

## **Opening Statement of Professor Allison Orr Larsen**

### **Senate Judiciary Committee Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights**

**April 27, 2021  
3:00 PM**

Chairman Whitehouse, Ranking Member Kennedy, and distinguished members of the Subcommittee:

#### **My Background**

Thank you for inviting me to testify today. I am honored to discuss my research in any way that would be helpful to you. I am a professor of law at William & Mary Law School where I teach Constitutional Law, Administrative Law, and related courses. Before joining the faculty at William & Mary in 2010, I clerked for Judge J. Harvie Wilkinson on the U.S. Court of Appeals for the Fourth Circuit, and for Justice David Souter on the U.S. Supreme Court. I also spent several years practicing appellate and Supreme Court litigation at O’Melveny & Meyers.

My scholarship focuses on the institutional and information dynamics of judicial decision-making. I have a particular interest in the role of fact-finding at the Supreme Court and the way the Justices inform themselves about those facts. My research on that topic over the last decade has received quite a bit of national attention (from the press and from the academy) and it is my privilege to share my observations with you today. The starting assumption of my work is that technological advances have changed much about the way courts desire and digest information. My concern is that the rules governing fact-finding have not caught up to the change and the absence of procedural safeguards risks tainting judicial decision-making with errors that are costly and difficult to change.

#### **Confronting Supreme Court Fact-Finding<sup>1</sup>**

In law school everyone learns that facts are developed in the trial courts, and that appellate judges review what is known colloquially as a “cold record” evaluating legal questions but with deference given to the lower court and legislative records on questions of fact. The reality is more complicated than that. Many of the Supreme Court’s most significant decisions turn on questions of fact that are not definitely determined at trial or governed by typical rules of deference. These facts are not of the “whodunit” variety concerning what happened between the parties. They are instead more generalized facts about the world: Can you effectively discharge a locked gun in self-defense? Is a child’s brain development affected by playing violent video games? Do independent campaign expenditures lead to corruption? Has minority voter turn-out changed significantly so as to render a legislative intervention outdated?

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<sup>1</sup> This portion of my testimony is drawn from my 2012 [article](#), *Confronting Supreme Court Finding*, 98 Va. L. Rev. 1255 (2012) and my 2018 [work](#), *Constitutional Law in an Age of Alternative Facts*, 93 NYU L. Rev. 175 (2018). Citations are largely omitted here but can be found within those articles.

Questions like these are not strictly legal – they do not involve the interpretation of a text nor do they involve a choice between competing rules that prescribe conduct. But they are also not “facts of the case” in the way we generally use that phrase -- the who / what / where / why questions that should ultimately go to a jury or fact-finder. Instead, these questions implicate what have come to be known as “legislative facts.”<sup>2</sup> A legislative fact gets its name not necessarily because it is found by a legislature (although it can be), but because it relates to the “legislative function” or policy-making function of a court. The central feature of a legislative fact is that it transcends the particular dispute and provides descriptive information about the world which judges use as foundational building blocks to form and apply legal rules.

Legislative facts are not governed by the existing rules of Federal Evidence. In 1972, legislative facts were specifically exempted from Federal Rule of Evidence 201 on “judicial notice,” and the advisory notes accompanying the rule actually encourage their “unfettered use.”<sup>3</sup> The result is a complete hodgepodge of procedure concerning fact-finding of this sort. Legislative facts can be –but do not have to be – the subject of expert testimony in the trial court. Citations to support assertions of legislative fact can – but need not – come from the record below. And district court decisions on legislative facts may – but are not entitled to – be given deference from reviewing courts.

Of course in 1972 when legislative facts were exempted from the judicial notice rule the world of information-sharing looked dramatically different from the way it does today. The traditional limitations of fact-finding at the appellate level are well known: the courts have limited staff, limited time, limited resources and the parties briefing them have many issues to cover and limited space in which to do so. Appellate courts are simply not built for fact-finding. Thanks to the dawn of the internet age, however, the Justices (and their clerks) now have new tools and are flooded with information literally at their fingertips. Social science studies, raw statistics, and other data are all just a Google search away and being pressed by motivated amicus briefs and through targeted bloggers seeking their attention. Today, if the Justices want more empirical support for a factual dimension of their argument, they can find it easily and they are increasingly being asked to do so.

