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Adam McCall April 16, 2012

The Influence of Business Groups as Amici on Judges in the U.S. Courts of Appeals

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Abstract

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Much has been written about the influence of business interest groups on U.S. federal government policy making. While most of the existing literature focuses on administrative rule making and legislative policy, this thesis explores the effectiveness of business interests in lobbying the federal judiciary. Thus, this study measures the impact that business groups have when participating as amici, friends of the court, before the U.S. Courts of Appeals. I used existing data about federal appellate cases collected from 1997-2002 and added new information about the different interest groups which participated, including their average expenditures on lobbying during that time period. I find that business groups, particularly well-resourced ones, tend to account for most of the impact that amicus briefs have on a judge's vote. This effect is much clearer when businesses file for appellants than when they support respondents. Aside from federal agencies, other groups have little success when filing amicus briefs. However, my thesis finds that organizations which specialize in legal advocacy do appear to help appellants when they submit amicus briefs. My thesis raises questions about whether the federal courts provide a level playing field for all participants in litigation or whether certain groups are advantaged due to their expertise and resources.

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Introduction

Students of American politics have long focused on the role and importance of interest groups in shaping public policy (e.g. Bentley 1908; Key 1942; Truman 1951). While both Bentley (1908) and Truman (1951) included chapters on interest groups in courts, research on the use of courts by interest groups was slow to develop (Epstein 1991). But with the general growth of interest groups and the growing evidence that interest groups pursue policy goals through the courts, judicial scholarship on the role and effectiveness of that participation has increased (e.g. Collins 2009, Collins and Martinek 2006; Kearney and Merrill 2000; Lowery and Brasher 2004). The present study falls within that strain of research. Specifically, my thesis focuses on the effectiveness of the use of amicus curiae briefs by business interest groups in influencing judicial decision making in the United States Courts of Appeals. Amicus curiae briefs are legal briefs filed by actors who do not have a direct stake in the outcome of a particular court case.

The focus of the thesis on business interests is in response to the claim of increased dominance by business interests in the elected and bureaucratic branches of government. Hacker and Pierson (2010) chronicle the growth of the business lobby in response to the expansion of government during the Great Society and the ensuing accommodating polices pursued by the Nixon and Ford administrations. They note the rise of the business lobby's campaign and think tank infrastructure and point to the defeat of President Carter's proposed Consumer Protection Agency in Congress as the moment in which the lobby came of age as a lobbying force in Congress. After years in the political wilderness following the Great Depression and New Deal, Philips-Fein (2009) contends that businesses placed unprecedented resources into think tanks and lobbying organizations to promote their interests in Washington. She argues this initially slow

moving reaction to the New Deal shaped the future business-friendly presidency of Ronald Reagan. Likewise, recent research by Yackee and Yackee (2006) indicates that the forces of regulatory capture have prevailed in co-opting the rule-making process of administrative agencies in favor of business. One of the attractions of the courts as policy makers is that they provide a more equal arena for the contestation of policy. Silverstein (2009) observes that political barriers push interest groups, such as those seeking prison reforms out of legislatures into courts, as their policy proposals are relatively unpopular among constituents. While the size of groups and their resources may still matter in courts, they convey less of an advantage than in lobbying Congress or the Executive branch. My thesis, thus, addresses the question of whether the purported dominance of business interests in determining public policy also is apparent within the courts where their resource advantage may be diminished.

Courts and Public Policy

Discussion of interest group influence on judicial decision making would be decidedly less consequential if appellate courts simply resolved conflicts and did not make regulatory policy. While the questions brought before appellate courts are in fact questions of law, the answers that courts provide often have important policy effects. This is most evident in cases decided by the U.S. Supreme Court, but it also characterizes the decisions of the lower federal appellate courts. Farhang (2010) argues that the rise of an ideologically polarized executive and legislative branch led Congress to pass laws that encouraged private litigation to gain enforcement. He notes that 97% of the lawsuits initiated to enforce federal law since 2000 came from private parties not the government. Miles and Sunstein (2006) emphatically argue that

judges take advantage of the new legal structures Farhang describes, using the *Chevron* case as an example. They show that moving regulatory issues out of the executive and legislative spheres and onto the judicial field of play has allowed judge's policy attitudes to shape their view of appropriate legal outcomes. Cross (2007) and Spriggs (1997) note that appellate courts often reverse regulations written by administrative agencies – regardless of Congressional opposition – and can count on their decisions being implemented by the agencies in the end. Viscusi (2002) points to the appellate cases brought to regulate the tobacco, guns, lead paint, breast implants, and health maintenance organizations as prime exemplars of the burgeoning "regulation by litigation." In sum, appellate courts in deciding cases often make public policy.

While most of the research on interest groups in the courts has focused on the U.S. Supreme Court, my thesis focuses on cases in the U.S. Courts of Appeals. The U.S. Courts of Appeals have existed since 1891. There are twelve Courts of Appeals with eleven serving circuits defined by groups of states (e.g. the U.S. Courts of Appeals for the Eleventh Circuit serves Alabama, Georgia and Florida) and the twelfth serves the District of Columbia. They review cases on appeal from the U.S. District Courts and some federal administrative agencies within their respective circuits. Because of its location, the Court of Appeals for the D.C. Circuit hears a large number of cases from federal administrative agencies. The Courts of Appeals are collegial courts that typically hear cases in three-judge panels. While the U.S. Courts of Appeals must consider all appeals, the U.S. Supreme Court since 1988 has exercised almost complete discretion over the cases that it hears. The Supreme Court over the last decade has granted review to fewer than 90 cases a year on average. In contrast over the same time period the Courts of Appeal has terminated in excess of 50,000 cases annually. Only about half of the cases terminated at the Courts of Appeals during this period were disposed on the merits, the

remainder was largely dismissals from procedural terminations.[1] The pre-review process that produces these procedural terminations is ripe for further study, yet there is a lack of data available about the decision to hear an appeal. Assuming an appropriate pre-review process, it is likely that policy salient cases survive the screening and receive a disposition on the merits, either on submission of briefs or after oral argument. In sum, the U.S. Courts of Appeals are an important source of public policy. They resolve a large number of cases that establish federal policy within their respective circuits and, given the low volume of cases granted review by the Supreme Court, their decisions are likely definitive. As we shall see below almost all studies of the use of amicus briefs have focused on the Supreme Court. Hence, my thesis by focusing on the Courts of Appeals brings much needed attention to the role of interest groups in shaping judicial decision making in the lower appellate courts.

Interest Groups and the Courts

While organized interests have sought to influence American public policy since the nation's beginnings, key changes have occurred in the past fifty years. Loomis and Cigler (1998, 1) note that there has been "a great proliferation of interest groups since the early 1960s…a centralization of group headquarters in Washington, D.C. … the rise of single interest groups… [and] the increased number, activity, and visibility of public-interest groups." Greenwald views this growth in the context of a pluralist American state. In her view, "[p]luralist theory assumes that within the public arena, there will be countervailing centers of power within governmental institutions and among outsiders. Competition is implicit in the notion that groups…will produce

[1] See Table B-1 various years of the Director's Report, Administrative Office of the United States Courts.

products representing the diversity of opinions (Greenwald 1977, 305).” Pluralism expects that interest group politics will result in representative public policy making by government.

A number of scholars have observed the large role business has played in the sharp increase in the number and sophistication of interest groups. Loomis and Cigler note the logic of economic interests organizing to protect and create public policy outcomes that help their constituent groups. They observe that the “[m]obilization of business interests since the 1960s often has resulted from threats posed by consumer advocates and environmentalists, as well as requirements imposed by the steadily growing federal government” (1998, 7). Hacker and Pierson (2010) concur. They claim that fears of further consumer and environmental protections, along with pro-unionization legislation, after the election of Jimmy Carter and a Democratic Congress in 1976 provoked not only intense investment in lobbying institutions centered in Washington, but also grassroots networks designed to pressure members of Congress. Hacker and Pierson argue that the dominance of business interest groups has created “winner-take-all politics;” in other words, a system that rewards economic elites. Southworth notes that this response was not limited to building institutions to effect policy made by Congress and the executive branch; she argues that business began a legal counterattack against the rise of liberal public interest law in the mid 1970s with the founding of organizations such as the National Chamber Litigation Center (2008).

Interest groups have many strategies for influencing public policy. While they do not run candidates for office, interest groups can provide resources for candidates who are favorable to the policy positions that they favor. They provide donor lists to campaigns, make direct appeals to their own donors, and, since *Citizens United*, provide support through independent expenditures or SuperPACs. Interest groups also try to influence policy directly by ‘lobbying’

relevant members of Congress and the Executive branch. They organize grassroots supporters to contact their members of Congress and employ professional lobbyists to meet with policy makers, sometimes providing food or entertainment. However, ethics legislation passed recently outlaws or limits many gift-giving practices. It is argued that among the most important resources that interest groups have to influence the shape of public policy is information (Lowery and Brasher 2004, 158). Hall and Deardorff (2006) argue that lobbying amounts to a legislative subsidy; that is, because Congressional offices are understaffed and underfunded they rely on lobbyists to furnish them with information about policy priorities and preferred pieces of legislations. They also note that lobbying is most successful when employed as a tactic to convince members of Congress who share the same general ideology as the interest group.

