

# The Statement of Interest as a Tool in Federal Civil Rights Enforcement

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## ABSTRACT

*The federal government recently has ramped up its use of statements of interest — amicus filings that are filed in federal and state trial courts across the country. Filing such briefs has become a key litigation strategy for federal civil rights enforcement. But no one has made a sustained effort to analyze these often-unnoticed statements. This Note places a spotlight on the briefs in civil rights litigation, offering the first wide-ranging analysis of them. The filing of such briefs, though a marked departure from historical governmental practice, generally is consistent with the government’s longstanding role in protecting civil rights and promoting social change. Still, the practice is shrouded in mystery, and the Department of Justice does not appear to follow many, if any, rules or guidelines when issuing the amicus statements. This Note offers recommendations for increased transparency and more structured use of the government briefs.*

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## INTRODUCTION

Among the most powerful — and least examined — tools in civil rights<sup>1</sup> litigation is the statement of interest.<sup>2</sup> These written statements are filed by the U.S. Department of Justice in many of the over 15,700 state and federal trial courts across the nation<sup>3</sup> and are “designed to explain to the court the interests of the United States in litigation between private parties.”<sup>4</sup> In the past, the government has filed them to defend a private litigant’s right to video-record police brutality, to ensure that blind people with service dogs can use the private car-sharing service Uber, and to prevent police from arresting homeless people in cities that lack available shelter beds.<sup>5</sup> As this Note will show, the rise of statements of interest in civil rights litigation is a recent and promising development. Because the document embodies the formal position of the federal government, the filing of a statement of interest in a case can serve as a “game changer” for litigants.<sup>6</sup>

In recent years, government officials have become vocal about their use of statements of interest. Filing such briefs has become a key litigation strategy for federal civil rights enforcement. In fact, an acting assistant attorney general for the Civil Rights Division of the Department of Justice highlighted the practice in an interview with *The New York Times* last year.<sup>7</sup> “We’re helping to clarify the law,” the government lawyer said, “and helping courts interpret the law in the right way.”<sup>8</sup> Yet, remarkably, the legal academy so far has focused on statements of interest only in the contexts of international law and foreign policy.<sup>9</sup> There has been no sustained effort to

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<sup>1</sup> In this Note, I discuss both positive civil rights, such as disability rights and prisoners’ rights created by statute, and negative civil liberties, such as free speech protections guaranteed by the First Amendment. I have chosen to use the term “civil rights” as shorthand for both categories of legal entitlements.

<sup>2</sup> The federal government does not appear to use the same name for all of its district-level amicus filings. In addition to “statement of interest,” the names include “amicus curiae brief,” “amicus brief,” “brief of amicus curiae,” “suggestion for dismissal,” and “suggestion of interest.” Through my research, I have found no publicly available explanation for why the United States chooses one name over another for each filing.

<sup>3</sup> There are 94 district courts in the federal system, see *Introduction to the Federal Court System*, U.S. DEP’T OF JUSTICE, OFFICES OF THE U.S. ATTORNEYS, <http://www.justice.gov/usao/justice-101/federal-courts>, archived at <https://perma.cc/F222-PJKC>, and at least 15,684 trial courts of general or limited jurisdiction in the states and territories, see *Trial Courts*, NAT’L CTR. FOR STATE COURTS, 34C. NUMBER OF COURTS, <http://www.ncsc.org/sco#>, archived at <https://perma.cc/JG39-YCCJ>.

<sup>4</sup> *Hunton & Williams v. DOJ*, 590 F.3d 272, 291 (4th Cir. 2010) (Michael, J., dissenting) (citation omitted).

<sup>5</sup> Matt Apuzzo, *Dept. of Justice Presses Agenda at Local Levels*, N.Y. TIMES, Aug. 20, 2015, at A1.

<sup>6</sup> *Id.*

<sup>7</sup> See Apuzzo, *supra* note 5.

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., John B. Bellinger III, *The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities*,

analyze the trial-level statements in civil rights cases. Moreover, the general public pays little attention to government amicus briefs beyond those filed by the Solicitor General in the Supreme Court.<sup>10</sup>

This Note places a spotlight on the often-unnoticed trial-level statements of interest in civil rights litigation, offering the first in-depth analysis of the briefs.<sup>11</sup> This Note intends to provide the public with information about the statements of interest, to put the statements in a historical context, and to suggest that they are useful, though potentially unwieldy, enforcement tools for civil rights litigants. I have searched on the Internet, Public Access to Court Electronic Records (“PACER”), Westlaw, Lexis Advance, and Bloomberg Law for all publicly available references to trial-level statements of interest. Based on the search, I found 614 federal and state cases since 1925 in which the United States filed a statement of interest at the trial level but did not intervene as a party.<sup>12</sup> I sorted the cases into various categories based on their subject matter and analyzed those involving civil

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44 VAND. J. TRANSNAT'L L. 819, 821–23, 831–32 (2011); David P. Stewart, *Samantar and the Future of Foreign Official Immunity*, 15 LEWIS & CLARK L. REV. 633, 635–36, 650, 654–55, 658–62 (2011). See generally Catherine H. Curlet, *Should a Statement of Interest Matter?: Judging Executive Branch Foreign Policy Concerns*, 44 GA. L. REV. 1063 (2010); Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 90 AM. J. INT'L L. 263 (1996).

<sup>10</sup> Notably, although federal regulations require that the Solicitor General approve the filing of all appellate and Supreme Court amicus briefs, the regulations do not have a similar requirement for trial-level statements of interest. See 28 C.F.R. § 0.20 (2001); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 2-2.123 (1997), <http://www.justice.gov/usam/usam-2-2000-procedure-respect-appeals-generally#2-2.123>, archived at <https://perma.cc/UH5N-YHC8>.

<sup>11</sup> I have found seven law review articles and four student notes that mention trial-level government amicus statements, but all of the pieces do so in passing and discuss only a few briefs in isolated civil rights cases. See, e.g., Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 FLA. L. REV. 1223, 1250–51 (2013); Richard Klein, *Civil Rights in Crisis: The Racial Impact of the Denial of the Sixth Amendment Right to Counsel*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 163, 185 (2014); Esinam Agbemenu, Note, *Medical Transgressions in America's Prisons: Defending Transgender Prisoners' Access to Transition-Related Care*, 30 COLUM. J. GENDER & L. 1, 22–23 (2015); Timothy D. Rodden Jr., Note, *Yes, This Phone Records Audio!: The Case for Allowing Surreptitious Citizen Recordings of Public Police Encounters*, 47 SUFFOLK U.L. REV. 905, 923–94 (2014). The scope of this Note is broader. This Note analyzes all electronically available trial-level government amicus statements, across all topics related to civil rights. See *infra* Part I. The Note also tries to provide historical context for the practice of issuing such amicus statements and to offer recommendations on how to improve them. See *infra* Parts II, IV.

<sup>12</sup> Although I have tried to be comprehensive in my search, I likely do not have all of the amicus statements, including most briefs filed in federal court before 2000 and most amicus briefs filed in state court in any given year. Digitization of court records and the ability to search court dockets for statements of interest are relatively recent phenomena. Many older federal court documents, and most state court documents, are unavailable online, and the costs of doing a more intensive search (visiting courthouses across the country and paying for processing fees) would have made this Note impracticable. Moreover, I may not have determined every title that the United States used for its district-level amicus filings. As I stated earlier, the United States has no consistent practice for naming the filings. See *supra* note 2. As I recommend below, the government should create a reporting mechanism so that the statements of interest are available in an easy-to-search platform. See *infra* Section IV.A.

rights. I found that although the government only recently has publicized its use of trial-level amicus statements in civil rights cases, the government quickly and quietly has ramped up the briefing over the last decade.

I mostly applaud the use of statements of interest, which now number more than 120 in civil rights cases nationwide. Still, I recommend that the federal government consider becoming more transparent and structured in its approach. Concerns about this new litigation strategy will likely surface if the government continues to implement it.<sup>13</sup> More publicly available information will ensure political accountability and the healthy expansion of civil rights.

This Note proceeds in four parts. Part I will describe the data compiled about the statements of interest, and it will show how the rise in trial-level civil rights statements occurred recently and rapidly. Part II will show that the filing of such statements, while a marked departure from historical government practice, generally is consistent with the government's longstanding role in protecting civil rights. Nonetheless, the trial-level practice is shrouded in mystery, and the Department of Justice for the most part does not appear to follow many, if any, rules or guidelines when issuing the amicus statements. Part III will explain how the lack of transparency and clear direction leads to worrying questions. Part IV concludes by offering recommendations for increased transparency and more regulated use of statements of interest in civil rights litigation.

## I. THE RISE OF "MODERN" STATEMENTS OF INTEREST

How the federal government participates in private litigation varies from case to case. The United States can choose from an array of litigation strategies. On one end of the spectrum is intervention and joinder, used when the government's rights are so adversely and seriously affected that the government may have an independent cause of action. Here, a government agency (or the United States itself) becomes a named party in litigation, will be bound by the judgment of the court, likely will appear before the judge, and likely will file multiple briefs.<sup>14</sup> On the other end of the spectrum is the filing of a statement of interest, which the United States (or a department or agency) uses when it wants to devote few resources and the stakes are lower.<sup>15</sup>

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<sup>13</sup> See, e.g., *infra* Section IV.B.

<sup>14</sup> See, e.g., David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1939 n.82 (2014); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 362–63 (1972); Arthur F. Greenbaum, *Government Participation in Government Litigation*, 21 ARIZ. ST. L.J. 853, 883–900 (1989).

<sup>15</sup> See Greenbaum, *supra* note 14, at 972; see also 3B C.J.S. *Amicus Curiae* § 2 (2015) (noting difference between intervening parties and amici curiae).

Several federal statutes grant the United States the authority to file statements of interest in trial-level litigation.<sup>16</sup> The most commonly invoked provision is 28 U.S.C. § 517, which gives the Department of Justice broad authority to file amicus briefs across the nation.<sup>17</sup> Still, the capacious statute does not specify how or when the federal government should participate in private party litigation, and the department has not published any guidelines governing this practice.<sup>18</sup>

When the United States offers briefs in private litigation, it often waits until an appellate court or the Supreme Court reviews the case.<sup>19</sup> But occasionally, the United States will get involved in trial-level litigation.<sup>20</sup> The

<sup>16</sup> One example is the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* (2014), which was first enacted in 1982, Pub. L. No. 97-258, 96 Stat. 978 (Sept. 13, 1982). *See, e.g.*, United States ex rel. Roach v. Obama, No. 14-cv-470, 2014 WL 7240520, at \*1 (D.D.C. Dec. 18, 2014) (describing statutory scheme); *see also, e.g.*, 31 U.S.C. § 3730(c)(2)(A) (2014).

<sup>17</sup> “The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.” 28 U.S.C. § 517 (2014); *see also* Gross v. German Found. Indus. Initiative, 456 F.3d 363, 384 (3d Cir. 2006) (“The United States Executive has the statutory authority, in any case in which it is interested, to file a statement of interest.”).

<sup>18</sup> “[N]either [28 U.S.C. § 517], nor any regulation, nor any administrative practice cabins this discretion or furnishes any standard by which to review the Attorney General’s determinations in this area.” *Falkowski v. EEOC*, 783 F.2d 252, 253 (D.C. Cir. 1986) (*per curiam*).

<sup>19</sup> On the appellate and Supreme Court level, the government may offer filings as of right. *See id.* The Federal Rules of Appellate Procedure generally requires amici to seek leave from the court or consent from the parties, but it explicitly exempts the federal government. *See* FED. R. APP. P. 29. Moreover, the Supreme Court Rules exempt the government from its consent requirement. *See* S. CT. R. 37.4. No similar regulations exist on the trial level.

