ADVISORY COMMITTEE ON APPELLATE RULES

Hearing on Proposed Amendments to Rules 29, 32, Appendix on Length Limits, and Form 4

February 14, 2025

HEARING ON PROPOSED AMENDMENTS TO APPELLATE RULES
FEBRUARY 14, 2025

ORDER OF WITNESSES

Please note that all times are Eastern. Timing is approximate and subject to change. Each witness will have ten minutes – five minutes for formal testimony and five minutes to answer questions from committee members.

	Time Slot	Name	Organization	Rule or Form
Chair's Welcome and Opening Remarks at 10:00 (ET)				
1	10:05—10:15	Sai	Fiat Fiendum	Form 4
2	10:15—10:25	Prof. Judith Resnik	Yale Law School	Form 4
3	10:25—10:35	Avital Fried	Yale Law School	Form 4
4	10:35—10:45	Anna Selbrede	Yale Law School	Form 4
5	10:45—10:55	Julia Udell	Yale Law School	Form 4
6	10:55—11:05	Carter Phillips	U.S. Chamber Litigation Center	Rule 29
7	11:05—11:15	Alex Aronson	Court Accountability	Rule 29
8	11:15—11:25	Lisa Baird	DRI Center for Law & Public Policy Amicus Committee	Rule 29
Break from 11:25 to 11:35 (ET) (estimated)				
9	11:35—11:45	Thomas Berry	Cato Institute	Rule 29
10	11:45—11:55	Molly Cain	NAACP Legal Defense and Educational Fund	Rule 29
11	11:55—12:05	Lawrence Ebner	Atlantic Legal Foundation	Rule 29
12	12:05—12:15	Doug Kantor	NACS Advancing Convenience & Fuel Retailing	Rule 29
13	12:15—12:25	Dana Livingston	American Academy of Appellate Lawyers	Rule 29
14	12:25—12:35	Seth Lucas	The Heritage Foundation	Rule 29

	Time Slot	Name	Organization	Rule or Form
15	12:35—12:45	Tyler Martinez	National Taxpayers Union Foundation	Rule 29
16	12:45—12:55	Sharon McGowan	Public Justice	Rule 29
17	12:55—1:05	Patrick Moran	NIFB Small Business Legal Center	Rule 29
Break from 1:05 to 1:35 (ET) (estimated)				
18	1:35—1:45	Jaime Santos	Goodwin Proctor	Rule 29
19	1:45—1:55	Stephen Skardon	American Property Casualty Insurance Association	Rule 29
20	1:55—2:05	Zack Smith	The Heritage Foundation	Rule 29
21	2:05—2:15	Gerson Smoger	Smoger & Associates	Rule 29
22	2:15—2:25	Tad Thomas	American Association for Justice	Rule 29
23	2:25—2:35	Larissa Whittingham	Retail Litigation Center	Rule 29
24	2:35—2:45	Kirsten Wolfford	American Council of Life Insurers	Rule 29
Final Questions & Closing Remarks at 2:45 (ET) (estimated)				

TAB 1

No written testimony outline or comment
was submitted by the requested January 29, 2025
deadline.

TABS 2-5

January 28, 2025

Advisory Committee on Appellate Rules
Judicial Conference of the United States
Via electronic submission

Dear Committee Members:

We are law professors and students, and we submit this comment in support of the proposed revision of Appellate Form 4, *Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis*.[1] As explained, "Revised Form 4 simplifies the existing Form 4, reducing the existing form to two pages. It is designed not only to reduce the burden on individuals seeking IFP status but also to provide the information that courts of appeals need and use, while omitting unnecessary information."[2] We hope the Advisory Committee will approve the recommendation and forward it to the Standing Committee.