More to the point, the effectiveness of interest group advocacy has provoked much debate among scholars as to whether regulation actually can serve the public good or if in fact it rewards powerful, organized special groups – such as big business. Some scholars support the "public interest" theory, which contends that government can in fact resolve market failures through legislative and regulatory action (Laffont & Tirole 1991, 1089). Others propose a theory of interest group "capture;" that the power of interest groups results in legislators and government agencies acting on behalf of the players in the industrial sector or policy area they are attempting to regulate. Stigler (1971) and Olson (1965) argue that groups, regardless of their absolute size, will lobby successfully for the status quo if there are high stakes of government regulation for the economic livelihood of the organization. Stigler also posits that consumers and the public cannot compete with businesses because they face significant collective action problems as they have a relatively lower stake in the outcome of most regulations. Most of this literature comes from the public choice discipline of Political Science and Economics. However, it focuses on the actions

taken by agencies and legislatures. Rubin, Curran, and Curran (2001) provide a model for an interest group's decision to seek legal policy change through the courts. They find that businesses often find legislature a more hospitable environment than the judiciary for favorable policy change, while other interest groups such as trial lawyers benefit from choosing to seek policy shifts through the courts. This thesis will clarify whether interest groups can capture the courts as they can other bodies that produce regulatory policy.

Interest groups as alluded to above may also seek to shape public policy through the courts. While this strategy was once seen as one employed when the more traditional electoral and direct lobbying strategies had failed or were unlikely to provide success, action through the courts has become the principal strategy for some interest groups and a strategy to be used in coordination with traditional strategies for many groups. Silverstein (2009) refers to this process as "juridification." He observes a number of motivating factors have pushed interest groups away from Congress and the Executive and towards the courts such as institutional barriers, political barriers, the normative superiority of adjudication, and the perceived effectiveness and efficiency of courts. Silverstein also posits that some interest groups involve themselves in litigation in order to mobilize their membership for conventional political action through lobbying members of Congress and campaigning for preferred candidates.

There are a number of ways in which interest groups attempt to advance their policy goals through interactions with the judicial branch. Lowery and Brasher (2004) note three main ways that groups seek to shape policy through the courts. The first is through participating in judicial appointments. They note that "lobbying over appointments [to the federal bench] decreases as we move from Supreme Court nominations down to district courts in the federal hierarchy (Lowery & Brasher 2004, 231)." Advocating for and against the appointment of

federal judges – who have life tenure – has an uncertain and, at best, indirect effect on policy outcomes as judges' opinions may shift over time. Nevertheless, interest group activity in the appointment of federal appellate judges has been shown to have grown and to be important (Steigerwalt 2010). And clearly the judicial appointments of Ronald Reagan and George H. Bush resulted in an ideological reshaping of the lower courts.

The second way interest groups seek to shape policy through the courts is through litigation. Interests can, of course, litigate cases in which they have the necessary stake in the outcome to achieve standing. Indeed, Hakman (1969) argued that economic interests like corporations had sufficient economic motivation that there was no need for 'interest groups' to sponsor litigation. The use of test cases, in which interest groups sponsor litigants who have standing to sue, however, had a highly visible role in civil rights policy (e.g. Vose 1959) and more recently in litigation over the Second amendment right to bear arms such as *District of Columbia vs. Heller*. While there was probably never a high volume of such test cases, Lowery and Brasher observe that group participation in litigation has declined. They write that litigation to enforce environmental and consumer protection legislation has fallen sharply since rules surrounding class action have tightened (Lowery and Brasher 2004). In general, test cases are resource-intensive for the public interest groups that support them. Furthermore, Epstein and Rowland found that interest groups had a decidedly mixed record when bringing test cases to court (1991).

The third method Lowery and Brasher mention is filing amicus curiae briefs, the focus of this study. Amicus curiae, sometimes referred to as friend of the court briefs, are legal documents submitted by interest groups expressing their views about the issues raised in a particular case. Courts will accept briefs from almost any organization, provided that the organization has some

interest in the decision or expertise in the issue area (Lowery and Brasher 2004). Notably less expensive than sponsoring a test case, amicus filings at the Supreme Court have increased by over 800% since the 1950s (Kearney and Merrill 2000). In fact, in March of 2012, *The New York Times* reported that "[l]awyers who work on amicus briefs before the Supreme Court say it can cost $25,000 to $100,000 in lawyers' time and expenses to prepare one, plus $1,500 or more to have them printed and distributed at the court." Amicus briefs are thus cheaper than sponsoring litigation or waging campaigns on behalf or against particular judicial nominees. Martinek (2006) found that the percentage of Courts of Appeals cases with amicus briefs increased from 2% in the 1920's to 6% of the 1990s. Moreover, when conservative legal interest groups participate in litigation, they do so most frequently as amici, not litigants (Southworth 2008). The increase in participation system-wide begs further study as to the effectiveness of amici.

To some extent the filing of an amicus brief may simply serve as strategy for institutional maintenance (Collins 2009, 29). Particularly for membership organizations filing an amicus brief in a case that is salient to the interest of members justifies the dues that the members pay to the organization. Filing the brief is an indication that the organization is active and serving the members' interest. This purpose is served whether the brief is successful in shaping policy or not. But a primary reason cited for submitting amicus briefs is to influence judicial decisions in ways consistent with the preferences of the interest group.

Amicus Briefs and Judicial Decision Making

As indicated above, the provision of information is a primary strategy employed by interest groups in their efforts to shape public policy in the legislative and executive branches.

The same is true in their use of amicus briefs. Critics of the courts as policy makers emphasize that judges are generalists lacking specific knowledge in most of the substantive areas in which their decisions create policy. Moreover, the critics emphasize that courts do not have the staff and administrative structure to gain the 'social facts', those outside of the facts of the case, which are needed for sound policy making (Horowitz 1977; Rosenberg 1991). Amicus briefs are one mechanism through which this informational deficit can be diminished. Indeed, prominent jurists have made this precise argument. For example, Justice Breyer has argued that the provision of additional expert information aids judges in deciding cases. Breyer observes that judges, who are merely legal experts, not policy specialists or scientists, actively rely on the briefs submitted by interest groups to inform their legal opinions (Breyer 1998). The increased submission of amicus briefs by interest groups and the statements of judges such as Breyer support the idea that amicus briefs influence court decisions and ultimately public policy.

Collins (2009, 90-91) details two potential ways for amicus briefs to influence judicial decision-making. First, consistent with the legal model, amicus briefs may persuade judges to adopt a particular line of legal reasoning to decide the case. Moreover, he notes that sometimes judges who are ideologically inclined to side with a litigant, but unsatisfied with the legal arguments made by the litigant's attorneys, may reach to an amicus brief to pull a more 'correct' argument in order to justify his decision. However, the prominence of non-legal information (i.e. social facts) in amicus briefs, such as the political and economic consequences of a ruling and statistical data about the issues at hand, implies that the briefs are persuasive in helping judges understand the consequences of the policy choices presented in a case not just potential legal rationales. Second, setting aside the content of the briefs, the interest groups who sign them may also signal to the judges which litigant and outcome is more ideologically palatable to the judge.

While the testimony of justices, the actions of rational interest groups and some theory suggest that amicus briefs and particularly the volume of amicus briefs should influence judicial decisions, the literature on this effect is mixed. And again, nearly all of it is limited to the Supreme Court, which limits their applicability to the Courts of Appeals.

There have been several major studies of how the Supreme Court processes amicus briefs. In *Friends of the Supreme Court*, Paul Collins finds that amicus briefs are indeed persuasive and effective in convincing a justice to rule for the side the brief supports (2008). Collins controlled for the perceived ideology of the justice, the resources each litigating side had at its disposal, whether the lower court decision was liberal or conservative, and participation by the Solicitor General. Collins then tested whether the number of liberal and conservative amicus briefs influenced the decisions made by justices. Collins used an ordered probit to test the effect of each marginal liberal or conservative amicus brief on each justice's vote. Collins' analysis shows that amicus briefs have roughly equal effects on both conservative and liberal justices; in both cases, they make it more likely for like minded justices to support their litigants backed by interest groups advocating an ideologically congruous position.

The literature indicates certain amicus filers have more success than others. Kearney and Merrill (2000) conducted a study of over 6,000 Supreme Court cases in the last half of the 20th century. They identified the Solicitor General, the ACLU, the AFL-CIO, and the States as particularly effective amicus filers before the court. They also found a bias toward the respondents to the case and against the petitioners. Also, like Collins, they demonstrated that disparities in amicus briefs led to the side with more briefs being favored over the other. However, the effect was the same regardless of the magnitude of the difference in briefs. Significantly, they found that the distribution of briefs submitted to the court between appellants

and respondents is roughly equal (Kearney and Merrill 2000). A few reasons could explain the outsized success rate of the most successful actors. They could be preferred repeat players because they frequently petition the court, they may have more legal expertise, or they could have greater ideological congruity with the Supreme Court. Regardless, there is reason to believe that some amicus brief filers are more successful than others.

A 1993 study by Songer and Sheehan, however, found evidence that contradicts others' claims about the importance of amicus briefs. They used matched pairs of cases to determine whether litigants with amicus support fared better than those without. In a sample of 132 matched pairs, they found no significant difference in the court's decision between litigants with amicus support and those without. Most importantly for this paper's topic, they found no effect even on economic cases (Songer and Sheehan 1993). Songer, Kuersten, and Kaheny (2000) found nearly identical results in a large N study of State Supreme Courts in Georgia, South Carolina, and North Carolina.

