Friends of the Circuits: Interest Group Influence on Decision Making in the U.S. Courts of Appeals*

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Objective. Though there is an extensive literature focused on the participation and efficacy of interest group amici curiae in the U.S. Supreme Court, there is little rigorous analysis of amici curiae in the U.S. Courts of Appeals. Here, we systematically analyze the influence of amicus curiae briefs on U.S. Court of Appeals decision making to provide insights regarding both judicial decision making and the efficacy of interest groups. *Methods.* We use a probit model to capture influences on appellant success in the courts of appeals from 1997–2002. *Results.* We find that amicus briefs filed in support of the appellant enhance the likelihood of that litigant's probability of success, but that amicus briefs filed in support of the appellee have no effect on litigation outcomes. *Conclusion.* Amici can help level the playing field between appellants and appellees by serving to counter the propensity to affirm in the U.S. Courts of Appeals.

Interest groups are everywhere in U.S. politics (Bentley, 1908) and they are armed with a plethora of tools for the pursuit of their goals in a host of venues. They are, to borrow from Schattschneider (1960), ready, willing, and able to redefine the scope of the conflict as necessary in furtherance of their objectives. Notwithstanding the image and the myth of the judiciary as

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above the common political fray, interest groups are no strangers to the courts (Kearney and Merrill, 2000). In the judicial arena, groups seek to create conditions conducive to the achievement of their goals by influencing the selection of judges (Bell, 2009), and further attempt to secure favorable outcomes through planned litigation (Wasby, 1995) and the submission of amicus curiae briefs arguing for particular outcomes and legal rules (Collins, 2008a). Though each of these mechanisms of participation in the courts has its appeal, amicus curiae briefs are the most commonly used interest group[1] tool in the judicial setting.

As scholars have documented, amicus curiae participation in the U.S. Supreme Court is omnipresent, with almost every case in recent terms guaranteed to have at least one amicus brief (Collins, 2008a:47; Epstein et al., 2003:Table 7-25). As scholars have also demonstrated, amicus curiae briefs are not merely vehicles for the communication of neutral information to the courts by third parties, but are put to work for the purposes of advocacy and persuasion (e.g., Banner, 2003; Krislov, 1963). Unfortunately, however, what we currently know about amici curiae is almost entirely limited to the context of the U.S. Supreme Court (but see, e.g., Comparato, 2003; Songer, Kuersten, and Kaheny, 2000). In this article, we set ourselves to the task of contributing to the remediation of this regrettable state of affairs by examining the efficacy of amicus curiae activity in the U.S. Courts of Appeals. We use data available from Kuersten and Haire's (2007) *Update to the Appeals Court Data Base (1997–2002)*, supplemented with original data collected specifically for the task at hand. We are motivated to do so for three reasons.

First, the almost exclusive focus on amici curiae in the U.S. Supreme Court limits the generalizability of our current understanding of interest group litigation strategies and the efficacy of those strategies. To be sure, the U.S. Supreme Court is an extremely significant court for a variety of reasons, not the least of which is the fact that it sits at the zenith of the U.S. judicial system. But the uniqueness of the nation's highest court is a nontrivial and stubborn threat to the external validity of studies based solely on it. More generally:

> [W]hile studies of single courts, such as the United States Supreme Court, are enormously important in their own right and are appropriate for developing theories of particular institutions, case studies necessarily generate a body of findings and theories that are highly circumscribed by time and place. (Hall and Brace, 1999:281)

[1]The term "interest group" encompasses "the wide variety of organizations that seek joint ends through political action" (Schlozman and Tierney, 1986:11). This includes, for example, public interest law firms, governments, trade associations, businesses, and educational institutions, as well as ad hoc organizations such as the group of scientists who, in *Selman v. Cobb County School District* (11th Cir. 2006), filed a brief in support of the school district's policy of placing a sticker inside certain science textbooks identifying evolution as a theory rather than a fact.

Without examining interest groups in courts other than the U.S. Supreme Court, we have no way of assessing the generalizability of the findings that have emerged from analyses of interest groups in that august court.

Second, while it is true that, in percentage terms, there is more amicus curiae participation in the U.S. Supreme Court than in the U.S. Courts of Appeals, in raw numbers much more amicus curiae participation occurs in the latter compared to the former. In fact, in recent years, the number of circuit court cases with amicus activity has exceeded the total number of cases (with or without amicus activity) heard by the Supreme Court (Harrington, 2005; Martinek, 2006). Hence, we cannot claim to understand amicus curiae activity without understanding amicus curiae activity in the U.S. Courts of Appeals.