<sup>20</sup> *See* Greenbaum, *supra* note 14, at 973. Non-governmental amici sometimes do more than file briefs, and the court has discretion to give amici a wide array of legal rights in a case. For instance, judges upon request will allow an amicus to appear in court and make arguments. Such a “litigating” amicus may wield powers similar to those held by intervening parties, and in some courts, they are considered to have the same status. *See id.* at 1000–01; *see also, e.g.*, Michael K. Lowman, Comment, *The Litigating Amicus: When Does the Party Begin After the Friends Leave?*, 41 AM. U.L. REV. 1243, 1273–75 (1992). *See generally* United States v. Michigan, 116 F.R.D. 655 (W.D. Mich. 1987) (describing factors for determining litigating amicus status). However, “[t]he named parties [including intervenors] should always remain in control, with an amicus merely responding to the issues presented by the parties. An amicus cannot initiate, create, extend, or enlarge issues. Further, the amicus has no right to appeal or dismiss issues.” *Wyatt ex rel. Rawlins v. Hanan*, 868 F. Supp. 1356, 1358–59 (M.D. Ala. 1994) (citations omitted).

According to my research, the Department of Justice will choose either to file a statement of interest or to intervene, but not to participate in other ways. I have not come across a case in which the federal government has served as a litigating amicus, as opposed to an intervening party. The government apparently tried to serve as a litigating amicus in one case, but its request for oral argument was denied. *Compare* Statement of Interest at 1, *Urbanek v. Lab. Corp. of Am. Holdings, Inc.*, No. 00-cv-4863-RB (E.D. Pa. Jan. 13, 2005) (requesting oral argument), ECF No. 34, *with* Order, *Urbanek, supra* (denying request), ECF No. 36. The lack of publicly available information about the government’s role as litigating amicus supports my argument in favor of greater public reporting of government participation in private litigation. *See infra* Section IV.A. The government’s proper role as a litigating amicus is outside the scope of this Note.

litigation subjects for prior amicus statements are vast: terrorists in Libya,<sup>21</sup> Medicaid,<sup>22</sup> and the arrests of homeless people.<sup>23</sup> Past statements have outlined official administration stances on patent law,<sup>24</sup> copyright law,<sup>25</sup> and constitutional law.<sup>26</sup> The statements often appear to the surprise of the litigating parties. They are filed days, months, or even years after the lawsuit was originally brought.<sup>27</sup> Part I will describe some basic data on these statements — data never before compiled — to start the public discussion.

### A. *Empirical Findings*

I have found 614 federal and state cases in which there were private litigants, the government filed a statement of interest, and the government did not become a party through intervention. Of the total cases I found, 17 (or 2.8%) were filed in state court, and the rest were filed in federal court.<sup>28</sup> In this Note, I propose a two-category classification system for the statements of interest based on their subject matter. Under the first category, 490 (or 79.8%) grappled with federal proprietary, administrative, or institutional interests. As I show *infra*, when these interests are involved, the federal government historically has participated in private litigation.<sup>29</sup> Accordingly, I describe these interests as “traditional.” The breakdown of cases in this category is as follows:

<sup>21</sup> See Statement of Interest of the United States at 1–2, *Clay v. Socialist People’s Libyan Arab Jamahiriya*, No. 06-cv-707-RWR (D.D.C. Dec. 15, 2008), ECF No. 73, 2008 WL 5588080, at \*1.

<sup>22</sup> See Statement of Interest of the United States at 1–2, *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, No. 15-cv-565-JWD-SCR (M.D. La. Oct. 29, 2015), ECF No. 24, 2015 WL 6551836.

<sup>23</sup> See Statement of Interest at 2, *Martin v. City of Boise*, No. 09-cv-540-REB (D. Idaho Sept. 28, 2015), ECF No. 276, 2015 WL 5708586.

<sup>24</sup> See Statement of Interest of the United States as to Plaintiffs’ Motion to Enforce Consent Judgment at 1–2, *Bd. of Trustees of the Univ. of Ala. v. Houndstooth Mafia Enters., LLC*, No. 13-cv-1736 (N.D. Ala. Oct. 14, 2015), ECF No. 20, 2015 WL 5305157 at \*1.

<sup>25</sup> See Statement of Interest in Opposition to Defendant’s Motion to Dismiss the Complaint at 6, *Fonovisa, Inc. v. Alvarez*, No. 06-cv-11-C-ECF (N.D. Tex. July 24, 2006), ECF No. 23, 2006 WL 5865272.

<sup>26</sup> See Statement of Interest of the United States at 1–2, *ABC Charters, Inc. v. Bronson* No. 08-cv-21865 (S.D. Fla. Apr. 14, 2009), ECF No. 115, 2009 WL 1010435.

<sup>27</sup> Compare Statement of Interest of the United States of America at 1–3, *Woosley v. U.S. Dist. Ct., Dist. of Conn.*, No. 15-cv-4778 (E.D. Pa. Sept. 2, 2015) (offering government’s argument less than two weeks after plaintiff filed a complaint), ECF No. 3, *with* Statement of Interest of the United States at 1, *The Equal Rights Ctr. v. Equity Residential*, No. 06-cv-1060-CCB (D. Md. Nov. 13, 2014) (filing statement about eight years after start of litigation), ECF No. 245; Apuzzo, *supra* note 5 (noting statement filed about two years into litigation).

<sup>28</sup> The limited online accessibility to state trial dockets and documents may explain for the small number of state cases I found. If others exist (and I suspect that they do), their relative unavailability suggests that the government should bolster its public reporting of statements of interest. See *infra* Section IV.A.

<sup>29</sup> See *infra* Part II.

- 310 cases dealt with federal government property, contracts, records, or employees;<sup>30</sup>
- 156 cases dealt with foreign policy;<sup>31</sup> and
- 24 cases dealt with the constitutional power of Congress — that is, its ability to preempt state law and its constitutional authority to enact certain legislation.<sup>32</sup>

Within this traditional category, only a few recent cases implicate civil rights. Nonetheless, all of the statements of interest that I found from the 1920s to the early 1990s fit within this category.

Meanwhile, the remainder, 124 (or 20.2%), of the cases deals with a hodgepodge of issues — what I call the “modern” federal interests. The vast majority of these interests implicate civil rights, such as policing, consumer protection, and informational privacy. The first statement of interest in this category was filed on Feb. 18, 1994.<sup>33</sup> Since then, there has been a recent and rapid increase in the use of statements of interest in this category. The federal government filed statements of interest in at least 159 cases prior to 2006. But of those 159, only 7 (or 4.4%) address a modern federal interest. In contrast, from 2006 to 2011, the federal government filed statements in at least 242 cases; a slightly larger share of these cases — 35 (or 14.5%) — fit in the modern category. From 2012 to now, the federal government has filed statements in at least 213 cases; a considerably larger share — 83 (or 38.5%) — fits in the modern category. The quick and sudden rise in civil rights statement use has attracted mass media attention.<sup>34</sup>

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<sup>30</sup> See, e.g., Statement of Interest of the United States, *Tyler v. Smith*, 472 F. Supp. 2d 818, No. 05-cv-1040-FJP-DLD (M.D. La. Apr. 5, 2006), ECF No. 21; Statement of Interest of the United States, *Jones v. Clinton*, No. 94-cv-290-LR (E.D. Ark. Aug. 19, 1994), ECF No. 22. In particular, 195 cases deal with the False Claims Act (“FCA”), 31 U.S.C. §§ 3729–33 (2014). The FCA is “the government’s primary tool for combating fraud involving federal contracts and programs.” Response to Lockheed Martin’s Motion to Strike United States’ Statement of Interest Regarding Lockheed Martin’s Motion for Summary Judgment at 2, *United States v. Lockheed Martin Corp.*, No. 08-cv-561 (C.D. Cal. Dec. 9, 2013), ECF No. 311, 2013 WL 11075960 at \*1. Private citizens may file FCA claims on behalf of the federal government through *qui tam* litigation. See generally Thomas R. Lee, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543 (1990).

<sup>31</sup> See, e.g., Statement of Interest of United States, ECF No. 71, *Harris v. Socialist People’s Libyan Arab Jamahiriya*, No. 06-cv-732 (D.D.C. Dec. 15, 2008), ECF No. 71, 2008 WL 5588087.

<sup>32</sup> See, e.g., Corrected Amicus Brief of United States, *Kallas v. Pfizer, Inc.*, No. 04-cv-998-PGC (D. Utah Sept. 29, 2005), ECF No. 66, 2005 WL 4030146.

<sup>33</sup> See Brief of Amicus Curiae United States and Interstate Commerce Commission, *In re Bulldog Trucking, Inc.*, No. C-B-90-31936 (4th Cir. Oct. 21, 1994), 1994 WL 16048455.

<sup>34</sup> See Apuzzo, *supra* note 5; Lauren Kirchner, *The Best Defense Is Good Offense: DOJ Challenges Local Public Defense Programs*, PROPUBLICA (Aug. 25, 2015, 11:52 AM), <http://www.propublica.org/article/justice-department-challenges-local-public-defense-programs>, archived at <https://perma.cc/7WQK-F8ND>.

*B. Closer Look at Modern Statements of Interest*

This Section takes a deeper look at the modern statements of interest. The United States has filed these modern statements in at least thirty states and the District of Columbia. There are clusters of trial-level amicus statements in many federal districts with large metropolises: the Southern District of New York (ten),<sup>35</sup> the Northern District of California (six),<sup>36</sup> the Northern District of Illinois (six),<sup>37</sup> and the Southern District of Florida (five).<sup>38</sup> The Department of Justice also has filed statements in at least four state court cases: Georgia,<sup>39</sup> New Jersey,<sup>40</sup> New York,<sup>41</sup> and Texas.<sup>42</sup>

Using my compiled research on trial-level statements of interest, I have created a chart identifying the five topics that are most frequently discussed by the Department of Justice. I include the chart below, with litigation subjects ordered by number of filed amicus statements:

<b>Subject of Litigation</b>	<b># Amicus Statements</b>	<b>Most Recent Filing (As of Dec. 31, 2015)</b>	<b>States or Territories Where Amicus Statements Were Filed</b>
Disability Rights	60 (48.4% of modern statements)	<i>Eley v. District of Columbia</i> <sup>43</sup> (Filed Oct. 5, 2015)	AL (1); CA (8); CO (1); DC (4); FL (7); GA (3); ID (1); IL (5); IN (5); KY (1); LA (3); MA (1); MD (1); MO (1); MS (1); NC (1); NJ (1); NY (6); PA (4); TX (2); VA (1); VT (1); WA (1)
Prisoners' Rights	11 (8.9%)	<i>Diamond v. Owens</i> <sup>44</sup> (Filed Apr. 3, 2015)	AL (2); CA (1); GA (1); IN (1); MI (2); NY (1); SD (1); TX (2)

<sup>35</sup> See, e.g., Statement of Interest of the United States, *Noel v. N.Y.C. Taxi & Limousine Comm'n*, No. 11-cv-237-GBD (S.D.N.Y. Oct. 13, 2011), ECF No. 60, 2011 WL 12709401.

<sup>36</sup> See, e.g., Statement of Interest of the United States, Dep't of Fair Emp't & Housing, No. C-12-1830-EMC (N.D. Cal. June 27, 2012), ECF No. 29.

<sup>37</sup> See, e.g., Statement of Interest of the United States, *Illinois ex rel. Madigan v. Ill. High School Ass'n*, No. 12-C-3758 (N.D. Ill. Aug. 17, 2012), ECF No. 27, 2012 WL 3581174.

<sup>38</sup> See, e.g., Statement of Interest of the United States, *ABC Charters, Inc. v. Bronson*, No. 8-cv-21865-ASG (S.D. Fla. Apr. 14, 2009), ECF No. 115, 2009 WL 1010435.

