

DISCOVERING THE TRUTH BEHIND AN AMICUS BRIEF

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ABSTRACT

Although some tend to believe that amici curiae appear only to pontificate on policy ramifications of given decisions, the amicus apparatus has been used to argue facts and even participate in discovery and trials. Such amici curiae have been decried by courts as litigating amici, legal mutants, and amici petitor—friends of plaintiffs. Despite such judicial hostility and the lack of a rule permitting amicus participation in federal district courts, interested organizations and people continue to appear before the courts. Scholarly research, in turn, is focused on normalizing amicus participation, proposing various amendments to the Federal Rules of Civil Procedure to govern amicus briefs. Far less attention has been given, however, to the parties' response to factual allegations in amicus briefs. How can a party prevent an amicus from alleging facts or submitting documents with its briefs? If unsuccessful, can a party obtain document discovery from the amicus to disprove its allegations? As this Article shows, there are methods to oppose amicus participation and obtain discovery from domestic amici. The problem arises when foreign amici curiae are involved. Such individuals and organizations may be insulated from discovery, allowing them to allege facts and provide prejudicial documents to opposing counsel without opening themselves to discovery. As a result, parties may be unable to fairly present their side of the dispute. The objective of this Article is to address this injustice. The Article proposes that Congress pass a rule or a statute allowing for limited discovery—i.e., authorizing parties to subpoena foreign individuals and corporations to obtain discovery regarding facts alleged in the amicus brief.

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I. INTRODUCTION

Imagine that you just filed the best motion to dismiss brief. You discovered a critical flaw in the plaintiffs’ securities fraud complaint – that they failed to allege with particularity your client’s false statement, the reason it is false, and the grounds for the plaintiff’s allegation.¹ Moreover, the plaintiffs failed to allege facts showing that the statements were made intentionally, knowingly, or with reckless disregard as to the statements’ falsehood.² Your client, the president of Righteous, Inc., reads over your brief and is overjoyed at the prospect of dismissal. You giddily file the brief, dreaming of a speedy victory. Fast forward three weeks. You get a notification from PACER that Norwegian Citizens United to Bankrupt Righteous, Inc. just filed an amicus curiae brief opposing the motion to dismiss. You open the amicus brief and see innumerable factual allegations. They claim that the president of Righteous, Inc. sent them an email boasting that he will lie to investors to boost stock prices. They attach affidavits and supplement the complaint to make it appear perfect. Once you recover from shock, you may be thinking: can they do that; and, what do I do now?

1. This is the standard under the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.). *See also* RONALD J. COLOMBO, LAW OF CORPORATE OFFICERS AND DIRECTORS: INDEMNITY AND INSURANCE § 12:70 (2017).

2. This is a requirement of a securities fraud claim under Rule 10b-5. *See* NORA M. JORDAN ET AL., ADVISING PRIVATE FUNDS § 21:10 (2017).

Amicus curiae have existed for millennia in common-law systems, dating back to Roman law.³ Historically, amici were responsible for “oral ‘Shepardizing,’ the bringing up of cases not known to the judges.”⁴ They also would challenge certain proceedings as fraudulent or as collusions between plaintiffs and defendants to foreclose rights of third parties.⁵ Today, however, amici curiae appear as advocates in favor of one party or another, with influential parties “lobbying” the court.⁶ Such advocacy is expressly permitted by the Federal Rules of Appellate Procedure,⁷ U.S. Supreme Court rules,⁸ and various state appellate rules.⁹ In appellate litigation, amici appearances are incredibly common—particularly in the Supreme Court, where the vast majority of cases see an appearance by an amicus curiae.¹⁰ While much ink has been spilled debating the efficacy of amicus practice,¹¹ this issue is not the subject of this Article.

3. Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172, 1176–77 (1953).

4. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 695–97 (1963). *But see generally* Stuart Banner, *The Myth of the Neutral Amicus: American Courts and Their Friends, 1790–1890*, 20 CONST. COMMENT. 111 (2003) (arguing that the amicus machine was never neutral in the United States).

5. Krislov, *supra* note 4, at 696 n.13 (citing *Coxe v. Phillips*, 95 Eng. Rep. 152 (K.B. 1736) (“[I]f an indictment be apparently vitious [be the crime what it will] it ought to be quash’d . . . and therefore as amicus Curiae anyone may move to quash it.”)).

6. *Id.* at 703–04; *see also* Harper & Etherington, *supra* note 3, at 1172–73; Michael J. Harris, *Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 1, 15 (2000) (“Amici curiae have evolved from being friends of the court without bias to being advocates and lobbyists with their own agendas.”) (citations omitted).

7. FED. R. APP. P. 29.

8. SUP. CT. R. 37.

9. *E.g.*, CAL. R. CT. 8.520; MASS. R. APP. P. 17; N.Y. COMP. CODES R. & REGS. tit. 22 § 500.23 (2018).

10. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 686–87 (2008).

11. *See, e.g.*, Ryan v. Commodity Futures Trading Comm’n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers) (“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.”); Harper & Etherington, *supra* note 3, at 1176–77 (arguing that there is value to allowing amici participation); John Harrington, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RES. L. REV. 667, 693–98 (2005) (arguing that amicus participation in circuit courts should be restricted).

What is less known is that amici curiae can appear in district court litigation.¹² Although the Federal Rules of Civil Procedure are silent as to amicus participation,¹³ district courts allow interested parties to appear as amicus.¹⁴ Courts have adopted a standard of “usefulness” when determining whether to grant a motion to appear as an amicus curiae.¹⁵ Judge Richard Posner penned the standard as follows:

An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or 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. Otherwise, leave to file an amicus curiae brief should be denied.¹⁶

As should be clear, the standard is very subjective. At its core, the test offers no more than guidelines that a district court judge should consider in determining whether to permit an amicus to appear.¹⁷ Thus, district courts have

12. See, e.g., Jeremy W. Bock, *Neutral Litigants in Patent Cases*, 15 N.C. J. L. & TECH. 233, 282–87 (2014) (discussing appearance of amicus curiae in patent litigations); Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1296–98 (1992) (recommending an amendment to the Federal Rules of Civil Procedure to govern amicus appearance).

13. E.g., *Onondaga Indian Nation v. New York*, No. 97-CV-445, 1997 WL 369389, at *2 (N.D.N.Y. June 25, 1997) (quoting *United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991)) (“There is no governing standard, rule or statute ‘prescrib[ing] the procedure for obtaining leave to file an *amicus* brief in the district court’”) (alterations in original).

14. Simard, *supra* note 10, at 687 (“At the district court level, amicus activity is . . . less significant, with the vast majority of District Court Judges (79.2%) responding that amicus activity is nominal or zero, and 19.9% indicating that approximately 5% of their docket involves amici curiae.”) (citing another source).

15. See, e.g., *ForestKeeper v. Elliott*, 50 F. Supp. 3d 1371, 1380 (E.D. Cal. 2014) (“The court has reviewed the proposed amicus brief . . . and finds it contains no material that is useful to the court or that is not set forth adequately by the parties.”).

16. *Ryan*, 125 F.3d at 1063. Many district courts across the nation have cited to this passage. See, e.g., *Am. Bird Conservancy v. Harvey*, 232 F. Supp. 3d 292, 299 (E.D.N.Y. 2017); *Forest-Keeper*, 50 F. Supp. 3d at 1380; *Cobell v. Norton*, 246 F. Supp. 2d 59, 62–63 (D.D.C. 2003); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999); *United States ex rel. Roby v. Boeing Co.*, 73 F. Supp. 2d 897, 900–01 (S.D. Ohio 1999).

17. *C & A Carbone, Inc. v. Cty. of Rockland*, No. 08-cv-6459-ER, 2014 WL 1202699, at *3 (S.D.N.Y. Mar. 24, 2014) (“Resolution of a motion for leave to file an *amicus* brief thus lies in the ‘firm discretion’ of the district court.”).

permitted amicus appearance even where parties are sophisticated, represented by counsel, and an amicus brief repeats some of the parties' arguments.¹⁸

Of course, parties may anticipate potential interlopers who allege policy reasons for or against the parties' positions—such is the role of amici.¹⁹ But what can a party do when an amicus begins to allege harmful facts?²⁰ Surely a party would want to subpoena documents from the amicus to disprove the allegations. But what can a party do when the amicus alleging the facts is beyond the court's subpoena power by virtue of being a foreign nonparty? This issue is the subject of this Article.

Part I explains how the amicus machine has been used, and abused, to influence the courts beyond the filing of briefs. Due to the absence of rules governing amicus participation at the district court level, courts have the discretion to grant amici a variety of functions, enabling some amici to actively participate in discovery and even trials. Then Part II explains the different methods a party could employ to counteract an amicus's factual allegations—i.e., opposing the filing of the amicus brief or obtaining discovery. As Part II will show, however, none of these methods are reliable, and a party can rarely obtain discovery when dealing with a foreign amicus—an amicus incorporated or living abroad. Thereafter Part III explains how allowing foreign amici to allege facts but avoid discovery can create serious injustice. Foreign amici actually participate in domestic litigation and have alleged facts that swayed the outcome of the litigation. Without an ability to verify the validity of amici's allegations, the parties are left unable to fairly litigate their dispute. For this reason, I propose in Part IV a modest change: a statute or rule enabling parties to obtain discovery from foreign amici as to matters contained

18. *Id.* at *4 (finding that despite these flaws, the amicus brief is nonetheless “helpful”).

19. *See, e.g.*, STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 753 (10th ed. 2013) (recommending amici to “inform the court of interests other than those represented by the parties, and to focus the court’s attention on the broader implications of various possible rulings”); Justice Stephen G. Breyer, Address at the Annual Meeting of the American Association (for the Advancement of Science: The Interdependence of Science and Law 9 (Feb. 16, 1998) (“[W]e hear . . . from outside groups which file briefs . . . to become more informed, for example, about the relevant scientific ‘state of the art.’ . . . In my own view, [amicus] briefs play an important role in educating judges” about the implications of their decisions.).

20. *E.g.*, *Hoptowitz v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) (noting that the district court appointed United States as amicus curiae with authority to “investigate fully the facts alleged in the complaint, . . . participate in the case with the full rights of parties, and . . . advise the Court on the public interest(s) at issue”), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 458–63 (1986) (describing how private amici representing commercial and sport fishermen were allowed to participate in settlement discussions and discovery in *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979)). Michael Lowman dubbed such amicus curiae as “litigating amicus curiae.” Lowman, *supra* note 12, at 1245.

in the amicus brief. This reform will enable parties to discover the truth while not disturbing the right of nonparties to appear as amici and inform the courts of their legitimate concerns.

II. AMICI'S INFLUENCE EXTENDS BEYOND POLICY DEBATE

Returning to the example we began with, how much damage can amicus curiae Norwegian Citizens cause to Righteous, Inc.? There is no doubt that an amicus curiae brief can influence the court.²¹ One should not assume, however, that amici's influence is limited to outlining policy justifications for a given decision. As this Part will show, amici have played a robust role in district court litigation and have, in certain instances, greatly benefited the parties beyond cautioning the court of policy implications or simply alleging facts.

The most extreme cases of amici intervention occurred in the late twentieth century. Take for example, a thirty-year-long case from the Middle District of Alabama, *Wyatt ex rel. Rawlins*.²² The case was a class action by the mentally ill against a state-run hospital for deprivation of state and federal rights.²³ The United States appeared as an amicus curiae in this case. For two decades the federal government, as amicus curiae, has been "submitting legal memoranda; conducting discovery, including participating in depositions and inspecting facilities; and participating in evidentiary hearings, including calling witnesses and cross-examining witnesses."²⁴ Perhaps the only difference between the United States as amicus curiae and the parties in *Wyatt* was that the United States could not appeal an adverse judgment and maintained its presence at the pleasure of the court.²⁵

21. Supreme Court Justices, for example, reported to be "moderately influenced" by the "identity, prestige, or experience of the amicus curiae." Simard, *supra* note 10, at 688.

22. This case has a long history. The earliest published decision was *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971) (ordering rulemaking). The latest decision was a motion to dismiss based on compliance with the settlement in 2004. *See Wyatt v. Sawyer*, 219 F.R.D. 529, 531 (M.D. Ala. 2004) (granting the motion).

23. *Wyatt v. Wallis*, Civ. A. No. 3195-N, 1986 WL 69194, at *1 (M.D. Ala. Sept. 22, 1986). The court had found that the conditions at the hospital were "degrading and dehumanizing," *Wyatt v. Stickney*, 334 F. Supp. 1341, 1343-44 (M.D. Ala. 1971), and that the hospital deprived the patients of a right "to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition," *Wyatt*, 325 F. Supp. at 784.

24. *Wyatt v. Hanan*, 868 F. Supp. 1356, 1357 (M.D. Ala. 1994).

25. Although this issue did not come up in *Wyatt*, black letter law prohibits amici from appealing. 4 AM. JUR. 2D *Amicus Curiae* § 11 (2018) ("An amicus curiae has no right to except to the rulings of the court; and if he or she takes such exceptions, they cannot avail on appeal."). Scholars and courts agree that the scope of amici participation is within the discretion of the courts and that, therefore, a court may revoke amicus curiae status. *Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio 1992) ("Because the privilege of being heard amicus rests solely within the discretion of the court, it necessarily follows that the scope of the amicus participation must also be discretionary.");

Importantly, the amicus participation in *Wyatt* was neither an isolated incident nor limited to government participation. In *EEOC v. Boeing Co.*,²⁶ for example, sixteen former Boeing pilots sought to intervene in an Equal Employment Opportunity Commission action to prohibit Boeing from terminating pilots at the age of sixty.²⁷ These pilots were dissatisfied with the Commission's progress and the lack of transparency and retained counsel to assert rights against Boeing.²⁸ Although the court determined that the pilots could neither seek intervention as of right nor permissive intervention,²⁹ the court allowed the pilots to appear as amici.³⁰ The court required the EEOC to consult with the pilots "before finalizing any proposed settlement," and allowed the pilots to access all pleadings, appear at depositions, depose witnesses, file separate briefs on any issue, argue the deficiency of any settlement, and even participate at trial.³¹

There are many cases where courts granted amici curiae similar rights as to the amici in *Wyatt* or *Boeing*.³² The scope of amicus participation in district court expanded so drastically that it eventually encountered opposition from some Courts of Appeals. The Sixth Circuit in *United States v. Michigan*³³ decried the litigating amicus as a "legal mutant" that "seriously impinge[s] the inherent rights of the only real parties" in the litigation and lacks any basis in law.³⁴ The Court of Appeals went so far as to accuse the amicus curiae in

John Bilyeu Oakley, *The United States as Participant in Public Law Litigation: Recent Developments*, 13 U.C. DAVIS L. REV. 247, 257 (1980) ("Once intervention is granted, the judge has no more control over the positions taken by the intervenors than over those of the original parties. This is in sharp contrast to the litigating amicus, who serves at the sufferance of the judge and who has no appeal as of right should the judge err.").

26. 109 F.R.D. 6 (W.D. Wash. 1985).

27. *Boeing Co.*, 109 F.R.D. at 8.

28. *Id.*

29. *Id.* at 9–11 (citing FED. R. CIV. P. 24(a)–(b)). The pilots lacked standing to bring the action as provided under the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. § 626(c)(1) (2012) ("That the right of any person to bring [an] action [for age discrimination] shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under this chapter.").

30. *Boeing Co.*, 109 F.R.D. at 11.

31. *Id.*

32. See, e.g., *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) (holding that there was no error with allowing an amicus to "participate[] fully in the discovery, trial, and appeal of this case"), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *In re Estelle*, 516 F.2d 480, 482–83 (5th Cir. 1975) (observing that the court previously ordered the United States to appear as amicus curiae to investigate the complaint); *United States v. Michigan*, 680 F. Supp. 928, 934 (W.D. Mich. 1987) (allowing private amicus to present witnesses); *DeVonish v. Garza*, 510 F. Supp. 658, 658–59 (W.D. Tex. 1981) (refusing a motion to restrict the participation of amicus curiae).

33. 940 F.2d 143 (6th Cir. 1991).

34. *Michigan*, 940 F.2d at 164–66.