And, third, while the scholarship devoted to unraveling and understanding what were previously "among the least comprehended of major federal institutions" (Howard, 1981:xvii) has flourished in recent years, there are lingering aspects of decision making in the U.S. Courts of Appeals "about which we remain stubbornly and conspicuously uninformed" (Martinek, 2006:804). Amici curiae in the courts of appeals constitute one such deficiency. At worst, amici in the courts of appeals are ignored altogether. At best, amici are "controlled for" in empirical analyses of decision making.[2] Accordingly, filling at least some of the gaps in our knowledge with regard to amici will simultaneously contribute to extending our understanding of these most important of U.S. appellate courts.

This article proceeds as follows. First, we provide some requisite background about amicus curiae participation in the U.S. Courts of Appeals. Next, we develop a theory of amicus influence on litigation success in these courts based on the lobbying-as-persuasion framework familiar to examinations of interest group influence in Congress (e.g., Wright, 2003). In particular, we argue that the greater the number of amicus curiae briefs in support of a litigant, the more likely it is for that litigant to prevail because amicus curiae briefs are used as tools of advocacy and provide additional argumentation beyond what direct litigants can include in their legal briefs.[3] Drawing on the relevant extant literature, we then develop a model with which to evaluate the ability of amici to influence case outcomes. Finally, we

[2]The exceptions include a study by McIntosh and Parker (1986) comparing group participation in the U.S. Supreme Court with that in the U.S. Courts of Appeals, an analysis by Martinek (2006) investigating the dynamics underlying the pattern of amicus participation in those courts, and a recent unpublished paper evaluating interest group success in the circuit courts (Sarver, n.d.).

[3]We readily acknowledge that numerous scholars have considered the presence of amici as a measure of case salience rather than as a substantive influence on judicial decision making (e.g., Hettinger, Lindquist, and Martinek, 2006). The validity of amicus participation as a measure of salience, however, is a premise with which some have taken vigorous issue (Collins, 2008b). If amici do serve as signals to judges to pay greater attention to a case (i.e., serve as a marker of the salience of a case), that does not preclude them from influencing the decisions rendered. Our focus here is on assessing the latter rather than the former.

subject our model to empirical verification and offer some thoughts about what our empirical results suggest about the efficacy of interest groups in the U.S. Courts of Appeals, as well as that of the lobbying-as-persuasion framework more generally.

Amici Curiae in the U.S. Courts of Appeals

The U.S. Courts of Appeals constitute the major intermediate appellate courts in the federal judicial hierarchy. Arranged geographically, the 11 numbered circuits, plus the U.S. Court of Appeals for the D.C. Circuit, process the overwhelming majority of appeals in the federal system. Though the U.S. Courts of Appeals are formally subservient to the U.S. Supreme Court, the anemic number of cases processed by the nation's high court each term represents a tiny proportion of all appeals.[4] This makes the U.S. Courts of Appeals—and not the U.S. Supreme Court—the courts of last resort for virtually all federal appeals (Martinek, 2009).

The Federal Rules of Appellate Procedure govern the participation of amici curiae in the U.S. Courts of Appeals. With some minor variations, formal requirements with regard to the timing, format, and content of amicus briefs are generally consistent both across the circuits and in comparison to the U.S. Supreme Court. Historically, the rate of participation by amici in the U.S. Courts of Appeals has grown from under 2 percent in the 1920s to over 6 percent in the 1990s (Martinek, 2006:807). This rate of participation positively pales in comparison to the rate of such participation in the Supreme Court (Collins, 2008a:47). But, as noted earlier, in terms of raw numbers, the amount of amicus activity in the circuit courts far exceeds that in the Supreme Court every year.

Data available for the 1997–2002 period from Kuersten and Haire's (2007) *Update to the Appeals Court Data Base*, which includes a sample of cases by circuit and year, supplemented with data gathered from Westlaw and PACER,[5] provide a window into the distribution of amicus activity between litigants and across issue areas. More cases involve amicus curiae participation on behalf of the appellant than on behalf of the appellee in both absolute and percentage terms. In absolute terms, the greatest amount of amicus activity occurs in cases involving economic activity and regulation (e.g., appeals related to local, state, or federal taxation). In percentage terms, however, appellees enjoy the greatest amici support in cases having to do

[4]As a point of comparison, consider that the U.S. Supreme Court disposed of a mere 78 cases with either a per curiam or full opinion in the 2006 term (Administrative Office of the U.S. Courts, 2007:Table A-1), while the U.S. Courts of Appeals disposed of 31,717 cases on the merits in the 12-month period ending September 30, 2007 (Administrative Office of the U.S. Courts, 2007:Table B-1).

[5]Westlaw is an online legal research source, while PACER refers to the Administrative Office of the U.S. Courts' Public Access to Court Electronic Records database.