As a result, Supreme Court decisions today are very fact-heavy. Pick up any issue of the U.S. Reports and one will quickly encounter “fact-y” claims and non-legal authorities: Justice Kennedy citing statistics on car crashes, Justice Breyer explaining rates of medical complications following abortions, Chief Justice Roberts on the economics of the health insurance industry, to name a few. Available empirical evidence is clear that—compared to thirty years ago—Supreme Court opinions are longer, padded with significantly more citations, and rich with “nonlegal” authorities (like citations to newspaper articles, online data sets, websites and even blog posts).

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<sup>2</sup> This terminology and distinction, as I explain in my articles, originated with Kenneth Culp Davis in 1942 although it has been refined and re-articulated since then. See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Procedures*, 55 Harv. L. Rev. 364, 365–66 (1942).

<sup>3</sup> An explicit reference to legislative facts (excluding them from coverage) can now be found in the text of the current Federal Rule of Evidence 201; it was added to the text as part of the 2011 amendment, but according to the committee notes, the change was intended to make the rule more easily understood, not to substantively change the rule. The advisory notes explaining that legislative facts are to be excluded from the rule on judicial notice date back to 1972.

The Justices are not just surrounded by these facts, they seem hungry for them. For judges—and indeed for everyone alive today—no factual question seems out of reach. We can all access infinite information on our phones now, so it is no wonder that there is a bolstered faith in our ability to understand the world around us. The information age, in other words, has produced an increased confidence in digesting factual information and this new dynamic has had a significant effect on judicial decisions, particularly at the U.S. Supreme Court. Put simply, Supreme Court fact-finding is no longer a fringe issue; it is core to the Court’s every-day business and there is every indication that it is here to stay.

### **An Amicus Growth Spurt and its Implications<sup>4</sup>**

One increasingly common way that Supreme Court Justices inform themselves about the factual dimensions of their decisions is through the use of *amicus curiae* (Latin for “friend of the court”). Amicus briefs are on the rise. Ninety-eight percent of Supreme Court cases now have amicus filings; over 800 briefs are filed each term and the marquee cases attract briefs in the triple digits. This is an 800% increase from the 1950s and a 95% increase from 1995. To put things in perspective historically, amici averaged roughly one brief per case in the 1950s and about five briefs per case in the 1990s. By contrast, in the 2015 *Obergefell* case the number of amicus briefs reached 147 amicus briefs (a record-breaker) and the health care case two years earlier (*NFIB v. Sebelius*) had 136 amicus briefs on the docket. For the sake of comparison, consider that *Roe v. Wade* had 23 amicus briefs. In *Brown v. Board of Education*, there were only six. In *Lochner v. New York* that number was zero.

Amicus briefs are filed for any number of reasons: to make or reiterate a legal argument, to flag implications of a law for an industry, to weigh in and show consensus on a policy debate, or to ask the Court to steer clear of an issue altogether. Perhaps the most influential type of amicus brief, however, is one that adds new facts to the record. This is the role of the amicus applauded by the Justices and their clerks. Justice Breyer has said that these briefs “play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our decisions.”<sup>5</sup> Likewise Justice Alito (while sitting as a federal appeals court judge) observed that “[e]ven when a party is very well represented, an amicus may provide important assistance to the court . . . [by] collect[ing] background or factual references that merit judicial notice.”<sup>6</sup> And former Supreme Court law clerks have remarked that it is the “non-legal” information provided by amici that is the most useful.

Perhaps it is not surprising, therefore, that the Justices cite these briefs to support their factual claims with increasingly regularly. In my 2014 study on the subject I found that that one in every five citations to amicus briefs by the Justices were used to support a factual assertion. Of those citations, several surprising patterns emerge. Less than a third of the factual claims credited

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<sup>4</sup> My testimony in this section comes from my articles [The Trouble with Amicus Facts](#), 100 Va L. Rev. 1757 (2014), and [The Amicus Machine](#), 102 Va. L. Rev 1901 (2016) (with Neal Devins). Internal citations are largely omitted here but can be found in the original articles.

<sup>5</sup> Justice Breyer Calls for Experts to Aid Courts in Complex Cases, N.Y. Times, Feb. 17, 1998, at A17.

