

Supporting Newly-Asserted Facts in Amicus Briefs

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The Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals* fundamentally changed way that consider scientific evidence. Prior to that decision many courts had taken a deferential view toward scientific testimony, asking only if the testimony had "gained general acceptance in the particular field in which it belongs." Growing concern about the integrity of scientific evidence led the Supreme Court to require judges to be more assertive in testing the scientific foundation for proffered expert testimony. *Daubert* required that expert testimony be properly grounded scientific methods and procedures. As a result, judges now often conduct rigorous inquiries into the scientific basis of proffered expert testimony before allowing such testimony to be considered by a jury.

The *Daubert* decision also marked the start of a collaboration between the scientific and legal professions to strengthen the role of science in legal decision making. Both professions follow well-developed rules for reaching conclusions, and share an interest in protecting the integrity of scientific information submitted for consideration by judges and juries. In *Daubert*, the Supreme Court urged trial judges to incorporate the standards of the scientific community in making decisions about admissibility of expert testimony. In doing so, the Supreme Court relied heavily on an amicus brief submitted jointly by the National Academy of Sciences and the American Association for the Advancement of Science asserting that science "is a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement."¹ The Supreme Court expanded on this process-definition of science to encourage judges to make a preliminary determination of the scientific validity of the reasoning or methodology underlying the expert testimony. More specifically, the Supreme Court required the trial court judge to determine if proffered scientific testimony is capable of being empirically tested and is well-grounded in common scientific procedures, such as peer review, error testing, and (echoing the earlier standard) acceptance by the scientific community.

After *Daubert* the scientific and legal communities collaborated in developing educational programs to train judges in scientific methodologies and to recognize the threats to scientific reasoning and inference. The National Academies and the Federal Judicial Center worked

¹ 509 US 579, 590 (1993). Citing Brief for American Association for the Advancement of Science and the National Academy of Sciences as *Amici Curiae* 7-8 (emphasis in original). Subsequently, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999) the Court cited an amicus brief filed by the National Academy of Engineering for its assistance in explaining the process of engineering. While the amicus briefs submitted by the National Academies are examples an amicus brief that the court found useful, these are unlike the amicus briefs that are the concern of this proposal since the National Academies' briefs did not offer factual assertions that could be tested and disproven.

together to develop a new edition of the *Reference Manual on Scientific Evidence*, which explains to judges the underlying research methodologies for a number of areas of science that commonly arise in litigation. In this way, the scientific and legal professions have worked together to strengthen the rigor and integrity of scientific information introduced into the trial courts.

This initiative presents another opportunity for the scientific and legal professions to collaborate to strengthen the role of science in legal decision-making, this time focusing on amicus briefs submitted to the United States Supreme Court. A growing body of legal scholarship demonstrates that amicus briefs often include new facts that are not included in the briefs by the parties or the record of the case.² The introduction of material facts at the appellate stage of litigation is inconsistent with customary procedural safeguards.³ Such “newly-asserted facts” have not undergone the adversarial examination regarding their accuracy and reliability that typically occurs in the initial forums. Such facts were neither vetted in a pretrial *Daubert* proceeding to establish their admissibility, nor introduced and considered as part of deliberations in administrative hearing. Instead, such facts first appear in an appellate forum that was never intended to resolve disputed factual issues.⁴ An appellate court’s reliance on such untested facts may undercut the strength of judicial decisions and raise doubts about the integrity of judicial review. In short, the risk of introducing unvetted facts at this late stage of litigation seems sufficiently worrisome to justify further collaboration between scientific and legal communities to develop safeguards to ensure the validity of facts that have not been examined in the proceedings below.

This paper proposes an amendment to Rule 37 of the U.S. Supreme Court Rules of Procedure that will highlight new factual assertions appearing in amicus briefs and allow the Supreme Court to make a meaningful assessment of the proper weight, if any, to give such newly-asserted facts.⁵ In offering this proposal I have made a number of assumptions, each of which may require separate examination.

² I found the most helpful resource to be Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014) [hereinafter Larsen, *Trouble*]. See also, Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1216 (2013) (Amicus briefs “may be replete with dubious factual assertions that would never be admitted at trial.”); Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 94-95 (1993) (noting that facts presented in amicus briefs lack safeguards of evidence introduced in the trial courts).

³ Frederick Schauer, *The Decline of “The Record”*: A Comment on Posner, 51 DUQ. L. REV. 51, 53-54 (2013) (expressing the traditional view regarding fact-finding by the appellate court as follows: “Facts are to be ‘found’ by trial courts, and the task of appellate courts is to determine whether the trial court has properly applied the law to the facts found below. For a judge to go outside of the record in the search for additional facts, or for an advocate to encourage a judge to do so, has long been a cardinal taboo of American appellate practice.”).

