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## Uses of Extra-Legal Sources in *Amicus Curiae* Briefs Submitted in *Fisher v. University of Texas at Austin*

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**Abstract:** As the political arena becomes increasingly polarized, the legal arena is playing a more important role in the creation of education policy in the United States. One critical stage in the legal process for such efforts is at briefing where “*amici curiae*,” or friends-of-the-court, may introduce additional arguments for the court to consider through the filing of *amicus curiae* briefs. To explore

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the use of extra-legal sources by *amici*, we focus on the 2013 U.S. Supreme Court case *Fisher v. University of Texas at Austin* and ask the questions: 1) What are the types, and relative use by *amici*, of extra-legal sources cited in the briefs submitted in *Fisher P*? and 2) What is the relative use of extra-legal sources cited in *amicus* briefs by supporting party and by category of *amici*? Our findings reveal the wide-range of extra-legal sources used in *amicus* briefs, and that the type of extra-legal sources incorporated may be associated with who the *amici* are and which party they support. Ultimately, we discuss potential reasons for the differences observed in the use of extra-legal sources and offer recommendations to more effectively engage in the policy briefing process.

**Keywords:** research use; law; higher education

### **Uso de fuentes legales adicionales en breves de *amicus curiae* presentados en *Fisher v. University of Texas at Austin***

**Resumen:** A medida que la arena política se polariza cada vez más la arena legal juega un papel más importante en la creación de una política educativa en los Estados Unidos. Una etapa crítica en el proceso legal para tales esfuerzos es en una sesión de información donde “*amici curiae*”, o amigos de la corte, pueden presentar argumentos adicionales para que la corte los considere mediante la presentación de escritos *amicus curiae*. Para explorar el uso de fuentes extra legales por *amici*, nos enfocamos en el caso 2013 de la U.S. Supreme Court *Fisher v. University of Texas at Austin* y hacemos las siguientes preguntas: 1) ¿Cuáles son los tipos y el uso relativo de los *amici* de fuentes legales citadas en los escritos presentados en *Fisher P*? y 2) ¿Cuál es el uso relativo de las fuentes extra legales citadas en los escritos *amicus* por la parte que apoya y por categoría de *amici*? Nuestros hallazgos revelan la amplia gama de fuentes extra legales utilizadas en los informes *amicus*, y que el tipo de fuentes extra legales incorporadas puede asociarse con quiénes son los *amici* y qué partido apoyan. En última instancia, discutimos las posibles razones de las diferencias observadas en el uso de fuentes extra legales y ofrecemos recomendaciones para participar de manera más efectiva en el proceso de información sobre políticas.

**Palabras clave:** uso de investigación; ley; educación superior

### **Uso de fontes legais adicionais em breves de *amicus curiae* apresentados em *Fisher v. University of Texas at Austin***

**Resumo:** À medida que a arena política se torna cada vez mais polarizada a arena legal desempenha um papel mais importante na criação de uma política educacional nos Estados Unidos. Um estágio crítico no processo legal para tais esforços é em uma sessão de informação onde “*amici curiae*”, ou amigos do tribunal, podem apresentar argumentos adicionais para que o juiz considere arquivar *amicus curiae* briefs. Para explorar o uso de fontes legais extra pela *Amici*, nós nos concentramos no caso de 2013 do U.S. Supreme Court *Fisher v. University of Texas at Austin* e fazemos as seguintes perguntas: 1) Quais são os tipos e o uso relativo de *amici* de fontes legais citadas nos trabalhos apresentados em *Fisher P* e 2) Qual é o uso relativo das fontes extralegais citadas nos resumos de *amicus* pelo partido que apoia e pela categoria *amici*? Nossas descobertas revelam a ampla variedade de fontes legais extra usadas nos relatórios de *amicus* e que o tipo de fontes extralegais incorporadas pode ser associado com quem é o *amici* e qual partido eles apoiam. Em última análise, discutimos os possíveis motivos das diferenças observadas no uso de fontes extralegais e oferecemos recomendações para participar de forma mais efetiva no processo de informação política.

**Palavras-chave:** uso da pesquisa; lei; educação superior

## Introduction<sup>1</sup>

As the political arena becomes increasingly polarized and political actors are finding it more difficult to make progress through traditional routes, the legal arena is playing a more important role in the creation of policy in the United States. In this changing context, policy actors must present their positions simultaneously in a number of venues to maximize the possibility of their ideas influencing enacted policy. The ways in which policy-interested actors can engage in the public and political arenas has been the subject of study and analysis for many years (e.g., Cooper & Shewchuk, 2015; Rodway, 2015; Roesch, Golding, Hans, & Repucci, 1991; Sabatier & Weible, 2014; Scott, Jabbar, LaLonde, DeBray, & Lubienski, 2015); however, the ways in which these same actors can influence policy via the legal arena deserves additional attention. Specifically, there are a number of important stages in the legal process where interested parties may seek to influence policy development. One critical stage is the briefing process. At this juncture, various individuals and organizations called “*amici curiae*,” or friends-of-the-court,<sup>2</sup> may introduce additional arguments for the court to consider through the filing of *amicus curiae* briefs. Understanding the extra-legal sources being provided to judges and Justices by *amici* in support of that decision making ultimately can lead to a better utilization of this policy entry point with an eventual goal of understanding how to leverage it more effectively.

To explore the use of extra-legal sources by *amici*, we focus our investigation on a 2013 U.S. Supreme Court case, *Fisher v. University of Texas at Austin*. This case, which was before the Supreme Court twice, addresses the constitutionality of using race as a factor in postsecondary admissions decisions, a controversial education policy historically sought to be resolved through the legal arena. The *Fisher* case first reached the Court in 2011 after Abigail Fisher filed suit against the University of Texas at Austin arguing that the institution’s admission process violated the Equal Protection Clause of the U.S. Constitution. In 2013, the Court sent the case back to the lower court for additional review based on Court precedent (*Fisher I*). After reconsidering, the 5th Circuit Court of Appeals affirmed its prior ruling (*Fisher*, 2014). That decision was then appealed again to the Supreme Court on the grounds that it did not satisfy the Court’s requirements. The Court agreed to hear the case again. In June 2016 the U.S. Supreme Court decided in favor of the University of Texas and its admission policy (*Fisher II*). Our analysis draws from the briefing that took place in *Fisher I*.

