distorted descriptions of accurate science in *amicus curiae* briefs).

opens the possibility that the *amicus curiae* brief might contain inaccurate or misleading information.<sup>15</sup>

*Amicus curiae* briefs occupy a unique place in appellate court litigation because, among other things, they are not bound by the rules of evidence that typically govern the information, including expert information, which is provided to a judicial decision-maker.<sup>16</sup> One commentator noted that the use of *amicus curiae* briefs “runs afoul of almost every other norm or rule regarding the use of evidence at trial or on appeal.”<sup>17</sup> The absence of procedural safeguards that traditionally regulate expert information presented to a court raises significant concerns about the use of *amicus curiae* briefs, and those concerns are magnified by the documented persuasiveness of *amicus curiae* briefs on judicial decision-making.<sup>18</sup> Rather than functioning as a genuine *amicus*, or friend of the court, some *amicus curiae* briefs have been described as “inimical to sound judicial decision-making,”<sup>19</sup> or what we term *inimicus curiae* briefs.

Given the increasing rate at which *amicus curiae* briefs are being filed in the U.S. Supreme Court,<sup>20</sup> and the documented persuasiveness of

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15. See *id.* at 152 (advocating for safeguards that provide “more guidance to determine whether the amici are distorting findings, citing unreliable data or drawing questionable normative arguments from incomplete data”).

16. See Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICHMOND. L. REV. 361, 361–62 (2015) (discussing the absence of limitations on *amici curiae*). “[A]mici curiae—nonparties who are nevertheless advocates, who are not bound by rules of standing and justiciability, or even rules of evidence, and who can present the court with new information and arguments—occupy a unique place in the appellate courts.” *Id.* Anderson’s succinct statement captures a primary concern of using *amicus curiae* briefs.

17. Simms, *supra* note 7, at 1.

18. See *infra* notes 69–82 and accompanying text for a discussion about the persuasiveness of *amicus curiae* briefs on court decisions. As this Article will discuss, there is substantial and growing evidence that *amicus curiae* briefs are highly influential on judicial decision-making.

19. Rustad & Koenig, *supra* note 7, at 95. Rustad and Koenig analyze the inclusion of potentially inaccurate science or distorted descriptions of accurate science in *amicus curiae* briefs. *Id.* at 94–95.

20. See, e.g., Kearney & Merrill, *supra* note 2, at 749 (highlighting the 800% increase in *amicus curiae* filings that occurred in the last fifty years of the Twentieth Century); Pacelle et al., *supra* note 2, at 1253 (discussing the striking increase of *amicus curiae* briefs submitted to the Supreme Court from the 1960s to the present); Walbolt & Lang, *supra* note 1, at 281–82 (discussing dramatic increase in the prevalence of *amicus curiae* briefs in the latter half of Twentieth Century). As is evident by the aforementioned sources, the substantial increase in *amicus curiae* briefs submitted to the Supreme Court has been the topic of conversation for many years.



these briefs on judicial decision-making at the highest level of the U.S. court system,<sup>21</sup> the inclusion of unchecked and potentially biased, inaccurate, or mischaracterized expert information in *amicus curiae* briefs raises concerns about the Supreme Court's continued reliance on these briefs when deciding whether to accept a case for review or when deciding the merits of a case. Unfortunately, this concern has received little meaningful attention from legal scholars, commentators, and courts. This lack of attention has enabled *amici* to continue to provide expert information to courts that may not actually assist the court in making a better-informed decision.

Part I of this Article provides an overview of *amicus curiae* briefs, including their historical development, the rules that govern *amicus curiae* participation in U.S. courts, and the influence of *amicus curiae* briefs on the U.S. Supreme Court.<sup>22</sup> Part II provides a detailed discussion of the admissibility rules that govern lay evidence and expert evidence in federal courts, along with a discussion of the persuasiveness of expert testimony on judicial decision-making.<sup>23</sup> Part III.A describes the fundamental concern with *amicus curiae* briefs—i.e., the bypassing of traditional admissibility standards for expert information.<sup>24</sup> Finally, Part III.B concludes this Article by offering several suggestions for regulating the use of *amicus curiae* briefs in an effort to prevent the submission of *amicus curiae* briefs in certain contexts, change how courts view *amicus curiae* briefs, and minimize the likelihood that *amicus curiae* briefs contain inaccurate or misleading expert information.<sup>25</sup>

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21. See, e.g., Collins, *supra* note 7, at 65–66 (discussing the results of empirical research that strongly supported the idea that *amicus curiae* briefs have an impact on the “ideological direction” of the Supreme Court’s decision-making process); Catherine L. Horn, Patricia Marin, Liliana M. Garces, Karen Miksch & John T. Yun, *Shaping Educational Policy Through the Courts: The Use of Social Science Research in Amicus Briefs in Fisher I*, 34 EDUC. POL’Y 449, 452, 457 (2020) (analyzing the nature and credibility of the social science research used in the ninety-two amicus briefs filed to address the merits of *Fisher I*); Pacelle et al., *supra* note 2, at 1256–57, 1260–61 (finding that “moderate” Supreme Court Justices, such as Justices Breyer and Kennedy, “exhibit[ed] the greatest influence by *amicus* briefs” during the 2005 through 2014 Supreme Court terms).

22. See *infra* Section I.

23. See *infra* Section II.

24. See *infra* Section III.A.

25. See *infra* Section III.B.

## I. *AMICUS CURIAE* BRIEFS

*Amicus curiae* briefs, and the use of *amicus curiae* in legal disputes more generally, have a lengthy history that long predates the United States.<sup>26</sup> The use, utility, and governing rules of *amicus curiae* briefs have changed considerably over the years, but the essential idea—i.e., the court’s receipt (and sometimes invitation) of information from non-parties to the litigation—has remained largely unchanged for more than a hundred years.<sup>27</sup> After tracing the historical development of *amicus curiae* briefs,<sup>28</sup> this Section discusses the rules that govern participation by *amicus curiae*,<sup>29</sup> followed by a discussion of the current use and influence of *amicus curiae* briefs in the Supreme Court.

### A. *Historical Development*

It is commonly believed that *amicus curiae* participation originated in Roman law and then became a relatively common feature of English common law in the Seventeenth and Eighteenth Centuries.<sup>30</sup> In both

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26. See Krislov, *supra* note 9, at 694–97 (discussing the use of *amicus curiae* at common law); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1765–68 (2014) (tracing the development and use of *amicus curiae* and revealing that it was not until the 1900s that organizations and not lawyers sponsored *amicus curiae* briefs); Larsen & Devins, *supra* note 2, at 1909 (noting *amicus curiae* originated in Roman law and then were adopted into other legal systems including in Europe and the United States); Piper, *supra* note 2, at 864 (describing use of *amicus curiae* in the early 1700s in England). In English common law and the early United States, it was much more common for *amici curiae* to appear in person rather than submitting a written brief, but written briefs are now the most common method of participation. Frank M. Covey, Jr., *Amicus Curiae: Friend of the Court*, 9 DEPAUL L. REV. 30, 33 (1959).

27. See Kearney & Merrill, *supra* note 2, at 761–67 (discussing Supreme Court rules that govern the filing of *amicus curiae* briefs by governmental representatives and nongovernmental entities and how the Court proceeds when a party declines to consent to an *amicus* filing); Masciocchi, *supra* note 1, at 23–24 (examining U.S. Supreme Court and federal and state appellate courts’ rules—and their ambiguities—that dictate the procedural requirements of *amicus curiae* briefs). The specific rules that govern the filing of *amicus curiae* briefs will be discussed later in this Article.

28. See *infra* notes 30–47 and accompanying text.

29. See *infra* notes 48–61 and accompanying text.

30. See, e.g., Harper & Etherington, *supra* note 2, at 1176 (noting *amicus curiae* originated under Roman law); Krislov, *supra* note 9, at 694 (discussing how the device of *amicus curiae* has developed alongside common law); Temchenko, *supra* note 1, at 98 (“*Amicus curiae* have existed for millennia in common-law systems, dating back to Roman law” and “[h]istorically, amici were responsible for ‘oral Shephardizing,’ the bringing up of cases not known to the judges.” (quoting Krislov, *supra* note 9, at 695));

Roman law and English common law contexts, courts would sometimes permit or even invite a lawyer (or sometimes a non-lawyer) who was not representing a party in the case to provide information that would assist the court in reaching a decision.<sup>31</sup> In this capacity, the *amicus curiae* was functioning as a “friend” to the court who, typically through the oral presentation of information (as opposed to the submission of a written brief), was assisting the court in some capacity to make a more-informed decision regarding the merits of the case.<sup>32</sup> While the parameters of *amicus curiae* participation were often unclear during this early historical period,<sup>33</sup> the key feature of *amicus curiae* was the presentation of relevant, neutral, and unbiased information to the court.<sup>34</sup> For example, when functioning as an *amicus curiae*, the lawyer would often assist the court in becoming familiar with on-point prior court cases that were not known to the deciding judge or with understanding Parliament’s intent behind the passage of certain laws.<sup>35</sup>

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Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 *YALE L.J.F.* 141, 143 (2021) (“[A]micus briefs find their roots in Roman and British common law.”).

31. See Larsen & Devins, *supra* note 2, at 1909 (discussing the purpose of permitting *amici curiae* to participate in legal proceedings in Roman law and English common law to present “neutral, unbiased information”). As this Article will discuss, there are concerns that some *amici* are not, in fact, presenting neutral and unbiased information, which further highlights the concerns associated with the lack of checks on the validity of the information presented to courts. See *infra* notes 131–35 and accompanying text.

32. See Krislov, *supra* note 9, at 695 (discussing the role of *amicus curiae* in English common law and noting that the primary role was to assist courts in making a more-informed decision through the consideration of neutral information).

33. See *id.* (“Inasmuch as permission to participate as a friend of the court has always been a matter of grace rather than right, the courts have from the beginning avoided precise definition of the perimeters and attendant circumstances involving possible utilization of the device.”).

34. See Larsen & Devins, *supra* note 2, at 1909 (emphasizing the original role of early *amicus curiae* in presenting objective and unbiased information to the court and discussing the change in nature of the after crossing the Atlantic due to “tough consequences and injustices that flowed from restrictions inherent in the adversarial process”).

35. See Krislov, *supra* note 9, at 695 (discussing role of *amicus curiae* in English common law). *Amici curiae*, who were not required to be attorneys under English common law, would fulfill other roles for the court by, among other things, calling the court’s attention to manifest error, the death of a party in the case, collusive suits, and appropriate law. *Id.* at 695–96.

Although the involvement of the earliest *amicus curiae* was intended to provide the court with relevant, objective, and useful information to assist the court's decision-making, scholars have discussed a fundamental shift in the nature of *amicus curiae* participation when courts in the United States adopted this mechanism.<sup>36</sup> Specifically, *amicus curiae* shifted from a neutral, unbiased, and objective role to more of an advocacy-based role.<sup>37</sup> Rather than assisting the court, *amicus curiae* were primarily assisting the parties to the litigation.<sup>38</sup>

Several factors explain the shift from "friend" to "advocate" among *amici curiae*.<sup>39</sup> The most prominent factor that contributed to this shift

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36. See Krislov, *supra* note 9, at 697–704 (discussing transition among *amicus curiae* from neutrality to advocacy shortly after *amici* were first used in U.S. courts to be a "friend" of one of the litigants before the court); Larsen & Devins, *supra* note 2, at 1910–12 (discussing the shift in the nature of *amicus curiae* in the early Twentieth Century from friend to lobbyist and advocate). *Amicus curiae* successfully maintained its role of neutrality in U.S. courts until the early Twentieth Century. See Larsen & Devins, *supra* note 2, at 1910 (noting the transition of *amicus curiae* from "friend" to "advocate" was "almost complete" by the early 1900s).

37. See sources cited in *supra* note 36; Larsen, *supra* note 26, at 1766 (noting *amicus curiae* became more advocacy-based in the United States, which stands in contrast to the use of *amicus curiae* in European courts); Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1245 (1992) ("No longer a mere friend of the court, the amicus has become a lobbyist, an advocate, and, most recently, the vindicator of the politically powerless." (footnotes omitted)); Temchenko, *supra* note 1, at 98 (noting current *amicus curiae* function primarily as advocates for a party to the litigation and lobbyists to courts).

38. See Larsen & Devins, *supra* note 2, at 1910 ("The name 'amicus curiae' once described 'an essentially professional relation to the Court,' where the amicus was the lawyer assisting the judge, not the client sponsoring the assistance." (quoting Krislov, *supra* note 9, at 703)). Interestingly, courts have held *amicus curiae* briefs to different standards of neutrality. See Allison Lucas, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 FORDHAM URB. L.J. 1605, 1608 (1999) (explaining that some courts require neutrality from an *amicus* whereas other courts permit "limited advocacy"). Lucas also asserts that the majority of courts acknowledge that *amici* do not need to be completely disinterested, and that an *amicus* who argues in favor of a particular legal position is fulfilling a permissible role. *Id.* In her comprehensive article on *amicus curiae* briefs, Professor Anderson stated that "the term amicus—friend—seems to obscure the reality of amicus curiae participation today." Anderson, *supra* note 16, at 364.

