

Indiana Law Blog Newsletter

Thank you for subscribing to the ILB Newsletter. Invite your friends and colleagues to [sign up to receive this free weekly newsletter](#), emailed every Monday morning. The issues are intended to bridge the gap between the former **Indiana Law Blog** and its anticipated replacement (more about which will be coming later). Because it is a weekly, the **ILB Newsletter** (unlike the blog) will not be able to bring you the news *as it happens*. But it will highlight news you may have missed, and provide some depth on news you may have had questions about. Because it is a newsletter, length will be limited to what I believe the normal reader can tolerate. (BTW, feedback and suggestions are encouraged - send to ilb.newsletter@indianalawblog.com.)

Amicus briefs: How do Indiana's attorneys general decide when to author or sign on to amicus briefs, and where can we learn about them?

[In the 9-11-17 issue](#) his subscription newsletter, **Indiana Gaming Insight**, Ed Feigenbaum wrote:

In January, just after he assumed office, we brought readers of our sister newsletter, **Indiana Legislative Insight**, some insight into how the new attorney general viewed amicus brief sign-ons. In an exclusive interview, General Hill told us “You look over the circumstances that are being forwarded and you make a determination if you’re in agreement with the position that that state’s taken; if you are in agreement that this is detrimental to the interests of our state and what we’re doing; and if it’s something that, going forward, makes sense for us in terms of stopping inappropriate conduct that would be detrimental to Hoosiers.”

Perhaps more telling was his response to our questions about involvement in multi-state litigation, which likely explains his substantive reasons for adding Indiana to the West Virginia amicus brief [backing the right of the State of New Jersey to legalize sports betting in its state]. As General Hill posed it, “We want to look at legislation that comes down — well, not necessarily legislation; federal action, for example that comes through — that appears to be outside of the Constitution. We want to look at, first of all, is it outside the Constitution by virtue of what’s coming and what is the impact on Indiana? If it’s

something that we determine is clearly outside the bounds or role of that federal agency or that executive authority, the next step would be to determine, ‘Does it have a harmful effect on Indiana?’ If it does not have a harmful effect on Indiana, it may not be something that we want to engage in, just as a matter of course. If it is determined that it has a detrimental effect to Indiana, then we want to take a step further and determine what role we take on going forward. So I think it’s a matter of looking at a case-by-case scenario, determining if it is, in our view, unconstitutional, if it does have a harmful effect.”

AG Hill added, “I can also see circumstances where it may not have a direct harmful effect on Hoosiers at this particular time, but the precedent that it’s setting could.”

Hill’s predecessor, AG Greg Zoeller, wrote an opinion piece in 2014 (here in the [Jul 2, 2014 Hendricks County Flyer](#)) headed *"Filing amicus briefs gives Indiana a voice in court."* Some quotes:

The United States Supreme Court and federal appeals courts decide important cases impacting the constitutional rights of everyone, the responsibilities of businesses toward consumers and the relationship between government and citizens. States such as Indiana have a stake in these questions, but how do states make their legal arguments known to the Supreme Court if they are not plaintiffs or defendants in the lawsuit the Court hears?

The answer is that Indiana and other states file amicus briefs, also called friend-of-the-court briefs, with the Supreme Court and federal appellate courts. If not a party to the lawsuit, a state can submit an amicus brief, a thoroughly researched legal document explaining the state’s interest in the case and legal argument for the judges to consider as they formulate their ruling. * * *

Cooperating with AG’s offices in other states, my office since January 2009 has authored or co-authored 29 amicus briefs that other states joined, or signed on to; and we joined another 113 briefs that other states authored. Of the briefs Indiana participated in at the U.S. Supreme Court, 34 were filed at the “cert petition” stage, where justices consider whether to accept an appeal from a lower court; and another 79 were filed at the “merits” stage after the Court accepted a case. The rest were filed with other courts.

