



As She Was Saying: The Role of Gender and Narratives in Oral Argument Amicus Success*

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ABSTRACT

Attorney success at oral arguments is related to compliance with gender norms, subtle expectations about how men and women should speak and act in a host of contexts. While oral arguments are typically between two attorneys, amici curiae are present in a significant minority of cases. Amici, often representing the federal government, lend credibility to their endorsed attorney and complement the argument. Much like arguments for attorneys representing the petitioner and respondent, we contend amici oral argument success is tied to the performance of gender. However, while attorneys for the petitioner and respondent are more successful when adhering to gender norms, amici success is tied to mimicry of the gender norms associated with the endorsed attorney. Thus, a female attorney supporting a male attorney will be more successful if she utilizes male gender norms. Drawing on communication literature, we argue this is because endorsed attorneys and their amici collectively construct a narrative. By arguing first, the endorsed attorney sets gender norm expectations which the amicus then matches via mimicry. We find support for this argument via a quantitative textual analysis of oral amicus arguments from the 2004–2016 terms. While our results add a new wrinkle to our understanding of gender at oral arguments, they also raise normative concerns. Whereas previous work indicates women must balance gender and professional norms, our results suggest that it is not just women who are held to this double standard, but also the men who support them. This compounds concerns about how effectively women can participate as counsel at the Supreme Court.

KEYWORDS

Amicus; attorneys; oral arguments; gender norms

Introduction

Oral arguments are the culmination of years of legal activity where the petitioner's and respondent's attorneys are given 30 minutes each to summarize and expand upon their briefs (Johnson 2001; Johnson 2004). While rarely deterministic, the stakes are high; oral arguments shape the contours of judicial decision-making (Black et al. 2012; Johnson 2004; Johnson et al. 2006) and can sway a justice sitting on the proverbial fence (Ringsmuth, Bryan, and Johnson 2013). As such, attorneys for the petitioner and respondent typically welcome support from oral amici curiae. Often with considerable litigation experience and prestige, oral amici can help boost the success of the endorsed attorney (Roberts 2009). However, the presence of an oral amicus does

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not automatically translate into success for the endorsed attorney; moreover, the amicus argument does not stand alone. The endorsed attorney and her or his amicus construct a joint narrative. Importantly, this narrative is gendered.

Amici and their endorsed attorneys do not present arguments in a vacuum from each other. Rather, they collectively construct a narrative. Narratives, as a unique form of communication, require a story and a story-teller (Rowland 1989). At the Court, the story is the legal argument advanced at oral arguments. When an attorney is supported by an amicus, the two become joint story-tellers; their collective narrative is more likely to be effective when the amicus narrative echoes, supports, and extends the narrative the Court expects from the endorsed attorney (e.g. Allen 2017; Fisher 1984). While narrative success hinges on many factors (e.g. Fisher 1984, 1989; Fusaroli et al. 2012; Rowland 1989), gender norms prominently factor into narrative success at the Court because the Bar remains predominantly male in composition and culture (Gleason, Jones, and McBean 2019; Sarver et al. 2007).

Gender norms, subtle expectations about how men and women should act in a given context (e.g. Eagly and Mladinic 1989; Kaheny et al. 2015), are problematic for female attorneys since the norm of a good attorney and a good woman are often at odds (Rhode 1994; Gleason, Jones, and McBean 2019). Women have made remarkable gains in the legal profession over the past half century (Norgren 2018) and now make up more than half of law school graduates (Liebenberg and Scharf 2019). But, the legal profession has a “sticky floor” (Baker 2003) where female attorneys are more likely to be found at municipal court than the Supreme Court (e.g. Rhode 2002; Bjerck 2008; Rainbird 2007; Shambaugh 2007). This has consequences for the conditions under which women are able to effectively argue as amici at the Supreme Court.

Work on attorneys representing the petitioner and respondents finds oral arguments are more effective when attorneys comply with the gender norms associated with her or his gender. But, it is important to recall amici form a narrative along with their endorsed attorneys. Accordingly, the calculus is somewhat different for amici. Amici do not stand alone; rather they stand in tandem with their endorsed attorneys to construct a joint narrative (Allen 2017). Accordingly, amicus success is not just determined by the balance of gender and professional norms (Gleason 2020; Rhode 1994), but also the extent to which amici comply with the gender norms associated with their endorsed attorney. This raises normative concerns about how gender shapes attorney success.

We explore the extent to which amici oral arguments increase the probability of endorsed attorney success via shared narratives through the lens of gender norms. In doing so, we draw upon work from the discipline of communication which stresses interaction (and, by association narrative) is more successful when participants employ mimicry by imitating or mirroring each other’s verbal and nonverbal behavior (e.g. Fusaroli et al. 2012; Fusaroli and Tylén 2016; Guégen 2011). More specifically, we contend that when amici mimic the gender norms expected of the endorsed attorney via language style matching, the endorsed attorney is more likely to secure the justice vote (e.g. Allen 2017). In practice, this means whereas attorneys for the petitioner and respondent are more successful when their arguments are consistent with gender norms (Gleason 2020), amici are more successful when mimicking the gender norms expected of their endorsed attorney rather than those associated with their own gender. We find support for our argument.

In order to test our expectations, we utilize quantitative textual analysis of all oral amicus arguments at the Supreme Court from 2004 to 2016. In doing so, we employ psychological software (Pennebaker and King 1999) to extract the underlying gendered content of each argument (Gleason 2020). In combination with data on petitioner and respondent attorney and amicus gender, we note the extent to which each amicus adheres to the gendered language expected of the endorsed attorney. We find female amici are more successful when their arguments align with the gender norms of their endorsed attorney, regardless of whether or not those norms align with the amicus’ own gender.

