

Sixty Years of American Psychological Association

Amicus Curiae Briefs:

1962 to 2022

LEGAL UPDATE

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Dynamic Internet resources like SCOTUSblog (<https://www.scotusblog.com/>) are useful for staying abreast of news and analyses of legal happenings—and in the case of SCOTUSblog, those of the Supreme Court of the United States (SCOTUS), specifically. With respect to updates about the legal side of the psychology and law interface, the websites of the American Psychology–Law Society (AP-LS; <https://ap-ls.org/> and <https://www.apadivisions.org/division-41>) may currently be a far cry from the dynamism of a website like SCOTUSblog. However, AP-LS’s social media presence (Facebook: <http://www.facebook.com/APLS41> and Twitter: <https://twitter.com/APLS41>) is a step in that direction.

Thus, it occurred to us, for the first author’s last column as editor of the Legal Update column of *AP-LS News*, to submit an entry that might serve as another step—albeit a humble one—in the direction of imitating some of the impressive offerings from SCOTUSblog, but specific to psychology and law. And so rather than focusing on SCOTUS, we thought to focus on the *amicus curiae* briefs (*amicus* briefs, for short) of AP-LS’s parent organization, the American Psychological Association (APA; <https://www.apa.org/about/offices/ogc/amicus>).

To imitate some of SCOTUSblogs’s statistics (<https://www.scotusblog.com/statistics/>), the first part of this column summarizes APA’s history of *amicus* briefs in terms of number of filings by decade and topics. In doing so, we expand upon similar prior data reported by Gilfoyle and Dvoskin (2017). Then, to imitate SCOTUSblogs’s coverage of cases recently on SCOTUS’s docket (<https://www.scotusblog.com/case-files/terms/>), the second part of this column summarizes the three *amicus* briefs thus far submitted by APA in the 2020s.

APA *Amicus* Briefs Statistics Through April 2022

For all filings by APA (196 *amicus* briefs, 1 letter in support of certiorari, and 1 letter in support of petition for review) posted at <https://www.apa.org/about/offices/ogc/amicus>, we coded case name (which we occasionally revised based on the name of the ultimate court decision), the date the brief was filed, the court with which the filing occurred, and the index topics reported by APA. We next recoded dates into years and months and court by jurisdiction (state or federal, and trial, intermediate appellate, and highest appellate), and recoded index topics to streamline them (from 80 to 40). Finally, we calculated frequency counts and generated summary visuals.

Notably, Gilfoyle and Dvoskin (2017) reported some similar statistics through 2016 in describing the history of APA’s *amicus* program. But given the dynamic spirit of our column