TABLE 1

Percentage of Cases with at Least One Amicus Curiae Brief in the U.S. Courts of Appeals by Issue Area and Litigant, 1997–2002

	For Appellant	For Appellee
Criminal	1.1% (8)	0.4% (3)
Civil rights	7.0% (27)	4.6% (18)
First Amendment	17.0% (10)	13.6% (8)
Due process	11.4% (5)	2.3% (1)
Privacy	5.9% (1)	23.5% (4)
Labor relations	7.4% (10)	8.2% (11)
Economic activity & regulation	5.4% (40)	4.2% (31)
Total	4.8% (101)	3.6% (76)

NOTE: Entries in parentheses indicate number of cases with at least one amicus curiae brief. The sample of cases on which this table is based was taken from Kuersten and Haire (2007). We relied on information in Kuersten and Haire (2007) to code the issue areas. The data on the litigants supported by the amicus curiae briefs were collected by the authors on the basis of information obtained from Westlaw and PACER.

with privacy (e.g., abortion rights, mandatory drug testing), while appellants receive the most amici support in cases raising First Amendment issues (e.g., free speech, the establishment of religion). Not surprising given their routine nature and the paucity of substantial legal issues raised (Howard, 1981; Songer, Sheehan, and Haire, 1999), criminal cases (e.g., appeals of conviction, habeas corpus petitions) attract the least amicus curiae attention, whether on behalf of appellants or appellees (Table 1).

Some empirical investigations of the choices circuit court judges make and the outcomes of court of appeals cases consider the presence of amici as a control variable (e.g., Hettinger, Lindquist, and Martinek, 2006:Ch. 5). However, the only recent systematic study of amicus curiae activity in the U.S. Courts of Appeals is the analysis by Martinek (2006). In that study, Martinek developed a model of amicus curiae participation in the courts of appeals derived from a consideration of the goals of potential amici; that is, to secure legal policy favorable to the group submitting the amicus brief. She found that those cases that are better policy-making vehicles (e.g., en banc cases, cases involving judicial review, and cases in which the litigants are represented by counsel rather than pro se) are more likely to garner amicus participation. ''The question remains, however, as to their success in that regard,'' that is, in securing favorable outcomes (Martinek, 2006:818).

Since, with rare exceptions, amici specify the litigant (appellant or appellee) for whom they are filing in support, here we analyze the factors that structure the likelihood of the appellant (vs. the appellee) winning. We argue that amicus briefs supporting a litigant will increase that litigant's probability of success because the amici provide the court of appeals panel with

persuasive argumentation advocating for that litigant's position (e.g., Collins, 2008a; Kearney and Merrill, 2000). In other words, amici are not unbiased providers of information, but tailor the content of their briefs to support the party on whose side they are filing.

Though there are notable differences between legislators and judges, this perspective on amicus influence is analogous to that taken by scholars studying interest group interactions with members of Congress from the perspective of lobbying as persuasion (e.g., Wright, 2003). The lobbying-as-persuasion framework directs attention to interest groups' provision of persuasive information to legislators regarding the public policy implications of their positions, tying those positions to legislators' reelection goals. Obviously, court of appeals judges lack reelection goals, given their constitutionally mandated lifetime appointments, but judges, like legislators, remain open to persuasion. Whereas interest groups attempt to persuade legislators via the provision of information that bears on their reelection prospects, they attempt to persuade judges via the provision of information that maximizes judges' ability to create effective law and policy. The information provided, however, is selected to support the preferred outcome of the interest group.

Because the parties to a case are constrained by page limitations in terms of the number of arguments they are able to advance, the addition of outside support—in the form of amicus curiae briefs—provides the decision-making panel with supplemental argumentation supporting a particular outcome in the case (Tigar and Tigar, 1999). Given that the persuasion forwarded by amici typically presents the panel with novel perspectives on the economic, legal, and social implications of the case (e.g., Coleman, 2003; Collins, 2008a:63–71; Spriggs and Wahlbeck, 1997), we expect that court of appeals judges, in their capacities as both legal and political actors, will be especially receptive to the information provided by the amici. For example, Coleman notes that:

> Trade organizations, for instance, can provide the court with a factual context not provided by the record, conveying the commercial consequences of the case's possible dispositions. Similarly, government and public-interest organizations with expertise in a particular field of law can contextualize a case for the court, describing the broader impact of the case on the legal system. (2003:3)

Moreover, even when the amici reiterate the arguments presented by the party they support, this information can still be useful to judges in that it signals broad support for the validity of that argumentation, corroborating the credibility of a line of legal reasoning (Spriggs and Wahlbeck, 1997:369).

