

**Testimony of Professor Allison Orr Larsen  
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**Presidential Commission on the Supreme Court of the United States  
Panel on Access to Justice and Transparency in the Operation of the Supreme Court  
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**My Background**

Thank you for inviting me to testify today. I am honored to discuss my research in any way that would be helpful to you. I am a professor of law at William & Mary Law School where I teach Constitutional Law, Administrative Law, and related courses. Before joining the faculty at William & Mary in 2010, I clerked for Judge J. Harvie Wilkinson on the U.S. Court of Appeals for the Fourth Circuit (2004-2005), and for Justice David Souter on the Supreme Court (2005-2006). I also spent several years practicing appellate litigation at O’Melveny & Meyers.

My scholarship focuses on the institutional and information dynamics of judicial decision-making. I have a particular interest in amicus participation at the Supreme Court, and I suspect that aspect of my work will be the one most relevant to this Commission. Briefs of amicus curiae (Latin for “friend of the court”) have undergone a tremendous growth spurt at the Supreme Court in recent years. They are filed in record-breaking numbers, submitted by a greater variety of players than ever before, and increasingly cited by the Justices in their decisions. My work warns about the unregulated use of amicus briefs at the Court in an era where facts are easy to access and easy to manipulate. I do not advocate for the abolition of amicus briefs; their value to Supreme Court decision-making is well accepted. But safeguards should be implemented to avoid the pitfalls of an unregulated amici market – specifically, exacerbating confirmation bias and tainting Supreme Court decisions with unreliable evidence.

**An Amicus Boom<sup>1</sup>**

Amicus briefs are on the rise. Ninety-eight percent of Supreme Court cases now have amicus filings; over 800 briefs are filed each term and the marquee cases attract briefs in the triple digits. This is an 800% increase from the 1950s and a 95% increase from 1995. To put things in perspective historically, amici averaged roughly one brief per case in the 1950s and about five briefs per case in the 1990s. By contrast, in the 2015 *Obergefell* case the number of amicus briefs reached 147 (a record-breaker) and the health care case two years earlier (*NFIB v. Sebelius*) had 136 amicus briefs on the docket. For the sake of comparison, consider that *Roe v. Wade* had twenty-three amicus briefs. In *Brown v. Board of Education*, there were only six. In *Lochner v. New York* that number was zero.

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<sup>1</sup> My testimony in this section comes from my articles [The Trouble with Amicus Facts](#), 100 Va L. Rev. 1757 (2014), [The Amicus Machine](#), 102 Va. L. Rev 1901 (2016) (with Neal Devins), and [Constitutional Law in an Age of Alternative Facts](#), 93 NYU L. Rev. 175 (2018). Internal citations are largely omitted here but can be found in the original articles.

Amicus briefs are filed for any number of reasons: to make or reiterate a legal argument, to flag implications of a law for an industry, to weigh in and show consensus on a policy debate, or to ask the Court to steer clear of an issue altogether. Perhaps the most influential type of amicus brief, however, is one that adds new facts to the record. This is the role of the amicus applauded by the Justices and their clerks. Justice Breyer has said that these briefs “play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our decisions.”<sup>2</sup> Likewise Justice Alito (while sitting as a federal appeals court judge) observed that “[e]ven when a party is very well represented, an amicus may provide important assistance to the court . . . [by] collect[ing] background or factual references that merit judicial notice.”<sup>3</sup> And former Supreme Court law clerks have remarked that it is the “non-legal” information provided by amici that is the most useful.

Perhaps it is not surprising, therefore, that the Justices cite these briefs to support their factual claims with increasingly regularly. In my 2014 study on the subject I found that that one in every five citations to amicus briefs by the Justices were used to support a factual assertion. The Justices seem to have only picked up the pace since then.<sup>4</sup> A 2020 study of amicus citations found citations to amici in 65 percent of the Court’s cases (a record), and “most of all” the justices relied on briefs that “provided real world information.” Of the citations I studied, several surprising patterns emerge. Less than a third of the factual claims presented by amici and credited by the Court were contested by the party briefs. And more than two-thirds of the time, the Justice citing the amicus brief for a fact cites only the amicus brief as authority—not any accompanying study or journal citation from within the brief. The implication from this omission is telling: the Justices are using these briefs as more than a research tool. The briefs themselves are the factual authorities, and the amici are the experts.<sup>5</sup>