39. See Krislov, *supra* note 9, at 697–704 (discussing how *amicus curiae* participation shifted from neutral and objective participation to advocacy-based participation in U.S. courts as material third-party interest in the outcome of cases increased resulting from the federal system's expansive reach); Larsen & Devins, *supra* note 2, at 1910–12 (explaining why *amicus curiae* functioned more as party advocates beginning in the early Twentieth Century).

was that third-party interests were not being adequately represented in the newly developed U.S. legal system.<sup>40</sup> The nature of the U.S. legal system, in particular the distinction between federal law and state law provided by the Tenth Amendment, meant that state and federal interests could conflict and that conflicting public interests could be unrepresented in private lawsuits.<sup>41</sup> The absence of sufficient representation of these third-party interests raised concerns among the early judiciary that its decisions would result in unintended negative consequences for individuals and entities who were not involved in the lawsuit but who nevertheless had a legitimate interest in the outcome of the case.<sup>42</sup>

*Amici curiae*, which made their first appearance in the Supreme Court case *Green v. Biddle*,<sup>43</sup> evolved out of prior experiments to provide a platform for third-party interests in private litigation.<sup>44</sup> The legal issue

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40. See Krislov, *supra* note 9, at 697 (discussing the development of the federal system, which placed third-party interests at odds with private suits, particularly as these suits began to shape the system's "constitutional contours" and public interests went unrepresented).

41. See *id.* (pointing to how the structure of the U.S. legal system contributed to a shift in *amicus curiae* participation). When discussing the problem of unrepresented third-party interests, Krislov stated: "While the number of potentially unrepresented interests was greater under a federal system, the possibility of their being heard in federal court was less." *Id.*

42. See *id.* at 698 (discussing the recognition of the utility of third-party participation beyond the context of *in rem* proceedings). Another factor that contributed to the shift in *amicus curiae* participation to a more advocacy-based role was the proliferation of special interest groups at the end of the Nineteenth Century and beginning of the Twentieth Century. See *id.* at 703–04; see also Larsen & Devins, *supra* note 2, at 1910 (discussing the role of special interest groups vis-à-vis the shift in *amicus curiae* participation).

43. 21 U.S. 1 (1823).

44. See *id.* at 17 (identifying Henry Clay "as *amicus curiae*"); see also Harper, *supra* note 4, at 1506 (explaining that the first *amicus brief* filed in the U.S. Supreme Court was in *Green v. Biddle*). *Biddle* was argued in 1821 but apparently decided by the Supreme Court in 1823. See *Biddle*, 21 U.S. at 1, 7 (noting that the case was argued during the February term of 1821). Interestingly, before *amicus curiae* participation was formalized and became an ingrained component of the U.S. legal system, courts used various mechanisms to provide a way for interested third parties to participate in private lawsuits. See Krislov, *supra* note 9, at 699 (discussing various ways in which courts considered third-party interests prior to the use of *amicus curiae*). Prior to the emergence of *amicus curiae* briefs per se, courts would occasionally permit or even invite interested non-parties to a case to submit a brief, particularly if the lack of representation for the third party could result in an obvious injustice. See *id.* In early

in *Biddle* was whether the Commerce Clause of the U.S. Constitution<sup>45</sup> applied to a land agreement between Kentucky and Virginia.<sup>46</sup> The Supreme Court, concerned that issuing a decision without Kentucky's input could have negative consequences, asked the Speaker of the U.S. House of Representatives, Henry Clay, for a legal opinion, marking the first formal appearance of an *amicus curiae* before the Supreme Court.<sup>47</sup>

### B. Rules Governing Amicus Curiae Participation

After the formal emergence of *amicus curiae* in U.S. courts, the process of submitting *amicus curiae* briefs was regulated through newly developed court rules.<sup>48</sup> Specifically, Supreme Court Rule 37 and

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scholarship regarding the problem of unrepresented third-party interests, Hersman articulated a list of ways in which third parties with an interest in a particular case could make their interests known to the court. See Ann Bates Hersman, *Intervention in Federal Courts*, 61 AM. L. REV. 1 (1927). Hersman's list of options included, *inter alia*, the following: leave from the court to intervene as a party or quasi-party in the case; participation in the case as an ancillary party (if the third party had a cause of action that was so connected with the primary case that it was advisable or necessary for the court to adjudicate it as part of the primary case); a claim on a fund in the possession of the court could be made by petition, motion, or presentation by a third party before the court; and class action lawsuits (which extended jurisdiction and therefore involvement to people who were not part of the initial litigation). *Id.* at 4–6. Along with these suggestions, Hersman noted (but with no elaboration or discussion) that interested third parties could also become involved in a case by “[m]otion, suggestion, and appearance as *amicus curiae*.” *Id.* at 5. At that time, however, involvement of *amici curiae* was much less common than it would become over the next nearly hundred years, and rules regarding the involvement of *amici curiae* had not yet been developed by the U.S. Supreme Court. The eventual emergence of rules to govern *amicus curiae* briefs is discussed later in this Article.

45. U.S. CONST. art. I, § 8, cl. 3.

46. See *Biddle*, 21 U.S. at 3 (enumerating the legal issues before the Supreme Court, which were rooted in the Commerce Clause's application to agreements between two states).

47. Harper, *supra* note 4, at 1506. Henry Clay, in his role as an *amicus*, petitioned the Supreme Court for a rehearing, which the Court granted. See Krislov, *supra* note 9, at 700–01 (noting it was unusual for a court to allow an *amicus*, who is a non-party to the case, to petition for a rehearing of the matter). Clay later argued the case, again in his role as an *amicus*, which should be viewed as an anomaly because *amici curiae*, at least currently, cannot perform any act on behalf of a party to the litigation. *Id.* at 701. Rules governing *amicus curiae* briefs and participation are discussed later in this Article.

48. See Krislov, *supra* note 9, at 701–03 (explaining that the Supreme Court itself, and later Congress in the Twentieth Century, did not start adopting preferences and rules for *amicus* participation until after *Green v. Biddle*). It is interesting to note that regulation of *amicus curiae* briefs occurred after, not before, courts began using such briefs. *Id.*

Federal Rule of Appellate Procedure 29 expressly permit the filing of *amicus curiae* briefs.<sup>49</sup> Rule 37 describes the Supreme Court's interest in briefs that bring "to the attention of the Court relevant matter not already brought to its attention by the parties."<sup>50</sup> Rule 37 also discourages any brief that "does not serve this purpose" because that would be a burden to the Court.<sup>51</sup>

The Federal Rules of Appellate Procedure generally require an *amicus curiae* party to accompany its brief with written consent of all parties or obtain leave from the court;<sup>52</sup> however, the Supreme Court has recently eliminated this requirement altogether, allowing any party to submit an *amicus curiae* brief within specified time constraints.<sup>53</sup> In an effort to promote transparency, Supreme Court Rule 37 provides that the *amicus curiae* brief must indicate "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."<sup>54</sup> The brief must also "identify every person [or entity], other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution."<sup>55</sup> An exception to this rule applies if the brief was written on behalf of the United States.<sup>56</sup>

When a motion for leave is required before an *amicus curiae* brief can be filed, Federal Rule of Appellate Procedure 29 requires that it must identify the interest of the applicant and state why the *amicus curiae* brief is desirable and relevant to the disposition of the case.<sup>57</sup> Generally, per Supreme Court Rule 37, an *amicus curiae* brief must be filed within seven days after the time limits required of the party the *amicus* supports.<sup>58</sup> An *amicus* may participate in oral argument with the Supreme Court's permission, but the Court has traditionally only granted such permission in extraordinary circumstances; the primary

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49. See SUP. CT. R. 37; FED. R. APP. P. 29. Although we focus mostly on substantive rules, Federal Rule of Appellate Procedure 29 also has several requirements relating to an *amicus curiae* brief's structure, order of pages, and length. FED. R. APP. P. 29.

50. SUP. CT. R. 37(1).

51. *Id.*

52. FED. R. APP. P. 29(a)(2), (b)(2).

53. SUP. CT. R. 37(2)–(4).

54. SUP. CT. R. 37(6).

55. *Id.*

56. *Id.*

57. See FED. R. APP. P. 29(a)(3). There are also several requirements regarding the formatting of *amicus curiae* briefs.

58. SUP. CT. R. 37.

mode of *amici* participation is through a written brief.<sup>59</sup> In addition to the Supreme Court's request for *amicus curiae* briefs that bring attention to a matter not already brought to the Court's attention by the parties, the Court has articulated in precedential opinions a general prohibition on *amicus curiae* that raise legal arguments not raised in the lower court proceedings or by any party to the proceedings.<sup>60</sup> However, in practice, the Supreme Court has made exceptions for legal issues or policy questions that were not addressed in lower court proceedings or raised by the parties if those issues or questions are of sufficient importance.<sup>61</sup>

### C. *Amicus Curiae Briefs in Current Practice*

#### 1. *Use of amicus curiae briefs*

Since *Biddle* was decided in 1823, and the subsequent development of special interest groups, the use of *amicus curiae* briefs has increased considerably in U.S. legal practice.<sup>62</sup> There are several ways to document the increase in *amicus curiae* briefs, including the number of briefs filed in a particular Supreme Court term or the average number of briefs filed per Supreme Court case, but examination of any metric reveals a staggering increase.<sup>63</sup> For example, there were 250 Supreme

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59. See FED. R. APP. P. 29(a)(8), advisory committee's note to 1998 amendment.

60. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 721 (2014) ("We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party."); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981) (declining to consider an argument in an *amicus curiae* brief because it was not raised by either party). The idea behind these Supreme Court decisions is to limit the scope of *amicus curiae* briefs to issues addressed in lower courts or raised by the parties, which is in line with viewing *amicus curiae* briefs as assisting courts in addressing legal issues raised in the litigation.

61. See *Teague v. Lane*, 489 U.S. 288, 300 (1989) (addressing the question of the retroactivity of a habeas petitioner's claim even though the retroactivity issue was raised only in an *amicus curiae* brief and not by one of the parties to the litigation); *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961) (applying the exclusionary rule at the suggestion of an *amicus* while acknowledging that this argument was not raised by the appellant). The determination of which legal issues are of sufficient importance to justify permitting an *amicus curiae* brief to raise a previously unraised issue is made by the Supreme Court on a case-by-case basis, and there does not appear to be any scholarship that has examined that specific point.

62. See *supra* note 2 and accompanying text.

63. See *Larsen & Devins, supra* note 2, at 1911–12 (providing statistics that highlight the sharp increase in the number of briefs per case in the past decade compared to



Court cases that involved an *amicus curiae* brief in the ten-year period from 1946 to 1955, and that figure jumped to 982 cases in the ten-year period from 1986 to 1995.<sup>64</sup> Looking at more recent statistics, *amici* filed 781 briefs in the 2014 Supreme Court term, which represented an “800% increase from the 1950s and a 95% increase from 1995.”<sup>65</sup> *Amici* filed briefs in 96% of cases in the 2013 to 2014 Supreme Court term and 98% of cases in the 2014 to 2015 term.<sup>66</sup> Even more recently, *amici* filed 911 briefs in the 2019 Supreme Court term, which is an average of approximately sixteen briefs per case; this increased to nearly 940 *amicus curiae* briefs in the 2020 Supreme Court term.<sup>67</sup> The number of *amicus curiae* briefs has even reached three figures for some high-profile cases.<sup>68</sup>

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the middle of the Twentieth Century); see also Kayla S. Canelo, *The Supreme Court, Ideology, and the Decision to Cite or Borrow from Amicus Curiae Briefs*, 50 AM. POL. RSCH. 255, 255–57 (2022) (noting that the increase in the Supreme Court’s use of *amicus*-provided language in its decisions indicates *amicus curiae* briefs’ increasing influence on the Court).

64. Kearney & Merrill, *supra* note 2, at 758 (documenting the number of *amicus curiae* briefs filed in the Supreme Court in each decade of the latter half of the Twentieth Century).

65. Whitehouse, *supra* note 30, at 144 (discussing remarkable increase in the use of *amicus curiae* briefs over the past few decades); see Kearney & Merrill, *supra* note 2, at 751–56 (discussing the increase in filings of *amicus curiae* briefs in latter half of Twentieth Century).

66. Larsen & Devins, *supra* note 2, at 1911 (providing various statistics to illustrate the increase in *amicus curiae* briefs submitted to the Supreme Court).

67. Whitehouse, *supra* note 30, at 144 (discussing steep increase in filing of *amicus curiae* briefs in recent Supreme Court terms).

68. See Larsen & Devins, *supra* note 2, at 1911–12 (noting high-profile cases pertaining to same-sex marriage and health care were accompanied by more than one hundred *amicus curiae* briefs in each case). According to Larsen and Devins, the 2012 Supreme Court health care case *National Federation of Independent Business v. Sebelius* was accompanied by 136 *amicus curiae* briefs. *Id.* at 1912. By comparison, the number of *amicus curiae* briefs filed in the landmark abortion rights case *Roe v. Wade* was in the low twenties, and only six *amicus curiae* briefs were filed in the landmark school desegregation case *Brown v. Board of Education*. *Id.* Relatedly, research suggests that the number of groups that file an *amicus curiae* brief in a case has an impact on judicial decision-making. See Pacelle et al., *supra* note 2, at 1263 (suggesting a positive correlation between the number of *amicus curiae* briefs filed in a case and the briefs’ impact on individual Justices’ decisions in the case); see also Collins et al., *supra* note 1, at 228–29 (discussing research regarding the relationship between the number of *amicus curiae* briefs, the novelty of the information provided in those briefs, and success in a case). When addressing the relationship between the volume of *amicus curiae* briefs filed in a case and a party’s likelihood of success, one scholar concluded: “Taken as a whole, the evidence indicates

## 2. *Influence of amicus curiae briefs*

The available data suggest that *amicus curiae* briefs are being submitted to the Supreme Court at unprecedentedly high rates, with a remarkable level of growth in more recent years. But is the Court paying attention to these briefs?<sup>69</sup> As some scholars have noted, the striking growth in the submission of *amicus curiae* briefs is at least partially due to the perception that these briefs are influencing court decisions.<sup>70</sup> Fortunately, this is an empirical question, and there are several ways to examine whether *amicus curiae* briefs are exerting any influence on the Supreme Court's decisions.<sup>71</sup>

One approach is to examine how often the Supreme Court references *amicus curiae* briefs in its written decisions. In their comprehensive examination of *amicus curiae* briefs submitted to the Supreme Court between 1946 and 1995, Professors Kearney and Merrill reported that approximately 18% of Supreme Court cases with *amicus* filers referenced an *amicus curiae* brief between 1946 and 1955, and that figure jumped to nearly 37% of the cases with *amicus* filers between 1985 and 1995.<sup>72</sup> Overall, during the roughly fifty-year period between 1946 and 1995, the Supreme Court referenced an *amicus* in

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that the party supported by the largest number of amicus briefs enjoys a modest advantage in terms of litigation success in the U.S. Supreme Court." Collins, *supra* note 1, at 226. However, some scholars have asserted that the quality of *amicus curiae* briefs and the reputation of the entities that submit the briefs are more important considerations than the quantity of briefs filed in a case. *E.g.*, Janet M. Box-Steffensmeier, Dino P. Christenson & Matthew P. Hitt, *Quality Over Quantity: Amici Influence and Judicial Decision Making*, 107 AM. POL. SCI. REV. 446, 458–59 (2013) (noting quality of *amicus curiae* briefs and reputation of filers can be more persuasive in the Supreme Court than the quantity of *amicus curiae* briefs that are filed).