Amicus success and narrative construction at oral arguments

Oral arguments, the only public stage of the judicial decision-making process, are atypical conversations (Wrightsmann 2008) in which attorneys attempt to construct a compelling narrative that reiterates or elaborates on their brief's main points (e.g. Johnson 2001). An effective oral argument can change justices' minds in a significant minority of cases (Ringsmuth, Bryan, and Johnson 2013) and help shape the content of the final opinion (Johnson 2004). While adding an amicus at oral arguments comes at the cost of 10 minutes of argument time for the endorsed attorney, it provides an assist from an attorney typically representing the prestigious federal solicitor general or a state government (Roberts 2009; Schweitzer 2019). Despite these benefits, adding an amicus creates a break in the narrative as speakers change. With multiple speakers, it is possible the narrative becomes disjointed. However, if the amicus, who speaks after the endorsed attorney, mimics the language style expected of the endorsed attorney, the narrative will be more cohesive and the odds of success increase (e.g. Cannava and Bodie 2017; Meinecke and Kauffeld 2019).

When a narrative contains multiple speakers, mimicry, the intentional mirroring of verbal and nonverbal communication, is critical (e.g. Guégen 2011). At the Supreme Court, we contend amici are more successful when mimicking the language style expected of their endorsed attorney as doing so contributes to a cohesive narrative. While much of the recent work on mimicry across a range of domains focuses on function words (e.g. Gonzales, Hancock, and Pennebaker 2010; Ireland et al. 2011; Ireland and Henderson 2014; Segalowitz and Lane 2004), we concentrate on gender norms because the gendered context of the Court heightens the salience of gender norm compliance in predicting attorney success (Gleason, Jones, and McBean 2019; Gleason 2020).

Existing work on gender norms and attorney success focuses on cases without oral argument amici. In these studies, attorneys for the petitioner and respondent are fully in control of the narrative (e.g. Gleason 2020; Szmer, Sarver, and Kaheny 2010). When the amicus begins to speak, her or his argument does not stand on its own, independent of the endorsed attorney's argument. Rather, the amicus enters into the narrative after the endorsed attorney has already set the tone of the narrative. That is to say, if a female amicus speaks after a male endorsed attorney, the justices expect the overall narrative to comply with male gender norms. She will be more successful if she continues that expected narrative. We now turn to an in-depth discussion of our theoretical approach.

Amici have appeared before courts since the Roman Republic. The practice made its way to American courts relatively early in history when Henry Clay appeared as an amicus in 1821¹ (Barker 1967). Though their rate of participation has waxed and waned with time, cases without amici are now the exception rather than the norm (Collins 2008). Scholars devote a great deal of attention to amici, but typically focus on amicus briefs (e.g. Collins 2018; Gleason and Provost 2016; Provost 2011; Spriggs and Wahlbeck 1997) at the exclusion of oral amici. The theoretical focus on amicus briefs makes sense; far more amicus briefs are filed than amici present at oral arguments. Additionally, briefs may have a larger impact on the outcome of a case than do oral arguments (e.g. Corley 2008; Ringsmuth, Bryan, and Johnson 2013). However, the presence of amici at oral arguments can help augment or refine the endorsed attorney's argument (Roberts 2009). Moreover, while the impact of amici on outcomes has often been contested, scholars generally agree amicus briefs filed by the federal government are among the most successful (Caldeira and Wright 1990; Collins, Corley, and Hamner 2015; Nicholson and Collins 2008; Pacelle 2003). Since the vast majority of oral amici represent the federal government,² it is

¹*Green v. Biddle* 1 U.S. (8 Wheat.) 1.

²The majority of oral argument amici (372) in our data are from the Office of the Solicitor General; eight represent state governments. Another five are invited by the Court and thus do not represent any office. Additionally, three oral amici appear

plausible the credibility of endorsed attorney arguments is bolstered if supported by a prestigious amicus (e.g. Galanter 1974; McGuire 1998). Of course, the mere presence of an amicus will do little good if the endorsed attorney and the amicus arguments are disconnected.

Narratives, mimicry, and language style matching

Narratives, studied as a key paradigm in human communication (Fisher 1987), hinge on how well a speaker can persuade listeners via a coherent argument (Allen 2017). Ultimately, a narrative is a story and the speakers are the story-tellers (Rowland 1989). In the case of the Court, the petitioner and respondent are both story-tellers with the justices as listeners. When an amicus appears for one of the attorneys, she or he becomes a joint story-teller and arguments must be considered in tandem with the endorsed attorney. Disjointed or illogical narratives will likely not be persuasive. Accordingly, to be maximally effective, the amicus' narrative should carry on in much the same way the endorsed attorney is expected to. This often occurs via mimicry, generally, and language style matching, specifically.

Mimicry is the intentional copying or mirroring of another person's behavior and it can have a significant effect, such as heightening one's powers of persuasion, building rapport, and reinforcing and supporting another person's communication across a variety of contexts (Bodie et al. 2011). It can also create a sense of rhythm or synchrony between communicators, thereby enhancing perceptions of a successful interaction and a supportive relationship. While communication scholars often examine mimicry through nonverbal cues³ (e.g. Ivy and Wahl 2019), it can also emerge through choice of language (Richardson et al. 2019).⁴ For amici at oral arguments, this takes place when amici arguments mirror the expectations the Court has of the endorsed attorney. That is to say, an amicus will be successful if she or he sounds like what the Court expects the endorsed attorney to sound like. As a number of recent studies note, the Court's expectation of attorneys often turns on the question of identity (e.g. Gleason, Jones, and McBean 2019; Gleason 2020; Szmer, Sarver, and Kaheny 2010).

The role of who the attorney is

Attorney success is, in many ways, tied to *who* an attorney is and the types of experience she or he possesses (McGuire and Caldeira 1993). This falls under Fisher's (1987) rubric of a narrative speaker's credibility. An attorney representing the Office of the Solicitor General has considerable credibility (Nicholson and Collins 2008; Pacelle 2003) as an experienced attorney and a known entity to the justices (Curry 2015; McGuire 1995). Other markers of credibility operate on a more implicit level. In particular, scholars are increasingly aware of the ways in which attorney gender shapes outcomes. Female attorneys are often presumed to be support staff or incompetent at trial courts (Blodgett 1986; Kearney and Sellers 1996; Seidenberg 1985). They are generally less successful than their male counterparts at the Supreme Court (Szmer, Sarver, and Kaheny 2010), and are interrupted more at oral arguments than men (Patton and Smith 2017). This seemingly suggests women are more successful when they are supported by a male amicus, as his credibility may be "lent" to her and the narrative. However, this would turn on the mere presence of gender;

on behalf of Senator Mitch McConnell or the U.S. Senate. While third parties such as representatives from the American Civil Liberties Union have appeared at oral arguments as amici in the past, none do so in cases with just one amicus attorney and one attorney for each of the direct parties in the time frame of our study.

