

**Representing the States Before the Supreme Court:  
State *Amicus* Brief Participation, the Policy-Making Environment  
and the Fourth Amendment**

**ABSTRACT**

State attorneys general, situated at the intersection of the state and federal governments, are increasingly the subject of scholarly inquiry. Yet, little work examines what prompts them to participate as amici. The decision to participate as amici reveals important information about how state actors attempt to shape outcomes at the federal level. We investigate how the broader policy making environment facilitates and constrains AG amicus brief initiation and joining. Analyzing all orally argued Fourth Amendment cases from 1970-2009, we find the characteristics of the policy making environment shape AG amicus activity. Initiation is predicted by institutional resources; whereas joining is the product of legal case facts and institutional resources. Because prior research notes larger attorney general coalitions are more successful, we highlight the complexity of amicus participation by state actors and speak to the conditions under which state actors can mobilize large coalitions to shape federal search and seizure case law.

The Supreme Court is democratic in the sense that interested parties may participate in any case on the docket as *amici curiae*, literally “friends of the Court.” However, relatively open filing rules mean that not all amici receive equal consideration. The most successful class of amici are governmental actors, particularly the federal solicitor general and state attorneys general (hereafter: state AGs or AGs). While the literature focuses mostly on the federal solicitor general, AGs are the second most frequent and successful class of amici. As such, their amicus briefs have a profound impact on policy output at the Court (Myers and Ross 2007; McAttee and McGuire 2007) and demand scholarly attention, particularly in federalism (Morris 1987) and criminal procedure cases (Provost 2011). As the states' chief law enforcement officers and frequent policy implementers, AGs have strong policy preferences and often seek to shape case law in line with their preferences. The Court itself notes the privileged place of AG amicus briefs and readily draws upon them.<sup>1</sup> While scholars have recently turned their attention to AGs as amici generally, this scholarship is largely silent on what prompts AG amicus brief participation.

Unlike the expansive literature on AG participation in multi-state litigation (Derthick 2009; Gifford 2010; Provost 2010), scholars have only recently begun to explore AG amicus brief activity (e.g. Goelzhauser and Vouvalis 2013, 2014; Nolette 2014; Owens and Wohlfarth 2014). Many of these studies focus on the success of amicus briefs and conflict amongst AGs while neglecting how AGs decide to participate in amicus briefs. Given the potential impact of state preferences on the Court, we must understand not only the mechanisms that shape AG amicus brief success (e.g. Goelzhauser and Vouvalis 2013; 2014; Owens and Wohlfarth, 2014), but also the mechanisms which prompt AGs to participate as amici as well. Drawing on previous, temporally limited studies of AG amicus brief participation, we examine the role of the policy making environment on AG amicus participation, specifically in the form of legal case factors and institutional resources. Utilizing a new dataset spanning forty years, we provide

insight into the genesis of AG amicus brief initiation and joining. Our findings are portable not only to AGs in other issue areas, but also amici writ large. We now briefly discuss legal case facts and institutional resources in turn.

Case factors often provide a window into the body of precedent and case law. Thus, the presence or absence of particular case characteristics can signal how judges will rule (Epstein and Knight 1996; Hansford and Spriggs 2006). AGs, as repeat players, must be strategic about amicus participation to maintain their high success rate and privileged status before the Court (e.g. Clayton 1994; Galanter 1974; Wohlfarth 2009), choosing to participate only when particular case factors are present or absent. Yet, an alternative view holds that AGs are advocates for state government and opt instead to push for particular points of view before the Court much like interest groups, with only minimal regard for legal case facts (Caldeira and Wright 1990; Collins 2008).

Second, we ask how institutional resources impact both amicus brief initiation and joining. Previous research suggests that authoring amicus briefs is resource-intensive and may be a difficult cost to bear for those with few resources (Box-Steffensmeier and Christenson 2014; Caldeira and Wright 1990). However, since AGs typically file in coalitions (Clayton 1994; Nolette 2014), they can minimize costs by joining existing briefs rather than initiating an entirely new one (e.g. Hula 1999). While we expect resources to matter more for brief initiation than for brief joining,<sup>ii</sup> they may still be beneficial in brief joining. Since AGs are inundated with a number of required tasks (Wall and Winder 1995), smaller AG offices may not have the resources to invest much, if any, effort into amicus briefs and instead use limited resources to fulfill their required duties (e.g. Wilson 1989). We also examine collective institutional resources, such as the National Association of Attorneys General (NAAG) Supreme Court

Project and the Republican and Democratic Attorneys General Associations (RAGA and DAGA). These organizations are available to all AGs and serve to both educate and inform AGs and can play an important role in reducing costs for both brief initiation and joining (Nolette 2014).

To evaluate the impact of these features of the policy making environment, we analyze Fourth Amendment (search and seizure) cases. Fourth Amendment cases have important implications for law enforcement organizations, the street-level implementers of legal policies. As the chief legal representative of law enforcement organizations in the states, AGs have crucial policy-making and electoral incentives to utilize their role as amicus advocates. Additionally, Fourth Amendment case law easily lends itself to analysis of legal case facts, allowing us to create the most comprehensive account of the policy making environment. Since we posit differences between initiation and joining briefs, we conduct two analyses, the first of which focuses on brief initiation and , the latter on joining

Our study makes important contributions to the literatures of American state politics and amicus briefs. Even if some studies find amicus briefs do not impact case outcomes (e.g. Epstein, Segal and Johnson 1996; Songer and Sheehan 1993; Spriggs and Wahlbeck 1997), AGs clearly believe that such participation matters (Myers and Ross 2007) and previous work notes AGs generally succeed in persuading the Court via their briefs (Goelzhauser and Vouvalis 2015; McAttee and McGuire 2007). To that end, if we wish to understand the behavior of major advocates before the Court, we should look to AGs' decision to participate as amici. This study also helps us understand how the policy making environment both constrains and facilitates amicus participation of government attorneys before the Supreme Court. Since AGs are situated at the intersection of the state and federal governments, they frequently seek to shape policy in line with their preferences across a variety of elective legal contexts at both state and national

levels (Spill, Licari, and Ray 2001; Derthick 2009; Gifford 2010), but they must remain attentive to legal and institutional resource factors in order to ensure their long term success (e.g. Wohlfarth 2009). By exploring the determinants of AG amicus brief participation, scholars can arrive at a more complete understanding of how states etch their preferences into federal case law.

