THE MODERN HISTORY OF STATE ATTORNEYS ARGUING AS AMICI CURIAE IN THE U.S. SUPREME COURT

Dan Schweitzer

IF THE U.S. SOLICITOR GENERAL'S office is the proverbial "Tenth Justice," what are the states' Solicitor General offices? They are not (yet) an Eleventh Justice. But neither are they just another litigant before the U.S. Supreme Court. They collectively occupy a middle ground.

We see this play out in various ways. Take cert-grant rates. The Court grants certiorari in only about 4% of paid cases.[1] But it grants more than 70% of the cert petitions filed by the U.S. Solicitor General's office.[2] The states fall comfortably in between, with a grant rate of about 25%.[3] Amicus briefs supporting cert petitions tell a similar story. When the U.S. Solicitor General recommends in an amicus brief that cert be granted – whether it

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[1] *The Statistics*, 132 Harv. L. Rev. 447, 455 (2018) (Table II).

[2] Stephen M. Shapiro et al., SUPREME COURT PRACTICE 237 (10th ed. 2013).

[3] That figure is based on tabulations I make each Term by reviewing *U.S. Law Week*'s listing of counsel on every paid cert petition.

be an amicus brief filed at the "invitation" of the Court or on the Solicitor General's own initiative – the Court almost always grants the petition.[4] When a group of states files an amicus brief supporting a cert petition, the Court grants certiorari about 45% of the time.[5] Once again, an impressive figure but not equal to that of the Tenth Justice.

Another way this phenomenon manifests itself is in oral arguments by amici curiae. The Court grants virtually every motion the U.S. Solicitor General files for argument time as amicus curiae.[6] Putting the states to the side, the Court routinely denies most other litigants' requests to argue as amicus.[7] Then there are the states. State attorneys' efforts over the past 20 or so years to argue as amici curiae in the Supreme Court is the story this article wishes to tell. It is a story about future judges and two future United States Senators. And it is a personal story.

I.
THE BACKSTORY

In February 1996 I began serving as Supreme Court Counsel for the National Association of Attorneys General (NAAG). My mission was (and remains) to assist members of state Attorney General offices when they have cases in the U.S. Supreme Court. I do that by editing briefs drafted by state attorneys; by organizing moot courts for every state attorney about to argue in the Court; by holding conferences on Supreme Court practice and on managing state appellate units; and, more generally, by answering any and all questions state attorneys may have about their cases and Supreme Court procedure.

It was in that last capacity that the young, relatively new, Ohio State Solicitor reached out to me in the fall of 1996. Jeffrey Sutton (he was still about eight years from becoming Judge Sutton) wanted to run something

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[4] *See* Patricia A. Millett, *"We're Your Government and We're Here to Help": Obtaining Amicus Support from the Federal Government in Supreme Court Cases*, 10 J. App. Prac. & Process 209, 216 (2009).

[5] That figure is based on records I maintain thanks to my role circulating amicus briefs to all state Attorney General offices for sign-on.

[6] Shapiro et al., *supra*, at 782.

[7] *Ibid*.

past me. What did I think about his trying to obtain oral argument time in *City of Boerne v. Flores*? *City of Boerne*, of course, was one of the major federalism cases of the decade. At issue was whether the Religious Freedom Restoration Act was a valid exercise of Congress' power, under Section 5 of the Fourteenth Amendment, to enforce Section 1 of the Fourteenth Amendment against the states. Did Section 5 give Congress the power to interpret and define Section 1's due process and equal protection guarantees? Or did Section 5 merely give Congress the power to prevent or remedy state violations of Section 1, as definitively interpreted by the Supreme Court?

State Solicitor Sutton reminded me that he was authoring the multi-state amicus brief supporting the City of Boerne. In his view, the states ought to have a place at the argument table. If the U.S. Solicitor General's office was going to lay out the United States' views on this important federalism question, the states should be permitted to lay out their opposing view. How did I think the Court would react to a motion by him for argument time?

Back then, less than a year into the job, all I knew about amici's motions for argument time was that the Court seemed never to grant them unless they were filed by the U.S. Solicitor General's office. The Court's recent denial of a motion by the ACLU, which had hoped to argue in support of a not-very-well-represented criminal defendant, spoke volumes to me. It seemed clear that the Court didn't like divided argument except when the United States was involved. I saw no grounds for believing the states would prove an exception.