³Examples of nonverbal vocalic cues include rate, pitch, and volume, as well as non-word utterances in conversation (e.g. "um hm," "hmm") and interruptions/overlaps (Ivy and Wahl 2019).

⁴Verbal mimicry is also referred to as linguistic coordination (Fusaroli et al. 2012), interactive alignment (Fusaroli and Tylén 2016; Pickering and Garrod 2004, 2013), and echo effect (Kulesza et al. 2014). While there are small differences between each of these constructs, they are substantively the same.

more recent research finds attorney gender at oral arguments is evaluated as a performance rather than a binary for petitioner and respondent attorneys (Gleason 2020). We contend a similar process is at play for amici.

The performance of gender is rooted in gender norms, defined as subtle, implicit expectations about how men and women should act in a host of contexts (see for instance: Biernat, Tocci, and Williams 2012; Butler 1999; Greco 2012; Nelson 2015; Rudman and Glick, 1999). At the Court, this often manifests via language. The Court instructs attorneys to avoid emotion in favor of dispassionate argument of legal theory (Black et al. 2016). This poses few problems for male attorneys, as the norms of a good attorney and a good man are coextensive; both should employ dispassionate arguments. But this is problematic for female attorneys, as women are expected to utilize more emotional language (e.g. Menkel-Meadow 1986). Female attorneys thus must choose between complying with gender norms or professional norms (Gleason, Jones, and McBean 2019). However, the justices enforce gender norms and female attorneys are typically less successful when they comply with the Court's dictate at oral arguments (Gleason 2020). Thus, in order to be successful, female attorneys must eschew the professional norm of a good attorney in favor of the gender norm of a good woman. This places women in a difficult balancing act as attorneys for the petitioner or respondent (e.g. Rhode 1994).

It is tempting to utilize the same explanation previous work finds for petitioner and respondent attorneys and extend it to amici. That is to say, a female amicus should be successful when her argument conforms with female gender norms. While this approach is intuitive, it misses the fact amici actually take the second part in a continuing narrative (e.g. Fisher 1987). Should a female amicus conform with female gender norms in support of a male endorsed attorney she will break the flow of the expected narrative and lessen its impact (Allen 2017; Fisher 1989). Amici are, by definition, supportive of the endorsed attorney (e.g. Collins 2018). If the endorsed attorney is male, the Court expects him to "argue like a man." Should he be supported by a female amicus, she would break the narrative if she "argues like a woman," as compliance with male gender norms are already an established part of the narrative. In essence, we argue the need for narrative coherence and continuity between endorsed attorney and amici trumps adherence to expected gender norms (e.g. Allen 2017; Fisher 1987). Even more specifically, we argue successful amici verbally mimic the endorsed attorney's expected argument through the use of language style matching in the narrative.

Social psychology notes mimicry often occurs via language style matching (Cannava and Bodie 2017; Meinecke and Kauffeld 2019; Pennebaker, Mehl, and Niederhoffer 2003; Richardson et al. 2019). Language style matching occurs when two parties, usually a conversational dyad, speak with parallel or matched wording. This includes contexts such as attorneys examining witnesses (Aronsson, Jönsson, and Linell 1987), therapists' exchanges with clients (Lord et al. 2015), online chats (Niederhoffer and Pennebaker 2002), small group discussions (Gonzales, Hancock, and Pennebaker 2010), romantic relationship initiation (Ireland et al. 2011), and conflict negotiation and resolution (Bowen, Winczewski, and Collins 2017; Ireland and Henderson 2014). In this context, we contend effective amici mimic the gender norms expected of the endorsed attorneys, thereby continuing the narrative, rather than adhering to gender norms expected of her or him. Thus, a female amicus is likely to increase her endorsed attorney's probability of success using female gender norms only when the endorsed attorney is female. Should she endorse a male attorney, she will be more likely to succeed if she utilizes male gender norms in her argument.⁵

⁵It is tempting to argue amici should mirror the gender norms the endorsed attorney actually utilizes rather than those gender norms dictate she or he should use. However, the Court remains heavily gendered (Gleason, Jones, and McBean 2019; Gleason 2020; Sarver et al. 2007–2008). Thus, if a male endorsed attorney argues first, the Court will expect a narrative that conforms with male gender norms. If amici are seen as carrying on the argument the endorsed attorney started, the amicus will be most successful if she or he continues that expected narrative, even if it requires "correcting" for missteps the

When attorneys come to the lectern, words matter. The justices expect a particular type of language based on gender. Should that attorney be male, the justices expect him to comply with male gender norms. When a female amicus follows him, gender norms also dictate her success. But, amici take the second part of a continuing narrative. Accordingly, they are held to the gender norms expected of their endorsed attorney. Failure to mimic the gender norms associated with the endorsed attorney via language style matching may reduce the endorsed attorney's success.

Data and method

We collect transcripts for all orally argued cases resulting in a signed opinion from 2004 to 2016 where exactly one attorney argues for the petitioner and one attorney argues for the respondent (Black et al. 2016; Feldman 2017; Gleason 2020) via the Court's online archive.⁶ To isolate the impact of amici mimicry, we restrict our analysis to those cases where just one of the two attorneys is supported by an amicus at oral arguments.⁷ Ultimately, we are able to analyze 379 cases; since our unit of analysis is the justice-vote, we have 3,314 observations.

