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HIDDEN NONDEFENSE: PARTISANSHIP IN STATE ATTORNEYS GENERAL AMICUS BRIEFS AND THE NEED FOR TRANSPARENCY

*Lisa F. Grumet**

INTRODUCTION

In all fifty states, the State Attorney General (SAG)—as the state's chief legal officer—is charged with defending state laws that are challenged in court.[1] If an SAG declines to defend or challenges a state law on the ground that it is unconstitutional—an action scholars describe as "nondefense"[2]—the SAG ordinarily will disclose this decision to the public.[3]

This Essay discusses a hidden form of nondefense that can occur when SAGs file amicus curiae briefs on behalf of their states in matters before the U.S. Supreme Court. Surprisingly, some SAGs have joined multistate amicus briefs that support invalidating other states' laws without disclosing that similar state or local laws exist in the SAGs' own jurisdictions. This Essay explores this problem through analysis of multistate amicus briefs filed in the 2017 Supreme Court term. It proposes requiring that SAGs disclose relevant laws from their state when they file amicus briefs on behalf of their state with the Supreme Court.

Any SAG may file an amicus brief "on behalf of [their] State" without obtaining leave from the Court.[4] Like other amicus participants, SAGs must

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1. Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 233 (2014).
2. *See id.* at 219 (explaining that scholars define "nondefense" to include "both decisions not to defend the constitutionality of statutes that have been challenged in court and decisions to affirmatively attack statutes").
3. *See id.* at 271.
4. SUP. CT. R. 37(4).

include in their amicus briefs a statement of "the interest of the *amicus curiae*."[5] But when SAGs sign onto amicus briefs, unlike when the state is a party to litigation, the Court does not expressly require them to identify laws of their own state that might be impacted by the outcome of the litigation.[6] In multistate amicus briefs, SAGs typically allege common interests among the participating states.[7] While a multistate amicus brief may discuss individual state laws, this discussion is not required and is not always included.

In this time of significant political polarization, it is particularly troubling that SAGs can join partisan multistate amicus briefs that undermine their own state laws without disclosing this information in the brief.[8] This practice can distort principles of separation of powers within a state and transform the SAG's role without accountability to the SAG's constituents. That is, an SAG may pursue policy or political goals through Supreme Court litigation that could not be accomplished through legislative changes within the SAG's state, either because of a lack of political will, the unpopularity such a change could cause, or both.

This practice is evident in multistate amicus briefs submitted by Republican SAGs in two high-profile cases in the 2017 Supreme Court term. In *Janus v. American Federation of State, County, & Municipal Employees*,[9] the Michigan and Wisconsin SAGs opposed an Illinois law, under which nonunion members could be required to pay public-sector union agency fees, without defending or even mentioning similar laws in their own states.[10] In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[11] multiple Republican SAGs opposed Colorado's enforcement of its law prohibiting sexual-orientation discrimination in public accommodations against a bakery that denied a same-sex couple's request for a wedding

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5. *Id.* r. 37(5).

6. *Id.* r. 24(1)(f) (requiring "merits" briefs to include "[t]he constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation").

7. *See* Timothy Meyer, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CALIF. L. REV. 885, 904–06 (2007).

8. *See* PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 196 (2015) (concluding that a "lack of consistency" in SAG positions on federalism and the scope of state policymaking authority "suggests that AGs are using their structural independence and nearly exclusive control over shaping their state's position in litigation to pursue their own, and increasingly partisan, conceptions of good public policy"). For a historical perspective on policymakers taking conflicting positions on federalism depending on the issue, see EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 59–68, 191–93 (2007).

9. 138 S. Ct. 2448 (2018).

10. *See generally* Brief of Amici Curiae States of Michigan, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Missouri, Nebraska, Nevada, Oklahoma, South Carolina, Tennessee, Texas, Utah, West Virginia, and Wisconsin in Support of Petitioner, *Janus*, 138 S. Ct. 2448 (No. 16-1466) [hereinafter Republican *Janus* Brief].

11. 138 S. Ct. 1719 (2018).

cake.[12] Many of these SAGs endorsed arguments that could have undermined public-accommodation antidiscrimination laws in their own states without disclosing those laws to the Court.[13]

When an SAG joins an amicus brief that challenges another state's law and they fail to disclose their home-state laws, the implicit message is that the SAG's home-state laws are not implicated or at risk. If the SAG's state has laws or practices that may be adversely impacted by the litigation, the SAG has essentially engaged in nondefense without providing notice to the public or to the Court.[14] Furthermore, SAGs can use the amicus brief to collaterally attack laws that they oppose for personal or political reasons, even if the SAGs might be legally required to defend the laws if challenged in their own states.[15]

This Essay argues that SAGs should be required to disclose information concerning laws in their states that may be adversely impacted by the outcome of the litigation when they file or sign onto Supreme Court amicus briefs. Part I provides context concerning the role of SAGs and nondefense generally. Part II discusses the politicization of multistate amicus briefs and the lack of requirements for SAGs to disclose their own laws when attacking laws in other states. It includes data on partisanship and disclosure in amicus briefs filed by SAGs on opposite sides in five high-profile cases from the 2017 Supreme Court term. Part III uses two case studies—the *Janus* and *Masterpiece Cakeshop* cases—to show how SAGs engage in nondefense in multistate amicus briefs without disclosing their own state laws. Part IV outlines a proposal to require transparency in SAG amicus briefs filed with the Court to address hidden nondefense.

I. NONDEFENSE GENERALLY AND THE IMPORTANCE OF TRANSPARENCY

Every state has an attorney general, and forty-three of those SAGs are independently elected by state voters.[16] The scope of an SAG's responsibilities is generally a matter of state law.[17] Among other duties,

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12. *See generally* Brief for the States of Texas, Alabama, Arizona, Arkansas, Idaho, Louisiana, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin, the Commonwealth of Kentucky, by and Through Governor Matthew G. Bevin, and Paul R. Le Page, Governor of Maine, as Amici Curiae in Support of Petitioners, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) [hereinafter Republican *Masterpiece Cakeshop* Brief].

13. *See infra* Table 1.

14. *See* Shaw, *supra* note 1, at 219.

15. *Cf.* Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2125–27, 2144–50 (2015) (discussing how political considerations may lead SAGs "to take litigation positions that reflect their legal policy preferences and resonate with their political base").

16. *See About NAAG*, NAT'L ASS'N ATTORNEYS GEN., http://www.naag.org/naag/about_naag.php [https://perma.cc/JC5C-63Q7] (last visited Mar. 15, 2019). Five SAGs are appointed by governors (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming), one SAG is chosen by the state legislature (Maine), and one SAG is appointed by the state supreme court (Tennessee). *Id.*

17. *See* Devins & Prakash, *supra* note 15, at 2125–27.