<sup>6</sup> *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 132 (3d Cir. 2002).

by the Court were contested by the party briefs. And more than two-thirds of the time, the Justice citing the amicus brief for a fact cites only the amicus brief as authority—not any accompanying study or journal citation from within the brief. The implication from this omission is telling: the Justices are using these briefs as more than a research tool. The briefs themselves are the factual authorities, and the amici are the experts.<sup>7</sup>

The Justices are hungry for factual information and an amicus machine has emerged to feed that hunger. The trouble is that this information coming to the Court is not uniformly reliable, not stress-tested through the adversarial system, and not provided by neutral parties. Historically, a “friend of the Court” was a lawyer who happened to actually be in the courtroom during oral argument. There was no preparation and no agenda in his participation. The amicus today, however, has evolved significantly since its original incarnation. Now the norm is targeted amicus briefs authored by motivated interest groups, often coordinated by the parties, and submitted by well-organized and well-funded players. This change matters because the studies, statistics, and articles marshaled by these groups to support factual assertions are selected by those with a “dog in the fight.” The factual sources are chosen by amici, in other words, for reasons other than that they are the industry standard, the most peer-reviewed, or the most accurate state of our knowledge today. Rather they are chosen as part of a coordinated plan to win the day. And with the vast amount of information and studies available online now, it is not hard to assemble evidence – whether of dubious or strong reliability – to support a pre-existing point of view.

It is a mistake to conclude that the Justices can easily tell which of these amici are real factual experts and which of them are not. Most of the names on the covers of the briefs sound neutral and mask the advocacy that may be motivating them. The American College of Pediatricians, for example, is a socially conservative group founded to protest the adoption of children by gay couples, in opposition to the contrary position taken by the similarly-named American Academy of Pediatrics. With so much data out there and so many “experts” competing for the Court’s attention, it becomes increasingly difficult for the Justices and their clerks to sort the reliable amici information from the unreliable.

### **The Risks of Unregulated Appellate Fact-Finding<sup>8</sup>**

Nowhere outside the Supreme Court do we see this widespread eleventh-hour supplementation of the factual record from sources that are not subject to cross-examination or other checks on reliability. The fact that the U.S. Supreme Court is unique in educating itself about the world in this way should give us pause. Unlike other legal decision makers (i.e., administrative agencies and trial courts), the U.S. Supreme Court is not set up to sort through what is now a sea

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<sup>7</sup>I updated this research for a 2019 retreat with the Annenberg Foundation (looking at decisions from 2014-2018) and although that research was never published I found even more dramatic results: 50% of the citations to amicus briefs were for questions of fact and of the 277 citations to amicus briefs for claims of fact during that more recent time period, 93% of them were uncontested by the parties to the litigation.

<sup>8</sup> This portion of my testimony comes from the following three articles: [Constitutional Law in an Age of Alternative Facts](#), 93 NYU L. Rev. 175 (2018); [The Trouble with Amicus Facts](#), 100 Va. L. Rev. 1757 (2014); and [Judging Under Fire and the Retreat to Facts](#), 61 W&M Law Rev. 1083 (2020). Internal citations and quotations are omitted here but can be found in the original articles.

of factual claims coming from a variety of actors who all claim to be experts. Mistakes are almost inevitable.

As part of my research I did a deep-dive into some of the amicus briefs the Justices use to support their arguments. I found several examples where the reliability of the information presented is shaky at best. 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.

*Gonzales v. Carhart*—the Court’s 2007 decision on a federal “partial birth abortion” ban—provides a controversial example.<sup>9</sup> Writing for the majority and acknowledging that he could “find no reliable data to measure the phenomenon,” Justice Kennedy wrote that “it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow.” The authority he cites for this proposition is an amicus brief filed by Sandra Cano, the “Mary Doe” in *Doe v. Bolton*, and 180 women who alleged injuries from abortions. The relevant pages of the Cano brief, in turn, rely on the work of Dr. David Reardon to demonstrate what he claims are serious adverse psychological consequences that accompany a decision to have an abortion. Dr. Reardon is a trained electrical engineer who holds a Ph.D. in bioethics from an unaccredited and now non-existent school in Hawaii. He runs the “Elliot Institute,” which is an organization known for its anti-abortion advocacy. Dr. Reardon’s research has been the subject of much controversy. His work on the psychological harm caused by abortion has been consistently refuted by psychologists and psychiatrists, including groups such as the American Psychological Association and the American Medical Association. To be sure, this is a debate in psychology that is particularly charged politically but it was not one of the reasons Congress gave (in extensive factual findings) for banning the procedure. Regardless of how one feels politically on the subject, there are two relevant points for now: (1) Dr. Reardon’s research is a minority view in the field of psychology, and (2) one would not be able to figure that out by looking at the name on the brief or the statement of interest on its first page.