Our views are informed by our research and that of many others. As is likely familiar, Professor Andrew Hammond has studied the forms used for *in forma pauperis* (IFP) applications in the federal district courts. In his article, *Pleading Poverty in Federal Court*, he documented the lack of uniformity in the forms that district courts use when individuals apply, pursuant to 28 U.S.C. § 1915, to proceed without prepayment of fees.[3]

As studies by the federal courts have documented, court staff and judges report spending considerable time on IFP applications. A 2005 survey of court staff reported that the respondents described apportioning five percent of their time on IFP matters and about thirty percent on initial merits screening in prisoner civil rights cases.[4] The Federal Judicial Center in 2011 chronicled the difficulties in assisting pro se litigants and the array of activities in district courts aiming to assist litigants.[5] By 2023, the judiciary dedicated $94 million to employ 471 clerks (termed "Pro se and death penalty" staff), of whom most "receive, prepare, and process civil complaints filed against the government by prisoners and other individuals without attorney representation."[6]

Additional research builds on data made available through Northwestern's Systematic Content Analysis of Litigation Events (SCALES), which coded 2016 and 2017 federal court docket sheets. One essay (co-authored by some of us) is *Lawyerless Litigants, Filing Fees, Transaction Costs, and the Federal Courts: Learning from SCALES*, which sought to learn about the relationship between self-representation and requests to proceed IFP.[7] In terms of outcomes of requests for IFP status, about forty percent of the cases for which SCALES had data, courts granted more than eighty percent of the IFP applications, whether filed by non-prisoners or prisoners.[8] In addition to the time spent on assisting and responding to such applications, legal questions have arisen about the criteria for determining IFP eligibility. Thus, federal judges at the trial and appellate levels have dealt with litigation over eligibility. Further, given the obligations for

prisoners granted IFP status to pay over time, court and prison staff time is also devoted to fulfilling those requirements. In short, contemporary practices impose costs on litigants who need to compile information, on judicial staff and judges who make decisions, and on institutions dealing with the financial interactions. Lowering the challenges and the need to invest time by simplifying forms—as is proposed for Rule 4 of the Appellate Rules—is an important step forward. The uniform, simplified approach would lessen the burdens of the current practice.

The proposed revisions are also responsive to concerns that forms can be misleading and confusing.[9] In 2022, the White House Legal Aid Interagency Roundtable published a report on "Access to Justice through Simplification." The Roundtable collected feedback from more than "70 state and local legal aid and advocacy organizations," including the recommendation to "simplify applications, forms, and notices."[10] Drawing on those materials, the Roundtable created a "Simplification Roadmap," highlighting best practices for simplification and noting that "[b]ecause legal assistance is rare, a simplification approach is essential to both increase the accessibility of the legal system and to reduce its costs."[11] The roadmap includes strategies to "simplify government forms," "eliminate unnecessary requirements" in forms or processes, and "use plain language."[12] Researchers at "justice labs," based at Stanford and Harvard Law Schools, have also identified the impact of making forms accessible to people who are not lawyers so that they can provide the information courts need.[13]

A body of case law also discusses such challenges. For example, Judge Rosenbaum on the Eleventh Circuit identified two problems: first, that court forms may demand "too much" from litigants, and second, that litigants may not understand the consequences of the answers to questions "they are being asked."[14] Other judges, describing the communication challenges, have responded by including in their opinions paragraphs summarizing the outcomes—a "plain language summary"—to enable self-represented litigants to understand the import of decisions.[15] The proposal to revise Form 4 fits within this agenda to "reduce the burden on individuals" while providing relevant information to the court for IFP determinations.[16]

In addition to supporting the proposal, we have a a few modest revisions to offer in furtherance of the goals for revision. To make it simple to see our suggestions, we set them forth in bold below.

Question 1 currently states "What is your monthly take-home pay from work?" We recommend: "What is your monthly take-home pay, **if any,** from work?"

Question 4 currently states "How much are your monthly costs for other necessary expenses (such as food, medical care, childcare, and transportation)?" We recommend: "How much are your monthly costs for other necessary expenses (such as food, medical care, childcare, **old-age or other dependents' needs,** and transportation)?"