SAGs represent state agencies and officials in litigation, including litigation challenging state laws.[18]

There is some disagreement over the scope of an SAG's duty to defend the state's legislation.[19] Some government officials and scholars have argued that SAGs should defend state laws in almost all circumstances, with very limited exceptions.[20] Others have argued that SAGs can and should decline to defend state legislation that the SAG determines is unconstitutional.[21] Neal Devins and Saikrishna Bangalore Prakash surveyed state statutory and constitutional provisions and concluded that the "duty to defend" question varies by state—some SAGs have a clear duty to defend, some SAGs have no clear obligation, and some SAGs have authority or even a duty to challenge state laws that the SAG determines are unconstitutional.[22]

Historically, SAGs rarely decline to defend state laws, although nondefense appears to be increasingly common in recent years.[23] Nondefense received considerable attention in the years leading up to *Obergefell v. Hodges*.[24] Before *Obergefell* was decided, U.S. Attorney General Eric Holder declined to defend the federal Defense of Marriage Act, and multiple SAGs declined to defend state laws prohibiting same-sex marriage.[25]

When an SAG declines to defend a statute, the SAG generally discloses and explains this decision. Katherine Shaw has emphasized the importance

18. *Id.*

19. This question is related to a broader debate over the role of government attorneys to promote justice in civil litigation or in nonlitigation matters. For arguments that government lawyers do have a justice-seeking role, see Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 789 (2000); Bruce A. Green, Gideon*'s Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336, 2339–40 (2013); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 279 (2000); and Lisa F. Grumet, *Promoting Justice from the Inside: The Counseling Role of Local Government and School District Attorneys*, *in* 2 IMPACT: COLLECTED ESSAYS ON EXPANDING ACCESS TO JUSTICE 127, 129 n.6 (2016), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1003&context=impact_center [https://perma.cc/F5MH-54FX]. For arguments that the government lawyer's role is similar to that of a private attorney, see Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 1013–17 (1991); and Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294 (1987).

20. *See, e.g.*, Rena M. Lindevaldsen, *The Erosion of the Rule of Law when a State Attorney General Refuses to Defend the Constitutionality of Controversial Laws*, 21 BARRY L. REV. 1, 50–51 (2015); Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 556 (2015); *see also* Michael A. Cardozo, *The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer*, 22 PROF. LAW., no. 3, 2014, at 4, 6–8.

21. Shaw, *supra* note 1, at 263–71.

22. Devins & Prakash, *supra* note 15, at 2105–06, 2127–34; *see also* Shaw, *supra* note 1, at 257–63 (discussing state approaches to nondefense of state laws).

23. Devins & Prakash, *supra* note 15, at 2135–40 (identifying three SAG nondefense cases from 1930 to 1980, twelve cases from 1980 to 2007, twenty cases from 2008 to 2014, and sixteen cases from 1930 to 2011 in which SAGs initiated challenges to state laws on the grounds that they were unconstitutional).

24. 135 S. Ct. 2584 (2015).

25. Devins & Prakash, *supra* note 15, at 2102.

of SAG transparency about the existence of and rationale for a nondefense decision.[26] Transparency in the context of nondefense is important because it provides notice to the legislature and other government officials, engages the public, and permits others to seek leave to participate in litigation challenging the law.[27] At times, other government officials (such as members of the legislature or the governor) may intervene or appoint counsel to defend the law.[28]

Furthermore, if an SAG took a position in state court that conflicted with a state law, the SAG would likely be required to disclose this information under ethical rules that mandate "candor toward the tribunal."[29] Under Rule 3.3 of the Model Rules of Professional Conduct (a model code that most states have adopted in some form):

> A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or . . . ; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . .[30]

Transparency can also "help guard against the erosion of the distinction between constitutional law and pure politics."[31] That is, requiring SAGs to discuss their reasons for nondefense minimizes the likelihood that SAGs could take positions in litigation for personal, partisan, or political reasons, as opposed to constitutional concerns.

II. PARTISANSHIP IN MULTISTATE AMICUS BRIEFS AND THE LACK OF DISCLOSURE REQUIREMENTS

Given the importance of states in the American constitutional system, SAG amicus briefs can have considerable influence on the Supreme Court.[32] Scholars have observed an increase in the number of amicus briefs filed by states and the number of states participating in each brief.[33] Most SAGs have created solicitor general or appellate advocacy offices, which may provide resources and expertise for Supreme Court amicus brief writing.[34] Since

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26. Shaw, *supra* note 1, at 271–74.

27. *Id.*

28. Devins & Prakash, *supra* note 15, at 2132.

29. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2016). *See generally* Elaine Bucklo, *The Temptation Not to Disclose Adverse Authority*, 40 LITIGATION, Winter 2014, at 26.

30. MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2016).

31. Shaw, *supra* note 1, at 274.

32. *See, e.g.*, Anthony Johnstone, *Hearing the States*, 45 PEPP. L. REV. 575, 602–03 (2018); Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1232–33 (2015); *see also* Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 362–70 (2012); Brandon D. Harper, Comment, *The Effectiveness of State-Filed Amicus Briefs at the United States Supreme Court*, 16 U. PA. J. CONST. L. 1503, 1515–24 (2014).

33. Lemos & Quinn, *supra* note 32, at 1238–39; *see also* Cornell W. Clayton & Jack McGuire, *State Litigation Strategies and Policymaking in the U.S. Supreme Court*, 11 KAN. J.L. & PUB. POL'Y 17, 23–25 (2001).

34. Johnstone, *supra* note 32, at 601.

1982, the Center for Supreme Court Advocacy of the nonpartisan National Association of Attorneys General has provided training, coordination, editing, and other support for SAGs filing briefs with the Supreme Court.[35] In addition, the Republican Attorneys General Association (RAGA), founded in 1999, and the Democratic Attorneys General Association (DAGA), founded in 2002, provide political and organizational support for their members.[36]

While some multistate amicus briefs are bipartisan, scholars have documented an increase in partisanship in recent years, with Democratic SAGs and Republican SAGs at times filing competing amicus briefs in high-profile cases.[37] The positions in SAG amicus briefs sometimes concern whether states, as a general matter, should have authority to act in a specific area, but in some cases they involve conflicts over substantive policy.[38] Paul Nolette and Colin Provost determined that partisanship in SAG amicus briefs has significantly escalated under the administrations of Presidents Barack Obama and Donald Trump.[39]

Margaret Lemos and Kevin Quinn have suggested that the amicus brief "statement of the interests" requirement[40] could serve as a check on partisanship in amicus briefs, as SAGs whose state laws conflict with their political beliefs "may not be able to give full vent to their partisan motivations."[41] Anthony Johnstone has argued that "the Court should pay close attention to the states' interests" as expressed in an amicus brief and should be "suspicious of arguments that serve partisan goals without any apparent relationship to state federalism interests."[42]

However, the "statements of the interests" in multistate amicus briefs do not always provide sufficient information to assess the interests of the participating states. When an SAG files an individual amicus brief on behalf of a state, the statement of interest in the brief may discuss interests specific to that state.[43] For example, in *Janus*, the California SAG filed an individual

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35. *NAAG Center for Supreme Court Advocacy*, NAT'L ASS'N ATTORNEYS GEN., http://www.naag.org/naag/about_naag/center-supreme-court.php [https://perma.cc/JT9F-7WAM] (last visited Mar. 15, 2019); *see* Lemos & Quinn, *supra* note 32, at 1237.