69. See Marin et al., *supra* note 4, at 6 (discussing proliferation and influence of *amicus curiae* briefs submitted to the Supreme Court).

70. See, e.g., REAGAN W. SIMPSON & MARY R. VASALY, *THE AMICUS BRIEF: ANSWERING THE TEN MOST IMPORTANT QUESTIONS ABOUT AMICUS PRACTICE* 11 (4th ed. 2015) ("There is no doubt that the proliferation of *amicus* briefs is the result of their perceived impact on the Court's decisions.").

71. See, e.g., Kearney & Merrill, *supra* note 2, at 757–59 (noting the influence of *amicus curiae* briefs can be assessed by examining the number of times *amicus curiae* briefs are cited or quoted by the Supreme Court). See generally Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 72–75 (2004) (detailing the types of *amicus curiae* briefs that are influential on Supreme Court decision-making).

72. Kearney & Merrill, *supra* note 2, at 758.

28% of all cases in which an *amicus curiae* brief was submitted,<sup>73</sup> which suggests that the Court is indeed paying attention to *amicus curiae* briefs in its decision-making.

Besides simply examining how often the Supreme Court mentions *amici*, another metric to assess the influence of *amicus curiae* briefs is how often the Supreme Court quotes from an *amicus curiae* brief.<sup>74</sup> Using this metric, Professors Kearney and Merrill reported that the Supreme Court quoted from *amicus curiae* briefs in nearly 10% of all cases decided between 1946 and 1995.<sup>75</sup> Ten percent is not an inconsequential proportion of Supreme Court cases given the size of the Supreme Court's docket. Further, as recently stated by U.S. Senator Sheldon Whitehouse, "[t]he extent to which the Court's opinions directly quote amici further highlights just how impactful amicus briefs can be to the Court's decision-making."<sup>76</sup>

Evidence also suggests that the rate of citations and quotations per *amicus curiae* brief referred to by the Supreme Court is also increasing.<sup>77</sup> For example, in the 2019 to 2020 Supreme Court term, the Court cited *amicus curiae* briefs in 65% of argued cases with *amicus* participation and resulting majority opinions.<sup>78</sup> Of note, the rate of citation in the 2019 to 2020 Supreme Court term was higher than the rate in the previous nine Supreme Court terms.<sup>79</sup>

Taken together, the research reveals a steep increase in the number of *amicus curiae* briefs being filed in the Supreme Court and the rate at

73. *Id.* at 757 (reporting that an *amicus* was mentioned or cited in 936 Supreme Court decisions issued between 1946 and 1995).

74. *See id.* at 758–59 (examining extent to which the Supreme Court quotes language from *amicus curiae* briefs in cases decided between 1946 and 1995).

75. *Id.* at 759. Overall, between 1946 and 1995, the Supreme Court quoted an *amicus curiae* brief in 316 of 3,389 cases, which is roughly 10%. *See id.* When examined by decade, the percentage of Supreme Court cases in which an *amicus curiae* brief was quoted went from 2.80% in cases decided between 1946 and 1955 to 15.38% in cases decided between 1986 and 1995. *Id.* The five-fold increase in cases in which an *amicus curiae* brief was quoted by the Supreme Court is one indication of the Court's increased reliance on these briefs.

76. Whitehouse, *supra* note 30, at 145.

77. *See* Kearney & Merrill, *supra* note 2, at 759–60 (discussing the increase in the rate which the Supreme Court references *amicus curiae* briefs that were filed as an indicator of the Court's reliance on *amicus* filings in the last fifty years).

78. Anthony J. Franze & R. Reeves Anderson, *Amicus Curiae at the Supreme Court: Last Term and the Decade in Review*, NAT'L L.J., Nov. 2020, at 2 (comparing the rate of filing *amicus curiae* briefs to the number of citations to *amicus curiae* briefs in the Supreme Court from 2010 to 2020).

79. *Id.*

which the Supreme Court is citing and quoting *amicus curiae* briefs.<sup>80</sup> When interpreting all of these statistics regarding the Supreme Court's mention or quotation of *amicus curiae* briefs, it is important to note that the number of cases being decided on the merits by the Supreme Court has decreased, not increased, in recent years.<sup>81</sup> It is also important to note that the range of cases in which *amicus curiae* briefs are submitted to the Supreme Court is quite broad.<sup>82</sup>

*Amicus curiae* briefs submitted to the Supreme Court are filed by a variety of entities, including individuals, corporations, governments, public advocacy organizations, public interest law firms, trade associations, unions, and peak associations.<sup>83</sup> *Amicus curiae* briefs also address a wide range of topics across the social sciences, hard sciences, technology, and other fields.<sup>84</sup> Given the content of *amicus curiae* briefs, some of which include scientific, technical, or other expert information, it is important to examine the rules that govern the admissibility of such information in trial contexts before discussing the use of such information in the specific context of *amicus curiae* briefs.<sup>85</sup>

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80. See Whitehouse, *supra* note 30, at 145 (summarizing Supreme Court's use—including citation and quotation—of *amicus curiae* briefs over the past seventy-plus years); see also James F. Spriggs, II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RSCH. Q. 365, 373 (1997) (noting substantial research supports the conclusion that Supreme Court Justices rely on *amicus curiae* briefs when writing opinions).

81. See Harper, *supra* note 4, at 1513 (noting that the rate of filing of *amicus curiae* briefs in the Supreme Court has continued to rise even though the number of cases decided by the Supreme Court has not appreciably risen, and in fact has decreased, since the mid-Twentieth Century).

82. See, e.g., Ronald Roesch, Stephen L. Golding, Valerie P. Hans & N. Dickon Reppucci, *Social Science and the Courts: The Role of Amicus Curiae Briefs*, 15 LAW & HUM. BEHAV. 1, 1–2 (1991) (noting *amicus curiae* briefs have been filed in a wide range of cases).

83. See generally Gregory A. Caldeira & John R. Wright, *Amicus Curiae Before the Supreme Court: Who Participates, when, and how Much?*, 52 J. POL. 782, 789–91 (1990) (stating that entities act as organized interests when they use *amicus curiae* briefs as a means to advance their own political agendas); Collins et al., *supra* note 1, at 229 (noting that the legal arguments articulated in *amicus curiae* briefs infrequently reflect the diverse array of *amici*).

84. See, e.g., Roesch et al., *supra* note 82, at 1–2 (highlighting that social science briefs were filed in cases related to the death penalty, gay rights, abortion, jury size, prediction of dangerousness, and the rights of the mentally ill); Rustad & Koenig, *supra* note 7, at 111–14 (discussing topics addressed by *amicus curiae* briefs that relied on social science data, such as treason, progressive social legislation, and desegregation).

85. See *infra* notes 90–115 and accompanying text.

## II. LAY AND EXPERT EVIDENCE

Although U.S. courts use an adversarial system of justice, the parties in a case do not fully control what evidence reaches the trier of fact.<sup>86</sup> Parties introduce (or seek to introduce) evidence to further their case or detract from the other party's case, but the presiding judge makes a legal determination regarding what evidence is ultimately admitted into the proceedings.<sup>87</sup> In federal court, the admissibility of evidence is governed by the Federal Rules of Evidence (FRE).<sup>88</sup> The FRE are not directly applicable in state courts, and states are not required to adopt the FRE, but nearly every state has adopted the FRE in whole, in part, or with only minor modifications.<sup>89</sup> The FRE make a distinction between the standards that govern the admissibility of lay evidence and the standards that govern the admissibility of expert evidence, with the

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86. See generally FED. R. EVID. 101, 102 (delineating evidentiary rules including admissibility standards, for civil and criminal cases in federal courts). The Federal Rules of Evidence (FRE) were adopted by order of the U.S. Supreme Court on November 20, 1972, transmitted to Congress by the Chief Justice on February 5, 1973, and were initially scheduled to become effective on July 1, 1973. See FED. R. EVID., HISTORICAL NOTE. Pub. L. 93-595, January 2, 1975, 88 Stat. 1926, enacted the Federal Rules of Evidence proposed by the Supreme Court, with amendments made by Congress, to take effect on July 1, 1975. *Id.* The FRE have wide applicability, but they do not apply to all federal proceedings. According to FRE 1101, the FRE apply (a) to proceedings before federal district courts, federal appellate courts, federal bankruptcy and magistrate judges, and the U.S. Court of Federal Claims; and (b) in civil cases and proceedings, criminal cases and proceedings, and contempt proceedings (except those in which the court may act summarily). FED. R. EVID. 1101(a)–(b). The FRE rules on privilege also apply to all stages of a case or proceeding. *Id.* 1101(c). However, per FRE 1101(d), the FRE (except for the rules on privilege) do not apply to a court's determination under FRE 104(a) of a preliminary question of fact governing admissibility, grand jury proceedings, and “miscellaneous” other proceedings (i.e., extradition or rendition; issuing an arrest warrant, criminal summons, or search warrant; preliminary examination in a criminal case; sentencing; granting or revoking probation or supervised release; and considering whether to release on bail or otherwise). *Id.* 1101(d).

87. FED. R. EVID. 104(a) (“The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.”).

88. See *id.* 401–03 (articulating standards for admissibility and exclusion of relevant evidence in all federal courts).

89. See David N. Dreyer, F. Beau Howard & Amy M. Leitch, *Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence*, 63 MERCER L. REV. 1, 2 n.3 (2011) (noting the adoption of the FRE, or substantially similar rules, among the majority of states).

latter needing to meet a much more stringent standard before it will be admitted.<sup>90</sup>

A. *Admissibility Standards for Lay Evidence*

As a starting point, all evidence—both lay and expert—must satisfy the basic admissibility standard in the FRE.<sup>91</sup> Specifically, per FRE 401, all proffered evidence must be relevant to the proceedings to be admissible, and FRE 401 states that “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”<sup>92</sup> There are, however, several bases in the FRE for excluding relevant evidence.<sup>93</sup> For example, if the proffered evidence is determined to be relevant, it can nevertheless be excluded under FRE 402, which provides for the exclusion of relevant evidence if the U.S. Constitution, federal law, the FRE, or Supreme Court rules provide otherwise.<sup>94</sup> Furthermore, evidence that is determined to be relevant (under FRE 401) and admissible (under FRE 402) can nevertheless be excluded pursuant to FRE 403 if the risk of, *inter alia*, prejudice, confusion, misleading the jury, or waste of time substantially outweighs the probative value of the relevant evidence.<sup>95</sup>

Taken together, for any evidence to be admissible, it must be relevant (i.e., it is material to the issue before the court and the existence of the evidence provides predictive value in determining if a fact exists); this is often referred to as *probative value*.<sup>96</sup> If proffered evidence is determined to be probative, it is generally admissible (per FRE 402), but even probative evidence can be excluded if the evidence would have an overly

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90. Compare FED. R. EVID. 401–03 (articulating admissibility standards for all evidence), with *id.* 702 (articulating heightened admissibility standards for expert evidence).

91. FED. R. EVID. 401–03.

92. *Id.* 401. As with all decisions relating to admissibility, this decision is made by the presiding judge. *Id.* 104(a).

93. See *id.* 402–03 (describing various bases for the exclusion of evidence determined to be relevant under FRE 401).

94. *Id.* 402.

95. *Id.* 403.

96. See *id.* 401, 403 (outlining the characteristics of relevant evidence and referring to the “probative value” of evidence); see also CHRISTOPHER SLOBOGIN, THOMAS L. HAFEMEISTER & DOUGLAS MOSSMAN, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 498 (7th ed. 2020) (noting admissibility determinations initially hinge on whether the probative value of the proffered relevant evidence outweighs its potential prejudicial impact).

*prejudicial impact* on the factfinder (per FRE 403).<sup>97</sup> The admissibility framework in the FRE thus requires a balancing of the probative value of the proffered evidence with its potential to confuse or mislead the factfinder.<sup>98</sup> The admissibility standards encompassed in FRE 401 and 403 are often referred to as the 401/403 “relevance/prejudice hurdle.”<sup>99</sup>

### B. Admissibility Standards for Expert Evidence

Besides meeting the basic admissibility standard articulated in the FRE 401/403 relevance/prejudice hurdle, there are additional admissibility rules that apply specifically to proffered expert evidence.<sup>100</sup> Experts and the evidence they provide occupy a unique and privileged position in the U.S. justice system.<sup>101</sup> Although testimony from lay witnesses is typically restricted to what they saw or heard (or “facts”),<sup>102</sup> expert witnesses can offer opinion evidence, including opinions on the ultimate legal issue (in most jurisdictions and in most legal contexts), and they can often rely on

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97. FED. R. EVID. 402 (noting relevant evidence is generally admissible, with several exceptions); *id.* 403 (describing additional bases upon which relevant evidence can be excluded).