*Fisher I* provides a unique opportunity to examine the use of extra-legal sources by *amici* in light of the numerous briefs that cited an abundance of such sources. It is important to note that for this study we focus on the use of extra-legal sources by *amici* and leave for separate work the use of these sources by the U.S. Supreme Court in its opinion. That being said, we do know from a separate analysis (Garces, Marin, & Horn, in press) that in *Fisher* the Justices have cited, questioned, and criticized a range of extra-legal sources (including books, law journal articles, education journal articles, policy reports, and news media) in their written opinions, suggesting that these sources are relevant in the case before the Court and, therefore, important to understand further.

We focus only on *Fisher I* *amicus* briefs for several reasons. First, briefs submitted in *Fisher I* were filed with the understanding that the case would be decided on the merits. This means the

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<sup>1</sup> The authors gratefully acknowledge the support of the William T. Grant Foundation. The findings represent the perspectives of the authors alone.

<sup>2</sup> *Amici* are defined as “parties not directly involved in the litigation, but who believe that the court’s decision may affect their interests” (Erickson & Simon, 1998, p. 31). While there are strict rules governing the submission of briefs (U.S. Supreme Court, 2013), and many scholars have offered best practice guidelines (Ennis, 1984; Lynch, 2004; Simpson & Vasaly, 2015), there are minimal requirements with respect to the information that can be included in the narrative of the brief.

extra-legal sources *amici* found relevant to the issues being decided were most likely included in these briefs. Second, because *Fisher II* introduced additional (albeit related) legal questions into the case, *amici* were required to address the modified questions posed to the Court. As such, briefs in *Fisher I* and *Fisher II* were responding to different issues which would have confounded the analysis.

In *Fisher I*, 92 *amicus* briefs were filed with nearly all (99%) including citations to extra-legal sources. In our examination of these briefs we ask two key research questions: 1) What are the types, and relative use by *amici*, of extra-legal sources cited in the briefs submitted in *Fisher I*? and 2) What is the relative use of extra-legal sources cited in *amicus* briefs by supporting party and by category of *amici*? These analyses are descriptive and provide an essential starting point in understanding the use of extra-legal sources by interested parties in *amicus* briefs. From this basis—and the frameworks created for categorizing the extra-legal sources and *amici curiae*—additional research can be conducted to extend our understanding of the impacts and usefulness of extra-legal sources on the courts and their decision making.

In our analysis, we separate legal evidence (sources such as court cases, statutes, or regulations) from extra-legal sources (such as peer-reviewed journal articles, books, reports, and media sources). These distinctions are essential because we are seeking patterns of extra-legal source use, which may vary by type as well as by party or *amici*. It is important to note that we keep our definition of extra-legal sources broad (other forms of evidence that are not legal) to allow us to capture the wide range of sources that *amici* use to support their arguments.

Our focus on *amicus* briefs is important both because of the increase in their submission as well as the change in their content. Over the last half of the 20<sup>th</sup> century, the U.S. Supreme Court saw an astonishing 800% increase in the number of briefs filed before the Court (Simard, 2008). In fact, according to Salzman, Williams, and Calvin (2011), “in recent terms, for the Supreme Court to hear a case that has not garnered interest-group attention is a rarity” (p. 294). In addition to the rising numbers of briefs, *amici* are increasingly incorporating extra-legal sources, including social science research, to support their positions (see, for example, Roesch, Golding, Hans, & Repucci, 1991; Rublin, 2011). The combination of these two trends has resulted in a substantial increase in the inclusion of extra-legal sources before the Court, making *amicus* briefs a key entry point for this type of evidence into an increasingly important policy arena—the courts.

Prior empirical work examining the inclusion of extra-legal sources in the legal system has largely focused on the use of expert witnesses at trial at the beginning of the legal process (e.g., Ramsey & Kelly, 2004) and on the effect of research on policy via court opinions (e.g., Dunn & West, 2008). Because these extra-legal sources ultimately reach the legal debate through *amicus* briefs (Ancheta, 2006), the briefing process demands more attention with an eye to understanding the full range and distribution of sources used by *amici* to support their policy arguments. Moreover, because *amici* differ in their roles and intentions with respect to brief submission (Anderson, 2015; Simpson & Vasaly, 2015), it is particularly important to look by category of *amici* at their extra-legal source use as they seek to impact a court’s decision and, often, policy. As Justice Breyer describes, the briefs “help [the Court] to become more informed about the relevant science” (Breyer, 1998, para. 11) leading to more informed policy decisions by the Court—and by extension creating an important arena for competing policy ideas to shape the information the Court receives.

In sum, this study helps identify how *amici* use this policy entry point to shape the interpretation of issues before the Court. Towards this goal, we first present our conceptual framework and a concise synthesis of related literature, with a focus on *amicus* briefs. We then outline our methods and findings before concluding with the implications of these findings for policy and future research.

## Conceptual Framework

The significance of *amicus* briefs in the policy arena rests on the idea that the courts are becoming an increasingly important place where policies are shaped. A critical framework for understanding why this is the case can be found in Plank and Boyd's (1994) insightful but underutilized article that argues political polarization—as has been heightened in the US over the past decade—has often led to efforts to seek out more “antipolitical” mechanisms to address “divisive” questions in education. They write,

disagreements about educational policy and practice are increasingly likely to be addressed in conflict over the institutions of educational governance rather than in open debate on the merits of alternative goals and strategies. [In] *antipolitics*... advocates of reform seek to spare themselves the rigors and uncertainties of interest mobilization and coalition-building by shifting consideration of key issues from legislatures and school boards to institutions that are less ‘political’ and more authoritative, such as courts and markets. (Plank & Boyd, 1994, p. 264)

In the case of education, the courts have a long and important history of serving in the key role of authoritative reformer (Superfine, 2010), including on issues of segregation and affirmative action in university admissions.

The conditions that Plank and Boyd (1994) describe as being critical for the utilization of antipolitical policy development strategies (e.g., political grid lock, decision making bodies not representative of particular groups) are just as relevant today and exist at almost every level of government in the United States. Given this reality, it is likely that individuals and organizations looking to foment change in society may move toward antipolitical avenues such as the courts. As those shifts toward engaging in antipolitical approaches occur, the apparatus around them to wield influence becomes increasingly important and will likely grow to meet the needs of these efforts.

Increasing the use of antipolitical processes, which, importantly, Plank and Boyd do not suggest are *apolitical*, ultimately requires a shift in the ways groups and organizations engage the courts to improve their leverage in the legal process. A key entry point into these discussions is the *amicus* process. As described by Simpson and Vasaly (2015), “When legislatures make law, everyone has an opportunity to weigh in on the issue. Not so in courts, which open their doors only to actual litigants. So the *amicus* process allows others to comment on issues of importance to them” (pp. 5–6).