<sup>39</sup> See Statement of Interest of the United States, *N.P. v. Georgia*, No. 2014-cv-241025 (Ga. Sup. Ct. Apr. 20, 2015).

<sup>40</sup> See Statement of Interest of the United States, *Zarrelli v. Harvey*, No. C-199-5 (N.J. Sup. Ct. Apr. 25, 2006), 2006 WL 6667072.

<sup>41</sup> See Statement of Interest of the United States, *Hurrell-Harring v. New York*, No. 8866-07 (N.Y. Sup. Ct. Oct. 21, 2014).

<sup>42</sup> See Statement of Interest of the United States, *GGE v. Perry*, No. D-1-GN-11-273 (Tex. Dist. Ct.).

<sup>43</sup> Statement of Interest of the United States, *Eley v. District of Columbia*, No. 11-cv-309-BAH-JMF (D.D.C. Oct. 5, 2015), ECF No. 49.

<sup>44</sup> Statement of Interest of the United States, *Diamond v. Owens*, No. 15-cv-50-MTT, (M.D. Ga. Apr. 3, 2015), ECF No. 29, 2015 WL 5341015.



Subject of Litigation	# Amicus Statements	Most Recent Filing (As of Dec. 31, 2015)	States or Territories Where Amicus Statements Were Filed
Policing	7 (5.6%)	<i>Henderson v. Lentz</i> <sup>45</sup> (Filed July 9, 2013)	AZ (1); MA (1); MD (2); NY (2); OH (1)
Voting Rights	6 (4.8%)	<i>Ohio State Conference of NAACP v. Husted</i> <sup>46</sup> (Filed July 30, 2014)	AK (1); LA (1); MT (1); OH (1); TX (1); WA (1)
Data Privacy	4 (3.2%)	<i>In re Imagitas, Inc., Drivers' Privacy Protection Act Litigation</i> <sup>47</sup> (Filed Dec. 14, 2007)	FL (2); NY (1); TX (1)

### C. Case Study: Disability Rights

As noted in the chart, the most-discussed subject matter is disability rights. A significant plurality — 60 (or 48.4%) — of the modern cases dealt with them. In these statements, the federal government interpreted several disability rights statutes, such as the Fair Housing Act,<sup>48</sup> the Individuals with Disabilities Education Act,<sup>49</sup> and the Protection and Advocacy for Individuals with Mental Illness Act of 1986.<sup>50</sup> However, most of the government briefs related to disability rights involving Title II of the Americans with Disabilities Act (“Title II”).<sup>51</sup> Targeting local and state government, Title II imposes an “integration mandate,” requiring that persons with mental disabilities be placed in “community settings rather than institutions.”<sup>52</sup>

<sup>45</sup> Statement of Interest of the United States, *Henderson v. Lentz*, No. 11-cv-1646-DAP (N.D. Ohio July 9, 2013), ECF No. 125.

<sup>46</sup> Statement of Interest of the United States, *Ohio State Conference of NAACP v. Husted*, No. 14-cv-404-PCE-NMK (S.D. Ohio July 30, 2014), ECF No. 49.

<sup>47</sup> Statement of Interest of the United States, *In re Imagitas, Inc., Drivers' Privacy Protection Act Litig.* No. 07-md-2-TJC-JRK (M.D. Fla. Apr. 9, 2008), ECF No. 71, 2008 WL 977333.

<sup>48</sup> 42 U.S.C. §§ 3601–19 (2012).

<sup>49</sup> 20 U.S.C. §§ 1400–82 (2012). The statute ensures that children with disabilities have a “free appropriate public education,” by “requir[ing] school districts to develop an [individualized education program] for each child with a disability, with parents playing a significant role in this process.” *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 523–24 (2007) (citations and internal quotation marks omitted).

<sup>50</sup> 42 U.S.C. §§ 10801(a)–(b), 10803(2)(A) (2012). The statute created a “conditional spending program that directs states to establish protection and advocacy (P&A) agencies to advocate for persons with mental illness in exchange for federal funding.” Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 61 (2014).

<sup>51</sup> 42 U.S.C. §§ 12131 *et seq.* (2014). With respect to Title II, Congress explicitly delegated the Department of Justice authority to promulgate regulations. *See* 42 U.S.C. § 12134(a) (1990); 28 C.F.R. pt. 35 (2016).

<sup>52</sup> *See, e.g.*, Statement of Interest of the United States of America at 4–5, *Hunter v. District of Columbia*, No. 12-cv-1960-GK, 64 F. Supp. 3d 158 (D.D.C. 2014) (arguing that plaintiff sufficiently alleged discrimination claims against homeless shelter that denied access to his daughter, who suffered from medical disorders and used a wheelchair). *See generally* U.S.

For instance, the Department of Justice filed a statement of interest in *Napper v. County of Sacramento*<sup>53</sup> two months after the plaintiffs had started the lawsuit. They sought to enjoin the county government from shutting down most of the county's privately run regional out-patient mental health centers and transferring the thousands of mental health patients from those centers to county health clinics, which would provide less specialized and individualized care.<sup>54</sup> The federal government argued that the move to centralized county institutions likely would violate the integration mandate and would lead to "clinical regression, increased hospitalization and institutionalization, injury, illness, and death."<sup>55</sup> The county government settled less than two years later.<sup>56</sup>

The large number of trial-level amicus briefs relating to Title II's integration mandate is consistent with the Department of Justice's aggressive approach to enforcing disability rights. In 2009, the Civil Rights Division announced its plans to vigorously support *Olmstead v. L.C. ex rel. Zimring*,<sup>57</sup> in which the Supreme Court found "unjustified isolation" of individuals with mental disabilities to be discriminatory and interpreted Title II to create the integration mandate.<sup>58</sup> As part of those plans, the Department of Justice created a website to serve as a central hub to update the public on Title II enforcement.<sup>59</sup> As a public reporting tool, the website has a page listing every statement of interest that addressed Title II's integration mandate and was filed by a member of the Civil Rights Division or a rank-and-file Assistant U.S. Attorney from 2010 to now.<sup>60</sup> The Department of Justice also has published on the website legal guidance about the proper interpretation of Title II.<sup>61</sup> Moreover, the department frequently cites the language of the website in its Title II-related statements of interest.<sup>62</sup> The interconnectedness of government litigation documents and the online public reporting is no accident. According to a Department of Justice official, the Civil Rights Division created the website and issued amicus statements to publicize a

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DEPT OF JUSTICE, CIVIL RIGHTS DIV., *Olmstead: Community Integration for Everyone*, <http://www.ada.gov/olmstead/index.htm>, archived at <https://perma.cc/9BRV-K64H>.

<sup>53</sup> No. 2:10-cv-1119-JAM-EFB (E.D. Cal. 2010).

<sup>54</sup> See Statement of Interest of the United States at 2–4, *Napper*, *supra* note 53, ECF No. 104, 2010 WL 3798439; see also U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., DISABILITY RIGHTS ONLINE NEWS (Sept. 2010), <http://www.ada.gov/newsltr0910.htm>, archived at <https://perma.cc/PH8Q-URF2>.

<sup>55</sup> Statement of Interest of the United States at 7, 17, *Napper*, *supra* note 53.

<sup>56</sup> See Stipulation, *Napper*, *supra* note 53, ECF No. 139.

<sup>57</sup> 527 U.S. 581 (1999).

<sup>58</sup> *Id.* at 581, 597.

<sup>59</sup> See U.S. DEP'T OF JUSTICE, *supra* note 52.

<sup>60</sup> See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Olmstead Enforcement*, [http://www.ada.gov/olmstead/olmstead\\_cases\\_list2.htm](http://www.ada.gov/olmstead/olmstead_cases_list2.htm), archived at <https://perma.cc/E34H-ZHT2>.

<sup>61</sup> See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.* (June 22, 2011), [http://www.ada.gov/olmstead/q&a\\_olmstead.htm](http://www.ada.gov/olmstead/q&a_olmstead.htm), archived at <https://perma.cc/SE52-2YSF>.

<sup>62</sup> See, e.g., Statement of Interest of the United States of America at 6, *Maertz v. Minott*, No. 13-cv-957-JMS-MJD (S.D. Ind. 2015).

governmental message that “help[s] people understand their rights and . . . help[s] public entities understand and implement their obligations.”<sup>63</sup>

Still, outside the context of Title II’s integration mandate, the Department of Justice has been relatively silent about its use of statements of interest. With respect to traditional federal interests, I have found only occasional public pronouncements about statements of interest.<sup>64</sup> In the civil rights context, a department official will sometimes give a speech in which he or she mentions a statement of interest towards the end, or the department will publish a press release about a series of statements.<sup>65</sup> Sometimes, a department official will talk to the press.<sup>66</sup> The Department of Justice has not discussed publicly how it decides when to announce a statement of interest to the general community.

Beyond the Title II website, there appears to be no comprehensive or systematic approach to reporting the statements of interest. Although the Civil Rights Division has published on its website statements of interest for most civil rights cases, the statements appear in different pages under different sections of the Civil Rights Division website, and each page is organized differently.<sup>67</sup> For published statements, the federal government often (but

<sup>63</sup> U.S. DEP’T OF JUSTICE, OFFICE OF PUB. AFFAIRS, *Assistant Attorney General Thomas E. Perez Testifies Before the U.S. Senate Committee on Health, Education, Labor and Pensions* (June 21, 2012), <http://www.justice.gov/opa/speech/assistant-attorney-general-thomas-e-perez-testifies-us-senate-committee-health-education>, archived at <https://perma.cc/RV8D-64F4>.

<sup>64</sup> See, e.g., Executive Order No. 12,284, *Restrictions on the Transfer of Property of the Former Shah of Iran*, 46 Fed. Reg. 7,929 (Jan. 19, 1981) (announcing government practice of issuing “suggestions of dismissal” for cases involving assets owned by Iran).

<sup>65</sup> See, e.g., U.S. DEP’T OF JUSTICE, OFFICE OF PUB. AFFAIRS, *Department of Justice Files Statement of Interest in Kentucky School Handcuffing Case* (Oct. 2, 2015), <http://www.justice.gov/opa/pr/departement-justice-files-statement-interest-kentucky-school-handcuffing-case>, archived at <https://perma.cc/8ZB6-QF2S>; U.S. DEP’T OF JUSTICE, OFFICE OF PUB. AFFAIRS, *Attorney General Holder Announces Department of Justice Filings in Voting Rights Cases in Wisconsin and Ohio* (July 30, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-announces-justice-department-filings-voting-rights-cases-wisconsin>, archived at <https://perma.cc/A93J-YGHG>; U.S. DEP’T OF JUSTICE, OFFICE OF PUB. AFFAIRS, *Assistant Attorney General Thomas E. Perez Speaks at the National Congress of American Indians’ 69th Annual Convention* (Oct. 23, 2012), <http://www.justice.gov/opa/speech/assistant-attorney-general-thomas-e-perez-speaks-national-congress-american-indians-69th>, archived at <https://perma.cc/3HCD-MWCW>.

<sup>66</sup> See Apuzzo, *supra* note 5.