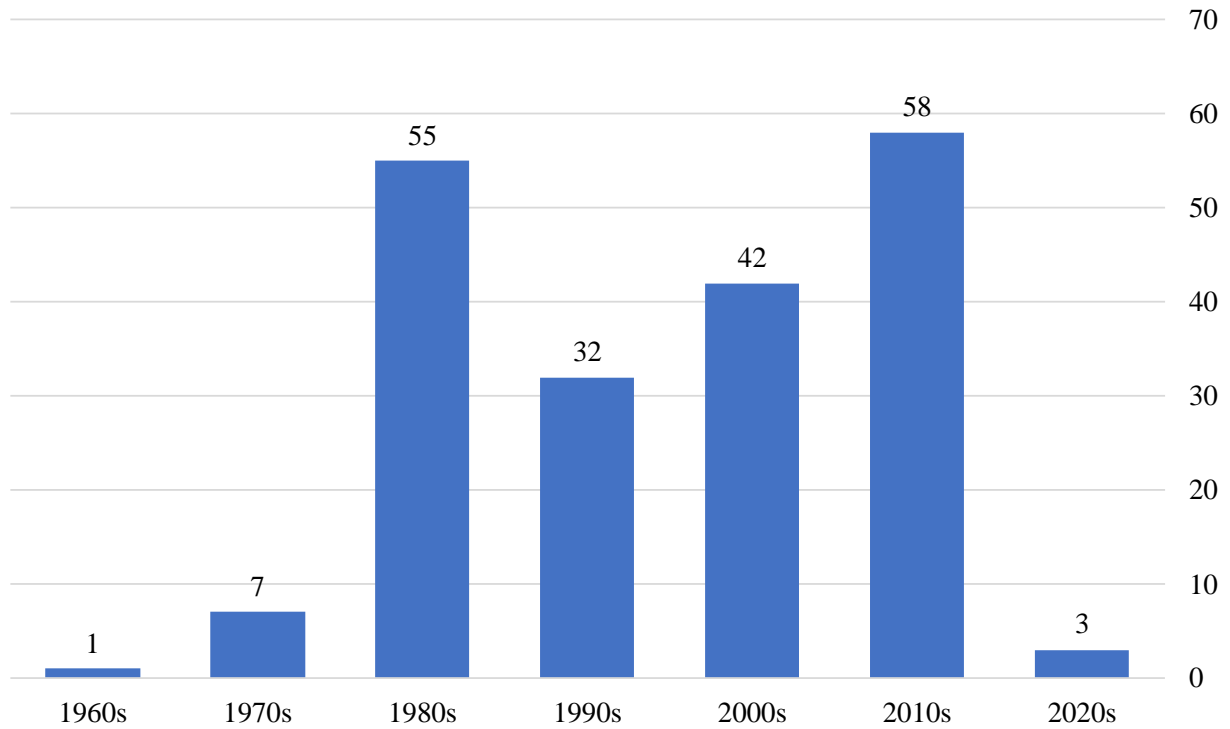
entry, we are also making available the data set we compiled for periodic updating by AP-LS or others (https://osf.io/732df/?view_only=8db2c10cd4fd4852bca9ec36d264a612). The data set includes the names of all cases (and hyperlinks to the ultimate court decisions whenever available) in which APA has submitted filings (and hyperlinks to those filings), and it can also be searched and sorted—for students and professionals interested in the specific legal cases (and specific index topics) in which APA has intervened with its advocacy

Filings by Decades

Beginning in 1962 and up to April 2022, APA submitted 198 filings (again, 196 of which were *amicus* briefs; Figure 1). APA filed a modest number of briefs during the 1960s and 1970s before markedly increasing its number of filings beginning in the 1980s and each decade thereafter—though having filed only a modest number of *amicus* briefs thus far during the 2020s.

Figure 1

APA Filings by Decade

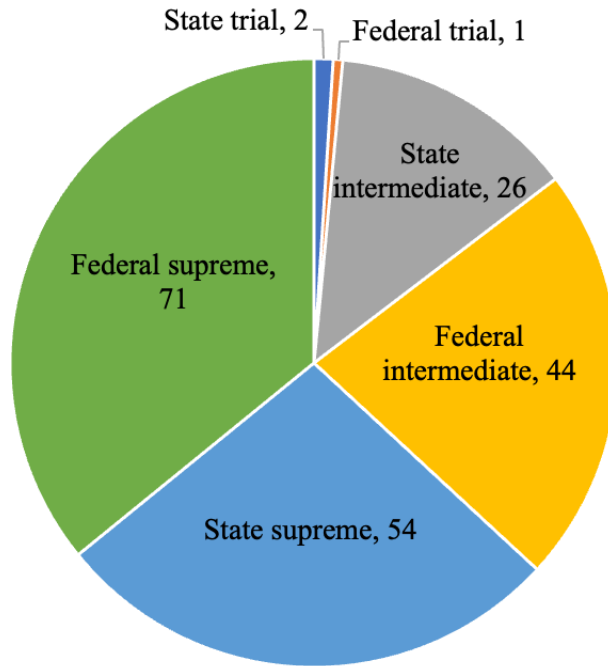


Filings by Court Jurisdiction

APA most often submitted filings with SCOTUS or state supreme courts, followed by federal and state intermediate appellate courts (Figure 2). Exceedingly few filings occurred with federal or state trial courts.