*Amici* make decisions about which extra-legal sources to include, guided at least in part by the function they want the brief to serve (Simpson & Vasaly, 2015). While many briefs focus on providing explanations for complex legal or social issues, the roles of *amici* can expand to providing the empirical evidence on which courts can base their decisions (Roesch, Golding, Hans, & Reppucci, 1991; Simpson & Vasaly, 2015). The debate around the use of *amicus* briefs and the extra-legal sources included within them as levers for policy may ultimately become analogous to current strategies that bring intermediaries and primary decision makers together to work toward policy change (e.g., Scott et al., 2015). Having a clear understanding of what types of extra-legal sources are being included is a critical step in understanding this process because the producers of the work, in this case the *amici*, are functionally “hidden participants” (Kingdon, 2011) in the policy creation process. As policy decisions increasingly come from the courts, we need to know what information is being provided to judges and Justices by *amici* in support of that decision making—making the hidden visible, and thus providing a window into how extra-legal sources are being used to shape arguments in the courts.

## Context: *Amici* and *Amicus Curiae* Briefs

Originally, *amici* served “to provide a court with legal information that was beyond its notice or expertise” (Simpson & Vasaly, 2015, p. 1). The first brief in the US was requested by the Supreme Court in the early 1800s. In that instance, Henry Clay was asked to assist the Court “in determining the application of the commerce clause to a land agreement between Kentucky and Virginia” (p. 2). After Clay’s brief, the United States, other state governments, and lobbyists all began to file *amicus* briefs. Over time, *amici* have evolved from their original function as neutral parties to individuals or groups with a significant interest in the matter before a court. As a result, “amicus participation is especially valuable to non-parties, allowing them to ‘have their say’” (p. 5).

The submission of *amicus* briefs is most observed at the U.S. Supreme Court. In fact, most recent work identifies that *amicus* briefs are submitted in approximately 90% of cases before the Court (Simpson & Vasaly, 2015), up from only 71% between 1980 and 1991. Studies over the last 30 years of *amicus* briefs submitted to the U.S. Supreme Court have focused on issues of impact, generating mixed conclusions as to their effectiveness (e.g., Caldeira & Wright, 1988, 1990; Collins, 2004, 2007, 2008; Collins, Corley, & Hamner, 2015; Larsen, 2014; Songer & Sheehan, 1993; Wofford, 2015), as well as strategies for making them effective (e.g., Ennis, 1984; Grisso & Saks, 1991; Lynch, 2004; Melton, 1987; Morgan & Pullin, 2010; Zuber, Somer, & Parent, 2015). According to Simpson and Vasaly (2015), however, “there is no doubt that the proliferation of *amicus* briefs is the result of their perceived impact on the Court’s decisions” (p. 11) with evidence of such impact in cases such as *Grutter v. Bollinger* and *Romer v. Evans*.<sup>3</sup>

Although the numbers of briefs are increasing and the discussion of their significance continues, there are no formal rules regarding extra-legal sources that can be included in an *amicus* brief to the Supreme Court (U.S. Supreme Court, 2013). Because *amicus* briefs are largely “unregulated” and their inclusion of extra-legal sources over the years has greatly increased, understanding the range of sources used by *amici* as they attempt to impact the Court’s decision is particularly important.

### Categories of *Amici*

To date, studies that examine *amici* have largely focused on the types of organizations that submit briefs, at what stage of the legal process they submit, how much they participate, how often they are on the winning side, and why these interest groups submit briefs (e.g., Caldeira & Wright, 1990; Collins, 2008; Hansford & Johnson, 2014; Segal, 1988; Zuber, Sommer, & Parent, 2015). In addition to informing a court, *amici* file briefs for a variety of reasons including influencing public discourse, signaling the importance of an issue, responding to an organization’s membership, or even increasing the visibility of an organization (Simpson & Vasaly, 2015). Most relevant to this study, research has sought to understand the ways in which the category of *amici* developing the brief may shape these purposes. For example, Simpson and Vasaly (2015) identify six categories of *amici*: special interest organizations and trade groups; parties in other, similar cases; the government, or some agency or official of the government; persons affected by, but not parties to, the litigation; law professors and lawyers practicing in a specialized field; and national, state, and local bar associations. (p. 34)

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<sup>3</sup> *Grutter v. Bollinger* was a U.S. Supreme Court case challenging the use of race in the law school’s admissions policy at the University of Michigan. *Romer v. Evans* was a U.S. Supreme Court case challenging an amendment of Colorado’s State Constitution that denied discrimination protections due to an individual’s sexual orientation.

Similarly, Anderson (2015) suggests a thematic typology of *amici* that includes descriptive categories: governmental; the Court's lawyer; the invited friend; friend of a party; independent friend; and near intervenors. Also related are studies that examine the briefs of conservative groups and liberal groups (e.g., Box-Steffensmeier, Christenson, & Hitt, 2013; Swenson, 2016), as well as the involvement of social scientists as *amici* (Garces, 2013; Powell, Quadlin, & Pizmony-Levy, 2015). These collective findings highlight the differences among *amici*, often reflected in their strategies and goals for their *amicus* briefs. Through our analysis of *Fisher I*, we take up the relevance of these differences and build upon the categories identified in previous literature.

### Uses of Extra-Legal Sources in the Legal Arena

Empirical work examining the use of extra-legal sources in the legal arena has largely focused on the use of social science research from a variety of vantage points. For example, scholars have discussed the increasing consideration of social science by the courts (e.g., Moran, 2010), the function of science in the courts (e.g., Ancheta, 2006), the courts' evaluation of scientific evidence (e.g., Beecher-Monas, 2007; Larsen, 2014), how lawyers and courts should treat social science (e.g., Walker & Monahan, 2014), and the evolving role of expert witnesses and the rules of evidence (e.g., Engstrom, McCool, Chapa, Webster, 2013; Hirsch & Quartaroll, 2011). Work has also sought to understand the reliability of expert testimony (e.g., Chlistunoff, 2016), the mobilization of research as part of legal strategies (e.g., Moran, 2010), and the increasing role social science research has played in legal advocacy before the U. S. Supreme Court as well as in its judicial opinions (Ancheta, 2006; Erickson & Simon, 1998; Frankenberg & Garces, 2008; Garces, 2013). Further, researchers have considered the criticism surrounding the courts' use of social science research (e.g., Cashmore & Parkinson, 2014; Moran 2010).