98. See SLOBOGIN ET AL., *supra* note 96, at 498 (discussing the application of the so-called FRE “relevance/prejudice hurdle”).

99. *Id.*

100. See FED. R. EVID. 702 (articulating the standard for admissibility of expert evidence in federal courts); see also SLOBOGIN ET AL., *supra* note 96, at 528–29 (discussing the application of the *Frye* and *Daubert* admissibility standards for proffered expert evidence in federal courts).

101. See David DeMatteo, Sarah Fishel & Aislinn Tansey, *Expert Evidence: The (Unfulfilled) Promise of Daubert*, 20 PSYCH. SCI. PUB. INT. 129, 129 (2019) (noting that expert witnesses in most jurisdictions can offer opinions based on inadmissible evidence).

102. See SLOBOGIN ET AL., *supra* note 96, at 498 (noting that lay witnesses typically cannot offer opinion evidence). There is, however, a provision in the FRE that permits lay witnesses to offer opinion testimony in limited circumstances. FED. R. EVID. 701. Per FRE 701 (“Opinion Testimony by Lay Witnesses”):

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FED. R. EVID. 701. In general, however, lay witnesses are restricted from offering opinions, and this is a key way in which expert testimony differs from lay testimony. *Id.*

inadmissible evidence in reaching their opinions. This makes experts powerful tools for the parties that introduce them.<sup>103</sup>

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103. See DeMatteo et al., *supra* note 101, at 129 (discussing the unique and powerful role of expert witnesses in court proceedings); see also FED. R. EVID. 702 (articulating the admissibility standard for expert testimony in federal courts). Per FRE 702 (“Testimony by Expert Witnesses”):

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702. It is noteworthy that the qualifications for experts listed in FRE 702 are disjunctive, while the requirements for proper expert testimony (in the form of an opinion) are conjunctive. *Id.* The summary of FRE 702 provided by Slobogin et al. is instructive: “Put another way, a witness with the appropriate qualifications may offer testimony in the form of an opinion when it is based on sufficient facts, relies on reliable, specialized knowledge and will add to what the factfinder could discern for itself.” SLOBOGIN ET AL., *supra* note 96, at 499.

Several amendments to the FRE, including FRE 702, were adopted by the U.S. Supreme Court and will take effect on December 1, 2023. See Order Adopting the Proposed Amendment to the Rules of Federal Evidence (Apr. 24, 2023), [https://www.supremecourt.gov/orders/courtorders/frev23\\_5468.pdf](https://www.supremecourt.gov/orders/courtorders/frev23_5468.pdf) [<https://perma.cc/8K99-H6AN>] (stating the amendments shall take effect on December 1, 2023). Here is the amended language of FRE 702 (“Testimony by Expert Witnesses”):

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

*Id.*

The required bases for expert testimony are articulated in FRE 703 (“Bases of an Expert’s Opinion Testimony”):

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

FED. R. EVID. 703; see also Michael Karson, *What Can the Rules of Evidence Teach Us About Writing Forensic Reports?*, 8 PSYCH. INJ. & L. 1, 3 (2015) (discussing implications of FRE 703



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for expert reports and expert witnesses who may rely on otherwise inadmissible evidence in forming their opinion); Ian Volek, Note, *Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later*, 80 *FORDHAM L. REV.* 959, 967–68 (2011) (discussing application of FRE 703 in context of testimony offered by expert witnesses). The last sentence of FRE 703, which calls for a balancing test between the probative value of the facts or data and their potential prejudicial effect, was added in 2000 when FRE 703 was amended. See Samuel R. Gross & Jennifer L. Mnookin, *Expert Information and Expert Evidence: A Preliminary Taxonomy*, 34 *SETON HALL L. REV.* 141, 145 n.11 (2003) (discussing amendment of FRE 703 restricting the extent to which an expert may testify when relying on otherwise inadmissible evidence).

Although experts can rely on inadmissible data in reaching their opinions if the requirements of FRE 703 are satisfied, a thornier question is whether experts can talk about inadmissible data that formed the bases of their conclusions or opinions while testifying. Courts have reached different conclusions regarding the question of how to treat inadmissible information during testimony when such information is reasonably relied upon by an expert witness in forming an opinion or drawing inferences. Compare *United States v. Rollins*, 862 F.2d 1282, 1292–93 (7th Cir. 1988) (admitting hearsay statements of the informant as part of the basis of an FBI agent’s expert opinion), with *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1496 (9th Cir. 1997) (holding it was error to admit hearsay offered as a basis of an expert opinion without a limiting instruction) and *In re Interest of A.M., Jr.*, 797 N.W.2d 233, 261–62 (Neb. 2011) (holding that experts must base their opinions on admissible evidence).

Courts also have different rules with respect to whether an expert’s opinion can address the ultimate legal issue in a particular case. For example, in an insanity case, the ultimate legal issue is whether the criminal defendant was insane at the time of the offense. The traditional rule was that experts were prohibited from addressing the ultimate legal issue in a case because it was believed that permitting such testimony usurped the function of the factfinder. See *SLOBOGIN ET AL.*, *supra* note 96, at 624. However, the original version of FRE 704 enacted by Congress eliminated the prohibition on ultimate issue testimony by experts because it would be challenging to enforce (because experts could simply rephrase their testimony to avoid directly addressing the ultimate issue) and prohibiting ultimate issue testimony deprived the factfinder of helpful information. *Id.* However, in 1984, Congress added a limitation to FRE 704 that prohibited experts from offering ultimate issue testimony related to a defendant’s mental state at the time of the offense. *Id.* Here is the current version of FRE 704 (“Opinion on an Ultimate Issue”):

- (a) In General—Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue. (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

FED. R. EVID. 704. Paragraph (b) of FRE 704, which was added largely in response to the outcome of John Hinckley’s trial for the attempted assassination of President Reagan, was intended to avoid the confusion that can result from competing expert witnesses. *SLOBOGIN ET AL.*, *supra* note 96, at 624. However, several states permit expert witnesses to offer opinion testimony on the ultimate legal issue in all contexts. See, e.g., PA. R. EVID. 704 (“An [expert witness] opinion is not objectionable just because it embraces an ultimate issue.”).

The extraordinary role of expert witnesses and the unique nature of expert testimony have led courts and legislatures to formulate various frameworks for determining who should be recognized as an expert, what constitutes expert testimony, and what type of expert evidence should be admitted at trial.<sup>104</sup> The Supreme Court articulated the federal admissibility standard for expert testimony thirty years ago in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>105</sup> In *Daubert*, the Supreme Court held that FRE 702, not the “general acceptance” standard that had been articulated in an earlier federal appellate case,<sup>106</sup> governs the admissibility of scientific expert testimony.<sup>107</sup> The *Daubert* decision was

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104. See DeMatteo et al., *supra* note 101, at 129–30 (discussing the context surrounding the Supreme Court’s interpretation of FRE 702).

105. 509 U.S. 579 (1993).

106. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding proffered expert evidence must be based on methods that are generally accepted in the relevant field).

107. *Daubert*, 509 U.S. at 588–89 (holding FRE 702 is the proper standard for determining the admissibility of proffered expert testimony in all federal courts). In *Daubert*, the legal issue addressed by the Supreme Court was whether the proper admissibility standard for expert evidence was the *Frye* “general acceptance” test or FRE 702. *Id.* at 585. The FRE did not take effect until 1975, which was more than fifty-years after *Frye* was decided, and this was a question of first impression for the Supreme Court. In *Frye v. United States*, the U.S. Court of Appeals for the District of Columbia held that proffered expert evidence must be based on scientific methods that are sufficiently established and accepted in the particular field in which it belongs. 293 F. at 1014. The expert evidence in *Frye* was derived from a test called the systolic blood pressure deception test, which was essentially an early form of a lie detector test. *Id.* at 1013. The expert in *Frye* was Dr. William Moulton Marston, a psychologist and lawyer with an interest in lie detection who invented the systolic blood pressure deception test; interestingly, Dr. Marston later became a consultant for DC Comics, in which capacity he invented the superhero character Wonder Woman (who used her own “lie detector” called the Golden Lasso of Truth). See Kenneth J. Weiss, Clarence Watson & Yan Xuan, *Frye’s Backstory: A Tale of Murder, a Retracted Confession, and Scientific Hubris*, 42 J. AM. ACAD. PSYCHIATRY & L. 226, 227, 230–31 (2014) (discussing Dr. Marston’s involvement in *Frye* and his subsequent invention of the Wonder Woman character for DC Comics). When addressing the admissibility standard that should apply to expert evidence, the federal appellate court in *Frye* held that “the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye*, 293 F. at 1014. This admissibility test became known as the “general acceptance” standard. See SLOBOGIN ET AL., *supra* note 96, at 528 (calling the *Frye* rule the “general acceptance” test). The court in *Frye* held that the lower court’s exclusion of the expert testimony based on the systolic blood pressure deception test was appropriate because the test had not yet gained general acceptance in the field. *Frye*, 293 F. at 1014. Of note, it is the method used to obtain

the first time the Supreme Court had identified the admissibility standard for expert evidence that should be used in all federal courts.<sup>108</sup> In a subsequent case—decided six years after *Daubert*—the Supreme Court clarified that FRE 702 governs the admissibility of *all* expert testimony, not just the scientific testimony that was at issue in *Daubert*.<sup>109</sup> Today, all federal courts use the *Daubert* admissibility

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the science, not the specific results, that must be generally accepted in the field. SLOBOGIN ET AL., *supra* note 96, at 528. Although many books and articles routinely herald *Frye* as representing a major paradigm shift in admissibility standards for expert testimony, the *Frye* decision garnered virtually no contemporaneous attention from courts, commentators, or scholars. See David L. Faigman, Elise Porter & Michael J. Saks, *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 CARDOZO L. REV. 1799, 1808 (1994) (discussing the relative unimportance of the *Frye* decision). In fact, *Frye* was not cited by any court for more than a decade, and it was cited only thirteen times in the twenty-five years after the case was decided and eighty-three times in the fifty years after it was decided. *Id.* at 1808 n.25.

In *Daubert*, the Supreme Court held that *Frye* (which was decided more than fifty years before the FRE became effective) had been superseded by FRE 702. *Daubert*, 509 U.S. at 588–89. When discussing the *Frye* standard, the Supreme Court in *Daubert* stated: “That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.” *Id.* at 589. The Supreme Court also noted that (a) nothing in the text of FRE 702 establishes “general acceptance” as an absolute prerequisite to admissibility, (b) there is nothing to suggest that FRE 702 intended to incorporate a “general acceptance” standard, (c) the drafting history of FRE 702 makes no mention of *Frye*, and (d) a rigid “general acceptance” requirement would be at odds with the liberal thrust of the FRE. *Id.* at 588. *Daubert* effectively ended the use of “general acceptance” as the sole criterion for determining the admissibility of expert testimony, although (as will be discussed) the Supreme Court suggested that “general acceptance” of the expert’s method or technique is still a valid consideration in admissibility determinations as long as other admissibility criteria are used. *Id.* at 593–94.

108. *Daubert*, 509 U.S. at 588–89.

109. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999). The Court in *Kumho* discussed several reasons for concluding that the judicial gatekeeping function promulgated in *Daubert* applies to all expert testimony. *Id.* at 147–49. First, the Court noted that the language of FRE 702 makes no meaningful distinction between “scientific” knowledge, which was the type of expert testimony at issue in *Daubert*, and “technical” or “other specialized” knowledge, which was the type of knowledge at issue in *Kumho*. *Id.* at 147. Second, the Court noted that the rationale underlying the *Daubert* gatekeeping function—i.e., to prevent the introduction of invalid or unreliable science into court proceedings—should apply to all expert testimony, not just scientific expert testimony. *Id.* at 148–49. Third, the Court noted that trial court judges applying *Daubert* would have difficulty reliably distinguishing between “scientific” knowledge and “technical” or “other specialized” knowledge. *Id.* The third Supreme Court case in the

standard. States are not required to adopt *Daubert* due to the decision's FRE focus, but most use the *Daubert* standard or a close derivative; the remaining states use the *Frye* "general acceptance" standard.<sup>110</sup>

The *Daubert* standard imposes a tremendous gatekeeping function on trial court judges when a party seeks to introduce expert testimony.<sup>111</sup> In essence, when faced with a proffer of expert testimony,

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so-called *Daubert* trilogy of cases (besides *Daubert* and *Kumho*) is *General Electric Co. v. Joiner*, in which the Supreme Court held that a trial court's determination regarding the admissibility of expert evidence should be reviewed on appeal using the abuse of discretion standard. 522 U.S. 136, 143 (1997). In contrast with a de novo review standard, the abuse of discretion standard provides great deference to trial court determinations regarding expert evidence admissibility. Seven years after *Daubert* was decided (and one year after *Kumho*), Congress amended FRE 702 to be more consistent with the Supreme Court's decision in *Daubert*. See SLOBOGIN ET AL., *supra* note 96, at 530 (discussing the congressional amendment that added additional language to FRE 702 in 2000).