Staying in regular contact with our state AG counterparts, my office participates in briefs where states have strong common interests. Since 2009, approximately one-sixth of briefs were filed in cases involving the relationship

between the federal government and states, as it's important for states to raise questions if federal agencies exceed their authority. Approximately one in 10 briefs involved consumer protection and environmental laws impacting state enforcement authority. The largest group, one in four, involved criminal law. *
* *

In a wide array of cases, many corporations and special interests submit their own amicus briefs conveying their positions to the Court, but states' amicus briefs carry special significance because states represent the public as a whole.

At the time, the **ILB** posted:

Five years ago, in 2009, the ILB had several entries under the heading "*Who should decide Indiana's position on national legal issues? Who should know?*" The ILB requested of the AG's office a list of the amicus briefs his [Zoeller's] office had filed.

As it turned out, the AG's office was easily able to produce lists from both Zoeller's 2009 term and Carter's 2007-2009 terms. However, neither this information nor any updated information appears on the AG's website, or that of his Solicitor General division. The opinion piece from this weekend *is the first updated, compiled information of any kind the ILB has seen in the past five years*. At a minimum, the 29 amicus briefs authored in Zoeller's office should be available online via the AG's website, along with timely future updates.

According to the figures provided in the opinion piece, the AG's solicitor general's division has participated in 142 amicus briefs around the nation since Zoeller took office in 2009.

That is nearly a dozen-dozen (or more than seven-score). But we know little about them, other than that at least 29 of the amicus briefs were crafted in the Indiana AG's office, using state resources.

It is possible, with effort, to identify some of the amicus briefs filed by AG Hill on behalf of the State of Indiana. For instance, here is an [August 10, 2017 news release](#) from Texas, headed "*AG Paxton Leads 23-State Coalition in Amicus Brief Defending Displays of the Ten Commandments.*" Indiana is listed as having joined in the amicus brief. Another [news release from Texas, dated July 31](#), begins:

Texas Attorney General Ken Paxton recently joined a coalition of 15 states [including Indiana] filing an amicus brief in the U.S. District Court for the District of Alaska in the case of *Center for Biological Diversity v. Ryan Zinke*

and Department of the Interior, defending the constitutionality of the Congressional Review Act (CRA).

Sometimes there is a news story or editorial, such as [this editorial](#) from the Sept. 8, 2017 **Fort Wayne Journal Gazette**, headed "*Indiana attorney general on wrong side of Supreme Court gerrymandering case.*" A quote:

Amicus briefs filed in the U.S. Supreme Court case challenging gerrymandering draw a sharp distinction between those who see the practice as a threat to democracy and those who support the use of voting records in redistricting.

Arguing the practice is unconstitutional: Former Indiana Sen. Richard Lugar, Sen. John McCain, former Kansas Sen. Bob Dole, Ohio Gov. John Kasich, former California Gov. Arnold Schwarzenegger, 15 leading historians, attorneys general of 17 states and 65 current and former state lawmakers.

Arguing in favor of gerrymandering: The Republican National Committee and attorneys general of 15 states, including Indiana Attorney General Curtis T. Hill.

The Supreme Court will hear arguments in the case, *Gill v. Whitford*, on Oct. 3. The case challenges political maps in Wisconsin that gave Republicans an overwhelming advantage in state assembly districts.

"Wisconsin's gerrymander was one of the most aggressive of the decade, locking in a large and implausibly stable majority for Republicans in what is otherwise a battleground state," Thomas Wolf, redistricting counsel at the Brennan Center for Justice, wrote when the Supreme Court agreed to hear the case. "It's a symptom of politics going haywire and something that we increasingly see when one party has sole control of the redistricting process."

This 2009 chart, prepared with information provided by the office of AG Zoeller, points the way for the *enhanced transparency* possible with regard to amicus briefs filed on behalf of the citizens of the State of Indiana. AG Hill could easily add such data to his website and ensure its currency.