Importantly, two lines of research most directly link to this study: the dissemination of research to the legal arena (e.g., Cashmore & Parkinson, 2014) and the effect of research on policy via judicial decisions (e.g., Dunn & West, 2008). This body of work suggests that social scientists have a broader role to play in the education policy forum of the courts (e.g., Morgan & Pullin, 2010) which is borne out by the increasing inclusion of related studies into briefs. Presumably, if the parties did not believe this to be true, the focus of *amici* would be directed to much more fruitful areas of influence. Thus, currently, the focus of the research literature on social science in the courts has been an important, albeit limited, one. Further, while this extant literature offers insight with respect to social science and the law, it is largely silent on a wider range of extra-legal sources similarly utilized. Our study seeks to advocate for and add to this area of research by parceling out the use of extra-legal sources and answering the important question of the relative use by *amici* of a fuller array of extra-legal sources that includes, but goes beyond, social science research. In doing so, our study contributes to and expands this existing body of work by including a range of extra-legal sources incorporated by different categories of *amici* in court-centered policy decision making and providing a framework for categorization of the key types of extra-legal sources. Together, these findings could aid future research in many areas including the identification of key leverage points in the *amici* process.

### Data Sources and Methods

Our data source is the census ( $N=92$ ) of *amicus* briefs submitted to the U.S. Supreme Court in *Fisher I*: 17 briefs submitted on behalf of the petitioner, 73 on behalf of the respondent, and 2

briefs submitted in support of neither party.<sup>4</sup> Conducted entirely as a document analysis, we began our study by reviewing each brief's list of "Other Authorities," a specific section of the "Table of Authorities" which includes cited sources that are not case law or legal authorities, and then reviewed the body of text in each brief. We found that 91 of the 92 briefs (99%) cited extra-legal sources—all except one submitted in support of Fisher.<sup>5</sup> These 91 briefs are the focus of our analysis.

The briefs in *Fisher I* are used by *amici* to make arguments in support of, or against, the University of Texas at Austin's race-conscious admissions policy. More specifically, *amici* deliberate whether there are compelling reasons to justify the use of race-conscious admissions. The claims include constitutional arguments and legal precedent, the value of diversity in higher education, the relevance to sectors outside of education (i.e., the military and workforce), the autonomy of colleges and universities, the definition of merit, and the efficacy of race-neutral policies (Jaschik, 2012). The range of *amici* in *Fisher I* includes individuals and organizations from education, as well as the military, government, corporations, and civil rights organizations. This wide array of *amici* such as the AFL-CIO, the American Educational Research Association, the American Psychological Association, the Cato Institute, the Center for Individual Rights, and the NAACP-LDF, is an important rationale for selecting this unique Court case as it allows for rich understanding of the different types of extra-legal sources used by different categories of *amici* to defend or oppose an education policy.<sup>6</sup>

In line with an often-employed methodological standard when studying the legal arena, we concentrate on one case to allow for an in-depth analysis of the issue (see, for example, Bersoff, 1987; Denno, 2006; Fiske, Bersoff, Borgida, Deaux, & Heilman, 1991; Hoewe & Zeldes, 2012). Further, by using purposive sampling (Merriam, 1998), we are not attempting to generalize to all cases. Instead, we are identifying an optimal opportunity to explore the use of extra-legal sources in *amicus* briefs. These methodological choices supplement the reasons highlighted earlier for focusing only on *Fisher I* briefs.

### Types of Extra-legal Sources

To answer the research questions about the breadth of extra-legal sources used in briefs interested in impacting policy, one team of researchers first sorted the extra-legal source citations by type. These types were identified through an iterative qualitative coding process (Saldaña, 2013). First, researchers compiled the citations listed in each of the briefs' "Table of Authorities" that were listed as "Other Authorities." Based on the generated list, the research team reviewed each citation and created descriptive types based on the extra-legal source (e.g., book, government report) and included a catch-all group for items where the source was unclear. After the initial round of coding extra-legal sources, another team of researchers searched for each source. During the acquisition process, the second team confirmed or revised the placement of each source and refined and finalized definitions of the types of extra-legal sources used. A review by members of both research teams then confirmed an appropriate type descriptor for each item. This resulted in 2,304 unique citations across 20 unique types of extra-legal sources. Table 1 includes a description of each type.

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<sup>4</sup> Court rules allow *amici* to file briefs "in support of neither party." The rules do not define this designation. *Amici*, however, may chose this designation when their position does not support either side of the case or for other strategic reasons.

<sup>5</sup> The *amicus* brief of the Mountain States Legal Foundation does not cite any extra-legal sources.

<sup>6</sup> A full list of *Fisher I* briefs is available on the website of the University of Texas at Austin (2016).



Table 1

*Types of Extra-Legal Sources and Descriptions*

Type of Extra-Legal Source	Description
Books and Book Reviews	Published books and reviews of published books
Book Chapters	Chapters published in books
Data	Basic demographic information
Dictionaries	Print and online dictionaries and encyclopedias as well as individual entries
Dissertations	Published dissertations
Federal/State Guidance	Compliance manuals, dear colleague letters, etc.
Government Reports	Federal and state reports
Intangible Objects	Personal interviews, videos, etc.
Law Journal Articles	Law review and Bar Association journal articles
Legal Briefs	<i>Amicus</i> briefs filed in <i>Fisher</i> or other cases, as well as party briefs and motions filed in <i>Fisher</i> *
Media	Newspaper articles, magazine articles, AP wire stories, news shows, online media, blogs
Non-Gov. Reports	Reports by organizations such as universities, university systems, and NGOs
Non-Law Journal Articles	Articles published in peer and non-peer-reviewed non-law journals
Other	Items not classified in other categories (e.g., comic strips and emails)
Other Papers	Conference and other papers not yet published nor issued by a government agency, university, non-profit organization, etc.
Press Releases	Press releases about a study, report, article, or book rather than the original material itself
Speeches and Letters	Speeches or letters cited independently rather than as part of a reprint in a book or journal
Statements	Mission statements, diversity statements, bylaws of organizations, etc.
Tables	Published data tables
Websites	Citations to web pages with no direct cite to any information/report, etc.

\*Legal briefs are included here as extra-legal sources because they are produced outside of the evidentiary process, that is, after evidence is submitted and considered in the trial court.