110. DeMatteo et al., *supra* note 101, at 129; SLOBOGIN ET AL., *supra* note 96, at 530. For an up-to-date reference regarding which states are *Daubert* jurisdictions or *Frye* jurisdictions, see Christine Funk, *Daubert Versus Frye: A National Look at Expert Evidentiary Standards*, EXPERT INST., [https://www.expertinstitute.com/resources/in\\_sights/daubert-versus-frye-a-national-look-at-expert-evidentiary-standards](https://www.expertinstitute.com/resources/in_sights/daubert-versus-frye-a-national-look-at-expert-evidentiary-standards) [https://perma.cc/5Q3C-JG7F] (last updated Mar. 11, 2022).

111. See *Daubert*, 509 U.S. at 589 n.7 (noting the trial court judge's role as a gatekeeper, but the Court fails to explain what the role entails). See generally David L. Faigman, Christopher Slobogin & John Monahan, *Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony*, 110 NW. U. L. REV. 859, 862 (2016) (discussing the obligation of trial court judges to determine whether proffered expert testimony is more likely than not reliable and valid). Although trial court judges are also performing a gatekeeping function when determining the admissibility of proffered expert evidence in *Frye* jurisdictions, the nature of the judicial gatekeeping function is much different in *Frye* jurisdictions than in *Daubert* jurisdictions. See SLOBOGIN ET AL., *supra* note 96, at 529–30 (comparing the practical outcomes of the conceptual differences in the gatekeeping function under *Frye* and *Daubert*). A particularly noteworthy difference between *Frye* and *Daubert* jurisdictions is the role of the judge—in terms of judicial activism and involvement—in performing the gatekeeping function. See Simon A. Cole, *Out of the Daubert Fire and into the Fryeing Pan? Self-Validation, Meta-Expertise and the Admissibility of Latent Print Evidence in Frye Jurisdictions*, 9 MINN. J.L. SCI. & TECH. 453, 454–55, 459–61 (2008) (discussing the difference in the level of deference to a relevant scientific community in the judge's role in *Frye* and *Daubert* jurisdictions). In *Frye* jurisdictions, which use a deference model, the judge defers to the expert's scientific community to determine whether the proffered evidence is "generally accepted," which is used as a proxy for valid and reliable science. *Id.* at 454. The essential abdication of the admissibility decision to the expert's scientific field is one of several criticisms of the *Frye* "general acceptance" test. See JENNIFER L. SKEEM, KEVIN S. DOUGLAS & SCOTT O. LILIENFELD,

the trial judge must determine whether the proffered testimony is valid and reliable evidence that will assist the trier of fact.<sup>112</sup> To assist trial court judges in this new gatekeeping function, the Supreme Court in *Daubert* identified four criteria that could be applied to the proffered expert testimony: (1) whether the theory or technique underlying the proffered expert testimony can be and has been scientifically tested; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error of the technique; and (4) whether the theory or technique is generally accepted in the relevant scientific community.<sup>113</sup>

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PSYCHOLOGICAL SCIENCE IN THE COURTROOM: CONSENSUS AND CONTROVERSY 5–6 (2009) (highlighting several concerns regarding the use of the *Frye* test such as, *inter alia*, abdicating review authority and its inherent ambiguity). By contrast, in *Daubert* jurisdictions, for better or worse, judges must take a more active and involved role in determining whether proffered expert evidence is good science that will assist the trier of fact. See Cole, *supra*, at 455 (discussing the need for trial court judges in *Daubert* jurisdictions to become “amateur scientists” so they can make properly informed decisions regarding the admissibility of proffered expert testimony).

112. See *Daubert*, 509 U.S. at 592–93 (noting the court makes a preliminary assessment of proffered expert testimony pursuant to FRE 104(a)).

113. See *id.* at 593–94 (outlining criteria that trial court judges can apply when performing their gatekeeping function under *Daubert*). A lot has been written about the four *Daubert* criteria in both the legal and scientific literature. See, e.g., David E. Bernstein & Eric G. Lasker, *Defending Daubert: It’s Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1, 12–19 (2015) (discussing the four *Daubert* criteria and subsequent congressional amendment of FRE 702 after *Daubert* was decided); Lisa R. Fournier, *The Daubert Guidelines: Usefulness, Utilization, and Suggestions for Improving Quality Control*, 5 J. APPLIED RSCH. MEMORY & COGNITION 308, 309–10 (2016) (noting the lack of uniformity in federal courts’ application of the four *Daubert* criteria); Brandon L. Garrett & M. Chris Fabricant, *The Myth of the Reliability Test*, 86 FORDHAM L. REV. 1559, 1565–66 (2018) (pointing out that the Court’s standard in *Daubert* is both “exacting” and “flexible”); Karen Kafadar, *The Critical Role of Statistics in Demonstrating the Reliability of Expert Evidence*, 86 FORDHAM L. REV. 1617, 1622 (2018) (discussing how some aspects of the four *Daubert* criteria are inappropriate in assessing the validity and reliability of proffered expert evidence); Tess M. S. Neal, Christopher Slobogin, Michael J. Saks, David L. Faigman & Kurt F. Geisinger, *Psychological Assessments in Legal Contexts: Are Courts Keeping “Junk Science” Out of the Courtroom?*, 20 PSYCH. SCI. PUB. INT. 135, 139 (2019) (analyzing how the *Daubert* criteria in a mental health expert context require “forensic mental health experts . . . use methods that are appropriate for the specific population and circumstances of the case at hand”); Michael D. Wade, *Using Fed. R. Evid. 702 and Daubert*, 20 W. MICH. U. COOLEY J. PRAC. & CLINICAL L. 121, 127–31 (2019) (discussing in-depth how to satisfy the *Daubert* criteria in practice); Gerald Young & Jane Goodman-Delahunty, *Revisiting Daubert: Judicial Gatekeeping and Expert Ethics in Court*, 14 PSYCH. INJ. & L. 304, 305–06 (2021) (discussing shortcomings in

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judicial gatekeeping related to determinations of the admissibility of expert evidence using the *Daubert* criteria).

In *Daubert*, the Supreme Court provided some explication of each of the four criteria outlined in its decision. 509 U.S. at 593–94. With respect to the *testing* criterion, the Court noted that testing is the basis of scientific knowledge in many fields, and it seemed to equate testing with the scientific concept of falsifiability, which is the idea that something must be capable of being proven wrong for it to be considered true science. *Id.* at 593. Although perhaps somewhat circular, the Court defined science, or scientific knowledge, in this context as being derived from the “scientific method.” *Id.* at 590. When discussing the criterion *peer review and publication*, the Court stated: “submission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.” *Id.* at 593. The Court recognized, however, that peer review and publication “does not necessarily correlate with reliability,” and that “[s]ome propositions, moreover, are too particular, too new, or of too limited interest to be published.” *Id.* Despite the concerns about relying too heavily on peer review and publication, the Court concluded that peer review and publication is “a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.” *Id.* at 594; see *United States v. Gissantaner*, 990 F.3d 457, 464–65 (6th Cir. 2021) (providing additional guidance on how to interpret the peer review and publication criterion). The Court provided no discussion of *error rate* beyond simply noting that trial court judges “ordinarily should consider the known or potential rate of error” of the particular scientific technique at issue. *Daubert*, 509 U.S. at 594. Given the concerns discussed in the next paragraph in the text, particularly as they relate to judges’ understanding (or lack thereof) of the concept of error rate in the context of admissibility determinations, it is unfortunate that the Court provided no additional explanation or guidance about what an error rate is and how it can be used by trial courts judges when making admissibility determinations. Some have noted that the error rate of a technique that underlies proffered expert testimony must simply be known or potentially knowable, which means that even a high error rate would not necessarily be grounds for excluding the evidence. See, e.g., Frederick Schauer & Barbara A. Spellman, *Is Expert Evidence Really Different?*, 89 NOTRE DAME L. REV. 1, 7 (2013) (noting a key consideration when assessing a technique’s error rate is whether the error rate is known because the size of the error rate may be “highly relevant to reliability and thus admissibility”). Finally, with respect to the criterion of *general acceptance*, which was a nod to *Frye* (which the Court had just held had been superseded by FRE 702), the Court stated: “Widespread acceptance can be an important factor in ruling particular evidence admissible.” *Daubert*, 509 U.S. at 593. The inclusion of the other criteria in addition to general acceptance is the Court’s recognition that admissibility of proffered expert evidence depends on more than just the general acceptance of the evidence in the relevant scientific community. See SLOBOGIN ET AL., *supra* note 96, at 529 (discussing the Supreme Court’s inclusion of general acceptance among the four *Daubert* criteria). For a useful discussion of *Frye* and *Daubert*, see JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 39, 59–60 (10th ed. 2022).

The Supreme Court described the application of the *Daubert* standard as “flexible,” and it emphasized that trial court judges are not required to use the four *Daubert* criteria in performing their gatekeeping function; indeed, judges are permitted to use any admissibility criteria as long as the admissibility determination is designed to assess the validity, reliability, and utility of the proffered expert evidence.<sup>114</sup> What is clear, however, is that for expert evidence to be admitted in federal courts (and the states that have adopted the *Daubert* standard), it must satisfy a higher and more demanding standard than lay evidence.<sup>115</sup> It is also clear that judges must have at least a basic understanding of the basis of the proffered expert evidence for them to make useful determinations about the validity, reliability, and potential utility of the expert evidence in the case before the court.<sup>116</sup>

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114. See *Daubert*, 509 U.S. at 593–94 (discussing application of *Daubert* admissibility standard by trial court judges). The Supreme Court also recognized the flexible nature of the *Daubert* gatekeeping analysis in *Kumho*, 526 U.S. at 141 (“But, as the Court stated in *Daubert*, the test of reliability is ‘flexible,’ and *Daubert*’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.”). Of note, many state and federal courts have developed and applied their own “*Daubert*” criteria when assessing the validity and reliability of proffered expert testimony. See DAVID M. MALONE & PAUL J. ZWIER, *EFFECTIVE EXPERT TESTIMONY* 221–22 (3d ed. 2014) (noting many cases involve the use of admissibility criteria other than those articulated in *Daubert* to assess the validity, reliability, and utility of proffered expert evidence). Some of the other “*Daubert*” criteria used by courts include, *inter alia*, the existence and maintenance of standards governing the use of the expert evidence, analogy to other scientific techniques that are admissible, nature and breadth of the inferences adduced, clarity and simplicity with which the technique or theory can be described, availability of other experts to test and evaluate the technique, care with which the technique was employed, preparation or creation for a purpose other than litigation, adequacy to explain important empirical data, basis in quantitatively sufficient data, basis in qualitatively acceptable data, the precision of the results generated by the methodology, the extent to which research preceded the development of any conclusions, and consistency in the application of the methodology. See *id.*; 1 DAVID L. FAIGMAN, EDWARD K. CHENG, JENNIFER L. MNOOKIN, ERIN E. MURPHY, JOSEPH SANDERS & CHRISTOPHER SLOBOGIN, *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* § 1:15 n.2 (2022–2023 ed. 2022) (describing additional criteria courts use to supplement *Daubert*).

115. See Schauer & Spellman, *supra* note 113, at 4 (advocating against the disparity in treatment between lay evidence and expert evidence admissibility).

116. See FAIGMAN ET AL., *supra* note 114, § 1:15 (noting judges in *Daubert* jurisdictions must become “sophisticated consumers of science” and must “understand the philosophical and practical considerations raised by the scientific method”). When

*C. Persuasiveness of Expert Evidence*

*Daubert*'s judicial gatekeeping function is necessary not only because expert witnesses can do things that lay witnesses cannot (e.g., provide opinions, rely on inadmissible evidence, answer the ultimate legal question in some contexts), but because expert evidence can be extremely powerful, persuasive, and influential on the triers of fact.<sup>117</sup>

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discussing the role of judges in *Daubert* jurisdictions shortly after *Daubert* was decided, the U.S. District Court for the Northern District of California stated:

The responsibilities of district courts under *Daubert* are indeed heavy ones . . . .

Armed with a degree of intellectual curiosity inherent in district court judges . . . federal courts will perform the assigned task. Whether the *Daubert* analysis is ultimately viewed as "wise" law, or whether it promotes "good" science, must be answered at some time in the future.

Casey v. Ohio Med. Prods., 877 F. Supp. 1380, 1382–83 (N.D. Cal. 1995). This quote usefully illustrates the increased judicial burden imposed by *Daubert*.

