

## The Corporate Clique in the Courtroom: a Jurisprudential Study of the Success and Influence of Amicus Curiae Briefs Filed by the U.S. Chamber of Commerce During the 2014-2017 Terms of the U.S. Supreme Court

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THE CORPORATE CLIQUE IN THE COURTROOM: A  
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OF AMICUS CURIAE BRIEFS FILED BY THE U.S. CHAMBER OF  
COMMERCE DURING THE 2014-2017 TERMS OF THE U.S.  
SUPREME COURT

R. Betsy Emmert\*

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INTRODUCTION

The U.S. Chamber of Commerce stands out among its peers of national advocacy organizations for its efforts to influence the U.S. Supreme Court.<sup>1</sup> The Chamber wields its influence by filing *amicus curiae*, or “friend of the court,” briefs as a secondary source to aid the Court in its decision-making.<sup>2</sup> Amicus briefs serve as valuable sources of knowledge and provide the Justices with unique insights from various interest groups. However, the role of the amicus brief continues to evolve as the increasing number of amicus briefs filed with the Court make it impractical for the Justices to thoroughly read all such briefs that are filed. Consequently, those interest groups that have access to the legal and financial resources to petition the Court, both frequently and effectively, increase their

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\*I express deepfelt appreciation for the guidance and research on this topic from Professor Michael E. Solimine, Donald P. Klekamp Professor of Law, University of Cincinnati College of Law.

1. John Shiffman, *Chamber of Commerce Forms its Own Elite Law Team*, Reuters: #Special Reports (Dec. 8, 2014), <http://www.reuters.com/article/us-scotus-firms-chamber/chamber-of-commerce-forms-its-own-elite-law-team-idUSKBN0JM10Q20141208>.

2. Adam Feldman, *The Most Effective Friends of the Court*, Empirical SCOTUS (May 11, 2016), <https://empiricalscotus.com/2016/05/11/the-most-effective-friends-of-the-court/>.

likelihood of influencing the Justices' decisions.<sup>3</sup> Most notably, the U.S. Chamber of Commerce ("Chamber") increased its participation in the judicial process by filing amicus briefs at the U.S. Supreme Court ("Court") level with the assistance of sophisticated outside counsel, and the Chamber's efforts have produced positive results, with the Court ruling in favor of corporate interests.<sup>4</sup>

Over the past 227 years, the Court has changed very little, but the role played by amicus curiae briefs in the Court's decision-making process continues to drastically evolve.<sup>5</sup> The term "amicus curiae," formerly portrayed a professional relationship to the Court, in which the lawyer was a "friend," of sorts, assisting the Court in understanding the issue before it, rather than acting with the influence and standing of a lawyer representing a party.<sup>6</sup> It was not until the twentieth century that it became common for organizational sponsors to fulfill the role of amicus.<sup>7</sup> Amicus briefs provide Justices with information and perspective to assist them in complex decision-making.<sup>8</sup> As observed by Justice Black, "[m]ost case before [the] Court involve matters that affect far more people than the immediate record parties."<sup>9</sup>

This Comment studies the jurisprudential history and influence of amicus curiae briefs filed by the Chamber with the Court. Part II traces the number of amicus briefs filed by the Chamber through the decades and the corresponding rulings by the Court on related free-enterprise and corporate issues. This Comment will analyze how often the Court has cited the Chamber's amicus briefs, and the perceived impact the briefs filed by the Chamber have on the Justices' opinions. Part III discusses the prominent business interests promoted by the Chamber and the influence such amicus briefs have on the Court in determining whether to grant certiorari, and if so, what interests are at the forefront of the Justices' and in turn, the nation's concerns. Part III also normatively comments on the extent to which the Chamber's amicus activity influences the Court, and raises the question as to whether the Court's pro-business orientation is driving the Chamber's amicus activity or vice versa.

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3. *Id.*

4. Zachary Roth, *How the Chamber of Commerce Conquered the Supreme Court*, MSNBC (May 2, 2013), <http://www.msnbc.com/msnbc/how-the-chamber-commerce-conquered-the-sup>.

5. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 746 (2000).

6. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901, 1910 (2017).

7. *Id.*

8. *Amicus Briefs in the Supreme Court*, MAYER BROWN, <https://www.mayerbrown.com/amicus-briefs-in-the-supreme-court/> (last visited Sept. 29, 2017).

9. *Id.*

## BACKGROUND

In the first few decades of the twentieth century, outside groups filed amicus curiae briefs with the Court in as few as 10% of cases.<sup>10</sup> Yet, by the end of the century, outside groups filed amicus briefs in nearly 85% of cases.<sup>11</sup> Today, in the twenty-first century, outside groups file nearly one thousand amicus briefs each year, averaging close to fourteen cases, per diem.<sup>12</sup> This significant increase raises the question as to the perceived influence of such friend of the court briefs on the U.S. Supreme Court. While almost anyone can submit an unsolicited brief, most lawyers and academics are amenable towards briefs, viewing them as helpful to the extent that they provide courts with arguments or facts not raised by the litigants.<sup>13</sup> Justices sitting on the Court admit that secondary resources, like amicus briefs, provide “useful knowledge . . . in a world community grappling with the same difficult question.”<sup>14</sup> Codified at Sup. Ct. R. 37.1, an amicus brief “brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court,” which explicitly encourages arguments and claims outside of what the adversary system provides.<sup>15</sup>

In 1971, two months prior to his appointment as a Supreme Court Justice, Lewis Powell, as a private attorney in Richmond, Virginia, penned “Attack on American Free Enterprise System.”<sup>16</sup> This private memorandum to the U.S. Chamber of Commerce has since established the blueprint for Supreme Court litigation followed by the Chamber.<sup>17</sup> The memorandum urged the Chamber to defend the American economic system by specifically focusing on petitions to the Court.<sup>18</sup> Justice Powell viewed the Court as “the most important instrument for social, economic, and political change,” and recommended that the Chamber enlist “a highly competent staff of lawyers. . . , lawyers of national standing and reputation” to not only represent the Chamber’s interests, but also to serve

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10. Kearney, *supra* note 5, at 744.

11. *Id.*

12. Anthony J. Franze & R. Reeves Anderson, *The Supreme Court’s Reliance on Amicus Curiae in the 2012-13 Term*, NAT’L L.J. (Sept. 18, 2013), <https://www.law360.com/in-depth/articles/84695>.

13. Zachary Mider, *How ‘Friends’ of the Court Can Tip the Scales of Justice*, Bloomberg Politics (September 12, 2017), <https://www.bloomberg.com/news/articles/2017-09-12/how-court-friends-can-tip-the-scales-of-justice-quicktake-q-a>.

14. David Souter, Ruth Bader Ginsburg, David S. Tatel, & Linda Greenhouse, *The Supreme Court and Useful Knowledge: Panel Discussion at the Supreme Court and Useful Knowledge Symposium*, (Nov. 15, 2008), in *Proceedings of the American Philosophical Society*, at 299, Vol. 154, No. 3 (Sept. 2010).

15. Orr, *supra* note 6, at 1913-14.

16. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo. L.J. 1487, 1505-06 (2008).

17. *Id.*

18. *Id.* at 1505.

amicus to “select [ ] the cases in which to participate, or the suits to initiate.”<sup>19</sup>

First, this section traces the legitimization of the Chamber’s advocacy efforts and current level of its expertise and efficacy. Factors, including the organization of the Chamber’s litigation center, the Chamber’s key players, as well the make-up of the Court contribute to the increased sophistication of the Chamber’s litigation efforts as a critical amicus for corporate partners. This section also examines the Chamber’s participation in litigation at the Supreme Court level, in terms of the number of amicus briefs filed on behalf of corporate partners in the most recent October 2017 Term. Finally, this section concludes with recent cases in which the Chamber filed amicus briefs and discusses metrics useful to gauge the Chamber’s influence on the Court.