Michigan of fermenting “much of the discord, bitter confrontation, and continuing acrimony that has pervaded the[] proceedings.”³⁵ The Court of Appeals’ scathing remarks have been credited with stifling the growth of the litigating amicus practice, with commentators claiming that the litigating amicus is an idea of the past.³⁶

One should not assume that the “mutant” known as litigating amicus has disappeared from our courts. Like Frankenstein’s monster, it still appears in the fringes of our case law. The United States continues to appear as “litigating amicus curiae” in certain civil rights actions.³⁷ Private parties also continue to meddle in litigation. In one case, a Native American tribe appeared as amicus and requested the court to take judicial notice of twenty-four documents, comprised of government documents, court filings, and newspaper articles.³⁸ The plaintiffs argued that the tribe’s attempt to expand the record transformed them into litigating amicus, but the court disagreed.³⁹ Similarly, the ACLU allegedly participated in discovery as an amicus by making Freedom of Information Act requests and by mailing letters to and questioning potential victims.⁴⁰ Amici thus continue to participate in litigation as more than lobbyists or policy advocates⁴¹ and can assist parties with developing a record that is favorable to the amicus’s position. The role of the amicus is still within the discretion of the court such that “[t]he amicus curiae may,

35. *Id.* at 166. Commentators agree. *See, e.g.*, Bock, *supra* note 12, at 286 (“Although private individuals and organizations have also served as litigating amici, their involvement has been criticized as leaving the case vulnerable to manipulation by a non-party who may attempt to control the litigation in furtherance of its own agenda.”).

36. *See* Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 382–83 (2015) (“After the Sixth Circuit’s denunciation of the practice, there have been few references to ‘litigating amicus curiae’ in the case law. The term seems to have died away. Like most hybrids, it has been unable to reproduce. The story of the ‘litigating amicus curiae’ shows the limits of the flexibility of the amicus curiae role.”). Courts often cite disapprovingly of excessive participation by amici. *E.g.*, NVG Gaming, Ltd. v. Upstream Point Molate, LLC, 355 F. Supp. 2d 1061, 1068 (N.D. Cal. 2005) (citing *Michigan*, 940 F.2d at 163–64) (reminding the amicus curiae that it may not participate as a litigating amicus curiae and that it “is not a party and has no control over the litigation and no right to institute any proceedings in it, nor can it file any pleadings or motions in the case”).

37. *E.g.*, *Monroe v. Jackson-Madison Cty. Sch. Sys. Bd. of Educ.*, C.A. No. 72-1327, 2010 WL 3732015, at *1 (W.D. Tenn. Sept. 24, 2010).

38. *Jamul Action Comm. v. Stevens*, No. 2:13-cv-01920-KJM-KJN, 2014 WL 3853148, at *6–8 (E.D. Cal. Aug. 5, 2014).

39. *Id.* at *9.

40. *Human Rights Def. Ctr. v. Bezotte*, No. 11-CV-13460, 2016 WL 1258992, at *8–9 (E.D. Mich. Mar. 31, 2016).

41. *See supra* notes 6, 19 and accompanying text. There are more subtle attempts at factual advocacy as well. The Washington Legal Foundation, for example, filed an amicus brief in district court opposing a motion to dismiss in order to prevent “organizations with ‘ulterior motives’” from “spread[ing] known falsehoods.” *Interest Group Says Isuzu Has Viable Product Disparagement Claim Against CU*, 17 ANDREWS AUTOMOTIVE LITIG. REP., Dec. 2, 1997, at 3.

with permission of the court, file briefs, argue the case, and introduce evidence.”⁴²

The potential effect of amicus participation in record-building cannot be understated. Studies have shown that “amicus briefs filed by more experienced lawyers supporting petitioners experienced a p-win rate about 8% higher than the benchmark rate, and amicus briefs filed by more experienced lawyers supporting respondents experienced a p-win rate nearly 10% lower than the benchmark rate.”⁴³ If a well-written brief is capable of changing the outcome of a litigation, how much more so are factual allegations capable of swaying the court? Take for example an antitrust litigation where the government alleges that Microsoft unlawfully tied its browser to its operating system.⁴⁴ To prevail, the government would have to prove that the arrangement did not unreasonably impair competition, but even then the defendant could show that the procompetitive benefit of the arrangement outweighs the anti-competitive effect.⁴⁵ If Microsoft’s competitors appear as amici for the government and allege anticompetitive effects, Microsoft’s position suffers.

Granted, the government could obtain evidence of the same through discovery. But an amicus brief would focus the court’s attention on the relevant piece of evidence as well as amplify its effect. Moreover, the very language that an amicus uses can influence the court. In the Microsoft antitrust litigation, for example, certain technology trade associations appeared as amicus curiae and alleged that Microsoft withdrew from the association and “induced some other companies” to do the same, thereby withdrawing funding from

42. 4 AM. JUR. 2D, *supra* note 25, at § 8 (citing *Concerned Area Residents for the Env’t v. Southview Farm*, 834 F. Supp. 1410 (W.D.N.Y. 1993)); *Gandee v. Glaser*, 785 F. Supp. 684 (S.D. Ohio 1992), *aff’d*, 19 F.3d 1432 (6th Cir. 1994)); *see also* *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990) (“[C]ourts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case, and, with further permission of the court, to argue the case and introduce evidence.”) (citations omitted).

43. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 814–15 (2000) (but admitting that the results are not statistically significant for lack of number of observations); *see also* David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce’s Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1024 (2009) (observing that the Chamber of Commerce, a frequent amicus curiae before the Supreme Court, wins 69.8% of the time). This is not to say, of course, that as the number of amici increases, so does the likelihood of success. *See* Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 L. & SOC’Y REV. 807, 827 (2004).

44. *United States v. Microsoft Corp.*, 253 F.3d 34, 46 (D.C. Cir. 2001).

45. *See* Nat’l Soc’y of Prof’l Eng’rs. v. *United States*, 435 U.S. 679, 691 (1978); *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997).

the association and seeking to silence critics.⁴⁶ Or consider *Wyatt*; there, the United States sought amicus status, alleging:

based on “information and belief” that defendant state officials “are violating the *Wyatt* standards, which are now more than twenty years old, as well as the 1986 decree”; that they “have failed and are continuing to fail to provide community services to hundreds of class members who are presently confined in institutions and for whom community placement has been recommended or is otherwise appropriate”; and that they “have failed and are continuing to fail to make substantial progress in placing members of the plaintiff class in community facilities and programs as required by the 1986 decree.⁴⁷

The allegations in the amicus briefs can dispose the court against the defendants. As all lawyers know, a judge wields tremendous power over the litigation; so lawyers are well advised to avoid displeasing judges.⁴⁸

Whether a party would have prevailed absent amicus participation one could not say. What we can conclude, though, is that amicus participation goes well beyond mere policy argument and often involves active participation in the development of the trial court record. Thus, the power of amicus curiae cannot be understated. As the next Part illustrates, the power of amicus curiae becomes a serious issue when a party cannot obtain fact discovery from the amicus.

III. CIVIL PROCEDURE PROVIDES NO RELIABLE MEANS FOR DEFENDING AGAINST FOREIGN AMICI

As the previous Part shows, amicus Norwegian Citizens can play a major role in the coming litigation. So as a lawyer for Righteous, Inc., you would

46. Brief on Remedy of Amici Curiae Comput. & Commc’ns Indus. Ass’n & Software Info. Indus. Ass’n at 1, *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000) (Nos. CIV. A. 98-1232(TPJ), CIV. A. 98-1233(TPJ)), 2000 WL 34019328.

47. *Wyatt v. Hanan*, 868 F. Supp. 1356, 1357 (M.D. Ala. 1994).

48. Orders by upset judges routinely make news. One judge, for example, was so displeased with a discovery dispute that the judge ordered the parties to solve things with a game of rock, paper, scissors. Michael Simon, *How to Not Make Judges Hate You*, ABOVE L. (Sept. 4, 2014, 1:48 PM), <https://abovethelaw.com/2014/09/how-to-not-make-judges-hate-you/>. In fact, lawyers routinely have to overcome judicial bias against their client. See, e.g., Stan Perry, *Overcoming Judicial Bias*, AM. BAR ASS’N: LITIG. NEWS, https://apps.americanbar.org/litigation/litigationnews/trial_skills/060310-tips-judicial-bias.html (last visited Oct. 10, 2018). Sometimes, judicial action is even more extreme, with some judges screaming at the parties, Christopher Danzig, *Judge of the Day: Shut Up When I’m Talking to You!*, ABOVE L. (July 2, 2012, 2:53 PM), <https://abovethelaw.com/2012/07/judge-of-the-day-shut-up-when-im-talking-to-you/>, or even engaging in a fistfight with an attorney, William Peacock, *Awkward: Judge Beats the Crap Out of Public Defender in Court*, FINDLAW (June 3, 2014, 11:02 AM), <http://blogs.findlaw.com/strategist/2014/06/awkward-judge-beats-the-crap-out-of-public-defender-in-court.html>.

need to develop a plan for diminishing the impact of the amicus's meddling in your case. There are three potential steps you could take. For one, you could argue against the court admitting the amicus brief. Alternatively, you could move to strike the allegations. Otherwise, or if the court overrules your objections, you could seek discovery from the amicus. As this part shows, however, the aforementioned strategies are not reliable. If the court grants Norwegian Citizens amicus status, you may find yourself facing factual allegations you can do nothing about.

A. OPPOSE THE MOTION TO APPEAR AS AN AMICUS CURIAE

The simplest avenue for dealing with an unwanted amicus curiae brief is to file a motion in opposition to it. One problem with this approach is that amicus participation is not discussed in the Federal Rules of Civil Procedure, and individual judges have the discretion to decide whether to grant amicus participation.⁴⁹ Nonetheless, there are common objections that parties raise to amicus participation.

1. *Timeliness*

One ground for objecting to amicus participation is that the motion to appear as amicus is untimely. The rationale for opposing an untimely brief is that it will unduly delay the resolution of an issue or the case.⁵⁰ As the following chart shows, however, there is no definite length of the delay (from when the amicus brief should have been filed to when it was actually filed) that determines whether courts grant or deny amicus status.

Length of the Delay	Amicus Status
48 months	Denied ⁵¹
36 months	Denied ⁵²
12 months	Denied ⁵³
11 months	Denied ⁵⁴

49. See *supra* notes 12–17 and accompanying text.

50. See *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999).

51. *United States v. Yaroshenko*, 86 F. Supp. 3d 289, 290 (S.D.N.Y. 2015).

52. *Nat'l Ass'n of Optometrists & Opticians v. Lockyer*, 463 F. Supp. 2d 1116, 1118 n.3 (E.D. Cal. 2006), *rev'd and remanded sub nom. on other grounds Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521 (9th Cir. 2009).

53. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1271, 1274 (D.N.M. 2002).

54. *Allstate Ins. Co. v. Glob. Med. Billing, Inc.*, No. 09-14975, 2012 WL 344930, at *5 (E.D. Mich. Feb. 1, 2012), *aff'd*, 520 F. App'x 409 (6th Cir. 2013).

7 months	Denied ⁵⁵
5 months	Granted ⁵⁶
3 months	Granted ⁵⁷
3 months	Denied ⁵⁸
2 months	Denied ⁵⁹
1 month	Granted ⁶⁰
Appx. 2 weeks	Granted ⁶¹
Appx. 2 weeks	Denied ⁶²
Less than 1 week	Denied ⁶³

Although the table above shows that opposing the brief on the grounds of timeliness can be unpredictable, it also shows that counsel can successfully block an amicus brief even in cases of a short delay.

In opposing amicus appearance for timeliness, counsel should take into account a few other factors that some courts pay attention to. One such factor is notice of the pending action—i.e., whether the potential amicus curiae was on notice of the dispute in which the amicus seeks participation. Two cases discuss this notice requirement. In *United States v. Yaroshenko*,⁶⁴ the Russian Federation sought to appear as amicus four years late despite being “on notice of [the] pending trial.”⁶⁵ The district court concluded the delay was unrea-

55. *Greater Yellowstone Coal, Inc. v. Servheen*, CV 07-134-M-DWM, 2009 WL 10677466, at *1 (D. Mont. June 5, 2009).

56. *Andersen v. Leavitt*, No. 03-cv-6115 (DRH)(ARL), 2007 WL 2343672, at *1 (E.D.N.Y. Aug. 13, 2007).

57. *United States v. Holy Land Found. for Relief & Dev.*, CRIM. NO. 3:04-CR-0240-P, 2009 WL 10680203, at *3 (N.D. Tex. July 1, 2009), *rev'd in part on other grounds*, 624 F.3d 685 (5th Cir. 2010); *United States v. Microsoft Corp.*, 159 F.R.D. 318, 326 (D.D.C.), *rev'd on other grounds*, 56 F.3d 1448 (D.C. Cir. 1995).

58. *Yates v. Ortho-McNeil Pharm., Inc.*, 76 F. Supp. 3d 680, 691 (N.D. Ohio), *aff'd in part sub nom. on other grounds Yates v. Ortho-McNeil-Janssen Pharm., Inc.*, 808 F.3d 281 (6th Cir. 2015); *Hawksbill Sea Turtle v. FEMA*, 11 F. Supp. 2d 529, 541 (D.V.I. 1998).

59. *In re Becker*, No. 03-C-170, 2009 WL 2762787 (E.D. Wis. Aug. 28, 2009); *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 131 n.1 (W.D.N.Y. 2003).

60. *United States ex rel. Hooper v. Lockheed Martin Corp.*, Case No. CV 08-00561 (BRO) (PJWx), 2014 WL 12561070, at *4 (C.D. Cal. Jan. 17, 2014), *aff'd sub nom. on other grounds Hooper v. Lockheed Martin Corp.*, 640 F. App'x 633 (9th Cir. 2016).

61. *Duronslet v. Cty. of Los Angeles*, Case No. 2:16-cv-08933-ODW(PLAx), 2017 WL 5643144, at *2 (C.D. Cal. Jan. 23, 2017); *Tafas v. Dudas*, 511 F. Supp. 2d 652, 660 (E.D. Va. 2007).

62. *In re Thorpe Insulation Co.*, CV 10-1493 DSF, 2010 WL 11531078, at *1 n.1 (C.D. Cal. Sept. 21, 2010), *rev'd and remanded on other grounds*, 677 F.3d 869 (9th Cir. 2012).

63. *United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 787 n.6 (S.D.N.Y. 2017), *rev'd*, 899 F.3d 163 (2d Cir. 2018).

64. 86 F. Supp. 3d 289 (S.D.N.Y. 2015).

65. *Yaroshenko*, 86 F. Supp. 3d at 290.

sonable and denied amicus participation in part because the motion was untimely.⁶⁶ In *Anderson v. Leavitt*,⁶⁷ on the other hand, the amicus filed a motion five months late but the district court excused the delay because “there [was] no indication that [the case] was well-publicized, thereby warranting a conclusion that the [amicus] should have acted sooner.”⁶⁸ Thus, in opposing an amicus brief because of timeliness, a party would be well advised to argue that the amicus was on notice of the case and could have filed a brief sooner.

Prejudice is another factor courts sometimes require to deny amicus participation because of timeliness. That is, a court could require a party to show that a motion to file an amicus brief is so untimely that a party does not have enough time to respond.⁶⁹ Of course, the longer an amicus delays, the more likely it is that a court will find a late filing prejudicial. One last caveat on this point is that the analysis sometimes involves balancing the prejudice to parties against the usefulness of the briefs. In *United States v. Microsoft*,⁷⁰ both the government and Microsoft objected as untimely to the participation of amicus curiae in determining whether an antitrust consent decree was fair.⁷¹ Even though the proposed amicus briefs were served only “days before the scheduled final hearing,” the court allowed amicus participation because the parties failed to demonstrate prejudice and, in any event, amicus participation was important to properly evaluate the fairness of the consent decree.⁷²

2. *Lack of Special Interest and Excessive Interest*

A party can also oppose amicus curiae participation for both lack of a special interest in the litigation and excessive interest in the litigation. Courts

66. *Id.* at 290–91 (determining that “Russia [sought] to comment on matters that have already been decided or that are not truly in issue”).

67. No. 03-cv-6115 (DRH)(ARL), 2007 WL 2343672 (E.D.N.Y. Aug. 13, 2007).

68. *Anderson*, 2007 WL 2343672, at *6.

69. See *Duronslet v. Cty. of Los Angeles*, Case No. 2:16-cv-08933-ODW(PLAx), 2017 WL 5643144, at *2 (C.D. Cal. Jan. 23, 2017) (granting amicus status over objection because “the [party’s] reply to Plaintiff’s [brief] is not due for another three weeks, which is more than enough time for the [party] to review and respond to [amicus’s] arguments”).