So that's what I told Sutton. It's a long-shot; your motion will likely be denied. All the more likely because counsel for the City of Boerne would not consent to divided argument. The most I could muster is that there's no *harm* in filing the motion; just don't get your hopes up.

Fortunately, two things ensued. First, Sutton moved forward with his motion for argument time nonetheless, and the Court granted it. Indeed, the Court granted Sutton five more minutes of argument time than he had requested. Second, as the years passed, I learned more about the Court and started giving better advice.

Sutton's superb oral argument in *City of Boerne* ushered in a new age of state attorneys arguing as amici curiae in the Supreme Court. From that time on, I kept track of all state attorney requests for argument time as amici.

The chart appearing in the next section is the product of that endeavor, and summarizes the modern history of state attorneys' efforts to conduct amicus arguments in the Supreme Court.

II.
Charts of State Attorney Requests to Argue as Amici Curiae in the Supreme Court

The first chart below lists the total number of state motions for argument time granted and denied in the 1996 to 2018 Terms. The second chart provides more details. It specifies the case names, the attorney who sought argument time, whether the state obtained the consent of the party it was supporting, and whether states filed amicus briefs on both sides of the case. An asterisk next to the name of the attorney who sought argument time means the attorney was outside counsel for a state.

Amicus Oral Argument Motions Filed by State Attorneys – Totals

Term	Granted	Denied
1996	1	1
1997	1	1
1998	2	1
1999	2	3
2000	5	0
2001	4	1
2002	1	3
2003	3	1
2004	4	1
2005	2	2
2006	4	1
2007	1	7
2008	0	1
2009	0	2
2010	0	1
2011	0	2
2012	0	0
2013	0	0
2014	1	0
2015	1	0
2016	0	2

Term	Granted	Denied
2017 2018	0 3	1 0
Total	**35**	**32**

AMICUS ORAL ARGUMENT MOTIONS FILED BY STATE ATTORNEYS – SPECIFIC CASES

Term	Granted/ Denied	Case Name	Arguing Attorney	Lead State	Consent	States on Both Sides
1996	Granted	*City of Boerne v. Flores*	Jeffrey Sutton	OH	No	No
	Denied	*United States v. Alaska*	Roderick Walston	CA	?	No
1997	Granted	*State Oil Co. v. Khan*	Pamela Jones Harbour	NY	Yes	No
	Denied	*Hudson v. United States*	Jeffrey Sutton	OH	No	No
1998	Granted	*West Covina v. Perkins*	Jeffrey Sutton	OH	Yes	No
	Granted	*Amoco Production Co. v.*	Thomas Davidson	WY	Yes[8]	No
	Denied	*City of Chicago v. Morales*	Jeffrey Sutton	OH	No	No
1999	Granted	*Norfolk Southern Rwy. Co. v. Shanklin*	Gregory Coleman	TX	Yes	Yes
	Granted	*Santa Fe Independent School Dist. v. Doe*	John Cornyn	TX	Yes	No
	Denied	*Erie v. Pap's A.M.*	Edward Foley	OH	No	No
	Denied	*Indianapolis v. Edmond*	Stephen McAllister	KS	No	No[9]
	Denied	*Norfolk Southern Rwy. Co. v. Shanklin*	Stephen McAllister	NC/ KS	Yes	Yes
2000	Granted	*Penry v. Johnson*	Gene Schaerr*	AL	Yes	No

[8] Petitioners did not object to ceding 5 minutes of their time to the state.

[9] The United States also filed an amicus brief supporting petitioner, and received argument time.

