

BY DAN LEWERENZ

# Be a Good Friend: Tips for Effective Amicus Briefing

Amicus practice, on the rise generally, is particularly common in federal Indian law cases. Here are examples from recent cases to demonstrate some of the more nuanced elements of strategic amicus practice (beyond the basics: know the rules, keep it brief, don't duplicate, and don't wait until the last minute).

Nos. 21-376, 21-377

**In The  
Supreme Court of the United States**

CHEROKEE NATION; ONEIDA NATION;  
QUINAULT INDIAN NATION;  
MORONGO BAND OF MISSION INDIANS,  
*Petitioners,*

v.

CHAD EVERET BRACKEEN, et al.,  
*Respondents.*

DEB HAALAND, Secretary of the Interior, et al.,  
*Petitioners,*

v.

CHAD EVERET BRACKEEN, et al.,  
*Respondents.*

**On Petitions For Writs Of Certiorari To The United  
States Court Of Appeals For The Fifth Circuit**

**BRIEF OF 180 INDIAN TRIBES AND  
35 TRIBAL ORGANIZATIONS AS *AMICI CURIAE*  
IN SUPPORT OF CHEROKEE NATION, ET AL.**

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**T**he call came on a weekend, from a lawyer friend who knew that my practice involved a lot of work with amicus briefs. “I have a client who wants to file an amicus brief in an upcoming Supreme Court case,” my friend said, “and I wondered if I could ask you a few questions.”

“Sure,” I said. At that time, I was a staff attorney at the Native American Rights Fund (NARF). Amicus practice, which is on the rise generally,<sup>1</sup> is particularly common in federal Indian law cases, for a variety of reasons: Tribes often are procedurally barred from direct participation in cases that implicate the tribe’s sovereign prerogatives,<sup>2</sup> a decision in one tribe’s case often will affect many other tribes,<sup>3</sup> and Indian law cases frequently require the U.S. Supreme Court to consider the law in historical context.<sup>4</sup> During my time at NARF, amicus work made up probably one-half or more of my portfolio. “What does your client want to write about?”

“They support the petitioner.”

“That ...” I remember my voice trailing off. “That is not an amicus brief.” Over the next hour or so, we talked about what the Court *does* want to see in amicus briefs and how my friend and his client could advocate for their position while giving the Court what it wants.

I spent five years at NARF, where I was one of two attorneys who staffed the Tribal Supreme Court Project.<sup>5</sup> During that time, I drafted approximately one dozen amicus briefs, contributed to dozens more, and edited more than 100; and I coordinated or helped coordinate amicus briefing in dozens of cases, mostly at the U.S. Supreme Court but also in other state and federal appellate courts. The culmination of that work was *Haaland v. Brackeen*,<sup>6</sup> the constitutional challenge to the Indian Child Welfare Act (ICWA), in which I coordinated<sup>7</sup> 21 merits-stage amicus briefs in favor of the federal and tribal parties – the briefs supporting ICWA.<sup>8</sup>

I am not the first to offer amicus briefing tips in these pages.<sup>9</sup> And there are tips that you don’t need me to tell you, because you’ve been told many times before: know the rules,<sup>10</sup> keep it brief,<sup>11</sup> don’t duplicate,<sup>12</sup> don’t wait until the last minute,<sup>13</sup> and so on.

Instead, I use examples from recent federal Indian law cases to demonstrate some of the more nuanced elements of strategic amicus practice.

Here are some of the lessons I learned over half a decade of extensive amicus practice.

## Understand the Role of the Amicus Brief in Modern Appellate Litigation<sup>14</sup>

“Amicus curiae” means “friend of the court,”<sup>15</sup> and there was a time when it was understood that an amicus was an impartial commentator.<sup>16</sup> Not anymore.<sup>17</sup> Modern amici are strategic players in a complex game.<sup>18</sup>

That’s not a bad thing. Appellate courts, and especially the highest courts, make decisions that shape the law across an entire state, multiple states, or even nationwide. The adversarial process may serve to resolve discrete disputes between two parties, but it is ill equipped to provide the depth and breadth of information needed to set statewide or nationwide policy.