### *Legitimizing the Advocacy Efforts of the Chamber*

The advocacy efforts of the Chamber are unprecedented in terms of the dramatic increase in the number of amicus brief filings, as well as the success of the cases in which the Chamber has participated as a “friend of the Court.” The legitimization of these efforts trace back to the mid-1970s and the Chamber’s success continues to trend upward as the Court reflects a pro-business orientation in its rulings.<sup>20</sup> In 1977, the National Chamber Litigation Center (NCLC) formed as an affiliate of the Chamber to advocate for businesses at every level of the U.S. judicial system and continues to be staffed by in-house litigators, several of whom are former U.S. Supreme Court clerks,<sup>21</sup> including a clerk who assisted Chief Justice John Roberts and Justice Samuel Alito during their confirmation hearings.<sup>22</sup> The NCLC provides legal assistance to businesses with issues including class actions, arbitration, labor and employment, energy and environment, securities and corporate governance, financial regulation, free speech, preemption, government contracts, and criminal law.<sup>23</sup> The NCLC, which is often compared to a boutique law firm with attorneys who rival those of elite K Street firms, is often recognized for influencing the Roberts Court’s pro-business decisions.<sup>24</sup> In June 1977, the NCLC filed its first brief on the merits in the Supreme Court.<sup>25</sup> During the

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19. *Id.* at 1505-06. See Memorandum from Lewis F. Powell to Mr. Eugene B. Sydnor, Jr., Director U.S. Chamber of Commerce (Aug. 23, 1971).

20. Roth, *supra* note 4.

21. *Who We Are*, U.S. Chamber Litigation Center, <http://www.chamberlitigation.com/who-we-are> (last visited Sept. 23, 2017).

22. Shiffman, *supra* note 1.

23. *Who We Are*, *supra* note 21.

24. Shiffman, *supra* note 1.

25. Lazarus, *supra* note 16, at 1506.

October 1987 Term, the Chamber filed twelve amicus briefs in support of business interests in nine cases.<sup>26</sup> Nearly twenty years later, during the October 2005 and 2006 Terms, the Chamber served as either amicus or party in fifteen cases before the Court.<sup>27</sup>

In 2010, Chamber CEO Thomas Donohue overhauled the NCLC's legal team and replaced leadership with former Bush Administration appointees.<sup>28</sup> Donohue hired Lily Fu Claffee, a senior Bush official and former hiring partner at Mayer Brown as the Executive Vice President of the NCLC, as well as four Harvard Law graduates to serve in executive roles.<sup>29</sup> As a result, the Chamber has become a more active body before the U.S. judicial system, namely in front of the U.S. Supreme Court.<sup>30</sup> The Chamber continues to hire outside counsel to assist with brief writing, and annually increases its filings nationwide to advance pro-business decisions by the Court, as well as with the lower courts.<sup>31</sup> As a matter of policy, however, the Chamber does not participate in those cases in which businesses are pitted against each other as adversaries in the judicial system, such as patent and anti-trust cases before the Court.<sup>32</sup>

From January 2006 to 2009, with the elevation of Justice Samuel Alito, the Court decided forty-three cases in which the Chamber filed a brief as either a party or as amicus. Of those cases, the party supported by the Chamber prevailed in thirty cases, or a success rate of nearly 70%.<sup>33</sup> Moreover, twelve of the Chamber's thirty victories during this period were unanimous; and in eight more victories, the Chamber, or the party it supported, garnered either seven or eight votes from sitting Justices.<sup>34</sup> In contrast, during the last eleven years of the Rehnquist Court (1994-2005), the Chamber's success rate was 62% (forty-seven wins out of seventy-six cases).<sup>35</sup>

From a qualitative standpoint, briefs filed by the Chamber are viewed not only as successful, but also influential on the Court. A partner at Sidley Austin and prominent member of the Supreme Court bar commented that, "[t]he briefs filed by the Chamber . . . are uniformly excellent. . . . [e]xcept for the Solicitor General representing the United States, no single entity has more influence on what cases the Supreme

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26. *Id.* at 1507-08.

27. *Id.*

28. Shiffman, *supra* note 1.

29. *Id.*

30. *Id.*

31. *Id.*

32. David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 Santa Clara L. Rev. 1019, 1023-24 (2009).

33. *Id.*

34. *Id.* at 1019-20.

35. *Id.* at 1024.

Court decides and how it decides them than the National Chamber Litigation Center.”<sup>36</sup> While this conclusion about the influence of the Chamber is subjective, other objective efforts to assess the efficacy of amicus briefs filed with the Supreme Court are less definitive.<sup>37</sup> Some interest groups file amicus briefs without much concern about which side will prevail, but rather demonstrate to their members that they are “bulldogs” staying on the forefront of issues important to their respective members.<sup>38</sup> However, the Chamber, as the nation’s preeminent business-oriented lobbying group, is vested in presenting to their members not only that it is an active participant in litigation, but more so that it *prevails* as an effective advocate for its corporate members.<sup>39</sup>

The art of filing amicus briefs is not a one-man-show. The Chamber does not always or even usually file amicus briefs independently. Rather, the Chamber files briefs in tandem with one or more other interest groups or associations to promote business interests.<sup>40</sup> Evidence<sup>41</sup> has been found that amicus briefs filed jointly are more likely to be accepted and discussed by the Court.<sup>42</sup> In the 2017 case of *Bristol-Myers Squibb Co. v. Superior Court*, both the Chamber of Commerce and the U.S. Solicitor General filed amicus briefs in support of defendant pharmaceutical company, Bristol-Myers Squibb.<sup>43</sup> The Court found for Bristol-Myers Squibb, holding that there was no personal jurisdiction to entertain nonresidents’ claims. The Chamber filed its amicus brief jointly with the California Chamber of Commerce, the American Tort Reform Association, and the Civil Justice Association of California.<sup>44</sup> This recent case demonstrates how solidarity among related interest groups can influence the Court through effective and consistent petitioning.

The Chamber files amicus briefs at all levels of the U.S. court system, from state and federal court, to the U.S. Supreme Court to promote pro-business and/or deregulatory actions.<sup>45</sup> While this Comment focuses on

36. *Id.* at 1025-26.

37. *Id.* at 1026.

38. *Id.* at 1026-27.

39. *Id.*

40. U.S. *Supreme Court Amicus*, U.S. Chamber Litigation Center, <http://www.chamberlitigation.com/cases/bristol-myers-squibb-co-v-superior-court-0>.

41. See Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 *Sup. Ct. Econ. Rev.* 43, 69-72 (2006).

42. Michael E. Solimine, Article: *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 *Ga. L. Rev.* 355, 366 (Winter 2012).

43. *Bristol-Myers Squibb Co. v. Superior Court*, U.S. Chamber Litigation Center, <http://www.chamberlitigation.com/cases/bristol-myers-squibb-co-v-superior-court-0> (last visited Sept. 23, 2017).; 137 S. Ct. 1773 (2017).