70. 159 F.R.D. 318 (D.D.C.), *rev’d on other grounds*, 56 F.3d 1448 (D.C. Cir. 1995).

71. *Microsoft*, 159 F.R.D. at 326.

72. *Id.* at 326–27.

generally require an amicus to “ha[ve] a special interest that justifies his having a say” in the litigation.⁷³ This is as true in appellate litigation⁷⁴ as it is in district court litigation.⁷⁵ A whole slew of positions can satisfy the “special interest” requirement, from an auto dealers’ association appearing as amicus because it supported the legislation at issue,⁷⁶ to an amicus with an interest in automotive safety generally.⁷⁷ Nonetheless, not all interests rise to the level of a “special interest” that warrants an organization or an individual being allowed a voice as amicus curiae. For example, merely providing legal representation pursuant to a statute did not entitle an organization to file an amicus brief in a case challenging that statute.⁷⁸ Similarly, a hunters’ organization did not have an interest in litigation that could conceivably affect hunting, but which did not raise any issues directly pertinent thereto.⁷⁹ The principle that seems to arise from these cases is that the issues raised in the litigation have to actually affect the proposed amicus’s interests.

Yet an amicus curiae’s interest in the litigation can be so excessive as to result in denial of amicus status. This commonly occurs when an organization appears as highly partisan, merely as an advocate for one party. For example, in *Leigh v. Engle*,⁸⁰ the U.S. Secretary of Labor filed a brief that “[i]n every respect . . . support[ed] plaintiffs’ legal theories and their construction of the facts, many of them disputed by defendants.”⁸¹ The court concluded that the proposed brief was “not a memorandum amicus curiae,” but rather, “to coin a Latin phrase, it is memorandum amicus petitor, one proffered as a friend of

73. See, e.g., *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970); see also *Portland Pipe Line Corp. v. City of S. Portland*, 2:15-cv-00054-JAW, 2017 WL 79948, at *5 (D. Me. Jan. 9, 2017) (relying on *FED R. APP. P. 29* and *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 132–33 (3d Cir. 2002) to hold that an amicus must show “(1) an adequate interest, (2) desirability, and (3) relevance”).

74. See *FED. R. APP. P. 29(a)(3)(A)–(B)* (requiring a potential amicus that appears without party consent to provide a statement of interest and justify their position).

75. See, e.g., *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, Civil Action No. 09-11156-JLT, 2010 WL 1667622, at *1 (D. Mass. Apr. 22, 2010) (denying a motion for leave to file an amicus brief for, *inter alia*, a failure to articulate a special interest in the issues raised in the lawsuit).

76. *All. of Auto. Mfrs. v. Gwadowsky*, 297 F. Supp. 2d 305, 307 (D. Me. 2003).

77. *Gen. Motors Corp. v. Volpe*, 321 F. Supp. 1112, 1116 n.3 (D. Del. 1970).

78. See *Donovan v. Gillmor*, 535 F. Supp. 154, 159 (N.D. Ohio 1982). *But see* *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 728 (D. Md. 1996) (concluding that the amici had a special interest because they “represent large constituencies of individuals which have a vested interest in how the provisions of the [statute] are construed and applied”).

79. *Wildearth Guardians v. Lane*, No. CIV 12-118 LFG/KBM, 2012 WL 10028647, at *3 (D.N.M. June 20, 2012).

80. 535 F. Supp. 418 (N.D. Ill. 1982).

81. *Engle*, 535 F. Supp. at 421–22.

the plaintiff[s].”⁸² Finding such partisanship improper, the district court denied the motion to file an amicus brief.⁸³ The New Jersey district court explained the standard as follows: “Where a petitioner’s attitude toward the litigation is patently partisan, he should not be allowed to appear as *amicus curiae*.”⁸⁴ Where an amicus represents “interests which would be ultimately and directly affected by the court’s ruling on the substantive matter before it,” the amicus’s interest may be excessive.⁸⁵ Indirect effect on the organization’s interest, the district court explained, does not pose a problem.⁸⁶

It is important to recognize that courts are not monolithic in deciding how much interest is excessive. One court berated an organization for failing to remain an “objective, neutral, dispassionate ‘friend of the court,’” and instead arguing that “the court violated the fundamental constitutional rights of the defendant.”⁸⁷ The standard articulated in that case seems to create a whole host of problems. For one, it excludes most amicus curiae because contemporary amici tend to be partisan advocates.⁸⁸ Secondly, it is unclear how an amicus can have a “special interest” in the litigation yet remain objective, neutral, or dispassionate.⁸⁹ An amicus with an interest in the litigation would naturally advocate in favor of its interest. Imagine, for example, a lawsuit between a student and a university over a Title IX violation. Suppose further that the lawsuit involves a legal question into the scope of Title IX, which would have effects outside of the university-student relationship. An association of business corporations within the district may be legitimately concerned about the outcome of the legal question. Moreover, the association may not support the legal positions of the litigants and seek an entirely separate legal standard. The amicus brief of the association would certainly not be objective, neutral, or dispassionate. It would be partisan, just not in favor of any litigant. Thus, requiring objectivity would punish advocates of third parties who are partisan but not partisan in favor of any litigant.

82. *Id.* at 422 (citing *New England Patriots Football Club, Inc. v. Univ. of Colo.*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979)).

83. *Id.*

84. *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff’d*, 782 F.2d 1033 (3d Cir. 1986) (quoting *Casey v. Male*, 164 A.2d 374, 377 (N.J. Super. Ct. 1960)).

85. *Id.*

86. *Id.*

87. *United States v. Gotti*, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991).

88. *Krislov*, *supra* note 4, at 695–97. *See also* *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.) (“Th[e] description of the role of an amicus [as objective interpreter of the law] was once accurate and still appears in certain sources, but this description became outdated long ago.”) (citing other sources).

89. *Neonatology Assocs.*, 293 F.3d at 131.

Finally, some courts do not reject amicus briefs solely because of partisan advocacy. “There is no rule . . . that amici must be totally disinterested.”⁹⁰ A district court could allow an organization to file an amicus brief even if the organization contributed money to defray a litigant’s legal expenses and thus enabled the litigation.⁹¹ Thus, a party could attempt to argue that an amicus’s interest in the litigation is so excessive that the court should deny amicus status. The outcome is within the judge’s discretion.

3. *Lack of Relevance or Utility*

A third objection to an amicus brief filing is to the substance of the proposed brief. Recall that “[a]n amicus brief should normally be allowed [in district court] . . . 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.”⁹² The standard for admissibility of an amicus brief is relevance or usefulness.⁹³ If a court concludes that a brief does not assist the court in resolving the issues, then it is likely to deny amicus status.

Such lack of utility can come in a few different forms. For one, an amicus can fail the utility test if it merely “injects a new issue into [the] case not raised by the parties.”⁹⁴ An amicus brief that does not aid the court in resolving the *legal issues* but focuses wholly on *factual issues* can also fail the utility test.⁹⁵ An amicus that seeks to assist in “balanc[ing] the record” by supplementing facts may likewise be disfavored.⁹⁶ As far as substantive errors go, a court is most likely to reject an amicus brief when that brief merely duplicates the principal party’s brief. Judge Richard Posner decried such briefs as “abuse” and urged the district courts not to allow them.⁹⁷ The common thread that seems to run through these cases is that the court looks to an

90. *Hoptowitz v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

91. *Concerned Area Residents for the Env’t v. Southview Farm*, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993).

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

93. *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991); *United States v. Bd. of Cty. Comm’rs of the Cty. of Otero*, 184 F. Supp. 3d 1097, 1115 (D.N.M. 2015), *aff’d*, 843 F.3d 1208 (10th Cir. 2016). The U.S. Supreme Court likewise incorporated usefulness in determining whether an amicus brief should be permitted. *N. Sec. Co. v. United States*, 191 U.S. 555, 556 (1903).

94. *Otero*, 184 F. Supp. at 1116.

95. *See Ass’n of Am. Sch. Paper Suppliers v. United States*, 683 F. Supp. 2d 1326, 1328–29 (Ct. Int’l Trade 2010).

96. *Palladino v. Corbett*, Civil Action No. 13-5641, 2014 WL 830046, at *7 (E.D. Pa. Mar. 4, 2014).

97. *Ryan*, 125 F.3d at 1063 (Chief Judge Richard Posner decried such briefs as “abuse”); *see also Paper Suppliers*, 683 F. Supp. 2d at 1329 (quoting *Ryan*, 125 F.3d at 1063). Not all circuits followed suit. When Justice Samuel Alito was on the Third Circuit, for example, he urged courts to

amicus brief for the disposition of a given legal issue. Attempts to expand the scope of the dispute or delay the proceeding will be viewed unfavorably.

Moreover, a court is less likely to grant amicus status when the parties are sophisticated or represented by competent counsel.⁹⁸ Courts have rejected amicus brief filings in part because the parties were represented by competent counsel and had “ample opportunity to argue their respective positions”⁹⁹ One possible reason for this requirement is that parties that are represented by competent counsel are more likely to make the best available arguments, so an amicus brief will be less useful.¹⁰⁰

All in all, the aforementioned substantive limitations should discourage courts from granting amicus briefs. After all, “[a]t the trial level, where issues of fact as well as law predominate, the aid of amicus curiae may be less appropriate than at the appellate level where such participation has become standard procedure.”¹⁰¹ Judge Posner explained the reasons for the policy of limiting amicus status as follows:

[J]udges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties’ briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.¹⁰²

A party seeking to oppose a motion for leave to file an amicus brief may find it expedient to style the objection as preserving judicial resources. Briefs that are duplicative, address new legal issues, do not address any legal issue, or are otherwise unhelpful will be the easiest to oppose.¹⁰³

accept amicus briefs so as to not lose valuable input. *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 132 (3d Cir. 2002).

98. *Ryan*, 125 F.3d at 1063 (noting that “[a]n amicus brief should normally be allowed when a party *is not* represented competently or is not represented at all”) (emphasis added); *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970); *Paper Suppliers*, 683 F. Supp. 2d at 1328; *All. of Auto. Mfrs. v. Gwadowsky*, 297 F. Supp. 2d 305, 307 (D. Me. 2003).

99. *See, e.g., Lehman XS Tr., Series 2006-GP2 v. Greenpoint Mortg. Funding, Inc., Consolidated Actions Nos. 12 Civ. 7935(ALC)(HBP), 12 Civ. 7942(ALC)(HBP)*, 12 Civ. 7943(ALC)(HBP), 2014 WL 265784, at *2 (S.D.N.Y. Jan. 23, 2014).

100. *See Goldberg v. City of Phila., No. CIV. A. 91-7575*, 1994 WL 369875, at *1 (E.D. Pa. July 14, 1994) (citing other sources).

101. *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985).

102. *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003).

103. This has an interesting effect on motions filed by amici after the court has already granted amici status to other entities. The last-in-time amicus has a harder time convincing the court that it offers a unique perspective because it must not only show that its arguments differ from the parties,

B. MOVE TO STRIKE ALLEGATIONS IN THE AMICUS BRIEF

Even if a court grants an organization the right to file an amicus brief, all is not lost. A party may be able to limit the legal claims and factual allegations within the amicus by moving to strike the brief in part or in whole. As illustrated below, courts have entertained motions to strike for various reasons, and a party may prevail on its motion.

Perhaps the most promising case for striking an amicus brief that contains factual allegations is *Kitzmiller v. Dover Area School District*.¹⁰⁴ In this case, two amicus briefs contained references to an expert witness report prepared in the course of the litigation, but which the defendants opted not to use and the plaintiffs had no opportunity to scrutinize.¹⁰⁵ Moreover, one amicus brief attached the entire report as an exhibit.¹⁰⁶ The plaintiffs argued that the amicus brief constituted an attempt “to serve up [the] putative expert opinions without opening themselves to the scrutiny of cross-examination,” which was not allowed under the Federal Rules of Evidence and was fundamentally unfair.¹⁰⁷ The district court agreed, but further added that the brief also improperly referenced a witness’s factual assertions without affording the plaintiffs an opportunity to cross-examine the witness.¹⁰⁸ As this case illustrates, a judge can exercise his or her discretion and strike an amicus brief solely for offering evidence without allowing the other party to challenge it by cross-examination.

Yet one case granting a motion to strike does not guarantee future success. Judges have sole discretion in deciding the scope of amicus participation¹⁰⁹ and can deny seemingly meritorious motions to strike. Take, for example, a motion to strike an amicus brief for raising issues not raised by the parties. In appellate litigation, circuit courts have held that “[a]n *amicus* cannot expand the scope of an appeal with issues not presented by the parties.”¹¹⁰ District courts, however, have not consistently enforced this rule. In one case,

but also from other amici. *See, e.g., Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SAJ, 2008 WL 1994914, at *1 (N.D. Okla. May 5, 2008) (“[I]t does not appear that the proposed amici have such unique information or perspective that can help the Court beyond the help that the lawyers for the parties and the three permitted amici are able to provide.”).

104. No. 04CV2688, 2005 WL 2736500 (M.D. Pa. Oct. 24, 2005).

105. *Kitzmiller*, 2005 WL 2736500, at *1.

106. *Id.*

107. *Id.*

108. *Id.* at *1–2.

109. *See supra* notes 12–17 and accompanying text.

110. *E.g., Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 300 n.10 (3d Cir. 2012); *see also Garcia-Melendez v. Ashcroft*, 351 F.3d 657, 662 n.2 (5th Cir. 2003).

the defendant, an administrative agency, complained that the amicus challenged its guidelines as “final agency action under the APA,” despite the fact that “none of the parties raise[d] this particular issue”¹¹¹ Dismissing the agency’s opposition, the district court allowed the amicus brief.¹¹² Similarly, in another case, a court denied a motion to strike filings of amici that allegedly expanded the record.¹¹³ The judge explained the decision as an “exercise of [his] discretion.”¹¹⁴ Despite their apparent ability to expand the issues, amici may not be subject to discovery – the objective of which is narrowing the issues.

The same is true of motions to strike the brief for alleging new facts. In one bankruptcy action, the court denied a plaintiff’s motion to strike a brief that contained supporting affidavits, because:

- (a) the content of the affidavit relates solely to matters contained within [the] brief, (b) it is clear to the Court that the affidavit was only offered to assist the Court in considering [the amicus] brief, and (c) it is solely within this Court’s discretion to determine the extent and manner of [the amicus’s] participation in the instant matter.¹¹⁵

Thus, a judge may simply determine that the brief and the attached exhibits are useful to the disposition of the case and deny the motion to strike on those grounds.

Lastly, a party should not be discouraged from filing a motion to strike when appropriate. One district court was willing to strike the portion of an amicus brief that referred to sources that were not considered by the agency, finding them to be “not a part of the record below.”¹¹⁶ Another court decided that it could strike an amicus brief on the ground that the amicus “tried to

111. Fed. Defendant’s Response to Pa. Coal All.’s Amicus Opposition Brief at 1–2, *Amerikohl Mining, Inc. v. Dep’t of the Interior*, No. 2:12-cv-01709-JFC (W.D. Pa. June 17, 2013), 2013 WL 3297444.

112. Order Granting Motion to File Amicus Brief at 1, *Amerikohl Mining, Inc. v. Dep’t of the Interior*, No. 2:12-cv-01709-JFC (W.D. Pa. June 10, 2013), ECF No. 70 [hereinafter “*Amerikohl Order*”].

113. See *Md. Restorative Justice Initiative v. Hogan*, Civil Action No. ELH-16-1021, 2017 WL 467731, at *7–8 (D. Md. Feb. 3, 2017); Memorandum in Support of Plaintiffs’ Motion to Strike as Improper Filings of Amici Curiae *Md. Crime Victims Res. Ctr., et al.* at 2–3, *Restorative Justice Initiative*, Civil Action No. ELH-16-1021, 2016 WL 7210196. The saving grace was that the judge noted that he “will not consider any arguments advanced by amici that was not raised by the parties themselves.” *Restorative Justice Initiative*, 2017 WL 4767731, at *8.

114. *Restorative Justice Initiative*, 2017 WL 4767731, at *8.

115. *In re Meinen*, 228 B.R. 368, 372, 376 (Bankr. W.D. Pa. 1998) (citing *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974); *Waste Mgmt. of Pa., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995)).