<sup>67</sup> See generally U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., DOJ AGREEMENTS AND RESOLUTIONS (Nov. 18, 2015), <http://www.justice.gov/crt/doj-agreements-and-resolutions>, archived at <https://perma.cc/A3P7-5KHP>; U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., EDUCATIONAL OPPORTUNITIES CASES (Oct. 14, 2015), <http://www.justice.gov/crt/educational-opportunities-cases>, archived at <https://perma.cc/Q7CR-W2X7>; U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., HOUSING AND CIVIL ENFORCEMENT SECTION CASES (Dec. 22, 2015), <http://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1>, archived at <https://perma.cc/XAE6-F9VC>; U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INDIAN WORKING GROUP (Aug. 8, 2015), <http://www.justice.gov/crt/press-releases-0>, archived at <https://perma.cc/YY8Z-BG2W>; U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., LGBTI WORKING GROUP (Aug. 7, 2015), <http://www.justice.gov/crt/lgbti-working-group-3>, archived at <https://perma.cc/QCC6-V7XR>; U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., SPECIAL LITIGATION SECTION CASES AND MATTERS (Dec. 4, 2015), <http://www.justice.gov/crt/special-litigation-section-cases-and-matters0>, archived at <https://perma.cc/58DD-9KMN>.

not always) provides only a link to a PDF, giving little to no information about the relevant case or the procedural history. Finally, the federal government has not published online dozens of the amicus statements, including those relating to voting rights and at least two that were filed in state court.<sup>68</sup> Without the statements, the public is deprived of important information about the government's civil rights strategy.<sup>69</sup>

## II. A NEW ROLE FOR STATEMENTS OF INTEREST

As Part I has shown, the practice of issuing statements of interest in civil rights litigation has expanded. Part II seeks to contextualize the development. The new use is a marked departure from historical practice. But Part II argues that the modern use is consistent with the federal government's historical role as promoter of civil rights.

### A. *Diverging from Historical Practice*

Government third-party statements in cases are relatively common, resulting from a long-standing practice that started near the nation's founding. Federal government amicus briefs did not appear until about 1820, and the earliest form was the "suggestion," which government officials often filed in cases involving foreign sovereigns.<sup>70</sup> For instance, the French vessel *The Cassius* was sued twice for allegedly violating federal law. The government filed suggestions in both cases, offering early arguments of foreign sovereign immunity. Because *The Cassius* was an official French vessel, the government argued, the courts did not have jurisdiction to hear either case.<sup>71</sup>

When Congress enacted the Statutory Authorization Act of June 22, 1870, the predecessor statute to 28 U.S.C. § 517, government intervention and briefing in private lawsuits occurred only in cases involving foreign sovereigns and their property.<sup>72</sup> Indeed, for generations, the early government statements dealt exclusively with foreign vessels, foreign policy, suits against government officials, and disputes over government property, con-

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<sup>68</sup> See, e.g., sources cited *supra* notes 40, 42, 46.

<sup>69</sup> See *infra* Section III.A-B.

<sup>70</sup> See, e.g., *Ketland v. The Cassius*, 2 U.S. (Dall.) 365, 365 (C.C.D. Pa. 1796) (acknowledging "suggestion" by Attorney of the District of Pennsylvania "in pursuance of directions from the President"); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 699-702 (1963). But the early "suggestion" was more similar to an intervention than to the filing of a statement of interest. See Krislov, *supra*, at 698.

<sup>71</sup> See *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 124-25 (1812) (describing the government suggestions in *Ketland* and other cases).

<sup>72</sup> See *Int'l Prods. Corp. v. Koons*, 325 F.2d 403, 408 n.5 (2d Cir. 1963).

tracts, and employees.<sup>73</sup> Filing statements of interest in these areas of the law continues to this day,<sup>74</sup> and few would quarrel with this practice.<sup>75</sup>

However, as shown *supra*, the filing of statements of interest in civil rights lawsuits has occurred with increasing frequency.<sup>76</sup> These filings mark a substantial shift from the practice of offering traditional government amicus briefs. Unlike the older statements, the new ones involving civil rights cases rarely invoke proprietary, administrative, or institutional interests. The asserted interests are less clear, more indeterminate; sometimes, the government invokes interests that are not tethered to any federal law.<sup>77</sup> Although § 517 is broadly written, it nonetheless requires that “the interests of the United States be at stake.”<sup>78</sup> Moreover, the federal government must articulate a “sufficient interest.”<sup>79</sup> This legal limitation derives in part from the “traditional view that a law suit is a private controversy in which outsiders have no place.”<sup>80</sup> When the asserted interest is less recognizably federal in character, the government statement departs from the traditional amicus brief. Such a practice makes some lawyers — defense attorneys among others — nervous.<sup>81</sup>

<sup>73</sup> See, e.g., *In re Muir*, 254 U.S. 522, 532–33 (1921) (discussing diplomatic relations); *Booth v. Fletcher*, 101 F.2d 676, 682 (D.C. Cir. 1938) (“Throughout the years since the first Judiciary Act the Attorney General and his representatives have appeared on many occasions, in actions between private persons where the interests of the United States were involved, and [o]n behalf of officers of the United States who were sued by others.”). See generally *Krislov*, *supra* note 70.

<sup>74</sup> See, e.g., *United States v. Napper*, 887 F.2d 1528, 1530 (11th Cir. 1989) (“[T]he United States has authority to bring suit to enforce its contractual and property rights in federal court.”).

<sup>75</sup> See generally *Davis*, *supra* note 50.

<sup>76</sup> See *supra* Part I.

<sup>77</sup> See, e.g., Statement of Interest at 5, *Martin*, *supra* note 23 (noting that government has interest in “ensuring that justice is applied fairly” and “breaking the cycle of poverty and criminalization”).

<sup>78</sup> *Brawer v. Horowitz*, 535 F.2d 830, 834–35 (3d Cir. 1976); see also 13B Fed. Prac. & Proc. Juris. § 3531.11 (3d ed. 2015) (“[O]rdinarily the United States cannot sue simply to advance the private interests of some third party.”).

<sup>79</sup> *Hall v. Clinton*, 285 F.3d 74, 79–80 (D.C. Cir. 2002); see also *Conservation Council of W. Australia, Inc. v. Aluminum Co. of Am.*, 518 F. Supp. 270, 275 n.8 (W.D. Pa. 1981) (noting that federal government did not issue statement of interest because it did not see a “sufficiently direct or well-defined” interest); Raoul Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 YALE L.J. 65, 69 (1940) (explaining importance of articulating “interest”).

<sup>80</sup> Berger, *supra* note 79, at 65; cf. Michael J. Harris, Note, *Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 1, 10–11 (2000) (“When the government is acting in the public interest and within [certain] limits, the government is acting as a friend to the court in accordance with the original intent of the doctrine of amicus curiae.”).

<sup>81</sup> See Apuzzo, *supra* note 5 (“[T]o lawyers [advocating against the United States’ position], it can feel as if the government is using private court cases to make political points. ‘From the community’s perspective, it was an ongoing nightmare,’ said [one lawyer.]”); cf. Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways that Government Officials Pay Their Lawyers*, 50 STAN. L. REV. 65, 75 n.39 (1997) (“In purely private litigation, where the United States does not have an interest, providing representation would be beyond the Attorney General’s statutory authorization.”).

*B. Contextualizing Modern Statements of Interest*

Still, the government can justify the new government practice by contextualizing the shift. The expanded amicus practice comports with the expansion of the Department of Justice's civil rights agenda during the twentieth century. Given the government's longstanding role in enforcing the Reconstruction Amendments, the trial-level statements of interest resonates not only as a tool for respecting foreign sovereigns, but also as a tool for domestic civil rights advancement. In order to develop a historical context that justifies the government's new amicus practice, this Part focuses on the actions of the Department of Justice during the "civil rights movement spawned by World War II."<sup>82</sup>

Shortly after the Civil War, Congress enacted § 517's predecessor statute, which was called the "Act to Establish the Department of Justice" ("Act").<sup>83</sup> The Act served to provide basic structures that would expand the Attorney General's power over litigation relating to federal interests and secure enforcement of the Reconstruction Amendments.<sup>84</sup> In addition to creating the Department of Justice, the Act established the department's basic powers.<sup>85</sup> But those structures were relatively rudimentary. The Department of Justice lacked a Civil Rights Division until 1957.<sup>86</sup> Although the federal government rarely filed amicus briefs on civil rights cases during the 100 years after the Act's passage, the Department of Justice's hesitancy may be explained partly by the lack of sophisticated governmental structures that dealt with civil rights issues. The current statute, § 517, can be seen as Congress' attempt to expand the basic powers that were established by the Act to Establish the Department of Justice.

Changes during the 1950s and 1960s led to a bolder and more structured government, one more willing and more prepared to bolster fundamental rights. The infrequent filing of amicus briefs in the early twentieth century angered civil rights activists, and it was one reason why President Harry Truman created the President's Committee on Civil Rights ("PCCR") by executive order in 1946.<sup>87</sup> The publication of the PCCR's report — which

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<sup>82</sup> Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7 (1996). In addition to the creation of a presidential committee on civil rights, see *infra* text accompanying note 87, the civil rights movement is marked by "executive orders desegregating the federal military and civil service, the integration of major league baseball, the exponential increase in Southern black voter registration, the enactment of a plethora of Northern antidiscrimination laws[,] . . . and the emergence of a general war-related civil rights consciousness among African-Americans." *Id.* at 8.

<sup>83</sup> Act of June 22, 1870, ch. 150, § 5, 16 Stat. 162.

<sup>84</sup> See *United States v. City of Philadelphia*, 644 F.2d 187, 214–15 (3d Cir. 1980).

<sup>85</sup> See *Onvoy, Inc. v. Carolina Cas. Ins. Co.*, No. 06-cv-165, 2006 WL 1966757, at \*7 (D. Minn. July 11, 2006).

<sup>86</sup> See U.S. DEPT OF JUSTICE, CIVIL RIGHTS DIV., ABOUT THE DIVISION (Sept. 22, 2015), <http://www.justice.gov/crt/about-division>, archived at <https://perma.cc/X2KS-9X8Q>.

<sup>87</sup> See *id.*; see also SAMUEL WALKER, PRESIDENTS AND CIVIL LIBERTIES FROM WILSON TO OBAMA: A STORY OF POOR CUSTODIANS 143–46 (2012). As history shows, other parts of

laid out a plan with thirty-five points to strengthen the Department of Justice's civil rights agenda, to create a departmental policy on amicus briefs relating to civil rights cases, and, more generally, to establish "most of the agenda of the post-World War II civil rights movement" — marked a turning point for the federal government's use of amicus briefs.<sup>88</sup> Partly in response to the PCCR's report, the Department of Justice became active in issuing appellate amicus briefs as part of its commitment to safeguard individual rights.<sup>89</sup> The creation of the Civil Rights Division through the Civil Rights Act of 1957<sup>90</sup> only helped the cause. When Congress enacted 28 U.S.C. § 517 in 1966,<sup>91</sup> it ostensibly drafted the broad language in the context of an executive branch well prepared to advancing civil rights.

A thorough accounting of the history of government participation in civil rights litigation is beyond the scope of this Note. Still, I write this brief historical overview to suggest that trial-level statements of interest in civil rights cases need not appear passing strange. One cannot overstate the importance of government participation in the civil rights movement of the 1960s, and the use of trial-level amicus statements can serve as one tool in the government's arsenal. The federal government has wielded more drastic tools in the past, serving as an intervening party in many civil rights lawsuits from the 1960s to mid-1970s. For instance, the United States successfully filed lawsuits on behalf of black citizens in the South to challenge state laws mandating segregation.<sup>92</sup> At the time, many courts looked favorably upon the government practice.<sup>93</sup> "[P]articipation by the United States can con-

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President Truman's legislative plan to "revitalize the federal civil rights enforcement apparatus" largely failed. Lynda G. Dodd, *Presidential Leadership and Civil Rights Lawyering in the Era Before Brown*, 85 IND. L.J. 1599, 1607, 1655 (2010). In some of its amicus briefs on the appellate level, the government adopted equivocal positions with respect to civil rights cases. See, e.g., Brief for the United States as Amicus Curiae at 8–17, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), 1952 WL 82045, at \*8–17 (arguing that the Court could decide case without striking down the "separate but equal" doctrine). Still, President Truman was able to advance some civil rights goals; for instance, he ended segregation in the armed forces in 1948. See Constance Baker Motley, *The Supreme Court, Civil Rights Litigation, and Déjà Vu*, 76 CORNELL L. REV. 643, 646 (1991).