Our dependent variable is a measure of amicus success, which we operationalize as whether a given justice votes for the endorsed attorney at oral arguments (Gleason 2020). To do so, we determine whether the amicus endorses the petitioner or respondent via the list of appearances on each oral argument transcript⁸ and subsequently note the direction of each justice's vote in the case (Spaeth et al. 2018). This value takes on a value of "1" if the justice votes for the attorney supported by the amicus, "0" if not.

Our primary independent variable has three constituent parts: amicus gender, endorsed attorney gender, and the amount of emotional language in the amicus' argument. We measure amicus and supported attorney gender with binary measures set to "1" if a given attorney is female, "0" if male. We construct this measure via the honorific ("Mr." or "Ms.") used by the Court to address attorneys.⁹ We measure emotional content of amicus oral arguments via quantitative textual analysis. With an R script (Wickham 2016), we separate the amicus' utterances from the other attorneys and justices in the transcript. We process the resulting transcript with the Linguistic Inquiry Word Count software (hereafter: LIWC) (Pennebaker and King 1999). LIWC measures a number of structural and psychological features of language that have been used extensively in political science (see for instance: Black et al. 2016; Bryan and Ringsmuth 2016; Jones 2016). Following the lead of recent studies on gender norms at the Supreme Court (Gleason, Jones, and McBean 2017, 2019; Gleason 2020), we utilize LIWC's affect (emotional language) measure to note gender performance. The measure draws on 915 words associated with affect. Lower values of this measure denote less emotional language that is more in line with male gender norms. Higher values of affect are indicative of more emotional language and are more in line with female gender norms. In line with previous research, we standardize the resulting value

endorsed attorney made. This is consistent with prior work which notes amici sometimes attempt to salvage a sub-optimal endorsed attorney argument (Roberts 2009).

⁶A small number of cases are missing from the Court's archive. In these instances, we obtain the transcript from Westlaw.

⁷We exclude four cases in which both the petitioner and respondent are supported by an amicus. Additionally, when the federal government is the respondent the solicitor general sometimes admits error and argues "as respondent in support of the petitioner." In these instances, the Court appoints an amicus to effectively serve as the respondent. Since the dynamic here is substantially different from the typical arrangement in which the amicus supplements an endorsed attorney direct party, we exclude these cases from analysis.

⁸In a small number of cases, the transcript does not note which attorney the amicus supports. When this occurs, we consult the brief filed by the amicus to determine which party she supports. In rare instances the amicus supports neither attorney (15) or supports the petitioner in part and respondent in part (3); we exclude these cases from analysis.

⁹The Court addresses the solicitor general with the honorific "General." All attorneys in our data, with the exception of Elena Kagan, addressed as "General" also appear as "Mr." or "Ms." in other transcripts.

(Wedeking 2010). Thus, a score of “0” indicates that particular amicus argument used the mean level of affect. Values below 0 are less affective than the mean; values above 0 are more affective than the mean. Accordingly, lower values of the standardized affect measure are more in line with male gender norms and higher values are more in line with female gender norms.

Gender norms often operate at the implicit level in language (Jones 2016). To provide an example of this with our affect measure, consider the oral argument excerpts below. The first, given by Lenora Kruger,¹⁰ contains high affect; the second, given by Neal Katyal,¹¹ has low affect¹² (affect words in bold):

Well speeding is not a felony **offense** under the laws of any State to my knowledge. And we have to recall that the ACCA contains two requirements for **treatment** for prior conviction as a violent felony that would support enhanced sentencing under that act. The felony requirement is not a **trivial** requirement. It was in fact a focus of congressional debate and it was intended to capture only **serious** crimes. As a general matter crime of ordinary negligence simple carelessness or totally **blameworthy** acts don't **merit** felony **punishment**. As this Court recognized in *Staples* to label a criminal act as a felony is indeed a **serious** thing and something that legislatures by long tradition reserved for **truly serious** acts.

I **disagree** on two levels. First is I do not think that is what *Flast* is. I think *Flast* is about that micro-fraction of a cent that is coming from your pocket and being used to fund religion. And that's what Madison **complained** about. It may be very small; it may be pence. But there's a **special harm** of conscience when its your money your hard-earned money being used to fund a program directly as to which you do not **like**.

Each of the highlighted affect words, on their own, have relative value and may even seem to be trivial. Moreover, some of these words are inherently present in legal arguments and are seemingly without any affective content (e.g. “punishment” in a criminal procedure case). Still, it is important to recall gender in language often operates in benign ways. To illustrate, Jones (2016) notes women are rewarded for using more function words. Additionally, women utilize more function words than men on average. Particularly as function words, inclusive of articles, prepositions, auxiliary verbs, and pronouns, are for all intents, “genderless,” this indicates gender norms operate at an implicit level. Moreover, in line with previous work on petitioner and respondent briefs at oral arguments (Gleason, Jones, and McBean 2017), we find a statistically significant difference between the amount of affect used by male and female amici attorneys at oral argument.¹³ Since we expect amici are held to the gender norms of their endorsed attorney, we then interact amicus gender, supported party gender, and affective content of the amicus argument. This constitutes our primary independent variable.

We also include a number of control variables suggested by previous research. Since the Court generally defers to attorneys from the Office of the Solicitor General (Black and Owens 2012; Pacelle 2003), we include a dichotomous measure noting whether the amicus represents the federal government.¹⁴ Moreover, this should be particularly true in cases where the Court calls for the views of the solicitor general (e.g. Black and Owens 2011; Salokar 1992). Accordingly, we include a dichotomous marker noting whether the Court requested the solicitor general file an amicus brief at the cert stage. Former clerks are more successful at the merits; accordingly, we include three dichotomous measures noting whether the amicus, the endorsed attorney, and the opposed attorney previously served as clerks at the Court (Peppers 2006). Since the Court often

¹⁰*Begay v. United States*, 553 U.S. 137 (2008).

¹¹*Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011).

¹²The theoretical lowest level of affect is the complete absence of any affect words. While we have chosen both high and low affect examples for illustrative purposes, the low affect quote contains affect words to illustrate the concept.