⁴ See generally, Brienne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 60-61 (2011) (“[A]micus practice presents, at best, a limited and ad hoc opportunity for the presentation of adversarial ideas, not the structured opportunity for give-and-take presented by the party-centered adversarial system.”).

⁵ Amicus briefs are less common in the Courts of Appeals. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 687 (2008) (responding to a mailed survey (24% response rate), a significant majority of Circuit Court respondents (79%)

First, I assume that the assertion of unexamined facts in amicus briefs is of sufficient concern to justify a change in the rules of procedure in order to highlight presence of such unexamined facts. The Supreme Court has repeatedly expressed concern about departing from the record in the case under consideration.⁶ Supreme Court Rule 26 makes a point of requiring the parties to specify in the Joint Appendix “any relevant pleadings, jury instructions, **findings**, conclusions, or opinions . . .”. (emphasis added) Such attention to the findings of the forum below suggests that factual assertions by an amicus party that go beyond the record established by the proceedings below are a departure from normal practice and should be highlighted in a separate section of the brief.

Second, I assume that on occasion such newly-asserted facts may be useful to the Court and should not be barred from consideration. Rule 37(1) of the Supreme Court Rule recognizes that, “An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.” Apparently, the Supreme Court finds the presentation of factual information in amicus briefs to be useful as well.⁷ Larsen found that one in every five Supreme Court citations to amicus briefs was used to support a factual claim.⁸ For that reason, I do not suggest that the presentation of newly-asserted facts be prohibited.

indicated that 5% or less of their docket involves amici curiae. Only twelve Circuit Court judges (21.1% of all respondents) indicated 15% or more of their cases involve amici curiae). A parallel proposed amendment to the Federal Rules of Appellate Procedure is included in Appendix B.

⁶ See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2739 n.8 (2011) (Justice Scalia objecting to Justice Breyer’s “own research into the issue of the harmfulness of violent video games” as being outside the record of the case). Chief Justice Roberts has often voiced concern about departing from the record of the case during oral argument. See e.g., *City of Hays v. Vogt*, 2018 WL 1368609 (U.S.), 41-43 (U.S.Oral.Arg., 2018) (Roberts, C.J.) (“Well, before we start having an -- an extended exchange about material and something that's not in the record, I -- well, I guess I would just like to point out that it's not in the record. There's a reason we [confine] things to what's in the record, including how do we know what this is if it's not in the record.” . . . “How do we know that it's been adequately -- had a chance for people to object to it and all that? It's -- it's not just a passing comment that it's not in the record.” . . . “And as far as I'm concerned, coming in and saying I want to know about this thing that's not in the record is no different from somebody else coming off the street and saying: ‘Hey, wait a minute, I know what happened in this case.’” . . . “I'm just saying I will discount the answers because it's not something that's in the record.”); *Chantell Sackett v. E.P.A.*, 2012 WL 38639 (U.S.), 35-36 (U.S.Oral.Arg., 2012) (Roberts, C.J.) (“If [the documents] weren't in the record, I don't want to hear about them. You appreciate that rule, that we don't consider things that aren't in the record.”).

⁷ The Supreme Court often relies, at least to some extent, on factual assertions in amicus briefs. Larson examined 124 Supreme Court citations to amicus briefs that supported assertions of legislative fact in the 417 opinions decided from 2008 to 2013, and offered the following examples of their use: “Justice Alito relied on an amicus brief from the New York County District Attorney's Office to assert that numerous lab technicians routinely have their hands on DNA evidence. Justice Sotomayor relied on a brief from an economics professor to establish the average length of time of a Chapter 12 bankruptcy. And, in the challenge to the Affordable Care Act in 2012, Chief Justice Roberts relied on a brief from ‘America's Health Insurance Plans’ to assert that the new law ‘will lead insurers to significantly increase premiums on everyone.’” (footnotes omitted) Larsen, *Trouble* at 1778-1779.

⁸ Larsen, *Trouble* at 1762.

Third, I have restricted the focus of the amendment to newly-asserted facts that appear in amicus briefs. On rare occasion a brief submitted by a party may also include assertions of facts outside the record. Such assertions in a party's brief present less of a problem since issues raised in a party's brief are likely to be the focus of a response by the opponent, thereby giving the court sufficient information to assess the integrity of the asserted facts. Factual assertions in an amicus brief, on the other hand, are less likely to be the object of a response by a party.⁹ It is in these circumstances that an alternative means of assessing the newly-asserted facts is required.