This article proceeds as follows. First, we provide a brief overview of AG amicus activity. Second, we develop our theory of how legal and institutional resource factors predict AG amicus brief initiation and joining. Third, we introduce our data on all orally argued search and seizure cases decided on the merits from 1970 through 2009 and outline our methods. We subsequently present our results and discuss their implications. We close with a summary of our findings and suggest avenues for future work on AG amicus brief behavior.

### **AG Policy Making and Amicus Brief Participation**

The AG's office is a unique institution in American politics; situated at the intersection of the state and federal systems, it wields tremendous influence over both federal and state law (Myers and Ross 2007; Nolette 2014, 2015; Waltenburg and Swinford 1999). As elected law enforcement officers in 43 states,<sup>iii</sup> AGs have twin goals of making policy and securing reelection or moving on to higher office. These goals originate largely from the institutional structure of the office. AGs are prosecutors, but of course no prosecutor can deal with every issue; they must formulate policy priorities. Their priorities are largely left to their own discretion; in all 50 states the features of common law or *parens patriae* authority give them broad discretion to make policy in the public interest.<sup>iv</sup> Importantly, AGs are largely free from interference from other state actors; indeed the 43 elected AGs are directly accountable to state voters and not to the governor, legislature or state supreme court.<sup>v</sup> A large body of research finds AGs pursue their policy preferences in tobacco litigation (e.g. Derthick 2001; Schmeling 2003; Spill, Licari and Ray 2001), other multi-state litigation which rose to prominence in the 1990s (e.g. Gifford 2010;

Provost 2010), and amicus curie brief activity before the Supreme Court (e.g. Myers and Ross 2007; Provost 2011). We contend this discretion, though broad, is not unlimited and tempered by two aspects of the policy making environment: legal case facts and institutional resources.

AGs must pay close attention to the legal facts of a case before deciding to participate as amici. In order for any party to maintain long-term success before the Supreme Court, s/he must demonstrate his/her advocacy is based on legal expertise and well-crafted arguments, not just partisan considerations (Galanter 1974; Wohlfarth 2009). While partisan considerations certainly shape any amicus brief activity (Caldiera and Wright 1990; Collins 2007), exclusive attention to such preferences can derail the success of briefs filed by an otherwise prestigious and successful government attorney (Wohlfarth 2009). If AGs participate as amici frequently, yet produce ineffective partisan-charged briefs with little regard to legal case facts, they face significant reputational costs from the Court (Drahozal 1999) and risk greater likelihood of losing future cases. Thus, AGs are likely strategic and engage in amicus activity when the legal case facts point towards success with the justices. The likelihood of success is influenced by legal case factors that indicate consistency with prevailing case law.

Because of the norm of *stare decisis*, legal facts are powerful predictors of how a given case will be adjudicated (Hansford and Spriggs 2006). As such, there is arguably a “safe” disposition in any case. The “safe” legal disposition of a case can be discovered by looking to case facts and the determinations of lower courts. Segal (1984; 1986) finds the Court and justices are more likely to uphold searches when the characteristics of the search and the disposition of the lower court meet previously established legal markers of what constitutes reasonable conduct by the police. Thus, AGs are able to make an educated guess about how the Court will rule in a case and determine whether or not to participate in amicus briefs based on the prevailing legal patterns present in the case.

*Hypothesis 1A: State AGs are more likely to initiate and join briefs when legal case*

*characteristics indicate a reasonable search.*

Strict adherence to the legal model of amicus behavior we outline above does not account for policy making preferences and precludes any desire to zealously defend the amici's constituency or his/her own interests. Often, amici not only seek to provide the Court with legally relevant information, but also to frame the case and the relevant legal case facts to suit their interests (e.g. Collins 2008; Corley, Collins, and Hamner 2013; Spriggs and Wahlbeck 1997). Such a finding carries to other government attorneys as well; the federal solicitor general often seeks to shape case law in a way that benefits his/her administration (Black and Owens 2012; Meinhold and Shull 1998; Nicholson and Collins 2008). Along these lines, former AGs note they are keen to bring case law closer to their own policy preferences (e.g. Clinton 2004; Mondale 2010). Thus, while legal case facts should predict AG amicus brief activity, AGs will sometimes opt instead to pursue their policy preferences.

Court decisions regarding the Fourth Amendment affect police searches in all states; consequently, some AGs will advocate zealously for their law enforcement clients, even in the absence of legal case facts that characterize the search as reasonable. Specifically, Republican AGs participate as amici more frequently in criminal procedure cases because the government's position represents the law enforcement, or conservative, position (Provost 2011). We posit Republican AGs are therefore also more likely to participate as amici in Fourth Amendment cases, arguing for an expansion of search and seizure powers on behalf of the police in line with their policy preferences.<sup>vi</sup> To this end, they are more likely to discount the effects of legal case factors than are Democrat AGs. Partisanship, then, has a conditioning effect on the relationship between legal case facts and amicus participation.