36. Johnstone, *supra* note 32, at 609–10; DEMOCRATIC ATTORNEYS GEN. ASS'N, https://democraticags.org/ [https://perma.cc/2BE2-QBR9] (last visited Mar. 15, 2019); REPUBLICAN ATTORNEYS GEN. ASS'N, https://www.republicanags.com/ [https://perma.cc/TJ5W-ULJ4] (last visited Mar. 15, 2019).

37. For detailed studies of partisanship and SAG participation before the U.S. Supreme Court, see Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 PUBLIUS 469, 473–76 (2018); and Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS 451, 452 (2014); and see also Lemos & Quinn, *supra* note 32, at 1247–60.

38. Lemos & Quinn, *supra* note 32, at 1241–42, 1257–58, 1263.

39. Nolette & Provost, *supra* note 37, at 474–76.

40. SUP. CT. R. 37.

41. Lemos & Quinn, *supra* note 32, at 1266 ("If state law embraces restrictive abortion policies, for example, it would be challenging for the state AG to advance a pro-choice argument on behalf of the state.").

42. Johnstone, *supra* note 32, at 620, 622; *see also* Solimine, *supra* note 32, at 384–85.

43. *See* SUP. CT. R. 37.

amicus brief supporting Illinois that included detailed discussion of how an adverse ruling would impact California.[44] Similarly, in *South Dakota v. Wayfair, Inc.*,[45] the SAGs from New Hampshire and Montana each filed individual amicus briefs describing how a ruling permitting South Dakota to impose its sales tax on out-of-state retailers would adversely impact their states, which lacked sales taxes.[46] In contrast, multistate briefs typically present collective interests that may be shared by the participating states. Some multistate amicus briefs support this assertion of shared interests by identifying relevant laws or practices from participating states.[47] However, as shown in Table 1 below, at times discussion of individual state laws is incomplete or absent.

In five high-profile Supreme Court cases from the 2017 term challenging state laws or practices, partisan coalitions of SAGs filed multistate amicus briefs on opposite sides. The five cases are (1) *Gill v. Whitford*,[48] in which Democratic voters in Wisconsin sued the state for its allegedly gerrymandered voting districts;[49] (2) *Husted v. A. Philip Randolph Institute*,[50] where voters and activists challenged Ohio's practice of removing allegedly inactive voters from the state's registration rolls;[51] (3) *Janus*;[52]

44. Brief for the State of California Supporting Affirmance at 23–26, Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448 (2018) (No. 16-1466).

45. 138 S. Ct. 2080 (2018).

46. Brief for Montana as *Amicus Curiae* Supporting Respondents at 1–2, *Wayfair*, 138 S. Ct. 2080 (No. 17-494); Brief for State of New Hampshire as *Amicus Curiae* Supporting Respondents at 1–2, *Wayfair*, 138 S. Ct. 2080 (No. 17-494). South Dakota was supported by a bipartisan multistate amicus brief filed on behalf of forty-one states, the District of Columbia, Puerto Rico, and the Virgin Islands. Brief for Colorado and Forty Other States, Two United States Territories, and the District of Columbia as Amici Curiae Supporting Petitioner, *Wayfair,* 138 S. Ct. 2080 (No. 17-494).

47. *See, e.g.*, Brief for the States of New York, Alaska, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia and Washington, and the District of Columbia as Amici Curiae in Support of Respondents app., *Janus*, 138 S. Ct. 2448 (No. 16-1466) [hereinafter Democratic *Janus* Brief].

48. 138 S. Ct. 1916 (2018).

49. *Id.* at 1923. For the SAG briefs in this case, see Brief for the States of Oregon, Alaska, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maine, Massachusetts, Minnesota, New Mexico, New York, Rhode Island, Vermont, Washington, and the District of Columbia as Amici Curiae in Support of Appellees, *Gill*, 138 S. Ct. 1916 (No. 16-1161) [hereinafter Democratic *Gill* Brief]; and Brief for the States of Texas, Alabama, Arizona, Arkansas, Georgia, Indiana, Kansas, Louisiana, Michigan, Missouri, Nevada, Ohio, Oklahoma, South Carolina, Utah, and West Virginia as Amici Curiae in Support of Appellants, *Gill*, 138 S. Ct. 1916 (No. 16-1161) [hereinafter Republican *Gill* Brief].

50. 138 S. Ct. 1833 (2018).

51. *Id.* at 1838–41. For the SAG briefs in this case, see Brief of Georgia and Sixteen Other States as Amici Curiae Supporting Petitioner, *Husted*, 138 S. Ct. 1833 (No. 16-980) [hereinafter Republican *Husted* Brief]; and Brief for the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Kentucky, Maryland, New Mexico, Oregon, and Washington, and the District of Columbia as Amici Curiae in Support of Respondents, *Husted*, 138 S. Ct. 1833 (No. 16-980) [hereinafter Democratic *Husted* Brief].

52. 138 S. Ct. 2448 (2018); *see supra* notes 9–10 and accompanying text. For the SAG briefs in this case, see Republican *Janus* Brief, *supra* note 10; and Democratic *Janus* Brief, *supra* note 47.

(4) *Masterpiece Cakeshop*;[53] and (5) *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*),[54] which involved a First Amendment challenge to a California law that required certain health clinics to post and distribute notices regarding the availability of state-subsidized health services for pregnant women, including abortion.[55] The table below shows the number of participating states in each multistate amicus brief, the SAG party affiliation, and the number of states with relevant state or local laws specifically identified or discussed in the amicus brief for each of these cases. In these cases, there was a complete partisan divide, with Democratic SAGs on one side and Republican SAGs on the other side, and one independent SAG joining with the Democrats in two cases.

53. 138 S. Ct. 1719 (2018); *see supra* notes 11–12 and accompanying text. For the SAG briefs in this case, see Brief of Massachusetts, Hawaii, California, Connecticut, Delaware, the District of Columbia, Illinois, Iowa, Maine, Maryland, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington as Amici Curiae in Support of Respondents, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) [hereinafter Democratic *Masterpiece Cakeshop* Brief]; Republican *Masterpiece Cakeshop* Brief, *supra* note 12.