Question 8 currently states: "Do you receive SNAP (Supplemental Nutrition Assistance Program), Medicaid, or SSI (Supplemental Security Income)? We suggest adding a short sentence to explain that some states have different names for the same programs. In Connecticut, for example, the name for Medicaid is HUSKY Health.[17] At the end of the question, we recommend adding: "**The names of these programs vary in some states**."

Our fourth suggestion addresses the placement of the sentence: "If there is anything else that you think explains your inability to pay the filing fees, feel free to explain below." Our concern is that the sentence's location after the paragraph on prisoners could lead some non-prisoners to believe the comments are not addressed to them and they are not to add additional explanations. To avoid that potential, we suggest rephrasing that sentence to read: "**For all applicants,** if there is anything else that you think explains your inability to pay the filing fees, please feel free to explain below. (Attach additional pages if necessary.)."

In sum, we hope the Advisory Committee will approve these recommendations for submission to the Standing Committee. Doing so will, we also hope, be a model for clarifying and simplifying the IFP process throughout the federal courts. Thank you for your consideration of these comments. Some of us will testify on February 14, 2025, and we look forward to the opportunity to discuss these suggestions and respond to questions.

Respectfully submitted,

Avital Fried,
Yale Law School '26

Myriam Gilles,
Paul R. Verkuil Chair in Public Law
Yeshiva University Cardozo School of Law

Andrew Hammond,
Associate Professor of Law, Indiana University Maurer School of Law

Alexander A. Reinert,
Max Freund Professor of Litigation & Advocacy
Yeshiva University Cardozo School of Law

Judith Resnik,
Arthur Liman Professor of Law, Yale Law School

Tanina Rostain,
Agnes Williams Sesquicentennial Professor Justice Innovation, Georgetown Law

Anna Selbrede,
Yale Law School ‘26

Lauren Sudeall,
David Daniels Allen Distinguished Chair of Law, Vanderbilt Law School

Julia Udell,
Yale Law School ‘26

[1] We provide our institutional affiliation for identification purposes only; we speak only for ourselves.
[2] Memorandum from IFP Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure (February 29, 2024), https://www.uscourts.gov/sites/default/files/2024-04-10_agenda_book_for_appellate_rules_meeting_final.pdf.
[3] Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (2019).
[4] NINTH CIR. JUD. COUNCIL TASK FORCE ON SELF-REPRESENTED LITIGANTS, FINAL REPORT 21 (Oct. 2005), https://cdn.ca9.uscourts.gov/datastore/judicial-council/publications/prose/FinalTaskForceReport.pdf.
DONNA STIENSTRA, JARED BATAILLON & JASON A. CANTONE, FED. JUD. CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES (2011), https://www.govinfo.gov/content/pkg/GOVPUB-JU7-PURL-gpo73052/pdf/GOVPUB-JU7-PURL-gpo73052.pdf).
[6] ADMIN. OFF. OF THE U.S. CTS., APPENDIX 1 - COURT SUPPORT STAFFING app. 1.7 (2024), https://www.uscourts.gov/sites/default/files/fy_2025_appendix_01_court_support_staffing.pdf [hereinafter APPENDIX 1 - COURT SUPPORT STAFFING]; ADMIN. OFF. OF U.S. CTS., COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES: SALARIES AND EXPENSES 4.8 (2024), https://www.uscourts.gov/sites/default/files/section_04_salaries_and_expenses.pdf). The formula for staffing levels (nine cases for a full-time death penalty clerk) suggests that about 50 were focused on capital cases. APPENDIX 1 - COURT SUPPORT STAFFING, *supra*, app. 1.7. In the Ninth Circuit, the “position of Pro Se Staff Attorney (PSSA) was sometimes referred to as Pro Se Law Clerk,” and “PSSAs track the cases, drafting IFP and screening orders.” Memorandum from Charles R. Pyle, Chair of Pro Se Litig. Comm., & James P. Donohue, Outgoing Chair of Pro Se Litig. Comm., to Ninth Cir. Judicial Council (Oct. 17, 2014), https://cdn.ca9.uscourts.gov/datastore/judicial-council/publications/prose/Pro_Se_Committee_Interim_Report_14.pdf.
[7] Judith Resnik, Henry Wu, Jenn Dikler, David T. Wong, Romina Lilollari, Claire Stobb, Elizabeth Beling, Avital Fried, Anna Selbrede, Jack Sollows, Mikael Tessema & Julia Udell, *Lawyerless Litigants, Filing Fees, Transaction Costs, and the Federal Courts: Learning from SCALES*, 119 NW. UNIV. L. REV. 109 (2024).
[8] *Id.* at 160.
[9] Richard Zorza, who coordinated a Self-Represented Litigation Network, stated that “[a]lthough it is a minor simplification step, the plain language and forms movement has shown how small changes in the process can have a significant impact throughout the system. Improvements in data collection potentially result in smoother processes and less wasted time.” Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845, 864 (2013). *See also* Hammond, *supra* note 3, at 1503-05.
[10] *Access to Justice through Simplification: A Roadmap for People-Centered Simplification of Federal Government Forms, Processes, and Language*, WHITE HOUSE LEGAL AID INTERAGENCY ROUNDTABLE 7 (2022), https://www.justice.gov/d9/2023-03/Legal%20Aid%20Interagency%20Roundtable%202022%20Report.pdf.