The use of judge's votes as the unit of analysis, most prolifically by Collins (2008, 2010, 2011), has caught on with scholars. This approach captures less pronounced shifts in voting patterns that may be caused by the presence of amicus briefs. Studies by Songer and Sheehan (1993) and Songer, Kuersten and Kaheny (2000) employed the case as the unit of analysis while the work discussed above focused on the decisions of individual justices. This variation in results suggests that the effect of amicus briefs on judicial decisions may not be so large as to systematically be evidenced in case outcomes.

Spriggs and Wahlbeck (1997) also offer skepticism about the role of amicus briefs in shaping court opinions. After reading all the briefs and opinions submitted to the Supreme Court

during the 1992 term, they discovered that the amicus briefs tended to restate arguments made in the litigants' briefs. Moreover, they also concluded that the unique opinions made in amicus briefs were only sparsely cited in Supreme Court opinions. This could lead to two competing conclusions; either justices' votes are swayed by the quantity of support and social facts provided by amicus briefs as opposed to the legal arguments, or amicus briefs have only a spurious relationship to the actual votes cast by justices.

Currently, Collins and Martinek are the only scholars who have examined the influence of amicus briefs at the U.S. Courts of Appeals. In their 2010 study, they examined a random sample of cases from 1997-2002. Collins and Martinek found that amicus briefs filed in support of the appellant help but that those in support of the respondent had no effect on judicial decisions. They theorize that amicus briefs persuade judges to reconsider their inclination to defer to lower courts because the briefs add novel perspectives to the case.

In sum, the evidence for the influence of amicus briefs on judicial decision-making is mixed. The statements of justices, the behavior of interest groups in submitting the briefs and research focused on the decisions of individual justices and judges support the expectation that amicus briefs influence judicial decisions. On the other hand, research employing the case as the unit of analysis suggests caution in claiming substantively significant effects for amicus briefs at the Supreme Court. The research of Collins and Martinek (2010) on amici at the Courts of Appeals is particularly mixed suggesting that the effects may be conditioned by litigant status as appellant or respondent. They also leave open the question of how the effects of amicus briefs might be conditioned by the nature of the groups that submit them. This is an important consideration given the presumption that courts provide a more level playing field for interest group competition than do the electoral branches of government.

Principal Hypotheses

H1a: The presence of amici increases the probability of a positive vote for the side supported by the amici.

H1b: The probability of a positive vote for the side supported by the amicus briefs increases with the number of amici.

These are the basic hypotheses of an effect for amicus and provide a test to determine if Collins and Martinek's (2010) finding across all cases holds for the subset of business related cases.

H2a: The presence of business interests as amici increases the probability of a positive vote for the side supported by the amici

H2b: The probability of a positive vote for the side supported by business amici increases with the number of such amici.

H3: The increases hypothesized in H2a and H2b will be greater than the effects for non-business amici.

H4: The amount spent on lobbying by amici increases the probability of a positive vote for the side supported by the amici.

H5a: The probability of a positive vote for the side supported by legal advocacy groups increases with the number of such amici.

H5b: The increase hypothesized in H5a will be greater than the effects for non-legal advocacy group amici.

H6: The probability of a judge casting a pro-business vote will increase with the number of business amici.

Amicus filed by business groups should be seen as potentially the more effective for several reasons. First, Hacker and Pierson's (2010) findings of business dominance in the Congress and executive agencies would imply that businesses would seek influence in the courts. Business groups have been a part of the aforementioned dramatic increase in amicus filings; presumably, they would not do so if they were ineffective. Moreover, businesses may have unique and novel claims about how a particular legal interpretation will affect their business practices that play well in amicus briefs. Finally, businesses may be accorded a certain amount of respect not given to other organizations petitioning the court. This could result from judges being predisposed to appreciate the role businesses play in the American economy.

While the effects of resource difference may be less in the courts than in the elected branches of government they may still be present. The briefs submitted by well-resourced business groups may be simply stronger due to their access to elite attorneys and status as repeat players. Corporations and trade associations have complex legal departments that regularly participate in appellate proceedings and can develop working knowledge of judges' preferences and gain credibility with the same judges to whom they submit arguments.

Other factors influencing Judicial Decisions

While the evidence on the effects of amicus on judicial decisions is mixed, scholars have pointed out a number of factors that influence the decision making of appellate court judges. These will need to be controlled in the analysis to provide unbiased estimates of the effects of

amicus briefs. Additionally, some of these variables have been suggested as conditioning the effects of amicus briefs.

There are three major models of judicial decision-making. Early theories claimed that judges used purely legal criteria to decide cases. Levi (1949) claimed that good legal reasoning uses common-law traditions such as *stare decisis*, or deference to precedent to inform decisions. This principle may help explain the higher success rates for respondents in the appellate courts (Cross 2007). Given that the Courts of Appeals have no control over the cases that are placed on their docket, a large percent are 'easy' cases where the U.S. District Court simply gets it right. This is quite the opposite from the Supreme Court which controls its docket and tends to reverse the majority of cases that it agrees to hear. In addition to needing to control for respondent status, Collins and Martinek (2010) find that the effects of amicus briefs are conditioned by whether they are filed on behalf of the respondent or the appellant. They observe that amicus briefs filed on behalf of the appellant are more effective than those filed on behalf of the respondent.

The second model of judicial decision making argues that policy views drive judicial outcomes. In 1993, Segal and Spaeth crystallized the argument that policy preferences most strongly explain behavior of Supreme Court Justices in their groundbreaking study, *The Supreme Court and the Attitudinal Model*. Support for the operation of preferences on judicial behavior has been the strongest in studies of the Supreme Court. But numerous studies at the Courts of Appeals have also found preferences at work although the effects are typically weaker (e.g. Cross 2007; Thomas 2010). In general conservative justices and judges will be willing to support pro-business outcomes regardless of the presence of amicus briefs. At the Supreme Court level Collins (2008) found the effects of amicus briefs to be conditioned by the ideology of the justice. While ideologically consistent briefs had little persuasive force, he found ideologically

inconsistent briefs (e.g. liberal justice and conservative brief) diminished the effect of ideology on voting at least for some justices.

Following Collins and Martinek (2010) I will also control for litigant resources. I plan to do this by including dummy variables for whether the federal government and/or businesses are appellants or respondents in the case. Both are widely acknowledged to have significant resources and developed, complex legal operations. The federal government in particular has been shown to have greater success in the courts compared to private litigants.

Two of my hypotheses focus less on the types of groups filing amicus briefs and instead concentrate on their resources. I am interested in whether organizations that lobby the federal government have greater success in the court system. If proponents of the strategic model are correct, judges should be concerned about legislative reversal of policy-salient decisions. Because, as previously stated, few appellate court cases receive a rehearing from the Supreme Court, one might expect some appellate decisions to be negated by statutes passed by Congress. The presence of groups that actively pressure Congress should indicate to judges a higher likelihood of a legislative correction in the future. Therefore, I will also collect information on the lobbying resources of each of the groups submitting amicus briefs to provide a more direct assessment of the effect that different expenditures on political influence have on court decisions.

Judges may also be more swayed by groups with legal expertise. This could be expected for legal or strategic reasons. Judges may be unsatisfied with the legal rationale of the lower court and respond to the logic proposed by groups that offer novel legal arguments. Groups that specialize in legal advocacy may be expected to focus more on providing legal context than other organizations that would perhaps provide more policy, political, scientific, and social context for

judges. Moreover, the lawyers who work for these specialist groups may be cause lawyers who spend more of their time preparing such briefs than those that work for other entities. Finally, judges may look to these groups to provide a fig leaf of legal reasoning for their policy preferences. As it is against the norms of the legal profession to outwardly vote one's attitudes as opposed to the law, this may be important for strategic judges. Thus, I will test whether legal advocacy groups do in fact see more success as amici.

Data

The principal data source for this study is the "Updated Court of Appeals Database" compiled by Ashlyn Kuersten and Susan Haire.[2] The database contains a random sample of thirty cases for each of the twelve circuits for each year from 1997 to 2002 inclusive. This is the same database employed by Collins and Martinek (2010).

Following Collins and Martinek (2010) the unit of analysis of this study is judge's vote in a case. Examining individual votes rather than case outcomes allow me to control for each judge's ideology, as opposed to trying to control for attitudes with an aggregate score of the three judges hearing each case. Individual votes also have more variation than outcomes. While swaying a single vote may not always change the policy outcome, it does speak to the ability of amicus briefs to influence judicial decision-making. Amicus briefs may have impacts that are not be easily measured with case level data; a case that was decide three votes to none might have been decided two votes to one given participation of amici.