Figure 2

APA Filings by Court Jurisdiction



Index Topics

APA has tagged its filings by 80 index topics, which we streamlined into 40 (Table 1). Some cases were tagged with multiple index topics, each of which we counted. In total, filings had been tagged 260 times. The largest number of filings ($n \geq 10$) pertained to the topic of sexual orientation, followed by expert witnesses, the death penalty, confidentiality, abortion, the rights of persons with mental illness or intellectual disability, and the right to refuse medication.

Table 1*Index Topics for APA Filings*

#	Index topic	80 topics	40 topics
1	Abortion	5	12
2	Abortion (abortion rights; Medicaid funding)	1	
3	Abortion (mandated pre-abortion counseling)	1	
4	Abortion (mandatory counseling; adolescent abortion)	1	
5	Abortion (parental notification)	4	
6	Affirmative Action	6	6
7	Animal Research	2	2
8	Antitrust	3	3
9	Battered Women's Syndrome	2	2
10	Child Abuse/Child Witnesses	1	3
11	Child Abuse/Child Witnesses (child abuse reporting laws)	1	
12	Child Abuse/Child Witnesses (protection of child witnesses)	1	
13	Child Sexual Abuse	1	1
14	Civil Commitment	2	2
15	Competency	2	6
16	Competency (to be executed)	3	
17	Competency (to waive rights)	1	
18	Confidentiality/Psychotherapist-Patient Privilege	14	14
19	Copyright	2	2
20	Criminal Defendant's Right to Assistance of Mental Health Professionals (psychiatric evaluations)	2	4

21	Criminal Defendant’s Right to Mental Health Assistance	1	
22	Criminal Defendant’s Right to Mental Health Assistance (psychiatric evaluations)	1	
23	Death Penalty	10	14
24	Death Penalty (death-qualified juries)	1	
25	Death Penalty (juveniles)	1	
26	Death Penalty (mentally retarded)	1	
27	Death Penalty Mentally Ill	1	
28	Defamation	1	1
29	Disabilities/Rights under the ADA	2	2
30	Duty to Warn/Protect	8	8
31	Employee Retirement Income Security Act (ERISA)	2	2
32	Employment	2	8
33	Employment (First Amendment)	3	
34	Employment (gender)	1	
35	Employment (race)	1	
36	Employment (sexual harassment)	1	
37	Environmental Impact Analyses	2	2
38	Expert Witnesses	1	15
39	Expert Witnesses/Psychologists’ Competency	14	
40	Eyewitness Identification	3	9
41	Eyewitness Identification Research	6	
42	False Confessions	9	9
43	Gay, Lesbian and Bisexual Parenting	7	7
44	Gender Identity	1	1

45	Hospital Privileges for Psychologists	1	1
46	Insanity Defense	7	7
47	Juvenile Sentencing	2	2
48	Marriage Equality	3	3
49	Medicare	1	1
50	Medication (right to refuse)	10	10
51	Mentally Ill and Mentally Retarded (rights of)	8	9
52	Mentally Retarded (rights of)	1	
53	Neuropsychologists' Competency (brain injury assessment)	7	7
54	Peer Review	1	1
55	Psychologists' Scope of Practice	2	8
56	Psychologists' Scope of Practice/Reimbursement for "Mental Health" Services	6	
57	Residential Treatment	3	3
58	Rights of Incarcerated Persons to Mental Health Treatment	1	1
59	Scientific Research	1	6
60	Scientific Research (animal research)	1	
61	Scientific Research (confidentiality of unfunded grant proposals)	1	
62	Scientific Research (environmental impact statement)	2	
63	Scientific Research (libel/slander)	1	
64	Sexual Harassment	1	1
65	Sexual Orientation	5	58
66	Sexual Orientation (anti-sodomy law)	7	