[11] *Id.* at 9.
[12] *Id.* at 11.
[13] *See Filing Fairness Toolkit: Simplifying Court Filing for All*, LEGAL DESIGN LAB & DEBORAH L. RHODE CTR. ON THE LEGAL PRO. (2023), https://filingfairnessproject.law.stanford.edu/wp-content/uploads/2023/11/SLS_FilingFairnessProject_FF.pdf; *see also Current Projects*, ACCESS TO JUST. LAB, https://a2jlab.org/current-projects; *Home*, SELF-REPRESENTED LITIG. NETWORK, https://www.srln.org.
[14] Wells v. Brown, 58 F.4th 1347, 1364 (11th Cir. 2023) (en banc) (Rosenbaum, J., joined by William Pryor, C.J., and Jill Pryor, J., concurring).
[15] Serna v. Irvine, No. 22–cv–02998–WJM–MDB, 2023 WL 2261143 (D. Colo. Feb. 28, 2023); Vora v. Dionne, No. 22–cv–00572–CNS–MDB, 2023 WL 1784227 (D. Colo. Feb. 6, 2023); Muniz v. Thompas, No. 2:21-cv-1820-TLN-AC (E.D. Cal. Mar. 23, 2023); Michael Karlik, *Federal Judge in Colorado Springs Deploys New Tool for Self-Represented Plaintiffs*, COLO. POLS. (Feb. 2, 2023), https://www.coloradopolitics.com/courts/federal-judge-in-colorado-springs-deploys-new-tool-for-self-represented-plaintiffs/article_daff024a-a30a-11ed-b3ce-3bab7614cebd.html; Michael Karlik, *Second Federal Judge in Colorado Adopts Plain English Summaries in Decisions*, COLO. POLS. (Mar. 10, 2023), https://www.coloradopolitics.com/courts/second-federal-judge-in-colorado-adopts-plain-english-summaries-in-decisions/article_fdad5baa-bec3-11ed-bb31-4399aa8d9a99.html).
[16] *Proposed Amendments Published for Public Comment*, U.S. CTS., https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment.
[17] *Medicaid By State: Alternative Names and Contact Information*, AM. COUNCIL ON AGING (July 10, 2023), https://www.medicaidplanningassistance.org/state-medicaid-resources.

TAB 6

U.S. Chamber of Commerce
Litigation Center

December 19, 2024

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle Northeast
Washington, District of Columbia 20544

Re: Request for Comments on Proposed Amendments to Rule 29

Dear Judge Bates:

I write to express the views of the Chamber of Commerce of the United States of America on the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure, including: (i) the proposal to require amici to disclose whether a party has contributed 25% of an amicus organization's total revenue in the past year; (ii) the proposal to require amici to disclose the identities of certain non-party associational members who contribute to the preparation of their own association's amicus brief; (iii) the proposal to eliminate the option to file an amicus brief on consent during a court's initial consideration of a case on the merits; and (iv) the proposal to bar supposedly "redundant" amicus briefs.