117. Schauer & Spellman, *supra* note 113, at 10–11 (highlighting Judge Rakoff's explanation for *Daubert* gatekeeping). There has been longstanding concern that jurors will overvalue (or undervalue) expert testimony. See, e.g., Schauer & Spellman, *supra* note 113, at 13–18 (noting the concern that jurors will overvalue expert testimony and discussing the empirical research on the persuasiveness, or lack thereof, of expert testimony). When discussing expert testimony, there is an important distinction between *admissibility*, which is the determination of whether the proffered expert evidence should be admitted into the legal proceedings, and *credibility*, which is the weight assigned to the expert testimony that has been admitted. SLOBOGIN ET AL., *supra* note 96, at 529. Whereas admissibility determinations are made by the judge as a matter of law, credibility determination are made by the factfinder, which is often a jury. *Id.* Some have argued that questions about the accuracy of expert testimony should go to the weight of the evidence and not its admissibility, which would permit more expert evidence to be introduced. *Id.*

There are various estimates regarding the prevalence of expert witness testimony in court cases, but the use of expert witnesses is high by any of the available estimates. For example, in early research, Professor Samuel Gross reported that expert testimony was involved in 86% of 529 civil cases over a two-year stretch. Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1114, 1119 (1999). In later studies, researchers examined the use of expert witnesses over a two-month period in several jurisdictions and reported that expert witnesses were involved in 93% of the cases in Baltimore, 46% of the cases in Seattle, and 80% of the cases in Tucson. Daniel W. Shuman, Elizabeth Whitaker & Anthony Champagne, *An Empirical Examination of the Use of Expert Witnesses in the Courts – Part II: A Three City Study*, 34 JURIMETRICS J. 193, 197 (1994). A 2007 study found that forty-three of fifty cases, or 86%, used in a study on juror behavior involved expert witnesses. Shari Seidman Diamond, *How Jurors Deal with Expert Testimony and How Judges Can Help*, 16 J.L. & POL'Y 47, 56 (2007). A more recent estimate of the use of expert witnesses in federal courts is that approximately 92% of civil trials involve expert testimony for the plaintiff, 79% involve expert testimony for the defense, and 73% involved expert testimony for both plaintiffs and defendants. STEVEN LUBET &



After all, expert testimony is being offered by someone who has been recognized as an expert by the court deciding the case;<sup>118</sup> if, after extensive vetting, the court has determined that the witness is an expert, then jurors may be more likely to be influenced by the expert witness's testimony.<sup>119</sup> The concern that underlies the stringent admissibility standard for expert testimony outlined in *Daubert* is that jurors will either place too much emphasis on valid expert testimony or be misled by invalid expert testimony.<sup>120</sup> There is also a concern that judges, either when making preliminary admissibility determinations

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ELIZABETH I. BOALS, *EXPERT TESTIMONY: A GUIDE FOR EXPERT WITNESSES AND THE LAWYERS WHO EXAMINE THEM* 2 (4th ed. 2020). Another estimate, more circumscribed because it focuses on one type of expert, is that as of the late 1980s mental health experts are involved in approximately one million cases per year. See GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS, CHRISTOPHER SLOBOGIN, RANDY K. OTTO, DOUGLAS MOSSMAN & LOIS O. CONDIE, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 575 (4th ed. 2018). Regardless of the actual figure, it is clear that expert testimony is a common occurrence. See generally Andrew W. Jurs, *Expert Prevalence, Persuasion, and Price: What Trial Participants Really Think About Experts*, 91 *IND. L.J.* 353, 355 (2016) (comparing studies and noting that while the percentage of experts has not changed, the number per case has dropped). It is also important to note that experts are essential in certain types of cases. For example, in professional malpractice cases, experts are typically required to establish the relevant standard of care. See SLOBOGIN ET AL., *supra* note 96, at 160 (discussing the need for experts when courts are determining if a professional deviated from an accepted standard of care).

118. *FED. R. EVID.* 104, 702.

119. See generally Shuman, *supra* note 116, at 200–01 (discussing the traits jurors find important when evaluating expert opinions).

120. See, e.g., *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999) (noting *Daubert's* stringent admissibility standard for expert testimony is based on the Supreme Court's concern that jurors will be overly persuaded by expert testimony); see also Sanja Kutnjak Ivković & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 *LAW & SOC. INQUIRY* 441, 441 (2003) (discussing the concern that jurors may misunderstand expert testimony and examining how jurors evaluate expert witnesses and the associated expert testimony). In *Allison*, the U.S. Court of Appeals for the Eleventh Circuit expressed concern about the ability of jurors to understand certain expert testimony:

While meticulous *Daubert* inquiries may bring judges under criticism for donning white coats and making determinations that are outside their field of expertise, the Supreme Court has obviously deemed this less objectionable than dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique.

184 F.3d at 1310.

or in the context of deciding a case on its merits during a bench trial, will be confused or misled by expert testimony.<sup>121</sup> The concern that jurors and judges will overvalue or undervalue expert testimony, or be confused or misled by such testimony, is not new; indeed, scholars and courts have expressed similar concerns for several decades, long predating *Daubert* and even *Frye*, that the nature of expert testimony can be inherently problematic for some jurors and judges.<sup>122</sup>

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121. See generally Barbara A. Spellman, *On the Supposed Expertise of Judges in Evaluating Evidence*, 156 U. PA. L. REV. 1, 1–2 (2007) (pondering whether and how judges during bench trials and juries may differ when fulfilling the role of fact-finder); see also Simms, *supra* note 7, at 1–2 (discussing whether judges are able to understand complex information included in *amicus curiae* briefs and the potential bogus *amicus* facts contained therein). The central issue being discussed in this Section was concisely stated by Gross: “We call expert witnesses to testify about matters that are beyond the ordinary understanding of lay people (that is both the major practical justification and a formal legal requirement for expert testimony), and then we ask lay judges and jurors to judge their testimony.” Gross, *supra* note 117, at 1182. Along similar lines, Simms stated:

Appellate judges are generally not competent to evaluate *amicus* facts. Judges may be highly skilled legal analysts and thus able to properly evaluate an *amicus*' legal arguments, but judges are unlikely to be skilled in medicine, mathematics, the natural sciences or the social sciences. Judges thus must take *amicus* facts at face value.

Simms, *supra* note 7, at 2–3.

122. See, e.g., Ronald J. Allen & Esfand Nafisi, *Daubert and Its Discontents*, 76 BROOK. L. REV. 131, 132 (2010) (discussing the increasing complexity of legal issues, the associated increase in expert testimony, specifically regarding medical malpractice, and the risk that legal decision-makers will not possess a sufficient understanding of complex scientific or technical issues absent experts and their specialized knowledge); Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535 (1998) (discussing the concern that judges and jurors must solicit and defer to the judgments of experts when unfamiliar with the relevant scientific fields); Gross, *supra* note 117, at 1163–64 (explaining how expert witnesses may confuse jurors); Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 429 (1952) (discussing the importance of jurors' evaluations of experts themselves when jurors are unable to understand the underlying subject matter); Jed Rakoff, *Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise*, 17 FORDHAM J. CORP. & FIN. L. 4, 5–7 (2012) (pondering whether federal judges are competent to adjudicate cases that present complex financial issues); see also *Atchison, Topeka & Santa Fe R.R. Co. v. Thul*, 4 P. 352, 355–56 (Kan. 1884) (detailing the “proper weight” that should be accorded to expert testimony in the context of a personal injury suit); *Haviland v. Kan. City, P. & G. R.R. Co.*, 72 S.W. 515, 517 (Mo. 1902) (upholding the lower court's exclusion of expert testimony because of concerns related to the “gullibility of the jury”).

A related but distinct question is *how* jurors and judges assign weight to expert witness testimony. In other words, what characteristics of an expert or features of the

Importantly, the question of whether judges and jurors afford too much or too little weight to expert testimony is a question that has received some critical attention from scholars and researchers.<sup>123</sup> However, research on the weight given to expert testimony by judges and jurors, and the related (threshold) question of whether judges and jurors possess a sufficient understanding of expert testimony (including the methods used to derive the expert evidence), is mixed both in terms of methodological quality and findings.<sup>124</sup>

Before addressing the question of whether judges and jurors can understand expert testimony presented at trial, it is important to note that there is some empirical evidence that trial court judges may not possess a sufficient understanding of the *Daubert* criteria that would permit them to make an informed admissibility determination.<sup>125</sup> Nearly a decade after *Daubert* was decided, Gatowski and her colleagues surveyed 400 state trial court judges to assess their opinions regarding the utility of the *Daubert* criteria and their understanding of those criteria.<sup>126</sup> They found that while 82% of the judges possessed a

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expert's testimony are associated with enhanced juror and judicial perceptions of expert witness credibility? See Robert J. Cramer, Caroline Titcomb Parrott, Brett O. Gardner, Caroline H. Stroud, Marcus T. Boccaccini & Michael P. Griffin, *An Exploratory Study of Meta-Factors of Expert Witness Persuasion*, 35 J. INDIVIDUAL DIFFERENCES 1, 1 (2014) (examining mock juror perceptions of expert witness credibility, efficacy, and personality to determine which aspects are associated with increased persuasiveness of expert witness testimony); Alessandro Tadei, Katarina Finnila, Julia Korkman, Benny Salo & Pekka Santtila, *Features Used by Judges to Evaluate Expert Witnesses for Psychological and Psychiatric Legal Issues*, 66 NORDIC PSYCH. 239 (2014) (examining how judges evaluate expert characteristics when choosing an expert witness for a forensic psychological or forensic psychiatric case).

123. See, e.g., Brewer, *supra* note 122, at 1539 (expressing concern that nonexpert judges and jurors may not sufficiently understand some expert testimony); Schauer & Spellman, *supra* note 113, at 13–20 (summarizing research on whether jurors overvalue expert testimony); Neil Vidmar, *Expert Evidence, the Adversary System, and the Jury*, 95 AM. J. PUB. HEALTH 137, 138–41 (2005) (discussing empirical research on weight accorded to expert witnesses by juries).

124. See, e.g., Ivković & Hans, *supra* note 120, at 449–50 (summarizing research on juror reactions to experts and offering a critique of the research quality); Schauer & Spellman, *supra* note 113, at 13–18 (discussing conflicting findings on whether jurors sufficiently understand expert testimony); Vidmar, *supra* note 123, at 138–40 (noting findings from interview research on juror understanding of expert evidence).

125. See DeMatteo et al., *supra* note 101, at 130 (discussing research regarding whether trial court judges understand the *Daubert* criteria).

126. Sophia I. Gatowski, Shirley A. Dobbin, James T. Richardson, Gerald P. Ginsburg, Mara L. Merlino & Veronica Dahir, *Asking the Gatekeepers: A National Survey*

sufficient understanding of the general acceptance criterion and 71% sufficiently understood the meaning of peer review and publication, only 6% of the judges demonstrated a sufficient understanding of the testing criterion and only 4% sufficiently understood the meaning of error rate.<sup>127</sup> In another study, researchers surveyed 144 state court judges regarding their knowledge of research design and methodology, and they found that 92% of the judges failed to identify a major methodological flaw in a research study, and 83% of the judges mistakenly concluded that a high-quality, flaw-free study was junk science that should be excluded.<sup>128</sup> Perhaps it is axiomatic, but a trial court judge must sufficiently understand the *Daubert* criteria before the judge can reliably apply those criteria in a judicial gatekeeping capacity.<sup>129</sup> A related concern is that judges and jurors may not sufficiently understand certain types of expert testimony that have passed the *Daubert* threshold and been admitted into the legal proceedings, which can, of course, affect judicial and jury determinations about the merits of the case.<sup>130</sup>

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*of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433, 451–52 (2001) (describing a study examining judicial opinions regarding the utility of the *Daubert* criteria and the judges' understanding of those criteria).

127. *Id.* at 442, 444–48 (presenting results of a survey of state court judges' understanding of the four *Daubert* criteria).

128. See Margaret Bull Kovera & Bradley D. McAuliff, *The Effects of Peer Review and Evidence Quality on Judge Evaluations of Psychological Science: Are Judges Effective Gatekeepers?*, 85 J. APPLIED PSYCH. 574, 578–81 (2000) (presenting results of a survey of state court judges' knowledge of research design and methodology). In the Kovera and McAuliff study, judges were both highly likely to (a) admit invalid expert evidence (i.e., flawed research studies) and (b) exclude valid expert evidence (i.e., quality studies/science), both of which are problematic determinations. See *id.* at 580.

129. See DeMatteo et al., *supra* note 101, at 130 (comparing research studies on whether trial court judges understand the *Daubert* criteria). After reviewing the research suggesting that trial court judges lack a sufficient understanding of the *Daubert* criteria, DeMatteo et al. stated: "Obviously, those who do not understand the [*Daubert*] criteria cannot be expected to apply them properly." *Id.*

130. See *Jackson v. Pollion*, 733 F.3d 786, 787–88 (7th Cir. 2013). Some cases have recognized the limitations of judges in understanding basic science, even though some level of scientific understanding by the trial court judge is an inarguable prerequisite in *Daubert* jurisdictions. For example, in *Jackson v. Pollion*, a wonderfully written opinion by Judge Posner expressed concern about the ability of lawyers and judges to understand expert scientific evidence. 733 F.3d at 787–88. In *Jackson*, a prison inmate sued the prison for allegedly being deliberately indifferent to his serious medical condition, and the U.S. District Court for the Southern District of Illinois granted the defendant's motion for summary judgment and dismissed the case. *Jackson v. Pollion*,

The concerns regarding the inclusion of potentially inaccurate, misleading, or mischaracterized expert information in *amicus curiae* briefs, combined with the empirical evidence that *amicus curiae* briefs can be highly persuasive to judges but that some judges may not understand certain expert information, highlight the fundamental

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No. 09-CV-688, 2012 WL 2412098, at \*1–2 (S.D. Ill. June 26, 2012), *aff'd*, Jackson v. Pollion, 733 F.3d 786 (7th Cir. 2013). On appeal, the U.S. Court of Appeals for the Seventh Circuit noted that the lower court’s “ground [for dismissing the case], so clearly correct as not to require elaboration by us, is that neither defendant was deliberately indifferent to the plaintiff’s condition.” *Jackson*, 733 F.3d at 787. Writing for the court, Judge Posner then stated:

What is troubling about the case is not its disposition but that both the district judge, and the magistrate judge whose recommendation to grant summary judgment the district judge accepted, believed that Jackson ‘can present evidence permitting a reasonable inference’ that he had experienced a serious medical condition as a consequence of the interruption of his medication.

This is mistaken, and (not surprisingly) has no support in the record.