Fourth, I have assumed that the current briefing schedule and word limits for amicus briefs will not be altered.¹⁰ One might construct an auxiliary procedure that would extend time limits and word limits of the normal briefing process to allow a more expansive opportunity for thorough vetting of initial factual assertions outside the record.¹¹ However, such a procedure would be awkward and disruptive to the normal functioning of the Court. The proposed amendment would maintain the current restrictions on amicus briefs.

Retaining the current word limit on briefs may force amicus parties to make difficult choices between introducing new factual information and making legal arguments. I assume that amicus parties will introduce new factual information only in extraordinary circumstances where they regard the new factual information as essential to the resolution of the dispute. In such a circumstance an amicus party should be willing to forgo a portion of the space allowed for legal argument to alert the court to such essential factual information. If the extent of information required to support new factual information is so great as to crowd out the opportunity for legal argument, that may be an indirect indication that the Supreme Court should be cautious in giving much weight to such information.

Fifth, I have assumed that best means of altering the current practice is through an amendment to Supreme Court Rule 37, which governs submission of amicus briefs. Changes to procedural rules do not always bring about the intended result,¹² and other methods such as educational programs can be used to highlight this issue. Perhaps simply raising awareness of such concerns will encourage the Supreme Court to become sufficiently vigilant to identify and properly consider such newly-asserted facts. But I have chosen to propose a rules amendment since the rules of procedure presently address the proper role of the amicus brief, and a specific proposed rule amendment allows a more focused discussion of the concerns raised by this practice and possible solutions.

⁹ Larsen, *Trouble* at 1800-1802; Gorod, *supra* note 4 at 60.

¹⁰ Supreme Court Rule 33 limits the amicus brief on the merits to 9,000 words. Supreme Court Rule 37 requires that the amicus brief shall be submitted within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief.

¹¹ Larsen has suggested a "limited letter at the end of the *amicus* submissions in which the parties can respond-not to legal arguments-but only to instances where they think the amicus has relied on a shady authority for a claim of fact." Larsen, *Trouble* at 1812.

¹² See generally Richard Marcus, *The Rulemaker's Laments*, 81 *FORDHAM L. REV.* 1639 (2013) (setting forth the frustrations that accompany attempting to change litigation practice through amendment of procedural rules).

Lastly, I have restricted the scope of the proposed rule to amicus briefs in cases accepted for oral argument. The problem of newly-asserted facts also arises in amicus briefs submitted to the Supreme Court in support of petitions for a writ of *certiorari*. Such amicus briefs are likely to be influential in the Court's decision to grant a writ.¹³ On rare occasion amicus briefs submitted to the US Courts of Appeals and in State Supreme Courts may raise similar issues.¹⁴ Nevertheless, this proposed amendment focuses only on the issue as it arises in amicus briefs submitted to the Supreme Court in cases accepted for oral argument in order to avoid distraction by issues that may be distinctive to these other forums. A focused discussion of the proposed amendment to Rule 37 of the Supreme Court Rules of Procedure also should inform the consideration of newly-asserted facts in these other circumstances as well.

¹³ Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782, 803 (1990) (finding that during the 1982 term "30% of all amicus activity takes place on writs of certiorari and on jurisdictional statements on writs of appeal.").

¹⁴ Simard, *supra* note 5 at 687 (most circuit court judges indicating that amicus practice constitutes less than 5% of their docket); Larsen, *Trouble* at 1779-1780 (only 56 citations to amicus briefs in the opinions of the 50 state supreme courts for the years 2008 to 2013).

**Proposed Amendment to Supreme Court Rule of Procedure 37:
Brief for an *Amicus Curiae***

7. An *amicus curiae* brief that brings to the attention of the Court one or more facts not brought to its attention by the parties' briefs must set forth each of those newly-asserted facts in a separate section of the brief that does not include legal argument. This separate section must present a clear statement of the newly-asserted fact, explain how the newly-asserted fact relates to the questions presented to the Court, and either

- (a) provide appropriate references to the factual assertion in the joint appendix or the record of the case; or
- (b) provide appropriate citations to published sources that support the establishment of the newly-asserted fact, and
 - i. indicate the extent to which such sources have been subjected to scholarly peer review; and
 - ii. explain how the findings presented in such published sources relate to the newly-asserted fact; or
- (c) provide appropriate citations to unpublished sources that support the establishment of the newly-asserted fact, and
 - i. identify the sponsor of such unpublished sources; and
 - ii. indicate the nature of the involvement of a party or counsel for a party in developing such unpublished sources, including whether a party or counsel for a party authored the unpublished source, in whole or in part, and whether a party or counsel for a party made a monetary contribution intended to fund the preparation of the unpublished source; and
 - iii. justify the consideration of the findings of such unpublished sources in relation to the questions presented, with reference to the factors for admissibility of expert testimony set forth in Federal Rule of Evidence 702 or the standards for consideration for such finding in the initial proceeding; and,
 - iv. indicate the means of gaining sufficient access to the research data underlying the unpublished sources to allow replication of the findings that are material to the asserted fact.