That is where amicus briefs come in. Speaking recently to an audience of law professors and other legal scholars, U.S. Supreme Court Justice Sonia Sotomayor said that, in many cases, the Supreme Court relies on amicus briefs to provide history and context important to the ultimate decision.<sup>19</sup>

*Brackeen* offers an excellent example of this. The plaintiffs argued, among other things, that ICWA “intrude[d] upon Texas’s sovereign interest in regulating domestic relations within the State.”<sup>20</sup> But an amicus brief submitted by historians demonstrated that states had been complicit in the illegal removal of Indian children from their families and that ICWA had been enacted to prevent these types of practices.<sup>21</sup> The plaintiffs also argued that ICWA commandeered the states through its notice and record-keeping requirements.<sup>22</sup> But one pro-ICWA amicus brief showed that Congress has required such things of states since the very first Congress.<sup>23</sup> In both briefs, the amici provided valuable context that helped the Court analyze the plaintiffs’ arguments.

Another good example is *Washington State Department of Licensing v. Cougar Den Inc.*, which concerned whether an 1855 treaty exempted a Yakama Nation fuel importer from Washington state’s fuel transportation tax.<sup>24</sup> The transportation of modern motor fuel can seem far removed from mid-19th-century treaty negotiations. But amicus briefs explained that the Yakamas were participants in a vast trade network and that they



## Amicus Briefs: Know the Rules

### Wisconsin Supreme Court

**Wis. Stat. § (Wis. R. App. P.) 809.19(1)(e)-(f)** establishes substantive requirements for all briefs, including nonparty briefs (a category that includes amicus briefs).

**Wis. Stat. § (Wis. R. App. P.) 809.19(7)** governs nonparty briefs (including amicus briefs) generally.

**Wis. Stat. § (Wis. R. App. P.) 809.19(8)(c)3.** sets the word limit for nonparty briefs (including amicus briefs).

Wisconsin Rules of Appellate Procedure, <https://docs.legis.wisconsin.gov/statutes/statutes/809/ii/19>.

### U.S. Court of Appeals for the Seventh Circuit

**Fed. R. App. P. 29** addresses amicus briefs generally.

**7th Cir. R. 29** amends Fed. R. App. P. 29(a)(5) by limiting amicus briefs to a maximum of 7,000 words.

Federal Rules of Appellate Procedure and Circuit Rules for the Seventh Circuit, <https://www.ca7.uscourts.gov/rules-procedures/rules/rules.htm>.

### U.S. Supreme Court

**Rule 21.2(b)** details the filing requirements for amicus briefs.

**Rule 29.5(c)** exempts amicus briefs filed by nongovernmental corporations from the corporate disclosure statement requirements.

**Rule 32.3** governs filing of non-record material by either a party or an amicus.

**Rule 33.1(g)(x)-(xiv)** sets forth the word limits for various amicus briefs.

**Rule 37** addresses amicus briefs generally.

**Rule 44** disallows amicus briefs addressing petitions for rehearing.

Rules of the Supreme Court of the United States, <https://www.supremecourt.gov/filingandrules/2023RulesoftheCourt.pdf>. **WL**

(and other tribes with similar treaty language) had deliberately negotiated for the right to continue with their trade.<sup>25</sup>

### Amici Should, When Possible, Coordinate with Parties and with One Another

More than a quarter century ago, Randy Parlee wrote the following in these pages: “Amicus counsel should coordinate efforts with the lawyer representing the party aligned with



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the amicus curiae’s interests,” both to avoid unnecessary duplication and to ensure that parties and amici are on the same page.<sup>26</sup> Judge Neal Nettlesheim and Clair Ryan made the same point eight years later: “If weighing in on the side of a party, coordinate with the party to avoid filing a redundant brief – or worse, a contradictory one.”<sup>27</sup> Nevertheless, there are amici out there who still have not gotten the message (or maybe they’re not reading *Wisconsin Lawyer*).