67	Sexual Orientation (custody)	5	
68	Sexual Orientation (discrimination; adoption)	3	
69	Sexual Orientation (discrimination; marriage equality)	2	
70	Sexual Orientation (discrimination; marriage)	5	
71	Sexual Orientation (discrimination; same-sex marriage)	19	
72	Sexual Orientation (discrimination)	2	
73	Sexual Orientation (general)	1	
74	Sexual Orientation (military)	2	
75	Sexual Orientation (sodomy)	2	
76	Sexual Orientation (visitation)	1	
77	Sexual Orientation—Custody	1	
78	Sexual Orientation—General (discrimination)	1	
79	Sexual Orientation/Sexual Orientation Change Efforts (SOCE)	2	
80	Tests (use, validity, & security of psychological tests & test data)	7	7

Note. The 40 collapsed index topics are in boldface. *Mental retardation* was the term used by APA in its index topics.

Future Directions

A helpful future direction would be to categorize all of APA's *amicus* briefs by whether the court of submission decided the case consistently with APA's advocacy, or whether the case was resolved on other (e.g., procedural) grounds. It may also be informative to ascertain and code other organizations that have joined APA in its filings. Furthermore, periodically updating the data set we have made available (e.g., at the start of each new decade) would also be helpful to maintain an up-to-date and user-friendly summary of the useful information provided by APA on its *amicus* briefs website.

APA *Amicus* Briefs Thus Far Filed During the 2020s

Thus far during the 2020s, APA has submitted two *amicus* briefs on the topic of sexual orientation (consistent with its high level of advocacy in this area over the years, first tracing back to 1983 and the SCOTUS case of *New York v. Uplinger*, 1984), and one on the topic of false confessions (an area of more moderate advocacy on the part of APA, first tracing back to 2008 in the Pennsylvania Supreme Court case of *Commonwealth v. Wright*, 2011). At the time of this entry, SCOTUS has rendered its decision in the case of *Fulton v. Philadelphia* (2021) and the Texas Court of Criminal Appeals has rendered its decision in the case of *Ex parte Lucio* (2022). The appeal in the case of *Tingley v. Ferguson* (2021) is still pending before the United States Court of Appeals for the Ninth Circuit.

***Fulton v. Philadelphia* (filed in 2020, decided in 2021)**

The case of *Fulton v. Philadelphia* (2021) arose out of the City of Philadelphia freezing referrals to and signaling its refusal to contract in the future with a private Catholic foster care agency due to the latter's refusal to certify same-sex couples as foster parents. The city took the position that such refusal violated a local non-discrimination ordinance as well as non-discrimination provisions in the contract between the city and the agency. The agency and three foster parents sued the city in federal court, claiming its actions violated both the Free Exercise and Free Speech Clauses of the First Amendment. The District Court denied preliminary relief for the plaintiffs and the Court of Appeals for the Third Circuit affirmed.

Upon SCOTUS granting *certiorari* to review the case, APA, joined by the American Academy of Pediatricians, American Medical Association, and American Psychiatric Association, submitted an *amicus* brief in 2020 (Brief for American Psychological Association et al. as Amici Curiae Supporting Respondents, *Fulton v. Philadelphia*, 2021). APA et al. urged that there was scientific support for the city's interest against sexual orientation-based discrimination. Namely, that stigma-based discrimination against sexual minorities, in general, is associated with psychological and physical health problems, and that stigma against such persons is specifically evident in the public child welfare system. APA et al. also advised that there was scientific support for the city's interest that children have access to all qualified families. Namely, that research supports child adjustment relating to factors such as the quality of relationships with parents and other significantly involved adults, and economic and related resources of a family. APA et al. further noted that research did *not* support that sexual minority parents were less fit than opposite-sex parents, nor that the former's children were less well-adjusted or psychologically healthy. Finally, APA reported statistics evidencing the sizable need for foster parents and that many sexual minority parents raise foster and adopted children.