44. *Id.*

45. U.S. *Chamber Litigation Center*, U.S. Chamber of Commerce, <https://www.uschamber.com/us-chamber-litigation-center> (last visited Sept. 23, 2017).

the Chamber's amicus briefs filed at the Supreme Court level, it would be remiss to not mention the Chamber is an active filer at both the lower federal and state court levels, as well.<sup>46</sup> For instance, the Tenth Circuit recently dismissed an appeal of final judgment against the Bureau of Land Management's hydraulic fracturing rule for being "prudentially unripe" in light of the Trump administration's intention to repeal the rule.<sup>47</sup> Despite the Tenth Circuit's ruling, the Chamber filed an amicus brief to enjoin the Bureau's regulations in the case.<sup>48</sup>

For the past ten years, not only have scholars and Court observers noted the Chamber's increasing involvement with cases, but also its increased willingness to voice its' members interests.<sup>49</sup> As suggested by a blogger who comments on the Court, the Chamber's high level of activity and success at the certiorari stage reflect its efforts to shape the Roberts Court's dwindling docket.<sup>50</sup> As suggested by one political blogger, the most active amici are generally pro-business and anti-regulatory groups, such as the Chamber.<sup>51</sup> This trend is likely a product of these groups' enhanced financial ability to afford certiorari stage briefs, as a corollary to the liberal, left-leaning interest groups that tend to file far fewer briefs.<sup>52</sup> The rising tide of judicial deference to amici has inevitably led to the Court's new "open door" policy to "friends of the court."<sup>53</sup>

Scholars and legal academics attempt to explain judicial decisions in terms of legal doctrine or ideological preferences. However, other scholars suggest that the Justices, particularly those sitting on the Roberts Court, are driven by attitudes about the law that are not necessarily rooted in doctrinal understandings of the law.<sup>54</sup> The seemingly pro-business attitude that characterizes the Roberts Court has been suggested to not merely reflect a free enterprise bias, but rather highlights an overriding "skepticism about litigation as a mode of regulation."<sup>55</sup> As one scholar opines in his article, "businesses seem to fare especially well when they

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46. *U.S. Chamber Litigation Center*, *supra* note 32.

47. Brief for Amicus Curiae The Chamber of Commerce of the United States of America in Support of Appellees and Affirmance, *State of Wyoming v. Zinke*, U.S. Department of the Interior, Np. 16-8068 (10th Cir. 2017); *State of Wyoming v. Zinke*, U.S. Department of the Interior, U.S. Chamber of Litigation Center, <http://www.chamberlitigation.com/cases/state-wyoming-v-jewell-us-department-interior> (last visited Nov. 30, 2017).

48. *Id.*

49. Adam Chandler, *Cert.-stage Amicus Briefs: Who Files Them and to What Effect?*, SCOTUS Blog (Sept. 27, 2007), <http://www.scotusblog.com/wp/cert-stage-amicus-briefs-who-files-them-and-to-what-effect-2/>.

50. *Id.*

51. *Id.*

52. *Id.*

53. Kearney, *supra* note 5, at 762-63.

54. Franklin, *supra* note 32, at 1056.

55. *Id.* at 1021.



are defendants; even better when the justices appear to view the litigation in question as having broader regulatory goals as opposed to individual remedial objectives; and better still when the justices view the litigation as lawyer-driven rather than party-driven.”<sup>56</sup> The conservative characterization of the Court’s recent judgments is merely an observation. However, this presumption is not unfounded as evidenced by the Court’s continued rulings in favor of deregulation and pro-business interests.<sup>57</sup>

### *The Current State of the Pro-Business Roberts Court*

Political science and legal scholars agree that while the current Justices sitting on the Supreme Court are clearly divided on most issues, the Roberts Court largely supports corporate interests irrespective of the Justices’ political affiliations.<sup>58</sup> While on one hand the Chamber is filing amicus briefs at an unprecedented rate, the business-friendly orientation of the Justices sitting on the bench is a contributing factor to the Chamber’s success at its Supreme Court-level amicus filings.<sup>59</sup> It is this current judicial climate which is favorable to the Chamber and its corporate partner litigants, and in turn, enables the Chamber to prevail in Court more often than not.

The Chamber continues to besiege the Court, filing ten amicus briefs since the beginning of the October 2017 Term.<sup>60</sup> Of the fifteen decisions handed down by the Supreme Court this year, and for which the Chamber filed briefs, all but one of the decisions were favorable to the litigants supported by the amici.<sup>61</sup> While it is not possible to precisely gauge the degree of influence these briefs have on the Justices and their clerks when writing their opinions, the Justices admit that amicus briefs do, in fact, play an influential role when difficult questions arise and when the Justices are looking for a “non-interested” party perspective on an issue.<sup>62</sup>

However, some spectators of the Court argue that the Chamber is “no friend of the Court.”<sup>63</sup> Parties in opposition to the Chamber’s stance insist

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56. *Id.*

57. Feldman, *supra* note 2.

58. *Id.* See also Roth, *supra* note 4.

59. Roth, *supra* note 4.

60. *U.S. Supreme Court Amicus*, U.S. CHAMBER LITIGATION CENTER, <http://www.chamberlitigation.com/what-we-do> (last visited Sept. 24, 2017).

61. *Id.*; Betsy Emmert, *The Corporate Clique in the Courtroom: A Jurisprudential Study of The Success and Influence of Amicus Curiae Briefs Filed by the U.S. Chamber of Commerce* (Oct. 1, 2017) (unpublished research, University of Cincinnati) (on file with author).

62. Souter, *supra* note 14, at 299.

63. Alison Frankel, “*U.S. Chamber is not friend of the court: TCPA plaintiffs to 11th Circuit*,” Reuters: #Intel, (Aug. 21, 2017), <https://www.reuters.com/article/us-otc-chamber/u-s-chamber-is-no-friend-of-the-court-tcpa-plaintiffs-to-11th-circuit-idUSKCN1B1237>.

that the Chamber is not a friend, but instead suggest that the relations among parties, lawyers, and amici are impermissible.<sup>64</sup> In 2017, two plaintiffs' firms made attempts to block proposed amicus briefs filed by the Chamber on the ground that the Chamber was not a legitimate amicus. The Court accepted an amicus brief from the Chamber in *DirectTV, LLC v. Hall*, which urged the Court to grant certiorari to resolve the standard of joint employment under the Fair Labor Standards Act (FLSA).<sup>65</sup> The plaintiff's counsel sought to delegitimize the Chamber in court, arguing that the Chamber was too tightly tied to the defendant.<sup>66</sup> In actuality, the plaintiff's counsel argued that the Chamber was not an impartial amicus, but rather, a party because DirecTV is a dues-paying member of the Chamber, and DirecTV's lead appellate counsel had represented the Chamber in over fifty cases, including appeals where counsel drafted Chamber amicus briefs in support of DirecTV.<sup>67</sup> In this case, and countless others,<sup>68</sup> the Chamber arguably crosses the line between "an uninterested party" and "more than a friend" when filing amicus briefs on behalf of its corporate partners, who also financially support the Chamber.

With the ever-increasing number of amicus briefs filed by corporate advocacy groups, impartiality from frequent amicus filers is not a realistic expectation in today's judicial climate.<sup>69</sup> In response to such pushback, the Chamber contends that suppression of amicus filings by interest groups could be unconstitutional as proposed rules by plaintiffs' counsels to ban trade associations from filing briefs would impair interest groups' First Amendment rights to free speech and to petition the government.<sup>70</sup> Despite this pushback, the Chamber continues to successfully file more amicus briefs than almost any other national interest group at the Supreme Court level.<sup>71</sup>

## DISCUSSION

First, it is useful to look at the Chamber's amicus success rates through

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64. *Id.*

65. *DirectTV, LLC v. Hall*, U.S. Chamber Litigation Center (last visited Sept. 24, 2017), <http://www.chamberlitigation.com/cases/directtv-llc-v-hall>.

66. Frankel, *supra* note 63.

67. *Id.*

68. *Recent Activity*, U.S. CHAMBER LITIGATION CENTER, <http://www.chamberlitigation.com/recent-activity> (last visited Nov. 19, 2017).