Because the Tribal Supreme Court Project has been coordinating amicus briefing in Indian law cases for more than 20 years now, most tribes and tribal organizations know to participate in the strategic process. But in one recent case, *United States v. Cooley*,<sup>28</sup> a group of tribes filed an unexpected amicus brief that largely duplicated the arguments of an existing brief.

### Make Sure Your Amici Match Their Arguments

Although the plaintiffs in *Brackeen* made the *legal* argument that ICWA was

unconstitutional, they also tried desperately to get the Court to take up the policy question of whether ICWA was in the best interests of Indian children.<sup>29</sup> Justice Neil Gorsuch and Justice Elena Kagan questioned whether they should even consider such policy arguments,<sup>30</sup> which Justice Kagan described as “atmosphere.”<sup>31</sup> Only Justice Samuel Alito, in a solo dissent, briefly wandered into the policy question of whether ICWA is good or bad for Indian children.<sup>32</sup>

The Court was able to set aside such policy concerns in part because it received an impressive array of amicus briefs on the subject. The Casey Family Programs and its allies demonstrated conclusively that ICWA *does* benefit Indian children.<sup>33</sup> The National Association of Counsel for Children and a coalition of children’s rights organizations focused on correcting mistakes and misrepresentations in the plaintiffs’ (and plaintiffs’ amici’s) characterizations of ICWA.<sup>34</sup> Meanwhile, attorneys who regularly represent parents in child welfare cases addressed how ICWA achieves its goals while also protecting

the rights of parents.<sup>35</sup> Each brief contained valuable context for the Court – provided by amici uniquely suited to give that context.

An even better example is from an opinion that was released in 2018: *Washington v. United States*,<sup>36</sup> the latest iteration in a long-running fishing dispute<sup>37</sup> between the state of Washington on one side and the U.S. and tribes on

## In many cases, the Supreme Court relies on amicus briefs to provide history and context important to the ultimate decision.

the other. The U.S. and the tribes had argued that Washington's road culverts illegally reduced salmon and other fish populations in violation of the tribes' treaty rights, and the U.S. Court of Appeals for the Ninth Circuit affirmed a district court injunction requiring that Washington remove the culverts.<sup>38</sup> A

key aspect of Washington's argument to the U.S. Supreme Court was that replacing the culverts would cost the state billions of dollars,<sup>39</sup> an argument echoed by many of Washington's amici.<sup>40</sup> Other amici expressed concern that the decision would hurt the logging and mining industries.<sup>41</sup>

So how did the tribes respond to this economic argument? Knowing that

more fish in Washington's rivers means more fish for *everyone*, they found an unlikely ally in commercial and sport fishers,<sup>42</sup> who had for decades been on the other side of tribal-state fishing disputes in Washington.<sup>43</sup> To counter the economic argument made by the state and its amici, the fishers demonstrated

how reduced salmon runs were devastating the fishing economy and why removing the culverts, though costly, was in the public interest.<sup>44</sup> It cannot have been lost on the Court that these two longtime adversaries – Indian tribes and non-Indian commercial and sport fishers – were now on the same side. With Justice Anthony Kennedy recused, the Ninth Circuit's decision was affirmed by an equally divided court.<sup>45</sup>

## Conclusion

Good amicus practice is a challenge. It requires forethought, planning, and extensive communication. Most important, it requires that both the amicus and their counsel put the interests of the case before their own interests. When done well, it constitutes an important aspect of our adversary system, providing courts with context they could not get anywhere else. **WL**

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## ENDNOTES

<sup>1</sup>Joyce E. Cutler, *Sotomayor Calls Supreme Court Pace, Workload More Demanding (1)*, Bloomberg L. (Jan. 29, 2024), <https://news.bloomberglaw.com/business-and-practice/sotomayor-says-surprised-by-supreme-court-pace-tougher-workload> (“The number of amici are greater....”) (quoting Justice Sonia Sotomayor). One recent study found that, at the U.S. Supreme Court, amicus briefs now get filed in 98% of cases. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901, 1902 (2016).