The Committee should reconsider these proposals. As discussed below, Rule 29 already safeguards the integrity of the judicial process with respect to amicus briefs, and it does so in a manner that is consistent with the First Amendment. The contemplated disclosure amendments to Rule 29 are unnecessary, and they are not sufficiently tailored to avoid encroachment on core associational rights. The disclosure amendments would also discriminate against established membership organizations compared with ad hoc associations by requiring greater disclosure of established organizations' members. That differential treatment, which itself raises First Amendment concerns, should be rejected.

The proposals to eliminate the consent option and to reduce the number of amicus briefs filed are likewise misguided. Rule 29's current framework champions judicial economy by permitting the parties to resolve most issues without the need for judicial intervention, while leaving courts free to ignore unhelpful or duplicative amicus briefs and to strike any that create recusal issues. Imposing additional hurdles pursues the wrong goal. It also will burden prospective amici, reduce the quality of amicus briefing, and add to courts' workload by cluttering their dockets with unnecessary motions for leave to file. These amendments should also be rejected.

1615 H Street, NW | Washington, DC 20062-2000 | 202.463.5337 | chamberlitigation.com

I. The Proposed Disclosure Amendments

A. Rule 29 already protects the integrity of amicus briefing in a manner consistent with the First Amendment.

As an initial matter, it is unclear why Rule 29 should be amended at all. As the Advisory Committee noted in its report to the Standing Committee on the Rules of Practice and Procedure, the Advisory Committee appointed a subcommittee to consider potential amendments to Rule 29 only "after learning of a bill introduced in Congress that would institute a registration and disclosure system for amici curiae like the one that applies to lobbyists," and in anticipation of congressional inquiries regarding the "disclosure requirements for organizations that file amicus briefs." Report of the Advisory Committee on Appellate Rules at 11 (revised Aug. 15, 2024) (appended to Preliminary Draft of Proposed Amendments) ("August Report"); *see* Letter from Sen. Sheldon Whitehouse & Rep. Henry C. Johnson to Hon. John D. Bates at 1, 6 (Feb. 23, 2021) ("Whitehouse Letter") (encouraging the Standing Committee to "address the problem of inadequate funding disclosure requirements" in order to root out "anonymous judicial lobbying").

Those concerns rested on a fundamental misapprehension of the role and purpose of amicus briefing in the federal courts. Amicus briefing is not a form of lobbying, as the Advisory Committee has acknowledged. *See* August Report at 12 ("[A]micus briefs are significantly different from lobbying. Amicus briefs are filed with a court, available to the public, and the arguments made by amici can be rebutted by the parties. Lobbying activity, by definition, consists of non-public attempts to influence the legislative or executive branch."). The influence of an amicus curiae is directly proportional to the persuasive value of the arguments presented in the briefs submitted by that amicus. The weight that courts afford to amicus briefs submitted by the ACLU, for instance, depends not on the individual identities of that organization's members or donors, but on the strength of the arguments made in the brief.

Indeed, the suggestion from some members of Congress that amicus organizations must disclose their members or donors to the public in order to shine a light on the "influence" of those "who seek to shape the law through the courts," Whitehouse Letter at 2, would *introduce* the very appearance of improper judicial influence that these members of Congress seek to avoid.[1] If anything, anonymity of an association's members confirms that an amicus brief submitted by that association will be accorded weight based on the strength of its arguments, rather than the identities or perceived influence of the association's members. Compelled disclosure of an amicus's members or donors threatens to undermine that system and create an appearance of judicial partiality where in truth there is none, either in appearance or in fact.