Term	Granted/ Denied	Case Name	Arguing Attorney	Lead State	Consent	States on Both Sides
	Granted	*Atwater v. Lago Vista*	Andy Taylor	TX	Yes	No
	Granted	*C & L Enterprises, Inc. v. Citizen Band Potawatomi*	Gregory Coleman	TX	Yes	No
	Granted	*Lackawanna County Dist. Atty. v. Coss*	Robert Russel	CO	Yes	No
	Granted	*Artuz v. Bennett*	Dan Schweitzer*	FL	Yes	No
2001	Granted	*Lapides v. Board of Regents of Univ. Sys. of Ga.*	Julie Caruthers Parsley	TX	Yes	No
	Granted	*Alabama v. Shelton*	Gene Schaerr*	TX	Yes	No[10]
	Granted	*Hope v. Pelzer*	Gene Schaerr*	MO	Yes	No
	Granted	*Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton*	David Gormley	OH	Yes	No
	Denied	*Columbus v. Ours Garage & Wrecker Service, Inc.*	Stephen McAllister	KS	Yes	No[11]
2002	Granted	*Abdur'Rahman v. Bell*	Paul Zidlicky*	AL	Yes	No
	Denied	*Nevada Dep't of Human Resources v. Hibbs*	Charles Campbell	AL	Yes	Yes
	Denied	*Syngenta Crop Protection, Inc. v. Henson*	Lonny Hoffman*	TX	Yes	No
	Denied	*Franchise Tax Bd. of Cal. v. Hyatt*	Jonathan Glogau	FL	No	No
2003	Granted	*Aetna Health Inc. v. Davila*	David Mattax	TX	Yes	No
	Granted	*Jones v. R.R. Donnelley & Sons Co.*	Kevin Newsom	AL	Yes	No
	Granted	*City of Littleton v. Z.J. Gifts D-4, LLC*	Douglas Cole	OH	No	No

[10] The Court initially granted Schaerr's motion but implicitly rescinded its grant by later inviting Charles Fried to file a brief and argue as amicus curiae in opposition to the judgment below on different grounds than Alabama was asserting.

[11] The United States also filed an amicus brief supporting petitioner, and received argument time.

Term	Granted/ Denied	Case Name	Arguing Attorney	Lead State	Consent	States on Both Sides
	Denied	*Tennessee v. Lane*	Gene Schaerr*	AL	Yes	Yes
2004	Granted	*Jackson v. Birmingham Bd. of Ed.*	Kevin Newsom	AL	Yes	No
	Granted	*Clingman v. Beaver*	Gene Schaerr*	SD	Yes	No
	Granted	*Halbert v. Michigan*	Gene Schaerr*	LA	Yes	No
	Granted	*City of Sherrill v. Oneida Indian Nation of N.Y.*	Caitlin Halligan	NY	Yes	No
	Denied	*Bates v. Dow Agrosciences*	Ted Cruz	TX	No	No
2005	Granted	*Holmes v. South Carolina*	Steffen Johnson*	KS	Yes	No
	Granted	*United States v. Georgia*	Gene Schaerr*	TN	Yes	No
	Denied	*Arbaugh v. Y&H Corp.*	Kevin Newsom	AL	Yes	No
	Denied	*Buckeye Check Cashing, Inc. v. Cardegna*	Christopher Kise	FL	No	No
2006	Granted	*United States v. Atlantic Research Corp.*	Jay Geck	WA	Yes	No
	Granted	*Smith v. Texas*	Gene Schaerr*	CA	Yes	No
	Granted	*Leegin Creative Leather Prods. Inc. v. PSKS Inc.*	Barbara Underwood	NY	Yes	No
	Granted	*United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*	Caitlin Halligan	NY	Yes	No
	Denied	*Environmental Defense v. Duke Energy Corp.*	Kevin Newsom	AL	Yes	Yes
2007	Granted	*Kennedy v. Louisiana*	Ted Cruz	TX	Yes	No
	Denied	*Danforth v. Minnesota*	Stephen McAllister	KS	No	No
	Denied	*Riegel v. Medtronic, Inc.*	Barbara Underwood	NY	No	No
	Denied	*Warner-Lambert Co. v. Kent*	Stephen McAllister	KS	Yes	No