<sup>2</sup>Two recent examples include *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), which concerned whether the Muscogee (Creek) Nation’s reservation remained intact or had been disestablished, and *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019), which concerned whether the Crow Tribe of Indians still has hunting rights secured in their 1851 and 1868 treaties with the United States. In each case, the outcome would directly affect every member of the tribe, as well as the sovereign prerogatives of the tribes themselves. But each case was a criminal appeal, meaning the only parties were the defendant and the state; the tribes could participate *only* as amici.

<sup>3</sup>Three federally recognized tribes – the Eastern Shoshone Tribe of the Wind River Reservation, the Navajo Nation, and the Shoshone-Bannock Tribes of the Fort Hall Reservation – had treaty language identical to that in the Crow Tribe’s treaty, and more than a dozen other tribes had very similar language. See *Herrera*, 139 S. Ct. 1686, Amicus Br. Of Crow Tribe of Indians (cert stage) at 9-10 & nn. 6-8, [https://sct.narf.org/documents/herrera\\_v\\_wyoming/cert\\_amicus\\_crow.pdf](https://sct.narf.org/documents/herrera_v_wyoming/cert_amicus_crow.pdf).

<sup>4</sup>Again, *McGirt* and *Herrera* are excellent examples. Each required the Court to construe treaties and statutes more than 100 years after those treaties and statutes were enacted.

<sup>5</sup>Native Am. Rts. Fund, *What Is the Tribal Supreme Court Project?*, <https://sct.narf.org/> (last visited May 13, 2024).

<sup>6</sup>*Haaland v. Brackeen*, 599 U.S. 255 (2023).

<sup>7</sup>I did not draft any of the pro-ICWA amicus briefs, although one brief retained substantial elements from briefs that I had drafted in lower courts; I was a signatory on another. I did not develop the amicus strategy, a process led by counsel for those tribes that were parties to the litigation (Cherokee Nation, Morongo Band of Mission Indians, Navajo Nation, Oneida Nation, Quinault Indian Nation), but I helped them develop and execute that strategy. I paired amici who needed counsel with experienced attorneys, helped interested amici find and join the right brief, and persuaded some interested groups *not* to file a brief. And I edited 20 of the 21 pro-ICWA briefs (including multiple drafts of some briefs) to help ensure consistency and reduce unnecessary duplication, all in furtherance of the strategy developed by the parties.

<sup>8</sup>The *Brackeen* briefing is at [https://sct.narf.org/caseindexes/haaland\\_v\\_brackeen.html](https://sct.narf.org/caseindexes/haaland_v_brackeen.html).

<sup>9</sup>See Neal Nettesheim & Clare Ryan, *Friend of the Court Briefs: What the Curiae Wants in an Amicus*, Wis. Law. 10 (May 2007); Randy S. Parlee, *A Primer on Amicus Curiae Briefs*, Wis. Law. 14 (Nov. 1999).

<sup>10</sup>Nettesheim & Ryan, *supra* note 9, at 12; Parlee, *supra* note 9, at 15; see *Amicus Briefs: Know the Rules* (sidebar).

<sup>11</sup>Stephen M. Shapiro, *Amicus Briefs in the Supreme Court*, Litig. 10, 22 (Spring 1984).

<sup>12</sup>Nettesheim & Ryan, *supra* note 9, at 13, 55; Parlee, *supra* note 9, at 16; Shapiro, *supra* note 11, at 24.

<sup>13</sup>Jerrold J. Ganzfried, *Amicus Practice in the Supreme Court: Answering Hypotheticals Before They Are Asked*, Litig. 31, 32, 36 (Fall 2017); Mary R. Vasaly & Reagan W. Simpson, *A Little Help from Your Friends: Gathering Amicus Support on Appeal*, TortSource 1, 6 (Summer 2005); Shapiro, *supra* note 11, at 24.

