AMICUS BRIEFS REVISITED

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In our article on amicus briefs in the first volume of the Appellate Advocacy Symposium, we discussed the importance of amicus briefs and what makes them useful to courts.[1] We explained that, although some amicus briefs are merely "me too" briefs and, as such, add little insight, others can "be very valuable in highlighting for the Court that people or organizations in the State other than the litigants themselves view the case as one requiring a decision . . . ."[2]

However, it is rightly said that an ounce of practice is worth a pound of precept. With that in mind, we offer this short reflection on an actual amicus brief filed published in the United States Supreme Court cases *Grutter v. Bollinger*[3] and *Gratz v. Bollinger*[4] after our article was published. We believe the amicus brief provided by high-ranking individuals of the military[5] well exemplifies what an amicus brief can and should be.

I. THE CASE

Grutter involves the University of Michigan Law School's admissions policy and considers "race in the context of a competi-

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1. Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?* 32 Stetson L. Rev. 269 (2003).

2. *Id*. at 307–308 ("An amicus party may be able to articulate a case's public policy implications in a way that the main litigants may not. Without the input of amicus, important cases could be turned aside.").

3. 123 S. Ct. 2325 (2003).

4. 123 S. Ct. 2411 (2003).

5. Br. of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respt. at 1, *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) and *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) [hereinafter Amici Br. of Mil.].

tive review of the ways that each applicant will contribute to the overall diversity of the student body."[6] *Gratz* considers the constitutionality of the University of Michigan's undergraduate admissions policies, which award twenty points for certain minorities on a 150-point scale.[7] *Grutter* and *Gratz*, both argued on April 1, 2003 and both decided on June 23, 2003, are the first of such cases to be heard by the Court since its landmark decision in *Regents of the University of California v. Bakke*.[8] *Bakke* was a splintered decision that each side in the *Grutter* case and the *Gratz* case used differently to focus on the race-conscious admissions policies at issue. As a result, *Grutter* and *Gratz* "could be the [C]ourt's most significant affirmative-action decision in a quarter-century."[9]

Lawyers representing the University of Michigan argued that a student body requires diversity to prepare the Nation's future leaders for the multiethnic society found in modern-day America, and that considering race in the context of "cautious, limited, and narrowly tailored" admissions policies to achieve "compelling educational goal[s]" is not problematic under the United States Constitution.[10] Lawyers representing the white applicants who were denied admission to the University of Michigan argued that the policies were nothing more than unconstitutional quotas.[11] The solicitor general, arguing for the United States in support of the applicants, agreed.[12]

Because of the case's importance, more than 100 amicus briefs were filed to support each side.[13] For instance, as reporter Linda Greenhouse explained, the amicus briefs in support of the University of Michigan represented "a very broad swath of, you might say, establishment America."[14] Also, the mere fact that

6. Br. of Respt. at 12, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).
7. *Gratz*, 123 S. Ct. at 2419.
8. 438 U.S. 265 (1978).
9. James M. O'Neill, *High Court Hears Diversity Debate*, Phila. Inquirer A01 (Apr. 2, 2003).
10. Br. of Respt., *supra* n. 6, at 12.
11. Oral Arg. Transcr. at 14, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).
12. *Id*. at 23.
13. Brendan I. Koerner, *Do Judges Read Amicus Curiae Briefs?* http://slate.msn.com/id/2081006 (posted Apr. 1, 2003).
14. *Washington Week*, "Analysis: Status of University of Michigan Affirmative Action Case in the Supreme Court" (WETA Feb. 21, 2003) (TV broadcast, transcr. available at 2003 WL 16106362).

amicus briefs were the subject of *Washington Week* speaks for itself.