54. 138 S. Ct. 2361 (2018).

55. *Id.* at 2368. For the SAG briefs in this case, see Brief for the States of New York, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, Vermont, Virginia, and Washington, and the District of Columbia as Amici Curiae in Support of Respondents, *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361 (No. 16-1140) [hereinafter Democratic *NIFLA* Brief]; and Brief for the States of Texas, Alabama, Arkansas, Georgia, Idaho, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, Wisconsin, and the Commonwealth of Kentucky, by and Through Governor Matthew G. Bevin, and Paul R. Lepage, Governor of Maine, as Amici Curiae in Support of Petitioners, *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. 2361 (No. 16-1140) [hereinafter Republican *NIFLA* Brief].

Table 1: 2017 Term Partisan Multistate SAG Amicus Briefs Filed on Opposite Sides in Supreme Court Challenges to State Law or Practice and Disclosure of Related State Laws

Case	**SAG[56] Amicus Brief *Supporting* Challenged State**				**SAG Amicus Brief *Opposing* Challenged State**			
	SAG Party Affiliation			**Related Laws Discussed**	**SAG Party Affiliation**			**Related Laws Discussed**
	Dem.	**Rep.**	**Ind.**		**Dem.**	**Rep.**	**Ind.**	
Gill[57]	0	16	0	**0**	17	0	1	**12**
Husted[58]	0	17	0	**0**	13	0	0	**11**
Janus[59]	20	0	1	**21**	0	20	0	**1**
Masterpiece Cakeshop[60]	20	0	0	**19**	0	20[61]	0	**2**
NIFLA[62]	17	0	0	**9**	0	22[63]	0	**21**

Note on Methodology: These five cases were identified through a review of SAG amicus briefs listed on SCOTUSblog for all Supreme Court cases decided during the 2017 term. Partisan affiliations for the SAGs signing each brief were determined by searching the websites maintained by DAGA and RAGA, *see supra* note 36, and Ballotpedia.org. Citations to state laws were identified by reviewing the briefs, including the tables of authorities and any appendices.

Table 1 also shows the absence of complete disclosure of relevant laws within the participating SAGs' states. Only one brief—the Democratic SAG brief supporting Illinois in *Janus*—included laws from all participating SAGs' states. In contrast, the Republican SAG brief opposing Illinois in *Janus* did not disclose agency-fee laws that existed in some of the SAGs' home states. The Republican SAG brief opposing Colorado in *Masterpiece Cakeshop* cited one state law and one local law from twenty participating states, even though eighteen of the states have public accommodation laws.

If a multistate amicus brief *supports* another state's law, it might be inferred that the SAG is supporting federalism or state legislative authority generally. That is, even if the state does not have a similar law, the SAG may determine it is in the state's interest to protect the state's ability to enact related legislation in the future.

56. In Table 1, the Attorney General for the District of Columbia is included as an SAG. Also, two Republican governors in states with Democratic SAGs joined Republican SAG amicus briefs. *See infra* notes 61, 63.

57. Democratic *Gill* Brief, *supra* note 49; Republican *Gill* Brief, *supra* note 49.

58. Republican *Husted* Brief, *supra* note 51; Democratic *Husted* Brief, *supra* note 51.

59. Republican *Janus* Brief, *supra* note 10; Democratic *Janus* Brief, *supra* note 47.

60. Democratic *Masterpiece Cakeshop* Brief, *supra* note 53; Republican *Masterpiece Cakeshop* Brief, *supra* note 12.

61. This number includes eighteen SAGs and two governors.

62. Democratic *NIFLA* Brief, *supra* note 55; Republican *NIFLA* Brief, *supra* note 55.

63. This number includes twenty SAGs and two governors.

However, an SAG who participates in a multistate amicus brief that *opposes* another state's law, notwithstanding similar laws within the SAG's own state, is essentially taking a nondefense position. That is, by not disclosing or discussing the law, the SAG makes no effort to distinguish or otherwise protect it.

Currently, SAGs joining multistate amicus briefs are not explicitly required to disclose relevant home-state laws or nondefense positions to the Court. Although ethical rules require an attorney to disclose adverse, controlling law to the Court, a state statute or regulation technically might not be considered controlling, adverse authority when the state participates as an amicus—as opposed to as a party—and the challenged law is from a different state.[64] Also, the nondefense procedures SAGs would follow if their state's law had been directly challenged may not clearly apply. Thus, other interested public officials or constituents from the SAGs' states may not have an opportunity to respond to a hidden nondefense position in a multistate amicus brief before the Court.

III. HIDDEN NONDEFENSE: CASE STUDIES

The multistate amicus briefs opposing Illinois and Colorado in *Janus* and *Masterpiece Cakeshop*, respectively, provide examples of SAGs taking positions that conflicted with laws in their own states without disclosing these state laws.

A. Janus v. American Federation of State, County, & Municipal Employees

In *Janus*, the issue before the Court was whether the First Amendment prohibits a state from requiring public employees who decide not to join a union to pay an agency fee that would cover collective bargaining and related costs.[65] The Court previously upheld agency fees in *Abood v. Detroit Board of Education*.[66] Mark Janus brought suit to challenge an Illinois agency-fee law and argued that *Abood* should be overruled.[67] The Illinois SAG, a Democrat, defended the law.[68] Nineteen Democratic SAGs, an independent SAG, and the AG from the District of Columbia jointly filed a multistate amicus brief in support of Illinois.[69]

Illinois's position was challenged in an amicus brief filed by Republican SAGs from twenty states, with Michigan identified as the lead state.[70] In this amicus brief, the SAGs asserted that their states had "a vital interest in protecting the First Amendment rights of public employees, and in the fiscal

64. MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1)–(2) (AM. BAR ASS'N 2016).
65. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448, 2459–60 (2018).
66. 431 U.S. 209 (1977).
67. *Janus*, 138 S. Ct. at 2462.
68. *See* Brief for Respondents Lisa Madigan and Michael Hoffman, *Janus*, 138 S. Ct. 2448 (No. 16-1466).
69. Democratic *Janus* Brief, *supra* note 47, at 27, app.
70. Republican *Janus* Brief, *supra* note 10, at 1, 28.

health of state and local governments."[71] They argued that collective bargaining could have significant fiscal impacts that "implicate[d] matters of public concern."[72]

Beginning dramatically in the first paragraph, the amicus brief argued that collective bargaining contributed to municipal bankruptcy in Detroit, Michigan, and other jurisdictions: "Detroit's $3.5 billion in unfunded pension liabilities was a matter of great public concern not just for the city, but for all of Michigan."[73] The brief also highlighted Wisconsin, another amicus state, as a state where legislation "curbing public-sector collective bargaining" had provided fiscal benefits for state and local governments.[74]

The Michigan and Wisconsin SAGs did not disclose in this amicus brief that Michigan and Wisconsin had their own agency-fee laws that, although limited to public safety and transit employees, were otherwise very similar to the Illinois law at issue.[75] The Democratic SAG brief supporting Illinois criticized Michigan and Wisconsin's position in the litigation, noting that "even the practices of petitioner's own amici call into question petitioner's proposed one-size-fits-all approach":

> Indeed, legislatures in Michigan and Wisconsin—two of petitioner's amici—also decided that, in some situations, public employers must have the ability to include agency-fee arrangements in their collective-bargaining agreements. This Court should view skeptically the efforts of these States and of petitioner himself to subvert the democratic decisions

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71. *Id.* at 2.