*Hypothesis 1B: Legal case factors will have a weaker effect on the likelihood of Republican AGs participating as amicus than they will for Democrat AGs.*

In addition to legal case facts, the policy making environment is also shaped by the

institutional resources available to AGs at both individual and collective levels. Existing scholarship on AG amicus brief initiation and joining does not find a role for resources, but this work only examines the effect of AG office budgets over a small temporal frame (Provost 2011). While fiscal resources are key to any elective legal activity, budgets are hardly the only resource at AGs' disposal. Other resources include litigation experience, the presence of a state solicitor general, and collective institutional resources, such as the Supreme Court Project, RAGA, and DAGA (Goelzhauser and Vouvalis, 2013; Nolette 2014). Additionally, it is not clear how these resource variables might matter across the different processes of initiating and joining amicus briefs. Initiating an amicus brief requires considerable resources in terms of time and expertise to write the brief (Caldeira and Wright 1990), whereas joining is potentially as easy as signing one's name to an existing brief (Box-Steffensmeier and Christenson 2014). Of course, the cost of brief participation may be lowered by collective resources available to all AGs (Clayton and McGuire 2001-2002; Nolette 2014). We first treat individual office resources, we then follow with collective resources.

Across a variety of contexts, policy makers are more likely to engage in elective activities when they have the resources to do so. Wilson (1989) notes that in times of abundance actors expand their operations to make full use of resources. Conversely, in times of scarcity they cut expenses wherever possible to ensure that they can fulfill required duties (e.g. Wall and Winder 1995). Amicus briefs, though inexpensive compared to direct party litigation, represents a considerable investment; the average cost of writing an amicus brief in 2015 dollars is \$60,500 (Caldiera and Wright 1990). Since amicus briefs are elective for all 50 AGs, amicus brief initiation should be less likely when resources are limited. Therefore, we expect that AG offices with greater resources, fiscal and otherwise, will initiate briefs more often.

*Hypothesis 2A: AGs are more likely to initiate amicus briefs when they are well endowed with office resources.*

A lack of resources does not preclude amicus brief participation. Box-Steffensmeier and Christenson (2014) find interest groups with few resources join amicus brief coalitions with their more resource rich colleagues (see also: Hula 1999). In this way, low resource groups are still able to participate as amici, while minimizing their overall expenses. This finding is specific to interest groups and may not generalize to AGs' unique institutional context. As AGs are heads of their respective state departments of justice (Thornburg 1990), they may seek to conserve expenditures for other elective tasks wherever they can by joining amicus brief coalitions rather than initiating briefs. However, while coalitions are a means to sidestep costs (Hula, 1999), resources may also enhance an AG's ability to join amicus briefs. Joining an amicus brief costs less than initiating a brief, but is not entirely costless. Miller (2009-2010) notes joining requires approximately eight hours of legal research. While eight hours is a relatively low cost, not all offices are equally equipped to bear it. This is particularly true if an office does not regularly conduct research to decide whether or not to join amicus briefs. AGs with greater resources, in terms of experience, budgets, and specialized staff are better able to dedicate resources and efficiently decide whether to join a brief (see also: Layton 2001). Conversely, AGs with limited resources may readily pass on amicus activity because it requires too much institutional attention for which the office is not prepared (e.g. Thornburg 1990; Wall and Winder 1995). From this point of view, office resources may help AGs to join more briefs as well as initiate them.

*Hypothesis 2B: AGs are likely to join amicus briefs when they are well endowed with office resources.*

While we hold individual office resources, such as specialized staff, budget, and experience, are key markers of capability for amicus brief activity, resources also exist at the collective level. Over the past 35 years AGs have established informal coordinating institutions to, in part, facilitate amicus brief participation (Clayton and McGuire 2001-2002). Thus, after the establishment of these organizations AG amicus brief initiation and joining should be more

likely because of the increased emphasis on elective legal activity brought on by collective resources. Joining also becomes more likely since collective institutions promote a more coalition based approach to amicus activity and facilitate information sharing among the AGs by lowering monitoring and communication costs (Baker and Asperger 1981-1982; Clayton and McGuire 2001-2002).

There are two classes of informal coordinating institutions, the non-partisan Supreme Court Project and the more partisan RAGA and DAGA. The Supreme Court Project was founded in 1982 partially in response to Justice Powell's remarks that, "some of the weakest briefs and arguments [come] from AGs" (Morris 1987: 300). The purpose of the Project is to improve the quality of state representation before the Supreme Court, by helping AGs to craft effective briefs, prepare for oral argument before the Court and share information with fellow AGs about ongoing cases (Baker and Asperger 1981-1982; Clayton and McGuire 2001-2002). The Project has been effective, as the average size of AG amicus coalitions has increased remarkably from the 1970s through the early 1990s (Clayton 1994) and the overall legal reputation of AGs has likewise improved (McAttee and McGuire 2007). With increased aid and a higher chance of success, AG amicus brief initiation and joining should be more successful, and thus more attractive to AGs (e.g. Waltenberg and Swinford 1999).

*Hypothesis 3A: State AGs are more likely to both initiate and join briefs after the creation of the NAAG Supreme Court Project.*

The Supreme Court Project is decidedly non-partisan. In the late 1990s then Alabama AG William Pryor formed RAGA, modeled after the Supreme Court Project's parent organization, to combat what he and other Republican AGs saw as excessive attacks on business by overly zealous Democrat AGs in the recent tobacco multi-state litigation campaign (Nolette 2014; Pryor 2001). RAGA thus pursues a policy of restrained government via their legal activities, including amicus briefs. In the wake of RAGA's founding, Democrats created their own partisan

organization, DAGA to serve as a counter-weight to RAGA and ensure that a liberal position is also represented in coordinated AG activity.

Nollette (2014) finds partisan AG organizations increase the amount of amicus brief conflict in the form of rival AG coalitions advocating for opposing parties. However, even partisan policy coordination requires the efficient distribution of information. Thus, both RAGA and DAGA serve as information conduits of partisan specific information for AGs. Thus, like the Supreme Court Project, both RAGA and DAGA should lower the transaction costs of amicus brief participation through their information distribution and increase the overall number of AGs participating as amici.