The Times of London also discussed the number of amicus briefs filed in this case, reporting that "[the University of] Michigan's position was endorsed in 78 friend-of-the-court briefs filed individually or jointly by nearly 100 large corporations."[15] Numerous amicus briefs were filed on behalf of the petitioners, including a joint brief by the State of Florida and Governor John Ellis "Jeb" Bush.[16] Some amicus briefs were filed in support of neither party.[17]

II. THE SUBJECT AMICUS BRIEF

However, without question a powerful influence in the cases was the single amicus brief of "the military," as it came to be informally called. The military's amicus brief was filed in support of the University of Michigan's admissions policy.[18] The amici included more than twenty "former high-ranking officers and civilian leaders of the Army, Navy, Air Force, and Marine Corps, including former military-academy superintendents, [s]ecretaries of [d]efense, and present and former members of the U.S. Senate."[19] They were interested in the case "because its outcome could affect the diversity of our [N]ation's officer corps and, in turn, the military's ability to fulfill its missions."[20]

This particular brief gained considerable media attention before the case's oral argument. For instance, a reporter for *Weekend All Things Considered* interviewed retired Lieutenant General Julius Becton, one of the signatories of the amicus brief:

> REPORTER: General, this is an interesting thing to pursue for me because I think about large numbers of Americans who proba-

15. James D. Zirin, *U.S. Students Challenge Affirmative Action*, Times of London 1 (Apr. 15, 2003).

16. Br. of the St. of Fla. & the Hon. John Ellis "Jeb" Bush, Governor, as Amici Curiae in Support of Petr., *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

17. *E.g.* Br. of EXXON Mobil Corp. as Amicus Curiae in Support of Neither Party, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (recognizing that the University of Michigan's admissions policies may not be lawful, but requesting the Court not to broadly remove race considerations from admissions decisions).

18. Amici Br. of Mil., *supra* n. 5, at 5.

19. *Id*. at 1.

20. *Id*.

> bly absolutely support what you've done in your career and would think of themselves as very strong supporters of the military, but would be inclined to see affirmative action as political meddling, as distracting the military from its far more essential goals, in their view.
>
> Lt. Gen. BECTON: Those who are prone to take that view, they ought to talk to *someone who's been a leader in battle*. You have the list of people who are signed up with me, I think, in front of you.
>
> . . .
>
> Every senior officer who's on there *has been in battle, has been battle-tested*. And every senior member—I'll be one to wager—would recognize this is a combat multiplier. It brings about unit cohesiveness. It takes away the "we–they" problems that we had 30 and 40 years ago and it makes the force to be one.[21]

Moreover, according to *The Miami Herald*'s report about the military's amicus brief,

> A month after the Bush administration filed a brief with the Supreme Court opposing affirmative action policies at the University of Michigan, more than 300 organizations announced that they would file briefs supporting the [U]niversity by today's deadline. The groups represented academia, major corporations, labor unions and nearly 30 of the [N]ation's top former military and civilian defense officials.
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> . . .
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> "Nothing that the [P]resident has done or said speaks to the cohesiveness of the fighting force . . . . It is absolutely critical

21. *Weekend All Things Considered*, "Analysis: Retired Members of U.S. Military and a Number of Companies File Friend of the Court Briefs in Supreme Court Case Regarding the University of Michigan Law School's Admission Process" 2–3 (Natl. Pub. Radio Feb. 23, 2003) (radio broadcast, transcript available at 2003 WL 7253028) (emphasis added).

> to have African-American leadership to work with," said Joe Reeder, a former [Under Secretary] of the Army.[22]

III. THE ORAL ARGUMENT

More important than its media attention, though, the amicus brief caught the Supreme Court's attention. From the outset of the argument, the Court questioned counsel for the petitioners and the solicitor general about the positions set forth in the amicus brief.[23] The Supreme Court Justices seemed unpersuaded by the suggestion that the Court should discount the brief because it was merely filed by certain individuals, rather than by the service academies themselves.[24] The Justices likewise appeared to brush aside the petitioners' argument that there was inadequate record in the case to show the current nature of the admissions process at some of the service academies.[25]

The Justices closely questioned the solicitor general about the arguments presented in the amicus brief. The Justices questioned whether the service academies' race-preference programs in admissions were unconstitutional.[26] The Justices also focused on the service academies' recruiting programs and whether they could succeed in accomplishing diversity in admissions without "a racial objective."[27]

Despite the media's focus on the amicus brief before the oral argument, it appears to the Authors that neither the petitioners' counsel nor the solicitor general were well prepared to deal with the issues raised in the amicus brief. The solicitor general was in an especially awkward position because he had to challenge the same type of race-conscious admissions policies that service academies regularly use and must use due to national security.[28] Although the solicitor general pointed out that he spoke for the United States and that the amicus brief recited purely individual