### Categories of *Amicus Curiae*

To examine the relative citation of various types of extra-legal sources by *amici*, one team of researchers first placed each of the 91 briefs into one of six *amici* categories guided by characteristics suggested by the extant literature (Anderson, 2015; Simpson & Vasaly, 2015). Specifically, the team reviewed the “Interest of *Amici Curiae*” section<sup>7</sup> in each brief and used that information, written by the *amici* themselves, to place each brief into one of six categories. Using the interest of *amici* section allowed us to consider the entire group of individuals/organizations involved in the brief, as numerous *amici* can be part of a brief. When a brief involved *amici* from different categories, the team placed the brief in the category of the lead *amicus* (i.e., the individual/organization listed first in the title of the brief). After the first pass of categorizing, another team reviewed the contents of each category for internal consistency as well as uniqueness across categories. This review resulted in one of the categories being divided into four separate categories to better reflect the uniqueness of those *amici* originally grouped together. These new categories were then reviewed by the original research team to verify placement of all *amici* into one of the nine categories. The final nine categories of *amici* in this study are: 1) civil rights organizations and legal foundations; 2) colleges, universities, and schools; 3) educational organizations; 4) individual scholars, faculty, and administrators; 5) individuals with current or former government affiliation; 6) bar and law associations; 7) business groups and trade associations; 8) individuals and alumni; and 9) governments. Table 2 provides a description of each category of *amici*.

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<sup>7</sup> In this section of the brief, *amici* provide background information about themselves and their specific interest in the case.

Table 2  
*Amicus Curiae Categories and Definitions*

Category	Definition
Civil Rights Organizations and Legal Foundations	Briefs submitted by civil, human, or religious rights groups; community organizing groups; legal foundations; legal organizations; law firms
Colleges, Universities, and Schools	Briefs submitted by colleges; universities; university-affiliated associations, organizations, groups, or centers; schools
Educational Organizations	Briefs submitted by educational organizations or associations not affiliated with a college or university
Individual Scholars, Faculty, and Administrators	Briefs submitted by individual scholars; faculty; university administrators including deans, chancellors, or presidents; school administrators
Individuals with Current or Former Government Affiliation	Briefs submitted by individuals who are or were employed by the federal or state government
Bar and Law Associations	Briefs submitted by state bar associations; law associations
Business Groups and Trade Associations	Briefs submitted by business groups; corporations; trade associations
Individuals and Alumni	Briefs submitted by individuals or alumni who are not faculty or scholars affiliated with a college or university
Governments	Briefs submitted by the U.S. government; state governments

Note: Categories are listed by number of briefs submitted by each, from greatest to least.

## Results

The answer to our first research question is represented in the distribution of 2,304 unique citations across the 20 types of extra-legal sources. By examining this distribution we can understand the incidence of extra-legal sources in *Fisher I* and which sources are most commonly cited. We address our second research question by looking at this same distribution disaggregated by supporting party and *amici* category which tells us whether particular sources are favored by particular types of *amici* or by those in support of a specific party. It is important to note that in many instances, the same extra-legal source was used across multiple *amicus* briefs. As such, while findings for our first research question focus on unique representation of extra-legal sources across types, the analyses for our second research question consider citations as non-unique counts (as indicated by table title and description and reference to the 2,500 citations in Tables 3 and 4).

### **What is the Relative Use by *Amici* of Types of Extra-legal Sources Cited in their Briefs Submitted in *Fisher I*?**

Overall, non-law journal articles represent the largest single proportion of extra-legal sources (649, representing 28% of the total extra-legal sources cited)—these sources include what we would characterize as social science peer-reviewed journal articles (see Figure 1). Four additional extra-legal sources—law journal articles, non-government reports, books, and media—also accounted individually for more than 10% of the total distribution (312, 294, 253, and 245 citations, respectively). In combination, these five types comprise over 75% of the extra-legal sources cited. In contrast, several types, including intangible objects (e.g., personal interviews, videos), federal guidance, dissertations, dictionary citations, and other citations (items not classified in other categories) each uniquely accounted for less than 1% of the total distribution of extra-legal sources. These distributions are important because we note that the most cited sources are from traditional social science venues with nearly twice the frequency as the law journal articles and nearly two-and-a-half times the frequency of books and media. Just as importantly, the top two cited sources are traditional peer-reviewed academic venues.

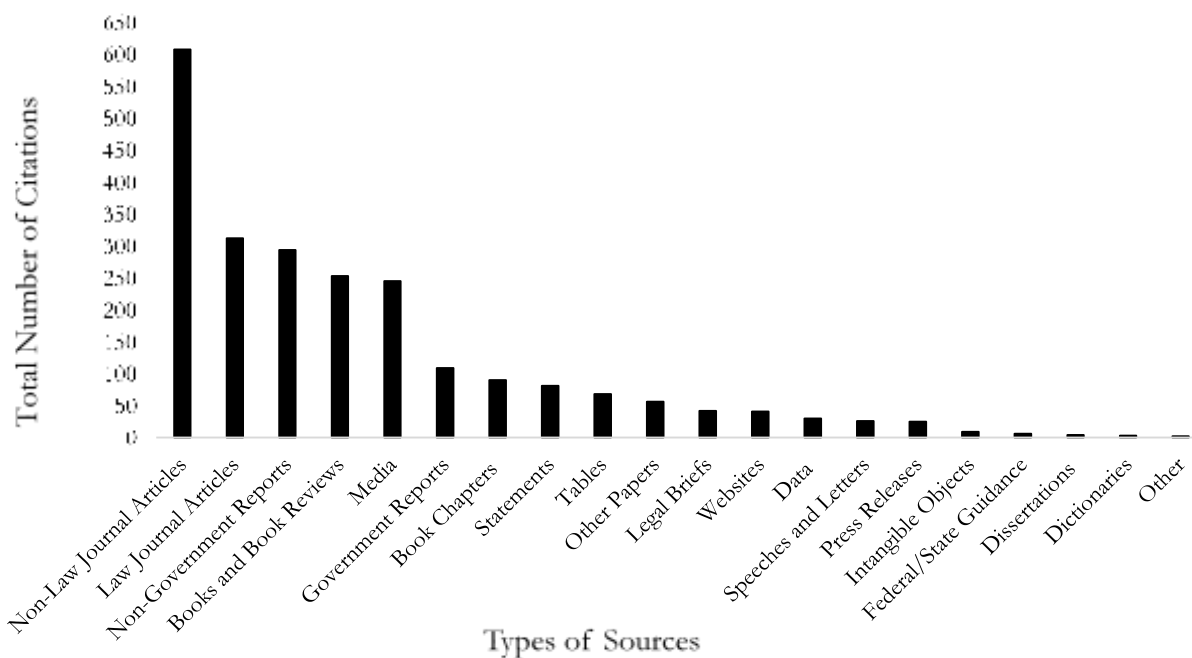


Figure 1. Unique, Non-Duplicated Counts of Extra-Legal Sources by Type Sorted by Frequency  
 Note: N=2,304