The Justices are hungry for factual information and an “amicus machine” has emerged to feed that hunger. Historically, a “friend of the Court” was a lawyer who happened to actually be in the courtroom during oral argument. There was no preparation and no agenda in his participation. The amicus today, however, has evolved significantly since its original incarnation. Now the norm is targeted amicus briefs authored by motivated interest groups, often coordinated by the parties, and submitted by well-organized and well-funded players. The end result is orchestrated and intentional – what I have called an “amicus machine.” Skilled advocates find the arguments that matter, the clients that matter, and the lawyers that matter—and then they match them up and package them for the Justices. A successful venture at the Supreme Court, in other words, requires a sophisticated “amicus strategy.”

Further, the number of groups pursuing an amicus strategy has increased significantly as well. Broadly speaking, there are more groups with wider missions seeking to change the course

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<sup>2</sup> Justice Breyer Calls for Experts to Aid Courts in Complex Cases, N.Y. Times, Feb. 17, 1998, at A17.

<sup>3</sup> *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 132 (3d Cir. 2002).

<sup>4</sup> Anthony Franze & Reeves Anderson, *Amicus Curiae at the Supreme Court Last Term and the Decade in Review*, National Law Journal (November 18 2020).

<sup>5</sup>I updated this research for a 2019 retreat with the Annenberg Foundation (looking at decisions from 2014-2018) and although that research was never published I found even more dramatic results: 50% of the citations to amicus briefs were for questions of fact and of the 277 citations to amicus briefs for claims of fact during that more recent time period, 93% of them were uncontested by the parties to the litigation.

of law through the courts today. For one thing, the number of public interest organizations who seek to influence law through the courts appears to have grown dramatically in recent years. By one count the number of such groups jumped over one thousand percent from 1975 to 2004.<sup>6</sup> Another obvious change in social movements seeking change through the courts—besides their explosion in size—is in a greater variety of missions. While social movements were once dominated by causes traditionally on the left of the political spectrum (the NAACP being the classic example), the last thirty years have brought a proliferation of public interest groups promoting conservative causes as well.

### **Why it Matters: A “fact-y” turn at the Court<sup>7</sup>**

This all matters because these interest groups have become experts at growing the factual dimensions of their arguments through amicus briefs. And those facts can be game-changers. Many of the Supreme Court’s most significant decisions turn on questions of fact that are not definitively determined at trial or governed by typical rules of deference. These facts are not of the “whodunit” variety concerning what happened between the parties. They are instead more generalized facts about the world: Can you effectively discharge a locked gun in self-defense? Is a child’s brain development affected by playing violent video games? Do independent campaign expenditures lead to corruption? Has minority voter turn-out changed significantly so as to render a legislative intervention outdated?

Questions like these are not strictly legal – they do not involve the interpretation of a text nor do they involve a choice between competing rules that prescribe conduct. But they are also not “facts of the case” in the way we generally use that phrase – the who / what / where / why questions that should ultimately go to a jury or fact-finder. Instead, these questions implicate what have come to be known as “legislative facts.”<sup>8</sup> A legislative fact gets its name not necessarily because it is found by a legislature (although it can be), but because it relates to the “legislative function,” or policy-making function, of a court. The central feature of a legislative fact is that it transcends the particular dispute and provides descriptive information about the world which judges use as foundational building blocks to form and apply legal rules.

Legislative facts are not governed by the existing rules of Federal Evidence. In 1972, legislative facts were specifically exempted from Federal Rule of Evidence 201 on “judicial notice,” and the advisory notes accompanying the rule actually encourage their “unfettered use.”<sup>9</sup> The result is a complete hodgepodge of procedure concerning fact-finding of this sort. Legislative

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<sup>6</sup> See Laura Beth Nielsen & Catherine Albiston, *The Organization of Public Interest Practice: 1975-2004*, 84 NC Law Rev 1591, 1607-08 (2006).

<sup>7</sup> This portion of my testimony is drawn from my 2012 [article](#), *Confronting Supreme Court Finding*, 98 Va. L. Rev. 1255 (2012) and my 2018 [work](#), *Constitutional Law in an Age of Alternative Facts*, 93 NYU L. Rev. 175 (2018). Citations are largely omitted here but can be found within those articles.