United States v. Dickerson (4th Cir. 1999) provides an excellent illustration of how amici can provide information beyond that provided by the direct parties to a case. In *Dickerson*, the Washington Legal Foundation

(WLF), joined by the Safe Streets Coalition, argued that a confession, suppressed as a violation of *Miranda v. Arizona* (1966) by the District Court for the Eastern District of Virginia, was permissible under 18 U.S.C.S. § 3501. This statute, enacted as an attempt to legislatively limit the application of *Miranda*, provides that voluntary confessions are admissible in a court of law, notwithstanding possible violations of a defendant's rights under *Miranda*. Significantly, the government not only failed to address the application of 18 U.S.C.S. § 3501, but refused to do so. Attesting to the importance of the amicus brief filed by WLF, the court's majority endorsed WLF's position in that case. Indeed, the majority's reliance on the WLF's amicus brief so exasperated Judge M. Blane Michael that he chastised the court's majority, in an opinion concurring in part and dissenting in part from the majority's judgment, for applying 18 U.S.C.S. § 3501 on the ground that it was not addressed by the parties to the litigation, but only brought up in an amicus brief.

Moreover, *Dickerson* illustrates that, far from being neutral third parties, amici act as adversarial actors (e.g., Krislov, 1963), urging the courts to rule in favor of one party over another. This role of amici in persuading judges to rule in favor of a particular litigant is consistent with comments made by then Third Circuit Court of Appeals Judge (now Justice) Samuel Alito in *Neonatology Associates v. Commissioner of Internal Revenue* (2002) regarding the value of amicus briefs.

> [T]he fundamental assumption of our adversary system [is] that strong (but fair) advocacy on behalf of opposing views promotes sound decision making. Thus, an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend. (293 F.3d 128, at 131)

In short, amici provide information to the courts. But, the information that is provided is carefully selected to support a particular litigant. Accordingly, we expect that the number of amicus briefs supporting a litigant will enhance that litigant's chances of obtaining a favorable outcome, consistent with a voluminous literature that examines the influence of amici curiae in the Supreme Court (e.g., Collins, 2004, 2008a; Kearney and Merrill, 2000; McGuire, 1995; Nicholson-Crotty, 2007).

Data and Methodology

To empirically test whether amicus curiae briefs shape decision making on the U.S. Courts of Appeals, we begin with the sample of all cases from 1997 to 2002—with and without amicus curiae participation—available from Kuersten and Haire's (2007) *Update to the Appeals Court Data Base (1997–2002)*. Like the original Songer (2007) database, this data set contains a random sample of 30 cases per year from each of the courts of appeals,

excluding the Federal Circuit.[6] We include cases decided by three-judge panels and those decided en banc.[7] Our dependent variable measures the appellant party's success, scored 1 if the court of appeals panel ruled in favor of the appellant and 0 if the panel ruled in favor of the appellee.[8] Given the dichotomous nature of the dependent variable, we estimate the model of appellant success using probit (Long, 1997). To control for circuit-level and temporal effects, we employ robust standard errors, clustered on circuit year (e.g., Hettinger, Lindquist, and Martinek, 2006:109).[9]

To obtain data on the positions taken in court of appeals amicus briefs, we examined all cases in which Kuersten and Haire (2007) indicated an amicus brief was filed. We then used Westlaw and PACER to identify whether each amicus brief supported the appellant or the appellee, neither party, or took a position that was indeterminable.[10] Of the 235 amicus briefs in our data set, we were able to identify the position taken in 88.1 percent of them. We excluded the 11.9 percent of amicus briefs in which the amici did not support either the appellant or the appellee and those briefs in which we were unable to identify the position taken by the

[6]The U.S. Court of Appeals for the Federal Circuit is a unique entity that differs from the other courts of appeals in numerous substantive ways that make it inappropriate to include with the other circuits in this analysis. Most notably, unlike the other courts of appeals, the Federal Circuit has a nationwide jurisdiction and is charged with hearing appeals in a variety of very specialized cases, including appeals from the U.S. Court of Federal Claims, U.S. Court of International Trade, and U.S. Court of Appeals for Veterans Claims.

[7]En banc cases make up 1.4 percent of our data. We obtain substantively identical empirical results to those reported below when we exclude en banc panels from our model. Although amicus briefs can be filed in connection with petitions for rehearing a case en banc, no such rehearing petitions appear in our data.

[8]More specifically, the dependent variable is scored 1 if the TREATMENT variable in Kuersten and Haire (2007) is equal to 0, 2, 3, 4, or 7 (i.e., if the stay, petition, or motion was granted; if the lower court decision was modified and remanded; remanded; reversed; reversed and remanded; reversed and vacated; set aside and remanded; vacated; or vacated and remanded). The dependent variable is scored 0 if the TREATMENT variable is equal to 1, 8, or 11 (i.e., if the petition was denied; the appeal was dismissed; if the lower court decision was affirmed; or affirmed, vacated (with no mention of reversal), and remanded). Because mixed outcomes result in a partial victory for both the appellant and the appellee (e.g., Lindquist, Martinek, and Hettinger, 2007), we exclude cases in which the TREATMENT variable is equal to 5 or 6 (i.e., those cases in which the lower court decision was affirmed in part and reversed in part; affirmed in part, reversed in part, and remanded; or affirmed in part, vacated in part, and remanded). We also exclude those instances in which the case was certified to another court and those in which the outcome was not ascertained, as neither of these outcomes is indicative of appellant or appellee success. Finally, we exclude cases in which the ideological direction of the decision (i.e., conservative or liberal) was indeterminable as this variable is utilized to measure the appellant's ideological congruence with the court of appeals panel (as discussed below).