COMMENTARY

The proposed amendment places new requirements on amicus briefs that present new factual information that has not been included in the parties' briefs.¹⁵ The amicus brief must highlight each new factual assertion in a separate section of the brief and provide information to assure the Court that the newly-asserted fact is accurate and valid.

As an initial matter, this separate section of the amicus brief must present a clear statement of each newly-asserted fact, including its limitations and constraints. This initial statement of the newly-asserted fact will alert the Court to the presence of additional factual information not included in the parties' briefs that the amicus party finds to be necessary for a proper resolution of the legal issues.

An example of such a newly-asserted fact arose in the recent Supreme Court oral argument in *National Institute of Family and Life Advocates v. Becerra*. The case concerned a California law requiring pregnancy care centers in California to notify women that the state provides free or low-cost abortion services. Justice Alito and Joshua Klein, Deputy Solicitor General for the State of California, had the following exchange regarding a factual assertion about the nature of covered clinics in an amicus brief submitted in the state court proceeding:

JUSTICE ALITO: So, when you put all this together, you get a very suspicious pattern. And I don't know that we need to go into statistics about what the percentage of covered clinics are -- are pro-life and -- and -- and what are not, but we do -- we have an *amicus* brief from a party in the state court case where the state court held that this law is unconstitutional. And according to their statistics, 98.5 percent of the covered clinics are pro-life clinics. Do you dispute that?

MR. KLEIN: Your Honor, yes. And I understand we're speaking outside of the record here, but that *amici's* evidence in the state court did not -- was off by I think a factor of 10 in terms of how many covered non -- I mean, it differed by a factor of 10 when it told the state court how many covered non-anti-abortion facilities there were.

JUSTICE ALITO: So what is your position on that? What's the percentage?

MR. KLEIN: Your Honor, the state does not have firm numbers on this. We have done a preliminary assessment which found a significant number of non-anti-abortion-covered

¹⁵ Such factual assertions are defined as "generalized descriptive statements about a condition or circumstance of the world that can be verified or falsified." Larsen notes that such facts are likely to be "legislative facts" (i.e., facts that assist the court in applying legal doctrines) rather than "adjudicative facts" (i.e., facts that relate exclusively to the litigants and the specific circumstances of the case and are typically resolved by a jury). Larsen, *Trouble* at 1774. See also, Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942) (setting forth the distinction between "legislative facts" and "adjudicative facts" as they apply in administrative law).

facilities.

However, I will also say that deriving this from purely state databases is very tricky because they rely on self-reporting that's hard to interpret as to who really does primarily pregnancy care. It's exactly the kind of thing where a record would be useful.¹⁶

If this issue had been raised as an initial matter in an amicus brief in the proceeding before the U.S. Supreme Court, the proposed amendment to Rule 37 would require that brief to set forth in a separate section the newly-asserted fact that 98.5 percent of the clinics covered by the statutory requirement offer pro-life counseling and do not provide information regarding access to abortion services. The brief would also have to include information to support the validity of this fact, which might be as easy as citing a published state report.

Not all newly-asserted facts are so straight forward. Mixed questions of law of fact are often at issue, and present greater difficulties. The proposed amendment would require an initial section of the amicus brief to present the factual statement after being shorn of its legal context. For example, the legal issue may be whether certain restrictions on abortion are unreasonably burdensome. However, the factual statement itself must be reframed in terms of the extent to which state-imposed regulation of pregnancy care providers focuses on centers that provide no counseling regarding abortion services.

Even a narrow specification of a newly-asserted fact may result in numerous amicus briefs with competing interpretations. In *Fisher v. University of Texas* (2016, also known as *Fisher II*), the Supreme Court held that the race-based preferences for state college admission survived strict scrutiny. The Court received several amicus briefs disagreeing about the effect of such preferences on academic performance by minority students. A debate that had been confined to the academic community became transformed into dueling assertions by social scientists in amicus briefs, and became an issue raised by Justice Scalia in oral argument.¹⁷ The proposed amendment to Rule 37 should sharpen the exchange among dueling amicus briefs to allow a better understanding of the underlying dispute. At a minimum the proposed amendment will warn the Court that the disputed empirical facts in amicus briefs may prove to be a shaky foundation for constitutional pronouncements.

This separate section of the amicus brief also must indicate how the newly-asserted fact will aid the Court in resolving the legal questions at issue. Only facts that assist the Court in resolving the legal questions at issue will be useful.¹⁸ In some instances the relevance of the newly-

¹⁶ *National Institute of Family and Life Advocates v. Becerra*, 2018 WL 1400475 (U.S.), 41-42 (U.S.Oral.Arg.,2018).