69. Frankel, *supra* note 63.

70. *Id.*

71. Debra Cassens Weiss, *US Chamber Remains Champion of Cert-Stage Amicus 'All-Stars'*, ABA Journal: Supreme Court (April 9, 2013 at 10:59 AM CDT) [http://www.abajournal.com/news/article/us\\_chamber\\_remains\\_champion\\_of\\_cert-stage\\_amicus\\_all\\_stars/](http://www.abajournal.com/news/article/us_chamber_remains_champion_of_cert-stage_amicus_all_stars/).

the decades to determine during which terms the Court was more receptive to pro-business interests than others. Second, it is critical to identify those cases in which the Court directly cites to the amicus briefs filed by the Chamber. Direct citations serve as another revealing indicator of effective advocacy by the Chamber, as well as of the interests which the Court finds most important. Third, it is necessary to understand which business interests on which the Chamber and the Court align, and on which interests the Court diverges from the Chamber to fully grasp the activity and corresponding influence of the Chamber. Finally, Part III explains what impact a business-friendly Court currently has during the Roberts Court era, as well as normatively comments on other factors that may influence the Court in its pending decisions.

### *A Linear Analysis of the Chamber's Litigation Activity*

Due to the large number of amicus briefs filed by the Chamber, not only this year, but over the past three decades, the most comprehensive manner to analyze the success of the Chamber's amicus activity and the Justices' receptivity to these briefs is to: (1) examine the Chamber's activity decade by decade; (2) look to the specific -- albeit rare -- instances in which the Court cites to the Chamber's briefs in its decision; and (3) identify those business interests in which the Chamber commonly prevails, as well as those interests in which the Chamber rarely succeeds at the Supreme Court-level.

### Through the Decades

Since its founding forty years ago in 1977, the NCLC has caught the attention of the Justices by filing amicus curiae briefs to advocate for business interests, ranging from deregulation to free speech.<sup>72</sup> Admittedly, landmark civil rights cases relating to topics such as abortion or the death penalty are more likely to gain public attention than corporate interest cases entertained by the Court. Nevertheless, such pro-business cases have lasting ramifications on the nation's corporate landscape and entities.<sup>73</sup> However, since Chief Justice Roberts took the bench on September 25, 2005, the Chamber's role as a "friend of the Court" has shifted from a seemingly mere acquaintance to something more akin to a

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72. *Who We Are*, *supra* note 21.

73. Doug Kendall, *Not So Risky Business: The Chamber of Commerce's Quiet Success Before the Roberts Court – An Early Report for 2012-2013*, CONSTITUTIONAL ACCOUNTABILITY CENTER (May 1, 2013),

[https://www.theconstitution.org/sites/default/files/briefs/The\\_Chamber\\_and\\_the\\_Roberts\\_Court-Early\\_Report\\_for\\_2012-2013\\_0.pdf](https://www.theconstitution.org/sites/default/files/briefs/The_Chamber_and_the_Roberts_Court-Early_Report_for_2012-2013_0.pdf).

close confidant.<sup>74</sup>

During the era of the Burger Court, from 1981 to 1986, the Chamber prevailed in approximately 43% of the cases for which it filed amicus briefs.<sup>75</sup> The Court warmed up to the Chamber during the Rehnquist Court (1994 to 2005), during which the Chamber's interests have prevailed in approximately 56% of the cases for which it filed amicus briefs.<sup>76</sup> Currently, during the era of the Roberts Court, the Chamber prevails in nearly 70% of the cases for which it files briefs.<sup>77</sup> The Court's receptivity to the Chamber's promoted interests signifies a gradual shift towards an increasingly deregulated, pro-business jurisprudential environment. What fuels this trend, though, is a combination of internal and external factors that create the optimal environment for the Chamber to effectively petition the Court.

Part of the Chamber's success can be attributed to external factors beyond the Chamber's control. For instance, the balance of the Court itself plays a significant role in the outcome of business-related cases. Traditionally, "conservative" justices tend to vote in favor of business interests, while "liberal" justices are more likely to vote against business interests.<sup>78</sup> Since Justice Alito succeeded Justice O'Connor on the bench in January 2006, the Chamber has experienced a 70% success rate in representing its business counterparts, compared to its less impressive track records during the Burger and Rehnquist eras.<sup>79</sup> Studies reveal that of the current Justices sitting on the bench, Justice Sotomayor is least favorable to business interests. However, she still ranks moderately liberal on her business rulings among previous Democratic-appointed Justices.<sup>80</sup>

During the October 2017 term, the Court granted certiorari to even more business-dispute cases. Judicial spectators noted the inherent paradox in the Court hearing an increasing number of business-interest cases, even after the passing of the late Justice Scalia, who admittedly thought such business cases were "boring."<sup>81</sup> However, Justice Scalia

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* The data of the success rate of briefs filed by the Chamber during the Roberts Court era reflects the Chamber's success rate from 2006-2013.

78. Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 Minn. L.Rev. 1431, 1433 (April 2013).

79. *The US Chamber of Commerce Continues its Winning Ways*, CONSTITUTIONAL ACCOUNTABILITY CENTER (June 30, 2014), <https://theusconstitution.org/text-history/2753/us-chamber-commerce-continues-its-winning-ways>.

80. Epstein, *supra* note 78, at 1449-52; Nick Wells, "The US Supreme Court is more friendly to businesses than any time since World War II," CNBC: The Big Crunch (March 1, 2017 at 3:10 p.m.), <https://www.cnbc.com/2017/03/01/supreme-court-very-business-friendly-data-show.html>.

81. Mark Chenoweth, "The Supreme Court's NOT Top 10: October 2016 Cert Petitions The

consistently voted in line with pro-business and open market interests, despite his distaste for these less than exciting cases.<sup>82</sup> Although other current liberal justices, including Breyer and Ginsburg, tend to vote against business interests in 5-4 decisions, by and large, the Roberts Court is highly pro-business, with conservative justices very supportive of business and the liberal justices voting only moderately liberal in comparison to previous eras.<sup>83</sup>

A phenomenon that also works to the Chamber's advantage is that the number of cases reviewed and heard by the Supreme Court continues to decline.<sup>84</sup> In the October 2017 Term, the Court heard thirty-nine cases argued. In the Spring 2013 Term, the Court heard seventy-six cases as compared to the typical average of 150 cases heard per term in the 1980s.<sup>85</sup> As the Court's docket lightens and the Court continues to grant certiorari to business-related cases, the Chamber's voice is only amplified, contributing to its unprecedented success rate among its peers.<sup>86</sup> As evidenced by the combination of the Chamber's increased participation as an amicus since the founding of the NCLC, with those external factors beyond the Chamber's control, the Chamber's influence has significantly expanded since its formalization of its litigation efforts to advance its corporate partners' interests at the Supreme Court.

### Citations by the Court

Legal scholars and researchers contend that one of the best indicators of the effectiveness or actual influence of an amicus is by tracking those opinions in which the Court textually cites to the amicus's brief.<sup>87</sup> The data collected over the past three terms provides a snapshot of the Roberts Court's activity and serves as one of several metrics<sup>88</sup> which gauge the

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*Justices Should Have Granted,*" FORBES, (July 25, 2017), <https://www.forbes.com/sites/wlf/2017/07/25/the-supreme-courts-not-top-10-october-term-2016-cert-petitions-the-justices-should-have-granted/#295796fa2723>.

82. *Id.*

83. Epstein, *supra* note 78, at 1449.

84. Kendall, *supra* note 73.

85. *Supreme Court of the United States Granted & Noted List Cases for Argument in October Term 2017*, SUPREME COURT OF THE UNITED STATES (Nov. 8, 2017), <https://www.supremecourt.gov/grantednotedlist/17grantednotedlist>; *see also* Kendall, *supra* note 73.