[9]We also estimated our model using fixed effects for the circuits. The results are substantively unchanged from those reported below.

[10]As Kuersten and Haire note in the documentation accompanying their data, the information about amicus participation that they include is frequently incomplete because of the often limited information about amici included in the *Federal Reporter*, Lexis-Nexis, and Westlaw, which are the primary sources on which they relied for collecting that information.

amici.[11] This percentage of excluded amicus briefs compares quite favorably to the 18 percent of excluded amicus briefs (i.e., those briefs in which the position was unable to be determined) common to studies that examine the influence of amici curiae on the U.S. Supreme Court (e.g., Collins, 2008a; Kearney and Merrill, 2000). The final sample relied on for the analyses presented here includes all cases from Kuersten and Haire (2007) without amicus curiae participation and all cases from Kuersten and Haire (2007) with amicus curiae participation for which we were able to identify the position taken by the amici.

To investigate whether amicus briefs influence the likelihood of appellant success in the courts of appeals, we created two variables. APPELLANT AMICUS BRIEFS is composed of the number of amicus briefs filed supporting the appellant. Similarly, APPELLEE AMICUS BRIEFS constitutes the number of amicus briefs filed supporting the appellee.[12] We expect the former variable will be positively signed, indicating that the appellant's likelihood of success increases when that litigant is supported by a greater number of amicus curiae briefs. Conversely, we expect the latter variable will be negatively signed, indicating a decreased probability of appellant success when the appellee is supported by a greater number of amicus briefs.

Our primary purpose is to examine the influence of amicus curiae briefs on decision making in the courts of appeals; however, it is necessary to control for a variety of other factors that influence appellant success. Past research has established that the resources available to a litigant can play a major role in litigation success since high-resource parties are privy to vast litigation resources, allowing them access to the best attorneys and the ability to perform extensive legal research (e.g., Galanter, 1974; Songer, Sheehan, and Haire, 1999). To capture litigant resources, we include a series of dichotomous variables in the model that account for the identities of the appellants and appellees, based on the following categories of litigants: businesses (BUSINESS APPELLANT, BUSINESS APPELLEE), local governments (LOCAL GOVERNMENT APPELLANT, LOCAL GOVERNMENT APPELLEE), state governments (STATE GOVERNMENT APPELLANT, STATE GOVERNMENT APPELLEE), the federal government (FEDERAL GOVERNMENT APPELLANT, FEDERAL GOVERNMENT APPELLEE), and miscellaneous litigants (i.e., parties not fitting into the aforementioned litigant typologies) (MISCELLANEOUS APPELLANT, MISCELLANEOUS APPELLEE). The reference category for the variables corresponding to the identity of the appellants is individual appellants and the excluded category for the variables corresponding to the identity of the appellees is individual appellees.

[11]For an example of an amicus curiae brief that supports neither party, see the amicus brief of the Public Employment Relations Commission in *Kelly v. Borough of Sayreville* (3d Cir. 1997).

[12]We also estimated our model including a variable composed of the number of amicus briefs in which we could not ascertain the position taken by the amici. That variable failed to achieve statistical significance.

We are also cognizant of the fact that the appellant's ideological compatibility with the court of appeals panel can potentially influence that panel's decision making. That is, all else equal, we expect that panel decision making will be heavily influenced by the ideological proclivities of the judges serving on the panel (e.g., Giles, Hettinger, and Peppers, 2001; Hettinger, Lindquist, and Martinek, 2006; Songer, Sheehan, and Haire, 1999). To measure the ideology of each judge on the decision-making panel, we use the Giles, Hettinger, and Peppers (2001) scores, which allow us to capture the dynamics of the federal judicial selection process. In the absence of senatorial courtesy (i.e., when the home state senators do not share the president's party affiliation),[13] each judge is assigned the nominating president's Common Space score (Poole, 1998).[14] If one senator from the judge's home state delegation is a member of the president's political party, that judge takes on that senator's ideal point score at the time of the judge's ascent to the bench. If both home state senators share the party affiliation of the president, that judge takes on the mean value of the two senators' Common Space scores at the time of the judge's nomination to the courts of appeals. The ideologies of district court judges serving by designation on the U.S. Courts of Appeals are calculated using this same method. Judges serving on the District of Columbia Circuit are given the ideal point score of the president who appointed them, as are judges temporarily serving on court of appeals panels from the Federal Circuit, International Court of Trade, and federal district courts located in U.S. territories and possessions.