¹⁷ Justice Scalia commented: "There are -- there are those who contend that it does not benefit African-Americans to -- to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school, a less -- a slower-track school where they do well." *Fisher v. University of Texas at Austin*, 2015 WL 8482483 (U.S.), 67 (U.S.Oral.Arg.,2015). In the end the Supreme Court found it unnecessary to address the disputed factual assertion.

¹⁸ As noted in Supreme Court Rule 37(1), the amicus brief is only useful to the extent that it informs the Court of "relevant matter not already brought to its attention by the parties . . ." This proposed amendment subsection specifies the manner in which newly-asserted facts will aid the court in resolving the issues before the Court.

asserted fact to the legal questions at issue may be obvious and a brief sentence or two will be sufficient to establish the connection. In the oral argument cited above, Justice Alito appeared to be concerned that enforcement of the statute, in effect, singled out pro-life pregnancy counseling centers. This section of the brief would then explain how the establishment of this fact will assist the court in applying the law. In other instances, the relevance of the newly-asserted fact may be less obvious and the amicus party should explain the importance of the fact to the legal question at issue in greater detail and specify any assumptions that are required to make the connection.

In this separate section of the brief the amicus party may not make legal arguments. Since the purpose of the amendment is to alert the court to newly-asserted facts, it makes sense to avoid confusion by requiring related legal arguments to appear elsewhere in the brief. Of course, after a party has established the newly-asserted facts, the party is permitted to reference legal arguments in subsequent sections of the brief that rely on the newly-asserted fact.

Newly-asserted facts often are subject to conflicting viewpoints and questions about their validity. Such conflicts typically are resolved prior to the appeal and the Supreme Court proceeds based on the factual information presented in the record of the case. But when facts are initially presented in the context of an appeal there has been no opportunity for consideration of these facts by the tribunal below, and only a limited opportunity for the opposing party to object to the validity of the newly-asserted facts. The proposed amendment recognizes that factual assertions initially introduced during the briefing process require some assessment of validity and reliability, and offers guidance about steps an amicus party can take to assure the Court that the factual assertions are accurate and valid.

Perhaps requiring such details will not be necessary as part of the proposed rule. Perhaps it will be sufficient simply to highlight the newly-asserted fact and allow the amicus party to offer support as it sees fit.¹⁹ That would accomplish the primary purpose of alerting the Court to the presence of information that is not commonly presented as part of an appeal. Nevertheless, the proposed amendment indicates steps to be taken to provide the Court with assurance that such newly-asserted facts would be accepted in the forum below and are appropriate for consideration by the Court.

The proposed amendment requires differing degrees of support for newly-asserted facts in three different circumstances: When the fact appears in the joint appendix or case record (but not in the briefs of the parties); when the fact is supported by published sources; and when the fact is supported by unpublished sources.

On rare occasion an amicus brief may assert a fact that has been considered by the lower court or administrative tribunal and appears in the record of the case but has not been raised in the

¹⁹ My personal view is that a proposed amendment should require only that the newly-asserted fact be set forth in a separate section of the brief along with an explanation of how the fact relates to the legal question that must be resolved, and some indication that the fact would have been considered by the forum that gives rise to the appeal.

parties' briefs. As indicated in subsection (a), in such an instance it will be sufficient to cite the established fact in the record of the proceeding below and offer whatever additional support the amicus party wishes to provide. Designation of these related sections of the record will allow the Court to place the asserted fact in the larger context of the litigation and factual assertions established by the parties.

When the case record does not include the newly-asserted fact, the amicus party must offer support sufficient to convince the Court that the fact is valid and useful in resolving the legal questions before the Court. The nature of this support will vary depending on the extent to which the newly-asserted fact relies on published or unpublished sources of support.

When the support for a newly-asserted fact is found in published sources, subsection (b)(i) allows the amicus brief to cite these published sources and indicate the extent to which these published sources have been subject to scholarly peer review by the relevant professional communities. Peer review practice varies across professions and may be a somewhat inexact indicator of validity. However, a discussion of the extent of peer review should allow the court to determine if the findings of the published study meet "the same level of intellectual rigor" that is acceptable in the general practice of the profession.²⁰ Often the findings of the published sources may differ somewhat from the newly-asserted fact. In such a circumstance, subsection (b)(ii) indicates that the amicus brief must explain how the findings presented in such published sources relate to the newly-asserted fact, including the importance of any differences between the findings and the newly-asserted fact.²¹

