



# Friendship

AMICUS BRIEFS IN THE SUPREME COURT

David Gossett

AS READERS OF THE Green Bag probably know, a minor debate has been raging in the law reviews and the courts over the utility of amicus, or friend-of-the-court, briefs, and the criteria courts should use in determining whether to accept such briefs. In this brief article I discuss a less important issue, but one that has nonetheless recently piqued the curiosity of a number of Supreme Court watchers (including me): to wit, the appropriate way to caption such briefs.

The issue emerged last year, when Professor Leandra Lederman submitted a friend-of-the-court brief in the consolidated tax cases of *Ballard v. Commissioner* and *Estate of Kanter v. Commissioner*, 125 S. Ct. 1270 (2005).<sup>1</sup> Professor Lederman captioned her submission “Brief of *Amica Curiae* Professor Leandra Lederman in Support of Petitioners.”<sup>2</sup> Eagle-eyed readers were set abuzz by the absolutely-correct-but-almost-never-

before-seen use of the word *amica* in that title, and the broader questions of labeling that it suggested.

Like all romance languages, Latin is gendered. Hence, the term for a male friend, “*amicus*,” differs from that for a female friend, which is “*amica*.” Similarly, the term for a set of male friends is “*amici*,” whereas the term for a set of female friends is “*amicae*.” So Professor Lederman was right to file a brief as “*amica curiae*,” and two women would file a brief as “*amicae curiae*.”

But Professor Lederman’s choice of title raises other questions, too. For example, *where* in the title of a brief should the term “*amic[] curiae*” appear? Is the word “*curiae*” necessary? And what should one do when the brief is being filed on behalf of (a) an organization, or (b) a group of individuals comprising both men and women? Though there is little consistency in practice, the correct answers to most of these questions

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- 1 Although it is irrelevant to the issue discussed in this article, I should disclose that I was involved in briefing these cases, and that my partner Steve Shapiro successfully argued them on behalf of the petitioners.
- 2 The brief is available at [www.lawprofessorblogs.com/taxprof/linkdocs/ledermanbrief.pdf](http://www.lawprofessorblogs.com/taxprof/linkdocs/ledermanbrief.pdf).

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

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CLAUDE M. BALLARD, ET UX.,

*Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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ESTATE OF BURTON W. KANTER, ET AL.,

*Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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**On Writ Of Certiorari To The  
United States Courts Of Appeals  
For The Seventh And Eleventh Circuits**

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**BRIEF OF AMICA CURIAE  
PROFESSOR LEANDRA LEDERMAN  
IN SUPPORT OF PETITIONERS**

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become fairly obvious once one analyzes them.

In particular, the phrase “amic[] curiae” is normally a compound *noun*. Although most of the people with whom I consulted believe that it can also be used as a compound *adjective*, the consensus is that it is probably better not to do so – and that if one is going to do so one should at minimum place it before the noun that it modifies rather than after it. Thus, “Brief Amicus Curiae of Organization So-And-So in Support of Petitioner” is out, “Amicus Curiae Brief of Organization So-And-So In Support of Petitioner” is grammatically correct but linguistically gauche, and “Brief of Organization So-And-So as Amicus Curiae in Support of Petitioner” or “Brief of Amicus Curiae Organization So-And-So in Support of Petitioner” are both grammatically and stylistically acceptable. I personally prefer the formulation “Brief of Organization So-And-So as Amicus Curiae in Support of Petitioner,” but that’s just me.

Similarly, the word “curiae” means “of the court,” so the decision whether it is necessary depends largely on the level to which one has been infected by legal realism. To the extent an *amicus* brief is supposed to be from a neutral third party – a friend of the court – it would seem inappropriate to drop the word “curiae.” On the other hand, we all know that with rare exceptions *amici* file specifically to

support one side or the other, so perhaps this legal fiction should be eliminated.<sup>3</sup> If so, an appropriate caption would be “Brief of Organization So-And-So as Amicus in Support of Petitioner.”

A couple of harder questions remain, however. First, in English we don’t tend to assign genders to inanimate objects; consequently, what is the appropriate term to use when an *amicus* is an organization? Traditionally governmental entities and private organizations file briefs “as *amicus curiae*,” but why shouldn’t such organizations be considered female? “Brief of the U.S. Chamber of Commerce as *Amica Curiae* in Support of Petitioner” has a certain ring to it. Second, although it is clear according to the rules of Latin grammar that a group containing men and women takes the masculine plural – *amici* rather than *amicae* – this is plainly a sexist relic of the past. In this day and age, should the choice of term for mixed-gender groups be determined by the roll of a die? These issues, I fear, have no obvious answers. It is worth noting, however, that using anything but the masculine singular for an organization and the masculine plural for any group that is not composed solely of women will strike most readers as more than a tad affected.

But this all raises a deeper question: Why are we playing around with Latin grammar in the first place? Perhaps the best solution would be for us all just to be “friend[s]”... *JB*

3 This in no way means that such briefs are either inappropriate or unhelpful; I’m a big fan of *amicus* briefs. Their utility, however, is beyond the scope of this article. For an extensive discussion of that topic, I’d point the reader to Kearney & Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PENN. L. REV. 743 (2000), as well as to the brief summary of that article in *Ex Ante*, 3 GREEN BAG 2D 243 (2000). The premier source for the answer to other questions about *amicus* briefs in the Supreme Court is STERN, GRESSMAN, SHAPIRO & GELLER, *SUPREME COURT PRACTICE* (8th ed. 2002), which discusses both cert-stage *amicus* briefs (at 464–468) and merits-stage *amicus* briefs (at 657–666).