To then capture the appellant's ideological compatibility with the court of appeals panel, we adopted the method developed by Johnson, Wahlbeck, and Spriggs (2006). If the appellant advocates for a conservative outcome, this variable is the ideology score of the median panel judge multiplied by +1. If the appellant advocates for a liberal disposition, this variable is the median panel judge's ideal point multiplied by -1.[15] Since positive ideal point scores are assigned to more conservative judges, and negative scores correspond to more liberal judges, higher values reflect increased proximity to the median judge on the court of appeals panel. Accordingly, we expect the APPELLANT IDEOLOGICAL CONGRUENCE variable will be positively signed.

[13]Senatorial courtesy is the norm under which a president will consult with home state senators if they are members of his party when deciding on nominees for the lower federal courts. This norm is most pronounced for the selection of nominees for the U.S. district courts, each of which falls within the confines of a particular state's geographic boundaries. But, it is also at play in the selection of nominees for the U.S. Courts of Appeals, each of which covers more than one state, because seats on each circuit traditionally "belong to" particular states.

[14]Common Space scores use information from roll-call votes in Congress to array congresspersons along ideological dimensions. Using a bridging technique, scholars have also developed Common Space scores for presidents that locate them, as the name suggests, on a common ideological dimension.

[15]As a check on the robustness of our findings, we estimated models using the mean ideology of the panel, as well as the sum of the panel members' ideologies, the results of which are consistent with those reported below.

TABLE 2

Summary Statistics

Variable	Mean	Mode	*SD*	Min.	Max.
Appellant success	0.293	0	0.455	0	1
Appellant amicus briefs	0.065	0	0.357	0	7
Appellee amicus briefs	0.053	0	0.440	0	14
Federal government appellant	0.054	0	0.226	0	1
State government appellant	0.326	0	0.178	0	1
Local government appellant	0.269	0	0.162	0	1
Business appellant	0.218	0	0.218	0	1
Miscellaneous appellant	0.018	0	0.134	0	1
Federal government appellee	0.447	0	0.497	0	1
State government appellee	0.093	0	0.291	0	1
Local government appellee	0.059	0	0.236	0	1
Business appellee	0.245	0	0.430	0	1
Miscellaneous appellee	0.019	0	0.138	0	1
Appellant ideological congruence	−0.028	n/a	0.337	−0.581	0.626
Criminal appellant	0.328	0	0.470	0	1

Our final control variable accounts for the fact that court of appeals panels overwhelmingly affirm criminal cases and thus rule in favor the appellee (e.g., Guthrie and George, 2005; Howard, 1981; Songer, Sheehan, and Haire, 1999). Although criminal cases are of the utmost importance to the individual appellant, such cases generally raise legally inconsequential issues, but nonetheless must be heard as a function of the mandatory docket of the courts of appeals. To capture the propensity to affirm criminal appeals, we include a CRIMINAL APPELLANT variable in the model, scored 1 if the case was a criminal appeal filed by an individual appellant and 0 otherwise. We expect this variable will be negatively signed.[16]

Empirical Results

Summary statistics on the variables included in the model are reported in Table 2. Of particular importance, Table 2 reveals that the average number of amicus briefs filed on behalf of appellants is slightly larger than the average number of amicus briefs supporting appellees, although a t test reveals that the difference of means for these variables fails to achieve statistical significance ($t = 1.26$, $p = 0.104$). This is a noteworthy (non)finding

[16]Sensitive to the unique nature of criminal appeals and the government's advantage in these cases, we also conducted an auxiliary analysis in which we excluded criminal appeals from the sample. The results we obtained from that auxiliary analysis produced results that did not materially differ from those reported below.

in that it suggests that organizations do not file amicus briefs in cases they are favored to win (Collins, 2004:821). If groups strategically choose to file amicus briefs in cases they are likely to win, we would expect the number of amicus briefs supporting the appellee to far outweigh the number of amicus briefs advocating for the appellant, given that the courts of appeals overwhelmingly affirm lower court decisions, ruling in favor of the appellee (Guthrie and George, 2005).