When support for the newly-asserted fact is not found in the case record or in published, peer-reviewed studies, the burden of providing sufficient information for an initial assessment of the validity of the factual assertion will be somewhat greater. As indicated in subsection (c), when support for the newly-asserted fact is found in unpublished studies that have not undergone peer review, the amicus brief must offer additional assurances that will establish the validity of the newly-asserted facts. More specifically, as indicated in subsections (c)(i)-(ii) the amicus brief must identify the sponsor of the unpublished study, as well as any involvement by a party or counsel of a party (including the amicus party and counsel), in authoring or funding the unpublished study or source that supports the newly-asserted fact. Disclosure of such involvement is consistent with scientific standards that require identification of research sponsors and is consistent with the requirements of Rule 37(6) that requires, with certain exceptions, identification of sponsors of the amicus brief itself.

²⁰ This requirement is intended to be an approximation of the assurance of reliability of expert testimony required by *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) ["The objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom *the same level of intellectual rigor* that characterizes the practice of an expert in the relevant field." (emphasis added)].

²¹ *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.")

Subsection (c)(iii) requires that the amicus brief address the validity of the findings of the unpublished source with reference to the standards for admissibility set forth in Federal Rule of Evidence 702 or the similar standards of the initial forum. Federal Rule of Evidence 702 sets for the standard for admissible expert testimony at trial. This proposed amendment tracks the standards of Rule 702 by requiring that the brief establish by a preponderance of the evidence that the findings of the unpublished study are based on “sufficient facts or data”; that the findings are “the product of reliable principles and methods”; and that findings are reliably applied to the newly-asserted facts.²² As part of establishing that the findings of the unpublished study “are the product of reliable principles and methods”, the amicus brief must set forth the methodology used to establish the findings of the unpublished study. In many instances this will consist of only a brief description with a citation to a more detailed methodology section in the unpublished study. When the unpublished study does not offer a detailed description of the underlying methodology, the brief should provide sufficient detail regarding the methodology to allow a third party to assess the extent to which the methodology is consistent with scientific standards.

While the standards of Rule 702 are easily applicable to newly-asserted facts in appeals arising from trial courts, these standards also will be helpful in assessing appeals arising from administrative decisions. Administrative agencies use similar standards to inquire into the underlying validity and reliability of factual evidence on which they base their decisions.²³ To the extent that the underlying administrative procedure relies on more liberal standards, those standards can be used to support the findings of the unpublished research. The underlying principle is that unpublished studies presented to support the newly-asserted facts should be measured against the standards employed by the initial forum.

Lastly, subsection (c)(iv) requires that the amicus brief indicate any means of obtaining access by interested parties to the underlying research data sufficient to replicate the findings. This requirement will be particularly helpful when the underlying research data is privately funded and the study is “on file with the author.” While providing access to the research data underlying the unpublished study is not a requirement, such access will be an important factor in determining the extent to which the newly-asserted fact deserves to be considered by the Court.

²² Federal Rule of Evidence 702 Committee Note (“In 2000 the rule was amendment in response to the Supreme Court decision in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*.”)

²³ See, e.g., Amanda Hungerford, Note, Back to Basics: Courts' Treatment of Agency Animal Studies After *Daubert*, 110 COLUM. L. REV. 70, 70 (2010); Jason R. Bent, An Incentive-Based Approach to Regulating Workplace Chemicals, 73 OHIO ST. L.J. 1389, 1451 (2012).

INTERIM MEASURES

Amending procedural rules can be a lengthy process that requires extensive consultation and an opportunity for public comment on proposed rules.²⁴ Amendment of procedural rules governing the lower courts often requires more than two years from the initial proposal to adoption of the final amendment. During this interim period, it may be useful to consider two means of gathering additional information to inform the consideration of the proposed amendment.

First, it may be useful to commission an empirical research study to examine in greater depth the nature of initial assertions of factual information in amicus briefs. In a similar study 79 cases argued in the 2012-2013 term of the Supreme Court Larsen found that 61 of the cases included at least one amicus brief that presented factual information cited in the table of authorities intended to aid the Supreme Court in resolving the appeal.²⁵ Moreover, Larson found that the justices are relying on such information. In the previous five terms, one in every five citations by justices to amicus briefs was used to support a factual claim. In a number of instances support for the factual claim was uncertain.²⁶

The proposed interim study would both replicate and expand upon the finding of Larsen's earlier study. For example, amicus briefs submitted in the 2019-2020 term of the Supreme Court could be gathered and examined by law students to identify factual assertions that do not appear in the parties' briefs or the record of the proceeding below. The study might be expanded to include newly-asserted facts in amicus briefs offered in support of petitions for writs of certiorari. Once the newly asserted facts are identified, amicus parties can be asked to provide the kind of support called for in the proposed amendment. In some instances involving uncertain factual assertions, the National Academies may solicit the opinions of some of its members regarding the validity of the assertion. In the end this effort will determine the extent to which such factual assertions in amicus briefs are properly supported and how this practice may be improved.