¹³A *t*-test finds female amici use *more* affective language than their male counterparts. This is consistent with prior work finding women tend to adopt masculine behaviors when occupying a token number of seats in a given institution in order to downplay the salience of difference (Gleason, Jones, and McBean 2019; Kanter 1977; Collins et al. 2010).

¹⁴Additionally, we run a control model where we exclude cases with an amicus from anywhere other than the Office of the Solicitor General. The results are substantively unchanged.

accepts cases in order to reverse the lower court, we utilize a dichotomous measure noting whether the amicus supports the petitioner (Spaeth et al. 2018).

The Court draws heavily on briefs in rendering decisions (Collins, Corley, and Hamner 2015; Corley 2008) and compliance with gender norms in briefs increases direct party success (Gleason, Jones, and McBean 2019). To this end, we collect the amicus brief associated with each oral amicus and note the extent to which it conforms with gender norms by noting the counsel of record and her or his gender. We subsequently process the brief with LIWC to obtain a standardized affect measure. We then multiply this score by -1 for male authors and 1 for female authors. Because more complex arguments are typically more successful at oral arguments (Gleason 2020), we include LIWC's measure of words longer than six letters for the amicus' argument.¹⁵

Since more experienced attorneys are more successful (Curry 2015; McGuire 1995), we include two measures of experience. The first is the difference in experience between the endorsed attorney and the opposed attorney. The second is the difference between the amicus' experience and that of the opposed attorney. Both are created by searching Lexis for the total number of times each attorney appears at the Court prior to 2004. We increment this value by one after each additional appearance. We subtract the respondent's (petitioner's) value from the petitioner (respondent) to calculate the experience advantage for the petitioner (respondent). We follow the same procedure for the amicus and her opposed attorney. Parties with more resources are typically more successful (Galanter 1974; Wheeler et al. 1987). Thus, we include two party capability scores: one for the amicus' supported attorney and one for the attorney she opposes, as defined by Szmer, Sarver, and Kaheny (2010).

Attorneys for the petitioner and respondent are more successful at oral arguments when they comply with gender norms (Gleason 2020). Accordingly, it stands to reason amici are better able to help endorsed attorneys who help themselves. As such, we extract the standardized affective content of each endorsed attorney's oral argument. We subsequently multiply the resulting value by -1 for male endorsed attorneys and 1 for female endorsed attorneys to create a measure of whether that attorney's argument complies with gender norms. A greater number of amici supporting a party relative to the opposing party typically increases the probability of success (Box-Steffensmeier, Christenson, and Hitt 2013; Collins 2008). Accordingly, we include the difference in amicus brief support for the oral amicus' supported attorney relative to the opposing attorney. More questions typically bode poorly for an attorney's success (Johnson et al. 2009). As such, we include the difference between the total number of judicial utterances for the supported attorney and the amicus relative to the opposed attorney. We create this by using a R script to count the total number of times the justices speak during each attorney's oral argument.¹⁶

The arguments made by oral amici are ultimately evaluated by the justices. Jurist attributes can shape the decision-making calculus (e.g. Harris and Sen 2019). Perhaps one of the strongest predictors of judicial behavior is ideology (Segal and Spaeth 2002).¹⁷ We include a measure of ideological congruence between the supported attorney and justice. We do so by first noting each justice's Judicial Common Space score (Epstein et al. 2007) and the ideological position each attorney advocates (Spaeth et al. 2018). More specifically, we multiply the justice's ideology score

¹⁵Another possible operationalization is LIWC's measure of cognitive complexity. In an abundance of caution, we rerun our models with the six letter measure replaced with standardized cognitive complexity; the results are substantively unchanged.

¹⁶We also run a model where we replace this measure with two measures of question advantage. One is the question advantage for the endorsed attorney relative to the opposed attorney and a second is the question advantage for the amicus relative to the opposed attorney. The results are substantively unchanged. Alternatively, we could measure this concept with the total number of words spoken by the justices to one party relative to the opposing party. We run an alternate model where we utilize the total number of judicial words rather than interruptions; the results are substantively unchanged.

¹⁷Other research notes individual jurist level characteristics, such as gender (Collins et al. 2010), work environment (Kromphardt 2017; Kaheny et al. 2015), and personalities (Hall et al. 2016; Hall 2018) also impact judicial decision-making. We run models including these measures as robustness checks. They do not substantively alter the results. In the interest of parsimony, we do not include them in the final models presented below.

by -1 if the attorney represents the liberal position and by 1 if the attorney represents the conservative position. This results in a positive score if the attorney argues in line with the justice's preferences, negative otherwise.¹⁸ Since our dependent variable is dichotomous, we utilize a logistic regression with standard errors clustered on justice.¹⁹

Results

Our results are presented in [Table 1](#). The two models are identical, save for the interaction terms exclusive to Model 2. Moreover, since logit coefficients are unintuitive, we discuss results in terms of predicted probabilities.²⁰ Our results provide support for our contention amici are more successful when their oral arguments mimic the gender norms expected of their endorsed attorney.²¹ We now turn to a detailed discussion of our results. In order to facilitate ease of interpretation, we discuss coefficients exclusively from Model 2 in [Table 1](#). A cursory glance at our results suggests female attorneys endorsed by amici are less successful than their male counterparts. Likewise, it appears female amici are less effective than their male amici. However, since we posit an interactive relationship between our three main explanatory variables, our expectations can only be properly evaluated via the three-way interaction term. While the three-way interaction appears only marginally significant ($p = .06$), it is important to note interaction terms cannot be evaluated like traditional additive terms; they are best evaluated graphically so as to allow all three terms to simultaneously vary (Brambor, Clark, and Golder 2006).²²

We graph the three-way interaction between female endorsed attorney, female amicus, and affective content of the amicus' oral argument in [Figure 1](#). In each of the two panels, the y -axis measures the level of affect in the amicus' oral argument. The x -axis notes the marginal effect of the amicus' gender on the success of the oral argument. The first panel depicts the marginal effect of amicus gender on oral argument success when the endorsed attorney is male. The second panel does the same for when the endorsed attorney is female. The sloping solid line represents the point estimate for the marginal effect of gender norm mimicry at that particular level of affective content. Should the solid reference line at $y = 0$ be inside the dashed 95% confidence interval lines, then the impact of amicus gender is not significant at that particular level of affect.