86. Adam Liptak, *Corporations Find a Friend in the Supreme Court*, THE NEW YORK TIMES (May 4, 2013), [http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?hp&\\_r=0](http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?hp&_r=0); Oliver Roeder, *The Supreme Court's Caseload Is On Track To Be The Lightest In 70 Years*, FIVETHIRTYEIGHT (May 17, 2016 at 9:00 a.m.), <https://fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years/>.

87. Kelly J. Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Politics 33, 34-35 (Winter 2004).

88. *City of L.A. v. Patel*, 135 S. Ct. (2015); *City of Los Angeles v. Patel*, U.S. CHAMBER

impact and influence of the Chamber on the Court as an amicus. On one hand, the sheer number of amicus briefs filed by the Chamber illustrates its support of its corporate members on the judicial level. On the other hand, the Court's rulings demonstrate its position on the interests represented in the cases that are granted certiorari. Although it is easier to quantify the number of "influential" amicus briefs filed by the Chamber by identifying those cases for which the Court ruled in favor of or against the Chamber's purported interests, tracking those cases in which the Justices cite to, or better yet, quote the Chamber of Commerce in the opinion itself is a significantly more precise barometer.<sup>89</sup>

Of those cases decided on the merits during 2014-2016 Terms and for which the Chamber filed an amicus brief, the Chamber was cited, however, in only one case.<sup>90</sup> A relatively recent example of such a citation appears in the landmark political expenditures case, *Citizens United v. Federal Election Commission*.<sup>91</sup> In a rather rare instance, Justice Kennedy referenced the amicus brief filed by the Chamber, when discussing the chilling effect of political speech prohibitions on small businesses.<sup>92</sup> The Court cites to the Chamber's brief in two separate instances: first, for the proposition that most members (96%) of the Chamber are small businesses, and second, to support the argument that the Government did not claim that political expenditures made by these small businesses have corrupted the political process.<sup>93</sup> In *Citizens United*, the Court clearly was influenced by the Chamber's amicus brief, as evidenced by the explicit citations to the amicus brief in support of its decision to reverse the district court's judgment regarding the constitutionality of the 2 U.S.C. §441b restrictions on corporate independent expenditures.<sup>94</sup>

Again, the Chamber wielded its influence and the Court recognized the Chamber's position in the case of *City of Los Angeles v. Patel*, in which the Court rejected warrantless, suspicionless searches of business records.<sup>95</sup> Given the relative rarity in which the Court cites amicus briefs

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LITIGATION CENTER, <http://www.chamberlitigation.com/cases/city-los-angeles-v-patel> (last visited Oct. 16, 2017) (the Supreme Court cited the Chamber's amicus curiae brief in the 2015 case of *City of L.A. v. Patel*).

89. *Id.*

90. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2455 (2015).

91. *Citizens United v. FEC*, 558 U.S. 310, 354-57 (2010) (citing the Chamber of Commerce's amicus brief urging the Court preserve business interests under the standard of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)).

92. *Id.* at 354.

93. *Id.* at 354, 357.

94. *Id.* at 372.

95. *City of L.A. v. Patel*, 135 S. Ct. 2443, 2455 (2015); *City of Los Angeles v. Patel*, U.S. CHAMBER LITIGATION CENTER, <http://www.chamberlitigation.com/cases/city-los-angeles-v-patel> (last visited Oct. 16, 2017).

in its opinions, the Court's citation calls into question the correlation of amicus filings and the "success" of the amici based on the Court's ruling. For instance, Justice Sotomayor relies on the Chamber's brief filed on behalf of Google, Inc. to explain that the exception to normal Fourth Amendment rules for a "pervasively regulated" business is narrow.<sup>96</sup> Although *Patel* is a paradigm in which the influence of the Chamber is clearly reflected in the Court's opinion, it is not only possible, but also necessary to look to other indicators of the degree of influence of the Chamber's amicus briefs on the Court.

### Business Interests of the Court and the Chamber

A third component to consider when examining the Chamber's activity in the Court relates to specific business interests advanced by the Chamber in its amicus briefs. The data collected for this Comment illustrates the sheer number of cases in which the Chamber has participated at the merits filing stage, in addition to the business interests that resonate most with the Chamber, and in turn, with the Court.<sup>97</sup>

The business interests advanced by the Chamber fall under a broad array of interests, ranging from class actions, to tort reform, to arbitration, and to bankruptcy.<sup>98</sup> From the Chamber's perspective, the issues of administrative law, jurisdiction and procedure, employment, and class actions have been of paramount importance in recent years.<sup>99</sup> Not all or even most of the cases for which the Chamber participates in the filing of an amicus brief does the Court grant certiorari or decide the case on the merits. Of the fifty-five cases reviewed and decided by the Supreme Court since the 2014 Term, and for which the Chamber has filed an amicus brief, the Court has ruled in favor of the Chamber in thirty-seven cases – a success rate of 67%. This success rate is indicative of the Roberts Court's receptivity to business interests and proclivity to align with corporate interests advocated by the Chamber.

Since the 2014 Term, administrative law stands as the most common business interest among the cases on which the Supreme Court has granted certiorari and decided the case on the merits, as reflected in Table 1. Administrative law, as a category, encompasses those cases that

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96. *City of L.A. v. Patel*, 135 S. Ct. 2443, 2455 (2015); *City of Los Angeles v. Patel*, U.S. CHAMBER LITIGATION CENTER, <http://www.chamberlitigation.com/cases/city-los-angeles-v-patel> (last visited Oct. 21, 2017).

97. Betsy Emmert, *The Corporate Clique in the Courtroom: A Jurisprudential Study of The Success and Influence of Amicus Curiae Briefs Filed by the U.S. Chamber of Commerce* (Oct. 1, 2017) (unpublished research, University of Cincinnati) (on file with author).

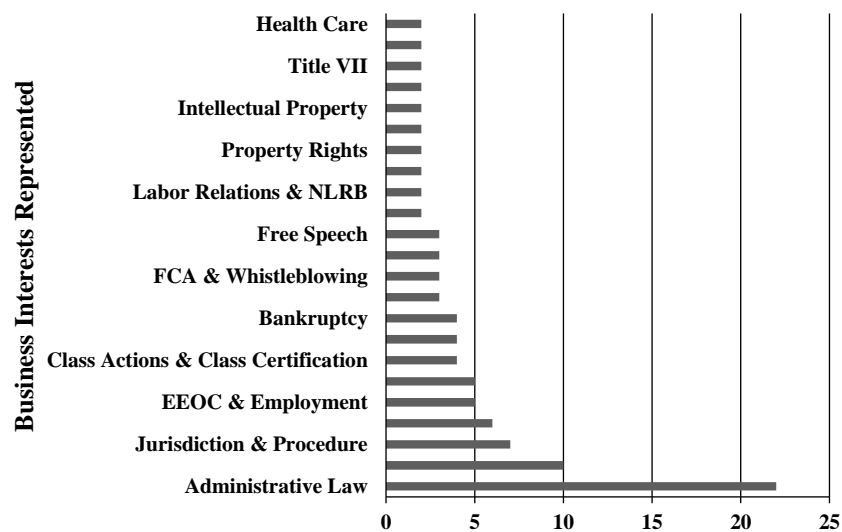
98. *Id.*

99. *Id.*

involve disputes such as SEC disgorgement claims,<sup>100</sup> violations of the Federal Vacancies Reform Act,<sup>101</sup> and questions of public disclosure under the Bipartisan Campaign Act of 2002.<sup>102</sup> Of the twenty-two cases relating to administrative law, thirteen of those cases resulted in “successes” for the Chamber and its corporate partners.<sup>103</sup>

Following the business interest of administrative law, the second-most common business interest for which the Supreme Court has granted certiorari and delivered a decision is related to benefits and compensation.<sup>104</sup> Within this category, both interests relating to Equal Employment Opportunity Commission (EEOC) and employment, and the Employee Retirement Income Security Act of 1974 (ERISA) were granted certiorari and decided on the merits by the Supreme Court. Of the cases related to the benefits and compensation, EECO and employment, and ERISA categories, the Court ruled in favor of the corporate interests in eleven out of the twenty cases for which the Chamber filed a brief the Court delivered a decision on the merits.