Second, it may be useful to examine the operation of the proposed amendment as a local rule established in one or more federal courts of appeal. The United States Courts of Appeals have authority to establish local rules to govern the operation of the appellate process in that circuit.²⁷ Adoption of local rules requires much less time than amendment of the federal rules of procedure. One or more circuits might adopt a local rule patterned after this proposed

²⁴ Rules Enabling Act 28 U.S.C. § 2072.

²⁵ Larsen, *Trouble* at 1762.

²⁶ Larsen, *Trouble* at 1764 ("Sometimes, for example, the *amicus* will cite a study that it funded itself. Sometimes the numbers supplied by an *amicus* to support an assertion of fact are not even publicly available but instead remain 'on file with' the *amicus*. And it is not uncommon for an *amicus* to present factual evidence that, in reality, rests on methods which have been seriously questioned by others working in the field.").

²⁷ Federal Rule of Appellate Procedure 47(a)(1) ("Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice.")

amendment to the Supreme Court Rules, and the process under the local rule can be examined to inform consideration of such an amendment to the Supreme Court Rules as well as an amendment to the Federal Rules of Appellate Procedure.²⁸

²⁸ Development of such a local rule should be straight forward. For example, the Local Rule 29 of the US Court of Appeals for the District of Columbia is patterned after Rule 29 of the Federal Rules of Appellate procedure. The Court of Appeals for the District of Columbia could adopt the proposed amendment in Appendix B as an amendment to its Local Rule 29.

Appendix A

Supreme Court Rule of Procedure 37: Brief for an *Amicus Curiae*

1. An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored. An *amicus curiae* brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5.

2. (a) An *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ, may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 2(b) of this Rule. An *amicus curiae* brief in support of a petitioner or appellant shall be filed within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later, and that time will not be extended. An *amicus curiae* brief in support of a motion of a plaintiff for leave to file a bill of complaint in an original action shall be filed within 60 days after the case is placed on the docket, and that time will not be extended. An *amicus curiae* brief in support of a respondent, an appellee, or a defendant shall be submitted within the time allowed for filing a brief in opposition or a motion to dismiss or affirm. An *amicus curiae* filing a brief under this subparagraph shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief, unless the *amicus curiae* brief is filed earlier than 10 days before the due date. Only one signatory to any *amicus curiae* brief filed jointly by more than one *amicus curiae* must timely notify the parties of its intent to file that brief. The *amicus curiae* brief shall indicate that counsel of record received timely notice of the intent to file the brief under this Rule and shall specify whether consent was granted, and its cover shall identify the party supported. Only one signatory to an *amicus curiae* brief filed jointly by more than one *amicus curiae* must obtain consent of the parties to file that brief. A petitioner or respondent may submit to the Clerk a letter granting blanket consent to *amicus curiae* briefs, stating that the party consents to the filing of *amicus curiae* briefs in support of either or of neither party. The Clerk will note all notices of blanket consent on the docket.

(b) When a party to the case has withheld consent, a motion for leave to file an *amicus curiae* brief before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest. Such a motion is not favored.

3. (a) An *amicus curiae* brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 3(b) of this Rule. The brief shall be submitted within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief. Motions to extend the time for filing an *amicus curiae* brief will not be entertained. The 10-day notice requirement of subparagraph 2(a) of this Rule does not apply to an *amicus curiae* brief in a case before the Court for oral argument. An electronic version of every *amicus curiae* brief in a case before the Court for oral argument shall be transmitted to the Clerk of the Court and to counsel for the parties at the time the brief is filed in accordance with the guidelines established by the Clerk. The electronic transmission requirement is in addition to the requirement that booklet-format briefs be timely filed. The *amicus curiae* brief shall specify whether consent was granted, and its cover shall identify the party supported or indicate whether it suggests affirmance or reversal. The Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing. Only one signatory to an *amicus curiae* brief filed jointly by more than one *amicus curiae* must obtain consent of the parties to file that brief. A petitioner or respondent may submit to the Clerk a letter granting blanket consent to *amicus curiae* briefs, stating that the party consents to the filing of *amicus curiae* briefs in support of either or of neither party. The Clerk will note all notices of blanket consent on the docket.

(b) When a party to a case before the Court for oral argument has withheld consent, a motion for leave to file an *amicus curiae* brief may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest.