<sup>8</sup> This terminology and distinction, as I explain in my articles, originated with Kenneth Culp Davis in 1942 although it has been refined and re-articulated since then. See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Procedures*, 55 Harv. L. Rev. 364, 365–66 (1942).

<sup>9</sup> An explicit reference to legislative facts (excluding them from coverage) can now be found in the text of the current Federal Rule of Evidence 201; it was added to the text as part of the 2011 amendment, but according to the committee notes, the change was intended to make the rule more easily understood, not to substantively change the rule. The advisory notes explaining that legislative facts are to be excluded from the rule on judicial notice date back to 1972.

facts can be –but do not have to be – the subject of expert testimony in the trial court. Citations to support assertions of legislative fact can – but need not – come from the record below. And district court decisions on legislative facts may – but are not entitled to – be given deference from reviewing courts.

Of course in 1972 when legislative facts were exempted from the judicial notice rule the world of information-sharing looked dramatically different from the way it does today. Thanks to the dawn of the internet age, the Justices (and their clerks) have new tools and are flooded with information literally at their fingertips. Social science studies, raw statistics, and other data are all just a Google search away and being pressed by motivated amicus briefs and through targeted bloggers seeking their attention. Today, if the Justices want more empirical support for a factual dimension of their argument, they can find it easily and they are increasingly being asked to do so.

As a result, Supreme Court decisions today are very fact-heavy. Pick up any issue of the U.S. Reports and one will quickly encounter “fact-y” claims and non-legal authorities: Justice Kennedy citing statistics on car crashes, Justice Breyer explaining rates of medical complications following abortions, Chief Justice Roberts on the economics of the health insurance industry, to name a few. Available empirical evidence is clear that—compared to thirty years ago—Supreme Court opinions are longer, padded with significantly more citations, and rich with “nonlegal” authorities (like citations to newspaper articles, online data sets, websites and even blog posts).

### **The Trouble with Amicus Facts<sup>10</sup>**

Nowhere outside the Supreme Court do we see this widespread eleventh-hour supplementation of the factual record from sources that are not subject to cross-examination or other checks on reliability. The fact that the U.S. Supreme Court is unique in educating itself about the world in this way should give us significant pause. Unlike other legal decision makers (i.e., administrative agencies and trial courts), the U.S. Supreme Court is not set up to sort through what is now a sea of factual claims coming from a variety of actors who all claim to be experts. Mistakes are almost inevitable.

The studies, statistics, and articles marshaled by these groups to support factual assertions are selected by those with a “dog in the fight.” The factual sources are chosen by amici, in other words, for reasons other than that they are the industry standard, the most peer-reviewed, or the most accurate state of our knowledge today. Rather they are chosen as part of a coordinated plan to win the day. And with the vast amount of information and studies available online now, it is not hard to assemble evidence – whether of dubious or strong reliability – to support a pre-existing point of view. Because the secret is out that the Justices value briefs that supplement their technical knowledge, many amicus briefs stretch to make factual claims – even if it is beyond their institutional capacity to do so.

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<sup>10</sup> This portion of my testimony comes from the following articles: [Constitutional Law in an Age of Alternative Facts](#), 93 NYU L. Rev. 175 (2018); [The Trouble with Amicus Facts](#), 100 Va. L. Rev. 1757 (2014); [Virtual Briefing at the Supreme Court](#), 105 Cornell Law Rev. 85 (2019); [Judging Under Fire and the Retreat to Facts](#), 61 W&M Law Rev. 1083 (2020). Internal citations and quotations are omitted here but can be found in the original articles.

It is a mistake to conclude that the Justices can easily tell which of these amici are real factual experts and which of them are not. Most of the names on the covers of the briefs sound neutral and mask the advocacy that may be motivating them. The American College of Pediatricians, for example, is a socially conservative group founded to protest the adoption of children by same-sex couples, in opposition to the contrary position taken by the similarly-named American Academy of Pediatrics. With so much data out there and so many “experts” competing for the Court’s attention, it becomes increasingly difficult for the Justices and their clerks to sort the reliable amici information from the unreliable especially given the traditional limitations of appellate courts (limited staff, limited time, limited resources).

As part of my research I did a deep-dive into some of the amicus briefs the Justices use to support their arguments. I found several examples where the reliability of the information presented is shaky at best. Sometimes, for example, the amicus will cite a study that it funded itself. Sometimes the numbers supplied by an amicus to support an assertion of fact are not even publicly available but instead remain “on file with” the amicus. And it is not uncommon for an amicus to present factual evidence that, in reality, rests on methods which have been seriously questioned by others working in the field.