[2] Available at http://www.cas.sc.edu/poli/juri/appct.htm

Because of the focus of my thesis on the impact of amicus briefs filed by business interest, I restricted the analysis to a modified version of Kuersten and Haire's definition of regulatory cases (2007). Their category with their case type variable of "economic activity and regulation" (2007:34) includes cases dealing with taxes, patents, copyrights, torts, commercial disputes, services, bankruptcy, antitrust, securities, property disputes and government regulations such as rent control, pollution regulation, and racketeering laws. Though common law rules of torts and contracts lack many of the same properties as regulations passed by federal agencies and the U.S. Congress, they do have a significant impact on economic policy and draw amicus participation. Moreover, these cases are interesting because courts are the first actors to decide on these policies. Unlike regulations adopted by the legislature and ruling making procedures which receive stringent scrutiny from interest groups, these rules are set by decisions made by judges based on arguments given by litigants – and amicus. I also included the entirety of the cases coded as involving labor issues. Not all of these cases have a large or even obvious impact on the business climate. However, these are the cases where such significant cases are likely to be observed and the most likely to have to have significant participation by business interests as amicus.

The dataset includes 773 cases. Of these, only 80, or slightly more than 10%, had amicus briefs present. The dataset includes 2,770 votes to analyze in total. Of these 2,457 were cast in cases without amicus briefs, and 313 were cast in cases with such briefs. The number of judges voting on each case ranged from three to fourteen and three to twelve on cases lacking and containing amicus briefs, respectively. Over 90% of each type of case was decided by a three judge panel. Roughly 83% of the dataset was comprised of votes on economic issues, and 17% of the dataset reflected votes on labor issues. Votes in which amicus briefs were present were

slightly more likely to be on labor issues; those questions made up 23% of such votes, while only 15% of the votes without interest group participation.

The principal dependent variable is whether the judge's vote is in favor of the respondent (1) or the appellant (0). All 'mixed' and 'not determined' votes are eliminated. This reduced the number of cases to 773 from 924. In the analysis of Hypothesis 6 the dependent variable is whether the vote was pro-business or not. In the original dataset, there was a variable indicating if a vote was conservative (1) or liberal (3). For all of the cases coded between 700 and 799, the economic cases, the conservative code also indicated a pro-business vote. The labor cases, coded between 600 and 699, had one exception to the rule that a conservative vote was also a pro-business one. The dataset deemed cases in which the court sided for the government over a labor union a liberal decision. While such a case may be seen to expand government power, restrictions on union activity by government is generally seen to be a pro-business policy. However, after refining my dataset, no such confounding instances remained. Therefore, I generated a new variable reflecting whether the vote was pro-business (1) or anti-business (0), based on whether the directionality variable was conservative or liberal.

The database identified cases in which amicus briefs were filed and the number of groups filing. Within the selected substantive area 80 cases were identified as having at least one amicus brief filed. While some effort was made in coding the database to assign the amicus briefs to one side or the other, Kuersten and Haire (2007) note that in many cases this is difficult to do. Given the singular importance of identifying both the side on which amici filed (respondent/appellant) and the type of group (business/non-business), I examined every case coded as having amici to determine the side of the dispute the group supported and the nature of the group.

This measurement effort first required that I determine how I would define an 'interest group' for purposes of coding. There is a rich literature about the role interest groups play in American government. Definitions of interest groups vary only slightly across scholars. The observance of interest groups is not a recent phenomenon; James Madison called them "factions," defined as "a number of citizens…who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community (Cigler and Loomis 1995:2)." More recently, Lowery and Brasher (2004) argue that three components characterize interest groups: that they are organized, have public policy preferences, and do not seek public office. Anthony Nownes offers a broader view, in which an interest group is merely a group of people that tries to influence political outcomes (Nownes 2001).

For the purpose of this study, Nownes' definition will suffice as its scope allows for the examination of any outside collection of individuals attempting to influence the appellate courts. His definition encompasses the variety of legal advocacy groups that claim no policy preference but advocate for a certain legal philosophy or attitudes that have policy implications. Nownes also looks at the players in the interest group universe. This is important for this paper as it informs which groups can be categorized as "business" groups and which can be categorized as "non-business." The business organizations Nownes explores include corporations and trade and professional associations. Some of the other groups clearly fall into the non-business category, such as labor unions, citizen groups, foreign and domestic governmental entities, and colleges and universities.

However, think tanks, coalitions, charities, and political action committees cannot be categorized as easily as some receive their financial support from corporations, trade

associations, and those employed by those entities. Hacker and Pierson (2010) note that much of the growth of business influence came through the strengthening of free market think tanks such as the Heritage Foundation, along with the creation of the American Enterprise Institute, and coalitions such as the Business Roundtable throughout the 1970s and 1980s. Nownes (2001) offers a potent concrete example of such influence with the creation of the Coalition for Health Care Choices, which lobbied successfully against President Clinton's health care reform legislation in 1993 and 1994. Yackee and Yackee (2006) additionally point to the success of business-affiliated groups in winning concessions in administrative rule-making process. Therefore, my paper will attempt to account for interest groups that are directly linked to business and those that receive significant indirect support in testing business influence at the appellate court level.

To determine the identity of each interest group that filed an amicus brief, I looked up each case citation on the WestLaw and LexisNexis databases. These databases usually included the names of the groups in the summary. WestLaw provided access to the actual briefs in some instances, which I read to identify groups. For cases which indicated the presence of amicus groups, but lacked attribution in WestLaw or LexisNexis, I attempted Google Searches. These generally proved unsuccessful, with one exception. For the case of *Garrett vs. University of Alabama*, not only did I find that that the National Employment Lawyers' Association joined an amicus brief but both WestLaw and LexisNexis erred in attributing a brief to the American Association of Retired Persons instead of the American Association of University Professors. That mistake is corrected in my dataset.

After listing the groups that participated, I began to categorize them into business groups, labor groups, public interest advocacy groups, state and local government agencies, and federal

government agencies. I also flagged groups that specialized in legal advocacy. I went to each group's webpage and looked at their mission statement to determine where to categorize them. Legal advocacy groups such as the Washington Legal Foundation which received significant support from businesses and expressed goals included "strengthen[ing] America's free enterprise system … [and supporting] business civil liberties" are coded as business interest groups. I also included trade associations such as the National Association of Manufacturers as business groups. Public interest advocacy groups ranged from general membership organizations such as the American Association of Retired Persons and the American Jewish Congress to Nader-ite political activist organizations such as Public Citizen. These groups generally oppose the pro-business position in court. Aside from labor unions, the labor category included organizations primarily supported by the labor movement such as the National Employment Lawyers Association. I also included organizations of professionals such as the American Association of University Professors which advocate for more regulated workplaces, but do not necessarily collectively bargain. State and local agencies contains organizations of municipalities and state and local officials, such as the National Association of Counties. Any government department or official, including two members of Congress who filed briefs in my dataset, is listed as a federal agency.

In addition to categorizing the different types of groups that participated, I attempted to gauge the political clout of each organization by gathering data about their expenditures on lobbying from the time period of the dataset. The Center for Responsive Politics makes such information available on their website, and I recorded the lobbying expenses from 1998-2003 of each interest group in the dataset. While the time range of the cases and the lobbying expenses do not match exactly, the information I collected provides a snapshot of the organization's

investment in the political process around the time these cases were adjudicated. Moreover, Nownes (2001 p.120) observes that the increase in the number of registered federal lobbyists has been accommodated by the development of the "lobbying law firm." In addition to providing legal services, these firms also offer "public relations, indirect lobbying…media services, political fundraising, and direct lobbying" (p120-1). In theory, organized interests who spend the high fees demanded by these firms should expect strong results not only on Capitol Hill, but also in the appellate courtroom. I created two measures, the six year lobbying expenditure average for the amici, and the amici only, on the side of the appellant and respondent, respectively.

For my analysis, I included a couple of controls that are commonly viewed to influence judicial decision-making. As discussed previously, many political scientists and court observers argue that ideology is the strongest determinant of a judge's vote. To measure political ideology, I used Poole's Common Space score which was already included in Kuersten and Haire's dataset. This measure takes into account the appointing president's ideology as well as the political positions of the judges' home state senators. The variable ranges from -1 (most liberal) to 1 (most conservative).

I also controlled for whether the federal government was an appellant or respondent. The tendency to defer to federal agencies has been documented elsewhere. Moreover, federal agencies are repeat players that frequently petition the court and thus should be expected to win over judges more frequently. I created two dummy variables that indicated whether the federal government was either the appellant or respondent. I further controlled for whether businesses were litigants with two dummy variables that reflected whether there was a business appellant or respondent. I incorporated these measures because businesses usually are well resourced and they may encourage other businesses to file amicus briefs in their litigation I did not control for

deference to lower court decisions in my analysis that used whether the respondent won, as that was my dependent variable.

Analysis: An Overview of the Data

Eighty cases had one or more interest groups signing on to amicus briefs. A total of 211 amicus briefs were submitted; 162 different groups submitted briefs. The average case with a brief included 2.64 interest groups. Businesses made up the overwhelming majority of interest groups, accounting for 120 of the 211 organizations participating, or 57%. Public interest groups were a distant second, composing only 11% of the observations. Federal agencies and labor groups tied for third most, totaling just 10% each. State and local agencies and individuals lagged even further behind the other types of filers, making up 7% and 4% respectively. A distinct minority, 15%, of groups specialized in legal advocacy, as opposed to either commercial activities or advocacy efforts directed at other branches of government.