*Hypothesis 3B: Republican AGs are more likely to both initiate and join briefs after the creation of RAGA, while Democratic AGs are more likely to both initiate and join briefs after the creation of DAGA.*

In summary, we argue AG amicus brief participation is both constrained and facilitated by the policy making environment which consists of legal case facts and institutional resources. From a legal perspective, AGs must balance the legal expectations of the Court with their own political preferences of what the law *should* be. From an institutional resource perspective, we contend that greater individual office resources increase AG amicus brief initiation. This effect may also be present at the joining stage. By the same token, we expect to find that collective institutional resources also increase the probability of AG amicus brief participation. These factors also help to illuminate how the policy making environment impacts AGs' decision to participate as amici.

## **Research Design and Methods**

To analyze the role of the policy making environment on AG amicus brief participation, we assemble a dataset of all orally argued search and seizure cases decided on the merits from 1970 through 2009 (Spaeth et al. 2011). We focus on Fourth Amendment cases for several key reasons. First, criminal procedure is an important legal policy area in which state AGs play a

central role. As mentioned briefly above, many state AG offices have their own criminal investigative units, many can initiate criminal prosecutions, and most AGs handle post-conviction criminal appeals (Myers and Ross 2007). Within the broader issue of criminal procedure, the Fourth Amendment is a subject of tremendous importance as it governs the legal procedures by which law enforcement organizations may investigate crime and enforce the law. Fourth Amendment issues before the Supreme Court accordingly matter a great deal to state AGs. Additionally, while policy preferences matter for amicus participation in criminal procedure cases (Provost 2011), these cases are less likely to be as politically polarizing as cases in other areas, such as abortion, the death penalty, or environmental regulation. Thus, we expect Fourth Amendment cases to be an ideal testing ground for the idea that the policy making environment affects AG amicus participation.

From a methodological point of view, analysis of any issue area would enable us to look at institutional resource factors, but search and seizure cases are ideally situated for evaluating the role of legal case facts since Segal (1984; 1986) identifies a number of readily codable case level indicators of search reasonableness. Reasonable searches are more likely to be upheld, and this fact enables us to test the effects of legal case factors on AG amicus behavior. If AGs are strategic and care about winning, they will let the case facts indicate when searches are reasonable and act accordingly. If AGs (particularly Republican AGs) care more about policy preferences and pushing the envelope, then legal case facts will have less of an impact.

We locate all 181 search and seizure cases from this period on Lexis and note which AGs, if any, participate as amici. We replicate each case observation a maximum of fifty times, which creates a dataset with 8,729 observations across 181 cases. 46 of these cases have at least one AG amicus brief. Thus, we have one observation for each AG for each case.<sup>vii</sup> Since it is impossible to join a brief if one does not already exist, we create a second dataset which only includes the 46 cases in which at least one AG initiated an amicus brief to assess what prompts

AGs to join briefs. This companion dataset includes 2,206 observations.<sup>viii</sup> Importantly, and keeping with our distinction between initiation and joining, we note each AG's role in each brief in which s/he participated. Given the nature of our hypotheses, we construct two dichotomous dependent variables. Our first dependent variable indicates whether an AG initiated a brief in a given case, while the second dependent variable—also dichotomous—notes whether an AG joins a brief initiated by one of his/her colleagues.<sup>ix</sup>

Our independent variables follow our previous delineation between legal case facts and institutional resources. Legal case facts are noted with a series of dichotomous variables developed by Segal (1984; 1986). These variables are designed to gauge the reasonableness of the search in each case. We employ four such variables, two of which should increase the likelihood of AGs participation and two which should reduce the likelihood. We expect AGs will be more likely to participate as amici if the police have a warrant or if the search falls under the general rubric of exceptions,<sup>x</sup> as these two factors indicate a search which is likely to be upheld and boost AGs' collective legal standing with the Court.

However, AGs should be less likely to participate as amici if the search is accompanied by an arrest deemed unlawful by the lower court. Additionally, AGs should be less likely to participate as amici if the police conduct a full search as opposed to a more limited search, such as a pat-down or a stop-and-frisk, as these are two instances where the Court is not likely to side with the state; and thus a brief in support of the state party would likely be a waste of resources (e.g. Waltenberg and Swinford, 1999). Should the above outlined variables prove significant in the expected direction, it will provide support for Hypothesis 1A. We test the conditioning effect of partisanship on legal case facts (Hypothesis 1B) by interacting a dichotomous variable noting whether an AG is a Republican with the legal case fact variables.

For these four legal case variables, data for most of the cases were furnished to us by Segal, but for 1999-2009—the time period during which we had no data—we used Segal's

(1984; 1986) coding rules to update the data. Each author individually examined each case in U.S. Reports to detect the presence of the above mentioned legal case facts. For the few cases in which we disagreed over coding, we reviewed the case again and made a mutual decision, in light of the coding rules.<sup>xi</sup>

Our second set of independent variables represents AGs' institutional resources, both in individual offices (Hypotheses 2A/B) and collectively (Hypotheses 3A/B). First, we employ several variables to measure individual office resources. AG budget is measured by each state's annual logged per capita budget in 2000 dollars (Klarner 2012). We note the presence of state solicitor general with the dichotomous measure developed by Miller (2009-2010).<sup>xii</sup> AG experience is noted with a count variable of the number of times each AGs office either initiated or joined an amicus brief in a 4<sup>th</sup> Amendment case before the Supreme Court in the preceding three years for the initiation model;<sup>xiii</sup> for the joining model we restrict this measure to just briefs joined in the preceding three years. Finally, we measure the impact of collective resources (Hypotheses 3A/B) through a series of dichotomous variables. The Supreme Court Project is indicated as present after 1982, the year of its creation. Similarly, RAGA and DAGA only appear as present for AGs of their parties, after 1999 for RAGA and after 2002 for DAGA.