*Gonzales v. Carhart*—the Court’s 2007 decision on a federal “partial birth abortion” ban—provides a controversial example.<sup>11</sup> Writing for the majority and acknowledging that he could “find no reliable data to measure the phenomenon,” Justice Kennedy wrote that “it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow.” The authority he cites for this proposition is an amicus brief filed by Sandra Cano, the “Mary Doe” in *Doe v. Bolton*, and 180 women who alleged injuries from abortions. The relevant pages of the Cano brief, in turn, rely on the work of Dr. David Reardon to demonstrate what he claims are serious adverse psychological consequences that accompany the decision to have an abortion. Dr. Reardon is a trained electrical engineer who holds a Ph.D. in bioethics from an unaccredited and now non-existent school in Hawaii. He runs the “Elliot Institute,” which is an organization known for its anti-abortion advocacy. Dr. Reardon’s research has been the subject of much controversy. His work on the psychological harm caused by abortion has been consistently refuted by psychologists and psychiatrists, including groups such as the American Psychological Association and the American Medical Association. To be sure, this is a debate in psychology that is particularly charged politically but it was not one of the reasons Congress gave (in extensive factual findings) for banning the procedure. Regardless of how one feels politically on the subject, there are two relevant points for now: (1) Dr. Reardon’s research is a minority view in the field of psychology, and (2) one would not be able to figure that out by looking at the name on the brief or the statement of interest on its first page.

To date, the standard response to questions about “junk science” ending up in Supreme Court opinions is to resort to the adversary process. While that may have been enough in a pre-Internet universe, it is insufficient today. My research shows that the check from the adversary system at the Court is very feeble to the point of being almost non-existent. In both my 2014 published study and my 2018 update I went through each of the factual claims supported by an

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<sup>11</sup> For relevant citations in *Carhart* and to the amicus brief discussed see *The Trouble with Amicus Facts*, 100 Va. L. Rev. at 1797-98.

amicus and cross-referenced the party briefs to see if they were contested by the parties. Such a check existed in less than a third of the citations for the 2014 study and less than 10% of the citations for the more modern time period. The number of amicus briefs filed and the amount of seemingly legitimate information available to present makes it very unlikely that a litigant can adequately respond to amici-presented factual claims.

There is more to fret about, however, than just “creative” or unreliable factual submissions to the Court. Facts are not just easier to access in the digital age, they are also easier to legitimize. Factual claims that may have once been labeled as outrageous assertions from fringe players are now easily distributed in a way that makes them seem more mainstream. Add to that the human tendency (shared of course by judges) of confirmation bias and one quickly sees the danger. Whether one believes climate change is man-made or voter ID laws suppress minority votes, for example, may well depend on one’s political affiliation. In today’s political dialogue, as comedian Stephen Colbert explained sarcastically, ideas that “feel right . . . should be true.” In the judicial context, the temptation to reach for an amicus brief or extra-record fact that confirms a pre-existing world view has never been higher. The risks are particularly acute once one acknowledges the parties have little control or ability to rebut the shaky factual claims.

The American legal system has relied on an adversarial method for a long time. As the Court put it not too long ago, “we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. [O]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.”<sup>12</sup> Old-fashioned or not, there is real value to this system: much can be gained by forcing oneself to wrestle with two sides locked into debate on an issue—literally reading two briefs and listening to both sides. The adversarial system is built on this foundation. It is dangerous to assume that safety net is no longer necessary at the Supreme Court now that facts are so freely accessible.

Granted, a closed market of ideas and authorities from advocates is not perfect and can lead to some inequities and missed opportunities. But I am skeptical that free for all fact-finding and briefing results in the triumph of the “best arguments” on a truly open market—that is, that the Justices are taking in all possible arguments and crediting the best ones. A more dangerous outcome is just as likely: with more voices chiming in and limited time to sort through them, it seems likely the Justices turn to the familiar and confirming, not the unfamiliar and challenging.

### **Potential Reforms: Increased Transparency / Disclosure Rules**<sup>13</sup>

What can be done to improve Supreme Court decisions reached in the current reality of unregulated fact-finding presented by a growing sea of amici? To be clear, I do not argue that the Justices avoid legislative facts in their decisions altogether or that they shut their eyes to amicus briefs presenting those facts. Instead, I have suggested several reforms over the years that all focus on increased transparency.