The distribution of respondents across litigant groups reflected the dataset's focus on economic and labor issues. A plurality of the respondents was businesses. For judges' votes on cases with amicus briefs present, they totaled 39% of first listed respondents and 48% in cases without amicus briefs. The next most frequent first listed respondent was the federal government. Federal agencies were 34% of primary respondents in cases with amicus briefs and 26% in cases without amicus briefs. The third most common primary respondent was individuals, making up 13% and 11% of the parties in cases without and with amicus briefs, respectively. Other levels of government and private organizations accounted for the remaining 10% of the primary respondents. For the 1,126 observations with a second respondent the plurality of groups was

also businesses. 43% of groups in votes in cases without amici and 40% of those with amici were businesses. Individuals were the second most common secondary respondent in votes without amicus briefs, comprising 20% of such respondents. However, votes with amici present only had a secondary respondent categorized as an individual 9% of the time. The federal government appeared the second most frequently as the secondary respondent when amicus briefs were present, accounting for 22% of all such respondents. For cases without briefs, the secondary respondent is only listed as the federal government 13% of the time. Another difference in the data lies in the frequency that state governments appear as a secondary respondent. In votes with amicus briefs, state governments represent 15% of secondary respondents while in votes without amicus briefs they only make up for 6%. Overall, government participates as a respondent more frequently in cases with amicus briefs than in cases without. This can be taken to indicate greater policy salience of cases with amicus briefs as they appeal decisions directly made by government, or in other words public policy.

The distribution of appellants varied only slightly from that of respondents. In the plurality of all judge's votes, and in a majority of votes with amicus briefs present, the first listed appellant was a business. In votes with interest group participation, 49% of the appellants were businesses while 41% were businesses in votes without amicus briefs present. The next most frequent primary appellant was individuals. Individuals appealed more frequently in votes without amicus briefs, representing 42% of such appellants in that pool of votes, compared to only 32% in cases with amicus briefs. Private organizations were primary appellants in 10% of the votes with amicus briefs, while only 4% of the appellants in votes without briefs. Various government agencies comprised the remainder of the appellants, totaling slightly over 10%. For the 1,099 votes that had a secondary appellant, a slight overall plurality, 43%, of secondary

appellants were individuals. Individuals equaled 42% of the secondary appellants when votes were not accompanied by an amicus brief and 45% of the secondary appellants when an amicus brief was filed. Overall, 34% of secondary appellants were businesses, which did not vary across votes with and without amicus briefs present. 7% of all secondary appellants were private organizations; votes with amicus briefs had a private organization as the second appellant listed 8% of the time, while those without had one recorded 6% of the instances. This data implies that organized groups tend to have greater interest group support in appealing unfavorable lower court decisions, given that businesses and private organizations account for about 60% of the first named appellants in votes with amicus briefs present compared to 45% of those without amicus briefs. In contrast, individuals made up 10% more of first listed appellants in cases without amicus briefs present than in cases with amicus participation.

The ideological orientation of the judges varied little across cases with and without amicus briefs. 57% of all the judges had a Common Space score of above zero, indicating a tendency towards conservatism. For all judges, the mean Common Space score was 0.0570. Votes on cases with amicus briefs came from only slightly more liberal judges. Those judges had an average ideology score of 0.0520, while judges voting on cases without amicus briefs had a mean score of 0.0576. I ran a two-sample t test and received a two tailed p value equal to 0.8111, which indicated the difference between the two means was not statistically significant at a 0.05 confidence level.

My dataset shows a slight inclination for judges to vote for the business friendly position more frequently when an amicus brief is present. Overall, the judges' vote in favor of business 54% of the time and in favor of labor, government, or individuals 46% of the time. These numbers shift somewhat when votes with amicus briefs present are separated from the general

pool. The business position wins 58% of the votes with amicus briefs and loses 42%. In contrast, without amicus briefs, the pro-business side earns a judge's vote 54% of the time and loses it 46%. However, this difference is not statistically significant. The increased percentage of pro-business votes, coupled with slighter lower percentage of anti-business votes and mixed votes, indicates that amicus lead judges to vote in favor of business interests. This is bolstered by the fact that ideology does not differ significantly across the pool of judges voting on both sets of cases. However, this does not control for a number of factors such as the presence of the federal government as a litigant. Moreover, it is difficult to demonstrate a causal link because this measure does not account for the actual policy position advocated by the amici. Also, amici may be more likely to participate in cases with more at stake, which may itself influence voting patterns.

Overall, judges in this dataset were more likely to vote in favor of the respondent than the appellant. As seen in Table 1, votes with amicus present appear much more likely to be in favor of appellants. Because there are so few observations involving amicus briefs, the overall percentages are relatively unaffected. However, this does call for additional investigation into the influence of amicus briefs in economic and labor relations cases.

Table 1: Respondent Success in Dataset

Respondent Wins	Amicus Filed	No Amicus	Total
Yes	46%	60%	59%
No	54%	40%	41%

Slightly more amicus groups entered the case on the side of the appellant, 107, than on behalf of the respondent, 104. Business groups composed 53% of those siding with the appellant, followed by labor groups at 15%, then the federal government at 14%. Public interest groups, individuals, and state and local governments made up 7%, 6%, and 5% respectively. The

percentage of organizations supporting appellants that were legal advocacy groups was 15%; this stayed the same among those filing on the side of the respondent. Business groups filed more frequently in favor of the respondent – 53% of businesses supported the respondent – and thus accounted for 61% of all organizations advocating against reversal. Public interest groups signed briefs in favor of the respondent 15% of the time, while state and local governments, federal agencies, labor groups, and individuals only did so 9%, 7%, 6%, and 3% respectively. Labor was the only group – aside from individuals – that participated most frequently on the side of the appellant, doing so 73% of the time it filed a brief. In this dataset, business groups were the most prolific filers of amicus briefs. No other category of organization even comes close. The high incidence of business groups filing on each side of the case shows that not only does business attempt to reverse unfavorable rulings through amicus briefs, but also to safeguard favorable judgments.

Some organizations submitted briefs at a higher rate than others. Of the 162 unique groups, only 24 submitted two or more briefs. Six of the twelve groups that filed three or more amicus briefs were businesses and four were federal agencies. The American Association of Retired Persons and the AFL-CIO, public interest and labor groups respectively round out the top twelve. The two most frequent filers overall were the Department of Justice and the National Association of Manufacturers, with six briefs each, or 3% of the total dataset. The Securities and Exchange Commission submitted five, while the Chamber of Commerce, Department of Labor, and National Employment Lawyers Association submitted four each. However, a number of affiliates of the Chamber of Commerce, National Association of Manufacturers, and the AFL-CIO signed on to briefs. When those groups' independent participation is included in the total of their parent organizations, the Chamber of Commerce and AFL-CIO lead the pack of amicus participants

with 12 briefs each. The National Association of Manufacturers has 11 when its state chapters are included. The organizations and their affiliates which often submit briefs, such the Chamber of Commerce, AFL-CIO, National Association of Manufacturers, and the Department of Justice may benefit by being repeat players; that is, they are experienced and effective at amicus advocacy and their opinions are well regarded by judges. However, after looking at the cases in my dataset, these organizations did not appear to win more frequently than others, winning judges' votes only one-third of the time they participated. This suggests that these groups are better at identifying cases likely to affect their group's interest rather than necessarily influencing judge's votes.

Table 2: Distribution of Amici in Favor of Appellant and Respondent

Appellant	Respondent	# of Observations
0	0	701
0	1	21
0	2	3
0	3	1
0	4 or more	3
1	0	28
1	1	0
1	2	0
1	3	2
1	4 or more	1
2	0	8
2	1	3
2	2	1
2	3	1
2	4 or more	1
3	0	1
3	1	0
3	2	0
3	3	1
3	4 or more	0
4 or more	0	1
4 or more	1	2
4 or more	2	0
4 or more	3	1
4 or more	4 or more	1

Table 2 above shows the distribution of groups that filed amicus briefs. It demonstrates that in most cases amici only enter on one side. Very rarely do organizations file conflicting briefs. There are only 14 cases where there were multiple parties filing briefs on both sides of the case. In 49 instances, over half of all cases with an amicus brief, there was only one amicus group. Thus, when parties submit amicus briefs they often are the only party other than the litigants.

Next, I looked at the general trend in lobbying expenditures among the groups in my dataset from 1998-2003. The data shows a steep increase; in 1998 the average group spent $781,933.04 on lobbying but by 2003 the average expenses reached $1,262,346.24. The average of the six-year average expenses was slightly over $1,000,000. Business groups consistently spent more than others; however, although they averaged $1,451,291.86 over six years the numbers fluctuated between $1.1 million and $1.9 million without a clear pattern during the time period. No other category of groups approached that dollar amount in lobbying; while the AFL-CIO and the Teamsters spent over $1 million fairly consistently throughout the era, other labor and public interest groups did not even near the million-dollar mark. Of the top 20 spenders on lobbying services in my dataset, only the AFL-CIO was not a business. Clearly, businesses used vast resources to invest in political and legal expertise, while other groups did not keep up.

Analysis: An examination of the Hypotheses

Before testing my specific hypotheses, I sought a baseline against which to evaluate my independent variables of interest. Therefore, I modeled the influence of my five control variables. As mentioned earlier, federal government agencies tend to have more success than

other groups when parties to litigation. I created two dummy variables reflecting whether the federal government was either an appellant or respondent in the case in which the judge cast his or her vote. Moreover, businesses tend to be well-resourced litigants and may attract other businesses to file amici in the cases in which they are parties. I also included the judge's ideology. While there was no expectation that ideology would have predictive power for whether the respondent earns a judge's vote, it would be an interesting and worthwhile finding if policy attitudes impacted such outcomes.