Looking first to the left panel, we note at lower levels of affect female amici's gender does not impact success when endorsing male attorneys. But, as the level of affect in an argument increases, meaning female amici decrease the mimicry of their endorsed attorney, the effectiveness of the argument decreases. The second panel models the interaction when female amici support female attorneys. While amicus gender does not impact argument success at low levels of affect, amicus effectiveness increases as the amicus uses more affective language, mimicking the gender norms expected of the female endorsed attorney. Collectively, then, the interaction term modeled in [Figure 1](#) provides support for our contention that female amici are more successful when their arguments mimic the arguments expected of their endorsed attorneys.

¹⁸As a robustness check, we also calculate this measure with the Martin and Quinn (2002) scores. The results are substantively the same.

¹⁹In an abundance of caution we also run fixed effects and conditional logit models as robustness checks. The results are substantively unchanged.

²⁰There are many ways to calculate predicted probabilities. We calculate them averaged across all observed values of the independent variables (Hanmer and Kalkan 2013).

²¹Additionally, we test models which include issue area and/or justice variables (Spaeth et al. 2018). The results are substantively unchanged; we do not include these in our models in the interest of parsimony.

²²Interaction terms require constituent terms, as well as all possible combinations thereof, be included in the model to avoid model misspecification. We opt to not discuss the two-way interactions or individual terms at length as the constituent terms and their various other combinations represent an incomplete account of how amicus mimicry of gender norms shapes outcomes (Brambor et al. 2006).

Figure 1 plots the interaction for female amici mimicking the gender norms associated with their endorsed attorneys. A natural follow-up question concerns what happens when the amicus is male. To evaluate this, we rerun Model 2 from Table 1 with the female amicus variable

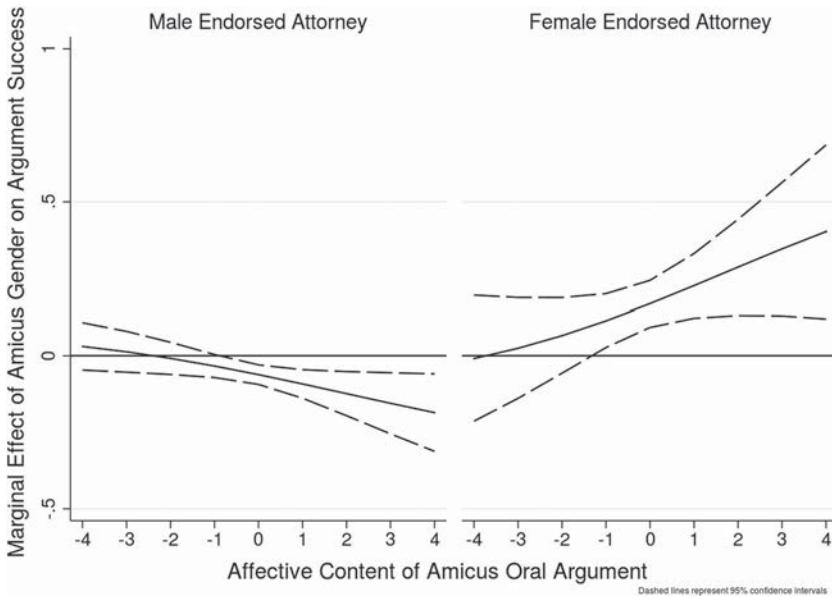


Figure 1. Impact of interaction of amicus gender, endorsed attorney gender, and affective content of amicus argument on securing justice vote (female amici).

Table 1. Female amici success at oral arguments.

| | (1) | (2) |
|---|------------------|------------------|
| Female amicus | -0.164 (0.062)** | -0.341 (0.087)** |
| Female endorsed attorney | -0.127 (0.097) | -0.476 (0.096)** |
| Affective content of amicus argument | -0.188 (0.034)** | -0.142 (0.050)** |
| Female amicus × female endorsed attorney | - | 1.330 (0.347)** |
| Female amicus × affective content of amicus argument | - | -0.143 (0.074)** |
| Female endorsed attorney × affective content of amicus argument | - | -0.207 (0.100)* |
| Female amicus × female endorsed attorney × affective content of amicus argument | - | 0.411 (0.217)** |
| OSG amicus | 0.491 (0.288)** | 0.412 (0.286) |
| Court invites SG | 0.057 (0.067) | 0.050 (0.067) |
| Amicus former clerk | -0.217 (0.107)* | -0.208 (0.107)** |
| Endorsed attorney former clerk | -0.285 (0.098)** | -0.299 (0.097)** |
| Opposed attorney former clerk | -0.368 (0.070)** | -0.380 (0.071)** |
| Amicus supports petitioner | 1.030 (0.087)** | 1.029 (0.091)** |
| Amicus brief gender norm compliance | 0.015 (0.027) | 0.022 (0.026) |
| Lexical complexity | 0.204 (0.051)** | 0.198 (0.053)** |
| Endorsed attorney experience advantage | 0.004 (0.001)** | 0.004 (0.001)** |
| Amicus experience advantage | -0.007 (0.001)** | -0.007 (0.001)** |
| Endorsed attorney party capability | -0.068 (0.030)* | -0.068 (0.028)* |
| Opposed attorney party capability | 0.014 (0.017) | 0.032 (0.018)** |
| Endorsed attorney gender norm compliance | 0.032 (0.022) | 0.037 (0.028) |
| Endorsed attorney amicus brief advantage | 0.022 (0.007)** | 0.021 (0.007)** |
| Question advantage | -0.018 (0.002)** | -0.017 (0.002)** |
| Ideological congruence | 1.250 (0.083)** | 1.258 (0.085)** |
| Constant | 0.554 (0.324)** | 0.659 (0.325)* |
| Observations | 3.314 | 3.314 |
| Area under ROC | 0.751 | 0.743 |

Standard errors clustered on justice in parentheses.