**Table 1: Snapshot of Related Business Interests in Cases Decided on the Merits and for which the Chamber of Commerce Filed an Amicus Brief (2014-2017 Terms)**



**Number of Cases Decided on the Merits by the Supreme Court from the 2014-2017 Terms**

100. See *Kokesch v. SEC*, 137 S. Ct. 1635 (2017).

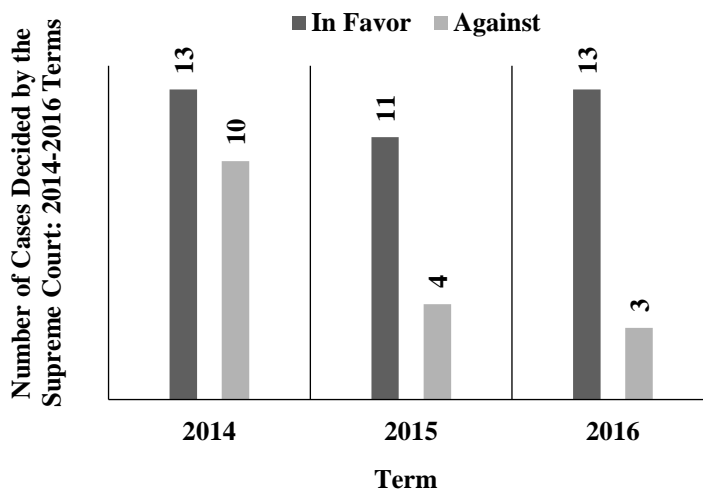
101. See *NLRB v. SW Gen., Inc.*, 137 S. Ct. 267 (2016).

102. See *Indep. Inst. v. FEC*, 137 S. Ct. 267 (2016).

103. Emmert, *supra* note 97.

104. *Id.*



**Table 2: Chamber of Commerce Success by Term**

Of the thirty-seven cases in which the Chamber has prevailed in advocating for a business interest during the 2014-2016 Terms, nearly half (seventeen) of those briefs have been jointly filed with one or more other interest groups. Some of the Chamber’s most successful amici include the National Federation of Independent Business (NFIB), the Business Roundtable, and the American Tort Reform Association. Nevertheless, the relatively equal distribution of success between those briefs filed separately and jointly with other business-related interest groups does not conclusively indicate that one approach is necessarily more influential on the Court. Perhaps filing jointly with other related interest groups is a merely an economical, efficient, and impactful alternative manner to petition the Court.

Moreover, the Chamber works closely with outside counsel on nearly all its amicus briefs. Some of the nation’s most prominent firms and lawyers serve as co-counsel with the NCLC when crafting these amicus briefs, such as Mayer Brown LLP, Jones Day, and Consovoy McCarthy Park PLLC. Moreover, the data reveals that during the 2014-2016 Terms, the Chamber prevailed at an average annual rate of 70% during the 2014 to 2016 terms, consistent with its performance since Chief Justice Roberts took the bench in 2005.<sup>105</sup> As Table 2 demonstrates, since 2014, business interests that the Chamber “champions” tend to triumph in Court more often than fail when the Chamber files amicus briefs.

However, not all business interests for which the Chamber advocates

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105. Kendall, *supra* note 73.

appear to fare equally as well as others. Although the data collected between the 2014 and 2016 Terms does not reflect a long-spanning trend, business interests including health care, tax litigation, and jurisdiction and procedure have traditionally been disfavored by the Court in recent years. Of the seventeen cases in which the Court has ruled against the Chamber, six of those decisions have either been 9 to 0 or 8 to 1 decisions and only three of the decisions have been 5 to 4 decisions. Notably, the Court has delivered adverse decisions to the Chamber's interests in 9 to 0 in cases relating to employment-related issues, primarily pertaining to Benefits and Compensation.<sup>106</sup> The issues on which the Court splits generally relate to administrative law and government litigation, as opposed to issues relating to health care wherein the Court has recently ruled against the interests advanced by the Chamber.

### *The Impact of a "Business-Friendly" Court*

The Chamber is, indeed, a "friend of the Court," as evidenced by its recent and continuing success in Supreme Court litigation. However, the current and future impact of a pro-business Court is far from a model of clarity.<sup>107</sup> Inherent danger exists when attributing the Chamber's success only to the conservative tilt of the Roberts Court. The presumption that the Court reflexively rules in favor of the Chamber is too simplistic given the multitude of other factors that influence the Justices. First, the politically neutral presence of the NCLC counters the argument that the "conservative" Chamber grabs the attention of the conservative Roberts Court. The NCLC manages to present its business positions in a facially neutral manner, vis-à-vis its virtual presence and in its amicus filings.<sup>108</sup> Moreover, the litigation strategies utilized by the Chamber indicate that the NCLC is keen to participate as amicus in cases that are likely to prevail in court, while avoiding participating in those cases that the Chamber perceives as less likely to succeed on the merits.<sup>109</sup> Second, various external factors, in addition to amicus briefs filed on behalf of corporate litigants, likely influence the Court. The salience of the Chamber's briefs is likely diluted by pressure from political parties, media outlets, and case precedent. Therefore, this Comment suggests that perhaps, the "corporate clique" between the Chamber and the Court is less a product of the Chamber's amicus activity, and rather a product of external dynamics.

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106. Emmert, *supra* note 97.

107. Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. Times (Dec. 18, 2010), <http://www.nytimes.com/2010/12/19/us/19roberts.html?pagewanted=all>.

108. *Who We Are*, *supra* note 21.

109. Kearney, *supra* note 5 at 750.

### The Current Impact

The Court's decisions during the past three terms cumulatively reflect the pro-business orientation of the Roberts Court, as echoed by political science scholars and judicial reporters alike.<sup>110</sup> However, when examining the data collected over this short period of time and comparing it to the broader trends of amicus activity by the Chamber over the past decade, the direct impact of the Chamber on the Court is less dramatic than some scholars and reporters suggest.<sup>111</sup> The sparse number of citations to the Chamber's briefs in the Court's opinions, the politically neutral positions taken by the NCLC, and the lack of first-hand acknowledgement by the Justices and/or their clerks of the influence of amicus briefs implies that the Chamber's actual influence on the Court cannot be clearly confirmed or denied.

The Chamber is rarely cited by the Court, in comparison to the number of briefs filed by the Chamber in support of various business interests.<sup>112</sup> While scholars opine on the rise of judicial activity by the Chamber and the Roberts Court's apparent favoritism towards corporations, these same scholars fail to provide substantial research or commentary on the frequency of the Court's direct citation to Chamber briefs – a better litmus test for the *actual* influence of the Chamber of the Justices.<sup>113</sup> As illustrated in Part A of the Discussion, the Court infrequently cites to amicus briefs, and the Chamber's briefs are no exception to this phenomenon. Rather, it may be more accurate to reframe the tendency of the Court to rule in favor of the Chamber's business interests as a reflection of the Justices' broadly shared vision that litigation is not the ideal mode of regulation.<sup>114</sup>

Another indicator of the Court's diluted impact on the Court relates to the NCLC's politically neutral stance. As an affiliate of the Chamber, the NCLC refrains from blatantly advocating for "conservative" interests in front of the Court. The former Executive Vice-President of the NCLC commented that the Court relies on briefs filed by the Chamber because it is a "credible voice for business," as opposed to being a purely political affiliated proponent.<sup>115</sup> Unlike the Chamber's other affiliate, Institute for Legal Reform (ILR), which supports civil justice reform, the NCLC website remains politically neutral and transparent in its success rates at

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110. Chandler, *supra* note 49; Franklin, *supra* note 32.