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<sup>12</sup> *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008).

<sup>13</sup> This section draws from my article, *The Amicus Machine*, 102 Va. L. Rev. 1901 (2016) (with Neal E. Devins) and *The Trouble with Amicus Facts*, 100 Va L. Rev. 1757 (2014), Internal citations are omitted here but can be found in the articles.

One possible reform involves increased disclosure rules on amici so that the Justices are fully aware of the source of the information they are digesting. Since the Justices are tempted to reach for outside experts to inform themselves about the factual dimensions of the decisions they reach, it only behooves them to know where the information is coming from. As any new researcher is taught and any cross-examiner knows well, a source's motivation is intrinsically tied to its credibility. (Are you being paid for your testimony? Is this product review being compensated by the seller?). If the Justices are blind to the actual funders of the amici then they have no way to evaluate critically the factual submissions coming from them. Current Supreme Court rules on amicus briefs require a statement of interest of the amicus and disclosure only as to whether the party contributed financially or otherwise to the brief.<sup>14</sup> The rules do not bar anonymously-funded amicus briefs and they do little to shed light on briefs filed by neutral-sounding organizations that are in reality funded by those with an interest in the case (even if not the party).

Indeed, increased disclosure rules will not only help the Justices but may control the amici themselves. In my research I have observed that many amicus briefs are orchestrated by members of the elite Supreme Court bar, and with good reason. The identity of the lawyer on the amicus brief matters inside the Court. In one (anonymous) survey of Supreme Court law clerks, 88% of the clerks admitted that they paid careful attention to amicus briefs written by renowned attorneys. The clerks identified about two dozen lawyers, who, by virtue of their reputation, "would be read carefully." In the words of one clerk, "A famous name creates a certain level of expectation; it is a natural human quality to look at the source."

While one could debate the virtues and the vices of this dynamic, there is a benefit to it that is particularly relevant to the problem of unreliable factual submissions. Members of the elite Supreme Court Bar—often led by former attorneys in the Office of the Solicitor General—have a vested interest in avoiding dubious authorities. In fact not a single example of troubling amicus facts highlighted in my article was filed by a member of the Supreme Court elite. Rather, these repeat players have formed a reputation market—an extralegal mechanism to constrain behavior. To protect their credibility with the Justices and with each other, these members of the elite Supreme Court Bar will not engage lightly with suspect authorities and overly creative claims to the Court. Indeed, they likely will not want to associate with those players who would. They have formed an economy of trust that they do not wish to be broken.

Stronger disclosure rules in terms of the client (the amicus organization sponsoring the brief) can take advantage of the reputation market dynamic that exists within the Supreme Court bar. Because these recognized lawyers fiercely protect their reputations with the Justices, it seems likely they will not want to taint that reputation by making factual claims on behalf of anonymously funded organizations with a (hidden) dog in the fight. Likewise, amicus briefs that are not filed

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<sup>14</sup> The core requirements for these briefs are set forth in Supreme Court Rules 33.1, 34 and 37. With respect to disclosure, Supreme Court Rule 37 generally requires amicus submissions to "indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made such a monetary contribution to the preparation or submission of the brief."

by these players (and are thus not subject to the check from the reputation market) will perhaps be approached by the Justices and the law clerks with a more skeptical eye. A key to making this work, however, is transparency – to the bar, to the Justices, and to the public.

Disclosure rules on amicus briefs can take many forms and still be effective. One possibility (borrowed from *Daubert* and the rules of evidence) is for the Court to require any amicus brief filed with factual claims to include an explanation of the methods used to discover them. Perhaps it is unrealistic that the Justices (or their clerks) would go through the methods employed by each amicus and evaluate them, but even just having the requirement at all would serve as a barrier to entry for advocacy groups that do not use rigorous methods for finding their facts. The Court could easily impose even minor variations of this reform. It could, for example, require that any statement of fact in an amicus brief be supported by data that is publicly available (not “on file with” the author). Or, the Court could require disclosure when an amicus (or a related group) funds or authors a study purporting to establish a factual claim. Although the current Supreme Court Rules require disclosure of who financed a brief, they do not require disclosing who paid for any particular study, “working paper,” “fact sheet,” blog post, e-mail, or whatever authority on which the amicus relies to support its factual assertion.