* $p < .05$, ** $p < .01$, and *** $p < .10$.

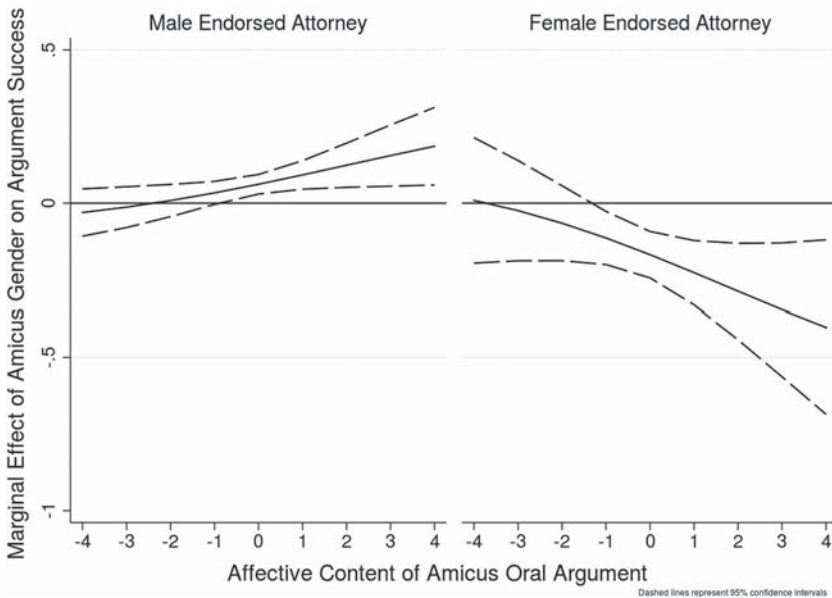


Figure 2. Impact of interaction of amicus gender, endorsed attorney gender, and affective content of amicus argument on securing justice vote (male amici).

replaced with a male amicus variable. Figure 2's results are somewhat perplexing; we find male amici are more successful when their arguments break with gender norms. In the first panel, the positive slope indicates male amici are more successful with male endorsed attorneys when using more affective language. The second panel indicates male amici are less successful supporting female attorneys when utilizing more emotional language. These perplexing findings warrant future research.

A number of control variables also reach statistical significance. Contrary to expectations, we note amici are less successful when they are former clerks. Whereas non-clerk amici have a predicted probability of success of 0.72, former clerk amici have a predicted probability of success of 0.68. Likewise, amici are less successful when endorsing attorneys who previously served as clerks. Amici have a predicted probability of success of 0.66 when endorsing a former clerk. However, when endorsing a non-clerk, the probability of success increases to 0.71. Consistent with expectations, when an amicus opposes a former clerk, she is less successful. Facing a non-clerk, amici have a predicted probability of success of 0.72. But, facing a former clerk, the predicted probability of success falls to 0.65.

Supporting the petitioner increases the predicted probability of amicus success from 0.58 to 0.78. Amici are more successful when using more lexically complex language. A one standard deviation increase in lexical complexity increases the predicted probability of success from 0.70 to 0.73. Amici are more successful when their endorsed attorneys are more experienced relative to their opponents. A one standard deviation increase from the mean in endorsed attorney experience relative to her opponent increases the predicted probability of amicus success from 0.70 to 0.72. However, greater amicus experience relative to the opposed attorneys decreases the probability of securing the justice vote. A one standard deviation increase from the mean in amicus experience decreases the predicted probability of success from 0.70 to 0.63. This perplexing finding may point to a more complex relationship between the experiences of all three attorneys. We encourage future scholars to more fully explore this.

Amici are less successful when the attorneys they endorse represent clients with higher party capability scores. Moving up one unit on the party capability ladder decreases the predicted probability of success from 0.73 to 0.72. At its most extreme, amici endorsing a private individual

have a predicted probability of success of 0.73; amici endorsing the federal government have a predicted probability of success of 0.67. To the contrary, amici are more successful as the party capability of their opposed attorney increases. Each step up the party capability scale for the opposed attorney's party capability increases the predicted probability of amicus success by 0.01. At the most extreme, the predicted probability of amicus success against an individual is 0.68; against the federal government it is 0.74. These findings may point toward the strategic calculus of cases in which amici request oral arguments. We encourage future scholars to more fully explore this.

A one standard deviation increase in amicus briefs for the endorsed attorney relative to the opposed attorney increases the predicted probability of success from 0.70 to 0.72. Amici are less successful as the number of questions the justices ask the supported party relative to that of their opponent increases. A one standard deviation increase in the number of questions asked of the amicus and her endorsed attorney decreases the predicted probability of success from 0.703 to 0.70. A one standard deviation increase from the mean in ideological congruence between the supported attorney and the justice increases the predicted probability of success from 0.71 to 0.94.

Discussion and conclusions

Oral arguments shape numerous aspects of judicial decision-making (e.g. Chen, Halberstam, and Yu 2016; Johnson et al. 2006; Johnson 2017; Ringsmuth, Bryan, and Johnson 2013); but scant work explores the role of amici at oral arguments. This is problematic because a well-crafted amicus oral argument can shape the margins of judicial decision-making (Roberts 2009). Drawing on work from the field of communication, we find oral amicus success is tied to how well the amicus contributes to the expected narrative. Because of the composition of the Court and its Bar, this narrative is gendered. Since amici take the second part in a continuing narrative, they are more successful when mimicking the gendered language style expected of their endorsed attorneys. These findings add to the scholarly understanding of judicial decision-making generally and the way gender operates in the legal profession specifically. Whereas success at oral arguments is tied, at least in part, to gender norms for petitioners and respondents (Gleason 2020), we find gender norms manifest differently for amici, as they necessarily play a supporting role by carrying on the argument started by the endorsed attorney (e.g. Roberts 2009).