<sup>88</sup> WALKER, *supra* note 87, at 143–46 (noting that PCCR was "first modern presidential initiative on civil rights"); Dodd, *supra* note 87, at 1638–39; Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 817 (1987) (noting that the committee "was taken very seriously in the Solicitor General's office").

<sup>89</sup> See Dodd, *supra* note 87, at 1638–39. The United States' first amicus brief filed after the PCCR report was in *Shelley v. Kramer*, 334 U.S. 1 (1948). The *Shelley* amicus brief was also the government's first in a civil rights case. See Drew S. Days III, *When the President Says "No": A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. APP. PRAC. & PROCESS 509, 509–10 (2001).

<sup>90</sup> Pub. L. No. 85-315, 71 Stat. 634 (1957).

<sup>91</sup> Pub. L. No. 85-554, 72 Stat. 415 (1966).

<sup>92</sup> See, e.g., *United States v. Brittain*, 319 F. Supp. 1058 (N.D. Ala. 1970); *United States v. City of Jackson*, 318 F.2d 1 (5th Cir. 1963); *United States v. City of Shreveport*, 210 F. Supp. 36 (D. La. 1962).

<sup>93</sup> See, e.g., *In re Estelle*, 516 F.2d 480, 487 n.5 (5th Cir. 1975) (Tuttle, J., concurring) (noting that without government intervention, "meritorious claims might fail for sheer lack of legal manpower").

tribute power and prestige to private litigation . . . .”<sup>94</sup> The federal government can also effect greater and more sophisticated legal change than any individual litigant.<sup>95</sup>

Starting in the Burger Court era, changes in the political climate and the judiciary resulted in pushback against governmental civil rights litigation.<sup>96</sup> But unlike government intervention and *parens patriae* lawsuits, which are resource-intensive and significantly intrusive, the filing of an amicus brief causes relatively low intrusion into litigation.<sup>97</sup> Although many judges nowadays dislike robust government lawsuits to enforce civil rights,<sup>98</sup> they generally have been receptive to statements of interest, sometimes outright asking for them.<sup>99</sup> Accordingly, the statement of interest is the scalpel to the cleaver of intervention or the *parens patriae* suit.

Civil rights lawyers welcome the new tool. So do judges.<sup>100</sup> The amicus brief provides the government an opportunity to present its opinion with “relatively low expenditure of its own resources and indirect costs to the parties.”<sup>101</sup> Government amicus statements can also be enormously persuasive. Consider a historical study completed by academic Lee Epstein about the success rate of the Solicitor General as amicus curiae in Supreme Court cases from 1952 to 1991.<sup>102</sup> As she found, “regardless of the political or ideological orientation of the administration under which they served or the particular predisposition of the sitting Justices, Solicitors General have inordinately high success rates in litigation” — with the lowest at a 65.1% suc-

<sup>94</sup> Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 Nw. U. L. REV. 111, 112 (1997).

<sup>95</sup> See *id.*

<sup>96</sup> See, e.g., Motley, *supra* note 87, at 647–48, 655 (noting an “ambivalence toward civil rights claimants” in the Burger and Rehnquist Courts and a “weariness . . . with civil rights issues”).

<sup>97</sup> See Note, *Nonstatutory Executive Authority to Bring Suit*, 85 HARV. L. REV. 1566, 1577 n.55 (1972) (noting that amicus participation raises fewer federalism concerns than does intervention).

<sup>98</sup> See, e.g., *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977).

<sup>99</sup> The Supreme Court in fact has encouraged the trial courts to do so. See, e.g., *Order, Salini Construttori S.P.A. v. Kingdom of Morocco*, No. 14-cv-2036 (D.D.C. May 28, 2015), ECF No. 21; Notice of Intent to File a Statement of Interest, *Salini Construttori, infra*, ECF No. 36 (answering court’s order and committing to writing a statement of interest within a month); Statement of Interest of the United States of America, *Salini Construttori, infra*; see also *Rosado v. Wyman*, 397 U.S. 397, 407 (1970) (encouraging courts to do so in cases with complicated regulatory matters); *Doe v. Anrig*, 500 F. Supp. 802, 810 (D. Mass. 1980) (inviting government input on interpretation of predecessor to disability rights case).

<sup>100</sup> Cf. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 697 (2008) (reporting that 86.4% of 227 surveyed district judges thought government amicus briefs were moderately or very helpful).

<sup>101</sup> Greenbaum, *supra* note 14, at 998–99; see also Apuzzo, *supra* note 5 (“By piggybacking on local cases, the Department of Justice can cover a lot more ground, coaxing judges around the country toward liberal interpretations of civil rights law without taking on a prolonged court fight.”).

<sup>102</sup> See Lee Epstein, *Interest Group Litigation During the Rehnquist Era*, 9 J.L. & POL. 639, 672–73 (1993).



cess rate during the Carter Administration, and the highest at a 87.5% success rate during the Kennedy Administration.<sup>103</sup>

The government may also have reasons for not waiting until the appellate level to file briefs.<sup>104</sup> Many trial court cases end in settlement, and rights violators may be motivated to settle in particularly egregious cases. Filing statements of interest at the trial level provides the federal government an opportunity to voice its opinion in problematic cases that may not arrive in the appellate courts. The Department of Justice's statement on the violation, if well publicized,<sup>105</sup> will put the states, municipalities, and judges on notice of the illegality of the defendant's actions. Although no binding law will emerge from a settled case, the government's statement will retain significant weight and potentially deter future rights violations.<sup>106</sup>

Take, for instance, the statements of interest filed in recent voting rights cases. The government filed at least six, all from 2011 to 2014, and one of the cases ended in settlement at the trial level.<sup>107</sup> Four of the statements related to the Voting Rights Act, and the government filed three after *Shelby County, Alabama v. Holder*<sup>108</sup> had rendered ineffective the preclearance requirement in § 5 of the Voting Rights Act.<sup>109</sup> Siding with the rights-asserting plaintiffs in each of the voting rights cases, the Department of Justice argued, *inter alia*, that the Alaska government needed to translate its election materials into Native American languages;<sup>110</sup> that the court should uphold Latino residents' voter dilution lawsuit in Washington state;<sup>111</sup> and that Ohio plausibly burdened minority voting rights by restricting registration during evenings and weekends.<sup>112</sup> The cases arose across the nation; only a few

<sup>103</sup> See *id.*

<sup>104</sup> See *supra* note 19.

<sup>105</sup> Of course, this Note argues that the federal government should better publicize their amicus statements.

<sup>106</sup> Cf. Emily Badger, *It's Unconstitutional to Ban the Homeless from Sleeping Outside, the Federal Government Says*, WASH. POST (Aug. 13, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/08/13/its-unconstitutional-to-ban-the-homeless-from-sleeping-outside-the-federal-government-says/>, archived at <https://perma.cc/LF4M-Y4ZH> (“By weighing in on this case, the DOJ’s first foray in two decades into this still-unsettled area of law, the federal government is warning cities far beyond [the defendant municipality] and backing up federal goals . . .”). “[I]t’s an amicus brief by the United States Department of Justice,” Norman Reimer, executive director of the National Association of Criminal Defense Lawyers, told a reporter for *ProPublica*. “That carries a lot of weight. No municipality or state wants to be found to be violating Constitutional rights in the eyes of the Department of Justice.” Kirchner, *supra* note 34.

<sup>107</sup> See *Toyukak v. Treadwell*, No. 13-cv-137 (D. Alaska Sept. 22, 2014).

<sup>108</sup> 133 S. Ct. 2612 (2013).

<sup>109</sup> See *id.* at 2625–31; see also Pub. L. No. 89-110, tit. I, § 5, 79 Stat. 439 (1965) (codified at 52 U.S.C. § 10304c(a) (2014)).

<sup>110</sup> See Statement of Interest of the United States of America at 2–4, *Toyukak*, *supra* note 107.

<sup>111</sup> See Statement of Interest of United States of America at 1–3, *Montes v. City of Yakima*, No. 2:12-cv-03108-TOR (E.D. Wash. Aug. 8, 2014), ECF No. 99.

<sup>112</sup> See Statement of Interest of the United States of America at 2, *Ohio St. Conf. of NAACP v. Husted*, No. 2:14-cv-00404 (S.D. Ohio July 30, 2014), ECF No. 49, 2014 WL 10384647.

entities have the reach and resources to participate in all five. The federal government is one of those entities.

### III. INITIAL CONCERNS ABOUT MODERN STATEMENTS OF INTEREST

In Part II, I largely applaud the practice of using statements of interest in civil rights cases. But Part III complicates my endorsement. Currently, the practice of filing statements of interest is shrouded in mystery, and the use of the statements raises concerns. Part III outlines three initial issues. First, some statements filed in civil rights cases argue against expanding the relevant right. Second, the statements of interest are subject to the whim of politics. Third, the statements of interest at times interfere with the judicial role.

#### A. *Justifying Idiosyncratic Statements*

The vast majority of trial-level amicus briefs in civil rights litigation take the side of the rights-asserting plaintiff and advocate for promotion of the civil right or liberty at issue. But some statements take equivocal or contrary positions in civil rights lawsuits, and the public needs more information to understand why the government has published these idiosyncratic statements.

Some statements of interest argue that the trial court should avoid certain civil rights issues. For instance, in *Blatt v. Cabela's Retail, Inc.*,<sup>113</sup> the plaintiff alleged workplace and sex discrimination at her company on the basis of her disability, which she asserted was gender dysphoria.<sup>114</sup> Although she said the discrimination violated Title VII of the Civil Rights Act of 1964 (“Title VII”)<sup>115</sup> and the Americans with Disabilities Act of 1990 (“ADA”),<sup>116</sup> the ADA specifically exempted accommodations for certain people who are transsexual.<sup>117</sup> The plaintiff argued that the exemption was unconstitutional and that the court should strike it down.<sup>118</sup> In response, the federal government submitted a statement of interest, arguing that the Court

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<sup>113</sup> No. 14-cv-4822 (E.D. Pa. 2014).

<sup>114</sup> Gender dysphoria is a long-term medical condition associated with a “marked difference between the individual’s express/experienced gender and the gender would assign him or her.” AM. PSYCHIATRIC ASS’N, GENDER DYSPHORIA (2013), <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>, archived at <https://perma.cc/53UW-WDY9>. The condition is “manifested in a variety of ways, including strong desires to be treated as the other gender or to be rid of one’s sex characteristics, or a strong conviction that one has feelings and reactions typical of the other gender.” *Id.*

<sup>115</sup> 42 U.S.C. §§ 2000e–2000e-17 (2012).

<sup>116</sup> Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

<sup>117</sup> 42 U.S.C. §§ 1211(b)(1) (2012) (providing that the ADA’s definition of “disability” excludes “transsexualism” and “gender identity disorders not resulting from physical impairments”).

<sup>118</sup> See Complaint, *Blatt*, *supra* note 113, ECF No. 1, 2014 WL 4379566.

should not consider the constitutional question and consider only the Title VII claim.<sup>119</sup> Striking down the ADA exception would create greater protections for people whose gender identities do not correspond with their sex assigned at birth, but the government decided not to endorse the rights-expansive arguments and urged constitutional avoidance.<sup>120</sup>

Another example is *Palladino v. Corbett*.<sup>121</sup> The plaintiffs in *Palladino* challenged the constitutionality of § 2 of the Defense of Marriage Act (“DOMA”), which allowed states to reject the marriage status afforded to same-sex couples by other states.<sup>122</sup> (The Supreme Court recently had struck down § 3 of DOMA in *United States v. Windsor*.<sup>123</sup>) However, the federal government submitted a statement of interest urging the Court to decide not whether § 2 is constitutional but rather whether the parties had standing.<sup>124</sup> The government argued that they did not.<sup>125</sup>

The statements in *Blatt* and *Palladino* can be justified by the Department of Justice’s obligation to defend the constitutionality of federal statutes. But consider *Sciarrillo v. Christie*,<sup>126</sup> which is mentioned on the Title II website.<sup>127</sup> In the case, the plaintiffs — patients at two state-run segregated residential care facilities for the developmentally disabled — wanted to block the state’s plan to close the facilities and to move the patients to smaller centers or a similar residential care facility more than 100 miles away. The federal government submitted a statement of interest arguing that the ADA does not require such an accommodation.<sup>128</sup>

In the area of policing, the federal government equivocates on the issue of expanding individual rights, sometimes arguing for them and sometimes not. The Department of Justice has argued that individuals have a First Amendment right to record police activity.<sup>129</sup> In an Eighth Amendment case, the government argued for striking down a municipal policing practice of arresting the homeless.<sup>130</sup> But when analyzing policing practices for pur-

<sup>119</sup> See Statement of Interest of the United States at 1–3, *Blatt*, *supra* note 113, 2015 WL 5173778, at \*1.