SCOTUS ultimately held contrary to the APA and the partnering medical organizations' advocacy in support of the city, ruling that the city's refusal to contract with the agency unless the latter agreed to certify same-sex couples as foster parents violated the Free Exercise Clause of the First Amendment. The Court factually distinguished precedent relied upon by the lower courts (*Employment Division v. Smith*, 1990), determining that the city's discretionary process for individualized exemptions, as reflected in the city's foster care contract, burdened the agency's free exercise in ways that were not generally applicable (the Court commented that, since it was able to decide this threshold issue in reference to a general applicability standard, it did not need to also decide it in reference to a separate neutrality standard from *Smith*). Furthermore, the Court determined that the local ordinance prohibiting sexual orientation-based discrimination in public accommodations—which applied to services classically made available to the public, like hotels, restaurants, and public transportation—did not extend to the more selective nature of foster parent certification.

Returning then to the contractual provisions, since the Court determined them to be not generally applicable in operation, it indicated that they were subject to strict-scrutiny review, whereby the government must have a compelling interest in its policy and said policy must be narrowly tailored to those interests. The Court narrowed the question to whether the city had a compelling interest in denying the agency an exemption (rather than its interest in protecting against non-discrimination in general) and reasoned that the agency was merely seeking an exemption to continue its longstanding mission consistent with its religious beliefs, without seeking to impose those beliefs on others. The Court ultimately held that the refusal to grant the exemption under such circumstances did not survive the requirements of strict scrutiny. And having decided the case under the Free Exercise Clause of the First Amendment, SCOTUS did not separately consider whether the Free Speech Clause had been violated.

Neither the majority nor the three concurring opinions made reference to the APA et al. *amicus* brief. None of these opinions ever use the word *stigma* either. Interesting also is the religious composition of the nine Justices at the time: six Catholic Justices, one Episcopalian Justice who was raised Catholic, and two Jewish Justices (Newport, 2022).

Ex parte Lucio (filed in 2022, decided in 2022)

The case of Ex parte *Lucio* (2022) concerns a capital prosecution and sentencing of a woman for the death of her two-year-old daughter. While the details of evidence in the case vary across recounting court decisions (see *Lucio v. State*, 2011; *Lucio v. Davis*, 2019; *Lucio v. Lumpkin*, 2021), highlights include the following: That the child evidenced a history of being severely abused and neglected. That the child died due to head trauma, with Ms. Lucio claiming that her daughter had fallen down a set of stairs for reasons unknown to Ms. Lucio. That Ms. Lucio was interrogated late at night for several hours soon after her daughter died, during which she eventually confessed to abusing the child and made vague statements of “I guess I did it” and “I did it” to an interrogator and her sister, respectively. That Ms. Lucio was directed to spank a doll to show how she had spanked her daughter, with the interrogator coaching her to spank the doll harder, and this filmed demonstration being played to the jury. And that proffered expert social work and psychological testimony for the defense was excluded from the guilt phase of the trial, about the effects of the defendant's history of being abused herself including a tendency to falsely take on blame.

In 2008, Ms. Lucio was convicted of capital murder, and she was afterward sentenced to death following the Texas jury being persuaded of proof of the future-dangerousness special issue. Since then, the case has been variously appealed and *habeas corpus* relief sought throughout both the state and federal systems. The case was most recently before the Court of Criminal Appeals of Texas on a writ of *habeas corpus* and motion to stay Ms. Lucio's execution. APA submitted an *amicus* brief to this court in 2022 that was joined by the National Association of Social Workers (NASW; Brief Amici Curiae of the American Psychological Association and the National Association of Social Workers in Support of Applicant, Ex parte *Lucio*). Therein, APA and NASW described research supportive of several general risk factors for false confessions that were evident in Ms. Lucio's case: the use of maximization and minimization techniques by law enforcement, lengthy interrogations, sleep deprivation, intellectual deficits, and past trauma or abuse. The brief urged the court to factor this research into its decision-making.

The Court of Criminal Appeals of Texas recently granted Ms. Lucio's writ of *habeas corpus*, two days before her scheduled execution on April 27, 2022. It remanded the case to the trial court for a review of the merits of four of Ms. Lucio's nine claims, including that "(1) but for the State's use of false testimony, no juror would have convicted her; (2) previously unavailable scientific evidence would preclude her conviction; [and] (3) she is actually innocent" (Ex parte *Lucio*, 2022, p. 1). Her execution was stayed until the remanded claims were resolved. Perhaps due in part to the advocacy of APA and NASW, Ms. Lucio is still alive at the time of this column entry.

