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To get on the argument docket, it helps to have friends

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The Supreme Court term that ended a month ago offered more proof of a subtle but significant shift in practice before the Court: More and more organizations are helping parties win a scarce spot on the argument docket by filing friend-of-the-court briefs at an early stage.

In the 73 cases that were granted and decided last term by signed opinions, a total of 74 amicus curiae briefs were filed before review or certiorari was granted, up from 66 the previous term and 44 the term before that.

The impact reflected in those numbers has grown to the point that some practitioners now say that cert-stage amicus briefs are more important than the traditional amicus briefs filed later on at the merits stage, after the Court has granted review but before the case is argued. Those later briefs continue to pile up at a staggering rate, but justices sometimes complain they are repetitive and confess they don't read all of them.

The Court still decides to review most new cases based only on filings from the appellant and the appellee. But in an increasing number of cases, groups are submitting amicus briefs shortly after petitions are filed, giving justices more to chew on when they decide if the case is worth their attention. Last term, in the closely watched business-methods patent case *Bilski v. Doll*, 11 separate briefs were filed by groups telling the Court how important it was that the justices grant review.

"It is generally understood now that amicus briefs are more valuable at the cert stage than at the merits stage," said Jonathan Hacker, an O'Melveny & Myers partner in D.C. who co-chairs the National Association of Criminal Defense Lawyers Committee that decides on amicus filings. "They have a strong signaling effect on the Court." NACDL has placed increasing emphasis on cert-stage filings in recent years, he said.

The acknowledged leader in this trend is the National Chamber Litigation Center, the litigating arm of the U.S. Chamber of Commerce. "We definitely put in more resources at the cert-stage than the merits stage," said executive vice president Robin Conrad. In the term just ended, the chamber filed amicus briefs supporting 20 petitions, and 16 cases on the merits. "It's where we feel we can do the most good."

In an era of scarce resources, Conrad said

she can understand why many amicus groups will only invest in a sure thing — a case that has already been granted. But she sees value in filing in support of petitions, even though the chamber has less than a 30% success rate. In part, that's because of the cumulative educational value of these briefs.

For example, she said the Chamber will often file in support of petitions involving class action lawsuits and punitive damages, both critical issues for business. Even if the particular case is not granted, the Court will learn about the importance of the issues over time, Conrad contends.

Supreme Court practitioner Kevin Newsom, a partner in Bradley Arant Boult Cummings in Birmingham, Ala., and Alabama's former solicitor general, agrees with Hacker and Conrad about the importance of this kind of brief.

"A point often lost on young lawyers is you're trying to do something entirely different at the cert stage than at the merits stage," said Newsom, a former clerk to Justice David Souter. "You're trying to convince the court that this case is important not just to me but to this larger universe of people who will be affected by it in a real way. It can add oomph to that contention."

The cert-stage amicus briefs can be especially helpful to the justices' law clerks, who have a key gate-keeping role and may feel more confident recommending certiorari in a case if the petition is backed up by endorsements from reputable advocacy or trade groups.

"If you have a business case and the Chamber [of Commerce] or the [National Association of Manufacturers] is willing to weigh in, that might matter; if you have a criminal case and the [National Association of Criminal Defense Lawyers] is willing to weigh in, that might matter," said Newsom. "If it's a qualified immunity case brought by a city and you can get a group of states to weigh in, that might matter too."

Dan Schweitzer of the National Association of Attorneys General agrees that cert-stage amicus briefs can be "a powerful tool" in spotlighting the importance of a case for the Court, and states often file them. "States know that one of the criteria of a cert grant is the importance of the case to others and the problems that will be created if a certain lower court decision stands."

At the same time, Schweitzer said states and others need to be cautious about overusing the tool. "The assertion that this case is vitally

important is lost if you say it too often, or if close review of the case reveals that it is not," he said.

NACDL is also selective about the criminal cases in which it will file a brief at the early stage, says Hacker. "We get a lot of requests for support, but we have to evaluate whether it is a good case from the viewpoint of criminal defendants, and whether it is likely to move the law in the right direction." Translation: There's not much point for the NACDL to flag a case for the Court to take up if the justices are certain to then rule against the defendant.

Sometimes, though, Hacker adds, when there is a circuit split and the defendant is petitioning the high court in the face of likely defeat, "you can't avoid it." In such a case, even though a loss is likely, the association may file a cert-stage amicus brief anyway, to help frame the issues as positively as possible for criminal defendants.

Newsom also said parties in high court cases ought to be strategic, careful and "choosy" about whom they select as cert-stage amici. He recalls a death penalty habeas case that he handled in which the U.S. Court of Appeals for the 11th Circuit "basically was wrong."

"My judgment was the Court was not going to grant and argue it. It just seemed too sort of one-offish," he said. But he asked the solicitor general of Illinois — a non-death penalty state — to file a cert-stage amicus brief.

"He did and it showed why this issue mattered not just to death penalty states," he said. "I had asked for a summary reversal in the petition and we got it."

Newsom filed a cert-stage amicus brief on behalf of the Defense Research Institute in *AT&T Mobility v. Concepcion*, a major arbitration case that the justices agreed to hear this coming term.

"Our principal engagement was to explain why this matters practically to defense lawyers who have clients who enter into these arbitration agreements," he said. "We're now in the middle of writing the merits-stage amicus brief."

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