To date, the standard response to questions about “junk science” ending up in Supreme Court opinions is to resort to the adversary process. While that may have been enough in a pre-Internet universe, it is insufficient today. My research shows that the check from the adversary system at the Court is very feeble to the point of being almost non-existent. In both my 2014 published study and my 2018 update I went through each of the factual claims supported by an amicus and cross-referenced the party briefs to see if they were contested by the parties. Such a check existed in less than a third of the citations for the 2014 study and less than 10% of the citations for the more modern time period. The number of amicus briefs filed and the amount of seemingly legitimate information available to present makes it very unlikely that a litigant can adequately respond to amici-presented factual claims.

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<sup>9</sup> For relevant citations in *Carhart* and to the amicus brief discussed see *The Trouble with Amicus Facts*, 100 Va. L. Rev. at 1797-98.

There is more to fret about, however, than just “creative” or unreliable factual submissions to the Court. Facts are not just easier to access in the digital age, they are also easier to legitimize. Factual claims that may have once been labeled as outrageous assertions from fringe players are now easily distributed in a way that makes them seem more mainstream. Add to that the human tendency (shared of course by judges) of confirmation bias and one quickly sees the danger. Whether one believes climate change is man-made or voter ID laws suppress minority votes, for example, may well depend on one’s political affiliation. In today’s political dialogue, as comedian Stephen Colbert explained sarcastically, ideas that “feel right . . . should be true.” In the judicial context, the temptation to reach for an amicus brief or extra-record fact that confirms a pre-existing world view has never been higher. The risks are particularly acute once one acknowledges the parties have little control or ability to rebut the shaky factual claims. The American legal system has relied on an adversarial method to test factual claims for a long time; it is dangerous to assume that safety net is no longer necessary at the Supreme Court now that facts are so freely accessible.

There is another, more subtle consequence of the digital revolution and the increased judicial confidence in digesting factual information at the appellate level. These facts are not only being used by the Justices to rationalize their decisions; there is reason to suspect that the turn towards facts is shaping the outcomes themselves. There is something very comforting about a retreat to facts. Rather than directly announcing philosophical or normative commitments, a Justice can announce the facts in a “neutral” way and use those facts as a shield to hide from accusations of judicial activism.

Take *Shelby County v. Holder* as an example. *Shelby County* was the 2013 decision by the Court invalidating a key part of the Voting Rights Act. It was largely briefed as a case about congressional power (power to force certain states to get approval before changing voting laws), but the Court held instead that the law’s coverage formula—which determined if a state or local government must obtain this permission—was outdated and unconstitutional. The Court explained that this part of the law (which was written in 1965, revised in 1982, and reauthorized without change by Congress in 2006) was “based on decades old data,” “eradicated practices,” and needed to be “updated.” In reaching this result, *Shelby County* emphasized facts about minority voter turnout and changes in those patterns since the passage of the Voting Rights Act. The opinion dissects the congressional record on this score and includes charts and graphs to make the factual point that times and racial voting patterns had changed.

Other scholars have criticized the facts marshalled by the *Shelby County* majority, but there is also a more fundamental lesson to learn from the opinion. In *Shelby County* the Justices were tempted by the allure of a presumably factual decision on the Voting Rights Act rather than a bold legal call about the scope of congressional power. Ultimately, the decision reached in *Shelby County* could be explained in charts and graphs about voter turnout. It could be laid out objectively and in a way that sounds scientific and data-driven. There was no need to answer doctrinal puzzles about standards of review or enter normative debates about the scope of congressional power or even to constitutionally interpret what the words “appropriate legislation” mean in the Fifteenth Amendment. Instead, by focusing on factual changes and the outdated nature of the coverage formula, the Court sought to insulate itself from criticisms that it was unfairly biased against the Voting Rights Act or minority voters. This “just the facts, ma’am” strategy is attractive because it appears judicially modest even if the modesty is only an illusion.