We also control for a number of variables previous literature suggests shape AG amicus brief participation. Since the state almost always represents the conservative side in criminal procedure cases, a dichotomous variable notes whether a given AG is Republican (Provost 2011). Second, elected AGs are more likely to engage in elective activity ranging from amicus briefs to multi-state litigation (Derthick, 2009; Provost 2010; 2011); thus a dichotomous variable notes whether a given AG is elected. Third, legal actors ranging from the justices (Baird 2004) to the federal solicitor general (Meinhold and Shull 1998; Nicholson and Collins 2008) alter their behavior in politically salient cases. Since previous research establishes AGs seek out publicity in politically salient multi-state litigation campaigns (Derthick 2009; Provost 2010), we employ

Epstein and Segal's (2000) political salience measure which indicates whether a case's result was reported on the front page of the *New York Times* the day after the decision was announced.<sup>xiv</sup>

Fourth, AGs are strategic and a conservative Court is likely to uphold a greater proportion of searches. Thus, we expect AGs to participate as amici more when the Court is more conservative. Thus, we include a control variable for the Court's ideology (Bailey 2013).

Finally, we control for two legal factors. AGs, like all amici, are more likely to participate when their interests are directly at stake and they have the greatest potential to shape the Court's decision; when a state is a direct party in a given case state interests are at stake. Because the Court is more likely to choose cases for review which it wishes to reverse (Palmer 1982; Provine 1980; Segal and Reedy 1988; Segal and Spaeth 2002), states are more likely to succeed when they are petitioning parties. We accordingly employ a dichotomous measure to indicate when a state party is the petitioner (Spaeth et al. 2011). Finally, when lower courts issue conflicting decisions, the Supreme Court is more likely to grant review and AGs have an opportunity to express their legal opinion in unresolved constitutional matters. Thus, we note lower court conflict as present if the Court notes conflict when granting certiorari (Spaeth et al. 2011).

Our hypotheses require us to examine the behavior of all 50 state AGs in dozens of Fourth Amendment cases over 40 years. Thus, pooling states and cases in the unit of analysis requires the use of a panel model. In general, there are two predominant classes of panel models which we might draw upon: mixed effects and marginal effects models. Mixed effects models, including the familiar random and fixed effects, make inferences to individual observations or sets of observations. By contrast, marginal effects models make inferences to a population (Agresti 2013; Fitzmaurice et al. 2011). We are interested in drawing inferences about AGs, their offices and case level factors. For instance, we are concerned with explaining the behavior of the average AG and the impact of legal case facts and institutional resources across a number of

cases, rather than explaining a specific AG or case. Coupled with the generally more forgiving distributional assumptions of marginal effects (otherwise known as population-averaged) models, we adopt this modeling choice. If anything, these models are more conservative and biased toward zero and therefore afford us greater confidence in the results (Neuhaus and Kalbfleisch 1998). Thus, if we obtain significant results it will demonstrate the overall power of the model, even under a modeling strategy which makes statistical significance more difficult to obtain. Additionally, AG amicus brief initiation and joining in criminal procedure cases in the 1990s adopt marginal effects models (Provost 2011); we employ population averaged models.

## **Results**

We present our results across two tables, corresponding to AG amicus brief initiation and joining. Within each table we present two models, one without the interaction terms and one with interaction terms to provide maximum leverage in discussing Hypothesis 1B.<sup>xv</sup> Despite some consistency across the initiation and joining models, they are distinct processes. Legal case facts do not account for the decision to initiate a brief, though they are a significant predictor of joining for members of both political parties. While institutional resources predict both initiation and joining, different resources are at play at each stage. This is particularly true of collective resources, which only predict joining; this provides support for our expectation that resources are not merely a predictor of initiation. We now turn to a more in-depth discussion of the results.

The initiation models are presented in Table 1 and Figure 1 displays coefficients and confidence intervals graphically. The baseline predicted probability of initiation is 0.007 (sd: 0.001),<sup>xvi</sup> indicating the typical AG does not initiate amicus briefs often; indeed across the 181 cases included in our study only 66 briefs are initiated in 46 distinct cases. Looking to the motive for initiating briefs, we find legal case facts rarely prompt initiation. In the first model, without interaction terms, none of the legal case facts reach statistical significance. In the second model, where interactions are present, the legal case facts represent the propensity of Democrats

initiating briefs. We find the predicted probability of Democrats initiating a brief decreases by 0.006 (sd: 0.002) when exceptions are present. While the interaction between exceptions and partisanship appears to be significant, one cannot discern from statistical tables alone whether an interaction term is significant nor should the significance of the constituent terms be factored into the evaluation of the interaction term. We must add the constitutive coefficients and manually calculate the standard errors in order to determine significance (Brambor et al 2006). After doing so, all of the interaction terms fail to achieve statistical significance. Based on these results, we must reject Hypotheses 1A and 1B for the initiation models.

Consistent with Hypothesis 2A, we find that greater resources increase the likelihood of initiation. The size of AGs' budgets and the amount of previous experience partly drives the decision to initiate a brief. Moving from the mean value of logged budget to two standard deviations above the mean increases the predicted probability of brief initiation by 0.035 (se: 0.013). As we note above, fiscal resources are not the only institutional resource at AGs' disposal, although the effects of other institutional resources are notably smaller. Moving from the mean value of experience to two standard deviations above the mean, the predicted probability of brief initiation increases by 0.005 (se: 0.002). Additionally, three of our control variables achieve statistical significance. Moving from an appointed to elected AG increases the predicted probability of brief initiation by 0.007 (se: 0.001). When a state party is the petitioner, the predicted probability of another state initiating an amicus brief increases by 0.010 (se: 0.004) relative to cases where a state party is not the petitioner. Finally, when the Court notes conflict in a case, the predicted probability of an AG initiating an amicus brief decreases by 0.006 (se: 0.002).

[Table 1 About Here]

[Figure 1 About Here]

We now turn to the joining models in Table 2, Figure 2 displays the coefficients and

confidence intervals graphically. Like the initiation models, we present two models: one without interaction terms and one with interactions. The results indicate there is a degree of continuity between the initiation and joining models, though we find greater support for legal case facts in the joining model and a role for collective resources. The baseline predicted probability of joining briefs is 0.338 (se: 0.010), which shows that AGs join briefs initiated by their colleagues with regularity. We elaborate on these findings below.