111. Liptak, *supra* note 86.

112. Emmert, *supra* note 97.

113. Kendall, *supra* note 73. This CAA article provides commentary on the Roberts' Court's pro-business orientation during the 2012-2013 terms. It does not, however, discuss cases that cite amicus briefs filed by the Chamber as an indicator of influence on the Roberts' Court.

114. Franklin, *supra* note 32, at 1054-55.

115. Liptak, *supra* note 107.

every level of litigation.<sup>116</sup> The ILR advocates for many of the same issues as the Chamber, but unlike the Chamber, the ILR expressly claims to “shine[] a light on what is wrong in the legal system.”<sup>117</sup> In stark contrast, the NCLC website refrains from political dialogue, and instead provides readers with a database of case information for nearly every amicus brief filed by the Chamber, with information regarding the disposition of the case, the court from which the case was appealed, and a synopsis of the case’s main issues. Although it is difficult to determine the Court’s perception of the Chamber, it is possible that the Court views the Chamber and the NCLC arm as less politically-motivated, focused primarily on promoting free enterprise and deregulation. By simple comparison, the NCLC appears more neutral in terms of its goals, motivations, and broad range of business issues, as compared to the relatively more specific issues for which the ILR zealously advocates.<sup>118</sup>

As reflected by the data collected for this study, the true impact of the amicus briefs filed by the Chamber is subject to conjecture. Aside from rare comments from the Justices themselves or from their clerks, it is difficult to understand the impact of the Chamber’s amicus briefs on the Court’s determinations.<sup>119</sup> While the data collected for the purposes of this Comment, and the data collected by other judicial scholars suggest that a relationship exists between the frequency with which the Chamber files amicus briefs at the Supreme Court level and the orientation of the Roberts Court in ruling in favor of the Chamber’s purported interests, correlation between the Chamber’s amicus briefs and the Court’s pro-business decisions does not imply causation, or vice versa.<sup>120</sup>

Without additional insight – such as personal testimony by the Justices or by their clerks, or textual citation to the Chamber’s briefs in the Court’s opinion – a truly bona fide relationship between the Chamber’s amicus activity and the Court’s response cannot be definitively established. Ancillary factors also must be considered which may skew the public’s perception of the impact of the Chamber’s briefs, including the political make-up of the Justices, as well as the shrinking docket of the Court.<sup>121</sup>

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116. *About ILR*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, <http://www.instituteforlegalreform.com/about-ilr> (last visited Oct. 22, 2017).

117. *Issues*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, <http://www.instituteforlegalreform.com/issues> (last visited Oct. 22, 2017). The ILR conducts research and advocates for issues, including class actions, False Claims Act (FCA), lawsuit lending, over-enforcement, and third party litigation funding (TPLF). The ILR, however, targets reducing “meritless” lawsuits. <http://www.instituteforlegalreform.com/issues> (last visited Oct. 22, 2017). The ILR conducts research and advocates for issues, including class actions, False Claims Act (FCA), lawsuit lending, over-enforcement, and third-party litigation funding (TPLF). The ILR, however, targets reducing “meritless” lawsuits.

118. *Id.*

119. Souter, *supra* note 14.

120. Epstein, *supra* note 78, at 1433.

121. Chandler, *supra* note 49.

Legal scholars agree that it is nearly impossible to gauge the true salience of the Justices' pro-business orientation from the outcome of the cases alone.<sup>122</sup> However, it is fairly unlikely that business interests are of the most salience or importance to the Justices, who come largely from public sector or academic backgrounds, as opposed to in-house corporate counsel positions or private practice.<sup>123</sup>

**Table 3: The Position Supported by the Chamber in "Successful" Cases (2014-2016 Terms)**

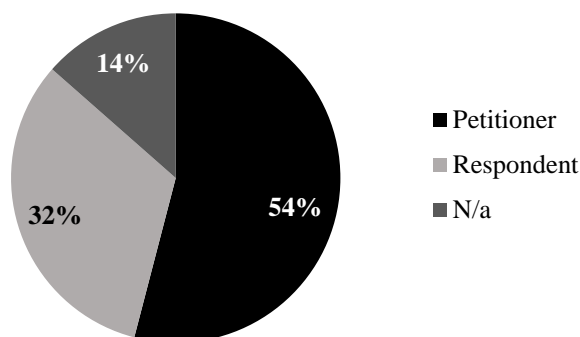


Table 3 suggests that other factors, such as the litigant's position as petitioner or respondent possibly contributes to the outcome of the cases in which the Chamber files amicus briefs. In 54% of the cases in which the Chamber filed a brief and the Court ruled in favor of the Chamber's interests, the Chamber supported the petitioner. Although the data set looks specifically at data from the past several years, it is more than likely that the Chamber, like other interest groups, chooses to file amicus briefs for only those cases which it believes that the litigant(s) has or have a relatively high likelihood of winning. The recent trend in the Chamber's success with petitioners may not indicate a strong correlation between the litigant's position, but rather supports the notion that the Chamber primarily advocates for corporate litigants with the financial means and access to sophisticated legal aid to argue before the Supreme Court.

It is naïve to assume that the Chamber files briefs for every business-related case that comes before the Supreme Court. Even though the NCLC does not hold a crystal ball to predict the outcome of every case for which it files an amicus brief, the seasoned attorneys at the NCLC, as well as its co-counsel, understand with which business interests and corporate litigants the Chamber will likely have success serving as a "friend of the Court."<sup>124</sup>

122. Franklin, *supra* note 32, at 1055-56.

123. *Id.*

124. Liptak, *supra* note 107 (quoting the now-former Executive Vice-President of the NCLC in

### External Factors That Influence the Court

Ultimately, more research must be conducted to evaluate the extent to which the Chamber's amicus briefs impact the Court. Legal scholars and Court observers are swift to attribute the Court's pro-business orientation to the Chamber's increased amicus participation. However, this correlation must be observed with caution for several reasons. First, the apparent increase in the Chamber's amicus activity is likely a product of the overall trend in increased amicus filings by interest groups.<sup>125</sup> Second, the Court is likely influenced, to an equal or greater degree, to vote in line with business interests because of external or internal pressures beyond that of the Chamber's amicus briefs. Third, the current make-up of the Court suggests that political pressure from the Justices' appointed parties also plays a significant role in how the Justices vote on business issues, with Republican-affiliated Justices voting overwhelmingly in favor of business interests.<sup>126</sup> As a result, the true influence and success of the Chamber's amicus briefs must be examined with heightened caution to avoid placing undue weight on the Chamber's advocacy efforts.

By examining the historical activity and "success" of the Chamber in Court, one can identify factors that may influence the Court's pro-business orientation in recent years to forecast the future judicial climate. Since 1981, during the era of the Burger Court, the Chamber's success rate at the Supreme Court level lagged behind its loss rate until the era of the Rehnquist Court. During this period, the success level increased from 43% to 56%.<sup>127</sup> In the early days of the Roberts Court, specifically between 2005 and 2013, the success rate of the Chamber climbed to nearly 69%.<sup>128</sup> While this 13% increase in the Chamber's success rate in Court for its litigious "friends" may appear dramatic at first blush, it is possible that other external factors beyond the Chamber's presupposed persuasive briefs played a defining role in the Court's dispositions.