***Tingley v. Ferguson* (filed in 2022, decision pending)**

The case of *Tingley v. Ferguson* (2021) involves a marital and family therapist who sued several Washington State officials in federal court (an intervening organization, Equal Rights Washington, also joined as a defendant) and sought a preliminary injunction against enforcement of a state law that prohibits rendering conversion therapy for sexual orientation or gender identity to minors (Wash. Rev. Code §§ 18.130.020, 18.130.050, 18.130.180, 18.225.030, West 2022). The therapist argued that the law violated his rights to free speech and free exercise of religion under the First Amendment and that the law was impermissibly vague and thus violated due process. In support of the defendants' motions to dismiss, an *amicus* brief was submitted by The Trevor Project, Inc., the American Foundation for Suicide Prevention, and the American Association of Suicidology.

The federal district court determined that the therapist had standing to challenge the law and his claims were ripe (both because his continued provision of prohibited conversion therapy to minors entails a real risk of enforcement against him) but that he did not have third-party standing to raise claims on behalf of his minor patients (as those clients are not hindered in their ability to pursue their own claims if they wished). Regarding the free speech claim, the therapist argued that the logic of a prior decision within the same federal circuit (Ninth Circuit) upholding a nearly identical law in California (*Pickup v. Brown*, 2014)—which distinguished between the levels of constitutional protection to be afforded to professional conduct vs. professional speech—had functionally been overruled by SCOTUS's 2018 decision in *NIFLA v. Becerra*, as supposedly recognized by the Ninth Circuit in the 2020 case of *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*. However, the district judge engaged in precision reasoning to distinguish these cases and conclude that *Pickup* was still good law, such that the state's conversion law was subject only to rational basis review, and that the law was rationally related

to the state’s interest in protecting the well-being of minors—including against harms caused by conversion therapy.

In regard to the therapist’s free exercise claim, the district judge also referred back to reasoning in *Pickup* that the state’s conversion therapy ban was prompted by a desire to protect minors rather than to infringe upon or restrict religiously motivated practices. Moreover, the therapist was free to exercise his religion in general; he was only forbidden from engaging in a certain type of conduct when functioning as a professional. Furthermore, because the judge had deemed that the law regulated professional conduct rather than speech, he rejected the therapist’s argument that the law implicated more than one constitutional right (free speech and free exercise) and should be subjected to a higher level of scrutiny under a “hybrid rights” theory.

Finally, concerning the therapist’s due process claim, the district judge reasoned that the terms and distinction between identity exploration and development (permissible) and working to change sexual orientation or gender identity (impermissible) were not vague (citing legal and dictionary definitions), especially for the knowledgeable class of licensed mental health professionals. He also rejected the therapist’s claim that it was impermissibly vague that “any . . . person” was empowered by the state law to bring in an action of enforcement against the therapist, for the therapist had clear notice about the conduct from which to abstain (*Tingley v. Ferguson*, 2021, p. 1143).

The district court ultimately granted the state defendants’ motion to dismiss (thereby rendering the intervening defendant’s motion to dismiss, and the plaintiff’s motion for a preliminary injunction moot). The therapist filed appeals with the United States Court of Appeals for the Ninth Circuit in September and October 2021, and the case remains pending. APA filed an *amicus* brief with this court in January 2022 (Brief of American Psychological Association as Amicus Curiae in Support of Defendants-Appellees and Affirmance). The *amicus* brief noted that both parties had discussed an APA report (American Psychological Association, Task Force on Appropriate Therapeutic Responses to Sexual Orientation, 2009) and resolution (*Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*; APA, 2009) from 2009, and more recent APA resolutions from 2021 (*APA Resolution on Gender Identity Change Efforts*; APA, 2021; *APA Resolution on Sexual Orientation Change Efforts*; APA, 2021), concerning sexual orientation change efforts (SOGE) and gender identity change efforts (GICE). APA alleged that the appellant (the therapist) had variously mischaracterized these sources, urging the court to discredit his position concerning the available scientific evidence and affirm the decision of the district court.