72. *Id.* at 1, 7.

73. *Id.* at 1, 10–16. The amicus brief also discussed municipal bankruptcies in Stockton and San Bernardino, California. *Id.* at 16–19. California's SAG supported Illinois in the litigation. *See generally* Brief for the State of California Supporting Affirmance, *supra* note 44.

74. Republican *Janus* Brief, *supra* note 10, at 22–24.

75. *See* 5 ILL. COMP. STAT. ANN. § 315/6(e) (West 2018); MICH. COMP. LAWS ANN. § 423.210(4)(a)–(b) (West 2018); WIS. STAT. §§ 111.70(1)(f), 111.70(2), 111.81(9), 111.85(1)(c) (2019). The Michigan and Wisconsin SAGs had both previously discussed their responsibilities to defend the laws of their states. Bill Schuette, Opinion, *Why I Will Continue to Defend the Voting Law*, DET. NEWS (Sept. 7, 2016), https://www.detroitnews.com/story/opinion/2016/09/07/schuette-will-continue-defend-voting-law/89987928/ [https://perma.cc/2HJX-NCCC] ("[D]efending state law is the job of the AG."); *see also* Brad Schimel, *Attorney General's Role Is to Uphold and Defend the Law of the Land*, WIS. ST. J. (June 26, 2017), https://madison.com/wsj/opinion/column/brad-schimel-attorney-general-s-role-is-to-uphold-and/article_727254ec-de2c-557b-bb21-f7a712cdc98e.html [https://perma.cc/VBV4-Y2TN] ("The role of the attorney general under Wisconsin's Constitution is to defend the laws that the Legislature passes, so long as there is a good faith basis to make such arguments."). In addition, the Missouri SAG joined the brief even though enough Missouri residents had signed a petition to delay implementation of the 2017 "right to work" legislation until after a referendum vote. Judy Ancel, *310,567 Signatures Block 'Right to Work' in Missouri*, LAB. NOTES (Sept. 18, 2017), http://www.labornotes.org/2017/09/310567-signatures-block-right-work-missouri [https://perma.cc/BGA8-JZ9G]. In August 2018, Missouri voters defeated the legislation. *See, e.g.*, John Haltiwanger, *Missouri Voters Blocked the State's 'Right-To-Work' Law in Perhaps the Biggest Electoral Stunner of the Night*, BUS. INSIDER (Aug. 8, 2018), https://www.businessinsider.com/missouri-right-to-work-law-vote-results-proposition-a-2018-8 [https://perma.cc/BXV4-FAUQ].

> of voters by seeking to constitutionalize a contrary policy of their own preference.[76]

The Democratic SAG brief supporting Illinois included an appendix listing state public-sector collective bargaining and agency-fee laws in all fifty states and the District of Columbia.[77] The Republican SAG brief opposing Illinois did not include such a list.

The Supreme Court held that Illinois's law was unconstitutional, and it invalidated agency-fee laws and collective bargaining agreement provisions across the country.[78] The impacted states included Michigan and Wisconsin.[79] Thus, the Michigan and Wisconsin SAGs helped to undo laws and collective bargaining agreement provisions in their own states without disclosing the potential impact on their own state laws in their amicus brief.

B. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

In *Masterpiece Cakeshop*, a for-profit bakery and its owner challenged the Colorado civil rights agency's finding that they violated Colorado's antidiscrimination law by refusing to provide a wedding cake to a same-sex couple.[80] Colorado law prohibited discrimination in public accommodations based on sexual orientation.[81] Colorado's definition of "place of public accommodation" included "any place of business engaged in any sales to the public and any place offering services . . . to the public," including retail businesses.[82]

The bakery's owner cited his religious objections to same-sex marriage and argued that, by requiring him to create cakes for same-sex wedding celebrations, Colorado had violated his First Amendment free speech and free exercise rights.[83] Colorado's SAG, a Republican, defended the Colorado Civil Rights Commission in the case.[84]

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76. Democratic *Janus* Brief, *supra* note 47, at 27, app.; *see also* Brief for Respondents Lisa Madigan and Michael Hoffman, *supra* note 68, at 53; Brief of the International Association of Fire Fighters as *Amicus Curiae* in Support of Respondents at 7–8, Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448 (2018) (No. 16-1466).

77. Democratic *Janus* Brief, *supra* note 47, app.

78. *Janus*, 138 S. Ct. at 2486.

79. *See* Amy Biolchini, *Court Ruling Ends Right-to-Work Carve-Out for Michigan Police, Fire Unions*, MLIVE (June 27, 2018), https://www.mlive.com/news/index.ssf/2018/06/michigan_police_fire_unions_no.html [https://perma.cc/NAL5-Q3QT]; Mark Sommerhauser, *Supreme Court: Public-Safety Unions in Wisconsin Can't Require Fees Be Paid by Non-Members*, WIS. ST. J. (June 28, 2018), https://madison.com/wsj/news/local/govt-and-politics/supreme-court-public-safety-unions-in-wisconsin-can-t-require/article_a0b8127a-486e-5041-ba2f-2376e48bbcd6.html [https://perma.cc/Y2CX-839X].

80. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1726 (2018).