[1] The advisory committee notes that while "[s]ome have suggested that information about an amicus is unnecessary because the only thing that matters about an amicus brief is the merits of the legal arguments in that brief," "courts do consider the identity and perspective of an amicus to be relevant" at times. August Report at 38. While the identity of an amicus organization *itself*, and in turn, the unique perspective that the organization may bring to the case may be relevant, the advisory committee cites no evidence suggesting that judges are more or less likely to rule for a particular position because of the specific identities of the organization's *members*.

Calls for compelled disclosure of associational membership are also openly hostile to core First Amendment principles. There is a "vital relationship between [the] freedom to associate and privacy in one's associations." *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 606 (2021) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)). Accordingly, the compelled disclosure of an association's members inevitably exerts a "deterrent effect on the exercise of First Amendment rights." *Id.* at 607 (plurality) (quoting *Buckley v. Valeo*, 424 U.S. 1, 65 (1976)). For this reason, the First Amendment requires at least "exacting scrutiny" of governmental regulations that compel the disclosure of an association's membership. *Id.* at 607–08; *see also id.* at 619 (Thomas, J., concurring in part and concurring in the judgment) ("strict scrutiny [applies] to laws that compel disclosure of protected First Amendment association"); *id.* at 623 (Alito, J., concurring in part and concurring in the judgment) ("I see no need to decide which standard should be applied here."). Under the exacting scrutiny standard, "there must be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest'" that "reflect[s] the seriousness of the actual burden on First Amendment rights." *Id.* at 607 (plurality) (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)). Furthermore, the form and degree of compulsion must be "narrowly tailored to the government's asserted interest." *Id.*

As it stands—and has stood for years—Rule 29 appropriately conforms to those First Amendment principles. The disclosure requirements of Rule 29 address two concerns. First, they prevent parties from seeking to "circumvent page limits on the parties' briefs" by ghostwriting or otherwise directing the arguments presented in amicus briefs. Fed. R. App. P. 29 advisory committee notes. Second, they "help judges to assess whether the amicus itself considers the [case] important enough to sustain the cost and effort of filing an amicus brief." *Id.*

In its current form, Rule 29 is narrowly tailored to address those concerns. Specifically, Rule 29 requires amici to submit a statement disclosing whether: (i) "a party's counsel authored the brief in whole or in part;" (ii) "a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief;" and (iii) "a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person." Fed. R. App. P. 29(a)(4)(E). Those measures protect the integrity of amicus submissions by ensuring that amicus briefs genuinely reflect the views and interests of the amicus itself and are not simply supplemental party briefs. They do not broadly intrude on the privacy of the relationships between amicus organizations and their members, and thus do not deter amicus organizations or their members from submitting amicus briefs.

B. The contemplated disclosure amendments raise serious First Amendment concerns.

The disclosure amendments contemplated by the Advisory Committee reflect a subtle—but significant—departure from the principles that undergird the current disclosure mandates of Rule 29. To be sure, the amendments currently under discussion are not as radical as those previously proposed by certain members of Congress. *See, e.g.*, S. 1411 § 2(a), 116th Cong. (2019) (requiring that every amicus organization filing three or more amicus briefs per year disclose the identity of any person contributing at least $100,000 or 3 percent of the organization's revenues, and that such information be "made publicly available indefinitely" by the Administrative Office of the U.S. Courts). But they appear to share some of the same animating premises. As drafted,

the amendments go beyond the current objectives of Rule 29—designed to protect the integrity of amicus submissions—by more broadly compelling disclosure of associational relationships between an amicus and its members. Those new disclosure requirements threaten to infringe the associational rights of amicus organizations and their members.

1. Mandatory disclosure of the identities of significant contributors will inhibit the First Amendment rights of amicus organizations and their members.