APA proceeded to discuss the history of SOGE and GICE up through its 2021 resolutions opposing both, while also highlighting that many other mental health professional organizations also oppose these practices (in addition to local, state, national, and international governmental trends against SOCE).¹ It then variously discussed the results of a systematic review conducted by the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation that informed its 2009 report, more recently reported studies, and reviews conducted by others, in support of its continued positions that SOCE and GICE have amassed little in the way of good-

¹ APA cited the positions of the American Academy of Child & Adolescent Psychiatry, American Association for Marriage and Family Therapy, American Counseling Association, American Foundation for Suicide Prevention, American Medical Association, American Psychiatric Association, American Psychoanalytic Association, and National Association of Social Workers.

quality scientific evidence for efficacy for change (of sexual orientation or gender identity), while also resulting in findings suggestive of risks for a wide range of psychological, social, and physical harms. APA additionally opined that youth, for developmental reasons, were especially vulnerable to the potential harms of SOCE and GICE, a position further buttressed by findings from recent studies conducted with adolescents and young adults. Furthermore, it described ethical reasoning about the need to balance respect for people's rights and dignity (e.g., self-determination) with other principles such as beneficence and non-maleficence (see, e.g., APA, 2017), toward its recommendations that clients and their families be provided with multiculturally competent and client-centered approaches rather than SOCE, and gender-affirming approaches rather than GICE (in addition to citing some research suggestive of positive effects of gender-affirming practices). Finally, APA sought to specifically rebut ways in which it argued the appellant in the case mischaracterized the APA's report and resolutions, and their underlying scientific bases.

APA's review of research in its brief could be critiqued for seeming more demanding with respect to persuasion about efficacy than for risk for harm. However, the rebuttal to this critique is that there is good reason to be especially sensitive to any concerning evidence about harmful effects of purportedly therapeutic approaches (maleficence) while simultaneously expecting higher-quality evidence that such approaches actually work to the benefit of clients (beneficence).

Time will tell whether the Ninth Circuit agrees with the district judge's thinking about how to distinguish the circuit court's reasoning in *Pickup* from the subsequent SCOTUS case of *Becerra*, such that the circuit court will uphold its prior *Pickup* decision as remaining good (and in the index case, dispositive) law. Of note, in its *amicus* brief, APA mentioned both that the California legislature relied on the 2009 APA report in banning mental health professionals from rendering SOCE to minors, and that the Ninth Circuit cited and discussed this report in upholding California's law in *Pickup*. Thus, APA's advocacy in the instant case may again prove persuasive on the federal appellate court.

However, regardless of what the Ninth Circuit decides, one can readily anticipate that one side or the other will be seeking a writ of *certiorari* from SCOTUS. Accordingly, sexual orientation, which has been the most frequent topic for APA's *amicus* advocacy (see Table 3), may well remain so during the 2020s, in addition to increasing advocacy around gender identity. Though considering that SCOTUS did not refer to the APA et al. *amicus* brief in the 2021 *Fulton* case discussed above, which involved religion-based challenges to a law meant to promote equality among sexual minorities, the receptivity of the current Justice to APA's advocacy around sexual and gender minorities is uncertain.

Conclusion

We hope that this column entry serves as a useful summary for those interested in the history of APA's *amicus* briefs and similar filings, and recent filings during the 2020s. For we believe that APA's *amicus* program represents an important sample of many of the most pressing intersections of psychology and law over the past 60 years. With the recent re-envisioning efforts for APA's *amicus* program (Ottaviano et al., 2022), we thought it timely to provide such a resource, with an eye to our summary being capable of efficient updating in the future (perhaps as a periodic resource of the *AP-LS News* Legal Update column).

Lastly, the first author wishes to thank AP-LS for the opportunity to have served as editor of the Legal Update column for *AP-LS News*, and all who contributed column entries during his editorship.

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