*Id.* Judge Posner continued: “This lapse is worth noting because it is indicative of a widespread, and increasingly troublesome, discomfort among lawyers and judges confronted by a scientific or other technological issue.” *Id.*

Other courts, including the U.S. Supreme Court, have expressed concerns about the ability of judges to understand certain types of expert evidence. In Justice Scalia’s concurrence in part and concurrence in the judgment in *Association for Molecular Pathology v. Myriad Genetics, Inc.*, he stated: “I join the judgment of the Court, and all of its opinion except Part I-A and some portions of the rest of the opinion going into fine details of molecular biology. I am unable to affirm those details on my own knowledge or even my own belief.” 569 U.S. 576, 596 (2013) (Scalia, J., concurring). Even the Supreme Court in *Daubert* expressed concern about judges’ ability to understand science. Chief Justice Rehnquist, concurring in part and dissenting in part, stated:

The various briefs filed in this case are markedly different from typical briefs, in that large parts of them do not deal with decided cases or statutory language—the sort of material we customarily interpret. Instead, they deal with definitions of scientific knowledge, scientific method, scientific validity, and peer review—in short, matters far afield from the expertise of judges.

*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 599 (1993) (Rehnquist, C.J., concurring in part and dissenting in part). When *Daubert* was remanded to the U.S. Court of Appeals for the Ninth Circuit, Judge Kozinski, in a brilliantly written section of the opinion titled “Brave New World,” stated:

[T]hough we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts’ proposed testimony amounts to ‘scientific knowledge,’ constitutes ‘good science,’ and was ‘derived by the scientific method.’ . . . Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.

*Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995).

concern that underlies the use of some *amicus curiae* briefs. We turn to this fundamental concern in the next Section.

### III. THE PROBLEM WITH *AMICUS CURIAE* BRIEFS AND POTENTIAL PATHS FORWARD

The use of *amicus curiae* briefs raises a significant concern given the documented persuasiveness of expert evidence on legal decision-makers and the absence of any meaningful checks on the accuracy of the expert information, particularly scientific and technical information, included in these briefs.<sup>131</sup> Specifically, *amicus curiae* briefs that include expert information are not subject to the rigorous admissibility standards that govern expert evidence offered at trial, despite considerable empirical support for the proposition that *amicus curiae* briefs can be highly persuasive in the decision-making of the U.S. Supreme Court (and other courts).<sup>132</sup> As previously noted, we believe that *amicus curiae* briefs that include inaccurate, misleading, or mischaracterized expert information can perhaps be better described as *inimicus curiae* briefs because they are not functioning as a friend of the court.

#### A. *Bypassing of Admissibility Standards*

Put simply, it is concerning that *amicus curiae* briefs that include expert information simply bypass traditional admissibility standards and are, therefore, not subject to the rigorous rules of evidence that govern the presentation of other expert information, such as expert witness testimony.<sup>133</sup> Although *amicus curiae* briefs are not considered evidence and therefore not regulated by procedural rules for expert testimony and other evidence, research suggests that expert information included in *amicus curiae* briefs may be no less persuasive on judicial decision-making—or even more persuasive—than other evidence presented in legal proceedings.<sup>134</sup> The absence of any meaningful regulation of *amicus curiae* briefs means that the expert

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131. See *infra* notes 133–36 and accompanying text.

132. See Collins, *supra* note 7, at 65–66 (discussing empirical evidence on the persuasive influence of *amicus* briefs on Supreme Court Justices).

133. See Rustad & Koenig, *supra* note 7, at 95 (noting how the lack of procedural safeguards for *amicus curiae* briefs can have serious repercussions by inhibiting judicial decision-making and prejudicing parties).

134. See *supra* note 68 and accompanying text discussing the persuasiveness of *amicus curiae* briefs on judicial decision-making.

information included in those briefs, which would normally need to be examined pursuant to a rigorous admissibility standard (such as *Daubert*) before it could be considered by a judge or jury, can be admitted into the court proceedings essentially through a backdoor.<sup>135</sup>

### B. Potential Paths Forward

There are, however, several potential ways to regulate the submission of *amicus curiae* briefs, with the goals of limiting the submission of *amicus curiae* briefs under certain circumstances, changing how courts view *amicus curiae* briefs in the context of litigation, and minimizing the likelihood that *amicus curiae* briefs contain inaccurate or misleading expert information.

#### 1. Limiting the submission of *amicus curiae* briefs

Limiting the scope of when and what types of *amicus curiae* briefs can be filed is one potential way to reduce the concerns associated with these briefs.<sup>136</sup> This is not a new idea; indeed, several jurists and

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135. See Simms, *supra* note 7, at 1 (noting how *amicus curiae* briefs can often misuse alleged facts and evidence that the court, in turn, may quote or rely on in its opinions); see also Larsen, *supra* note 26, at 1784–1800 (discussing several concerns regarding the science included in some *amicus curiae* briefs). In her outstanding analysis of *amicus curiae* briefs, Professor Larsen noted several concerns about the scientific content of some *amicus curiae* briefs, including the following: (1) some *amicus curiae* briefs either do not provide citations to support assertions or provide a citation to an unpublished source; (2) some *amicus curiae* briefs cite sources that were created specifically for the purposes of the litigation; (3) some *amicus curiae* briefs cite authorities that espouse minority views in the relevant field; and (4) the absence of any adversarial check on the content of *amicus curiae* briefs. *Id.* When discussing how *amicus curiae* briefs bypass traditional admissibility standards, Simms stated: “But many *amicus* facts are a backdoor attempt to avoid the gate. If trial courts must be vigilant to scrutinize expert evidence, appellate courts should be equally vigilant when faced with such evidence in *amicus* briefs.” Simms, *supra* note 7, at 3.

136. See, e.g., Harper, *supra* note 4, at 1528 (suggesting limiting the number of *amicus curiae* briefs that can be filed in Supreme Court cases to complement existing Court guidelines on brief filings); John Harrington, Note, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RESV. L. REV. 667, 667 (2005) (arguing federal courts of appeals should adopt rules limiting the number of “undesirable *amicus curiae*” briefs). With respect to possible limitations on *amicus curiae* briefs, Harper stated:

The Court has strict guidelines about cert petition submission, brief filing, oral argument, and practice before the Court. Perhaps it is time for the Court to adopt policies about the number of briefs that may be submitted on behalf of a litigant, the types of organizations that may brief, or the number of

scholars have endorsed this idea for nearly thirty years.<sup>137</sup> For example, in *Ryan v. Commodity Futures Trading Commission*,<sup>138</sup> Judge Posner—who has expressed concerns about *amicus curiae* briefs on several occasions—suggested that judges exercise more vigilance in determining which *amicus curiae* briefs can be submitted in a particular case.<sup>139</sup> Specifically, Judge Posner stated that “judges should be assiduous to bar the gates to *amicus curiae* briefs that fail to present convincing reasons why the parties’ briefs do not give us all the help we need for deciding the appeal.”<sup>140</sup> Judge Posner recognized that there are certain circumstances in which the interests of justice should permit the submission of *amicus curiae* briefs,<sup>141</sup> but he asserted that there should be limits on the submission of *amicus curiae* briefs.<sup>142</sup> Specifically, Judge Posner suggested that motions for leave to file *amicus curiae* briefs should be scrutinized by judges in a “more careful, indeed a fish-eyed, fashion” to examine the reasons why an *amicus curiae* brief may be desirable.<sup>143</sup>

Along these lines, rather than simply permitting the submission of an *amicus curiae* brief by anyone with an interest in the case, perhaps an *amicus curiae* brief could only be filed with the court’s permission if the court is convinced that the brief would provide useful information that informs the court’s decision-making.<sup>144</sup> This suggestion takes on

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organizations of a specific type that may brief a case.  
Harper, *supra* note 4, at 1528.

137. See, e.g., Lucas, *supra* note 38, at 1612–15 (discussing various approaches for limiting the use of *amicus curiae* briefs).

138. 125 F.3d 1062 (7th Cir. 1997).

139. *Id.* at 1064 (asserting that courts should not allow *amicus* briefs that fail to provide reasons the parties’ briefs do not present all the requisite information).

140. *Id.*

141. *Id.* at 1063 (detailing the circumstances in which it is appropriate for an *amicus curiae* brief to be submitted to the court, which include, *inter alia*, when a party is not represented completely or at all, when the *amicus* has an interest that may be affected by a decision in the case, or the *amicus* may provide unique information or perspective).

142. *Id.* at 1063–64.

143. *Id.* at 1063. In *Ryan*, Judge Posner focused primarily on the problem of *amicus curiae* briefs containing duplicative information. To that point, he stated: “The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief,” *id.*, and that repetition in *amicus curiae* briefs is problematic because the “bane of lawyers is prolixity and duplication,” *id.* at 1064.

144. See Bruhl & Feldman, *supra* note 2, at 136–37 (discussing the balance between



increased importance given that the Supreme Court recently eliminated the requirement that party consent is required for the submission of an *amicus curiae* brief.<sup>145</sup> The consent requirement was intended to serve a gatekeeping function, but the Court eliminated the requirement because it believed that requiring party consent imposed unnecessary burdens on litigants and the Court.<sup>146</sup> As such, there are essentially no meaningful barriers to the submission of an *amicus curiae* brief, and requiring court permission would perhaps function in a gatekeeping capacity to limit the number of *amicus curiae* briefs.

To be clear, Judge Posner in *Ryan* asserted that one permissible basis for submitting an *amicus curiae* brief is “when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.”<sup>147</sup> There are arguably many contexts in which scientific, technical, or other expert information in an *amicus curiae* brief would seem to satisfy the “unique information” criterion articulated by Judge Posner.<sup>148</sup> However, the inclusion of unchecked, inaccurate, misleading, or mischaracterized expert information in *amicus curiae* briefs does not “help the court”<sup>149</sup> and therefore should not be permitted. *Amicus curiae* briefs of this variety arguably function more like *inimicus curiae* briefs, although they may help one of the parties.<sup>150</sup> There is nothing to suggest that the mechanism of *amicus curiae* briefs was intended to function as an end-around the standard rules that govern the admissibility of expert information.

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the Court’s gatekeeping function and party consent). For example, if the Court served as the primary gatekeeper of *amicus curiae* briefs, it could more effectively evaluate each brief’s worth. *Id.* Unfortunately, the Court lacks the resources to do so. *Id.*

145. SUP. CT. R. 37(4).

146. REVISION TO RULES OF THE SUPREME COURT OF THE UNITED STATES 7–10 (Jan. 1, 2023), comment to Rule 37, <https://www.supremecourt.gov/filingandrules/SummaryOfRuleChanges2023.pdf> [<https://perma.cc/YP2D-5GU6>].

147. *Ryan*, 125 F.3d at 1063.

148. *Id.*

149. *Id.*

150. See Rustad & Koenig, *supra* note 7, at 100. Rustad and Koenig noted that *amicus curiae* briefs are often intended to persuade the court rather than inform the court, and the social science in *amicus curiae* briefs may therefore be distorted or ignored. *Id.* In her informative article on *amicus curiae* briefs in the context of First Amendment litigation, Lucas cites caselaw that is consistent with the views expressed by Judge Posner. Lucas, *supra* note 38, at 1613 n.69.

## 2. *Changing courts' conceptualization of amicus curiae briefs*

Although the original intent behind *amicus curiae* participation was to provide the court with objective information to promote better-informed legal decision-making, several legal scholars, commentators, and courts acknowledged that *amicus curiae* briefs have long-ago shifted to benefit litigation parties instead of the court.<sup>151</sup> As succinctly stated by Professor Anderson, “[a] myth persists that *amicus curiae* should be disinterested; that its only duty should be to assist the court—as the name ‘friend of the court’ implies—even though historically there was no such requirement.”<sup>152</sup> Indeed, it strains credulity to believe that an individual or entity with absolutely no interest in the outcome of the litigation would be sufficiently motivated to submit an *amicus curiae* brief.<sup>153</sup>

Given this reality, it might be beneficial for courts to disengage from the increasingly untenable assumption that *amicus curiae* briefs are submitted by disinterested parties and exclusively intended to provide the court with objective, neutral, and unbiased information.<sup>154</sup> In other words, courts must come to the firm realization that *amici curiae* may not be true friends of the court.<sup>155</sup> This reconceptualization does not directly address the primary concern that *amicus curiae* briefs may contain inaccurate, misleading, or mischaracterized expert information, but viewing *amicus curiae* briefs in a more realistic light—primarily as advocacy tools submitted by an individual or entity with an interest in the outcome of the litigation—may lead judges to be appropriately skeptical of the briefs’ content.<sup>156</sup> Unfortunately, some legal scholars have noted that “[c]ourts do not seem to distinguish

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151. See *supra* notes 30–47 the shift in *amicus curiae* briefs from neutral and objective to advocacy-focused.

152. Anderson, *supra* note 16, at 363.

153. See *id.* (discussing whether *amici* should be disinterested). It is interesting to note that “not too long ago, a complete lack of interest was seen as disqualifying an *amicus curiae* applicant.” *Id.* at 407. Anderson explains that law professors, for example, were often not permitted to submit an *amicus curiae* brief because they only had an “academic interest” in the litigation. *Id.* She notes, however, that law professors now routinely submit *amicus curiae* briefs to the U.S. Supreme Court. *Id.*

154. See *id.* at 363–64 (discussing whether *amicus curiae* briefs can function as true friends of the court when they are submitted by disinterested entities).