<sup>14</sup>The vast majority of amicus practice takes place in appellate courts. In fact, amicus practice at the trial level is so rare that the Federal Rules of Civil Procedure have no rule governing amicus briefs (although such a rule was considered as recently as 2021). Troy A. Price, *Amicus Curiae in Federal Trial Courts*, Ark. Law., Summer 2023, at 20, 21. Lawyers who are considering amicus practice at the trial court level should check with the court to see whether they have adopted a local rule, and if not whether the lawyers should follow the Federal Rules of Appellate Procedure. *Id.*

<sup>15</sup>Nettesheim & Ryan, *supra* note 9, at 11; Parlee, *supra* note 9, at 14.

<sup>16</sup>Ed R. Haden & Kelly Fitzgerald Pate, *The Role of Amicus Briefs*, 70 Ala. Law. 115, 116 (2009) (citing *Neonatology Assoc. v. Commissioner of Internal Revenue*, 293 F.3d 128, 131 (2002) (chambers order of Alito, J.)).

<sup>17</sup>*Id.*

<sup>18</sup>Larsen & Devins, *supra* note 1.

<sup>19</sup>Am. Ass’n of L. Schs., *A Conversation with U.S. Supreme Court Justice Sonia Sotomayor*, 11:33-13:29, <https://www.youtube.com/watch?v=WU3vFuCg92o>.

<sup>20</sup>*Brackeen*, Br. of Texas at 40, [https://sct.narf.org/documents/haaland\\_v\\_brackeen/brief\\_texas.pdf](https://sct.narf.org/documents/haaland_v_brackeen/brief_texas.pdf).

<sup>21</sup>*Brackeen*, Amicus Br. of Am. Hist. Assoc. & Org. Am. Hist. 13-28, [https://sct.narf.org/documents/haaland\\_v\\_brackeen/amicus\\_aha.pdf](https://sct.narf.org/documents/haaland_v_brackeen/amicus_aha.pdf).

<sup>22</sup>*Brackeen*, Br. of Texas at 60-69.

<sup>23</sup>*Brackeen*, Amicus Br. of Constitutional Accountability Center at 19-28, [https://sct.narf.org/documents/haaland\\_v\\_brackeen/amicus\\_cac.pdf](https://sct.narf.org/documents/haaland_v_brackeen/amicus_cac.pdf).

<sup>24</sup>*Washington State Dep’t of Licensing v. Cougar Den Inc.*, 139 S. Ct. 1000 (2019).

<sup>25</sup>*Id.*, Amicus Br. of Confederated Tribes & Bands of Yakama Nation, [https://sct.narf.org/documents/washington\\_v\\_cougar\\_den/amicus\\_yakama.pdf](https://sct.narf.org/documents/washington_v_cougar_den/amicus_yakama.pdf); Amicus Br. of Nez Perce Tribe & Confederated Salish & Kootenai Tribes, [https://sct.narf.org/documents/washington\\_v\\_cougar\\_den/amicus\\_nez\\_perce.pdf](https://sct.narf.org/documents/washington_v_cougar_den/amicus_nez_perce.pdf).

<sup>26</sup>Parlee, *supra* note 9, at 16.

<sup>27</sup>Nettesheim & Ryan, *supra* note 9, at 55-56.

<sup>28</sup>*United States v. Cooley*, 593 U.S. 345 (2021).

<sup>29</sup>Matthew McGill, representing the individual plaintiffs, opened his argument by alleging that ICWA “deprives Indian children of the best interests of the child test.” *Brackeen*, Tr. at 4:13-15, [https://sct.narf.org/documents/haaland\\_v\\_brackeen/oral\\_argument\\_transcript.pdf](https://sct.narf.org/documents/haaland_v_brackeen/oral_argument_transcript.pdf).

<sup>30</sup>*Id.* at 19:12-14, 21-22 (Gorsuch, J., characterizing individual plaintiff’s arguments as “policy complaints” that “might be better addressed across the street” in Congress); 31:22-23 (Kagan, J., declaring that “the policy is for Congress’s to make”); 87:3-4, 87:21-24-88:1 (addressing Texas Solicitor General Judd E. Stone: “... there is an extraordinary amount of Texas’s view of policy in your brief. ... This is a matter for Congress, isn’t it? It’s not a matter for the courts to decide whether ICWA does these terrible things or whether ICWA doesn’t do any of them. Isn’t that really Congress’s judgment that we’re supposed to respect?”)

