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Re: Amicus Briefs in *Eldred v. Ashcroft*

Dear Jonathan:

I understand that you are planning to act, with the assistance of Donald Ayer of this Firm, as a sort of clearing house for *amici*, identifying issues on which *amicus* briefs would be helpful and trying to match those issues with potential *amici* able and willing to address them. As Don has discussed with you, there is much to be said for this plan. To facilitate your efforts, I have tried to distill some of our experience and that of our colleagues in Jones Day's appellate practice in writing *amicus* briefs for the Supreme Court.

The Role of Amicus Briefs in the Supreme Court

As you are well aware, amicus briefs can play a useful and important role in Supreme Court decision making, especially in cases such as *Eldred* that involve constitutional questions with broad practical ramifications. The role played by *amicus* briefs is, however, a limited one, and, where that role is not properly understood, *amicus* briefs can be of little use and, in some cases, counterproductive.

The number of *amicus* briefs received by the Supreme Court has greatly increased in recent years, and it now receives hundreds each year. The Court appears to receive *amicus* briefs in most civil cases that are argued, and in very high profile cases it may receive dozens of briefs. The Court has responded to this volume of briefs in two ways. First, many of the justices do not review all of the *amicus* briefs submitted to them; instead, they have their clerks screen the amicus briefs, and some even depend upon their clerks to summarize the important points made in *amicus* briefs. Second, the Court has made it clear that it is concerned not with whether an *amicus* supports a particular outcome, but rather with the "aid it provides in analyzing the legal questions" before the Court, *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 434 n.6 (1984), and, in particular, with its analysis of matters "not already brought to its attention by the parties." Sup. Ct. R. 37.1.

Because of the Court's approach to *amicus* briefs, "me too" briefs that simply restate the arguments made by the parties are rarely helpful -- generally only in cases where the parties' counsel is incapable of making the necessary arguments. In other cases, such briefs often waste the Court's time and detract attention from other *amicus* briefs. Moreover, skilled advocates can often exploit inconsistencies between a party's position and that of its *amici* to suggest weaknesses in both. Thus, it is rarely helpful and often harmful for an *amicus* to file a brief simply restating the arguments in favor of a party.

It can, however, be useful for *amici* to inform the Supreme Court of their perspective on a case when that perspective differs from that of the party they are supporting. The Court is concerned with the practical consequences of its decisions, and *amici* who describe how they have been or will be impacted by possible outcomes in a case can help the Court to understand the broader public interest in the case. This is especially true in a case, such as *Eldred*, where the Court is considering a novel legal issue with implications for a developing sector of the economy. Thus, it would be useful in *Eldred* for *amici* with interests that differ from petitioners' to submit briefs describing how the extension of subsisting copyrights adversely affects them.

Another useful role for *amici* is to amplify or supplement the arguments made by the parties. Sometimes there is not space in a party's brief to make every argument in full detail. For example, in discussing the purpose underlying a constitutional provision or the intent of Congress underlying a statute, it is often helpful to include a narrative describing the intentions of the Founding Fathers or the legislative history. As such narratives are often too lengthy for a party to include in its brief, an *amicus* brief can make a significant contribution by providing a fuller narrative that includes details that could not, for reasons of space, be included in the party's brief.

Amici can also be quite helpful by bringing to bear their expertise on particular issues of a technical or specialized nature. This may be done by a professional association or other organization with relevant expertise -- such as the American Psychiatric Association in cases involving the insanity defense or other mental impairments -- or by individuals with special credentials and renown within their profession.

Where, as in *Eldred*, a case implicates new technology or an industry with which the Court has had only limited experience, it is often useful for an *amicus* to describe the technology or industry in detail that the party does not have room to provide. Similarly, *amicus* briefs can effectively explain complicated economic analysis or present empirical research in detail. In addition, it is sometimes useful for an *amicus* to provide a primer on the basic principles underlying an area of law to help any Justice or clerk that is unfamiliar with that area.

Amicus briefs can also make arguments that have been purposefully omitted from a party's brief. For example, in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), billboard owners challenged an ordinance excluding most billboards from the city on grounds of traffic safety and aesthetics. Although the billboard owners were not in a position to argue credibly that the ordinance suppressed political speech, the American Civil Liberties Union was, and the deciding votes in the case were cast based upon the regulation of political, rather than commercial, speech. *See id.* at 512. There are other strategic reasons as well why a party may choose not to make an argument that can be effectively made in an *amicus* brief.