81. COLO. REV. STAT. § 24-34-601(2)(a) (2018).

82. *Id.* § 24-34-601(1). The statute included an exception for places "principally used for religious purposes." *Id.*

83. *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

84. Brief for Respondent Colorado Civil Rights Commission, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

Two competing multistate SAG amicus briefs were filed in this litigation, with a clear partisan divide. Democratic SAGs from Massachusetts, eighteen other states, and the District of Columbia filed a brief on behalf of Colorado.[85] Republican SAGs from Texas, seventeen other states, and the governors of Kentucky and Maine filed a brief opposing Colorado.[86]

In describing the "Interest of Amici Curiae," the Republican SAG amicus brief opposing Colorado's law asserted that "[s]tates do not have a legitimate interest in compelling citizens to engage in state-favored expression."[87] One argument advanced in the brief was as follows: "[P]ublic-accommodation concerns of past eras are not present here; customized pieces of art are not public accommodations (like restaurants and hotels), the artist plainly did not act out of invidious discrimination, and complainants had immediate access to other artists . . . ."[88] Moreover, the brief suggested that one solution for states to avoid violating an artist's constitutional rights would be to "define 'public accommodations' in the manner done so by the federal government, so as not to capture businesses that—by their nature—selectively choose clients."[89] The brief cited federal law, as well as a Wisconsin decision that held that "Wisconsin's analogous anti-discrimination law does not apply in similar circumstance to this case."[90]

Most state public-accommodation laws, similar to Colorado's statute, define public accommodation more broadly than federal law.[91] Of the eighteen SAGs who signed on to the Texas amicus brief opposing Colorado, sixteen—all but the SAGs from Texas and Alabama—were from states that

85. *See generally* Democratic *Masterpiece Cakeshop* Brief, *supra* note 53. The states joining this brief included Massachusetts, Hawaii, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington. *Id.* For information regarding the SAGs' membership in the Democratic party, see DEMOCRATIC ATTORNEYS GEN. ASS'N, *supra* note 36; and see also BALLOTPEDIA, https://ballotpedia.org/Main_Page [https://perma.cc/RJN8-JSZX] (last visited Mar. 15, 2019).

86. *See generally* Republican *Masterpiece Cakeshop* Brief, *supra* note 12. The states joining this brief included Texas, Alabama, Arizona, Arkansas, Idaho, Louisiana, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin. *Id.* For information regarding the SAGs' membership in the Republican party, see REPUBLICAN ATTORNEYS GEN. ASS'N, *supra* note 36; and see also BALLOTPEDIA, *supra* note 85.

87. Republican *Masterpiece Cakeshop* Brief, *supra* note 12, at 1.

88. *Id.* at 3; *see also id.* at 20.

89. *Id.* at 26 n.10.

90. *Id.* (first citing 42 U.S.C. § 2000a (2012); then citing Amy Lynn Photography Studio, LLC v. City of Madison, No. 2017CV0555 (Wis. Cir. Ct. Aug. 11, 2017)). Title II of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, or national origin in private lodgings, food service establishments, gasoline stations, theaters, and other places of entertainment. 42 U.S.C. § 2000a.

91. Jeremy D. Bayless & Sophie F. Wang, *Racism on Aisle Two: A Survey of Federal and State Anti-Discrimination Public Accommodation Laws*, 2 WM. & MARY POL'Y REV. 288, 300 (2011); Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 638–52 (2016).

had their own public-accommodation laws.[92] These laws, as well as the laws from the two states whose governors joined the amicus brief, prohibit discrimination based on race, sex, national origin, religion, and other categories that vary from state to state.[93]

In those eighteen states, the definitions of public accommodation are similar to Colorado's and extend far beyond "restaurants and hotels." All eighteen states prohibit discrimination by entities that provide goods or services to the public, with limited exceptions that would not apply to a for-profit business open to the public like the bakery in *Masterpiece Cakeshop*.[94] Several of the states specifically prohibit discrimination in "stores,"[95] "sales or rental establishments,"[96] or "retail or wholesale establishments."[97] Maine and Nevada expressly prohibit discrimination in bakeries.[98]

Even so, with the exception of Wisconsin's law, the SAGs opposing Colorado did not cite or mention any of their states' public-accommodation laws in the brief.[99] There was no discussion of the text of the public-accommodation laws in the states signing the brief or how these laws have been interpreted by state civil rights enforcement agencies or the courts. For states other than Wisconsin, there was no discussion of whether or how the

92. *See State Public Accommodation Laws*, NAT'L CONF. ST. LEGISLATURES (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/8VWH-U2RF].

93. *Id.*

94. *See* ARIZ. REV. STAT. ANN. § 41-1441(2) (2018); ARK. CODE ANN. § 16-123-102(7) (2018); IDAHO CODE ANN. § 67-5902(9) (2018); KY. REV. STAT. ANN. § 344.130 (West 2018); LA. STAT. ANN. § 51:2232(9) (2018); ME. REV. STAT. ANN. tit. 5, § 4553(8) (2018); MO. ANN. STAT. §§ 213.010(16), 213.065(3) (West 2018); MONT. CODE ANN. §§ 49-2-101(20), 49-2-304, 49-2-402 (West 2017); NEB. REV. STAT. ANN. §§ 20-133, 20-137, 20-138 (West 2018); NEV. REV. STAT. § 651.050(3)(f) (2017); N.D. CENT. CODE § 14-02.4-02(14) (2018); OKLA. STAT. ANN. tit. 25, § 1401 (West 2018); S.C. CODE ANN. §§ 45-9-10(B)–(C), 45-9-20 (2018); S.D. CODIFIED LAWS § 20-13-1(12) (2018); TENN. CODE ANN. § 4-21-102(15) (2018); UTAH CODE ANN. §§ 13-7-2(3)(a)(i), 13-7-3 (2018); W. VA. CODE § 5-11-3(j) (2019); WIS. STAT. § 106.52(1)(e) (2019).

95. *See* ARK. CODE ANN. § 16-123-102(7); KY. REV. STAT. ANN. § 344.130; LA. STAT. ANN. § 51:2232(9); OKLA. STAT. ANN. tit. 25, § 1401; TENN. CODE ANN. § 4-21-102(15).

96. *See* ME. REV. STAT. ANN. tit. 5, § 4553(8)(E) ("sales or rental establishment"); NEV. REV. STAT. § 651.050(3)(f) (same).

97. *See* S.C. CODE ANN. § 45-9-10(B)–(C) ("retail or wholesale establishment").

98. ME. REV. STAT. ANN. tit. 5, § 4553(8)(E); NEV. REV. STAT. § 651.050(3)(f).

99. *See generally* Republican *Masterpiece Cakeshop* Brief, *supra* note 12. Furthermore, the Wisconsin case involved a photography studio operated out of its owner's apartment. The owner indicated that she provided "commissioned visual storytelling services" on a "case-by-case" basis, and she would then post and write about some photographs in her blog or on social media. Verified Complaint at 1, 6–7, Amy Lynn Photography Studio, LLC v. City of Madison, No. 2017CV0555 (Wis. Cir. Ct. Mar. 5, 2017). The Court found that the Wisconsin public-accommodation law did not apply in part because there was no "place" of public accommodation, in that "this studio does not operate a physical storefront open to the public." Proposed Order Granting Declaratory Judgment at 3–4, Amy Lynn Photography Studio, LLC v. City of Madison, No. 2017CV0555 (Wis. Cir. Ct. Aug. 11, 2017). In addition, the court found the studio was not "comparable to or consistent with" other types of businesses recognized as places of public accommodation under Wisconsin law. *Id.* at 4 (quoting Hatheway v. Gannett Satellite Info. Network, Inc., 459 N.W.2d 873, 876 (Wis. Ct. App. 1990)).

position advanced in the brief could or should be reconciled with the states' own public-accommodation laws or how a ruling on the grounds advocated in the brief might impact enforcement of their laws.