116. *Sw. Ctr. for Biological Diversity v. Babbitt*, 926 F. Supp. 920, 922 (D. Ariz. 1996).

obtain amicus status under false pretenses,” if the court found that the amicus made statements outside of court that directly contradicted their claims in the brief.¹¹⁷ Although few cases address this argument, the standard appears to be that the movant has to show that the brief is actually inconsistent with out-of-court statements on the same matter. For example, a district court found no such inconsistency where an amicus appeared to advise the court on how certain actions could delay software transition but told newspapers that the litigation would not delay the transition.¹¹⁸ The court explained that the statements were not inconsistent because “[t]he thrust of the Amicus Brief is not that the software transition will not occur on schedule, but rather that if the Court takes certain actions the software transition could be disrupted.”¹¹⁹ Thus, a motion to strike may be a viable option but not a reliable one. In the end, a party opposing the amicus brief will find itself relying on the judge’s sympathy.

C. IF THE AMICUS IS A DOMESTIC ENTITY, THEN DISCOVERY IS AN OPTION

Suppose that the court granted the Norwegian Citizens’ motion for leave to file the amicus brief that contains various exhibits and makes factual allegations. Suppose further that amicus curiae Norwegian Citizens is actually a nonprofit organization incorporated somewhere in the United States. You are in luck: amici meddling in fact-finding is not a problem when the amicus curiae is a domestic individual or entity. There are numerous ways to obtain facts from a domestic amicus. For example, a party could depose the amicus; so long as the party seeks fewer than ten depositions, the court will likely permit discovery.¹²⁰ A party may even depose an organization as a whole, so long as it notes that a party is expected to testify on behalf of the organization.¹²¹ During the deposition, the party could ask the amicus about the basis for the allegations in its brief and thereby discover the truth.¹²² A party could

117. *Jano Justice Sys., Inc. v. Burton*, Case No. 08-cv-03209, 2009 WL 10685608, at *2 (C.D. Ill. Dec. 30, 2009).

118. *Id.* at *1–2.

119. *Id.* at *2.

120. FED. R. CIV. P. 30(a)(2)(A); *see also* 3 MICHAEL DORE, LAW OF TOXIC TORTS § 22:10 (2018) (“Depositions of third parties are available under the Federal Rules without any showing of special circumstances, as long as the number of depositions does not exceed ten per side.”). The rights and limitations under Rule 30 are applied the same to nonparties as they are to parties. *See Sara Lee Corp. v. Kraft Foods Inc.*, 276 F.R.D. 500, 503 (N.D. Ill. 2011).

121. *See, e.g., Chevron Corp. v. Salazar*, 275 F.R.D. 422, 426 (S.D.N.Y. 2011); *In re Johnson & Johnson*, 59 F.R.D. 174, 177 (D. Del. 1973).

122. Depositions routinely reveal important information and lawyers are advised that “[t]he most important deposition in your case is not one you will take” but the “one you will defend.”

also issue a request for production.¹²³ The Federal Rules allow a party to request:

[A nonparty] to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: . . . any designated documents or electronically stored information . . . stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or . . . any designated tangible things.¹²⁴

To use either of these discovery mechanisms, a party would need to observe a series of procedural rules. Unless the other party consents, a party would have to request that the court where the action is pending issue a subpoena commanding the production of documents or attendance at a deposition.¹²⁵ This presents a hurdle to obtaining discovery because “[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.”¹²⁶ Courts have found subpoenas to be unduly burdensome when they seek “an extremely broad range of sensitive information,” impose significant discovery costs on nonparties, are “not tailored to a particular purpose,” or seek irrelevant information.¹²⁷ This is not easy, considering that some discovery mechanisms, such as depositions, are notoriously expensive.¹²⁸ If the

Francisco Ramos J., *How to Prepare Your Client for Deposition*, 31 FLA. B. NEWS, May 15, 2004, at 15.

123. FED. R. CIV. P. 34.

124. *Id.* 34(a)(1).

125. *Id.* 45(a).

126. *Id.* 45(d)(1).

127. *E.g.*, *Singleton v. Sterling Transp. Co., Inc.*, 289 F.R.D. 237, 241 (E.D. Va. 2012); *Huntair, Inc. v. ClimateCraft, Inc.*, 254 F.R.D. 677, 680 (N.D. Okla. 2008). In certain circumstances, requiring long-distance travel for the purposes of appearing at a deposition may also amount to an undue burden. *See Armenian Assembly of Am., Inc. v. Cafesjian*, 746 F. Supp. 2d 55, 62 (D.D.C. 2010).

128. *E.g.*, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 YALE L.J. 117, 128–29 (1949) (discussing how parties can abuse depositions in securities litigation); Maurice Rosenberg et al., *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 479, 500 (1968) (“The oral deposition is the most expensive method of discovery as well as the one which is most readily misused for harassment.”). The only consolation prize is that the deposed party typically has the right to choose the location of the deposition. *See, e.g.*, *New Paradigm Promotional Mktg., Inc. v. ACF Glob. Imports, LLC*, CIVIL ACTION NO. 14-cv-11320, 2015 WL 6865738, at *3 (E.D. Mich. Nov. 9, 2015); *Aztec Energy Partners, Inc. v. Sensor Switch, Inc.*, Civ. No. 3:07CV775 (AHN), 2008 WL 747660, at *2 (D. Conn. Mar. 17, 2008). The Federal Rules allow for a witness to be deposed within 100 miles of their place of abode or work, FED. R. CIV. P. 45(c)(1), measured as a straight line from the place of abode or work rather than by the actual route taken. *See, e.g.*, *Universitas Educ., LLC v. Nova Grp., Inc.*, No. 11 Civ. 1590(LTS)(HBP), 2013 WL 57892, at *2

court determines that the subpoena is overbroad, it would quash or modify the subpoena as the court finds fit.¹²⁹

The party must then deliver the subpoena to the amicus or, if the amicus is an organization, to its corporate officer or agent authorized for service of process.¹³⁰ If the amicus or its agent can be served in the United States, then service is easy: the Federal Rules allow for service “at any place within the United States.”¹³¹ Likewise, if the amicus is a “national or resident of the United States” but is nonetheless abroad, a court can order the national to appear at a deposition or produce documents provided that the “court finds that particular testimony or production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding” that the evidence cannot be obtained otherwise.¹³² Finally, if the party is requesting production of documents, then it must also provide a notice and a copy of the subpoena to other parties to the litigation.¹³³

Even if you satisfy these substantive and procedural hurdles, however, the opposing side has avenues to avoid providing the requested documents. The recipient of the subpoena can move to quash or modify it but bears the burden of persuading the court that the subpoena is invalid.¹³⁴ Once the subpoena recipient files a motion to quash, the recipient typically does not need to provide any documents in response to the subpoena but must continue to preserve all responsive documents.¹³⁵ Alternatively, the recipient of the sub-

(S.D.N.Y. Jan. 4, 2013) (holding that the subpoena was not unduly burdensome because while driving directions between two points was 103 miles, the distance of the straight line was 75 miles); *Palazzo v. Corio*, 204 F.R.D. 639, 639 (E.D.N.Y. 1998) (holding the proper measure for distance is a straight line).

129. *See, e.g.*, *Am. Fed’n of Musicians of the U.S. & Can. v. Skodam Films, LLC*, 313 F.R.D. 39, 54–55 (N.D. Tex. 2015) (modifying the subpoena); *Andra Grp., LP v. JDA Software Grp., Inc.*, 312 F.R.D. 444, 455–58 (N.D. Tex. 2015) (same); *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 53–54 (S.D.N.Y. 1996) (refusing to modify the subpoena and quashing it). The court could allay a nonparty’s concerns about confidentiality of its trade secrets, for example, by issuing a protective order. *See* FED. R. CIV. P. 45(d)(3)(B).

130. FED. R. CIV. P. 45(b)(1); *Bergeron v. Great W. Cas. Co.*, Civil Action No. 14-13, 2015 WL 5307685, at *1–3 (E.D. La. Sept. 10, 2015); *Catlin v. Glob.*, No. 14-CV-6324L, 2014 WL 3955220, at *3 (W.D.N.Y. Aug. 13, 2014).

131. FED. R. CIV. P. 45(b)(2).

132. 28 U.S.C. § 1783 (2012).

133. FED. R. CIV. P. 45(a)(4).

134. *Id.* 45(d)(3); *see, e.g.*, *ATS Prods., Inc. v. Champion Fiberglass, Inc.*, 309 F.R.D. 527, 531 (N.D. Cal. 2015); *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005).

135. *See, e.g.*, *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 494 (9th Cir. 1983) (“Having objected [to the subpoena], [the recipient] was not obligated to produce the subpoenaed documents, or even search for them, until [the requesting party] obtained an order directing compliance.”); *TCYK, LLC v. Does 1–20*, No. 3:13-cv-327-L, 2013 WL 6475040, at *3 (N.D. Tex. Dec. 10, 2013) (“Each ISP must confer with TCYK. The ISPs may not assess any charge in advance of

poena could move for a protective order to avoid “annoyance, embarrassment, oppression, or undue burden or expense.”¹³⁶ A protective order can narrow the scope of discovery, specify its method or allocate expense, require trade secrets to remain confidential, and even “requir[e] that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.”¹³⁷ The party requesting the protective order has the burden of showing that it is necessary.¹³⁸ Nevertheless, an amicus curiae could not simply refuse to produce documents requested in a validly served subpoena. Parties and third parties alike must have the consent of the court overseeing the action to avoid discovery.¹³⁹

The aforementioned difficulties of obtaining discovery are not foreign to litigants. The procedural and substantive pitfalls of third-party discovery are well known to lawyers, and lawyers are able to, typically, conclude discovery without issue.¹⁴⁰ In fact, third-party discovery has been used offensively by parties to make litigation too expensive and thus encourage the opposing side to end the litigation.¹⁴¹ This all goes to say that obtaining fact discovery from a domestic amicus is possible, provided that the required procedural hurdles

providing the information requested in the subpoena. Each ISP that receives a subpoena and elects to charge for the costs of production must provide a billing summary and cost report to TCYK.”)

136. FED. R. CIV. P. 26(c)(1).

137. *Id.* 26(c)(1)(A)–(H).

138. *See, e.g.*, Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975); Johnson v. Jung, 242 F.R.D. 481, 482–83 (N.D. Ill. 2007); Jones v. Hirschfeld, 219 F.R.D. 71, 74–75 (S.D.N.Y. 2003).

139. A court cannot insulate a party from discovery in a different action. Baker v. Gen. Motors Corp., 522 U.S. 222, 238 (1998) (“Michigan’s judgment, however, cannot reach beyond the Elwell-GM controversy to control proceedings against GM brought in other States, by other parties, asserting claims the merits of which Michigan has not considered. Michigan has no power over those parties, and no basis for commanding them to become intervenors in the Elwell-GM dispute.”).

140. Lawyers have written numerous pieces educating clients about third-party discovery. *See, e.g.*, Austen C. Endersby, *United States: Third Party Discovery: The Balancing Act of Relevance Versus Burdensomeness*, MONDAQ (Sept. 28, 2015), <http://www.mondaq.com/united-states/x/430018/Civil+Law/Third+Party+Discovery+The+Balancing+Act+Of+Relevance+Versus+Burdensomeness>; Daniel Justice, *Be Reasonable with Non-Party Discovery Requests: A Lack of Diligence Can Cost You*, ORRICK: IP LANDSCAPE (Apr. 24, 2014), <https://blogs.orrick.com/iplandscape/2014/04/24/be-reasonable-with-non-party-discovery-requests-a-lack-of-diligence-can-cost-you/>. This is not to say that lawyers have not made costly mistakes with discovery. One lawyer’s failure to completely review a data set resulted in a data breach. Christine Simmons, *Lawyer’s ‘Inadvertent’ E-Discovery Failures Led to Wells Fargo Data Breach*, LAW.COM (July 26, 2017, 7:13 PM), <https://www.law.com/sites/almstaff/2017/07/26/lawyers-inadvertent-e-discovery-failures-led-to-wells-fargo-data-breach/?sreturn=20180310165653>.

141. *See, e.g.*, Judge William C. Griesbach, *The Joy of Law*, 92 MARQ. L. REV. 889, 907 (2009); Matthew L. Jarvey, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 DRAKE L. REV. 913, 915–16 (2013); Liesa L. Richter, *Making Horses Drink: Conceptual Change Theory and Federal Rule of Evidence 502*, 81 FORDHAM L. REV. 1669, 1695 (2013).

are satisfied. Even if the court grants Norwegian Citizens amicus status, so long as it is a domestic organization, you could still discover the truth behind its assertions.

D. IF THE AMICUS IS A FOREIGN ENTITY, DISCOVERY OPTIONS ARE LIMITED

What if in our hypothetical amicus Norwegian Citizens is not a domestic entity, but a foreign one? As this section will demonstrate, a party's ability to obtain discovery from a foreign entity is severely limited. The primary reason for this is that traditional discovery mechanisms are unavailable except in a narrow set of circumstances—when the nonparty is a foreign corporation with a domestic parent or subsidiary that has control over the foreign corporation's documents. To obtain discovery, a party has to resort to international discovery via a Hague request. This Part outlines the challenges with obtaining discovery from a foreign nonparty.

1. *Traditional Discovery Mechanisms Are Unavailable*

Recall that a request for production of documents under the Federal Rules of Civil Procedure must be delivered to the entity or its agent “at any place within the United States.”¹⁴² If the amicus curiae is a foreign entity with no domestic agent, the subpoena cannot be validly served.¹⁴³ So if you notified amicus Norwegian Citizens of the subpoena, they could successfully quash it for lack of proper service. Moreover, even if a party could validly serve the subpoena, a court could not enforce it absent personal jurisdiction over the amicus.¹⁴⁴ Where an amicus is a foreign entity with few contacts with the United States, personal jurisdiction will be hard to establish.

142. FED. R. CIV. P. 45(b)(2).

143. It is unclear whether a Rule 45 subpoena can be premised on tag jurisdiction. *See* Perrigo Co. & Subsidiaries v. United States, CASE No. 1:17-CV-737, 2018 WL 1353749, at *4 n.4 (W.D. Mich. Feb. 21, 2018). Some courts have held that it can be. *See, e.g., In re Edelman*, 295 F.3d 171, 179 (2d Cir. 2002) (in the context of 28 U.S.C. § 1782); *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20 (2d Cir. 1998) (due process is not offended when subpoena is served on a third party in the district); *In re Application for an Order Quashing Deposition Subpoenas*, dated July 16, 2002, No. M8-85, 2002 WL 1870084, at *2 (S.D.N.Y. Aug. 14, 2002) (“The [nonparty] fully ‘knew, or should have known, that by’ attending the meeting in New York, they were also ‘risking exposure to personal jurisdiction in New York.’”) (quoting *Price Waterhouse*, 154 F.3d at 20–21.).

144. Courts have looked to whether personal jurisdiction exists in deciding a motion to compel production. *See, e.g., P.H. Glatfelter Co. v. Windward Prospects Ltd.*, 847 F.3d 452, 455 (7th Cir. 2017); *Amtrust N. Am., Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp., LLC*, No. 16-mc-0340 (CM), 2016 WL 6208288, at *3 (S.D.N.Y. Oct. 18, 2016); *see also* Ryan W. Scott, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, 88 MINN. L. REV. 968, 981 n.105 (2004).

There are two types of personal jurisdiction: general and specific. A court has general jurisdiction over an entity when that entity's contacts "with [a] [s]tate are so 'continuous and systematic' as to render [the entity] essentially at home in the forum [s]tate."¹⁴⁵ In our hypothetical, if the amicus Norwegian Citizens is a foreign corporation, then general jurisdiction likely only exists in its place of incorporation or principal place of business—outside of the United States and, hence, beyond the jurisdictional powers of American courts.¹⁴⁶ With regards to specific jurisdiction, courts have departed from the typical definition of specific jurisdiction¹⁴⁷ to focus "on the connection between the nonparty's contacts with the forum and the discovery order at issue."¹⁴⁸ Assuming that amicus Norwegian Citizens has no contacts with the United States other than that it filed an amicus brief at issue, does filing an amicus brief create specific jurisdiction?