<sup>120</sup> See *id.* at 2–3 (urging the district court to “defer ruling” on the constitutional question).

<sup>121</sup> No. 13-cv-5641, 2014 WL 830046 (E.D. Pa. Mar. 4, 2014).

<sup>122</sup> See Complaint, *Palladino*, *supra* note 121, ECF No. 1; see also Pub. L. No. 104-199, 110 Stat. 2419, § 2 (Sept. 21, 1996) (codified at 28 U.S.C. § 1738C (2014)). Section 2 of DOMA no longer impinges upon the same-sex marriage right, because the Supreme Court has held that states must give full faith and credit to same-sex marriages authorized by other states. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

<sup>123</sup> 133 S. Ct. 2675 (2013).

<sup>124</sup> See Statement of Interest of the United States, *Palladino*, *supra* note 121.

<sup>125</sup> See *id.*

<sup>126</sup> No. 13-cv-3478, 2013 WL 6586569 (D.N.J. Dec. 13, 2013).

<sup>127</sup> See U.S. DEP’T OF JUSTICE, *supra* note 54.

<sup>128</sup> See Statement of Interest of the United States of America at 7–10, *Sciarrillo*, *supra* note 126.

<sup>129</sup> See, e.g., Statement of Interest of the United States at 1, *Garcia v. Montgomery Cty.* No. 12-cv-3592-JFM (D. Md. Aug. 23, 2013), ECF No. 15, 2013 WL 4539394.

<sup>130</sup> See Statement of Interest at 4, *Martin*, *supra* note 23.

poses of the Fourth Amendment, the Department of Justice has adopted more restrained, less rights-promoting arguments. In *Floyd v. United States*,<sup>131</sup> the United States declined to argue that the New York Police Department's stop-and-frisk practice is unconstitutional; rather, the government argued only that an independent monitor and injunction be used as the remedy if the court found the practice unconstitutional.<sup>132</sup> Notably, on the issue of remedies, the government did not endorse the plaintiffs' request for damages.<sup>133</sup> In *MacWade v. Kelly*,<sup>134</sup> the United States argued that the New York Police Department's random-bag search policy in public transportation systems was constitutional.

The statements in *Sciarrillo*, *Floyd*, and *MacWade* share a common attribute: The federal government in each case went out of its way to defend the state or municipal government. In all three cases, the Department of Justice said it wanted to "clarify . . . the scope" of federal statutory or constitutional law.<sup>135</sup> But it can do so in millions of cases each year.<sup>136</sup> It is not obvious why department officials chose these particular cases to "put[ ] their finger on the scale" against the plaintiffs,<sup>137</sup> when the defendants — state officials likely backed by their respective governments — could have made similar arguments on their own.

It is also not obvious why department officials must defend local governments at the trial court level. As I suggested *supra*, the United States may want to file a statement of interest in the trial-court level when the case involves particularly egregious rights violations and the defendant may settle by terminating the violation.<sup>138</sup> But if the Department of Justice believes, for instance, that a local practice is constitutional, then the United States should be less concerned the local government will settle early. The statement of interest, if anything, serves as a legal endorsement of the practice that encourages other local governments to follow.

The federal government might be able to justify its decision to assist local governments. It might want to encourage certain local government

<sup>131</sup> 959 F. Supp. 2d 668 (S.D.N.Y. 2013).

<sup>132</sup> See Statement of Interest of the United States at 2, *Floyd*, *supra* note 131, ECF No. 365.

<sup>133</sup> Compare *id.* at 2 (arguing for only independent monitor and injunction), with Complaint, *Floyd*, *supra* note 131 (requesting damages), ECF No. 1.

<sup>134</sup> No. 05-cv-6921, 2005 WL 3338573 (S.D.N.Y. Dec. 7, 2005).

<sup>135</sup> See Statement of Interest of the United States of America at 5, *Sciarrillo*, *supra* note 126.

<sup>136</sup> In 2013, plaintiffs filed at least 14.6 million civil lawsuits in federal and state court. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2013 (noting that 271,950 civil lawsuits were filed in federal trial court in 2013), <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2013>, archived at <https://perma.cc/GLA2-6U7C>; ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, 2013 CIVIL CASELOADS – TRIAL COURTS, [http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Intro](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro) (noting that at least 14,380,581 civil lawsuits were filed in state or local trial courts in 2013), archived at <https://perma.cc/GJB3-AZKJ>.

<sup>137</sup> See Apuzzo, *supra* note 5, at 4.

<sup>138</sup> See *supra* Part II.

actions or deter certain lawsuits by plaintiffs. But whereas other trial-level statements of interest in civil rights lawsuits can be readily justified as a tool for furthering civil rights, the statements in *Sciarrillo*, *Floyd*, and *MacWade* are outliers that require another justification — one that the Department of Justice has not publicly asserted and one that history does not necessarily support.<sup>139</sup> These three statements have received no public attention until now; Department of Justice officials have issued no press releases and given no speeches on them. Although the federal government has published the amicus statements in *Sciarrillo* and *Floyd* online,<sup>140</sup> it has not published the statement in *MacWade*. Because there are millions of cases and thousands of trial courts, only the federal government can determine how many other statements need further justification.

### B. *Understanding the Role of Politics*

As I stated *supra*, the United States appears to focus heavily on Title II's integration mandate and has devoted significant resources to publicizing its legal opinions, its litigation strategy, and its 39 statements of interest.<sup>141</sup> Many will commend the federal government for vigorously enforcing the integration mandate. But others may wonder why other disability rights — or other civil rights such as sex equality, freedom of religion, gun rights, or voting rights — garner significantly less attention and fewer statements of interest. Notably, I have found no trial-level statements of interest on affirmative action.

Like all enforcement tools wielded by the executive, the use of statements of interest is an exercise of prosecutorial discretion. As stated *supra*, the statute invoked by the Department of Justice — 28 U.S.C. § 517 — is broadly written, and as long as the government asserts a federal interest, no tenable legal argument can be made to limit that discretion.<sup>142</sup> But prosecutorial discretion is often informed, if not constrained, by politics. “Access to the legal process” by political actors “is a logical extension of realistic awareness of law as a process of social choice and policy making.”<sup>143</sup> Still, unlike many other enforcement tools, there exist no procedures, such as “notice and comment” review for agency regulations, in place for parties hoping to challenge the statement. The court has total discretion on whether to accept the statement, and it often does so when the statement creates neither prejudice toward a litigant nor delay to litigation.<sup>144</sup> Moreo-

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<sup>139</sup> *See id.*

<sup>140</sup> *See* U.S. DEP'T OF JUSTICE, SPECIAL LITIGATION SECTION CASES AND MATTERS, *supra* note 67.

<sup>141</sup> *See id.*

<sup>142</sup> *See supra* note 17 and accompanying text.

<sup>143</sup> Krislov, *supra* note 70, at 721.

<sup>144</sup> *See, e.g.*, Fluor Corp. & Affiliates v. United States, 35 Fed. Cl. 284, 286 (1996) (“The parties before the court should have their dispute resolved without any unnecessary delay. It would be unnecessary for an amici brief to cause a prolonged delay in the litigation.”); United

ver, a party cannot sue the government to prevent it from filing a statement of interest, whereas a party may sue to prevent, for instance, the executive branch from executing a presidential order.

Despite the lack of procedural protections associated with statements of interest, the interconnectedness of prosecutorial discretion and politics should pose no problem as long as the executive branch can be held publicly accountable for its briefing choices. As long as the voters are kept apprised of governmental activities, citizens can react to decisions by going to the voting booth. Just as a governor can be voted out of office for the unpopular acts of her state prosecutors, the President can be voted out of office for the Department of Justice's unpopular approach to social change and civil rights. The political pressures caused by popular sovereignty and foot voting can serve as a soft, yet important, check on the executive's power.<sup>145</sup>

However, the popular sovereignty paradigm works only to the extent that the public pays attention to the Department of Justice's litigation strategy. With respect to criminal prosecutions, the public can make use of reporting mechanisms such as near-daily press releases from police departments and regular reporting by prosecutors to the state or federal government.<sup>146</sup> At the moment, virtually no structures exist to keep citizens apprised of the Department of Justice's statements of interest. The Department of Justice can give little notice before it files a statement of interest. For instance, in a federal district court case in Washington State, the government had filed its statement of interest practically "unannounced" about two years into litigation.<sup>147</sup> No organization — except perhaps the federal government

States v. Michigan, 940 F.2d 143, 165 (6th Cir. 1991) (noting that amicus participation "continues to be . . . a privilege within 'the sound discretion of the courts'"); *see also* Long v. Coast Resorts, Inc., 49 F. Supp. 2d 1177, 1177-78 (D. Nev. 1999) (rejected as untimely and not useful a Department of Justice statement of interest because it was filed after the court issued its order and the matter "was extensively briefed and documented by the parties"); *cf.* Stanton v. Ruthbell Coal Co., 34 S.E.2d 257, 261 (W. Va. 1945) (rejected United States appellate amicus filing because it "was not timely filed in accordance with the practice prevailing in" the court); Fed. R. Civ. P. 24(b)(3) (noting that court may consider whether intervention would "unduly delay or prejudice" adjudication).

<sup>145</sup> Davis, *supra* note 50, at 26 (2014) ("[P]ublic officials . . . can (and do) dial deterrence levels up and down in response to changing circumstances, as well as, more controversially, political pressure . . .").

<sup>146</sup> *See, e.g.*, ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, 2013 CRIMINAL CASELOADS – TRIAL COURTS (Feb. 12, 2015), [http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Intro](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro), archived at <https://perma.cc/CN9L-ZUJ3>; N.Y. CTY. DIST. ATT'Y'S OFFICE, PRESS RELEASES, <http://manhattanda.org/press-release>, archived at <https://perma.cc/VH4B-EXS4>; OR. STATE POLICE, OREGON STATE POLICE NEWS RELEASES, [http://www.oregon.gov/osp/NEWSRL/pages/news\\_releases.aspx](http://www.oregon.gov/osp/NEWSRL/pages/news_releases.aspx), archived at <https://perma.cc/9M89-2PFL>; U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROSECUTION (Sept. 11, 2015), <http://www.bjs.gov/index.cfm?ty=tp&tid=63>, archived at <https://perma.cc/9LBJ-CMY5>; U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: PROSECUTORS IN STATE COURTS, 2005 (July 2006), available at <http://www.bjs.gov/content/pub/pdf/psc05.pdf>, archived at <https://perma.cc/H4SW-2YN8>.

<sup>147</sup> Apuzzo, *supra* note 5. Sometimes, the government will file a notice early in litigation that it does not wish to intervene but may wish to file a statement of interest in the future. *See, e.g.*, Statement of Interest, Tyler, *supra* note 30. The statement can alert the Court to the

itself — can monitor every trial level courthouse in every state and territory. At least 14.6 million civil lawsuits were filed in the state and federal level in 2013,<sup>148</sup> making active monitoring prohibitively expensive.