Term	Granted/ Denied	Case Name	Arguing Attorney	Lead State	Consent	States on Both Sides
	Denied	*Exxon Shipping Co. v. Baker*	David Frederick*	AK	Yes	No
	Denied	*District of Columbia v. Heller*	Ted Cruz	TX	Yes	Yes[12]
	Denied	*Rothgery v. Gillespie County*	Ted Cruz	TX	Yes	No
	Denied	*Riley v. Kennedy*	Gene Schaerr*	FL	Yes	No
2008	Denied	*Caperton v. A.T. Massey Coal Co.*	Kevin Newsom	AL	Yes	No
2009	Denied	*McDonald v. Chicago*	Greg Abbott	TX	Yes[13]	Yes
	Denied	*United States v. Comstock*	Stephen McAllister	KS	No	No
2010	Denied	*Astra USA, Inc. v. Santa Clara County*	Stephen McAllister	KS	Yes	No
2011	Denied	*Miller v. Alabama*	John Bursch	MI	Yes	No
	Denied	*Blueford v. Arkansas*	Eric Restuccia	MI	Yes	No
2014	Granted	*ONEOK, Inc. v. Learjet, Inc.*	Stephen McAllister	KS	Yes	No
2015	Granted	*Sturgeon v. Frost*	Ruth Botstein	AK	Yes	No
2016[14]	Denied	*Murr v. Wisconsin*	Lawrence VanDyke	NV	Yes[15]	Yes
	Denied	*Davila v. Davis*	Not specified	NV	Yes	No
2017	Denied	*Artis v. District of Columbia*	Misha Tseytlin	WI	Yes	No
2018	Granted	*Sturgeon v. Frost*	Ruth Botstein	AK	Yes	No
	Granted	*Gamble v. United States*	Kyle Hawkins	TX	Yes[16]	No

[12] The United States also filed an amicus brief supporting respondent, and received argument time.

[13] The Court granted the National Rifle Association amicus argument time.

[14] During this Term, West Virginia Solicitor General Elbert Lin sought amicus argument time in *Gloucester County School Board v. G.G.* The Court dismissed the case before it could act on Lin's motion.

[15] Petitioners did not object to ceding 5 minutes of their time to the state.

[16] The United States did not object to Texas's receiving 10 minutes of argument time

Term	Granted/ Denied	Case Name	Arguing Attorney	Lead State	Consent	States on Both Sides
	Granted	*Tennessee Wine & Spirits Retailers Ass'n v. Blair*	David Franklin	IL	Yes	No

III.
THE BIG PICTURE

The charts reveal that the Court's willingness to allow state attorneys to argue as amici has morphed over time.

The Glory Years (1996 to 2006 Terms)

For about a decade – the 1996 to 2006 Terms – state motions for argument time as amici curiae were regularly granted. More precisely, the Court granted 29 of the state attorneys' 44 motions, or about two-thirds of them. And most of the 15 denials could be readily explained.

Four times, states were amici on both sides of the case. Twice, the United States obtained argument time as amicus supporting the same party the states supported. Six times, the party the states supported did not consent to the state's motion. And once, the state attorney asked to take 10 minutes of the United States' argument time without its consent.

All told, from the 1996 Term to the 2006 Term, the following "rule" appeared to exist: The Court would grant a state attorney's motion for argument time as amicus if (1) the state had the consent of the party it was supporting and (2) the United States was not arguing (as amicus or a party) on the side the state supported.[17] That rule placed the states above all litigants in the Court other than the U.S. Solicitor General. Put another way, the states occupied a middle ground.

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so long as the Court extended the argument so that the United States kept its 30 minutes of argument.

[17] Like most rules, this one had exceptions. In *City of Boerne* the Court granted Jeffrey Sutton's motion for argument time even though the City did *not* consent. Conversely, the Court denied two motions that satisfied the rule.

Hard Times (2007 to 2013 Terms)

Then came the states' *annus horribilis* – the 2007 Term. In the Roberts Court's third Term, the Court changed course and denied seven of the state attorneys' eight argument motions, including four motions that satisfied the "rule." The states saw the writing on the wall and began requesting argument time less often. And the Court continued to deny even those few motions state attorneys filed. It wasn't until the 2014 Term that the Court once again granted a state attorney's motion for argument time as amicus, following six denials over the prior six Terms.

Because the Court grants or denies argument motions through one-line orders, we have no way of knowing why the Court changed course so dramatically. All we know is that from the 2007 Term to the 2013 Term, state argument motions (with just one exception) could not muster the necessary five votes.

Return to Glory? (2014 Term to present)

Starting with the 2014 Term, the Court has granted five of state attorneys' eight motions for amicus argument time – including all three motions this Term. The states thus appear once again to be occupying a middle ground. Certainly, no other category of litigant (apart from the U.S. Solicitor General's office) has argued that many times as amicus curiae since 2014.