To provide a more substantial basis for this conclusion, we followed Collins (2004:821) by estimating the probit model reported in Table 3 without the amicus variables. We then saved the model's predictions and generated the average number of amicus briefs filed on behalf of predicted winners and losers. The mean number of amicus briefs filed on behalf of predicted winners is 0.039, while the average number of amicus briefs filed on behalf of predicted losers is 0.079. A t test reveals that this difference is significant ($t = 4.17$, $p < 0.001$). To further corroborate these results, we reestimated the model including only those cases in which at least one amicus brief was filed. The average number of amicus briefs supporting predicted winners is 0.590, compared to 1.18 for predicted losers. A t test

TABLE 3

Probit Model of Appellant Success in the U.S. Courts of Appeals, 1997–2002

Predictor	Parameter Estimate	Marginal Effect
Appellant amicus briefs	0.270 (0.108)***	+9.5***
Appellee amicus briefs	−0.028 (0.107)	−0.9
Federal government appellant	0.906 (0.189)***	+34.4***
State government appellant	−0.082 (0.240)	−2.6
Local government appellant	0.257 (0.250)	+9.0
Business appellant	−0.102 (0.119)	−3.2
Miscellaneous appellant	0.158 (0.245)	+5.4
Federal government appellee	−0.365 (0.135)***	−13.0***
State government appellee	−0.266 (0.191)*	−7.9*
Local government appellee	−0.469 (0.207)**	−12.7**
Business appellee	−0.258 (0.147)**	−7.6**
Miscellaneous appellee	−0.310 (0.263)	−9.0
Appellant ideological congruence	0.594 (0.112)***	+6.9***
Criminal appellant	−0.270 (0.117)**	−8.0**
Constant	−0.260 (0.140)**	—
N	1,748	
Wald χ^2	243.7***	
Percent correctly predicted	73.7	
Percent reduction in error	10.2	

*$p < 0.10$; **$p < 0.05$; ***$p < 0.01$ (all tests one-tailed).

NOTES: Dependent variable indicates appellant success (1 = appellant win, 0 = appellee win). Numbers in parentheses report robust standard errors, clustered on circuit year. The reference category for the appellant and appellee variables is individual appellants and individual appellees, respectively.

confirms this difference is statistically significant ($t = 4.47$, $p < 0.001$). As is evident, both tests indicate that interest groups file more amicus briefs on behalf of litigants that are likely to *lose* in the courts of appeals. Thus, taken in tandem with the summary statistics reported for the amicus variables, it is unlikely that groups cherry-pick cases on the basis of their likely success; rather, they appear to participate in those cases they believe can be best used in the pursuit of their legal and policy goals (e.g., Martinek, 2006), regardless of whether the courts of appeals are a priori likely to rule in favor of or against the litigant supported by the amici.

Table 3 reports the results of the probit model that predicts appellant success in the courts of appeals. The model performs quite well, correctly predicting 74 percent of case outcomes, for a percent reduction in error of 10 percent. To facilitate the substantive interpretation of the parameter estimates, Table 3 includes the marginal effects for each variable in the model. The marginal effects were calculated altering the variables of interest from 0 to 1 for dichotomous variables and from the mean to one standard deviation above the mean for continuous and count variables, while holding all other variables at their mean or modal values, as appropriate.

The central variables of interest measure the number of amicus curiae briefs filed for the appellant and the appellee. As Table 3 indicates, we find strong evidence that the number of amicus briefs supporting the appellant increases that litigant's probability of success. However, the number of amicus curiae briefs supporting the appellee does not play a statistically significant role in shaping litigation outcomes in the courts of appeals. In substantive terms, a zero to one increase in the number of amicus briefs filed for the appellant enhances the likelihood of appellant success by 9.5 percent. The minimum to maximum change in this variable (zero to seven) improves the chances of observing the court of appeals panel reverse the lower court decision—that is, ruling in favor of the appellant—by 63 percent, a rather strong effect.

We expected to find that amicus briefs supporting the appellee would increase the probability of appellee success, but the null finding with respect to the APPELLEE AMICUS BRIEFS variable is not entirely surprising in retrospect. That is, because the courts of appeals overwhelmingly affirm lower court rulings (70 percent of the cases in the data correspond to affirmances), this finding suggests that an appellee's probability of success is so high to begin with that the addition of outside persuasion in the form of amicus curiae briefs does not increase the appellee's likelihood of victory. In this sense, the results indicating that only amicus briefs supporting the appellant play a statistically significant role in litigation success are particularly interesting as they suggest that amici supporting the appellant have the ability to level the playing field between the appellant and the appellee. That is, because the vast majority of courts of appeals' decisions result in the affirmance of lower court decisions, it appears that appellant amicus briefs are capable of reducing the prodigious tendency of the courts of appeal to rule in favor of the

appellee. Insofar as litigants might evaluate their probability of victory before appealing their cases (e.g., Songer, Cameron, and Segal, 1995), it is apparent that the ability to procure the outside assistance of friends of courts (e.g., Ennis, 1984:604) can potentially play a major role in persuading a court of appeals panel that the lower court judge erred in his or her application of the law.