Filed State Amicus Briefs 2009 AG Zoeller						
Case Name	Case No.	Stage	Authoring State	Join Deadline	Case Summary (or position of Indiana in brief)	Joined?
Briscoe v. Virginia	07-11191	SCOTUS Amicus (Resp.) Argument 1/11/10	Mass & IN	Submitted 11/2/09	(1) Did the petitioners waive their Confrontation Clause rights by failing to make a demand that the prosecution produce a forensic analyst for trial? (2) Does the Confrontation Clause require the prosecution to present the testimony of prosecution witnesses during the prosecution's case in chief and preclude exhibits from being introduced before the witness's live testimony?	Co-Authoring
Hemi Group, LLC v. City of New York	08-969	SCOTUS Amicus (Resp.) Argued 11/3/09	IN	Submitted 9/23/09	Whether a city government meets the RICO standing requirement that a plaintiff be directly injured in its "business or property" by alleging non-commercial injury resulting from non-payment of taxes by non-litigant third parties.	Authoring
Pottawattamie County, Iowa v. McGhee	08-1065	SCOTUS Amicus (Pet.) Argued 11/4/09	CO	7/16/09	Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's 'substantive due process' rights by procuring false testimony during ...	Yes
NRA v. City of Chicago	08-1497	SCOTUS Cert	TX	7/6/09	Whether the right of the people to keep and bear arms guaranteed by the Second Amendment to the United States Constitution is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment so as to be applicable ...	Yes
Perdue v. Kenny A.	08-970	SCOTUS Merits	AL	6/24/09	Whether a reasonable attorney's fee award under a federal fee-shifting statute can ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation.	Yes
United States v. Stevens	08-769	SCOTUS Merits	FL	6/12/09	At issue is whether the federal statute making it unlawful to create, sell, or possess, for commercial gain, a depiction of a live animal being intentionally wounded, tortured, or killed is facially invalid under the First Amendment.	Yes
Salazar v. Buono	08-472	SCOTUS Cert	IN	6/8/09	1. Whether respondent has standing to maintain this action where he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols. 2. Whether, even assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress	Authored

Amicus briefs: What could possibly go wrong?

Earlier this month, **Bloomberg** ran a three-part series titled "*Tipping the Scales.*" [Part I](#) looked at how 'friends of the court' have hidden ties to big investors, beginning with an example:

For the past four years, [Chuck Cooper, one of Washington's top litigators] has pursued a claim against the U.S. government that could generate a huge payday for his client ***

Last year, when an unrelated case in a federal appeals court threatened to create a damaging precedent, Cooper's firm showed just how far it would go to win. Lawyers at Cooper & Kirk PLLC wrote a legal brief to defuse the threat, then recruited another attorney to submit it in her name—effectively hiding their involvement.

The previously unreported episode casts light on an increasingly influential feature of the U.S. legal system known as the *amicus curiae*, or friend of the court. Intended to provide judges with outside perspectives, amicus briefs have proliferated in recent years. But sometimes these "friends" are the puppets of financial interests, and judges can't always see who's pulling the strings. When that happens, the briefs become a tool for well-funded litigants to try to tip the scales of justice.

[Part II](#) notes that:

In order to impose some transparency, and to discourage well-funded litigants from using such briefs to overwhelm opponents, the Supreme Court and federal appeals courts require amici to state whether anyone is paying them for their participation.

[Indiana's Appellate Rule 41 requires that a motion to appear as an *amicus curiae* identify the interest of the proposed *amicus curiae* and the party with whom the proposed *amicus curiae* is substantively aligned, and state the reasons why an *amicus curiae* brief would be helpful to the court.]