Filing an amicus brief could, conceivably, create specific jurisdiction. In *Grand River Enterprises Six Nations, Ltd. v. Pryor*,¹⁴⁹ for example, a plaintiff filed an action against out-of-state defendants premising personal jurisdiction on an amicus brief the defendants filed in a different case in New York.¹⁵⁰ The U.S. District Court for the Southern District of New York did not outright reject this argument, holding that filing an amicus brief was not "a continuation of the conduct that gave rise to the complaint in this case"—i.e., the case did not arise out of the alleged conduct.¹⁵¹ Had the dispute arisen from the filing of an amicus brief, the Southern District could have found personal jurisdiction over the nonparty. The Western District of Louisiana reached a broader decision. In *Revies v. Loyd*,¹⁵² the district court held that filing an amicus brief "subject[s] [the individual] to the court's jurisdiction over his [or her] person."¹⁵³

145. *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

146. *Id.* at 137.

147. Personal jurisdiction exists where the action arises "out of or relat[es] to the defendant's contacts with the forum." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (quoting *Daimler*, 571 U.S. at 127).

148. *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 141–42 (2d Cir. 2014) (citing Application to Enforce Admin. Subpoenas Duces Tecum of the SEC v. Knowles, 87 F.3d 413, 418 (10th Cir. 1996); Scott, *supra* note 144, at 1005–06).

149. No. 02 Civ. 5068(JFK), 2004 WL 2480433 (S.D.N.Y. Nov. 3, 2004).

150. *Grand River Enter.*, 2004 WL 2480433, at *3.

151. *Id.*

152. 205 F. Supp. 441 (W.D. La. 1962).

153. *Loyd*, 205 F. Supp. at 443.

Yet these cases are inconclusive, and the courts are divided. In *Trans World Airlines, Inc. v. Mattox*,¹⁵⁴ the Fifth Circuit distinguished litigants and intervenors—who voluntarily appear before the court and subject themselves to the courts’ jurisdiction—from amici curiae.¹⁵⁵ Similarly, the Eleventh Circuit suggested filing an amicus brief as a method to make one’s voice heard in a proceeding but avoid personal jurisdiction.¹⁵⁶ These courts reason that because an entity does not become a party to the litigation by filing an amicus brief, it does not subject itself to personal jurisdiction of the court.¹⁵⁷

Thus, a party would find it difficult to rely on subpoenas or other discovery mechanisms of the Federal Rules when seeking information from foreign amici. Difficulty of effectuating service in the United States coupled with lack of personal jurisdiction make a successful discovery request nothing but a theoretical chimera. With the exception of discovery requests premised on tag jurisdiction,¹⁵⁸ as of the writing of this Article, there does not appear to be a single case where a court enforced a subpoena against a foreign entity whose only connection with the United States is filing an amicus brief.

2. *Discovery When Amicus Is an Entity with a Domestic Affiliate*

Suppose that in the hypothetical underlying this Article, amicus Norwegian Citizens is a wholly owned subsidiary of a domestic corporation called Norwegian-Americans Citizens United to Bankrupt Righteous, Inc. The parent did not participate in the present action in any manner. Nonetheless, you could potentially use the parent to obtain discovery from the subsidiary amicus.

The Federal Rules of Civil Procedure allow documents to be subpoenaed that are in an entity’s “possession, custody, or control.”¹⁵⁹ The courts are, again, divided on the test for determining whether the subpoenaed party has possession, custody, or control.¹⁶⁰ One set of circuits utilizes the “legal rights

154. 897 F.2d 773 (5th Cir. 1990).

155. *Trans World Airlines*, 897 F.2d at 786–87.

156. *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006).

157. *Id.* (citing *City of Winter Haven v. Gillespie*, 84 F.2d 285, 287 (5th Cir. 1936)).

158. *See* cases cited *supra* note 143.

159. FED. R. CIV. P. 45(a)(1)(iii).

160. Johnathan D. Jordan, Note, *Out of “Control” Federal Subpoenas: When Does a Nonparty Subsidiary Have Control of Documents Possessed by a Foreign Parent?*, 68 BAYLOR L. REV. 189, 189 (2016).

test,” whereby the subpoenaed party must produce documents it has “the legal right to obtain . . . [if] requested upon demand.”¹⁶¹ The Ninth Circuit explained that the legal rights test ensures that a party subpoenaed for documents has a right to the documents and “[o]rdering a party to produce documents that it does not have the legal right to obtain will oftentimes be futile, precisely because the party has no certain way of getting those documents.”¹⁶² For example, a court determined that a domestic union could not obtain documents from a foreign affiliate because the two entities were separate under the law and “there [was] no contract giving [the domestic union] the right to compel [a foreign union] to furnish it with documents in [the foreign union’s] possession.”¹⁶³ On the other hand, a court enforced a subpoena that required a bank to produce documents it could, and did, request from the Federal Reserve.¹⁶⁴

Another standard for determining whether an entity has possession, custody, or control over documents adopts a piercing the corporate veil analysis. “The requisite control has been found,” the Third Circuit held, “where the [affiliate] was found to be the alter ego of the litigating entity.”¹⁶⁵ Where the subpoenaed party is the subsidiary, courts have found control where “a subsidiary corporation acts as a direct instrumentality of and in direct cooperation with its parent corporation, and where the properties of the two [were] . . . inextricably confused as to a particular transaction . . . [and] cannot exist separate one from the other.”¹⁶⁶ For example, in *Perini American, Inc. v. Paper Converting Machine Co.*,¹⁶⁷ two corporations were owned by a single individual—100% ownership of one and 99.5% of another.¹⁶⁸ The district court pierced the corporate veil, finding the corporations to be alter egos of the individual, and ordered the corporations to produce the requested documents.¹⁶⁹

161. *United States v. Int’l Union of Petroleum & Indus. Workers, AFL-CIO*, 870 F.2d 1450, 1452 (9th Cir. 1989); *see also, e.g., In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984).

162. *In re Citric Acid Litig.*, 191 F.3d at 1108.

163. *Id.* at 1107.

164. *See In re Bankers Tr. Co.*, 61 F.3d 465, 468–69 (6th Cir. 1995).

165. *Gerling Int’l Ins. Co. v. Comm’r*, 839 F.2d 131, 141 (3d Cir. 1988) (citing *Perini Am., Inc. v. Paper Converting Mach. Co.*, 559 F. Supp. 552, 553 (E.D. Wis. 1983)).

166. *Acme Precision Prods., Inc. v. Am. Alloys Corp.*, 422 F.2d 1395, 1398 (8th Cir. 1970) (citing *NLRB v. Deena Artware, Inc.*, 361 U.S. 398 (1960); *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157 (7th Cir. 1963); *Fisser v. Int’l Bank*, 282 F.2d 231 (2d Cir. 1960)).

167. 559 F. Supp. 552 (E.D. Wis. 1983).

168. *Perini Am.*, 559 F. Supp. at 552.

169. *Id.* at 553.

Other courts have adopted a “practical ability test,” which requires discovery so long as the subpoenaed party has the practical ability to obtain documents, regardless of whether it has a legal entitlement to those documents.¹⁷⁰ As one commentator observed:

The case law is so jumbled that it provides little real guidance. Courts have considered a number of factors in applying the test, such as: (1) commonality of ownership; (2) exchange or intermingling of directors; (3) exchange of or access to documents in the ordinary course of business; (4) the nonparty’s connection to the transaction at issue; (5) any benefit or involvement by the nonparty corporation in the litigation; (6) a subsidiary’s marketing and/or servicing of the parent company’s products; and (7) the financial relationship between the parties. Courts are inconsistent, however, in which factors they apply.¹⁷¹

The practical ability test is thus malleable and does not provide predictability as to whether a party could actually obtain documents from the domestic affiliate.

In summation, if amicus Norwegian Citizens has a domestic affiliate, it will become necessary to scrutinize that relationship. Contractual provisions enabling the affiliate to request documents from the amicus would enable Rule 45 discovery. Absent such provisions, you would have to show actual control over the documents or attempt to pierce the corporate veil. As many practitioners admit, piercing the corporate veil is difficult.¹⁷² Thus, this subpart should not be read as suggesting that it is easy to obtain discovery from a foreign entity so long as there exists a domestic affiliate. All that can be said is: Provided a narrow set of circumstances exist, discovery is possible.

3. *Hague Convention Letter Rogatories and International Discovery*

Cognizant of the increase in transnational litigation and the need for transnational discovery, the international community ratified the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Convention”).¹⁷³ The Hague Convention “prescribes certain proce-

170. See Jordan, *supra* note 160, at 200–01.

171. *Id.* at 201 (footnote and citations omitted).

172. Leo K. Barnes, Jr., *Easy to Allege, Difficult to Substantiate: Piercing the Corporate Veil*, 26 SUFFOLK L., June 2010, at 10.

173. Convention adopted at the Eleventh Session of The Hague Conference on Private International Law, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555 (entered into force Oct. 7, 1972)

dures by which a judicial authority in one contracting state may request evidence located in another contracting state.”¹⁷⁴ As of April 2017, sixty-one countries are signatories to the convention,¹⁷⁵ which has been heralded as “a significant step toward facilitating the availability of and access to discovery abroad” and as “embod[ying] a spirit of cooperation among signatory countries.”¹⁷⁶

The Hague Convention provides a mechanism for obtaining documents from citizens of fellow signatories to the convention:

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act. A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated. The expression “other judicial act” does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.¹⁷⁷

This provision is embodied in 28 U.S.C. § 1781, which vests the Department of State and the courts with power to “transmit[] . . . a letter rogatory or request . . . from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed.”¹⁷⁸ A party seeking discovery pursuant to the Hague Convention files a motion with a U.S. court to issue “letter rogatories,” also called “letters of request.”¹⁷⁹ Pursuant to the Hague Convention, the letter rogatories must specify the following information: (1) the authority requesting discovery; (2) the names of the parties and their attorneys; (3) the nature of the proceeding; and (4) the evidence

[hereinafter “Hague Convention”]; LETTER OF SUBMITTAL FROM THE DEPARTMENT OF STATE TO THE PRESIDENT REGARDING THE EVIDENCE CONVENTION, S. EXEC. DOC. A, 92d Cong., 2d Sess. IV (1972) (“The willingness of the Conference to proceed promptly with work on the evidence convention is perhaps attributable in large measure to the difficulties encountered by courts and lawyers in obtaining evidence abroad from countries with markedly different legal systems.”).

174. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 524 (1987).

175. *20: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82> (last updated Apr. 9, 2017) [hereinafter “Status Table”].

176. Jennifer S. Bales, *Initiating and Responding to Discovery in Transnational Litigation: Procedures and Challenges*, 66 TENN. L. REV. 765, 767 (1999).

177. Hague Convention, *supra* note 173, at art. 1.

178. 28 U.S.C. § 1781(b)(2) (2012).

179. FED. R. CIV. P. 28(b).

requested.¹⁸⁰ In addition to these requirements, courts consider “comity, the relative interests of the parties including the interest in avoiding abusive discovery, and the ease and efficiency of alternative formats for discovery.”¹⁸¹ Thus, a court may deny the request if it determines that the documents sought are unimportant, that the request is overbroad, that alternative means of discovery are available, or that the request undermines the target country’s important interests.¹⁸² Moreover, the party seeking discovery has the burden of persuading the court that the letter rogatories are necessary.¹⁸³

It is important to note that even if a court issues a letter rogatory, the party may not receive the requested discovery. For one, the signatory states did not all agree to provide unlimited discovery. Many have made reservations “under Article 23 of the Hague Convention,” which “allows a contracting state to declare that it will not execute a letter of request ‘for the purpose of obtaining pretrial discovery of documents as known in Common Law countries.’”¹⁸⁴ In fact, of the sixty-one signatories to the convention, over two-thirds have declared that they will not execute letters for the purpose of pretrial discovery, including Argentina, China, Denmark, France, Germany, and South Korea.¹⁸⁵ Moreover, even states that do not make such reservations can refuse to fulfill a letter rogatory on the grounds that (1) it requests assistance not covered by the Hague Convention; (2) the letter rogatory does not comply with the provisions of the Hague Convention; (3) the state’s judiciary has no function for executing the request; or (4) “the sovereignty or security of the requested state would be prejudiced.”¹⁸⁶

The individual states can also impose restrictions on discovery that border on absurd. In *First American Corp. v. Price Waterhouse LLP*,¹⁸⁷ the Second Circuit observed that the “U.K. permits pretrial discovery only if each document sought is separately described,” and concluded that such specific-

180. Hague Convention, *supra* note 173, at art. 3.

181. *Madanes v. Madanes*, 199 F.R.D. 135, 141 (S.D.N.Y. 2001).

182. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 546 n.28 (1987); *Seoul Semiconductor Co. Ltd. v. Nichia Corp.*, 590 F. Supp. 2d 832, 834 (E.D. Tex. 2008).

183. *Valois of Am., Inc. v. Risdon Corp.*, 183 F.R.D. 344, 346 (D. Conn. 1997).

184. TIMOTHY P. HARKNESS ET AL., *DISCOVERY IN INTERNATIONAL CIVIL LITIGATION: A GUIDE FOR JUDGES* 16 (2015) (citing Hague Convention, *supra* note 173, at art. 23; HAGUE CONFERENCE ON PRIVATE INT’L LAW, *DRAFT PRACTICAL HANDBOOK ON THE OPERATION OF THE EVIDENCE CONVENTION* ¶¶ 316–35 (2014)).

185. See Status Table, *supra* note 175 (listing all signatory states and their reservations); HARKNESS ET AL., *supra* note 184.

186. Harkness et al., *supra* note 184; see also JEFFREY L. KESSLER & SPENCER WEBER WALLER, *INTERNATIONAL TRADE AND U.S. ANTITRUST LAW* § 8:11 (2d ed. 2018).

187. 154 F.3d 16 (2d Cir. 1998).

ity was impossible and that “the Hague Convention would prove an ineffective [discovery] tool.”¹⁸⁸ “Execution of letters rogatory may take a year or more,” making it a time consuming process very different from our discovery procedures.¹⁸⁹ The “letters rogatory procedure” is thus “unpredictable, . . . notoriously slow and cumbersome.”¹⁹⁰ Considering that some cases progress on an expedited schedule—with some proceeding to trial in under a year¹⁹¹—letter rogatories may simply not be an option.

What does this mean for the imaginary Righteous, Inc.? Assuming that amicus Norwegian Citizens is a corporation of Norway without a domestic affiliate, obtaining fact discovery will be difficult. Norway has opted not to “execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents”¹⁹² and believes that “even voluntarily supplied discovery violates their law.”¹⁹³ The likelihood that Norway enforces the letter rogatory against amicus Norwegian Citizens is, therefore, low. This means that Righteous, Inc. would not be able to discover documents to refute any factual allegations that the amicus made in its brief.

IV. FOREIGN AMICI PARTICIPATION CAN CREATE INJUSTICE

As counsel for Righteous, Inc., you may be thinking that this whole scenario is unfair. You have a foreign party appearing and rescuing a deficient complaint and your chances of obtaining fact discovery from them are slim. Unfortunately, the potential for injustice here is as serious as it may seem.

A. FOREIGN AMICUS INTERFERENCE ACTUALLY OCCURS AND CAN AFFECT THE COURSE OF LITIGATION

You may be thinking that the concerns with amicus filing are not serious because, at its core, the filing is no more than a brief—a piece of advocacy

188. *Price Waterhouse*, 154 F.3d at 22–23.

189. U.S. Dep’t of State, *Preparation of Letters Rogatory*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-assst-obtaining-evidence/Preparation-Letters-Rogatory.html> (last visited Oct. 13, 2018).

190. HARKNESS ET AL., *supra* note 184.

191. Lisa C. Wood, *Views from the Bench on Merger Issues*, ANTITRUST, Fall 2016, at 59–60.

192. See *Declarations/Reservations*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=511&disp=resdn> (last visited Oct. 13, 2018).