Even if the "amicus machine"<sup>129</sup> currently trends as a popular tool among litigants to effectively petition the Court, it is undeniable that both internal and external factors manage to influence the Justices' final decisions. Such factors may include, but are not limited to, the Justices' personal beliefs, time limitations, other branches of government, social

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stating that "[t]here has been a return on investment," in terms of the Chamber's success in persuading the Roberts [C]ourt to take its cases).

125. Kearney, *supra* note 5, at 751.

126. Nick Wells, *The US Supreme Court is more friendly to businesses than any time since World War II*, CNBC: The Big Crunch, (March 1, 2017 at 3:10 p.m.), <https://www.cnbc.com/2017/03/01/supreme-court-very-business-friendly-data-show.html>.

127. Kendall, *supra* note 73.

128. *Id.*

129. Larsen, *supra* note 6, at 1906.

values, public opinions, and judicial philosophy.<sup>130</sup> Some legal scholars tend to measure the effectiveness of amicus briefs in a vacuum, but rather they must be considered in tandem with these other elements to prevent the inflation of any single factor's influence on the Court's rulings.<sup>131</sup> Thus, the recognition of the interplay of external influences on the Court reframes and refracts the recent data relating to the Chamber's frequent amicus activity and the Court's partiality toward corporate interests.

What is less clear is whether the current favorable climate for the Chamber, as an effective "friend of the Court," is a singular product of the Chamber's amicus activity, an alternate factor, or some combination of factors that influence the Court.<sup>132</sup> Although some studies<sup>133</sup> suggest that amicus participation is related to success at the certiorari and merits stage, this correlation does not indicate causation with respect to the Chamber's participation and success in Supreme Court litigation. As reflected in the data<sup>134</sup> examined for the purposes of this Comment, as well as by information collected to study the impact of amicus briefs, at large, the actual effect of amicus briefs were likely less impactful than amicus-filing interest groups would otherwise like to suggest. As evidenced by the publication of amicus activity by the NCLC on its website, interest groups, like the Chamber, want to communicate to their members and to their partners that they are actively advocating for their interests.<sup>135</sup> These interest groups are motivated, either in part or in whole, by self-serving interests to appear as proactive advocates for their dues-paying members. By being an "active" amicus, interest groups give the appearance of being bulldogs in the courtroom, representing and fighting for their members' interests. While the Chamber and other interest groups are propelled by unselfish motivations for their members, it is critical to the groups' public image and persona to frequently participate in high-profile and relevant litigation.

As discussed throughout this Comment, the Justices sitting on the Supreme Court are more likely to vote in favor of business interests than any other Court since World War II.<sup>136</sup> Particularly with President Trump's appointment of Justice Neil Gorsuch, businesses are likely to

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130. See Larsen, *supra* note 6; see also Rachel Horne, *Factors that Influence Supreme Court Decisions*, INFOGRAM, <https://infogram.com/factors-that-influence-supreme-court-decisions-1gdx3pwj86qrmgr> (last visited Oct. 22, 2017).

131. See Feldman, *supra* note 2.

132. Kearney, *supra* note 5, at 830.

133. Franklin, *supra* note 32, at 1026-27.

134. See Emmert, *supra* note 97 (data collected by and on file with author indicates that during the 2014 to 2016 Terms, the Roberts Court ruled in favor of corporate interests when the NCLC filed amicus briefs on behalf of the Chamber).

135. *Who We Are*, *supra* note 21.

136. Wells, *supra* note 126.

continue to prevail over regulatory interests.<sup>137</sup> Gorsuch falls on the conservative end of the Court's spectrum, resembling many of the same ideologies of Justice Alito, who also voted in favor of corporate interests.<sup>138</sup> While Republican-appointed Justices are likely to vote in favor of corporate interests, Democratic appointees now are, surprisingly, inclined to vote in line with business interests more frequently than many Republican appointed Justices who previously sat on the Bench.<sup>139</sup> Also, research indicates that over 73% of high-profile corporate cases that have made national headlines since 2005 were decided in favor of businesses' interests.<sup>140</sup> As evidenced by the Roberts Court's voting records, political pressure, as well as pressure from the media and the public's opinion are significant factors that influence the Justices' decisions. Without additional evidence of direct linkage between the Chamber's filed amicus briefs and the Court's voting pattern in favor of business interests, the causal chain between the Chamber's amicus activity and its influence on the Court cannot be affirmatively established.

#### CONCLUSION

While the Chamber has, and continues to position itself as a "friend of the Court," it is possible that the reverse is true - rather, that the Roberts Court is a "friend of the Chamber." The Chamber is an active amicus, filing more briefs than most interest groups, and in turn, the Court has ruled in favor of the Chamber's corporate interests. However, there are numerous other factors that contribute to the Court's decision-making processes, in addition to its consideration of amicus briefs.

It is possible that the Roberts Court can be accurately described as a "friend of the Chamber," because the current Justices are likely to embrace business-friendly judgments due to of their political affiliation, or because of pressure from the media or public opinion. Although amicus briefs filed by the Chamber and other pro-business interest groups may impact the Court's decisions, Justices and their clerks admit that amicus briefs are often overlooked or disregarded during the voting process.<sup>141</sup> In light of this revelation, the Chamber's seeming "success" may in actuality be incidental, and not directly causal in nature.

The relationship between the Court and the Chamber can be likened to that of a celebrity or a public figure advocating for social change. While

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137. *Id.*

138. *Id.*

139. *Id.* (citing data from *Preliminary Data Updating Lee Epstein*, William M. Landes, Richard A. Posner, "How Business Fairs in the Supreme Court," 97 *Minn. L. Rev.* 1431 (2013)).

140. *Id.*

141. *See* Kearney, *supra* note 5, at 745-46.



a celebrity seeks to influence Congress or a similar administrative agency to expand healthcare access or peacekeeping efforts, this social push is also a means by which the celebrity can increase his or her own publicity. It is also unlikely that the celebrity's social push, independently influenced or motivated Congress or an administrative agency to legislate or implement change in a certain way.

Likewise, the Chamber, like a celebrity or public figure seeking to influence change, uses its resources and public clout to solicit support for its causes. While the Chamber is driven, at least in-part, by its mission and purpose<sup>142</sup> to promote the needs of business and industry, the Chamber, like any interest group, seeks to outwardly appear as an active Capitol Hill advocate for its dues-paying members. Simply because the Chamber is an active amicus does not necessarily imply that the Justices or their clerks are influenced by or, for that matter, read the Chamber's amicus briefs.

Legal scholars and spectators obfuscate the correlation and causation between the Chamber's amicus briefs and the Roberts Court's seeming favoritism of corporate interests. The extent to which the Chamber's briefs influence the decisions handed down by the Court cannot be easily or objectively measured.<sup>143</sup>

Instead, this Comment suggests that empirical studies of the Chamber's influence are inconclusive because they only consider the ultimate outcome of the cases for which the NCLC files an amicus brief. Rather, the actual influence of the Chamber on the Court must be examined from multiple perspectives, including the political pressures from the parties appointing the Justices to the Bench, as well as the nation's social climate and citations to the Chamber's briefs in the Court's opinions. Nevertheless, the findings of this Comment and future empirical research will contribute to the jurisprudential understanding of the pro-business orientation that has come to characterize the era of the Roberts Court, and the ostensible "corporate clique."

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142. *About the U.S. Chamber*, U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/about-us/about-the-us-chamber> (last visited Nov. 18, 2017).

143. *See* Feldman, *supra* note 2.