<sup>31</sup>*Id.* at 88:9-10.

<sup>32</sup>*Brackeen*, 599 U.S. at 372 (Alito, J., dissenting).

<sup>33</sup>*Brackeen*, Amicus Br. of Casey Family Programs et al., [https://sct.narf.org/documents/haaland\\_v\\_brackeen/amicus\\_casey.pdf](https://sct.narf.org/documents/haaland_v_brackeen/amicus_casey.pdf).

<sup>34</sup>*Brackeen*, Amicus Br. of Nat’l Assoc. of Counsel for Children et al., [https://sct.narf.org/documents/haaland\\_v\\_brackeen/amicus\\_nacc.pdf](https://sct.narf.org/documents/haaland_v_brackeen/amicus_nacc.pdf).

<sup>35</sup>*Brackeen*, Amicus Br. of Family Defense Providers, [https://sct.narf.org/documents/haaland\\_v\\_brackeen/amicus\\_fdp.pdf](https://sct.narf.org/documents/haaland_v_brackeen/amicus_fdp.pdf).

<sup>36</sup>*Washington v. United States*, 584 U.S. 837 (2018) (per curiam).

<sup>37</sup>Westlaw’s “history” page for the case has 241 entries dating back to 1974. Since it decided *United States v. Winans*, 198 U.S. 371 (1905), the Supreme Court has heard more than half a dozen tribal treaty fishing disputes from the region.

<sup>38</sup>*United States v. Washington*, 853 F.3d 946 (9th Cir. 2017).

<sup>39</sup>*Washington v. United States*, Br. of Pet’r at i-ii, 55.

<sup>40</sup>*Washington v. United States*, Amicus Br. of Idaho et al. at 2, 32, [https://sct.narf.org/documents/washington\\_v\\_us/amicus\\_idaho\\_petitioner.pdf](https://sct.narf.org/documents/washington_v_us/amicus_idaho_petitioner.pdf); Amicus Br. of Pac. Legal Fdn. at 4, [https://sct.narf.org/documents/washington\\_v\\_us/amicus\\_pacific\\_legal\\_petitioner.pdf](https://sct.narf.org/documents/washington_v_us/amicus_pacific_legal_petitioner.pdf); Amicus Br. of Business et al. at 5, [https://sct.narf.org/documents/washington\\_v\\_us/amicus\\_building\\_farm\\_petitioner.pdf](https://sct.narf.org/documents/washington_v_us/amicus_building_farm_petitioner.pdf); Amicus Br. of Wash. Assoc. of Cntys. & Wash. Assoc. of Cities at 2, 5-6, 10, 16, [https://sct.narf.org/documents/washington\\_v\\_us/amicus\\_washington\\_state\\_petitioners.pdf](https://sct.narf.org/documents/washington_v_us/amicus_washington_state_petitioners.pdf).

<sup>41</sup>*Washington v. United States*, Amicus Br. of Am. Forest & Paper Ass’n & Nat’l Mining Ass’n, [https://sct.narf.org/documents/washington\\_v\\_us/amicus\\_forest\\_paper\\_petitioner.pdf](https://sct.narf.org/documents/washington_v_us/amicus_forest_paper_petitioner.pdf).

<sup>42</sup>*Washington v. United States*, Amicus Br. of Pac. Coast Fdn. of Fishermen’s Ass’ns et al., [https://sct.narf.org/documents/washington\\_v\\_us/amicus\\_fishermen\\_respondents.pdf](https://sct.narf.org/documents/washington_v_us/amicus_fishermen_respondents.pdf).

<sup>43</sup>See, e.g., *Washington v. Washington State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979).

<sup>44</sup>Amicus Br. of Pac. Coast Fdn. of Fishermen’s Ass’ns at 11-17, 32-34.

<sup>45</sup>*Washington*, 584 U.S. 837. **WL**