[A 2014 Miami Herald story](#) looked at how that state's attorney general, Pam Bondi, had signed onto numerous amicus briefs in cases in other states, joining "colleagues from southern and western states that dominate the Republican Attorneys General Association, a political fundraising organization known as RAGA that has contributed \$750,000 to Bondi's \$5.5 million reelection campaign." More from the story:

Since the 2010 Citizens United Supreme Court decision, super PACs like RAGA and its Democratic counterpart (DAGA) can raise unlimited cash from corporations and unions. In passing contributions along to candidates, the groups are further politicizing an office that had been removed from overt partisanship. * * *

RAGA is run by an eight-member attorney general executive committee, including Bondi, and a small policy staff in Washington, D.C. They promote a variety of issues, including opposition to gay marriage, medical marijuana and the "federal overreach" of the Environmental Protection Agency, which has inspired a number of briefs against federal attempts to limit pollution from coal-powered utilities and agribusinesses.

Indiana University opposes 2016 fetal tissue law in federal court

Originally, Indiana University tried to intervene in a lawsuit brought in April, 2016 by Planned Parenthood (PPINK) and the Indiana ACLU in relation to [HEA 1337-2016](#). The motion was denied in May, 2016 on the grounds that the University's issues were different and Indiana University immediately filed [its own lawsuit](#).

[Inside Higher Education reported May 26, 2016](#) that IU is "challenging the actions of the state that supports it," arguing that "important research on Alzheimer's disease is imperiled by new state abortion law" and the law "restricts academic freedom by criminalizing the acquisition or transfer of fetal tissue used for research." (See also this [Indianapolis Star story](#) from May 24, 2016.) PPINK's injunction was granted by federal district judge Pratt on June 30, 2016. But the Indiana University suit is still outstanding. The **WSJ** reported on it [last month in a long \\$\\$\\$ story](#) :

A legal challenge to an Indiana law that criminalizes research using the remains of aborted fetuses could determine how much power states have to restrict scientific access to fetal tissue.

The unusual case pits Indiana's government against the state's flagship research university, which is asking a federal court to declare Indiana's fetal-tissue statute unconstitutional. * * *

But it's the Commerce Clause claim that the university puts front and center. The school is invoking a constitutional doctrine that prevents states from interfering with free trade across their borders. University court briefs liken the tissue regulation to state laws invalidated years ago banning the sale of

margarine or banning the sale of fresh meat slaughtered more than 100 miles from the point of sale.

The case is *Trustees of Indiana University et al v. Prosecutor of Marion County* (CASE #: 1:16-cv-01289-JMS-DML).

Updates to earlier stories

Judge Posner's abrupt retirement from the 7th Circuit was a feature in last week's issue. Subsequently, the subscription only **Law360.com** had a [story Sept. 12th](#) reporting on "*The 'Very Ugly' Pro Se Case That Put Posner Over The Edge.*" It turns out it was an appeal brought by William A. Miller, a prisoner at Indiana's federal prison (15-1497). The **ILB** summarized the panel's [2-1 opinion](#) on 1-31-17, quoting at length from Posner's dissent. The whole court on Aug. 16th decided 5-3 not to hear the case *en banc*. || The new Posner book, mentioned in last week's issue, already is available via Amazon.com. Self-published, it is titled "*Reforming the Federal Judiciary: My Former Court Needs to Overhaul Its Staff Attorney Program and Begin Televising Its Oral Arguments.*" If you use Amazon's "look inside" option to see the Table of Contents, you will see there is a Chapter 7, at p. 135, titled "*The massive indifference of most judges and staff attorneys to the plight of the pro se.*" || Finally, David Lat of [Above the Law interviews Posner](#) in a long, Sept. 14th post. In response to a question as to why he did not take senior status, Posner replies. "That's a good question. I didn't really think about it!" He also says he had already hired clerks for next summer. There is quite a bit in the interview about Posner's issues with the handling of pro se appeals.