But what precisely does this middle ground look like? Is the Court again applying the 1996 to 2006 "rule"? If not, what criteria is the Court applying to states' motions? Although it is hazardous to generalize from a mere five arguments, a closer look at the eight cases in which the Court has granted – and denied – state argument motions since October 2014 provides four insights.

First, in contrast to the 1996 to 2006 period, the Court no longer appears willing to allow a state attorney to argue as amicus in support of another state attorney. The Court allowed state attorneys to argue as amici in such cases 10 times in the 1996 to 2006 Terms. It hasn't allowed a state amicus argument in that circumstance since, even where the amicus state had the party state's consent. Indeed, all three times the Court denied state attorneys' motions for argument time since the 2014 Term involved requests to support another state attorney. The Court has likely concluded that it's

already receiving the state-government perspective from the attorney for the state party.

Second, in all five cases where the Court granted the state attorneys' motions, states – based on their status as sovereigns – genuinely had a distinct perspective from the parties they were supporting. That is precisely when states *ought* to be permitted to argue as amici.

The paradigmatic case warranting state amicus participation is where the federal government and amici states disagree on how power should be divided between them. State Solicitor Sutton put it characteristically well in his motion for argument time in *City of Boerne*:

> Through the participation of the Solicitor General, the federal government will have a voice in this important oral argument. The States ought to have one as well, particularly in view of the federalism questions presented and in view of the Solicitor General's necessary predisposition toward the federal government on structural constitutional issues of this sort. . . . [T]he States have a unique perspective on the consequences of ceding power to the federal government and thus are acutely aware of the real-world consequences of broad assignments of power to the federal government . . . .[18]

That perfectly describes the situation in *Sturgeon v. Frost I*[19] and *Sturgeon v. Frost II*.[20] Brought by a hunter who violated a National Park Service regulation by using a hovercraft to access moose hunting grounds, the case concerns Alaska and the Park Service's competing claims to power over navigable waters within Alaska's boundaries. Yet, because the Ninth Circuit puzzlingly held that Alaska lacked standing to intervene as a party,[21] it was relegated to mere amicus when the case hit the Supreme Court. Alaska plainly deserved a voice both times the case was argued in the Court, to contest the Solicitor General's call for more expansive federal power within Alaska.

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[18] Motion for Leave to Participate in Oral Argument and for Divided Argument at 2, *City of Boerne, supra*, No. 95-2074 (Jan. 13, 1997).

[19] 136 S. Ct. 1061 (2016).

[20] No. 17-949 (argued Nov. 5, 2018).

[21] *Sturgeon v. Masica*, 768 F.3d 1066, 1072-75 (9th Cir. 2014).

Also fitting within the paradigm is a third recent case where the Court granted a state attorney's argument motion, *ONEOK, Inc. v. Learjet, Inc*.[22] *ONEOK* addressed the Natural Gas Act's division of authority between the federal government and the states, and whether the Act preempted a state-law antitrust suit. The Solicitor General argued as amicus supporting broader federal authority under the Act and narrower state authority. The amici states argued the converse position.

The two most recent state amicus arguments, while not fitting within the paradigm, also involved states' sovereign interests. In *Gamble v. United States*,[23] the Court is considering whether to jettison the longstanding separate-sovereigns doctrine, under which the Double Jeopardy Clause allows successive prosecutions under federal and state law and under the laws of different states. As Texas explained in its motion for argument time on behalf of the 36 amicus states, the "case implicates the States' core sovereign interests in combating crime and punishing those who offend their laws. . . . [T]hose interests are parallel to, yet also distinct from, those of the United States."[24]

And *Tennessee Wine & Spirits Association v. Blair*[25] concerns the states' powers under the Twenty-first Amendment. A trade association was defending a Tennessee law imposing in-state residency requirements on liquor retailers. Thirty-five amici states that impose similar requirements did not want the states' voice to go unheard in a case involving "core sovereign interests, reaffirmed by the text of the Twenty-first Amendment, to regulate 'the delivery or use' of alcohol within their borders."[26]

Third, we don't know the Court's current stance on state amicus arguments in a different situation: where both the federal government and the states regularly enforce a federal law but have differing views about how it should be interpreted. In the Glory Days, the Court permitted state attor-

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[22] 135 S. Ct. 1591 (2015).

[23] No. 17-646 (argued Dec. 5, 2018).