Furthermore, while the SAGs opposing Colorado faulted Colorado's application of its law prohibiting discrimination based on sexual orientation, they did not mention laws prohibiting sexual-orientation discrimination within their own states. These SAGs accepted Masterpiece Cakeshop's argument that the bakery's owner did not discriminate based on sexual orientation because although he would not "creat[e] commissioned expression for same-sex weddings," he would sell other goods to customers "regardless of [their] sexual orientation."[100] However, the Republican SAG amicus brief did not discuss the interpretation—or even the existence—of similar laws in several of the SAGs' states or in municipalities within their states. Nevada, Wisconsin and Maine all had state laws prohibiting discrimination in public accommodations based on sexual orientation.[101] Other than the reference to Wisconsin law, there was no discussion of how these laws have been interpreted or might apply in similar situations.

Also, at least eleven of the participating SAGs' states—including Texas—had municipalities with laws prohibiting sexual-orientation discrimination.[102] However, the only local law discussed in the brief was a law in Phoenix, Arizona; the SAGs faulted the "peculiar way" in which Phoenix and other jurisdictions had applied their sexual-orientation antidiscrimination public-accommodation laws.[103] In Phoenix, a wedding-invitation designer who did not wish to create invitations for same-sex weddings unsuccessfully challenged enforcement of Phoenix's antidiscrimination law.[104] Arizona's SAG, who joined the Republican SAG amicus brief, did not participate in the Phoenix litigation although it was within his own state.[105] There was no discussion in the brief of why it was in Arizona's interest to oppose Phoenix's interpretation of its law, which was upheld by Arizona courts.[106]

The Court resolved the *Masterpiece Cakeshop* litigation by finding that the Colorado Civil Rights Commission had demonstrated a lack of religious neutrality in violation of the Free Exercise Clause.[107] Although the Court

100. Republican *Masterpiece Cakeshop* Brief, *supra* note 12, at 26.

101. ME. REV. STAT. tit. 5, §§ 4591–4592 (2018); NEV. REV. STAT. § 651.070 (2017); WIS. STAT. § 106.52(3)(a)(1)–(3) (2019).

102. In addition to Texas (where local laws prohibiting sexual-orientation discrimination in public accommodations existed in San Antonio, Dallas, Austin, Fort Worth, El Paso, and Plano), the states included Alabama, Arizona, Idaho, Kentucky, Louisiana, Missouri, Montana, Nebraska, South Carolina, Texas, and West Virginia. The local laws are listed in an appendix to the multistate amicus brief filed in support of Colorado. Democratic *Masterpiece Cakeshop* Brief, *supra* note 53, app. B.

103. Republican *Masterpiece Cakeshop* Brief, *supra* note 12, at 27–28.

104. *See* Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 431–32 (Ariz. Ct. App. 2018), *review granted* (Nov. 20, 2018).

105. *See id.* at 430 (listing attorneys).

106. *See generally* Republican *Masterpiece Cakeshop* Brief, *supra* note 12.

107. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018).

did not reach the question of whether Colorado could enforce its public-accommodation law against a bakery when the bakery owner asserted religious objections to preparing wedding cakes for same-sex couples,[108] this issue may be revisited in the future. Republican SAGs from Texas, Arizona, and other states recently filed a multistate Supreme Court amicus brief supporting a petition for certiorari filed by an Oregon bakery that would not create a wedding cake for a same-sex couple.[109] In this brief, the Republican SAGs repeated the arguments about public accommodations that they made in *Masterpiece Cakeshop*—again without discussing their own states' laws.[110]

IV. ADDRESSING HIDDEN NONDEFENSE BY REQUIRING TRANSPARENCY

An SAG's contributions to an amicus brief in Supreme Court litigation can help to invalidate the state's own laws, as demonstrated in the *Janus* case.[111] An SAG's position in an amicus brief could also induce the Court to narrow the scope of laws within the SAG's state or limit the authority of state or local enforcement agencies, which might have happened had the Court adopted the Republican SAG arguments against Colorado in *Masterpiece Cakeshop*. These outcomes can result without the SAGs disclosing to the Court or to the public the impact that their position may have on laws in their respective states. Without disclosure, SAGs lack accountability to the Court and to the public for a nondefense decision. Without accountability, SAGs may act in the interest of political and personal preferences rather than on behalf of their state.

One way to remedy this failure of accountability is to require that, like the parties to the litigation, SAGs filing amicus briefs identify any state or local laws relevant to the litigation and explain how their position would affect their states' laws.[112] If the SAG believes that no laws would be impacted, the SAG could certify that no state laws, or local laws within the state, would be adversely impacted by an outcome in the litigation. If a state or local law *could* be impacted, the SAG could explain the potential impact, including whether the state or local law is distinguishable from any law being challenged before the Court.

These changes could be implemented through an amendment to the Supreme Court's rules.[113] Additionally, they could be implemented through the policies and practices of individual SAGs and organizations that provide support for SAG Supreme Court amicus briefs. SAGs could include this

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108. *Id.* at 1731.

109. *See generally* Brief for the States of Texas, Alabama, Arkansas, Arizona, Louisiana, Nebraska, Nevada, Oklahoma, South Carolina, Utah, and West Virginia as Amici Curiae in Support of Petitioners, Klein v. Or. Bureau of Labor & Indus., No. 18-547 (U.S. petition for cert. filed Oct. 19, 2018).

110. *See id.* at 4, 15, 19 n.8.

111. *See supra* Part III.A.

112. SUP. CT. R. 24(1)(f) (requiring "merits" briefs to include the legal provisions "involved in the case, set out verbatim with appropriate citation").