Our findings bespeak the balancing act between professional and gender norms for female attorneys is more nuanced than previous studies indicate (e.g. Gleason 2020; Rhode 1994). Whereas female attorney success representing the petitioner or respondent depends in part on eschewing professional norms for gender norms (Gleason 2020), it takes on additional complexities for amici since they do not stand on their own, but rather are supplemental to the endorsed attorney. Accordingly, female amici are not held to the gender norms associated with their gender, but rather those expected of their endorsed attorney. Thus, a female attorney arguing before the Court regularly in a variety of roles may find the language expected of her varies from day to day depending on whether she argues for the petitioner (respondent) or as an amicus. Beyond the inherent normative concerns in this finding, our results also prompt a number of new questions which should be addressed by future scholars. We now turn to a brief discussion of these avenues for future research.

While the written or spoken word are common ways to analyze judicial behavior (e.g. Corley 2008; Johnson et al. 2006; Wedeking 2010), communication research notes mimicry manifests in a multitude of nonverbal forms (e.g. Fusaroli et al. 2012; Fusaroli and Tylén 2016; Guégen 2011). These include such cues as gestures, stance/posture, facial expressions, and vocal tone (Ivy and Wahl 2019). While not specific to gender, Dietrich et al. (2019) find justices' vocal pitch predicts votes. We encourage future scholars to revisit this finding with attention to gender. We suspect

female attorneys may be more successful with higher pitches as petitioner or respondent. Further, in line with our findings above, we suspect mimicry of expected pitches predicts amicus success. Exploring other nonverbal forms of mimicry is more difficult at the Supreme Court because of the absence of video recording (e.g. Blodgett 1986; Kearney and Sellers 1996; Seidenberg 1985). However, some lower federal, state, and comparative courts permit video recording (e.g. Smyth and Mishra 2014). Accordingly, we encourage future scholars to utilize video feeds to explore mimicry in nonverbal forms at other courts.

Expanding the study of amicus mimicry beyond the Supreme Court would also introduce variation in institutional rules and judicial diversity. The federal courts of appeals may be a particularly fruitful venue as they have variable rules governing oral arguments generally and amici specifically (Johnson 2017). Moreover, the impact of gender on judicial decision-making is context dependent (e.g. Collins, Manning, and Carp 2010; Haire and Moyer 2015). Particularly as gender diversity is not uniform across the lower federal courts (e.g. Scheurer 2014) or state courts of last resort (Arrington 2018; Nguyen 2019; Szmer, Christensen, and Kaheny 2015), we expect such studies will add nuance to the role of mimicry in amicus success. Presumably, as diversity increases reliance on gender norm mimicry will decrease (e.g. Kaheny et al. 2011). We particularly encourage this line of inquiry at state supreme courts as several now have female majorities (Ritter 2019) and data on state decisions is increasingly available (Hall and Windett 2013; Windett, Harden, and Hall 2015).

Relatedly, we suspect scholars may note differences in the role of gender norms and mimicry in amicus success at the Court over a broader time frame. Much the same way previous work notes the role of judge gender in judicial decision-making changes along with lived experiences (Haire and Moyer 2015) and the relative diversity of a given bench (Scheurer 2014), we suspect mimicry's importance is context dependent. Additionally, a broader time frame would allow scholars to examine more nuanced predictors of amicus success, including women's issue cases (e.g. Szmer, Sarver, and Kaheny 2010) and cases with non-solicitor general oral amici. More recently, the Court has shifted the format of arguments to teleconference because of the covid-19 pandemic. It stands to reason that the lack of visual cues may enhance the importance of gender norms in language.

We, like a number of previous scholars (e.g. Gleason 2020; Szmer, Sarver, and Kaheny 2010), explore the impact of attorney gender via justice-vote. However, the vote is just the end product of oral arguments. With this in mind, scholars are increasingly attentive to the back and forth dynamic of interruptions (e.g. Johnson et al. 2009). Patton and Smith (2017, 2020) find women are interrupted more at oral arguments than men. This discrepancy may be due not to the fact an attorney is a woman, but because of the words she uses. More specifically, we suspect female amici are interrupted more when their utterances break the narrative expected of their endorsed attorney. Thus, high interruption counts for amici may not be due to their gender as a binary but rather because of a break in the expected narrative. While such a project is beyond the scope of the present article, we encourage future scholars to more fully explore this possibility.

Perhaps one of our most interesting findings pertains to how mimicry by male amici shapes success. Whereas female amici are more successful when they match the gender norms expected of their endorsed attorney, male amici are more successful when they *break* with the gender norms expected of their endorsed attorney. That is to say, a male amicus can boost the success of a male endorsed attorney by utilizing more emotional language. Likewise, he can aid a female endorsed attorney by utilizing less emotional language. While this finding is perplexing, it may be tied to gendered nature of the Court and its Bar (e.g. Gleason, Jones, and McBean 2019; Sarver et al. 2007-2008). We further suspect this is tied to the broader institutional context (e.g. Kaheny et al. 2015). Thus, fully exploring it requires examining the U.S. Supreme Court in tandem with other courts with varying levels of diversity. This serves to underscore male and female attorneys

are held to different standards as amici, just as they are as attorneys the petitioner and respondent (Gleason 2020; Gleason, Jones, and McBean 2019).

Ultimately, we draw on recent work finding attorneys are more successful when they conform to gender norms. Recognizing amici do not stand alone, but rather augment their endorsed attorney, we draw on the field of communication and recent work on the role of gender norms at oral arguments to argue female amici are more successful when they mimic the gender norms expected of their endorsed attorneys. We find support for our expectations. Our results make a number of contributions. First, we contribute to the broader understanding of how amici help shape outcomes at oral arguments. Second, we demonstrate the uniquely supportive role of oral amici creates a different set of gendered expectations. Finally, our results prompt a number of follow-up research questions at both the U.S. Supreme Court and other courts.

Disclosure statement

No potential conflict of interest was by reported the authors.

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