[24] Motion for Leave to Participate in Oral Argument and for Expanded Argument at 1, *Gamble, supra*, No. 17-646 (Nov. 2018).

[25] No. 18-96 (argued Jan. 16, 2019).

[26] Motion for Divided Argument and for Leave to Participate in Oral Argument at 1, *Tennessee Wine & Spirits Ass'n, supra*, No. 18-96 (Dec. 2018).

neys to argue cases of that sort in *State Oil Co. v. Khan* (antitrust),[27] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.* (antitrust),[28] and *United States v. Atlantic Research Corp.* (environmental law).[29] In *Leegin*, for example, the United States argued as amicus that modern economic theory supported discarding the *per se* ban on vertical minimum resale price maintenance agreements. A group of states led by New York filed an amicus brief arguing that their experience enforcing the Sherman Act led them to the opposite conclusion: the *per se* ban is justified and prevents anticompetitive harm to consumers.[30] The Court wisely gave New York Solicitor General Barbara Underwood the opportunity to present that argument.

None of the states' eight amicus argument requests since October 2014 involved this situation. We therefore don't know whether the Court will look favorably on state amicus requests in cases similar to *Leegin*.

Finally, because state attorneys obtained the consent of the parties they supported in all eight recent cases, we don't know whether the Court still views consent as an important criterion when assessing state amicus argument motions.

IV.
SOME MORE THOUGHTS AND TALES ABOUT STATE AMICUS ARGUMENTS

Each request for oral argument time is its own story – a story about how and why the state Attorney General office decided to write the amicus brief; about the state attorney's motivation for seeking argument time; and about the request for argument time and its disposition. Here are a few illustrative tales and observations about state oral argument amicus efforts over the years.

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[27] 522 U.S. 3 (1997).

[28] 551 U.S. 877 (2007).

[29] 551 U.S. 128 (2007).

[30] Brief of New York et al. at 6, *Leegin*, *supra*, No. 06-480 (Feb. 26, 2007).

The Luminaries

The attorneys who argued for states as amici are an impressive group. Jeffrey Sutton isn't the only federal court of appeals judge among them. Long before his appointment to the U.S. Court of Appeals for the Eleventh Circuit, Kevin Newsom argued as amicus in the 2003 Term as Alabama Solicitor General. And had the Senate acted on former New York Solicitor General Caitlin Halligan's nomination to the D.C. Circuit, we would have a third federal court of appeals judge who argued as a state amicus.

Moving from the bench to the Hill, two future United States Senators argued as state amicus curiae. Ted Cruz made his eighth and final argument as Texas Solicitor General in *Kennedy v. Louisiana* – the sole state amicus argument the Court permitted in the 2007 Term. Several years earlier, while serving as Texas Attorney General, John Cornyn argued *Santa Fe Independent School District v. Doe*, a noteworthy school prayer case.

Stepping on the United States' Turf

The U.S. Solicitor General's office is the top hen of the Supreme Court bar. It takes brass, therefore, for an attorney to try to take argument time from that office without its (rarely given) consent. But no one has ever said that Jeffrey Sutton lacks the courage of his convictions, including the conviction that state attorneys deserve a place at the argument table. And so he twice tried to obtain some of the United States' argument time – once, successfully.

His first attempt came in *Hudson v. United States*,[31] which asked whether monetary penalties and debarment sanctions imposed by a federal agency in a civil proceeding constitute criminal punishment for double jeopardy purposes. Both the United States and a large group of amici states led by Ohio agreed that they do not. But their strategies differed. The United States' merits brief sought to distinguish and narrow the key adverse precedent, *United States v. Halper*.[32] Ohio's amicus brief more directly argued that the Court should abandon *Halper*.[33] Emphasizing that difference in

[31] 522 U.S. 93 (1997).

[32] 490 U.S. 435 (1989); Brief of United States at 14-15, 31, *Hudson*, *supra*, No. 96-976 (August 26, 1997).