The analogy between state prosecutors and the Department of Justice is imprecise in another sense. Although state prosecutors will make charging decisions based on information largely provided by law enforcement agents, who are tasked with upholding the public interest and investigating crime dispassionately, the Department of Justice makes its amicus-filing decisions based largely on information provided by private actors, who may want the government to analyze and advance areas of civil rights that have no well-resourced advocate.<sup>149</sup> According to *The New York Times*, the Department of Justice has been “flooded” with requests by civil rights groups to add statements of interest,<sup>150</sup> but the public does not know what those groups are and which ones are getting positive responses from the government. Moreover, as the executive branch continues the practice, other well-resourced private groups, such as corporations or wealthy individuals, may try to influence the civil rights debate. The extent to which the Department of Justice will listen to the latter groups may depend on who serves as President and which political party is in power.

### C. *Encroaching Upon the Role of the Judiciary*

The final concern that I describe in Part III is not my own, but rather an issue raised by the judiciary itself. Out of respect of the judiciary’s role in deciding facts, amicus parties traditionally focus solely on legal issues. But some courts have criticized government agencies for offering more than a strictly legal interpretation in their filings. One noted legal scholar wrote: “Amicus participation is particularly appropriate when the [g]overnment seeks to argue issues of law that arise in private litigation. The [g]overnment can present its position as amicus at a relatively low expenditure of its own resources and indirect costs to the parties.”<sup>151</sup> But “when the [g]overnment is too partisan or focused too narrowly on the facts of the case rather than on law or policy, it oversteps its bounds.”<sup>152</sup>

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United States’ interest, and it can give the Court the opportunity to demand such a statement of interest. See, e.g., Statement of Interest, *Tyler*, *supra* note 30 at 5. But the practice is not institutionalized, and it occurs only haphazardly. And other times, the United States will file a statement of interest without any prior public notice. See, e.g., Motion for Leave to File Statement of Interest, *United States ex rel. Christensen v. Southern Care, Inc.*, No. 11-cv-137 (W.D. Mo. May 24, 2012), ECF No. 28.

<sup>148</sup> See sources cited *supra* note 146.

<sup>149</sup> *Davis*, *supra* note 50, at 26 (noting that government is influenced by “interest-group lobbying”).

<sup>150</sup> *Apuzzo*, *supra* note 5.

<sup>151</sup> *Greenbaum*, *supra* note 14, at 998–99.

<sup>152</sup> *Id.* at 974–75; see also 3B C.J.S. at § 2 (asserting that amicus participation is “appropriate when the party cares only about the legal principles of the case and has no personal, legally protectable interest in the outcome”).

Some judges have applied a prejudice analysis to determine whether a statement of interest was improper based on, *inter alia*, its focus on facts.<sup>153</sup> Judges have wide discretion to reject government briefs for prejudicing adjudication because of fact discussion. For instance, in an employment discrimination case, the First Circuit criticized a filing that somewhat discussed the applicable discrimination law but in most part “discuss[ed] the facts favorable to” the worker.<sup>154</sup> The court rejected the government brief as “improper.”<sup>155</sup>

Whether fact-finding in government amicus briefs is truly problematic strikes me as debatable. Given the federal government’s vast resources and expertise in civil rights cases, it is a boundless resource of which a judge should take advantage. Especially in civil rights lawsuits, where the paradigmatic plaintiff is under-resourced, the government can provide much-needed help to the litigant and to the court. Still, the Department of Justice appears to recognize the pushback from some judges. At times, the government emphasizes the narrow scope of some of its statements. For instance, department officials wrote the following in one statement of interest that related to a civil rights case: “The United States does not take a position on the truth of Plaintiffs’ allegations or Defendant’s factual assertions in their pleadings, but rather submits this Statement[ ] to clarify the reach of [the statute at issue] and its implementing regulations and to refute Defendant’s apparent misinterpretations of federal law.”<sup>156</sup>

But in other cases, the relevant statement of interest focused mostly on facts,<sup>157</sup> and the district court sometimes would reject it. For instance, in a voting rights case, the government amicus statement offered “expert analysis” with facts in support of several Native American voters who wanted a preliminary injunction forcing Montana to open another voting site in each of three counties.<sup>158</sup> The government provided a declaration from a Univer-

<sup>153</sup> See, e.g., *United States ex rel. McCready v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 114, 120 (D.D.C. 2003) (“The statement assists the Court in acting in the broader context of FCA jurisprudence, and does not seek to participate directly in the suit by discussing the merits of Relator’s complaint. The United States did not act improperly in submitting a statement carefully crafted to avoid involvement in the factual issues of this declined case and designed solely to protect its interests.”); see also *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1177–78 (D. Nev. 1999) (rejected as untimely and not useful a United States statement arguing for reconsideration because it was filed after the court issued its order and the matter “was already briefed and documented by the parties”); cf. *FED. R. CIV. P. 24(b)(3)* (noting that court may consider whether intervention would “prejudice” adjudication).

<sup>154</sup> *Banerjee v. Bd. of Trustees of Smith Coll.*, 648 F.2d 61, 65 n.9 (1st Cir. 1981).

<sup>155</sup> *Id.*; see also, e.g., *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) (noting that courts should rarely welcome an “amicus who argues facts”).

<sup>156</sup> Statement of Interest of the United States of America at 4, *Doe 1 v. Mich. Dep’t of Corr.*, No. 13-cv-14356 (E.D. Mich. Mar. 20, 2014), ECF No. 56, 2014 WL 2207136.

<sup>157</sup> See, e.g., Statement of Interest of the United States of America at 13–25, *T.E. v. Pine Bush Cent. Sch. Dist.*, No. 12-cv-2303-KMK-PED (S.D.N.Y. Jan. 24, 2014), ECF No. 67; Statement of Interest of the United States at 11–26, *Napper v. Cty. of Sacramento*, No. 10-cv-1119-JAM-EFB (E.D. Ca. July 9, 2010), ECF No. 104, 2010 WL 3898439.

<sup>158</sup> See Statement of Interest of the United States of America at 2, *Wandering Medicine v. McCulloch*, No. 12-cv-135 (D. Mont. Oct. 10, 2012), ECF No. 5.



sity of Wyoming professor, who testified that Native Americans in all three counties have significantly less access to voting than the white residents in those counties.<sup>159</sup> The trial court ultimately disagreed with the plaintiffs and the government, denying the injunction request.<sup>160</sup> The court acknowledged the expert declaration but quickly said the professor's statements were already "well-established" in the record.<sup>161</sup> Pointedly, the court also noted that the government brief, while flush with factual assertions, "ignored" the dispositive legal issue in the case.<sup>162</sup>

#### IV. POLICY RECOMMENDATIONS

Despite these initial concerns, I encourage the United States to expand its use of statements of interest in civil rights cases. Still, I provide in Part IV some policy recommendations to help address some of the troubling issues described in Part III. This Part urges increased structure and transparency. Part IV starts by advocating for a department-wide reporting mechanism and standardized practices with respect to filing statements of interest. This Part concludes by addressing the counterargument that my recommendations would undermine the executive's ability to promote civil rights by placing limitations on prosecutorial discretion.

##### A. *Creating a Reporting Mechanism*

The website of the Department of Justice's Civil Rights Division includes an index page titled "Appellate Briefs and Opinions."<sup>163</sup> On this page, the division commits to provide access, in a single location, to all appellate briefs filed since Sept. 1, 1999, and selected briefs filed before that date.<sup>164</sup> The Department of Justice has divided the appellate briefs into twenty-one recognizable civil rights categories (including affirmative action, immigration, police misconduct, and voting), and on the index page, the Civil Rights Division has provided links to individual pages for each category.<sup>165</sup> On each category page, the government provides the name of every case; the jurisdiction; a summary of the government's argument in the brief; links to copies of the government's briefs in either HTML or .pdf format; the date of filing; and links or citations to relevant opinions.<sup>166</sup>

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<sup>159</sup> *See id.* at 5–7.

<sup>160</sup> *See* *Wandering Medicine*, 906 F. Supp. 2d at 1092.

<sup>161</sup> *Id.* at 1089.

<sup>162</sup> *Id.* at 1088 n.2.

<sup>163</sup> *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., APPELLATE BRIEFS AND OPINIONS (Aug. 6, 2015), <http://www.justice.gov/crt/appellate-briefs-and-opinions-20>, archived at <https://perma.cc/58U6-AQAS>.

<sup>164</sup> *See id.*

<sup>165</sup> *See id.*

<sup>166</sup> *See, e.g.*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., AFFIRMATIVE ACTION (Nov. 3, 2015), <http://www.justice.gov/crt/appellate-briefs-and-opinions-10>, archived at <https://perma.cc/SXX5-99CQ>.

An online centralized compendium of all trial-level statements of interest<sup>167</sup> would produce numerous benefits for the government and the public. An online compendium in an easily sortable format would alert the public to idiosyncratic statements and help voters determine which civil rights are prioritized by the federal government. The Civil Rights Division has the web infrastructure to store the online compendium at relatively little cost. To spread the burden of collecting statements, the Department of Justice can create nationwide policies requiring each U.S. Attorney's Office to send its statements of interest to the Civil Rights Division for upload.

The Department of Justice's Title II website has other features that may prove useful as additions to the online compendium. The Title II website includes all available press clippings, speeches, and public testimony related to the statements of interest.<sup>168</sup> If the online compendium included all related public statements, the resource would be more comprehensive and authoritative. In addition, on the Title II website, the Department of Justice has provided a public statement that outlines its overall views on the integration mandate.<sup>169</sup> Likewise, in the online compendium, the Department of Justice can publish general statements about its views on major area of civil rights litigation, and those statements potentially will deter individuals from committing future rights violations.<sup>170</sup> The statements also ensure consistency among U.S. Attorney's Offices with respect to legal stances.<sup>171</sup> Finally, publishing a general statement sends a signal that the civil right at issue is a priority for the federal government. The published statements would encourage Assistant U.S. Attorneys to look for — and plaintiffs and their lawyers to file — non-frivolous lawsuits relating to those civil rights.

Finally, the Department of Justice should consider three relatively low-cost<sup>172</sup> policies that would address the “flood[ ]” of lobbyists meeting with

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<sup>167</sup> For the rest of Section IV.A, I use the term “online compendium” to refer to the website central to my proposed centralized reporting mechanism.

<sup>168</sup> See, e.g., U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Olmstead* Speeches, Testimony, and Press Releases, [http://www.ada.gov/olmstead/olmstead\\_press.htm](http://www.ada.gov/olmstead/olmstead_press.htm), archived at <https://perma.cc/L8BR-ZGVF>.

<sup>169</sup> See, e.g., U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Olmstead* Technical Assistance, [http://www.ada.gov/olmstead/olmstead\\_ta.htm](http://www.ada.gov/olmstead/olmstead_ta.htm), archived at <https://perma.cc/B9L6-9M7B>.

<sup>170</sup> See *supra* Part II.

<sup>171</sup> The Civil Rights Division need not file every statement of interest; rather, any of the U.S. Attorney's Offices can participate. See, e.g., Statement of Interest of the United States, *supra* note 43 (reporting the attorney of record as Vincent H. Cohen, Jr., Acting U.S. Attorney for the District of Columbia, and not any lawyer from the Civil Rights Division, the Solicitor General's Office, or other divisions of the Department of Justice); Statement of Interest of the United States, *supra* note 35 (same, but with Preet Bharara, U.S. Attorney for the Southern District of New York).

<sup>172</sup> Of course, government litigation demands time and money, but the resources spent likely would not be significantly more than what the government currently uses in issuing statements of interest. The government could also consider making available the information at a reasonable cost to private citizens. Such a system could mimic the payment system used for public disclosure requests under the Freedom of Information Act, 5 U.S.C. § 552(4) (2014). Outlining the contours of the payment system is outside the scope of this Note.