Alternatively, the Supreme Court Rules could create a limited way for the parties to respond to unreliability in factual claims. The Court could permit a limited letter at the end of the amicus submissions in which the parties can respond—not to legal arguments—but only to instances where they think the amicus has relied on a shaky authority for a claim of fact. Recall that the rate of response from the parties to the claims of fact presented by amici and ultimately relied on by the Justices is surprisingly low. The adversary system is currently providing only the very weakest of checks on amici fact finding. It is virtually ineffective. As the number of amici grow and the pool of factual data expands, something needs to be done to rehabilitate the check from the adversary method. Even the threat of a response (one that does not take away from the word limits the parties have to reply to the legal arguments) may discourage amici from relying on questionable authorities.

Another potential reform would forbid any amicus brief presenting factual claims from adding accompanying legal argument. At trial, there are strict limits on expert witnesses offering opinions on the law or generally opining on the case’s outcome. The idea of course is that this legal commentary detracts from the status of the expert as a neutral advisor, and that it oversteps what is the value and point of an expert witness in the first place. Applying this rule to the amicus process would stem the factual arguments that currently come from the pens of the amicus lawyers rather than from the technical experts themselves (presumably the clients).

Of course there is nothing preventing these groups and their counsel from framing factual submissions in a light sympathetic to the side they want to win. But even so there is still an advantage to divorcing factual claims from legal argument. If the Court forbade factual briefs from making legal arguments, these advocacy groups would face a choice: either present new information for the Court to consider or make a pitch to get the Court to rule your way. Not both. This reform would serve to discourage all advocacy groups from jumping in the factual pool and claiming to be experts. Presumably, some advocacy groups write amicus briefs in order to show value to their constituency. Given the choice between weighing in on a policy debate or adding

facts to the record (and perhaps disclosing financial donors in that case), these groups might choose the former. The consequence is a narrowing of the number of factual experts vying for the Court's attention and the allowance of more scrutiny for the Justices (and their clerks) to fact check.

A final reform possibility comes from the land of administrative law. The Administrative Procedure Act requires that an agency give “[g]eneral notice of proposed rule making.” Over the years, the D.C. Circuit has interpreted this rule to require that the agency “adequately flag” whatever rule it is likely to adopt. The reasons for this are well known. After the notice, interested parties are given a chance to comment on the agency’s proposal. If the notice fails to provide an accurate picture of the reasoning motivating the agency’s thinking—including the factual basis for its proposal—the comment period will become less meaningful. The fear is that the industry members will not know what criticisms and what factual information to present and then the agency will operate with a mistaken or lopsided view of the issues at stake.

If one thinks of the cert grant at the Court as analogous to the notice of proposed rulemaking for an agency, then the “adequately flag” rule could be a useful import. The Court could ensure that the factual questions relevant to the case are disclosed in the certiorari grant. And, as a corollary, it could discipline itself not to rely on extra-record facts that were not flagged from the start. As it currently stands, the scientific community is under-represented in the Supreme Court amicus process. One way to encourage participation by groups who are more knowledgeable on technical matters and perhaps less biased in their presentation of them is to highlight the importance of the fact at the beginning of the process—that is, in the certiorari grant. A theme in administrative law is that more process at the front end makes better substantive decisions on the back end. A more detailed certiorari grant when legislative facts are looming would incentivize reliable players to join the amicus process, would signal to the parties that they need to devote significant time to the issue, and, it is to be hoped, would prevent lopsided, unreliable, and untested information from unduly influencing the Court’s decisions.

## **Conclusion**

Over the past thirty years the world has undergone a revolutionary change in how information is transmitted and received. Factual information is now cheaply manufactured and easily posted to the world with a click of a mouse. There is now an emphasis in Supreme Court decision making on generalized factual claims and a turn toward empirical factual support for legal arguments. There is also a brave new world of factual data that can be marshaled easily and quickly by any interested party that can call itself an expert. The Court seems hungry for factual information; it consumes it at a greater rate than the parties and the record can provide. But by turning to motivated interest groups to fill the need—and indeed relying on the amicus briefs themselves as evidence on factual claims—the Court risks tainting its decisions with unreliable evidence. It is time to refashion this old tool for the new purpose for which it is currently being used, and to equip the Court to confront the factual free-for-all in which it finds itself.