[33] Brief of Ohio et al. at 1-4, *Hudson*, *supra*, No. 96-976 (August 26, 1997).

approach, Sutton sought argument time even though the United States did not consent. The bad news for Sutton was that the Court denied the motion. The good news was that the Court essentially adopted his argument, holding that it "in large part disavow[s] the method of analysis used in [*Halper*]."[34]

Sutton had better luck the next time he tried to take argument time that might otherwise have been the United States'. The Court granted certiorari in *West Covina v. Perkins*[35] to review a Ninth Circuit decision on the due process rights of individuals "who seek return of property lawfully seized but no longer needed for police investigation or criminal prosecution."[36] The United States filed an amicus brief supporting petitioner, as did Ohio on behalf of 27 states and territories. Sutton obtained consent from counsel for West Covina to argue as amicus curiae, and filed a motion for argument time. The United States, beaten to the punch, decided not to file its own motion – contrary to its by-then regular practice of seeking argument time in every case in which it filed an amicus brief. The Court granted Ohio's motion; at the argument, the United States' lawyers could only watch.

The Gene Schaerr Arguments

The chart of state amicus arguments reveals an oddity. Seven of the states' 35 arguments were made by one private counsel, Gene Schaerr. Two additional arguments were made by Schaerr's then-colleagues, Paul Zidlicky and Steffen Johnson. What was that all about?

The short answer is that Schaerr, a talented appellate advocate at Sidley Austin and then Winston & Strawn (now at Schaerr | Jaffe), wanted to expand his Supreme Court practice. Toward that end, he offered to write state amicus briefs pro bono. States that lacked the resources to write an amicus brief on their own (at that particular moment) often took him up on that offer. And so Schaerr wrote many a state amicus brief in the aughts. But part of the lure for Schaerr was getting to argue before the Court. He took advantage of the Court's pre-2007 willingness to grant argument time to amici states by regularly seeking that time. And being a good mentor,

[34] 522 U.S. at 96.

[35] 525 U.S. 234 (1999).

[36] *Id*. at 236.

he twice (with the lead amicus state's permission) let younger colleagues make the argument.

Invitations to Argue

Every so often the U.S. Solicitor General will not defend a lower court victory. When that occurs, the Court "invites" an accomplished attorney to "brief and argue th[e] case, as amicus curiae," to defend the judgment below. Twice in modern times, the Court has invited state attorneys to perform that prestigious task. First, in 1997 the Court asked State Solicitor Sutton to brief and argue that it lacked jurisdiction to review the lower court judgment in *Hohn v. United States*,[37] a complicated habeas corpus case. More than a decade later, in *Bond v. United States*,[38] the Court asked Kansas Solicitor General Stephen McAllister to defend the Third Circuit's holding that an individual lacks Article III standing to challenge a federal law on the ground it violates the Tenth Amendment.

Although these two arguments do not appear on the charts in Section II of this article (because they did not arise from motions for argument time), they illustrate the Court's recognition that state attorneys can play an important role at oral argument, even in cases where no state is a party.

My Moment in the Sun

A final, personal note. My sole argument in the Court was on behalf of 21 amici states in *Artuz v. Bennett*,[39] the first of many cases addressing the federal habeas corpus statute of limitations. I still look forward to winning my first vote.

V.
The Future

As one commentator recently observed, "perhaps more than ever before, state solicitors general offices enjoy a position of prestige in the nation's appellate community."[40] That prestige extends to the Supreme

[37] 522 U.S. 944-45 (1997).

[38] 562 U.S. 1038 (2010).

[39] 531 U.S. 4 (2000).

[40] Jimmy Hoover, "Once Overlooked, State SGs Enjoying Time in the Sun," Law360 (April 14, 2017) (cleaned up).

Court, as seen by Justice Kagan's remark that "the state attorneys actually are exceptional . . . . [N]ow most states have solicitor general offices which have really exceptional, skilled, experienced appellate counsel."[41] It is only natural, therefore, that state attorneys – particularly, the 40 state Solicitors General – be permitted to argue as amici curiae in appropriate Supreme Court cases.

As discussed earlier, the Court recently granted argument time to amici states in several cases implicating distinct state sovereign interests. Because the sample size is small, however, we don't know for certain whether the Court has truly embraced the practice.

Let's hope it has. Given the states' central role in federalism disputes and federal law-enforcement cases before the Court, and given the high quality of state advocates, they deserve a regular place at the argument table.

[41] Dep't of Justice, *50 Years Later: The Legacy of Gideon v. Wainwright, Ceremony Part 2*, U.S. Dep't of Justice (March 15, 2013) (video at 20:20-20:38), www.justice.gov/atj/gideon/events.html.