22. *Groups Back Race Admissions*, Miami Herald 3A (Feb. 18, 2003).
23. Oral Arg. Transcr., *supra* n. 11, at 7.
24. *Id*. at 8, 19–20.
25. *Id*. at 9 ("Are you serious that you think there is a serious question about that? That we cannot take that green brief as a representation of fact?").
26. *Id*. at 19–22.
27. *Id*. at 22.
28. *Id*. at 20–21.

views,[29] he never effectively countered the stark facts regarding the service academies' actual practices.

IV. WHY THE BRIEF WORKED

What made this brief stand out from all of the other amicus briefs in the case? There are numerous reasons why this amicus brief stood out from others, and all of them are reasons we discussed in our prior article regarding how to prepare a good amicus brief.[30]

First, the amici themselves were individuals of enormous stature who were independently interested in the case. They were from both ends of the political spectrum, conservative and liberal. The people who signed the brief were a star-studded list of persons vitally interested in this country's armed services. Significantly, the brief's *Interest of Amici* section did not simply give a general overview of the brief's signatories, but rather gave a short biography of the military accomplishments of each of those individuals:

> Admiral Dennis Blair, retired 4-star, served as Commander in Chief, U.S. Pacific Command (1999-2002), where he directed all Army, Navy, Marine Corps and Air Force operations across more than 100 million square miles.
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> Major General Charles Bolden, retired astronaut and 2-star, was the [N]ation's first African-American Marine astronaut. He flew four space shuttle missions, commanding two, including the mission placing the Hubble telescope into earth orbit.
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> . . .
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> Honorable Robert "Bud" McFarlane, a retired Marine Corps officer, was President Reagan's National Security Advisor (1983-85), and also served as Deputy Director of the National Security Council.
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> . . .
>
> Honorable Joseph R. Reeder, the 14th Under Secretary of the Army (1993-97), had oversight responsibility for admission[s] criteria for the U.S. Military Academy and the [Reserve Offi-

29. *Id*. at 19.
30. Walbolt & Lang, *supra* n. 1.

> cers Training Corps (ROTC)] programs at our [N]ation's universities.
>
> General H. Norman Schwarzkopf, retired 4-star, served as Commander in Chief, U.S. Central Command (1988-91), and overall Commander of Allied Forces during the Gulf War.[31]

Second, lawyers of considerable stature in United States Supreme Court practice advanced the brief. In fact, although he was not technically the brief's counsel of record,[32] Carter Phillips'[33] involvement with the brief drafting caused one Justice to refer to the brief as "Carter [Phillips'] brief."[34] Consequently, the Justices appeared prepared to accept the factual representations made in the brief, despite the petitioners' protests that those facts were not in the case's lower-court record.[35]

Third, and undoubtedly most importantly, the brief did not merely parrot the legal arguments in each party's brief. Instead, the brief brought a truly unique *factual* perspective to the issue before the Court. It did so without hyperbole or rhetoric, allowing the facts themselves make the amici's point.

The brief began by describing the serious problems the military experienced in recruiting officers following the integration of our country's armed services by explaining, "[T]he percentage of minority officers remained extremely low, and perceptions of discrimination were pervasive."[36] Accordingly, "In full accord with *Bakke* and with the [Department of Defense's] Affirmative Action Program, the service academies and the ROTC have set goals for minority officer candidates and worked hard to achieve those goals."[37] As explained in the brief, the military employs a variety of measures by which to achieve those goals. Some of these measures include,

> [the] use [of] financial and tutorial assistance, as well as recruiting programs, to expand the pool of highly-qualified mi-

31. Amici Br. of Mil., *supra* n. 5, at 1–4.

32. According to Supreme Court Rule 9, only one attorney is designated as counsel of record.

33. Carter Phillips was a former United States Supreme Court law clerk for Chief Justice Warren Burger.

34. Oral Arg. Transcr., *supra* n. 11, at 19.

35. *Id*. at 9.