First, the amendments under consideration would compel disclosure of the relationships between an amicus and its members in situations where the members are parties to a case in which the amicus submits a brief, and where such parties (either singly or collectively) are significant contributors to the general operations of the amicus. Specifically, an amicus would be forced to disclose whether "a party, its counsel, or any combination of parties, their counsel, or both has, during the 12 months before the brief was filed, contributed or pledged to contribute an amount equal to 25% or more of the total revenue of the amicus curiae for its prior fiscal year." August Report, Draft Proposal Rule 29(b)(4) (p. 35). And the amicus would further be required to disclose the identities of any such party or counsel. August Report, Draft Proposal Rule 29(c) (p. 35).

These provisions are unnecessary, counterproductive, and threaten to have a chilling effect on amicus organizations. They are unnecessary because Rule 29 already mandates disclosure of instances where a party (including a party that is a member of the amicus organization) has directed or shaped the content of an amicus brief either by authoring it (in whole or in part) or by directly contributing money for the preparation of the brief. Fed. R. App. P. 29(a)(4)(E)(i)–(ii). In those instances, disclosure well serves the purpose of alerting the court to the possibility that the "amicus brief" is substantively a party brief.

But that purpose is not served by mandating disclosure of a donor relationship between the party and the amicus anytime a combination of parties and counsel has contributed 25% or more of the general revenues of the amicus. There are instances in which an amicus organization that represents the interests of a particular industry or trade might have at least one large donor whose contributions account for over 25% of the organization's annual revenues. In those instances, the amicus organization cannot fairly be said to represent only the interests of the large donor; after all, such an organization will have other members and donors that account for up to 75% of its yearly revenues and that care deeply about the issues before the court. Where the large donor is a party to an appeal, an industry or trade association should be able to appear as amicus on behalf of its own interests—and the interests of its non-party members—without fear that its filing will be discounted as the work of the party itself. The disclosure rule under consideration threatens to deter filings from amici in those cases, thereby reducing the ability of non-party associational members to speak up (through their existing associations) in appeals that affect them.

This concern is especially acute with respect to appeals in which multiple participants in the same industry are named as parties, where the parties' contributions to an industry association may very quickly add up to 25% of the annual revenues of the amicus. In those cases, the interests of an industry-association amicus speaking up in support of those parties are well known. It is not clear what transparency interest is served by requiring the amicus to disclose whether any of those specific parties has chosen to be a member of the association. At the same time, forcing an amicus

to disclose those financial ties at the front of its brief conveys the misleading impression that the brief is simply a vehicle for those parties to present additional arguments, diminishing the independent interests and contributions of the amicus and its non-party members. And this requirement would impose a significant accounting burden on amicus filers. Even where the parties' contributions do not sum up to the 25% threshold, it will be unduly burdensome for amici to track contributions from numerous parties and their counsel to determine compliance with the rule, particularly in complex cases with many parties.

2. Mandatory disclosure of contributions for particular briefs from recent members of existing organizations is arbitrary, and does not withstand exacting scrutiny under the First Amendment.

Second, the Advisory Committee proposes to mandate disclosure of any non-party—including an existing member of an amicus organization—"who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting [an amicus] brief," unless the person "has been a member of the amicus *for the prior 12 months*." August Report, Draft Proposal Rule 29(e) (p. 36) (emphasis added).[2] Yet the contemplated amendment exempts *newly formed* amicus organizations from this disclosure requirement, providing that if "an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members, but must disclose the date the amicus was created." *Id.*

This proposal would directly interfere with associational rights. Under Rule 29 as it is currently structured, an amicus is not required to disclose any contribution intended to fund a particular brief if that contribution comes from a member of the amicus organization that is not a party to the case. *See* Fed. R. App. P. 29(a)(4)(E)(ii)–(iii). There is no reason to depart from the existing "member exclusion" to the disclosure requirement. That sensible rule protects associational rights. Under the First Amendment, amicus organizations that collect supplemental funding from members to budget for a brief have every right to be heard on an equal basis. Any demand for the disclosure of the identities of members who make such contributions naturally imposes considerable burdens on the associational rights of those members. Such demands are justified in only one circumstance: where the member is a party to the case. *See* Fed. R. App. P. 29(a)(4)(E)(ii). Absent a member's participation in a case *as a party*, there is no threat that a member's contribution for the preparation of an amicus brief would serve an improper purpose.