*Citizens United* provides another example of this dynamic at work. The Court in that case found “scant evidence that independent expenditures” lead to political corruption, and it cites an enormous variety of nonlegal texts to support its contentions about the purposes of campaign finance regulation, the scope of campaign finance corruption, and corporate power and rights. The end result is an opinion that focuses on what legal scholar Michael McConnell has called “dubious quasi-empirical inquiries relating to the prevention of corruption ... or leveling the playing field.” One could reasonably debate whether the rationale in *Citizens United* is a factual one or a legal one (or something in between), but it is hard to deny that the language used by Justice Kennedy is couched in factual terminology. Beneath the banner of the First Amendment, *Citizens United* issued a fact-heavy rationale that sounds empirical and data-driven.

Indeed the factual dimension of *Citizens United* sparked an interesting epilogue. Not even a full year after the decision, litigants in Montana challenged an almost identical campaign finance restriction in their state on the basis of a new and different factual record. Although the litigants eventually lost at the U.S. Supreme Court in a summary reversal, they met success below because the Montana Supreme Court explained that “*Citizens United* was a case decided upon its facts” or lack of facts. To the Montana litigants and Montana judges, *Citizens United* was such a fact-y decision that a different factual record could lead to a different result. In a quick summary reversal, the U.S. Supreme Court set the record straight— explaining “[t]here [could] be no serious doubt” that *Citizens United* applied to the Montana law.

The stakes of fact-finding at the Supreme Court are thus extraordinarily high. Not only do the Justices use factual claims (backed up by amici) to pad their rationales; they also change their rationales to take shelter in the facts – a move that carries significant implications for courts and future litigants around the country.

### **Potential Reforms**<sup>10</sup>

What can be done to improve Supreme Court decisions reached in a reality of unregulated fact-finding and a growing sea of manufactured factual claims?

One possible reform pursued by members of this Committee involves increased disclosure rules on amici so that the Justices are fully aware of the source of the information they are digesting. Since the Justices are tempted to reach for outside experts to inform themselves about the factual dimensions of the decisions they reach, it only behooves them to know where the information is coming from. As any new researcher is taught and any cross-examiner knows well, a source’s motivation is intrinsically tied to its credibility. (Are you being paid for your testimony? Is this product review being compensated by the seller?). If the Justices are blind to the actual funders of the amici then they have no way to evaluate critically the factual submissions coming from them. Current Supreme Court rules on amicus briefs require a statement of interest of the amicus and disclosure only as to whether the party contributed financially or otherwise to the

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<sup>10</sup> In addition to the previously linked articles, this section draws from my article, [The Amicus Machine](#), 102 Va. L. Rev. 1901 (2016) (with Neal E. Devins). Internal citations are omitted here but can be found in the article.

brief.<sup>11</sup> The rules do not bar anonymously-funded amicus briefs and they do little to shed light on briefs filed by neutral-sounding organizations that are in reality funded by those with an interest in the case (even if not the party).

Indeed, increased disclosure rules will not only help the Justices but may control the amici themselves. In my research I have observed that many amicus briefs are orchestrated by members of the elite Supreme Court bar, and with good reason. The identity of the lawyer on the amicus brief matters inside the Court. In one (anonymous) survey of Supreme Court law clerks, 88% of the clerks admitted that they paid careful attention to amicus briefs written by renowned attorneys. The clerks identified about two dozen lawyers, who, by virtue of their reputation, “would be read carefully.” In the words of one clerk, “A famous name creates a certain level of expectation; it is a natural human quality to look at the source.”

While one could debate the virtues and the vices of this dynamic, there is a benefit to it that is particularly relevant to the problem of unreliable factual submissions. Members of the elite Supreme Court Bar—often led by former attorneys in the Office of the Solicitor General—have a vested interest in avoiding dubious authorities. In fact not a single example of troubling amicus facts highlighted in my article was filed by a member of the Supreme Court elite. Rather, these repeat players have formed a reputation market—an extralegal mechanism to constrain behavior. To protect their credibility with the Justices and with each other, these members of the elite Supreme Court Bar will not engage lightly with suspect authorities and overly creative claims to the Court. Indeed, they likely will not want to associate with those players who would. They have formed an economy of trust that they do not wish to be broken.