36. Amici Br. of Mil., *supra* n. 5, at 6 (footnote omitted).

37. *Id*. at 7.

> nority candidates in a variety of explicitly race-conscious ways. They also employ race as a factor in recruiting and admissions policies and decisions.[38]

These methods "have substantially increased the percentage of minority officers," and have increased the number of officers who "are trained and educated in racially diverse educational settings, which provides them with invaluable experience for their future command of our [N]ation's highly diverse enlisted ranks."[39] The amici emphasized that "[t]he officer corps must continue to be diverse or the cohesiveness essential to the military mission will be critically undermined."[40]

The amici further expressed the view that "[a]t present no alternative exists to limited, race-conscious programs to increase the pool of high quality minority officer candidates and to establish diverse educational settings for officers."[41] Without specifically referencing the Florida and Texas plans touted by the solicitor general and the State of Florida, the amici cautioned,

> It is no answer to tell selective institutions such as the service academies or the ROTC automatically to admit students with a specified class rank, even if such a system were administratively workable and would result in a diverse student body. This one-dimensional criterion forces the admission of students with neither the academic nor physical capabilities nor the leadership qualities demanded by these institutions, damaging the corps and the military mission in the process. The military must *both* maintain selectivity in admissions *and* train and educate a racially diverse officer corps to command racially diverse troops. The device of admitting a top percentage will not simultaneously produce high quality and diversity.[42]

The brief then proceeded to explore, in careful detail, the history of the military's integration,[43] the integration of the officer corps,[44] and the nature of race-conscious admissions programs for

38. *Id*.
39. *Id*.
40. *Id*.
41. *Id*. at 9.
42. *Id*. (emphasis in original).
43. *Id*. at 10.
44. *Id*. at 13.

officer education and training.[45] Seventeen pages of the twenty-page argument were devoted to these points. The authorities cited included "Scholarly Authorities,"[46] as well as numerous other authorities such as military reports,[47] General Colin Powell's 1996 Commencement Address at Bowie State University,[48] President Harry Truman's Commission on Equality of Treatment & Opportunity in the Armed Services report,[49] and George Washington's letter, as President of the United States, to Alexander Hamilton, in which he "underscored the vital importance of direct association among diverse individuals in education and in the profession of arms."[50]

Only the brief's last four pages presented traditional legal arguments based on caselaw, which sharply contrasted to the University of Michigan's thirty-six page brief of legal argument.[51] A large portion of the amicus brief demonstrated, as a factual matter, the importance of race-conscious admissions and recruiting practices of the service academies and the ROTC.[52] The brief focused the Court on a core issue in the debate: If you can constitutionally *recruit* in a race-conscious manner, why can you not consider race when making admissions decisions?[53]

Indeed, the message that this amicus brief conveyed to the Supreme Court was made by men experienced in our Nation's military, who are knowledgeable of our country's needs. Also, this brief was powerful and compelling, particularly "At a time when the [N]ation's attention [was] occupied by the war in Iraq . . . ."[54] The brief brought something new to the table in this debate. It assisted the Court in dealing with a complex issue that divided our country and affected its institutions of higher learning.

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45. *Id*. at 18.
46. *Id*. at vi.
47. *Id*. at 15.
48. *Id*. at 27.
49. *Id*. at 14 n. 4.
50. *Id*. at 8 (citing Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* 960–961 (Knopf 2000)).
51. Only six cases were cited in the amicus brief, in contrast to the forty-five cases cited in the University of Michigan's brief.
52. Amici Br. of Mil., *supra* n. 5, at 27–30.
53. *Id*.
54. Charles Lane, *O'Connor Questions Foes of U-Michigan Policy*, Wash. Post A01 (Apr. 2, 2003).

Thus, the Authors were not surprised to see the amicus brief referred to prominently in the *Grutter* decision. Quoting at length from the amicus brief, the Court observed as follows:

> At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." (emphasis in original) To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting." (emphasis in original). We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."[55]

This amicus brief achieved its purpose of persuading the Court to consider important national ramifications outside the narrow scope of one university's admissions procedures. In this way, the military's amicus brief can be viewed as a model amicus brief.

55. *Grutter*, 123 S. Ct. at 2340 (citations omitted).