**What is the Relative Use of Extra-legal Sources Cited in *Amicus* Briefs by Supporting Party and by Category of *Amici*?**

In considering differences in relative use of types of extra-legal sources by supporting party, several patterns emerge (see Table 3). Among briefs submitted on behalf of UT Austin, traditional academic venues dominate the citations with non-law journal articles, non-government reports, law journal articles, and books each accounting for 10% or more of the extra-legal sources used and together accounting for 65% of the cited extra-legal sources. In addition, non-law journal articles hold substantial presence in this group with 28% of the citations, twice the share of the next closest category. Among briefs submitted in support of Fisher, 42% of the cited extra-legal sources is either media (22%) or book citations (20%). Non-law and law journal articles each represent an additional 14% and 13%, respectively, of the total extra-legal sources cited in briefs supporting Fisher—a large contrast with the briefs supporting the University. Between the two briefs submitted on behalf of neither party, 23% and 16% of the extra-legal sources cited were from non-law and law journal articles, respectively. Further, 14% were from media, and 11% from both other papers and government reports, respectively.

Table 3

*Non-Unique Counts of Extra-Legal Sources by Supporting Party Sorted by Percentage*

In Support of UT Austin (73 Briefs)			In Support of Fisher (16 Briefs)		In Support of Neither Party (2 Briefs)	
Rank	Type of Evidence	%	Type of Evidence	%	Type of Evidence	%
1	Non-Law Journal	28	Media	22	Non-Law Journal	23
2	Non-Govt. Reports	14	Books	20	Law Journal Articles	16
3	Law Journal Articles	13	Non-Law Journal	14	Media	14
4	Books	10	Law Journal Articles	13	Other Papers	11
5	Media	8	Non-Govt. Reports	8	Govt. Reports	11
6	Govt. Reports	6	Other Papers	4	Tables	9
7	Statements	4	Govt. Reports	4	Book Chapters	4
8	Book Chapters	4	Book Chapters	3	Books	4
9	Tables	3	Websites	2	Non-Govt. Reports	4
10	Other Papers	2	Tables	2	Data	--
11	Websites	2	Legal Briefs	3	Federal Guidance	--
12	Data	2	Speeches	1	Statements	--
13	Legal Briefs	2	Statements	1	Websites	--
14	Press Releases	1	Press Releases	1	Legal Briefs	--
15	Speeches	1	Federal Guidance	<1	Press Releases	--
16	Intangibles	<1	Dissertations	<1	Speeches	--
17	Federal Guidance	<1	Data	--	Intangibles	--
18	Other	<1	Other	--	Other	--
19	Dictionaries	<1	Intangibles	--	Dictionaries	--
20	Dissertations	<1	Dictionaries	--	Dissertations	--

Note: N=2,500. Percentages may not total 100 due to rounding.

Table 4 presents the relative presence of extra-legal sources by category of *amici*. Again, several distinguishing patterns emerge. For briefs submitted by civil rights organizations and legal foundations; colleges, universities, and schools; educational organizations; and individual scholars, faculty, and administrators, non-law journal articles represented the single largest contributor to the extra-legal sources cited (19%, 22%, 39%, and 43%, respectively). These *amici* clearly prioritize the information provided in more traditional academic publications—some to a large degree. Among briefs on behalf of individuals with current or former government affiliation, 19% of cited extra-legal sources were government reports, 17% were media citations, and 13% were non-law journal articles. In briefs submitted by governments and bar and law associations, law journal articles were the most prevalent among the extra-legal sources cited (20% and 30%, respectively). Among briefs submitted by individuals and alumni, 29% of the cited extra-legal sources were from media sources while the most prevalent extra-legal source cited by business groups and trade associations was non-government reports (28%) The only other type of extra-legal source ranked in the top five for all nine categories of *amici* was media, an interesting and unexpected pattern. Here it is important to note that our definition of media includes newspapers, magazines, news shows, and blogs and, in some of the cases, the cited source was referencing a social science study. The specifics of each pattern notwithstanding, it is clear that there are differences with regard to sources cited by categories of *amici*. The reasons behind these differences remain to be examined.

Table 4

*Non-Unique Counts of Extra-Legal Sources by Amicus Category Sorted by Percentage*

Civil Rights Organizations and Legal Foundations (21 Briefs)			Colleges, Universities, and Schools (15 Briefs)		Educational Organizations (15 Briefs)	
Rank	Type of Evidence	%	Type of Evidence	%	Type of Evidence	%
1	Non-Law Journal	19	Non-Law Journal	22	Non-Law Journal	39
2	Non-Govt. Reports	16	Law Journal Articles	15	Non-Govt. Reports	15
3	Law Journal Articles	14	Statements	11	Books	12
4	Media	13	Books	10	Law Journal Articles	8
5	Books	10	Media	9	Media	6
6	Govt. Reports	7	Non-Govt. Reports	7	Book Chapters	4
7	Statements	4	Govt. Reports	7	Govt. Reports	5
8	Tables	4	Tables	4	Other Papers	2
9	Legal Briefs	4	Data	3	Statements	1
10	Book Chapters	2	Book Chapters	3	Press Releases	1
11	Websites	2	Speeches	3	Websites	1
12	Other Papers	1	Other Papers	2	Data	1
13	Data	1	Websites	2	Legal Briefs	1
14	Press Releases	1	Legal Briefs	1	Speeches	1
15	Dictionaries	--	Press Releases	1	Tables	1
16	Dissertations	--	Intangibles	<1	Federal Guidance	<1
17	Federal Guidance	--	Federal Guidance	--	Intangibles	<1
18	Intangibles	--	Dissertations	--	Dissertations	<1
19	Other	--	Dictionaries	--	Dictionaries	<1
20	Speeches	--	Other	--	Other	--

Table 4 (Cont'd.)