193. WILLIAM W. SCHWARZER & LYNN H. PASAHOW, *CIVIL DISCOVERY: A GUIDE TO EFFICIENT PRACTICE* 80 (1988). Some countries, in fact, prohibit their citizens from producing documents to U.S. litigants by criminal statute. See David E. Teitelbaum, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 841 (1986). In fact, “some 15 states had adopted legislation expressly designed to counter United States efforts to secure production of documents situated outside the United States . . .” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 n.1 (AM. LAW INST. 1987).

that is not evidence. For one, an amicus brief filed in another case can be admitted into evidence.¹⁹⁴ This is because an amicus brief filed in a different action likely falls under the public records exception to the hearsay rule.¹⁹⁵ An amicus brief is likewise admissible as evidence if filed in the same action.¹⁹⁶ Thus, an amicus brief may itself constitute a piece of evidence that could sway the fact-finder. A more serious concern is the fact that amici curiae can attach evidentiary exhibits to their briefs.¹⁹⁷ With regards to evidentiary exhibits, the analysis for admissibility will likely be more complicated.

To illustrate the complexity, let's consider the case of the hypothetical Righteous, Inc. Suppose that in our case, amicus Norwegian Citizens seeks to introduce three pieces of evidence: (1) a copy of Righteous, Inc.'s Form 10-K submitted to the Securities and Exchange Commission; (2) an email the president of Righteous, Inc. sent to the amicus admitting to lying to investors; and (3) the testimony of a bystander who heard the president boast to his staff about lying to investors. Form 10-K is plainly admissible under the business records hearsay exception, provided that the document can be authenticated.¹⁹⁸ As to the second piece of evidence, a court is likely to conclude that the email is an opposing party statement that is used "against an opposing party and . . . was made by the party in an individual or representative capacity."¹⁹⁹ A bystander's written testimony of the conversation, however, is likely inadmissible hearsay.²⁰⁰

194. See, e.g., *O'Neal v. Smithkline Beecham Corp.*, 551 F. Supp. 2d 993, 1003 n.12 (E.D. Cal. 2008); *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. M: 05-1699 CRB, 2006 WL 2374742, at *7 (N.D. Cal. Aug. 16, 2006); *Witzvak v. Pfizer, Inc.*, 377 F. Supp. 2d 726, 730 n.6 (D. Minn. 2005).

195. *O'Neal*, 551 F. Supp. 2d at 1003 n.12 (citing FED. R. EVID. 803(8)).

196. See Order Denying Motion in Limine to Exclude All Amicus Curiae Briefs from Admission into Evidence or Consideration by the Court at 1, *Danaipour v. McLary*, No. 1:01-CV-11528 (D. Mass. filed Sept. 5, 2001), ECF No. 208 (denying a motion in limine to exclude amicus curiae briefs).

197. See, e.g., *Dodge v. Giant Food, Inc.*, Civil No. 96-71, 1971 WL 123, at *2 (D.D.C. Apr. 16, 1971) ("The Court . . . entertained an amicus brief from EEOC with several additional attached exhibits."); see also Stephen G. Masciocchi, *What Amici Curiae Can and Cannot Do with Amicus Briefs*, COLO. LAW., Apr. 2017, at 23, 24 (discussing how amici introduce evidence from outside of the record); *supra* notes 37–42 and accompanying text.

198. *SEC v. Jasper*, 678 F.3d 1116, 1122–23 (9th Cir. 2012).

199. FED. R. EVID. 801(d)(2).

200. Although it contains an opposing party statement, the written testimony is itself hearsay. See *id.* 805. The testimony could be admitted provided that (1) the witness is "unavailable," *id.* 804(a)(1)–(5), and (2) one of the following situations is true: (a) the statement was made at "a trial, hearing, or lawful deposition," and the party against whom the statement or its predecessor is offered had the opportunity and motive to develop this evidence; (b) the testimony is a statement made under belief of imminent death and concerning the circumstances causing the death; (c) the testimony is against the declarant's interest; (d) the testimony recounts the declarant's personal or family history; (e) the testimony is "offered against a party that wrongfully caused the declarant's unavailability"; or (e) a residual exception applies. See *id.* 804(b)(1)–(6); see also *id.* 807.

What is so problematic about admitting this evidence? Suppose that the president only sent the email because she lost a bet with the chairman of amicus Norwegian Citizens. The amicus is now submitting this email to take revenge on the president for some unrelated wrong. In other words, it could be the case that the evidence the amicus proffers is cherry-picked to inflict the greatest harm on the party. Without discovery into material related to the evidence, the amicus's evidence can obfuscate the truth of the matter.

The concerns outlined above are not purely theoretical, and litigants face actual meddling from foreign organizations that participate as amicus curiae in domestic litigation. *In re Vitamin C Antitrust Litigation*²⁰¹ illustrates just this problem. In this case, Chinese vitamin C manufacturers allegedly formed a cartel to control exports and thereby raise prices.²⁰² The cartel succeeded, raising U.S. prices on vitamin C from roughly \$2.50 per kilogram to \$7 per kilogram by December of 2012, and, due to an outbreak of SARS, to \$15 per kilogram by April of 2013.²⁰³ The cartel's principal defense was "that their actions were compelled by the Chinese Ministry of Commerce," and that, therefore, the cartel could not be found liable for the alleged antitrust violation.²⁰⁴ The defendants were not, however, left to prove their own defense. The Chinese Ministry of Commerce appeared as amicus curiae and alleged:

[T]he Complaint rests on a fundamental misunderstanding concerning the nature of the Chamber of Commerce . . . and its role in the vitamin C industry in China. . . . [T]he Chamber is vastly different from a U.S. trade association . . . [and] plays a role in regulating China's vitamin C industry. What the Complaint describes as a "cartel," and an "ongoing combination and conspiracy to suppress competition" through price-fixing, is a regulatory pricing regime mandated by the government of China. . . . Throughout the Relevant Period, the Chamber exercised its regulatory authority with respect to vitamin C. . . . [Moreover,] the Ministry . . . promulgated a new

201. 584 F. Supp. 2d 546 (E.D.N.Y. 2008), *rev'd*, 837 F.3d 175 (2d Cir. 2016), *vacated sub nom.*, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865 (2018). For an older case with similar factual circumstances, see Memorandum of Gov't of Can. as Amicus Curiae at 3–4, *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 617 F.2d 1248 (7th Cir. 1980) (Nos. 79-1427, 79-1502, 79-1641, 79-2004 and 79-2318 to 79-2321).

202. *Vitamin C*, 584 F. Supp. 2d at 548–49. Pursuant to U.S. antitrust law, the alleged "'naked' output agreement[] [would be] illegal per se." 12 HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 83, ¶ 2006 (3d ed. 2006); *see also* 15 U.S.C. § 1 (2012) ("Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce . . . with foreign nations, is declared to be illegal.").

203. *Vitamin C*, 584 F. Supp. 2d at 549.

204. *Id.* at 550 (citing *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004)).

regulation authorizing and requiring [defendants] to limit the production of vitamin C for export and to set export prices.²⁰⁵

This confession from the Chinese Ministry significantly bolstered defendants' defense that they were directed by China to engage in the allegedly anticompetitive practices. The district court gave the Ministry's brief "substantial deference" but not "conclusive evidence of compulsion," even though the "plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position."²⁰⁶ The Second Circuit, however, disagreed and held that the Ministry's explanation of Chinese law was entitled to conclusive deference.²⁰⁷ It did not matter that "[d]efendants [could have] had a hand in the Chinese government's decision to mandate some level of price-fixing" and that their initial decision to form a cartel was voluntary.²⁰⁸ The Second Circuit could thus dispense with the entire litigation with a single paragraph: "The official statements of the Ministry should be credited and accorded deference. On that basis, we conclude, as Defendants and the Ministry proffer, that Chinese law required Defendants to engage in activities in China that constituted antitrust violations here in the United States."²⁰⁹ The appearance of the foreign amicus decided the case against the plaintiffs.

Fortunately, litigants do not have to be concerned about courts following the Second Circuit's approach in the *Vitamin C* litigation and blindly accepting an amicus brief submitted by a foreign government as conclusive as to that government's law. The Supreme Court reversed the Second Circuit in a unanimous decision, holding that a court should not have given the Ministry's amicus brief binding effect.²¹⁰ This does not mean that the plaintiffs will necessarily prevail on remand. The Supreme Court instructed that foreign governments' submissions are "ordinarily entitled to *substantial* . . . weight."²¹¹ On remand, the plaintiffs would need to convince the courts that the Ministry's interpretation of its law is incorrect. For example, they could attempt to show that the interpretation was an *ex post facto* justification for the sole purpose of benefiting the cartel in the aforementioned litigation. The plain-

205. Brief of Amicus Curiae the Ministry of Commerce of China in Support of the Defendants' Motion to Dismiss the Complaint at 5–11, *Vitamin C*, 584 F. Supp. 2d 546 (No. 06-MD-1738 (DGT)(JO)), 2006 WL 6672257 (footnotes and citations omitted).

206. *Vitamin C*, 584 F. Supp. 2d at 557.

207. *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 189 (2d Cir. 2016), *vacated sub nom.*, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865 (2018).

208. *Id.* at 191.

209. *Id.* at 189–90.

210. *Animal Sci. Prods.*, 138 S. Ct. at 1874.

211. *Id.* at 1875.

tiffs could also potentially show that the official interpretation of the law during the relevant period did not mandate price- or output-fixing and that, therefore, there was no true conflict between U.S. and Chinese laws. To prove this scenario, however, the plaintiffs would need to obtain discovery from the foreign amicus, which, as explained above, is incredibly difficult. Thus, whether the plaintiffs will prevail on remand is unclear.

Additionally, the *Vitamin C* litigation should not be understood to be a solitary occurrence. Foreign amici similarly participated in the *Strauss v. Crédit Lyonnais*²¹² litigation under the Antiterrorism Act of 1992. In this case, the plaintiffs alleged that a French bank doing business in the United States aided Hamas by maintaining accounts that the bank suspected to be laundering money to Hamas.²¹³ The bank moved for summary judgment, arguing, among other things, that “no reasonable juror could find that . . . [the bank] acted with” knowledge.²¹⁴ Three foreign organizations appeared as amici to aid the bank: the Institute of International Bankers, the European Banking Federation, and the French Banking Federation.²¹⁵ The amici proceeded to allege facts meant to dispose the court favorably towards the defendant:

[The bank] reported its money launder suspicions regarding [the accounts’] transactions to the appropriate French authorities, which prompted two criminal investigations by the French police and prosecutors. [The bank] fully cooperated with these investigations. The French public prosecutors subsequently closed these cases without any charges brought against [the accounts]. There is no reason to expect or require that [the bank] should have conducted its own further investigation²¹⁶

Although less decisive than the *Vitamin C* case, the facts the foreign amici alleged certainly weakened the plaintiffs’ case. The French government’s alleged decision not to prosecute suggests that the banks were not knowingly supporting terrorism.

All this goes to show that foreign amicus participation poses a serious and immediate risk of prejudicing parties. Their factual allegations can be admitted into evidence and have, in practice, been entered into the district

212. 925 F. Supp. 2d 414 (E.D.N.Y. 2013).

213. *Strauss*, 925 F. Supp. 2d at 424–25, 427.

214. *Id.* at 425, 427 (citing *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 694 (7th Cir. 2008)).

215. See Brief of Amici Curiae the Inst. of Int’l Bankers et al. in Support of Defendant’s Motion for Summary Judgment, *Strauss*, 925 F Supp. 2d 414 (No. 1:06-CV-00702), ECF No. 279-2.

216. *Id.* at 9.

court record. The potential for injustice is thus great and, as the following subpart shows, the existing safeguards are insufficient.

B. CURRENT CASE LAW IS INCONSISTENT, UNFAIR, AND CONFLICTS WITH CONGRESSIONAL INTENT BEHIND THE DISCOVERY RULES

The current state of the law governing amicus filing in district courts is a mess. It creates a situation where a foreign amicus can intervene in domestic litigation and allege facts without subjecting itself to discovery. The simplest reason for reform is that the effect on litigants is plainly unfair. As one court explained:

[Amicus participation] is not proper because it injects an element of unfairness into the proceedings now pending before this court. The defendants in this case are entitled to have their contentions and arguments on the summary judgment motions considered without having the weight of the United States, speaking through the Secretary of Labor, joining plaintiffs in the assertion that there are no issues of material fact, that defendants have violated the provisions of ERISA, and thus are liable to a judgment ordering them to disgorge profits they have made from alleged breaches of trust.²¹⁷

Nonetheless, this critique applies equally to any amicus appearance in district courts, though it holds particular weight when dealing with a foreign amicus. In addition to the unfairness, there are two further reasons why current jurisprudence requires reform.

1. *It Undermines Objectives of Liberal Discovery Rules*

Congress created pretrial discovery to serve a number of important purposes. It is a device that “narrow[s] and clarif[ies] the basic issues between the parties.”²¹⁸ Discovery helps ascertain the truth behind every dispute.²¹⁹ Discovery aims to facilitate “a just and speedy determination of [the] case[.]”²²⁰ Additionally, many courts recognize that the purpose of the discovery rules is to “accomplish full disclosure of the facts, eliminate surprise, and promote settlement.”²²¹ When an amicus is able to allege facts but avoid discovery, every one of these interests is subverted.

217. Leigh v. Engle, 535 F. Supp. 418, 422 (N.D. Ill. 1982).

218. Hickman v. Taylor, 329 U.S. 495, 501 (1947).

219. *Id.*

220. Snead v. Am. Exp.-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 151 (E.D. Penn. 1973); Rios v. Donovan, 250 N.Y.S.2d 818, 820 (N.Y. App. Div. 1964).

221. S. Ry. Co. v. Lanham, 403 F.2d 119, 127 (5th Cir. 1968); *see also, e.g.*, Hamilton v. First Am. Title Ins. Co., Civil Action No. 3:07-1442-G, 2010 WL 791421, at *2 (N.D. Tex. Mar. 8,

A foreign amicus could appear in an action, expand the issues with a filing, and thereafter avoid discovery. To illustrate, imagine that a North Korean citizen appears as an amicus in a domestic wrongful death action and files a brief right before trial.²²² The North Korean claims to have committed the murder the defendant has been charged with and attaches a copy of an airline ticket showing that the North Korean was in the city where the murder occurred. Assume further that the amicus filing is a sham and, although there are no paper records, the defendant paid the North Korean to make this filing. What are the results of the filing? First, the defendant now has a new defense. Second, the North Korean will likely never be extradited because the United States does not have an extradition treaty with North Korea. Third, the plaintiff would not be able to verify the validity of the claim because North Korea is not a party to the Hague Convention and will likely refuse to permit discovery.

Avoiding discovery here creates the following problems: it allows an amicus to expand the factual issues and confuse the record; it infuses facts that cannot be verified, thus potentially obfuscating the truth; and it creates the possibility that a surprise amicus appears late in the litigation and saves a party from a claim. Granted, the example is farfetched and unlikely to happen. There is, however, very little stopping a more complex and ambiguous injustice from occurring. As Part II illustrates, judges vary widely in the arguments they accept. A judge could decide to entertain factual allegations made by a foreign amicus curiae²²³ not previously made by the parties²²⁴ – and filed five months after the close of all briefing²²⁵ – and later admit the allegations as evidence.²²⁶ This result, permitted by existing case law, is plainly inconsistent with fundamental principles of American discovery.

2. *It Imposes Undue Financial Burden*

Many commentators and judges have argued whether the costs created by amici briefs justify their appearance in district court litigations. As Judge Posner explained, amicus briefs require parties to expend “time and other resources . . . for the preparation and study of, and response to, amicus

2010); *Stark v. Photo Researchers, Inc.*, 77 F.R.D. 18, 20 (S.D.N.Y. 1977) (same) (citing another source).

222. As discussed in the text accompanying notes 51–63, courts have allowed briefs that were filed significantly late.

223. See, e.g., *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 189 (2d Cir. 2016).

224. See, e.g., *Amerikohl Order*, *supra* note 112, at 1.

225. See, e.g., *Andersen v. Leavitt*, No. 03-cv-6115 (DRH)(ARL), 2007 WL 2343672, at *1 (E.D.N.Y. Aug. 13, 2007).

226. See *supra* notes 182–94.

briefs,” which “drive[s] up the cost of litigation.²²⁷ For defendants and parties who pay their lawyers by the hour, the additional time spent on responding to the briefs translates directly into financial loss. High litigation costs already encourage defendants to settle frivolous cases,²²⁸ so the additional costs of dealing with amicus briefs will likewise encourage defendants to settle regardless of the case’s merit. Moreover, amicus briefs impose a particular cost on indigent defendants. Suppose that the prosecution brings a case against a young Wall Street banker on a novel theory of bank fraud.²²⁹ The young banker may not be able to afford a private lawyer because of student debt and would have to request a public defender. A federal public defender, however, can work for forty-six hours before she “begins to work for nothing,” which is “enough time to interview the defendant, perform the legal research, prepare the papers and litigate a motion or two, and undertake an exploratory investigation of the facts.”²³⁰ The novelty of the government’s position may cause numerous amici to appear for or against the government, thereby increasing the amount of time the public defender has to spend on responding to various briefs. Considering that the public defender is already overworked and underfunded, the additional briefing would distract the public defender from analyzing the evidence and building a case for the young banker.²³¹ As a result, the young banker may end up receiving poor representation and be found guilty of a crime she did not commit.²³² Thus, amicus briefs are particularly harmful to indigent defendants. For these reasons, amicus curiae participation may need to be restricted.²³³

227. See, e.g., *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003).

228. E.g., Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 548–50 (1991); Neal H. Klausner, Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 306 (1986).