Table 3: Baseline Showing Effects of Control Variables			
Probit regression	Presence of obvs =	2769	
	LR chi2(3) =	110.73	
	Prob > chi2 =	0	
Log likelihood = -1820.196	Pseudo R2 =	0.0295	
reswins	Coefficient	Std. Err.	P>|z|
Business Appellant	-0.1415612	0.0502124	0.005
Business Respondent	0.0052918	0.0595389	0.929
Federal Appellant	-1.0511	0.1200869	0
Federal Respondent	0.2438956	0.0655189	0
Judge's Ideology	0.2438956	0.0655189	0.971
_cons	0.2679278	0.0570542	0

The results in Table 3 are consistent with the expected outcomes. The federal government's participation in cases as appellant has a statistically significant negative effect on the likelihood a judge voted for the respondent. The federal government's participation as the respondent has a statistically significant positive effect on the likelihood a judge voted for the respondent. The impact of the federal government on the likelihood of a favorable outcome is much greater when the government is the appellant than when the respondent. Business litigants have weaker effect on respondent success than the federal government. As the appellant, businesses have a statistically significant negative effect on respondent success. When the

respondent, businesses slightly increases the probability the respondent earns a judge's vote. The coefficient associated with this variable, however, is not statistically significant. This is likely due to the fact that appellate judges tend to defer to lower courts and favor respondents regardless of the identity of the respondent; therefore, the government would be expected to have a stronger influence when it is an appellant and seeking to reverse a lower court.

Table 4 presents a test of my hypothesis that the presence of amici increases the probability of a positive vote for the side supported by the amici. This model provides an assessment of whether judges' voting behavior for economic and labor relations issues differed substantially from that for all issues. Collins and Martinek (2010) found that the briefs filed for appellants helped them at a significant level, while briefs on behalf of respondents had a positive but insignificant effect. The dependent variable was whether the judge voted in favor of the respondent. I included two dummy variables indicating whether amici filed on either the appellant or respondent's behalf. I also retained my five control variables from the previous model.

Table 4: Effect of the Presence of Amici			
Probit regression	Presence of obvs =	2769	
	LR chi2(3) =	136.62	
	Prob > chi2 =	0	
Log likelihood =-1807.2494	Pseudo R2 =	0.0364	
reswins	Coefficient	Std. Err.	P>|z|
Presence of Amici for Appellant	-0.2772702	0.0973129	0.004
Presence of Amici for Respondent	-0.3560721	0.1027968	0.001
Business Appellant	-0.1367919	0.0503936	0.007
Business Respondent	-0.0028163	0.0597207	0.962
Federal Appellant	-1.050066	0.1200295	0
Federal Respondent	0.2503844	0.0658355	0
Judge's Ideology	0.0005326	0.0632124	0.993
_cons	0.3106854	0.0578338	0

Table 4 provides mixed results. The presence of amici favoring the appellant in economic and labor cases does result in lower propensity for judges to support respondents at a 0.01 confidence level. Yet the presence of amici favoring the respondent appears to backfire on the respondent, as the negative coefficient indicates that respondents are expected to lose judges' votes more frequently when amici support them. This coefficient is not only statistically significant at the 0.001 level, but also has a greater magnitude than the presence of appellant briefs. These findings meet Collins and Martinek's expectation that amici for the appellant will be impactful. Judges' responses to respondent amicus briefs are unexpected; instead of being slightly positive as Collins and Martinek predict, it is negative and significant. The results for the control variables changed only slightly when accounting for the presence of amici.

In Table 5 I evaluate the expectation of hypothesis 1b that the probability of a positive vote for the side supported by the amicus increases with the number of amici groups. I substituted the sum of the amici filing for the appellant and the respondent for dummy variables employed in Table 2 reflecting their presence, while keeping the controls used previously.

Table 5: Effect of the Number of Amicus Groups			
Probit regression	Presence of obvs =	2769	
	LR chi2(3) =	112.21	
	Prob > chi2 =	0	
Log likelihood = -1819.4562	Pseudo R2 =	0.0299	
reswins	Coefficient	Std. Err.	P>|z|
Number of Amici for Appellant	-0.0328893	0.0264687	0.214
Number of Amici for Respondent	0.0040126	0.0228548	0.861
Business Appellant	-0.1388913	0.0502747	0.006
Business Respondent	0.0040688	0.0595746	0.946
Federal Appellant	-1.056854	0.1216421	0
Federal Respondent	0.2465101	0.0655855	0
Judge's Ideology	0.0019918	0.0630058	0.975
_cons	0.2712	0.0571761	0

Table 5 provides some support for the contention that the number of outside groups supporting each side does impact whether the respondent wins. The negative coefficient for the number of groups supporting appellants and the positive coefficient for the number of groups in favor of respondents conforms to my hypothesis' expectations. However, these coefficients are not statistically significant and are fairly close to zero. Hence, while the effects are directionally the same as those Collins and Martinek observed, they are not statistically significant. Thus, I at best only observed weak evidence that amicus groups might affect a judge's propensity to vote for the respondent's position.

My principle hypothesis is that the presence of business interests as amici increases the probability of a positive vote for the side supported by the amici. I examined this, hypothesis 2a, by creating two dummy variables, reflecting whether business groups signed briefs supporting the appellant or respondent. I also created dummy variables for whether the federal government participated as an amici or if other non-business, non-federal government affiliates signed amicus briefs. While this last category seems large, it allows me to evaluate whether businesses in particular have a greater effect than other private organizations. While state and local governments are included in this category, there were only 33 votes in which these entities filed briefs.

Table 6: Effect of Presence of Business, Federal, and Other Amici			
Probit regression	Presence of obvs =	2769	
	LR chi2(3) =	151.03	
	Prob > chi2 =	0	
Log likelihood = -1800.0477	Pseudo R2 =	0.0403	
reswins	Coefficient	Std. Err.	P>|z|
Presence of Business Amici for Appellant	-0.5938412	0.1501188	0
Presence of Business Amici for Respondent	-0.0680578	0.15928	0.669
Presence of Federal Amici for Appellant	-0.1025509	0.2001779	0.608
Presence of Federal Amici for Respondent	0.0523444	0.2265903	0.817
Presence of Other Amici for Appellant	-0.0332837	0.1514722	0.826
Presence of Other Amici for Respondent	-0.6171035	0.1598225	0
Business Appellant	-0.099755	0.0514266	0.052
Business Respondent	-0.0238892	0.0602414	0.692
Federal Appellant	-1.024209	0.120615	0
Federal Respondent	0.2626076	0.0661343	0
Judge's Ideology	0.0068088	0.0633397	0.914
_cons	0.2966321	0.0579041	0

Table 6 shows the probit model for the presence of different groups. It appears that the presence of business groups only helped when they supported the appellant, a result significant at the 0.001 level. To provide a more easily interpreted estimate of the effect for business amici, I calculated the change in probability of a vote for the respondent with STATA. The predicted probability fell from a 60% chance the respondent would win a judge's vote, all other variables held at the means, when there was no business amicus presence in favor of the appellant to a 36% chance when there was one. In contrast, the participation of business groups for the respondent's side decreased the likelihood the respondent received a judge's vote. This result, however, was small in magnitude and not statistically significant. The submission of briefs by the federal government benefitted the side the government weighed in on, albeit not to an extent that was statistically significant. When groups other than businesses or the federal government filed briefs for the appellant, they were helpful but not significant factors. In contrast, when other

parties submitted briefs for respondents they appear to diminish respondents' chances and were statistically significant.

Hypothesis 2b predicted that the probability of a positive vote for the side supported by business amici increases with the number of such amici. To analyze this prediction, I substituted six new variables for the number of different appellant and respondent groups. These variables represented the number of appellants and respondents which were business groups, federal agencies, and other groups. I retained my same control variables as before.