*Non-Unique Counts of Extra-Legal Sources by Amicus Category Sorted by Percentage*

		Individual Scholars, Faculty, and Administrators (12 Briefs)	Individuals with Current or Former Government Affiliation (8 Briefs)	Bar and Law Associations (7 Briefs)		
Rank	Type of Evidence	%	Type of Evidence	%	Type of Evidence	%
1	Non-Law Journal	43	Govt. Reports	19	Law Journal Articles	30
2	Law Journal Articles	12	Media	17	Non-Govt. Reports	14
3	Books	11	Non-Law Journal	13	Media	11
4	Non-Govt. Reports	8	Law Journal Articles	10	Non-Law Journal	10
5	Media	5	Non-Govt. Reports	10	Books	9
6	Book Chapters	5	Books	9	Tables	6
7	Other Papers	4	Websites	3	Book Chapters	4
8	Tables	2	Federal Guidance	3	Other Papers	3
9	Statements	2	Other Papers	3	Govt. Reports	3
10	Govt. Reports	2	Data	2	Statements	2
11	Speeches	1	Legal Briefs	2	Legal Briefs	2
12	Data	1	Statements	1	Data	2
13	Websites	1	Book Chapters	1	Press Releases	1
14	Legal Briefs	--	Press Releases	1	Speeches	1
15	Press Releases	--	Dissertations	1	Websites	<1
16	Dictionaries	--	Speeches	1	Dictionaries	--
17	Federal Guidance	--	Tables	1	Dissertations	--
18	Dissertations	--	Dictionaries	--	Federal Guidance	--
19	Intangibles	--	Intangibles	--	Intangibles	--
20	Other	--	Other	--	Other	--



Table 4 (Cont'd.)

*Non-Unique Counts of Extra-Legal Sources by Amicus Category Sorted by Percentage*

Business Groups and Trade Associations (6 Briefs)			Individuals and Alumni (4 Briefs)		Governments (3 Briefs)	
Rank	Type of Evidence	%	Type of Evidence	%	Type of Evidence	%
1	Non-Govt. Reports	28	Media	29	Law Journal Articles	20
2	Non-Law Journal	22	Legal Briefs	15	Non-Govt. Reports	20
3	Media	14	Tables	7	Govt. Reports	16
4	Books	13	Non-Govt. Reports	7	Media	8
5	Book Chapters	8	Books	7	Non-Law Journal	8
6	Law Journal	3	Law Journal Articles	6	Websites	6
7	Other Papers	2	Press Releases	4	Speeches	4
8	Press Releases	2	Intangibles	3	Statements	4
9	Govt. Reports	2	Non-Law Journal	3	Tables	4
10	Websites	1	Book Chapters	2	Books	2
11	Tables	1	Data	2	Press Releases	2
12	Speeches	1	Speeches	2	Data	2
13	Intangibles	1	Other	2	Federal Guidance	2
14	Dissertations	1	Websites	2	Other Papers	2
15	Dictionaries	1	Govt. Reports	2	Book Chapters	--
16	Statements	--	Dictionaries	1	Dictionaries	--
17	Data	--	Other Papers	1	Dissertations	--
18	Federal Guidance	--	Statements	1	Legal Briefs	--
19	Other	--	Dissertations	--	Intangibles	--
20	Legal Briefs	--	Federal Guidance	--	Other	--

Note: N=2,500. Percentages may not total 100 due to rounding.

Given the findings that suggest the relative importance specifically of non-law journal citations across categories of *amici* and supporting party, we undertook additional analyses to understand whether there were unique patterns of use (i.e., citation) when we cross-tabulated citation and *amici* types. Non-law journal citations accounted for at least a quarter of all the extra-legal sources used by *amici* who were individual scholars, faculty, and administrators regardless of supporting party. The pattern of use diverges when considering non-law journal article use by other *amici* categories across supporting parties. For seven of nine categories of *amici* submitting briefs in support of UT Austin, for example, non-law journal articles accounted for between 10% and 47% of all extra-legal sources cited. Among the briefs submitted in support of Fisher, non-law journal articles represented between 10% and 29% of all extra-legal sources cited. In sum, while there was some consistency in use, the types of extra-legal sources varied substantially across parties and *amici* categories.

## Limitations

This descriptive analysis provides a critical foundation for understanding the range of extra-legal sources used by different categories of *amici*. However, there are some limitations to this analysis. First, we restrict our definition of the use of extra-legal sources to citation in a brief and do

not review the content of the extra-legal sources cited to understand the quality, relevance, and credibility of the sources—all important factors that shape the use of research (Nutley et al., 2007/2008). An understanding of the context of the citation within the brief (i.e., how the extra-legal source is being used) would also provide additional insights for understanding the use of extra-legal sources in the legal arena. In addition, because this design is a document analysis, we are unable to consider *why* certain types of extra-legal sources were cited over others, which would provide more information explaining the patterns that we see among and between the *amici*. Finally, we intentionally focus our analysis on the *amicus* briefs and do not include a review of their impact on the Court's opinion in *Fisher I*. For each, we take up these ideas in separate studies.<sup>8</sup> This is intentional because, as outlined previously, briefs have various goals and intentions in addition to impacting the Court (Simpson & Vasaly, 2015). Our analysis lays the foundation for this additional research (discussed in “Future Research”). Even with these limitations, our analysis provides critical insights by characterizing an increasingly used policy entry point—the briefing process—and extra-legal citation use by various actors who would be “hidden participants” (Kingdon, 2011) in the policy process without this scrutiny.

## Discussion and Implications for Education Policy and Research

The findings of this study demonstrate a wide range of extra-legal sources, such as non-government reports, law journal articles, and media, may be used as tools of persuasion by actors who intend to influence education policy by including these sources in *amicus* briefs. While we recognize that the findings of this study are particular to *Fisher I*, their value lies in clearly demonstrating differences in use across different interest groups and by prompting a line of inquiry into the patterns of extra-legal source use that may exist in other cases. In addition, this approach allowed us to develop a framework for inquiry for those analyses that will support additional examination into the reasons for these differences as well as the degree to which these different approaches may affect the decisions of the Court.

Although in theory anyone can file an *amicus* brief in an attempt to influence the Court, that process requires expertise and resources, including a counsel of record that is admitted to the U.S. Supreme Court Bar. Thus, for many researchers and other actors seeking to influence policy through the courts, their sole entry point into this arena may be having their work cited by *amici* who have access to the necessary resources. A better understanding of the relationship between category of *amici* and the sources to which they may turn to support their arguments has important implications for researchers and others interested in improving the uptake of their work.

### Use of Extra-legal Sources: An Important Presence of a Range of Evidence in *Amicus* Briefs

In this study we examined the range of extra-legal sources *amici* cited in the briefs submitted in *Fisher I*, and the relative use of extra-legal sources by category of *amici* and supporting party. Our findings reveal that, while non-law journal articles represent the largest single proportion of extra-legal sources cited in the briefs, they still only encompass just over a quarter of all extra-legal sources cited. Some, including many social scientists who produce the work that appears in these peer-reviewed journals, might consider this to be an underutilization of these sources. Others, including legal scholars who publish in law journals, might consider it to be an overutilization of non-law journal articles and an underutilization of law journal articles (which represent 13% of extra-legal

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<sup>8</sup> A separate analysis reveals that in *Fisher I* and *II* the Justices cited a range of the types of extra-legal sources identified in the present analysis, including law journal articles, education journal articles, non-governmental and governmental reports, news, media, legal briefs, and data (Garces, Marin, & Horn, in press).

sources cited). These different perspectives raise questions including why certain extra-legal sources are used more than others or why they are not used similarly across the various categories of *amici* and by supporting party.