In the first column of Table 2 we examine the impact of legal factors for all state AGs, without interaction terms. The results indicate that each of the legal factors is significant and signed in the predicted direction, which provides support for Hypothesis 1A. As searches become more (less) reasonable as defined by their legal characteristics, all AGs are more (less) likely to join amicus briefs in these cases. When a valid warrant is present in the case, the predicted probability of an AG joining a brief increases by 0.10 (se: 0.026) and when search exceptions are present, the probability increases by 0.109 (se: 0.018). Conversely, if the lower court found the arrest during a search to be unlawful, the probability of joining decreases by 0.069 (se: 0.027) and if a full search was conducted, the probability of joining drops by 0.115 (se: 0.022). Thus, the results in Table 2, Model 1 are supportive of the idea that AGs are strategic and factor legal case characteristics into their decision making calculus. This provides support for Hypothesis 1A in the joining models.

We now turn our attention to the second column of Table 2, which includes interaction terms and allows us to examine the conditioning effect of partisanship on the relationship between case facts and brief joining. As mentioned above, because the legal case factors are components of interaction terms where we examine the conditioning effect of partisanship, the legal case factors by themselves represent the probability of Democrat AGs joining briefs when reasonable search factors are present. All four of these variables are significant and signed in the expected direction, indicating Democrat AGs strategically pay attention to the legal facts of the

case when deciding to join a brief. The presence of a warrant increases the predicted probability of Democratic AGs joining by 0.101 (se: 0.026); while in the presence of a search exception the predicted probability of joining increases by 0.110 (se: 0.017). Conversely, joining by Democrats is less likely when the legal facts point to a defendant victory. If a case concerns a search incident to an unlawful arrest, the predicted probability of a Democratic AG joining the brief decreases by 0.069 (se: 0.026). When a case involves a full search, as opposed to a pat-down or a frisk, the predicted probability of a Democratic AG joining the brief decreases by 0.116 (se: 0.023).

Hypothesis 1B suggests that case factors should have a weaker bearing on the probability of joining a brief for Republicans than for Democrats. Again, as mentioned above, interaction terms cannot be evaluated in the traditional manner and require manual calculation (Brambor et al 2006). Calculating the standard errors reveals that three of the interaction terms reach significance. In the presence of a warrant, the predicted probability of a Republican joining a brief is 0.063 (se: 0.042) higher than that of a Democrat. Although Republicans are still more likely to join a brief than Democrats when there is a warrant, the negative sign on the interaction term does indicate that being a Republican weakens the relationship between the presence of a warrant and the probability of joining. We witness the same effect for search exceptions and for the presence of a full search. In the presence of search exceptions, Republicans are .059 (se: .041) more likely to join a brief, but the negative sign on the interaction term again indicates that being a Republican weakens the relationship between the presence of search exceptions and joining a brief. In the presence of a full search, Republicans are .078 (se: 0.028) more likely to join an amicus brief. Again, being a Republican weakens the relationship, as the coefficient for Democrats joining when there is a full search is -0.663, but when we add the interaction term, the effect for Republicans becomes -0.506. These effects illustrate that case factors have a strong influence on the probability of Democrats joining briefs, but this probability weakens for

Republicans. This reveals that Republicans are influenced by legal case factors, but they are more likely to join even in the presence of legal case facts. This means Republicans are more likely to join briefs when legal case factors are absent, thus pushing the envelope in their representation of state law enforcement.

Resources are also a key predictor of AG amicus brief joining across a number of indicators. Having a state solicitor general increases the predicted probability of brief joining by 0.069 (se: 0.029). Greater experience with prior brief joining activity also increases the likelihood of joining. Moving from the mean participation value to two standard deviations above the mean increases the predicted probability of joining by 0.081 (se: 0.023). Interestingly, however, a larger budget actually *decreases* the predicted probability of joining an amicus brief. Moving from the mean value of budgetary resources to two standard deviations above the mean decreases the predicted probability of joining by 0.035 (se: 0.017). Conversely, moving two standard deviations *below* the mean leads to a 0.035 (se: 0.019) increase in the predicted probability of brief joining, which is consistent with prior research which notes resource poor interest groups join briefs with their more resource rich colleagues (Box-Steffensmeier and Christenson 2014).

Unlike in the initiation model, collective resources predict AG amicus brief joining. After the advent of the Supreme Court Project, the predicted probability of joining increases by 0.091 (se: 0.040); this provides support for Hypothesis 3A. Likewise, the formation of partisan specific AG organizations, RAGA and DAGA, increases the predicted probability of AG amicus brief joining by 0.083 (se: 0.044). This provides support for Hypothesis 3B. Finally, we note a number of control variables achieve statistical significance. If a case is politically salient, the predicted probability of joining decreases by 0.133 (se: 0.023). Additionally, AG brief joining is conditioned by the ideological mood of the Court. Moving from the mean ideology to two standard deviations above the mean, the predicted probability of joining increases by 0.178 (se:

0.044). Conversely, moving two standard deviations below the mean in a more liberal direction, decreases the predicted probability of joining by 0.082 (se: 0.017).

[Table 2 About Here]

[Figure 2 About Here]

## **Discussion**

As the second most frequent and successful class of amici, AGs are a valued source of information for the Court; and their briefs often shape case law, particularly in those issue areas where they have special expertise such as criminal law generally and search and seizure in particular (e.g. Morris 1987). Given their privileged place at the Court, AGs' decision to participate as amici, as either initiator or joiner, has consequences, not just on the lives of the defendants but also on broader federal case law governing police conduct at both the state and federal levels. While AGs have a great deal of discretion over how they pursue their policy preferences, they are constrained by the policy making environment. In this study we explore the effects of the policy making environment on AG amicus participation over a forty year span and find participation is governed by legal case facts and institutional resources. Importantly, we note that the relative importance of legal and institutional resource factors varies based on what stage of the brief participation process we examine.