Stronger disclosure rules in terms of the client (the amicus organization sponsoring the brief) can take advantage of the reputation market dynamic that exists within the Supreme Court bar. Because these recognized lawyers fiercely protect their reputations with the Justices, it seems likely they will not want to taint that reputation by making factual claims on behalf of anonymously funded organizations with a (hidden) dog in the fight. Likewise, amicus briefs that are not filed by these players (and are thus not subject to the check from the reputation market) will perhaps be approached by the Justices and the law clerks with a more skeptical eye. A key to making this work, however, is transparency – to the bar, to the Justices, and to the public.

Disclosure rules will certainly help with fact-checking, but ultimately it will be up to the Justices to show restraint before relying on unreliable facts provided by motivated groups. To facilitate this restraint, I do not argue for the (unrealistic) proposal that the Justices avoid legislative facts in their decisions altogether. Instead I have suggested a little well-placed skepticism: retooling the current standards of review to focus on the process used to generate the factual claim at the heart of a legal dispute.<sup>12</sup>

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<sup>11</sup> The core requirements for these briefs are set forth in Supreme Court Rules 33.1, 34 and 37. With respect to disclosure, Supreme Court Rule 37 generally requires amicus submissions to “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.”

<sup>12</sup> For elaboration on this idea see Larsen, [Constitutional Law in an Age of Alternative Facts](#), 93 NYU L. Rev. 175 (2018).



The general rule is that the level of judicial skepticism due for factual contentions in a legislative record should follow the corresponding level of deference in a constitutional case. Put differently, only on heightened scrutiny will a court open the trunk and kick the tires of a law in order to make sure the state is actually pursuing sufficiently weighty goals in a permissible way. The problem, however, is that these rules allow for much wiggle room (What is a factual conclusion versus a legal one? How much factual uncertainty is too much?) and hence they are not followed with any precision. Sometimes—as in *Gonzales v. Carhart*, the partial-birth abortion decision—the Supreme Court chooses deference even in light of medical uncertainty and even on heightened review. Other times—as in *Shelby County v. Holder*, the case striking down a critical part of the Voting Rights Act—the Court evaluates findings of fact skeptically and (while purporting to apply rationality review) “essentially dispose[s] of the remainder of the 15,000 page congressional record supporting the Act in one sentence.”

In my work I have resisted calls for blind deference to a legislative or trial record. Instead, I call for a more granular and nuanced view. Deference to factual claims should rise or fall depending on the nature of the process that led to the assertion in the first place. Instead of just focusing on whether the legislature’s purpose was rational or important or compelling, the Court should look at the factual record and attempt to assess the process that led to it. Questions to be asked include: Is the factual assertion backed by peer-reviewed studies? Is more than one study cited? If the fact is the product of a legislative hearing, was it bipartisan or more likely political theater? Would the experts cited hold up on cross-examination? Do they have degrees in the relevant fields? If a minority view in the field, do the authorities acknowledge and explain the inconsistency and is the methodology used accepted by the industry? The more complete the process behind the factual statement, the greater deference is due. By contrast, if the scientific evidence has been cherry-picked or over-simplified or even fabricated or baldly asserted, then the factual record deserves very little deference at all. The upshot of this proposal is to reward with deference factual claims reached after some sort of adversarial testing and to treat with suspicion untested claims submitted at the eleventh-hour by motivated (and often anonymous) groups.

## **Conclusion**

Over the past 30 years the world has undergone a revolutionary change in how information is transmitted and received. Factual information is now cheaply manufactured and easily posted to the world with a click of a mouse. There is now an emphasis in Supreme Court decision making on generalized factual claims and a turn toward empirical factual support for legal arguments. There is also a brave new world of factual data that can be marshaled easily and quickly by any interested party that can call itself an expert. The Court seems hungry for factual information; it consumes it at a greater rate than the parties and the record can provide. But by turning to motivated interest groups to fill the need—and indeed relying on the amicus briefs themselves as evidence on factual claims—the Court risks tainting its decisions with unreliable evidence. It is time to refashion this old tool for the new purpose for which it is currently being used, and to equip the Court to confront the factual free-for-all in which it finds itself.