113. *Id.* r. 37.

information in a statement of interest, in the discussion section of the brief, or in an appendix.[114] For example, in *Janus* and in *Masterpiece Cakeshop*, the multistate briefs supporting Illinois and Colorado included appendices listing agency-fee laws and sexual-orientation discrimination laws from across the country, including relevant laws from the participating SAGs' states.[115]

In discussing how a state or local law might be impacted by a ruling made by the Court, it may be appropriate in some cases for SAGs to explain how the text or implementation of their laws are different from the law or practice before the Court. For example, in *District of Columbia v. Heller*,[116] a bipartisan group of thirty-one SAGs who opposed the District of Columbia's handgun ban emphasized the breadth of the D.C. law, which they argued was "markedly out of step with the judgment of the legislatures of the fifty States."[117] They distinguished laws in their own states and argued that states "have a strong interest in maintaining the many state laws prohibiting felons in possession, restricting machine guns and sawed-off shotguns, and the like."[118] The amicus brief appendix included a table listing laws in these categories in all fifty states, with blank spaces for states that did not have laws in a given category.[119] The Supreme Court decision recognized an individual's right to bear arms and struck down D.C.'s law, but it also recognized limitations on that right that were consistent with the amicus brief arguments.[120]

If a law or practice in the SAG's home state could be adversely impacted if the SAG's position in the brief is adopted, the SAG should act in the same way as if a related law in their own state had been challenged and follow whatever procedures the SAG would follow if the SAG declined to defend the law in litigation within the state. Thus, the SAG could still file an amicus brief that could contribute to invalidation of the state's own law while disclosing the state's law and explaining the reasons for this position. In this way, the Court would be fully informed about the SAG's position in the brief and the potential impact of the Court's ruling on the SAG's state. The SAG could also provide notice to others within the state who might seek leave to file an amicus brief in the case. Through disclosure and public notification, SAGs would be more accountable to constituents who may have an interest in the law that the SAG has in effect opposed before the Court and who might

114. *Cf. id.* r. 24(1)(f) (noting that for "merits" briefs, lengthy statutory text may be provided in "an appendix to the brief").

115. Democratic *Janus* Brief, *supra* note 47, app.; Democratic *Masterpiece Cakeshop* Brief, *supra* note 53, app.

116. 554 U.S. 570 (2008).

117. Brief of the States of Texas, Alabama, Alaska, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Washington, West Virginia, and Wyoming as *Amici Curiae* in Support of Respondent at 1, *Heller*, 554 U.S. 570 (No. 07-290).

118. *Id.* at 36.

119. *Id.* app. at 7a–16a.

120. *Heller*, 554 U.S. at 626–28.

otherwise have no opportunity to express their concerns until the next election.[121]

When an SAG participates as an amicus curiae in Supreme Court litigation, neither the parties, the other amici participants, nor the Court should be required to review the SAG's state laws to determine whether any law in the SAG's own state may be at risk. The SAG's authority to file an amicus brief comes from the SAG's role as chief legal officer of her state.[122] An SAG's failure to disclose relevant information about laws within the state may raise questions about whether the amicus brief is in fact being submitted on behalf of a state. Furthermore, SAGs are experts on the laws within their states. They are in a better position to research complex state or local statutory or regulatory schemes, explain state laws, and provide needed context. For example, the Democratic SAG brief in *Husted*, which included SAGs from Hawaii, Illinois, and Oregon, identified errors in how Ohio's brief characterized voter-registration laws and practices from those three states.[123]

Requiring disclosure of laws that could be impacted by the litigation is not a perfect solution because there may be some disagreement over which laws could be impacted. For example, in *NIFLA*, the Democratic and Republican SAG amicus briefs disagreed over whether California's law, which required medical clinics to post and distribute notices of state programs that provide family planning services and abortion, could be distinguished from laws in the SAGs' states.[124] Moreover, the briefs identified laws from some of the same states, but in many cases the laws they considered relevant were different.[125] The Democratic SAGs argued that laws requiring disclosure of health and safety information were at risk, while the Republican SAGs distinguished laws requiring "informed consent" for abortion.[126]

Finally, requiring SAGs to discuss their own laws in multistate amicus briefs could ensure a well-considered position by each participating SAG. For example, in *Masterpiece Cakeshop*, the primary author on the brief was the SAG from Texas,[127] a state that does not have a public-accommodation

121. In November 2018, the Michigan SAG who led the *Janus* amicus brief and the Wisconsin SAG who joined him lost reelection. Paul Egan & David Jesse, *Gretchen Whitmer Defeats Bill Schuette in Michigan Governor's Race*, DET. FREE PRESS (Nov. 7, 2018), https://www.freep.com/story/news/politics/elections/2018/11/06/michigan-governor-results-whitmer-schuette/1847042002/ [https://perma.cc/PQ9K-L44E]; Riley Vetterkind, *GOP Attorney General Brad Schimel Concedes Re-Election Bid to Democrat Josh Kaul*, WIS. ST. J. (Nov. 20, 2018), https://madison.com/wsj/news/local/govt-and-politics/gop-attorney-general-brad-schimel-concedes-re-election-bid-to/article_0fe25496-bf0b-5326-b28c-5d3d95e6035a.html [https://perma.cc/T2K8-TUW8].

122. SUP. CT. R. 37(4).

123. Democratic *Husted* Brief, *supra* note 51, at 2 n.1, 16 n.20.

124. *See generally* Democratic *NIFLA* Brief, *supra* note 55; Republican *NIFLA* Brief, *supra* note 55.

125. *Compare* Democratic *NIFLA* Brief, *supra* note 55, at v–vii, *with* Republican *NIFLA* Brief, *supra* note 55, at III–VI.

126. *Compare* Democratic *NIFLA* Brief, *supra* note 55, at 1–2, *with* Republican *NIFLA* Brief, *supra* note 55, at 1–2.

127. *See generally* Republican *Masterpiece Cakeshop* Brief, *supra* note 12.

law. It is unclear to what extent the other SAGs who joined the brief considered possible risks to the public-accommodation laws in their own states should the Court adopt the narrow construction proposed in the amicus brief. Requiring SAGs to identify and describe their laws could potentially lead to SAGs seeking changes in the arguments presented in a multistate brief, or declining to sign the brief at all. As Professor Shaw has argued, "[I]f state actors are required to publicly articulate their objections in constitutional terms, the chances that they will refuse to defend laws they find merely politically troubling, rather than genuinely constitutionally objectionable, are at least reduced."[128]

CONCLUSION

When SAGs engage in hidden nondefense, they transform their role in our legal system. Rather than upholding legal and ethical principles as the states' chief legal officers, they can become partisan operatives and potentially undermine democratic institutions within their own states.

Requiring SAGs to identify in Supreme Court amicus briefs any laws from their own state that may be impacted by the case outcome is a simple step that provides many benefits. It could help clarify the issues before the Court and frame and inform the scope of the Court's ruling. Moreover, it ensures that nondefense decisions are not hidden. In this way, this change would promote accountability to SAGs' constituents and to the Court, and it would help mitigate the potentially corrosive effects of partisanship on our legal system.

128. Shaw, *supra* note 1, at 274.