The distinction between initiator and joiner highlights that brief participation is not a monolithic process, rather it is actually two processes. First, an AG must initiate a brief. Only after an AG initiates a brief can other AGs potentially join the brief. Particularly since AG amicus briefs are most successful when signed by a broad coalition (Clayton 1994), the different underlying processes which govern initiation and joining offer insight into the variable sizes of AG coalitions and their variable success rates (Morris 1987). Our results thus offer insight for future study of AG amicus briefs, and indeed the study of amici coalition mobilization and success across a host of different classes of amici. We turn now to an overview of the

implications of our research.

Scholars have long acknowledged amici have distinct policy preferences they advocate via their amicus briefs; but also that amici must take care to ensure the Court views their arguments as legally meritorious, particularly if the amici is a repeat player interested in long-term success at the Court (e.g. Galanter 1974; Wohlfarth 2009; Spriggs and Wahlbeck 1997; Collins 2008). As government attorneys, this is particularly pronounced for AGs; indeed it was one of the primary motivations for the founding of the Supreme Court Project (Baker and Asperger 1981-1982; Myers and Ross 2007). We had expected that this would be best accomplished by looking to legal case facts, as indicators of search reasonableness would enable AGs to ascertain what justices would be willing to uphold the search. Case factors are not significant predictors of brief initiation; however, legal case facts are key predictors of joining. Initiation is primarily governed by institutional resources at the individual office level. This suggests perhaps one of the reasons large AG amicus brief coalitions are so successful is that they only appear in the most legally meritorious of cases.

We also hypothesized that policy preferences would overwhelm strategic factors in some instances, in that Republican AGs would participate so often that they would pay little heed to search reasonableness. Overall, the findings reveal that Republicans do join amicus briefs more often, but with consideration of legal case facts. Republicans are still overall more likely to join a brief when characteristics of search reasonableness are present, but this relationship is weaker for Republicans than it is for Democrats. This indicates Republicans are less influenced by case factors because their policy preferences dictate joining briefs more often regardless of case factors. Additionally, as legal representatives of law enforcement, Republican AGs may have a greater desire to push the envelope and advocate positions that expand police power with respect to the Fourth Amendment.

Legal factors are not the only aspect of the policy making environment which shapes AG

amicus brief participation. Both initiation and joining are governed by resources, though differences exist in the precise role of resources between the two forms of participation. Much like resource rich interest groups are more likely to initiate amicus briefs, AGs with larger budgets are more likely to initiate briefs. This is likely because the cost of initiating a brief must be borne on top of an AG's normal duties. However, we find that monetary resources are hardly the only resources which predict AG amicus brief initiation. Greater experience, as both an initiator and joiner, predicts initiation. This is likely due to the diminishing costs that come with experience; as an AG becomes more familiar with drafting amicus briefs, s/he will be able to do so more efficiently. Given that initiators have greater control over the content of any document produced by a coalition (Hula 1999) and the Court's general deference to AGs (McAttee and McGuire 2007; Morris 1987), this suggests that a subset of AGs are best able to shape Fourth Amendment case law.

Resources also shape amicus brief joining, though in a different manner than initiation. In addition to previous experience, the propensity to join is shaped by the presence of dedicated appellate staff. This echoes our earlier concerns over which voices the Court is most likely to hear from amongst the states. Should a state have dedicated appellate staff, the likelihood of joining increases and this enhances experience, which further increases the probability of joining. This perhaps perpetuates a class of AGs that are frequently party to amicus briefs and another which rarely participates. However, resources provide some solace to the concern that some AGs are better able to participate as amici than others. The biggest resource difference between the two models is the role of the budget. Those AGs that lack the funds to initiate briefs turn instead to joining in order to participate as amici in much the same way as organized interests (Box-Steffensmeier and Christenson 2014). Even if experience and specialized staff afford greater joining opportunities, and perhaps a louder voice to the Court, those with little budgetary resources are still active in joining.

While resources dictate joining activities, not all resources exist at the office level. Over time, larger AG amicus brief coalitions have coincided with the advent of collective coordinating institutions, such as the Supreme Court Project, and its more partisan brethren, RAGA and DAGA. While collective resources have no impact on initiation, they lower the cost of joining briefs. The founding of the Supreme Court Project in 1982 ushered in an era of greater AG amicus participation in search and seizure cases. In much the same way, the founding of RAGA and DAGA increased AG amicus brief joining. Of course, more work remains to be done on the relative impact of each of these collective resources. Nolette (2014) finds that RAGA and DAGA coincide with greater conflict between AGs, which may well lead to the situation which the Supreme Court Project initially aimed to avoid, “amicus overload” (Clayton and McGuire 2001-2002, 23). Future work should look to whether the advent of the partisan organizations has led to a *decrease* in AG brief success at the same time the relative volume of joining has increased.

### **Conclusions and Directions**

As the states' chief law enforcement officers, AGs can shape case law on search and seizure in profound ways. While, as with all amici, AGs have distinct policy preferences, they are constrained by the policy making environment. We find above that AG activity in these cases is shaped by a variety of legal case facts and institutional resources; the precise mechanisms of which vary depending on the method of participation. AGs employ case factors strategically based on their partisanship, but only at the joining stage, while institutional resources matter at both stages of amicus brief participation. While these findings add to our understanding of AGs and amici writ large, this study also suggests a number of fruitful avenues for future research for both AGs and amici in general.

Morris (1987) notes that AG amicus brief success is variable across issue area (see also: McGuire and Caldeira 1993). It is entirely possible that AG activity in another issue area,

perhaps one with less clearly defined legal rules than search and seizure, will exhibit a different interplay between legal and resource-based factors. Perhaps legal factors will be absent at the joining stage or, alternatively, they will shape initiation as well as joining. As we indicated earlier, some legal policy areas such as abortion, the death penalty and environmental policy have more polarizing effects on the participants involved and it is possible that legal case facts will play even less of a significant role in such cases. Indeed, ideology may well be the principal driver in these issue areas. We thus encourage future scholars to expand our analysis to other issue areas where the predictors of AG brief participation may differ. Additionally, other features of the policy making environment, such as organized interests and AG constituencies, may affect amicus behavior more than they do in criminal procedure. Future scholarship should look to AG amicus activity across other, perhaps all, issue areas to create the most ecumenical account of AG amicus brief participation.