This differential use of extra-legal sources should be of interest to the producers of this work and may suggest an area of time investment for interested policy actors. For example, social scientists whose research may inform divisive policy debates like affirmative action might consider publishing their results in additional venues, including non-government reports and the media—two additional sources utilized frequently by *amici* in *Fisher I*. They may also consider allying themselves with *amici* who may use the type of work they publish but with whom they do not typically partner (for example, business groups and trade associations). Alternatively, they might explore the potential reasons work in non-law journal articles are not used more extensively in their existing form, including limited access to these types of journals and the inability to understand or interpret the findings. By making their findings more accessible or more consistent with the legal frameworks, they may increase their chances of entry into the *amici* policy arena. This may include dissemination of work in formats not often used (and perhaps not valued) by traditional scholars, such as blogs. Further, there may be additional strategic consideration at play by *amici* in citing a broader range of sources, including those that may not meet the agreed upon standards of “research.” Understanding the context of how different types of extra-legal sources are cited in briefs should prove beneficial to those interested in engaging in the legal arena via *amicus* briefs.

### **Use of Extra-legal Sources by Category of *Amici*: Factors that Matter**

As previously detailed, our findings identified differential use of extra-legal sources by category of *amici*. Our results identify considerable variation in the use of particular kinds of sources and suggests there are multiple factors that may shape what extra-legal sources are ultimately used in *amicus* briefs, and that the type of extra-legal sources incorporated may be associated with who the *amici* are. A greater share of extra-legal sources published in traditional research venues were cited by those *amici* in support of UT then by those supporting *Fisher*. Understanding why this is the case is important and may help us deconstruct the legal or intellectual strategies employed by the various *amici*, and provide us with more insight into how sources are being used to affect policy in this setting.

More broadly, this variation in outcomes is supported by Nutley et al.’s (2007/2008) work that acknowledges the importance of multiple factors that can shape research use. For example, individual scholars, faculty, and administrators who presumably have been trained in social science research and have access to non-law journal articles have relatively higher shares of citations from traditional academic sources in their legal briefs. UT, being an institution of higher education, is more likely to attract support from others that share this orientation, thus the larger share of *amici* who support UT citing from traditional academic outlets. Other categories of *amici*, such as individuals with current or former government affiliations, individuals and alumni, or business groups and trade associations who do not have a faculty affiliation and/or may not have research training or experience, presumably may not have as much access to databases to access non-law journal articles. As a result, they may rely on other sources of information, such as newspapers and magazines, to support their position and arguments. They may also share a lack of trust in the traditional academic outlets, further diminishing their reliance on these types of citations. Documenting this variation allows for future analysis to investigate why the variation exists and identify any potential barriers that restrict the use of extra-legal sources by categories of *amici*, as well as intentional choices to use certain types of sources over others. That work may also reveal underlying strategies at play by *amici* in citing various sources.

## Implications for Policy

As the courts become increasingly favored as an antipolitical mechanism (Plank & Boyd, 1994) to engage in education policy decision making, our findings suggest that a wide range of extra-legal sources are being used by *amici* to influence policy in these arenas. The five largest citation types in the *Fisher I* case are non-law journal articles, law journal articles, non-government reports, books, and media. This suggests that these sources are areas that are looked to as authorities by certain *amici*. In support of their role as policy actors, then, *amici* might consider how to partner with the producers of extra-legal sources to expand what information can be introduced into these authoritative sources to more effectively engage in, and ultimately influence, the policy making process at the Supreme Court. Simultaneously, the producers of this work may approach our findings in three ways. First, they may seek out those who already use the type of work they produce (e.g., non-law journal articles) in hopes of further increasing its utilization. Second, they may seek to collaborate with those who have tended not to use the type of work they produce to increase the uptake of their work by a wider range of policy actors. Finally, they might consider expanding the dissemination of what they produce into a wider range of venues to increase access to their work and related findings.

## Future Research

This study offers a critical starting point for additional work. A related paper, for example, focuses on a subset of the extra-legal sources—social science research—cited in *Fisher I amicus* briefs (Horn, Marin, Garces, Miksch, & Yun, in press). Our future research considers why (i.e., in support of what arguments) extra-legal sources are being cited in a brief. Additional work will explore (especially through interviews with counsels of record) the strategic role *amici* seek to play in their submission of briefs and, within that context, how various sources aid in that effort, particularly as it may relate to various arguments advanced by *amici* within their briefs. Future research will also consider whether certain publishing venues are particularly influential sources for *amici* in the work they cite—and whether *amici* are engaging in long-run strategies to support publication in these venues for future use. Another study will examine the perspectives of the producers of the cited extra-legal sources regarding the acquisition, interpretation, and use of their work. Collectively, such information will ultimately give both *amici* and producers of extra-legal sources an opportunity to consider how to leverage *amicus* briefs to influence the Court.

## Conclusion

Courts are unique entities; considering the increased use of the legal arena by *amici* to affect education policy, understanding the sources used in *amicus* briefs is essential. To that end, we believe our findings provide an important contribution to this body of knowledge. First, because this study focuses on *amicus curiae* briefs—a mechanism being used to impact policy—these analyses help shed light on the relationships between category of *amici* and use of extra-legal sources broadly. Researchers, for example, who seek to communicate their findings to a legal audience and inform policy deliberations may need to consider disseminating their studies to a wider range of outlets. That being said, access may not be the issue. If that is the case, the broader question becomes why certain *amici* strategically choose to use certain types of evidence over others. Lawyers may need to work with the *amici* they represent and other policy actors to identify various available sources that they could cite, sources that may not be readily known or available through their legal context. As noted by Ancheta (2006), “Scientists and legal professionals can ill afford to be ignorant of each other’s worlds” (Ancheta, 2006, p. ix). Understanding the process by which extra-legal sources are

disseminated, acquired, and used by *amici* in the legal context, then, may help improve the efforts of both the users and producers of extra-legal sources, leading ultimately to increased potential for an informed Court and better use of such sources to inform education policy decisions.

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