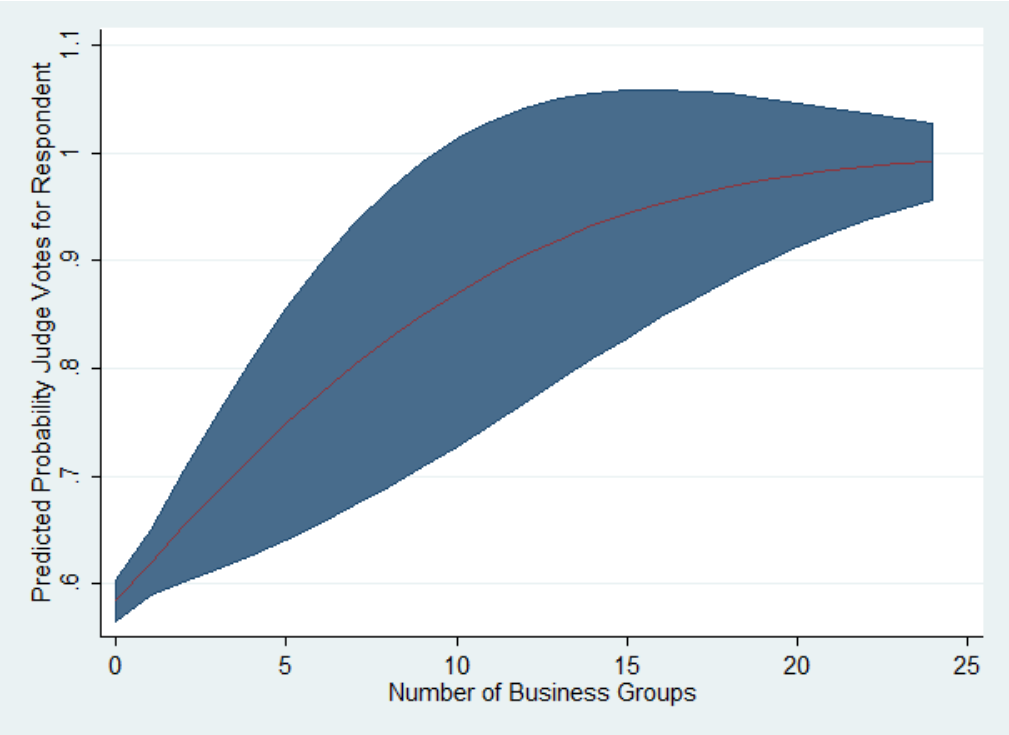
Table 7: Effect of Number of Business, Federal, and Other Amici			
Probit regression	Presence of obvs =	2769	
	LR chi2(3) =	154.35	
	Prob > chi2 =	0	
Log likelihood = -1800.9122	Pseudo R2 =	0.0411	
reswins	Coefficient	Std. Err.	P>|z|
Number of Business Amici for Appellant	-0.0236948	0.0309247	0.444
Number of Business Amici for Respondent	0.091185	0.034603	0.008
Number of Federal Amici for Appellant	-0.217054	0.1528758	0.156
Number of Federal Amici for Respondent	0.0747637	0.2264253	0.741
Number of Other Amici for Appellant	0.0916151	0.084629	0.279
Number of Other Amici for Respondent	-0.5112678	0.1014381	0
Business Appellant	-0.1130892	0.0509314	0.026
Business Respondent	-0.0323295	0.0603281	0.592
Federal Appellant	-1.096063	0.1232788	0
Federal Respondent	0.2448461	0.0660495	0
Judge's Ideology	0.0092509	0.063272	0.884
_cons	0.2922684	0.057826	0

I find that some groups appear to have success when filing as amicus curiae, as seen in Table 7. The number of business groups supporting the appellant is correlated with a lower probability that a judge will vote for the respondent although the coefficient is not statistically significant. On the other hand, increases in the number of business groups supporting the respondent increase the likelihood a judge will vote for the respondent. This effect is statistically

significant. Although the presence of business amici supporting the respondent does not appear to help, the number does here. This is likely due to the votes of three judges who had 24 business groups sign briefs supporting the respondent on one particular case, *Harmon Industries vs. Browner*, and no other votes cast on cases with more than seven such groups participating. In fact, when I removed the case from the probit model, the coefficient associated with business respondents became statistically insignificant and negative. However, even if the case is included and the number of business groups is lowered to seven, the next highest amount of groups which filed for the respondent, the coefficient is positive but not significant. It is clear that my ability to draw conclusions is limited by the few cases my dataset contains. The participation of federal agencies also helps the government's preferred side, but the coefficients for appellants and respondents are not statistically significant. As for other groups, switching from their presence to the number of parties still results in undesired outcomes.

Graph 1 displays the expected probabilities for a judge to favor the respondent for each additional business group filing on the respondent's behalf, holding all other variables at their mean with all cases included. The number of groups ranged from 0 to 24. Without such a group present, respondents won 58% of the time. With 24 participating, the percentage increased to 99%. The graph below shows the steadily increasing likelihood of a pro-respondent vote for every business group that participates. However, as noted above, much of the variation is driven by the outlier case in which 24 amici petitioned the court.

Graph 1: Predicted Probability of Pro-Respondent Vote with Business Amici



My fourth hypothesis anticipated that amicus groups that spent more on lobbying would have greater success in the appellate courts. Given that businesses and their affiliates vastly outspent other groups in my dataset, the success of business may be attributed to their resource advantage. To test this hypothesis, I included the average lobbying expenditures for the amicus groups supporting appellants and respondents as an independent variable.

Table 8: Effect of Average Lobbying Expenditures by Amici			
Probit regression	Presence of obvs =	2769	
	LR chi2(3) =	117.04	
	Prob > chi2 =	0	
Log likelihood = -1817.0393	Pseudo R2 =	0.0312	
reswins	Coefficient	Std. Err.	P>|z|
Sum of Average Expenditures on Lobbying by Amici for Appellants	-3.01E-08	1.19E-08	0.011
Sum of Average Expenditures on Lobbying by Amici for Respondents	4.80E-09	9.89E-09	0.628
Business Appellant	-0.1310236	0.0504246	0.009
Business Respondent	0.0040028	0.0596275	0.946
Federal Appellant	-1.058913	0.1210497	0
Federal Respondent	0.2534492	0.0657275	0
Judge's Ideology	0.0036621	0.0630346	0.954
_cons	0.2665125	0.0570854	0

Investing in traditional political advocacy seems to pay off, as shown in Table 8. When interest groups supporting appellants and respondents spend on lobbying Congress, judges appear more likely to take their side in court. The effect of spending on respondents is lower than appellants; it is also statistically insignificant. In contrast, money spent on appellants is statistically significantly related to whether the appellant wins a judge's vote. While the coefficient is close to zero, the values range from zero to $44 million. I estimated the predicted probabilities in increments of the standard deviation, which was $1,886,769. The standard deviation is so high because few groups spent much on lobbying; as noted in the descriptive statistics section, businesses tended to spend a lot, while other groups spent little if anything. Moreover, the variable also includes votes on cases without amici – and therefore, without any amici spending on lobbying.

Table 9: Influence of Lobbying Expenditures by Amici Supporting Appellants

Sum of Average Expenditures on Lobbying by Amici for Appellants	Margin	Std. Err.	P>|z|
0	0.591027	0.0095234	0
1886769	0.568813	0.0123662	0
3773538	0.5463792	0.0193712	0
5660307	0.5237963	0.0275911	0
7547076	0.5011368	0.0361719	0
9433845	0.4784736	0.0448087	0
11320614	0.4558797	0.0533349	0
13207383	0.4334277	0.0616312	0
15094152	0.4111886	0.0695992	0
16980921	0.3892313	0.0771539	0
18867690	0.3676223	0.0842204	0
20754459	0.3464244	0.0907333	0
22641228	0.325697	0.0966366	0.001
24527997	0.3054949	0.1018836	0.003
26414766	0.2858684	0.1064379	0.007
28301535	0.2668624	0.1102728	0.016
30188304	0.2485168	0.1133716	0.028
32075073	0.2308657	0.1157275	0.046
33961842	0.2139374	0.1173435	0.068
35848611	0.1977548	0.1182317	0.094
37735380	0.182335	0.1184128	0.124
39622149	0.1676892	0.1179154	0.155
41508918	0.1538235	0.1167752	0.188
43395687	0.1407388	0.1150342	0.221

This shows a sharp decrease for every additional $1.8 million spent on lobbying. This effect continues until about $34 million has been spent. At this point, the respondent is only expected to win 19% of the time, but this prediction only falls within the 0.1 confidence interval. After $34 million, the model predicts an effect, but cannot say that the effect is significant. This implies that there is a declining marginal utility to lobbying expenses; if judges are concerned about legislative reversals or if they are swayed by the information provided by these lobbying firms, there is only so much money can buy.

Additionally, I modeled my fifth hypothesis, that the number of groups specializing in legal advocacy improves the probability a judge voted for the side that group supports. The second part of this hypothesis expects that these legal advocacy groups will be more successful than other amici. I thus added variables representing the number of legal and non-legal groups supporting the appellant and respondent, respectively[3]. This is intended to capture any advantage to specializing in advocacy through the courts, rather than through conventional lobbying which is encapsulated in the lobbying expenditures.

Table 10: Effect of Specialized Legal Advocacy Amici			
Probit regression	Presence of obvs =	2769	
	LR chi2(3) =	120.6	
	Prob > chi2 =	0	
Log likelihood =-1815.4807	Pseudo R2 =	0.032	
reswins	Coefficient	Std. Err.	P>|z|
Number of Specialized Legal Amici for Appellant	-0.4053023	0.1495169	0.007
Number of Specialized Legal Amici for Respondent	-0.1203965	0.1651903	0.466
Number of General Advocacy Amici for Appellant	-0.009718	0.0290947	0.738
Number of General Advocacy Amici for Respondent	0.0193951	0.0292541	0.507
Business Appellant	-0.1382327	0.0503141	0.006
Business Respondent	0.0102781	0.0597959	0.864
Federal Appellant	-1.068348	0.121866	0
Federal Respondent	0.2499493	0.0659774	0
Judge's Ideology	0.0056851	0.0630799	0.928
_cons	0.2747134	0.0573561	0

Table 10 provides limited evidence for my hypothesis that legal advocacy groups are at an advantage over other organized interests in the courts. When supporting the appellant, legal groups are extremely influential. They have the highest coefficient of any variable included in the model, save whether the federal government was the appellant, and the coefficient is statistically significant. Table 11 below shows that with just one brief filed by a legal advocacy

[3] These groups were categorized based on the information provided on each group's webpage, using their mission statement or about section. Groups that emphasized their role in providing legal advice or participating in litigation were designated as legal advocacy groups.

group in favor of the appellant the probability that a judge supports the respondent drops from 59% to 43%. However, when legal advocacy groups support respondents they tend to hurt more than they help though the coefficient is statistically insignificant. The coefficients for all other interest groups indicate that each additional organization benefits the party's preferred side at level far from statistical significance. These results offer support for those who contend that judges look towards legal arguments to inform their decisions, either for principled or strategic reasons. While the coefficient for legal advocacy groups filing for respondents is somewhat unexpected, it can be explained by the observed inclination for judges who seek to uphold a lower court's decision to use the lower court's logic. They have no need for amici to provide alternative legal reasoning. However, judges who vote to overturn lower courts must either be persuaded by the legal arguments provided by amici and appellants or need new legal arguments that can rationalize policy preferences.