While AGs are prominent amici, they are of a small elite class of government attorneys; the majority of amici are organized interests. A growing scholarship examines organized interest amicus briefs, though no study has yet examined the underlying motivations of both brief initiation and joining, beyond highlighting the role of amicus briefs in organizational maintenance (e.g. Caldera and Wright 1988; 1990) and exploring which organized interests sign a given brief (Box-Steffensmeier and Christenson 2014). Particularly since Hula (1999) notes interest groups often use informal groups akin to the Supreme Court Project to coordinate lobbying efforts at Congress, it seems likely that a relationship between legal and resource-based factors is at play for organized interests. However, the precise dynamics are likely different given different institutional demands. In a similar manner, it is likely AG amicus brief activity in the lower federal courts is shaped by different dynamics.

Taken collectively, this article sheds light on how one of the most successful class of amici decides to undertake amicus brief activity within the constraints of the policy making

context. Much like the administration of their offices, this article finds that AG amicus brief participation is a complex proposition which is guided by different factors depending on the way in which AGs choose to participate. While our findings shed new light on AG amicus activity, we encourage future scholars to apply our findings to other issue areas and to port our findings to organized interests.

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*New York v. Uplinger* 467 U.S. 246 (1984).

- ii While other AGs joining the brief may provide help around the margins, most of the work is borne by the initiating state who is responsible not only for drafting the brief, but also mobilizing a coalition to support it (Clayton 1994; Mondale 2010).
- iii AGs are not elected in seven states: Alaska, Hawaii, Maine, New Hampshire, New Jersey, Tennessee and Wyoming. In these states, they are appointed by the governor, except Maine where they are appointed by the state legislature and Tennessee where they are appointed by the state supreme court.
- iv All but ten states have common law authority, which is defined by O'Brien (1995, 816) as "the collection of principles and rules, particularly from unwritten English law, that derive their authority from long-standing usage and custom or from courts recognizing and enforcing those customs." In *State of Florida ex rel. Shevin v. Exxon Corp.* (1976), the U.S. Fifth Circuit affirmed state AG common law authority to act in the public interest. Also, the U.S. Supreme Court maintains that states may invoke *parens patriae* authority to act on behalf of the state when "a state has a quasi-sovereign interest in the health and well-being-both physical and economic-of its residents in general" (*Alfred L. Snapp & Son, Inc. v. Puerto Rico* 1982).
- v While AGs are responsible for representing the institutions of state government, even this activity is subject to AG discretion (Davids 2005).
- vi The famous exception is *Gideon vs. Wainwright* (1962, 372 U.S. 335), where Minnesota AG Walter Mondale of Minnesota and a group of states argued as amicus for defendants' right to counsel. Such cases are exceptionally rare and do not exist at all in the universe of cases used in this analysis.
- vii

In some instances we only have 49 observations per case. This occurs when an AG is a direct party in the case, as direct parties cannot file amicus curiae briefs in that particular case.

- viii We exclude initiators from this dataset since imitating a brief is fundamentally different from joining a brief.
- ix Initiating states are listed first, as the counsel states of record, while additional states are the joining states. Undoubtedly, there are instances where an AG that joins a brief provides more support to his colleague initiating the brief than the typical joiner that simply signs a fully prepared brief. This raises questions about which AG is the "first mover." To assess this possibility, a researcher would need in-depth case studies of individual briefs. This is unfortunately impractical for our 40 years worth of data. We instead rely upon the fact that on each brief one of the AGs is listed as counsel of record. This gives us the ability to generalize across a broad number of cases rather than deeply analyze a single case. However, we agree that there is value in exploring the extent to which the initiator collaborates with joiners. We encourage future scholars to do so via case studies.
- x For example, if the police apprehend someone after a hot pursuit or they seize evidence that is in plain view, these exceptional circumstances enhance the reasonableness of a given search or seizure (Segal, 1984).
- xi We coded a case as containing search exceptions if the search or seizure occurred after a hot pursuit, if the seized evidence was in plain view, if the defendant or a cohabitant granted permission for the search, if the search took place at a fixed or functional border, if the evidence seized was used for administrative or grand jury hearings or if the search was allowed, pursuant to Congress's authority to regulate business (Segal 1984; 1986). For searches accompanied by unlawful arrests, we relied on Segal's coding method of looking to the lower court to indicate if the arrest was ruled unlawful. To gauge whether a search was a full search or not, we coded frisks, pat-downs, or detentive questioning as not a full search. All other searches generally counted as a full search.
- xii While many AGs have state solicitors general, the office, on occasion, falls into disuse. We therefore use

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Miller's (2009-2010) method, a state is only coded as having a state solicitor general if the office is used at least once to argue a case in the five-year period after its creation. Given different institutional designs for the office across states, it is possible that some state solicitors general are better able to shape amicus activity. We encourage future scholars to examine the institutional structure of the state solicitors general office.

xiii The lag specification is based on lag-order specification tests in Stata 13 (Lütkepohl, 2005).

xiv Epstein and Segal's (2000) political salience measure is far from ideal. While there are more robust and nuanced measures of salience, most notably Collins and Cooper (2012), which is based on the same media coverage basis as that developed by Epstein and Segal (2000). Perhaps most importantly, Collins and Cooper's (2012) data does not extend into the Roberts Court. This precludes meaningful analysis of the impact of RAGA and DAGA on AG amicus brief activity. Given the greater range of data we can cover with the Epstein and Segal (2000) measure, we opt to use it.

xv Within each table, the results are substantively similar across the two models.

xvi Due to the similar results across the two models, we only calculate predicted probabilities for the interaction model.

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