229. The Supreme Court recently addressed an expansive definition of bank fraud under 18 U.S.C. § 1344(1) in *Shaw v. United States*, 137 S. Ct. 462 (2016).

230. Peter W. Tague, *Ensuring Able Representation for Publicly-Funded Criminal Defendants: Lessons from England*, 69 U. CIN. L. REV. 273, 276 (2000).

231. Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, GUARDIAN (June 17, 2015, 7:30 AM), <https://www.theguardian.com/commentis-free/2015/jun/17/poor-rely-public-defenders-too-overworked>.

232. Complaints about the quality of public defenders have led to litigation at the state level. See, e.g., Simon McCormack, *Poor New Yorkers Get Lost in the State’s Broken Public Defense System*, NYCLU (Mar. 31, 2017), <https://www.nyclu.org/en/publications/poor-new-yorkers-get-lost-states-broken-public-defense-system>.

233. For some proposals calling for restricting amicus participation see Harrington, *supra* note 11, at 693–698.

When foreign amicus are allowed to allege facts and avoid discovery, however, litigants bear a unique burden of transnational discovery.²³⁴ For one, litigants will need to pay their lawyers to prepare Hague Convention letter rogatories and monitor the discovery process, which often lasts longer than a year.²³⁵ Additionally, parties are generally advised to consult the Department of State as well as retain local counsel, which further increases a party's legal fees.²³⁶ A year later, the party may not even be able to obtain the requested documents due to international hostility to American pretrial discovery.²³⁷ Where the requests are granted, the party will need to pay local counsel to oversee the execution of the letter rogatory or to assist in the taking of depositions.²³⁸ The involved party may also need to proffer funds for transporting the documents to the United States and translating them into English.²³⁹ The potential expenses associated with transnational discovery are thus great, and less affluent parties may find it difficult to bear the costs.

The unique costs foreign amici can impose on parties open the doors for abuse. Parties have already been using the costs of discovery offensively to make litigation unfeasible or to encourage settlement.²⁴⁰ Plaintiffs who have foreign allies with helpful information can encourage these allies to appear in domestic litigation as amici curiae for two purposes: to allege facts that could help them win the case; and to drown the opposition in transnational discovery costs. The existing jurisprudence may allow the foreign amicus to appear on the eve of trial,²⁴¹ brief issues not discussed by the parties,²⁴² submit cherry-picked evidence²⁴³ to hurt one side, and avoid discovery into the

234. For a general overview of transnational e-discovery costs, see generally John T. Yip, Comment, *Addressing the Costs and Comity Concerns of International E-Discovery*, 87 WASH. L. REV. 595 (2012).

235. *Preparation of Letters Rogatory*, *supra* note 189.

236. Phillip A. Buhler, *Transnational Service of Process and Discovery in Federal Court Proceedings: An Overview*, 27 TUL. MAR. L.J. 1, 36 (2002); William D. Wood & Brian C. Boyle, *Obtaining Foreign Discovery in U.S. Litigation*, 63 ADVOCATE (TEX.), Summer 2013, at 12, 16.

237. *See supra* notes 184–193 and accompanying text.

238. Wood & Boyle, *supra* note 236, at 16, 18.

239. United States *ex rel.* McBride v. Halliburton Co., 272 F.R.D. 235, 240–41 (D.D.C. 2011) (denying discovery due to high cost of transporting it to the United States); MUKESH ADVANI, UBIC N. AM., INC., HOW TO MANAGE COSTS AND EXPECTATIONS FOR SUCCESSFUL E-DISCOVERY: BEST PRACTICES 3 (observing that production of electronically stored data frequently costs in excess of one million dollars); Marsha Redmon, *Panel Discussion: E-Discovery*, 31 LEGALTIMES, Sept. 22, 2008, at 25 (estimating that costs of international e-discovery increases by at least thirty percent when foreign languages are involved).

240. *See, e.g.*, Alexander, *supra* note 228, at 548–50; Griesbach, *supra* note 141, at 907; Jarvey, *supra* note 141, at 915–916; Klausner, *supra* note 228, at 306; Richter, *supra* note 141, at 1695.

241. *See supra* notes 49–63 and accompanying text.

242. *See supra* notes 114–23 and accompanying text.

243. *See generally supra* Part III.A.

truth of its allegations.²⁴⁴ Granted, there is no evidence that the system has been used in this way. The potential for abuse, however, is there and warrants reform.

V. A MODEST PROPOSAL TO AVOID THE INJUSTICE

As the preceding parts show, foreign amici have incredible potential to alter the course of domestic litigation, but parties lack reliable means to control their influence or verify the truth behind their allegations. As to controlling amicus participation, numerous scholars have already written thoughtful proposals to address this issue.²⁴⁵ Instead of restricting amicus participation, filing an amicus brief should open the amicus up to discovery regarding the factual allegations contained in that brief. To this end, I suggest that either Congress enact a statute, or the Supreme Court enact a rule, to allow parties discovery into factual assertions in amicus curiae briefs. As this section shows, the proposals are constitutional and consistent with international comity.

A. A PROPOSED STATUTE TO ALLOW FOR DISCOVERY

As explained above, there are two basic reasons why parties cannot obtain discovery from foreign amici: difficulty of serving the subpoena and lack of personal jurisdiction.²⁴⁶ A statute that would enable parties to discover the truth regarding the allegations contained in foreign amicus briefs must therefore address these issues. The basic goals of the proposed statute are threefold: first, ensure that a subpoena can be validly served on the foreign amicus consistent with existing case law; second, ensure that a court has personal jurisdiction to compel production; and third, ensure that parties are authorized to conduct discovery.

244. See *supra* Part II.

245. See, e.g., Anderson, *supra* note 36, at 413–14 (offering suggestions for disclosure requirements and urging the court to deny an amicus brief when it would unduly burden the parties); Harrington, *supra* note 11, at 693–98 (suggesting, among other things, a multifactorial approach to limiting amicus appearance in district court); Harris, *supra* note 6, at 17 (arguing that private party litigating amici are inappropriate); Simard, *supra* note 10, at 709 (arguing that parties should disclose other information regarding amicus activity and that every amicus should be required to submit a report similar to an expert report required by Federal Rule of Civil Procedure 26(a)(2)(B)). Some, on the other hand, have sought only to codify in the Federal Rules the existing scope of amicus powers. Lowman, *supra* note 12, at 1291–98. Notably, some scholars have argued that amicus participation constitutes speech or a petition for a redress of grievances protected by the First Amendment, which would mean that amicus participation in district courts cannot be banned outright. See Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 333–38, 349–52 (2008) (arguing that Federal Rule of Civil Procedure 11, which permits judges to sanction lawyers, already serves as a safeguard against abusive briefs).

246. See *supra* notes 142–58 and accompanying text.

1. *Expanding the Scope of Permissible Service for Foreign Amici*

The Federal Rules currently only authorize subpoenas to be served by delivery to the nonparty or its agent “at any place within the United States.”²⁴⁷ This may be impossible when dealing with a foreign amicus, however, because the amicus may not have an agent or an office in the United States. Thus, to enable discovery, the rules for service must be expanded in this narrow circumstance.

Any proposed service of process must conform to constitutional requirements of due process. “The fundamental requisite of due process of law is the opportunity to be heard,” which requires that an individual “is informed that the matter is pending and can choose for himself whether to appear”²⁴⁸ The Supreme Court explained that due process requires for the notice to be “reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”²⁴⁹ The requirements imposed by due process are not difficult to satisfy, and even creative attempts at service will be deemed proper so long as they result in actual notice.²⁵⁰

The easiest way to notify foreign amici of the subpoena would be to authorize service on their lawyer or the person who filed the amicus brief. After all, even pro se amici include their contact information on the amicus brief.²⁵¹ Sending a notice of a subpoena to the individual filing the brief is reasonably calculated to apprise the amicus of the subpoena. Moreover, we already allow for pleadings and discovery papers to be served on parties’ attorneys.²⁵² If serving an attorney amounts to sufficient notice for parties whose rights are litigated,²⁵³ certainly due process cannot be offended by serving nonparties in the same way. Accordingly, the proposed statute would authorize service by certified mail, hand-delivery, or other acceptable means to the attorney or person named on the amicus brief. Where the address listed is foreign, certified international mail or its equivalent should suffice.

247. FED. R. CIV. P. 45(b)(2).

248. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

249. *Id.*

250. RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, *CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE* 654 (9th ed. 2007).

251. *See, e.g.*, Amicus Memorandum of Law in Opposition to Defendants’ Motion, *Fragola v. Plainville Police Dep’t*, Civil Action No. 15-6281 (CCC) (D.N.J. Dec. 21, 2015), ECF No. 15.

252. FED. R. CIV. P. 5(b)(1).

253. *See* 4B ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1145 (4th ed. 2018).

2. *Ensuring That the Courts Have Personal Jurisdiction over the Amici*

Case law is unclear as to whether filing an amicus brief creates personal jurisdiction over the filer.²⁵⁴ The court's personal jurisdiction power, because it exposes the party to the government's "coercive power," is limited by the Due Process Clause.²⁵⁵ Specific jurisdiction exists when there is an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum."²⁵⁶ This test is satisfied for foreign amici regarding assertions in their briefs because the discovery dispute arises wholly from the amicus's voluntary decision to file the brief. In that sense, the amicus "purposefully avails itself of the privilege of"²⁵⁷ alleging facts before the courts. The appearance, after all, is voluntary and serves to advocate for a certain result that is beneficial to the amicus.

Insofar as the Due Process Clause requires the courts to consider the burden on the nonparty,²⁵⁸ the burden here is limited. Unlike a party that must actively litigate in the forum and appears by compulsion of the court,²⁵⁹ an amicus can choose to do no more than file a single brief electronically with the court. No one compels the amicus to appear at trial, participate in discovery, or allege facts. Granted, the proposed statute would subject the amicus to discovery, which would be burdensome. Nonetheless, the burden is not great because the proposed statute does not allow for unlimited discovery, but only into matters asserted in the amicus brief. An amicus that compiles a brief alleging facts should have already collected the witnesses and documents regarding those facts. In other words, the proposed discovery statute would not expose the amicus to any additional burdens that it did not already voluntarily undertake. Finally, it must be noted that "[a] core concern in [the Supreme] Court's personal jurisdiction cases is fairness."²⁶⁰ As explained above, not allowing a party to verify the veracity of allegations that can enter

254. *See supra* notes 149–58 and accompanying text.

255. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1779 (2017) (Sotomayor, J., dissenting) (in the context of state court's assertion of jurisdiction).

256. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

257. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

258. *Bristol-Myers Squibb*, 137 S. Ct. at 1786 (Sotomayor, J., dissenting) ("The factors relevant to such an analysis include 'the burden on the defendant . . .'" (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985))).

259. *Id.* at 1780 ("Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.").

260. *Id.* at 1784.

into evidence is profoundly unfair to that party. This unfairness should weigh heavily in favor of exposing the amicus to a minimal discovery burden.

As for a model for the personal jurisdiction provision, potential choices include state long-arm statutes, a new Federal Rule, or a specific federal statute conferring jurisdiction. Personal jurisdiction statutes are typically found in state statutory compilations, and are extremely thorough as to the conduct that creates personal jurisdiction over the nondomiciliary.²⁶¹ Personal jurisdiction in federal cases is established in Federal Rule of Civil Procedure 4(k), which provides:

Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

- (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;
- (B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or
- (C) when authorized by a federal statute.²⁶²

Congress has, however, passed statutes creating personal jurisdiction in certain special circumstances. For example, Congress decided that “[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction . . . [and] where service has been made under section 1608 of [Title 28].”²⁶³ In our case, the issue of foreign amici fact-assertion is a special circumstance that is best resolved via a specific statute. For this reason, the personal jurisdiction portion would be modeled after 28 U.S.C. § 1330(b).

3. *Scope of the Proposed Discovery*

As to the discovery portion of the statute, Federal Rule of Civil Procedure 45 already contains carefully drafted rules on what evidence can and cannot be discovered from a nonparty. For this reason, it would be best for the statute to reference this relevant rule. The only caveat is that filing an amicus brief should not open up the party to discovery on any matter. Just as a single tortious action in a state does not create general jurisdiction over a

261. See, e.g., N.Y. C.P.L.R. 302 (McKINNEY 2018). But see CAL. CIV. PROC. CODE § 410.10 (West 2018) (“A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”).

262. FED. R. CIV. P. 4(k)(1).

263. 28 U.S.C. § 1330(b) (2012).

party,²⁶⁴ filing an amicus brief making certain factual allegations should not open up the party to discovery on unrelated matters. Accordingly, the proposed statute would only permit discovery that arises out of the amicus's allegations of facts.

4. *The Text of the Proposed Statute*

With the above considerations in mind, Congress should enact the following statute:

§ 1. OBTAINING DISCOVERY FROM FOREIGN AMICUS CURIAE

(a) A party before a tribunal in the United States may serve a subpoena authorized by Federal Rule of Civil Procedure 45 upon any individual, corporation, organization, or other legal entity that is not domiciled in any state or territory within the United States and that appears as an amicus curiae in the same case or controversy, provided that the subpoena arises out of the amicus curiae's allegations of fact.

(b) For the purposes of this Section, service of the subpoena shall be deemed proper if it is delivered in any manner consistent with the Constitution to the person signing the amicus curiae brief or at the address specified on the amicus brief.

(c) For the purposes of this Section, personal jurisdiction shall exist over any individual, corporation, organization, or other legal entity that is not domiciled in any state or territory within the United States and that appears as an amicus curiae before a district court of the United States.

B. IN THE ALTERNATIVE, A PROPOSED FEDERAL RULE

One fair criticism against enacting a statute to enable discovery is that a statute is too significant a measure for this problem—it is akin to using a sledgehammer to kill a fly. After all, a federal statute requires a significant amount of effort: a member of Congress sponsors it; it is referred to a committee; debate ensues; it must endure filibuster; be approved by both the House of Representatives and the Senate; and, eventually, be signed into law

264. Compare *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014) (general jurisdiction), with *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (specific jurisdiction).

by the President.²⁶⁵ Although nothing prevents Congress from acting in this case, the matter can also be handled by the Supreme Court.

The Supreme Court has the authority under the Rules Enabling Act to prescribe rules of practice and procedure in the federal courts.²⁶⁶ In practice, much of the rulemaking process has been delegated to the Judicial Conference—“the principal policy-making body of the U.S. Courts.”²⁶⁷ Within the Judicial Conference, one of the Conference’s advisory committees evaluates rule proposals and, with permission from the Conference’s Committee on Rules of Practice and Procedure (“Standing Committee”), solicits comments from judges, practicing attorneys and the general public.²⁶⁸ If an advisory committee approves a rule or an amendment, it refers its findings to the Standing Committee, which independently reviews them “and, if satisfied, recommends changes to the Judicial Conference, which in turn recommends the changes to the Supreme Court.”²⁶⁹ The Court then decides whether to enact the rule, but Congress can prevent the rule from taking effect through legislation.²⁷⁰

While the rulemaking process is still time-consuming, it is comparatively simpler than the process of enacting legislation. Moreover, the rulemaking process and the Federal Rules enacted under the Rules Enabling Act are constitutional²⁷¹ and have already been used to create personal jurisdiction over parties,²⁷² authorize specific methods of service of process,²⁷³ and govern discovery.²⁷⁴ In short, the Federal Rules provide a tried and true method of enabling parties to serve subpoenas, establish personal jurisdiction, and obtain discovery.