The Drafting of Amicus Briefs

To be effective, an *amicus* brief must be focused, preferably on one issue, theme, or subject area. Especially in cases such as Eldred where many *amicus* briefs will be filed, to receive any attention, an *amicus* brief must be as compact and well-organized as possible. Typically, such a brief should state up front how it will help the Court, and the section headings should make it clear from a glance at the table of contents what the brief argues.

An *amicus* brief normally begins with a discussion of the "Interests of *Amici Curiae*," which is often a good place to identify the theme of the brief or describe the impact that an issue has or could have on the *amici*. An *amicus* brief must also contain a summary of argument, the argument, and a conclusion. It is not always necessary for an *amicus* brief to contain a statement of the case, and it is often best not to include one or, where one is necessary, to incorporate the statement of a party and stress one or two salient facts.

An *amicus* brief should adopt a moderate, balanced tone. Although the day has long past in which *amicus curiae* were disinterested parties simply seeking to help the Court by pointing out relevant precedents and legislative developments, briefs filled with strident invective and other rhetoric are still likely to be discounted or ignored.

Finally, it is useful for *amici* to know that the Supreme Court normally gives *amicus* briefs some latitude to describe facts that are obviously within their knowledge. Although a party is generally limited to facts that are in the record and matters of public record, the Supreme Court will entertain *amicus* briefs that, for example, describe the practices of a company or industry that are neither in the record or matters of public record. Such statements are, however, only persuasive if they are consistent with common sense, and the source of the knowledge is clear or the method by which it was obtained is described.

Some Nuts and Bolts about Amicus Briefs

Under the Supreme Court's rules, *see* Sup. Ct. R. 37.3, *amici* cannot automatically file briefs. They must either obtain the consent of both parties or obtain leave of the Court by filing a motion. Fortunately, the United States, the respondent in *Eldred*, has adopted a general policy of

consenting to *amicus* briefs. As a consequence, in this case, *amici* should be able to obtain consent from the United States by faxing a letter to the Solicitor General requesting consent to file. Such letters should contain a reference to the case name and number and should include a signature line where the Solicitor General can grant his consent. Such letters should be copied to Emily Spadoni and faxed to the following number: (202) 514-8844. *Amici* supporting petitioners will also need to send a similar letter to you for petitioners' consent, and they will need to file copies of these consents with the clerk when they submit their briefs.

The *amicus* briefs should indicate in a footnote at the very beginning that counsel for both parties have consented to the filing of the brief and that the consents have been filed with the clerk of the Court. In addition, the first footnote should include a statement indicating whether counsel for any party authored a portion of the brief and identifying any entity other than *amicus*, its members, or its counsel who made a monetary contribution to the preparation or submission of the brief. *See* Sup. Ct. R. 37.6. Accordingly, *amicus* briefs often include a footnote either in the heading "Interests of *Amicus Curiae*" or in the first sentence of that section saying the following:

> Counsel for both parties have consented to the filing of this brief, and those consents have been filed with the Clerk of this Court. No counsel for either party had any role in authoring this brief, and no person other than the named *amicus* and its counsel made any monetary contribution to the preparation and submission of this brief.

Amicus briefs in support of the petitioners should be printed and contain no more than 30 pages of text. *See* Sup. Ct. R. 33.1(g). They should have a light green cover that identifies the party being supported (*e.g.*, "Brief of Various Concerned Persons as *Amicus Curiae* in Support of Petitioners"). *See id.*; Sup. Ct. R. 37.3. As the briefs should be printed in the Supreme Court's rather particular booklet format, *see* Sup. Ct. R. 33.1, it is helpful to use a printer who has some experience with printing Supreme Court briefs.

Amicus briefs must be filed at the same time as the briefs of the party that the *amicus* is supporting, and although *amici* automatically benefit from any extensions granted to the parties, extensions are rarely granted to *amici* separately. Forty copies of the brief must be filed with the Court, and three copies must be served on each of the parties, with service on the United States being made to the "Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001."

Membership in the Supreme Court bar affects both filing and service. As only a member of the Supreme Court bar may file a brief with the Court, *see* Sup. Ct. R. 9.1, the counsel of record listed on an *amicus* brief must be a member of the bar. In addition, unless a member of

the Supreme Court bar signs the proof of service, the proof must be through a notarized affidavit of declaration. *See* Sup. Ct. R. 29.5. Fortunately, it is fairly simple to become a member of the Supreme Court bar. *See* Sup. Ct. R. 5.

For further information concerning *amicus* briefs and Supreme Court practice, *Stern & Gressman's Supreme Court Practice* is a useful guide. In addition, the clerk's office at the Supreme Court, which can be reached at 202/479-3011, is normally quite helpful.

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I hope that this description was helpful. If you have any questions, please feel free to telephone me.

Sincerely,

Daniel H. Bromberg