4. No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

5. A brief or motion filed under this Rule shall be accompanied by proof of service as required by Rule 29, and shall comply with the applicable provisions of Rules 21, 24, and 33.1 (except that it suffices to set out in the brief the interest of the *amicus curiae*, the summary of the argument, the argument, and the conclusion). A motion for leave to file may not exceed 1500 words. A party served with the motion may file an objection thereto, stating concisely the reasons for withholding consent; the objection shall be prepared as required by Rule 33.2.

6. Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person or entity, other than the

amicus curiae, its members, or its counsel, who made such a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.

[Proposed amendment 37(7) would be inserted here.]

Appendix B**Proposed Amendment of Federal Rule of Appellate Procedure 29:
Brief of an *Amicus Curiae***

(Proposed amendment to Rule 29 is in italics)

(a) DURING INITIAL CONSIDERATION OF A CASE ON THE MERITS.

(1) *Applicability.* This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) *When Permitted.* The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(3) *Motion for Leave to File.* The motion must be accompanied by the proposed brief and state:

(A) the movant's interest; and

(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(4) *Contents and Form.* An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) a table of contents, with page references;

(C) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

(F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; ~~and~~

(G) a certificate of compliance under Rule 32(g)(1), if length is computed using a word or line limit; *and*

(H) if amicus brief brings to the attention of the Court one or more facts not brought to its attention by the parties' briefs, the amicus brief must:

(i) set forth each of those newly-asserted facts in a separate section that does not include legal argument;

(ii) present a clear statement of the newly-asserted fact;

(iii) explain how the newly-asserted fact relates to the questions presented on appeal; and,

(iv) provide support for the factual assertion by one of the following means:

(A) provide appropriate references to the factual assertion in the joint appendix or the record of the case; or

(B) provide appropriate citations to published sources that support the establishment of the newly-asserted fact, and indicate the extent to which such sources have been subjected to peer review, or

(C) provide appropriate citations to unpublished sources that support the establishment of the newly-asserted fact, and

(1) identify the sponsor of such unpublished sources;

(2) indicate the nature of the involvement of a party or counsel for a party in developing such unpublished sources, including whether a party or counsel for a party authored the unpublished source, in whole or in part, and whether a party or counsel for a party made a monetary contribution intended to fund the preparation of the unpublished source;

(3) justify the consideration of such factual material in relation to the questions presented, with reference to the factors for admissibility of expert testimony set forth in Federal Rule of Evidence 702 or the standards for consideration for such studies in the initial proceeding; and,

(4) indicate the means of gaining access to the research data underlying the unpublished sources sufficient to allow replication of the findings that are material to the asserted fact.

(5) Length. Except by the court's permission, an *amicus* brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court

grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(6) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

(8) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.

(b) DURING CONSIDERATION OF WHETHER TO GRANT REHEARING.

(1) Applicability. This Rule 29(b) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) When Permitted. The United States or its officer or agency or a state may file an amicus- curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

(3) Motion for Leave to File. Rule 29(a)(3) applies to a motion for leave.

(4) Contents, Form, and Length. Rule 29(a)(4) applies to the amicus brief. The brief must not exceed 2,600 words.

(5) Time for Filing. An amicus curiae supporting the petition for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

Appendix C: Rules Amendment Process

This paper proposes an amendment to Rule 37 the United States Supreme Court Rules of Procedure, altering the requirements for amicus briefs that make new factual assertions. However, the manner in which these rules are amended is not exactly clear.

The Rules Enabling Act of 1934²⁹ gives the Supreme Court the authority to promulgate federal rules of procedure and evidence as long as those rules not “abridge, enlarge, or modify” any substantive right. While the Act sets forth detailed requirements for amendment of the procedural rules of the lower federal courts,³⁰ the Supreme Court is not subject to these requirements. With the assistance of a reference librarian at the Supreme Court, I was able to find only the following statement regarding the procedure for amending the Supreme Court Rules of Procedure:

The Clerk’s Office also plays a key role in the development of the Court’s rules. As chief administrator of the rules, the Clerk’s Office is in a position to advise the Court of the need for changes or additions to the rules. When authorized by the Court, acting through a committee of three Justices, the Clerk’s Office drafts and refines all proposed changes to the rules. And when the Clerk invites public comment on proposed new rules, or amendments thereto, the Clerk supplies the “Clerk’s Comments” to help the public understand the purpose and meaning of such proposals.³¹

I have contacted the Clerk’s Office seeking additional information, and am awaiting a response. For the time being it appears that amendment of the procedural rules that do not implicate substantive rights is entirely within the discretion of the Supreme Court, aided by the Clerk’s Office.

²⁹ 28 U.S.C. §§ 2071, 2072

³⁰ This process is described at <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public>.

³¹ Stephen M. Shapiro, et al., *Supreme Court Practice*, 27 (10th Ed. Bloomberg BNA).