265. For individuals unfamiliar with the federal lawmaking process, see, for example, *How Laws Are Made and How to Research Them*, USA.GOV, <https://www.usa.gov/how-laws-are-made> (last updated Aug. 13, 2018).

266. 28 U.S.C. §§ 2071–77 (2012).

267. *How the Rulemaking Process Works*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> (last visited Oct. 28, 2018).

268. *See id.*

269. *Id.*

270. *Id.*

271. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 387 (1989); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941) (“Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States . . .”).

272. *See, e.g.*, Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988) (discussing, among other things, the bulge provision of Federal Rule of Civil Procedure 4(k)(1)(B)).

273. *See* FED. R. CIV. P. 4(c), (e)–(j) (service of summons); *id.* 4.1 (service of papers other than a summons or a subpoena); *id.* 5(b)–(c) (service of pleadings, order requiring service, discovery papers, written motions, and other papers).

274. *See id.* 26–37.

There are two possible ways to use the Federal Rules of Civil Procedure to ensure that parties can obtain discovery into factual allegations within amicus briefs submitted by foreign parties. First, the Supreme Court could amend the Federal Rules of Civil Procedure to include a Rule allowing service on foreign amici abroad and permitting parties limited discovery into matters asserted in the briefs—the Rule can be worded much like the statute proposed above.²⁷⁵ Alternatively, the Rule could simply require individuals who submit an amicus brief to consent to discovery.²⁷⁶ Either approach is likely to allow parties to discover whether foreign amici were truthful in their factual assertions.

C. DISCOVERY REFORM IS PREFERABLE TO RESTRICTING AMICUS PARTICIPATION

One objection to the proposed statute is that it may not do enough to solve the problem of amicus appearances in district court litigation. A critic of amicus participation may suggest rules that deny individuals the right to file amicus briefs in district court²⁷⁷ or limit their participation to certain enumerated circumstances.²⁷⁸ Alternatively, one may feel the urge to prohibit or restrict foreign organizations from participating as amici. For the reasons explained below, such positions are not advisable.

With regards to any attempted prohibition on the filing of amicus briefs, organizations may have a constitutional right to make such filings. Professor Ruben Garcia was perhaps among the first to suggest this view.²⁷⁹ He argues that amicus briefs may involve the guarantees of the Free Speech and the Right to Petition Clauses, although he concludes that the Right to Petition analysis may be more appropriate.²⁸⁰ An amicus may believe that both clauses should offer some protection. Amici tend to comment on the policy impact of certain legal decisions, even if they engage in factual assertions. Such advocacy almost by definition carries ideas of “social importance,” and political speech is typically entitled to “the full protection of the” First Amendment.²⁸¹ Even if litigation or allegations of fact constitute unprotected

275. *See supra* Part IV.A.

276. I thank Professor Kevin M. Clermont of Cornell Law School for this suggestion.

277. Scholars have argued that it is inappropriate to allow private organizations to appear as amici. *See Harris, supra* note 6, at 15–16.

278. Anderson, *supra* note 36, at 413–14 (urging the court to deny an amicus brief when it would unduly burden the parties); Harrington, *supra* note 11, at 693–98 (suggesting, among other things, a multifactorial approach to limiting amicus appearance in district court).

279. *See Garcia, supra* note 245, at 333–38.

280. *Id.*

281. *Roth v. United States*, 354 U.S. 476, 484 (1957).

speech,²⁸² speech that contains protected and unprotected statements—i.e., mixed speech—is generally treated as fully protected speech.²⁸³ If amicus filing is protected by the First Amendment, then the government could at most impose certain time, place, or manner restrictions.²⁸⁴ Yet the difficulty with the Free Speech Clause analysis is that courts do not, as Professor Garcia puts it, resemble traditional public fora for engaging in political speech. It may be that in-court advocacy does not constitute protected speech.

Instead, Professor Garcia suggests that the right to proceed as amicus is protected by the “the right of the people . . . to petition the government for a redress of grievances.”²⁸⁵ The Supreme Court has held that the Right to Petition permits parties to initiate ill-motivated lawsuits and even engage in advocacy that may restrict competition in violation of the Sherman Act.²⁸⁶ Moreover, amicus participation appears to fit this framework because an amicus must possess an interest in the outcome.²⁸⁷ Essentially, an amicus appears before the court to prevent the creation of a law that would aggrieve them or for a redress of a law that already does. A constitutional right to proceed as amicus is thus conceivable and may prohibit any law that disallows the filing of amicus briefs in district courts.

Even if the Constitution does not mandate the courts to permit amicus briefs, amici still serve an important function and should not be banned from filing briefs. When a district court is facing a case of first impression, an amicus can evince important legal issues or policy considerations that the court should keep in mind when creating law.²⁸⁸ Additional briefing and a more thorough analysis of the relevant law can improve the quality of the decision; and, therefore, amicus participation can be conducive to a more just decision.²⁸⁹ Amici might also fill in expertise lacking by the parties:

282. As Professor Garcia observes, the Supreme Court tends to treat litigation as a separate category of speech. Garcia, *supra* note 245, at 335 (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546–49 (2001)).

283. *E.g.*, *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (holding in the context of commercial speech that mixed speech does not “retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech”).

284. *E.g.*, *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677–78 (1998).

285. Garcia, *supra* note 245, at 337 (quoting U.S. CONST. amend I).

286. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961); *cf.* Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 84 (1998) (defamation laws). For other First Amendment challenges to antitrust law, see generally Scott E. Gant, Andrew Z. Michaelson & Edward J. Normand, *The Hart-Scott-Rodino Act’s First Amendment Problem*, 103 CORNELL L. REV. ONLINE 1 (2017).

287. *See* Garcia, *supra* note 245, at 337; *see supra* notes 73–79 and accompanying text.

288. *Cf.* Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 STETSON L. REV. 269, 279–80 (2003).

289. Harper & Etherington, *supra* note 3, at 1176–77.

Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group.²⁹⁰

More than merely serving the court, amicus participation also enables non-parties that could be potentially affected by the decision to have their voices heard.²⁹¹ Although their participation is of less import in district court litigation that generally does not result in precedential effect,²⁹² amicus participation can ensure that the court's judgment is appropriate in the particular case. This most often arises in the context of an antitrust consent decree, where the court must determine whether the proposed consent decree is in the public interest and must, therefore, solicit opinions from the public.²⁹³ In this instance, and in similar instances, the amicus apparatus ensures that public concerns are sufficiently aired before the court and that a decision in a particular case does not unduly harm the public.

For these and other reasons, amici should continue to have the opportunity to participate in district court litigation. Rather than prohibiting their advocacy, parties should be empowered to confront amicus filings by obtaining discovery from them. This proposal both ensures that the parties are able to discover the truth and that nonparties can continue advocating their interests when appropriate.

290. Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. APP. PRAC. & PROCESS 279, 281 (1999) (footnote and citations omitted).

291. *Id.*

292. In general, "there is no such thing as 'the law of the district,'" *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991), such that a district "court's precedent should be considered only to the extent its reasoning persuades," Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 802 (2012).

293. Joseph G. Krauss, David J. Saylor & Logan M. Breed, *The Tunney Act: A House Still Standing*, ANTITRUST SOURCE, June 2007, at 1, 3. Limiting amicus participation here may be impossible. One lawyer faced with a five-page amicus brief limit converted the brief into a comic strip. See Brief of Bob Kohn as Amicus Curiae at 1–5, *United States v. Apple, Inc.*, Civil Action No. 1:12-CV-2826 (S.D.N.Y. Sept. 4, 2012), ECF No. 110; see also Debra Cassens Weiss, *Faced with a Five-Page Limit, Lawyer Files Cartoon Amicus Brief with Proper Font Size*, ABA J. (Sep. 5, 2012, 12:39 PM), http://www.abajournal.com/news/article/faced_with_a_five-page_limit_lawyer_files_cartoon_amicus_brief_with_proper_.

D. THE PROPOSED STATUTE AND RULE CONFORM TO INTERNATIONAL COMITY

International comity is an important concern that guides the extraterritorial effect of domestic law.²⁹⁴ It refers to “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.”²⁹⁵ Courts honor international comity as a form of judicial diplomacy²⁹⁶ and treat it “not just [as] a vague political concern favoring international cooperation” but as “a principle under which judicial decisions reflect the systematic value of reciprocal tolerance and goodwill.”²⁹⁷ This does not mean that international comity is an overriding concern; rather, it is “a discretionary rule of ‘practice, convenience, and expediency.’”²⁹⁸

International comity has long been at odds with the liberal discovery regime espoused by American courts.²⁹⁹ For a comity concern to arise there must be a true conflict between domestic and foreign law.³⁰⁰ A true conflict over discovery law may frequently arise because few countries espouse liberal discovery rules like the United States.³⁰¹ Some countries consider discovery a judicial task and interpret American lawyers’ attempts to conduct

294. For a thorough discussion of international comity, see generally William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015). This should not be taken as a ubiquitous definition. Courts and scholars have found that international comity has never been expressly defined. *E.g.*, *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 886 (9th Cir. 2012); *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 75 (3d Cir. 1994); Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 4 (1991).

295. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

296. Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 BERKELEY J. INT’L L. 157, 162 (2016) (citing another source).

297. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part); *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005) (quoting *British Airways Bd. v. Laker Airways Ltd.*, [1984] E.C.C. 36, 41 (Eng. C.A.)) (“[I]nternational comity is clearly concerned with maintaining amicable working relationships between nations, a ‘shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.’”)

298. *JP Morgan*, 412 F.3d at 423 (quoting *Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997)).

299. See generally Zambrano, *supra* note 296, at 161–74.

300. *Chavez v. Carranza*, 559 F.3d 486, 495 (6th Cir. 2009).

301. See *supra* notes 184–193 and accompanying text; see also *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845(TPG), 2013 WL 491522, at *3–9 (S.D.N.Y. Feb. 8, 2013) (adjudicating whether foreign law prohibits document production); Martin Radvan, *The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters: Several Notes Concerning Its Scope, Methods and Compulsion*, 16 N.Y.U. J. INT’L L. & POL. 1031, 1039–40 (1984) (discussing lack of pretrial discovery in civil law countries).

discovery “an unlawful usurpation of the public judicial function and an illegal intrusion on the nation’s judicial sovereignty.”³⁰² The language used is by no means hyperbolic, as some countries criminalize the production of documents to U.S. litigants for pretrial discovery.³⁰³ Japan, for example, only permits depositions if:

(1) the witness or party is willing to be deposed, (2) the deposition takes place on U.S. consular premises, (3) a consular officer presides over the deposition, pursuant either to a letter rogatory issued by a U.S. court or to a court order . . . and each participant traveling from the United States to Japan to participate in the deposition obtains a “deposition visa.”³⁰⁴

In such countries, a domestic request for production of documents or a deposition order will be in true conflict with foreign law.

Although some foreign nations oppose domestic discovery, the proposed statute or rule does not run contrary to international comity concerns to any serious extent. This is because in deciding whether to apply the principles of comity, courts “take[] into account the interests of the United States, the interests of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law,”³⁰⁵ as well as the conduct of the parties to the dispute.³⁰⁶ First, foreign nations should not be concerned about the proposed discovery statute because it does not subject their citizens to American discovery except when those citizens voluntarily appear before U.S. courts. That is, a foreign actor would only be subject to American discovery if and only if the foreign actor chose to appear and provide evidence in the form of in-brief allegations or appended testimony or exhibits. Where providing such information to parties is against the law, the amicus should not be appearing before the court in the first place. By alleging facts and submitting affidavits, foreign amici insinuate that their conduct is not illegal in their country. Thus, foreign parties are not prejudiced when their decision to engage in record-building is met with a reciprocal re-

302. *Compagnie Francaise D’Assurance Pour le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 26 (S.D.N.Y. 1984).

303. Teitelbaum, *supra* note 193, at 841; *see also* *Synthes (U.S.A.) v. G.M. dos Reis Jr. Ind. Com. De Equip. Medico*, Civil No. 07-CV-309-L(AJB), 2008 WL 81111, at *6–7 (S.D. Cal. Jan. 8, 2008) (noting that “Brazilian law subjects foreign attorneys who conduct depositions of Brazilian nationals in Brazil to potential arrest, detention, expulsion or deportation”).

304. *In re* Application for Order Quashing Deposition Subpoenas, *supra* note 143, at *5.

305. *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1053 (5th Cir. 2012) (quoting *In re Artimm, S r.L.*, 335 B.R. 149, 161 (Bankr. C.D. Cal 2005)).

306. *Mujica v. AirScan Inc.*, 771 F.3d 580, 604 (9th Cir. 2014).

sponse for more information. Moreover, if a foreign nation is intent on preventing all American pretrial discovery from occurring within its territory, it simply has to prohibit its citizens and corporations from filing factual amicus briefs in U.S. courts.

Finally, one must remember that international comity is balanced against U.S. judicial sovereignty and interests. As courts have observed, “the United States has a substantial interest in fully and fairly adjudicating matters before its courts.”³⁰⁷ Foreign amici can prevent any chance for a fair adjudication when they are allowed to submit cherry-picked exhibits that harm the party they oppose but avoid discovery into those exhibits. The United States’ interest in just administration of its laws outweighs the minimal effect on international comity that only occurs because foreign actors choose to appear before U.S. courts. For these reasons, the proposed statute or rule does not undermine international comity.

VI. CONCLUSION

As counsel for Righteous, Inc., you may find yourself with a foreign amicus that just saved the plaintiffs’ complaint and facing allegations that you cannot disprove for lack of discovery. The whole process of attempting to deal with the amicus has cost your client tens of thousands of dollars, and you have nothing to show for your legal fee: the court denied the motion opposing the brief by concluding that the brief was useful;³⁰⁸ it rejected the motion to strike as an exercise of its discretion;³⁰⁹ and discovery pursuant to the Hague convention proved unfruitful.³¹⁰ Your client likely feels that the system is unfair, forcing them to somehow defend against allegations without discovery. The purpose of this Article was to evince this injustice and propose a standard for addressing it. The Article proposed a modest statute or Federal Rule that would enable parties to discover documents from foreign amici regarding the factual assertions in their briefs.³¹¹ As discussed above, subjecting foreign amici to discovery strikes the fairest balance between allowing the foreign nonparties to voice their concerns while ensuring that the parties can litigate fairly.³¹²

307. *Phillips Petroleum Co.*, 105 F.R.D. at 30.

308. *See* *United States v. Bd. of Cty. Comm’rs of the Cty. of Otero*, 184 F. Supp. 3d 1097, 1115 (D.N.M. 2015), *aff’d*, 843 F.3d 1208 (10th Cir. 2016); *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991).

309. *Md. Restorative Justice Initiative v. Hogan*, Civil Action No. ELH-16-1021, 2017 WL 467731, at *7 (D. Md. Feb. 3, 2017).

310. *See supra* notes 184–91 and accompanying text.

311. *See supra* Part IV.A.

312. *See supra* Part IV.B.

Litigation will surely grow more complex with every passing year. The pace of globalization is quickening,³¹³ and transnational litigation is becoming more common.³¹⁴ While the world is seeing a rise of nationalism,³¹⁵ and major economic powers are enacting protectionist policies,³¹⁶ the upward trend in transnational litigation is unlikely to change. As more litigation touches international concerns, more foreign amici may appear in domestic litigation and seek to submit briefs and other exhibits. In short, the problems outlined in this Article will likely get worse. Hopefully, the principles outlined herein will help prevent parties from facing injustice.

313. *Pace of Globalization Quickening: Process Will Be as Influential as Democracy Movements of the Last Century*, GLOBAL POL'Y F. (Aug. 22, 2000), <https://www.globalpolicy.org/global-taxes/48051-pace-of-globalization-quickening.html>.

314. Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133, 139 (2008).

315. Christina Pazzanese, *In Europe, Nationalism Rising*, HARV. GAZETTE (Feb. 27, 2017), <https://news.harvard.edu/gazette/story/2017/02/in-europe-nationalisms-rising/>.

316. Shawn Donna, *WTO Warns on Rise of Protectionist Measures by G20 Economies*, FIN. TIMES (June 21, 2016), <https://www.ft.com/content/2dd0ecc4-3768-11e6-a780-b48ed7b6126f>; Robert Plummer, *Protectionism: Is It on the Way Back?*, BBC NEWS (Sept. 17, 2012), <http://www.bbc.com/news/business-18104024>.