This is quite different than the findings from analyses of amicus curiae participation in the U.S. Supreme Court (e.g., Collins, 2004; Kearney and Merrill, 2000). In that venue, though amici are helpful for both appellants and appellees, they are more helpful for appellees than for appellants. This makes a great deal of intuitive sense given that the Supreme Court is more likely to find for the appellant than the appellee, the mirror image of the case for the courts of appeals. In other words, amici at either level of court are less able to enhance preexisting propensities (i.e., to affirm in the courts of appeals, to reverse in the Supreme Court) but can provide meaningful aid and comfort to those usually disadvantaged by those preexisting propensities (i.e., to appellants in the courts of appeals, to appellees in the Supreme Court).

An alternative way to conceptualize the effect of amicus curiae briefs is in terms of a net advantage. Modeling amicus influence in this way has the disadvantage of being unable to distinguish between, for example, situations in which there is one amicus brief for the appellant and zero amicus briefs for the appellee from situations in which there are six amicus briefs for the appellant and five amicus briefs for the appellee. Nevertheless, we reestimated our model using a net appellant advantage variable derived by subtracting the number of amicus briefs for the appellee from the number of amicus briefs for the appellant (results not shown). The net appellate advantage variable is statistically significant in the expected direction; that is, the greater the number of amicus briefs filed for the appellant relative to the number of amicus briefs filed for the appellee, the more likely the appellant is to win, further corroborating the results presented in Table 3.

Turning now to the control variables, our results indicate that party resources are important for understanding litigation success. In particular, we find that when the federal government is the appellant, the appellant's likelihood of success increases by 34 percent compared to when an individual is the appellant. With regard to appellees, our results reveal that the appellee's chances of victory, relative to individual appellees, increase by 13 percent for the federal government and local governments and 8 percent for state governments and businesses. We also find that the appellant's ideological proximity to the court of appeals panel influences litigation outcomes. A one standard deviation increase in the appellant's ideological proximity to the median judge on the panel, bringing the appellant closer to the median judge's ideology, enhances the appellant's likelihood of success by 7 percent. Given the extensive evidence regarding the influence of judicial ideology in the choice judges—including those on the courts of appeals

(e.g., Hettinger, Lindquist, and Martinek, 2006; Songer, Sheehan, and Haire, 2000)—this is hardly surprising.

Finally, and also not surprising, our results indicate that courts of appeals panels are 8 percent less likely to rule in favor of a criminal appellant, as compared to other types of petitioning litigants. Guilty or innocent, criminal appellants generally have very little to lose in appealing and potentially quite a bit to lose in not appealing. Regardless of the magnitude of their potential personal loss, however, criminal appellants are unlikely to bring much to the table when it comes to weighty legal issues, making their appeals the epitome of up-hill (perhaps unwinnable) battles.

Conclusions

Interest groups actively seek to etch their economic, legal, and political preferences into law through the filing of amicus curiae briefs. Extant research into the effectiveness of this strategy overwhelmingly focuses on the U.S. Supreme Court, ignoring the fact that organized interests more frequently file amicus briefs in the U.S. Courts of Appeals. This research investigated the influence of amicus curiae briefs on decision making in the courts of appeals from 1997–2002. Our empirical results indicate that amicus curiae briefs supporting the appellant enhance that litigant's likelihood of success. However, amicus briefs advocating for the appellee do not shape litigation outcomes in the courts of appeals. This suggests that, due to the overwhelming tendency of the courts of appeals to affirm lower court decisions—thus ruling in favor of the appellee—amicus briefs supporting the appellant are capable of leveling the playing field between appellants and appellees.

More broadly, this research corroborates the utility of viewing interest group lobbying as persuasion. Under this perspective, interest groups provide political actors with communication that assists these actors in achieving their goals. In Congress, groups provide information to legislators that aids them in realizing constituent preferences, thus enhancing their reelection prospects (e.g., Wright, 2003; cf. Hall and Deardorff, 2006). In the courts, groups provide information regarding the wide-ranging legal and policy implications of their decisions, thereby increasing judges' ability to create efficacious law and policy (e.g., Collins, 2008a). This information is particularly important for judges in that the law is not necessarily capable of providing objectively correct legal answers to pressing debates regarding law and policy. As such, organizations better enable judges to maximize their legal and policy preferences. Because the information provided by interest groups to judges virtually always advocates for a particular outcome, this enhances the prospects that judges will react to this persuasion by endorsing the outcome argued in a large number of amicus briefs. This suggests that through robust lobbying efforts, interest groups are capable of influencing judges regarding the merits of their particular positions, encouraging judges to consider their positions

more closely and, more importantly, actually endorse those positions. Just as the number of interest groups supporting a particular position is capable of influencing legislative (e.g., Wright, 2003) and bureaucratic decision making (e.g., Yackee and Yackee, 2006), so, too, can the number of interest group amicus curiae briefs shape legal decision making.

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