Justice officials about statements of interest.<sup>173</sup> First, the department should publicize on its online compendium whether any private actors had contacted the government with respect to cases in which it ultimately participates. Second, the department should report the identities of frequently appearing lobbyists, so that the public is aware of pro-civil rights and anti-civil rights groups that are vying for significant attention from the Department of Justice. Third, the government should annually report the number of private requests they get for each civil rights category. The information, while not relevant to the legal analysis, would increase government transparency and foster public trust in the executive branch as it enforces its civil rights agenda. In addition, the reporting would allow the public to mobilize, if any undue influence ever occurs behind the scenes.

The resulting online compendium and public disclosures could serve as an easy-to-use resource — as a supplement to the USABook, the Department of Justice’s internal online legal resource<sup>174</sup> — for federal prosecutors who are interested in finding model briefs for cases in their jurisdiction. The online compendium also could help state prosecutors interested in writing amicus briefs in state lawsuits, and put the public on notice about current viewpoints of the Department of Justice’s civil rights agenda. To the extent that the public disagrees with certain decisions by the government, voters can serve as a soft check.<sup>175</sup> The greater transparency established by the online compendium would be a significant improvement from the current government practice: publication of some statements in different parts of the Department of Justice website, and the sporadic mention of amicus statements in speeches or press releases.<sup>176</sup>

### B. Maintaining Standardized Practices

In addition to increasing transparency about the practice of issuing statements of interest, the federal government should publish in its U.S. Attorneys’ Manual, the official guidebook for all prosecutors, broad policy

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<sup>173</sup> See *supra* Section III.B; see also Apuzzo, *supra* note 5.

<sup>174</sup> See, e.g., U.S. DEP’T OF JUSTICE, FY 2013 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION 33, <http://www.justice.gov/sites/default/files/jmd/legacy/2013/09/21/fy13-usa-jus-tification.pdf> (describing USABook), archived at <https://perma.cc/6SGD-APGA>.

<sup>175</sup> See *supra* Section III.B.

<sup>176</sup> See, e.g., U.S. DEP’T OF JUSTICE, OFFICE OF PUB. AFFAIRS, *Department of Justice Files Statement of Interest in Kentucky School Handcuffing Case* (Oct. 2, 2015), <http://www.justice.gov/opa/pr/department-justice-files-statement-interest-kentucky-school-handcuffing-case>, archived at <https://perma.cc/7FWP-R36W>; U.S. DEP’T OF JUSTICE, OFFICE OF PUB. AFFAIRS, *Attorney General Holder Announces Department of Justice Filings in Voting Rights Cases in Wisconsin and Ohio* (July 30, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-announces-justice-department-filings-voting-rights-cases-wisconsin>, archived at <https://perma.cc/2M8F-ZL4M>; U.S. DEP’T OF JUSTICE, OFFICE OF PUB. AFFAIRS, *Assistant Attorney General Thomas E. Perez Speaks at the National Congress of American Indians’ 69th Annual Convention* (Oct. 23, 2012), <http://www.justice.gov/opa/speech/assistant-attorney-general-thomas-e-perez-speaks-national-congress-american-indians-69th>, archived at <https://perma.cc/2358-HD77>.

guidelines for how prosecutors should file such statements. Currently, there are none.<sup>177</sup>

When drafting the guidelines, the Department of Justice should consider the following relatively low-cost litigation practices, all of which are taken from statements of interest filed across the country: (1) start the statement with a section articulating the federal government's interest in the private lawsuit;<sup>178</sup> (2) file notices of potential interest early in litigation;<sup>179</sup> and (3) file a proposed briefing schedule for its amicus statement and potential response.<sup>180</sup> Finally, in order to abate concerns from the judiciary about interference with its fact-finding role, the United States should consider a general policy of providing only legal interpretations in statements of interest and, if need be, explicitly articulating the types of civil rights cases in which the department will engage in factual analysis.<sup>181</sup>

Like the Department of Justice's *Petite* policy, which provides guidance on dual prosecutions,<sup>182</sup> the policy guidelines for statements of interest would not impose any legal obligations on the executive branch.<sup>183</sup> Still, the guidelines would institutionalize responsible amicus-writing practices already in use by some Department of Justice attorneys. Because statements of interest can be filed by any prosecutor's office, not merely the Civil Rights Division, standardization of practices might be helpful to prosecutors less experienced with civil rights litigation. Moreover, the guidelines would provide sufficient notice of the amicus practice to litigants and judges, the latter of whom will scrutinize the statements and assess whether the government has unduly intruded in the private lawsuit. Finally, the guidelines help

<sup>177</sup> See generally U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL (lacking guidelines on statements of interest), <http://www.justice.gov/usam/united-states-attorneys-manual>, archived at <https://perma.cc/NZ3Q-LEHZ>.

<sup>178</sup> See, e.g., Statement of Interest of the United States at 1–2, *Native Am. Council of Tribes v. Weber*, No. 09-cv-4182 (D.S.D. 2012), ECF No. 181. Although the vast majority of statements include such a section, some do not. See, e.g., Statement of Interest of the United States of America, *Kohala Coast Enters., LLC v. The Unidentified Shipwrecked Vessel*, No. 12-cv-552-SOM-RLP (D. Hawaii 2013), ECF No. 44.

<sup>179</sup> See *supra* note 147; see also, e.g., Order, *Salini Construttori S.P.A. v. Kingdom of Morocco*, No. 14-cv-2036 (D.D.C. May 28, 2015), ECF No. 21; see also Notice of Intent to File a Statement of Interest, *Salini Construttori, supra* (answering the court's order and committing to writing a statement of interest within a month), ECF No. 36; Statement of Interest of the United States of America, *Salini Construttori, supra*, ECF No. 40.

<sup>180</sup> See, e.g., Letter, *Georges v. United Nations*, No. 13-cv-7146 (S.D.N.Y. Apr. 22, 2014), ECF No. 28 (offering schedule); see also Memo Endorsement, *Georges, supra* (approving a modified version of proposed schedule with earlier filing date for initial statement of interest).

<sup>181</sup> See *supra* Section III.C.

<sup>182</sup> See U.S. DEP'T OF JUSTICE, 9.2031 – DUAL AND SUCCESSIVE PROSECUTION POLICY (“PETITE POLICY”) (July 2009), <http://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031>, archived at <https://perma.cc/B279-LM82>; see also *Petite v. United States*, 361 U.S. 529, 530–31 (1960) (describing policy).

<sup>183</sup> Like the *Petite* policy, my proposed guidelines are not mandated by federal statutes or the U.S. Constitution and therefore do not confer rights upon defendants. Cf., e.g., *United States v. Shell*, 592 F.2d 1083, 1087–88 (9th Cir. 1979) (asserting that optional *Petite* policy does not confer rights upon defendants); *United States v. Howard*, 590 F.2d 564, 567–68 (4th Cir. 1979) (same); *United States v. Frederick*, 583 F.2d 273, 274–75 (6th Cir. 1978) (same).

make the statements impervious to legal attack, such as a claim of prejudice by the party accused of infringing individual rights.<sup>184</sup>

### C. *Curtailing Prosecutorial Flexibility*

The recommendations that I have offered would create greater transparency and structure within the Department of Justice as it expands its use of statements of interest. However, transparency and structure inevitably create limitations on prosecutorial discretion, which arguably can help the government promote liberty and civil rights through “flexibility and sensitivity.”<sup>185</sup> As Stephanos Bibas wrote in the criminal law context, “[d]iscretion is bad only when it becomes idiosyncratic, unaccountable, or opaque.”<sup>186</sup> I submit that a reporting mechanism and uniform amicus-writing guidelines allow prosecutors not only to remain flexible but also to practice prudence.

First, my recommendations are only minor limitations on discretion. They do not force the government to take particular positions about civil rights. Although this Note has shown how trial-level amicus statements can serve as tools for furthering civil rights,<sup>187</sup> I recognize that the government can (and should) consider countervailing interests. The government may find it necessary to advance legal positions that constrain or even restrict civil rights. I suggest only that the Department of Justice be explicit about its considerations and structure all of its statements in a consistent fashion.

Second, the federal government has made clear to the press that it wants to further civil rights through statements of interest, and new policy guidelines may help the government advance this goal. As I explained *supra*, greater transparency about the government’s position on certain civil rights might deter future rights violations. A standardized process for creating statements of interest will also ensure that certain professional standards are met, that trial courts know what to expect in government briefs, and that line prosecutors do not file amicus statements in an arbitrary fashion.<sup>188</sup> Of course, whether greater flexibility or greater structure would further the government’s civil rights agenda more effectively is an empirical question. But

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<sup>184</sup> When Lockheed Martin claimed prejudice from a statement of interest, the plaintiff responded that the government only discussed “four specific legal issues that have been raised . . . . The United States did not take a position on the factual issues in this matter, the merits of the relator’s allegations, or the ultimate question of liability in this case. Consequently, any prejudice to the parties is minimal.” See, e.g., Response to Lockheed Martin’s Motion to Strike the United States’ Statement of Interest Regarding Lockheed Martin’s Motion for Summary Judgment at 4–5, United States ex rel. Hooper v. Lockheed Martin Corp., No. 08-cv-561-BRO-PJWx (C.D. Cal.), ECF No. 311, 2013 WL 11075960 at \*1.

<sup>185</sup> State v. Pickering, 462 A.2d 1151, 1160–61 (Me. 1983).

<sup>186</sup> Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 372 (2010).

<sup>187</sup> See *supra* Part II.

<sup>188</sup> State v. Karpinski, 285 N.W.2d 729, 735 (Wis. 1979) (arguing that prosecutorial discretion fails when the resulting action is “arbitrary, discriminatory[,] or oppressive”).

experimenting with Department of Justice policies now and collecting information about their effects will only help the government determine the optimal level of structure and flexibility to further civil rights.

Finally, to some extent, flexibility must yield to public accountability. Given that the United States has asserted an interest in furthering civil rights through its statements of interest, the online compendium will ensure that the government remains faithful to the stated goal — and that the public will be aware of inconsistencies and can respond in kind. If the Department of Justice's litigation strategy is not to further civil rights, it is difficult to see why the government must start voicing its legal opinions at the trial level, a stage of litigation that so far has received little attention by the public. Without greater transparency, the public — the ultimate beneficiaries of civil rights litigation — lacks the knowledge to respond by voting in the next election. Additional reporting will help clarify what the Department of Justice's litigation priorities truly are, and whether the government's decision on how to expand use of trial-level statements of interest comports with the public's vision of civil rights.

#### CONCLUSION

This Note intends to start a discussion about federal trial-level statements of interest and civil rights litigation. I have performed original research on these amicus briefs, compiled the publicly available information about them, and demonstrated their recent and rapid rise. The governmental practice is booming: During several months of 2015, the Department of Justice was issuing such statements of interest every few days. As this Note shows, the current governmental filings differ significantly from the amicus briefs filed in the early years of our nation. Moreover, federal and state courts are still determining how much to defer to these civil rights statements and whether they are undue intrusions into private litigation. Nonetheless, we should encourage this new practice in civil rights litigation, insofar as the statements filed are rights-protective.

So far, so good. The Obama Administration was committed to advancing and protecting civil rights. The Trump Administration may not. The use of amicus statements is an exciting opportunity in civil rights litigation, but like any enforcement tool, it needs soft checks against the whims of politics. In addition to alerting the public to statements of interest, this Note advocates for greater transparency and structure. It recommends that the Department of Justice create a centralized public reporting website and publish general guidelines about its trial-level statements of interest. While curtailing some of the federal government's flexibility, my recommendations likely will fortify the statements of interest and — more importantly — civil rights.