155. See *id.* at 406 (discussing “myth of disinterest” as it relates to *amicus curiae* briefs).

156. See *id.* at 363–64 (discussing changing conceptualization of *amicus curiae* briefs in light of the relationship among *amici*, litigants, and courts).

between the various types of amic[i] curiae,<sup>157</sup> which raises a concern that judges may not be able to reliably distinguish true *amicus curiae* briefs from *inimicus curiae* briefs, or *amicus curiae* briefs that are focused on advocacy instead of objectivity.<sup>158</sup> Scrutinizing *amicus curiae* briefs in a more “fish-eyed”<sup>159</sup> and cautious fashion may help judges to avoid overvaluing the expert information included in an *amicus curiae* brief.<sup>160</sup>

### 3. *Quality control of amicus curiae briefs: A Daubert-type analysis*

Assuming most courts will continue to leniently permit *amicus curiae* submissions, several plausible quality-control measures, if implemented, could address the concern that *amicus curiae* briefs may contain unchecked and potentially inaccurate, misleading or mischaracterized expert information.<sup>161</sup> The most useful quality-control measure would be one that promotes the transparency of any expert data (and associated scientific methods) that are included in an *amicus curiae* brief.<sup>162</sup> Perhaps the easiest way to accomplish this would be to require that *amicus curiae* briefs that present scientific, technical, or other expert information include a reliable source for the data and

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157. *Id.* at 390.

158. *Id.* at 390, 406.

159. *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

160. *Id.* Along similar lines, Professor Larsen suggests that one possible approach is to require the Supreme Court to address opposing factual claims in its written opinions. *See* Larsen, *supra* note 26, at 1815–16 (discussing benefits of requiring the Court to respond to significant counter evidence in its written opinions). Professor Larsen states:

[T]his rule would require the Justices to acknowledge and explain away competing authorities for factual claims that may be dispositive to their decision. The point of the rule would be to push back on the natural tendency to cherry-pick the factual authorities that help an argument and ignore the inconvenient ones that do not.

*Id.* at 1816.

161. *See* Larsen, *supra* note 26, at 1809–16 (discussing several approaches for regulating *amicus curiae* brief quality, such as limiting the number and scope of expert witnesses, requiring transparent data and methodology, and requiring party responses to meaningfully counter evidence).

162. *See id.* at 1811–12 (suggesting that the Supreme Court could refuse *amicus curiae* briefs that contain factual claims based on self-funded data or require publicly accessible data).

a clear description of the methods used to obtain the data.<sup>163</sup> In other words, courts could apply a *Daubert*-type analysis to *amicus curiae* briefs that include expert information.<sup>164</sup> The goal of the *Daubert* admissibility standard is to prevent courts from relying on invalid and unreliable science when deciding the merits of a case.<sup>165</sup> That goal seems just as appropriate when courts are reviewing expert information included in an *amicus curiae* brief to decide the merits of a case, determine whether to accept a case for appellate review, or examine whether a lower court reached an appropriate legal decision in appellate proceedings.<sup>166</sup>

Because *amicus curiae* briefs are not considered evidence, they conveniently avoid the judicial scrutiny that would normally attach to expert evidence.<sup>167</sup> But it arguably makes little sense to require expert evidence presented at trial to be heavily scrutinized via application of a rigorous admissibility standard, such as *Daubert*, while expert evidence (even if it is the same expert evidence that could have been presented during the trial) can be included in an *amicus curiae* brief with no check on the validity, reliability, or utility of the expert information. The double maxim stated by prominent legal scholar Karl Llewellyn seems apt: “[T]he rule follows where its reason leads; where the reason stops, there stops the rule.”<sup>168</sup>

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163. *Id.* at 1811. Professor Larsen suggested: “[T]he Court could decline to accept any amicus brief filed with factual claims that are not backed up with an explanation of the methods used to discover them.” *Id.*

164. *See id.* (suggesting that requiring transparency in terms of scientific data and the accompanying methods used to obtain those data are consistent with the spirit of *Daubert*).

165. *Id.*; *see also* *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593–94 (1993) (outlining criteria that can be applied by trial court judges when determining the admissibility of proffered expert evidence); Fournier, *supra* note 113, at 308–10 (discussing the utility of the four *Daubert* criteria in preventing courts from relying on inadequate science and limiting the introduction of junk science).

166. *See* Simms, *supra* note 7, at 3 (stating that *amicus curiae* briefs “run afoul” of traditional admissibility standards for expert information and function as a “backdoor attempt to avoid the gate”).

167. *See, e.g.*, Anderson, *supra* note 16, at 361–62 (noting that these nonparty *amicus curiae* advocates are not subject to the rules of standing or justiciability); Rustad & Koenig, *supra* note 7, at 95 (suggesting that *amicus curiae* being subject to lower levels of procedural review than expert evidence harms judicial decision-making); Simms, *supra* note 7, at 1 (stating *amicus curiae* briefs bypass “almost every other norm or rule regarding the use of evidence at trial or on appeal”).

168. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 174 (11th prtng. 2008).

Requiring the following of *amici* would provide a measure of quality control that would permit courts to have more confidence in the expert information included in *amicus curiae* briefs: (a) identify the sources of any data included in the brief (i.e., include citations), (b) include only publicly available and preferably peer-reviewed data, (c) describe the scientific methods used to obtain the data, (d) describe whether the methods used to obtain the data and the resulting scientific findings are generally accepted in the relevant field (i.e., provide field-specific context for the science and findings), (e) disclose any ghostwriting,<sup>169</sup> and (f) disclose any funding sources for the studies described in the *amicus curiae* brief (or for the brief itself).<sup>170</sup> Such a transparent approach would be consistent with the heightened requirements for experts outlined in FRE 702<sup>171</sup> and the rigorous admissibility standard for expert evidence articulated by the Supreme Court in *Daubert*.<sup>172</sup>

#### 4. *Subjecting amicus curiae briefs to adversarial procedures*

Several legal scholars have raised the important point that *amicus curiae* briefs are not subject to the type of adversarial check that normally attaches to expert information considered by a court.<sup>173</sup> Without this check, there is a fundamental concern that the expert information included in *amicus curiae* briefs may be unchallenged by

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169. See Anderson, *supra* note 16, at 413 (discussing various disclosures, including ghostwriting, for those who submit *amicus curiae* briefs).

170. *Id.* With respect to the “dark-money” funding of *amicus curiae* briefs, Senator Sheldon Whitehouse stated: “But the emergence of coordinated, secretly funded amicus campaigns . . . reflects a troubling avenue of special-interest influence within the courts, obscuring from both the public and the Court who is really in the courthouse presenting arguments and how a favorable ruling might benefit them.” Whitehouse, *supra* note 30, at 152. Senator Whitehouse argued that existing disclosure rules for *amicus curiae* briefs, including provisions in Supreme Court Rule 37 and Federal Rule of Appellate Procedure 29, are not adequate. See *id.* at 158–65 (discussing “shortcomings” of existing disclosure rules).

171. See FED. R. EVID. 702 (articulating heightened admissibility standards for experts).

172. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593–94 (1993) (outlining criteria that can be applied by trial court judges when determining the admissibility of proffered expert evidence); Larsen, *supra* note 26, at 1809–10.

173. See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 37 (2011) (“[T]here has been no effort to square the Court’s reliance on amicus briefs with its purported commitment to an adversarial system of justice.”); Larsen, *supra* note 26, at 1800–02 (noting absence of any adversarial check on the content of *amicus curiae* briefs).

the party against whose legal interests the brief was filed. To be clear, Supreme Court Rule 37 provides a mechanism for a party to respond to an *amicus curiae* brief if the brief is adverse to the party's interest.<sup>174</sup> Some scholars have noted that only a small proportion of factual assertions made in *amicus curiae* briefs submitted to the Supreme Court are ever contested by the parties.<sup>175</sup> The lack of contest suggests the absence of any meaningful adversarial check on the content of *amicus curiae* briefs.<sup>176</sup> As succinctly stated by Professor Larsen: "The low rate of response for these claims (among parties and other amici) indicates that the adversarial system is not functioning as the sort of safety net we assume it will be. Indeed, it is catching virtually nothing."<sup>177</sup>

The timing of when *amicus curiae* briefs are submitted to the Supreme Court perhaps partially explains why there are so few adversarial challenges to the factual assertions made in those briefs.<sup>178</sup> *Amicus curiae* briefs are submitted at the "eleventh hour of litigation—after the record is closed and after the experts have been called."<sup>179</sup> As such, parties have limited options to challenge *amicus curiae* briefs;<sup>180</sup> for example, there is no opportunity to call rebuttal witnesses or cross-examine the experts who provided the expert information included in the *amicus curiae* brief. In essence, the only option for parties who wish to challenge an adverse *amicus curiae* brief is to challenge the factual assertions in a reply brief.<sup>181</sup> Pursuant to Supreme Court Rule 37(3)(a), at the merits stage, *amicus curiae* briefs must be filed within seven days of the filing of the merits brief by the party it supports (or within seven days after the time allowed for filing the petitioner's or appellant's brief if the *amicus curiae* brief does not support either party), and then the other party can choose whether to respond to any assertions made

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174. SUP. CT. R. 37(3)(a); *see also* Larsen, *supra* note 26, at 1800 (discussing court rules for responding to *amicus curiae* briefs).

175. *See* Larsen, *supra* note 26, at 1801 (expressing concern over how uncontested *amicus curiae* briefs fail to provide a safety net as the last available adversarial check).

176. *See id.* (highlighting Supreme Court opinions' reliance on facts derived from *amicus curiae* briefs despite the absence of any meaningful adversarial check on the factual content of the briefs).

177. *Id.*

178. *Id.*

179. *Id.*

180. *See id.* at 1800–02 (discussing limited ways in which parties can challenge factual and other assertions made in *amicus curiae* briefs).

181. *See id.* at 1801 ("The only check the adversarial system has left to perform is in the Supreme Court briefing.").

in the *amicus curiae* brief in its reply brief.<sup>182</sup> However, as previously noted, very few *amicus curiae* briefs submitted to the Supreme Court are ever contested.<sup>183</sup>

Several changes could amplify the adversarial check on *amicus curiae* briefs. For example, loosening the time limit to submit reply briefs and any word limits<sup>184</sup> attached to those briefs may provide a more meaningful opportunity for parties to respond to *amicus curiae* briefs that contain inaccurate, misstated, or mischaracterized expert information, thus enhancing the adversarial check on *amicus curiae* briefs that contain expert information. A more ambitious proposal would be to change the rules surrounding who has standing (and therefore who can be a party to the litigation) so that individuals and entities who submit *amicus curiae* briefs could contribute their expertise to the court and, importantly, be subject to the rules of evidence and the broader adversarial process.<sup>185</sup> Standing is a court-conceived doctrine,<sup>186</sup> which means courts can change the rules; this would seem to be justified if it enhances the adversarial response to *amicus curiae* briefs that may include shaky expert information. Rather than introducing expert information via *amicus curiae* briefs at the appellate

182. SUP. CT. R. 37(3)(a).

183. See Larsen, *supra* note 26, at 1801 (noting that only a small proportion of *amicus curiae* briefs submitted to the Supreme Court are contested by the opposing party). In her research, Professor Larsen found that of 124 Supreme Court citations to *amicus curiae* briefs (for factual claims) over a five-year period, only thirty-five (28%) were contested in the briefs by either party and only thirty-three (25%) were contested by another *amicus curiae* brief. *Id.* Professor Larsen also described a “strategic bind” faced by parties who are confronted with an *amicus curiae* brief that is unfavorable to their legal interests, perhaps through the inclusion of, for example, inaccurate or mischaracterized expert information. *Id.* Although there may be a desire to rebut the expert information in a reply brief, attorneys may have limited available space in briefs and a limited time to respond, and they also need to strategically decide whether it makes sense to draw attention to an *amicus curiae* brief that may not even attract the court’s attention. *Id.*

184. SUP. CT. R. 33(1)(g). *Amicus curiae* briefs submitted to the Supreme Court are limited to 9,000 words, while party briefs are limited to 13,000 words. *Id.* In federal appellate courts, *amicus curiae* briefs can be no longer than one-half the length limit for a party’s brief on the merits. FED. R. APP. P. 29(d).

185. See Gorod, *supra* note 173, at 70 (discussing how rules regarding standing can be used to subject *amicus curiae* briefs to adversarial checks); Simms, *supra* note 7, at 3–4 (highlighting that the right to cross-examination is a fundamental aspect of the adversarial legal system in the United States).

186. See Gorod, *supra* note 173, at 70 (noting how most commentators agree that standing is rooted in private actions and has spread to “public actions” despite its lack of constitutional foundation).

stage of legal proceedings, one commentator noted that it “would be far better to bring those organizations and individuals with relevant facts into the process at the trial court stage, when the information they have to offer can be subjected to some form of scrutiny and testing.”<sup>187</sup> A benefit of this approach would be that “the trial court can have a meaningful opportunity to be the first real factfinder—as it is supposed to be—and the appellate court can look to the record the trial court developed for all of the facts that are relevant to the case.”<sup>188</sup>

#### CONCLUSION

*Amici curiae* have a long history in both Europe and the United States. When used properly, *amicus curiae* briefs provide an important opportunity for non-parties to a case to assist the court in making a better-informed decision by providing objective and useful information. Despite their potential utility, the use of *amicus curiae* briefs has generated some concerns, including that they provide needless repetition of legal arguments and are being used primarily as an advocacy or lobbying tool.

This Article focused on a different concern that has received less consideration—that *amicus curiae* briefs often include expert information that skirts the safeguards expert evidence must typically comply with at trial, thus increasing the potential that these briefs will function more like *inimicus curiae* briefs and not be helpful to the court. Given the increasing complexity of court cases, the staggering increase in the frequency with which *amicus curiae* briefs are being submitted, and the documented persuasiveness of *amicus curiae* briefs on judicial decision-making, the lack of meaningful regulation and judicial scrutiny of *amicus curiae* briefs is a concern that is long overdue to be addressed. Hopefully, the potential solutions identified in this Article will further the important dialogue on *amicus curiae* briefs and their appropriate role in the U.S. legal system.

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187. *Id.*

188. *Id.*