Table 11: Predicted Probability of Pro-Respondent Vote for Pro-Appellant Legal Groups

Number of Specialized Legal Amici for Appellant	Margin	Std. Err.	P>|z|
0	0.5925893	0.0095842	0
1	0.4320758	0.0580591	0
2	0.2821744	0.1000722	0.005

Finally, I analyzed my sixth hypothesis that number of business groups filing amicus briefs will increase the likelihood a judge casts a pro-business vote. To model this, I created variables for the total number of business, federal government, and other groups that filed amicus briefs for each judge's vote. I included judicial ideology and whether the federal government was a litigant as control variables.

Table 12: Effect of Business, Federal, and Other Amici on Judge's Pro-Business Votes			
Probit regression	Presence of obvs =	2769	
	LR chi2(3) =	87.51	
	Prob > chi2 =	0	
Log likelihood =-1865.9239	Pseudo R2 =	0.0229	
judvote	Coefficient	Std. Err.	P>|z|
Total Number of Business Amici	0.0293983	0.0217427	0.176
Total Number of Federal Amici	0.0347853	0.1259573	0.782
Total Number of Other Amici	0.0551371	0.0483441	0.254
Number of Business Litigants	-0.3179754	0.0402402	0
Number of Federal Litigants	-0.3323499	0.0552063	0
Judge's Ideology	0.1859749	0.0621991	0.003
_cons	0.5010417	0.0550156	0

The types of interest groups that participate seem to have little effect on how judges vote. The coefficient for business groups is positive, signifying that each additional group increases the likelihood a judge casts a pro-business vote, but is not statistically significant. The number of federal agencies and other amici also has positive, statistically insignificant coefficients associated with them. This is an interesting result as many of the anti-business votes are positively expressed as pro-government in the codebook. Pro-business federal and state governments may be responsible for this outcome. However, there are far more labor, public interest groups, and individuals in the dataset than state and local governments. Given their statistical insignificance, it seems fair to dismiss these coefficients as statistical noise. As expected, federal litigants decreased the probability that a judge cast a pro-business vote and judicial ideology increased it. Both coefficients were statistically significant.

As a side note, I also examined cases in which business and the federal government engaged in litigation against each other. These cases are likely to be the cases most interesting to my thesis as they involve businesses filing complaints about government actions in the economy or government attempts to enforce legislation or regulations against businesses. When I modeled

these cases for whether the judge voted for the respondent, I found that the presence of federal government amicus briefs confused the model. Moreover, none of the coefficients were statistically significant, with the exception of the presence of other amicus groups supporting the respondent. While significant, the direction of the coefficient was negative instead of positive. My attempt to model these cases with whether a judge's vote was pro-business ran into the same issues as the previous model. Both federal government amici and litigants perfectly predicted outcomes and none of the other variables provided meaningful results.

Conclusions:

This study sought to determine whether theories of interest group dominance of the U.S. policy-making process found evidence in the appellate courts. Its focus on business interests stems from the large literature describing the growth of business influence in the other branches of government. I chose to focus on the cases most likely to attract the attention of business; those which made economic and labor policy.

All told, my models show that businesses tend to have more success in filing amicus briefs in appellate courts than states, labor unions, and other private groups. The presence of amicus briefs filed by businesses on behalf of appellants significantly improves the likelihood an appellant wins. This increase is greater than the effect of a brief from any other group. While the number of business groups that support an appellant does not matter, the number that support the respondent somewhat increases the probability that appellate panels uphold a lower court's decision, though my dataset's usefulness is limited by the presence of one outlying case. A possible explanation for this odd phenomenon is that cases in which amicus briefs are filed are

more controversial and likely to be overturned by appellate judges than those without such briefs. Still, my models provide support for the theory that businesses are more effective amici than all other groups.

As my research indicated a strong relationship between money spent on lobbying Congress and success in the appellate courts, I propose the reason for business success stems from their political success elsewhere. Through the process of influencing judicial appointments and orchestrating legislative overrides, businesses work with a judiciary receptive to their concerns. Businesses further benefit from a large stable of legal advocacy firms dedicated to advancing business interests in the courts. About half of the interest groups, such as the Pacific Legal Foundation and the Product Liability Advisory Council, that specialized in litigation were affiliated with businesses. This combination of political power and legal expertise provides businesses with the ability to move judge's votes.

While the federal government had the expected strong coefficients indicating success as an amicus participant, the impact was always statistically insignificant. As for the federal government's only slight impact, this may be a result of the Department of Justice's and other agencies selecting only cases that they are likely to win. The federal government made up about 10% of total amici in the dataset. Perhaps with a larger sample, my model would have been able to find a statistically significant relationship. Even so, the federal government still had some of the influence I expected at the beginning of my research.

The ineffectiveness of non-business, non-federal groups is likely due to two related reasons. First, these groups are generally less resourced than the aforementioned organizations as shown in my discussion of lobbying expenditures and federal influence in the courts. Businesses

far outspend even the well-funded labor and public interest groups, such as the AFL-CIO and the AARP. Moreover, they are likely filing briefs on behalf of litigants with similarly constrained resources. Often, they support litigants who are individuals, smaller unions, or other civic organizations. Given that cases in which briefs are filed tend to be salient, controversial cases, e.g. cases calling for enforcement of environmental regulations, it may be that there are powerful litigants opposing these amici groups.

My thesis falls short of answering a couple of key questions. First, it does not address directly the policy outcomes of business influence. While regulatory capture may be occurring as a result of the mix of litigation-based enforcement and business lobbying of the courts, it may actually be more simply that businesses are able to advance freer markets through the courts. As I did not read the briefs, nor research about the final outcome of the litigation, my thesis does not say all I would like it to about the result of business influence. While businesses tend to get what they want, what exactly they want is unclear in my research. Further study would require careful reading of selected cases to determine what the briefs addressed and what the judges actually decided.

The small number of cases and the changing nature of the federal judiciary further limit my conclusions. I only had 773 cases fit to analyze in the Kuersten and Haire dataset; of these only 80 had amicus briefs. Adding cases would have been time-consuming and difficult. Had I more cases, I could have included more control variables and received results with greater statistical significance. Moreover, the federal bench has changed since 1997-2003. The results I have only speak to the influence of interest groups then, not now. While the judiciary changes at a relatively slow pace compared to other branches of government, I am unsure about what my results would look like had these cases been litigated from 2005-2011.

However, my thesis still makes several key strides in advancing the literature. First, my study confirms some of Collins and Martinek's (2010) findings about the effectiveness of amicus briefs in the appellate courts can be applied in cases regarding economic regulation. Notably, my thesis supports their conclusion that briefs for appellants are more successful than those for respondents. Second, I looked at whether some groups see more success than others in filing amicus briefs in appellate courts and found that they do. Businesses, on the whole, tend to earn judges' votes as amici more frequently than the federal government and other groups in my dataset. Third, I looked at whether interest group expenditures on lobbying affected judges' voting behavior, and found that they did. The courts may not be the safe haven for underdogs as some would claim; on economic, material issues, the court seems swayed by those with resources. Finally, I tested whether groups that focus on legal issues take advantage of their legal expertise in court. The evidence I found indicates they do; this demonstrates that law does matter in determining judges' votes, with tremendous implications for those who advocate a legal or strategic view of judicial decision-making.

In sum, I found that two sets of groups are responsible for the effectiveness of amici at the appellate court level in economic cases. The presence of business groups helps appellants win, though the number has little effect. Legal groups also aid appellants' chances when they file amicus briefs. This suggests that further research may be necessary to determine whether all different types of amici help their preferred side succeed in the appellate courts or if subgroups of amici drive the effectiveness of amicus briefs in areas other than economic regulation and labor relations.

All told, my thesis paints a picture of an appellate court system that can be pressured by outside parties. Like the executive and legislative branch, it is hospitable to the most-resourced

interests and groups that specialize in effective advocacy techniques. However, the U.S. Courts of Appeals are still characterized by deference to legal norms, especially decisions made by lower courts. As policy-making bodies, they are unique and clearly different than the Congress or the Presidency. Still, those with great stakes in their deliberations are those who seek out and ultimately win influence over the important decisions these courts make.

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