The threatened Republican, and actual Democratic, suits by Attorneys General against the Trump administration over DACA, reported here last week, ended with discussion of the pro-DACA suit brought by "a group of 16 attorneys general — all Democrats — filed ... in Federal District Court in Brooklyn." They were soon joined by another pro-DACA lawsuit, this one filed in on the west coast. On [Sept. 11, Politico](#) reported:

California and three other states on Monday added to a barrage of states challenging President Donald Trump's decision to rescind protections for undocumented people brought to the United States illegally as children.

The lawsuit, in which California was joined by Minnesota, Maryland and Maine, comes five days after 15 states and the District of Columbia first filed suit to defend the Obama-era Deferred Action for Childhood Arrivals program.

Oral arguments before the Indiana Supreme Court this week of September 17, 2017

Thursday, Sept. 21st. (Notice that the Supreme Court has not yet granted transfer in any of the three cases it will hear on Thursday.)

- **9:00 AM - *Destin Jones v. State of Indiana* ([84A05-1609-CR-02065](#))** (Vigo) At a jury trial in the Vigo Superior Court, Destin Jones was convicted of attempting and conspiring to commit armed robbery. Jones appealed, arguing the State did not disprove his abandonment defense beyond a reasonable doubt. The Court of Appeals agreed with Jones as to the attempted robbery conviction, which it reversed. But it affirmed Jones' conspiracy conviction, finding the abandonment defense did not apply. *Jones v. State*, --- N.E.3d ---, No. 84A05-1609-CR-2065 (Ind. Ct. App. 2017). Jones has petitioned the Supreme Court to accept jurisdiction over the appeal.
- **9:45 AM - *In the Matter of A.K.G. (S.M.H. v. IDCS)* ([02A03-1608-JT-01869](#))** (Allen) The Allen Superior Court involuntarily terminated the mother's rights and approved a permanency plan of placement of the child for adoption. The court found that although the mother had completed services, she had been unable to ensure the child's safety and maintain employment and suitable housing. A majority of the Court of Appeals, in a not-for-publication opinion, affirmed. *In re A.K.G.*, No. 02A03-1608-JT-1869 (Ind. Ct. App. Mar. 16, 2017). The mother has petitioned the Supreme Court to accept jurisdiction over this appeal.
- **10:30 AM - *Billy Brantley v. State of Indiana* ([49A04-1606-CR-01401](#))** (Marion) The State charged Billy Brantley with voluntary manslaughter in the shooting death of his brother-in-law. After a trial in Marion Superior Court, a jury rejected Brantley's claim of self-defense and convicted him as charged. A majority of the Court of Appeals reversed, concluding the State failed to prove "sudden heat" as required to sustain the conviction. *Brantley v. State*, 71 N.E.3d 397 (Ind. Ct. App. 2017), *reh'g denied*. The State has petitioned the Supreme Court to accept jurisdiction over the appeal.

The briefs and lower court opinions may be accessed via the links above. Webcasts of the Supreme Court's oral arguments are [available here](#).

Recommended this week

- [How to Digitally Erase All Your Stuff When You Quit Your Job](#), **Wired**, 8-23-16.
- [How to Win at Texas Hold'em Poker](#) - **Mass. Institute of Technology Open Courseware** - this short course covers the poker concepts, math concepts, and general concepts needed to play the game of Texas Hold'em on a professional level. Video lectures and study materials available.

- [*How to Read a Legal Opinion: A Guide for New Law Students*](#), Orin S. Kerr. 11 **The Green Bag 2d** 51 (2007), 16 pp. Abstract: This essay is designed to help new law students prepare for the first few weeks of class. It explains what judicial opinions are, how they are structured, and what law students should look for when reading them.
 - Digitized handwritten manuscript of [Fitzgerald's The Great Gatsby](#) via **Princeton University Library**. See also "[Seven bound volumes](#) of clippings about the life and work of F. Scott Fitzgerald." Scrapbook 4 has contemporaneous reviews of TGG. Also interesting, this [8-27-17 NY Times story](#): "*Grisham's Capers Steals Fitzgerald's Manuscripts: Could It Happen?*"
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