There is also no sound reason to single out new members for disclosure. The Advisory Committee's basis for this singling out is that the rule would "effectively treat[ ]" a "new member making contributions earmarked for a particular brief … as a non-member" to "close" a purported "loophole." August Report at 24. The idea seems to be that non-party nonmembers of an amicus organization could evade disclosure of their earmarked contributions in support of a particular

[2] The previously proposed threshold was $1,000. *See* Report of the Advisory Committee on Appellate Rules, Draft Proposal Rule 29(d) (p. 8) (Dec. 6, 2023). It seems doubtful that organizations could efficiently "crowdfund" solely with contributions less than $100. *Cf. Randall v. Sorrell*, 548 U.S. 230, 249–53 (2006) (plurality) (holding $200 contribution limits "too low … to survive First Amendment scrutiny"). But regardless of the threshold, any disclosure requirement that does not include an exemption for members of an amicus organization would seriously infringe the First Amendment rights of associations and their members.

amicus brief by becoming members of the amicus organization. But the First Amendment affirmatively encourages the public to form private associations by shielding those associations from blunderbuss inquiries into the identities of their members. Thus, there would be no evasion or "loophole" in this circumstance; just individuals or entities joining private associations for their intended purpose. A new or "recent" member of a membership association has the same First Amendment rights as other members. Moreover, it is ultimately the *membership organization* that is the amicus presenting the views of *all* its members, no matter when they joined.

Perhaps the concern is *temporary* membership—that is, where a non-party has become a member of the amicus organization solely for the purpose of making a contribution for an amicus brief while intending to withdraw from the amicus organization following submission of the brief. We are not aware of any evidence suggesting that there is a practical problem with temporary members. And even temporary associations are entitled to First Amendment protection so long as they reflect a "collective effort on behalf of shared goals," and the First Amendment looks askance at "intrusion into the internal structure or affairs of an association." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984). Some associations have members who come and go, or who periodically join and leave and re-join; others have members who remain for decades. And many have members whose membership lapses temporarily, sometimes as the result of an oversight or an internal delay, and who then re-join; associations and members should not be penalized for that reason. Policing the degree of associational commitment of an amicus organization's individual members is not an appropriate task for Rule 29—regardless of whether an amicus organization has been around for decades or was newly formed. It is the act of association, not an organization's pedigree, that garners First Amendment protection.

Under the contemplated amendments, moreover, a longstanding amicus organization must disclose any earmarked contributions received by its newest members, but an entirely new amicus organization may avoid such disclosure and instead simply note its date of organization. *See* August Report, Draft Proposal Rule 29(e) (p. 36). Thus, an ad hoc association organized solely for the purpose of presenting a particular amicus brief in a particular case may shield the identities of all of its member-contributors from disclosure (no matter the size of their contributions), while a longstanding association must disclose the identity of any relatively new member that has made a contribution of more than $100 for the preparation of a particular amicus brief. This dichotomy makes little sense, indicating that the amendment is not narrowly tailored to achieve an important objective. For that reason, at least, the current proposal cannot survive even "exacting" judicial scrutiny. *Americans for Prosperity Foundation*, 594 U.S. at 608.

The Chamber appreciates the Advisory Committee's concern for the interests of newly formed amicus organizations and its concomitant interest in protecting "crowdfunding with small anonymous donations." August Report at 11; *see also* Whitehouse Letter at 6–7 (expressing concern that existing amicus-disclosure rules disfavor such crowdfunded briefs). Just as debate in the public square is enriched by the proliferation of speech, the proliferation of amicus briefs submitted by new and diverse amicus organizations—including wholly ad hoc groups—promotes speech and can be a significant aid to judicial decisionmaking. But there is no reason why Rule 29 should *discriminate against* existing amicus organizations in favor of new or ad hoc organizations. Longstanding amici may bring greater institutional expertise and perspective to the presentation of legal issues on appeal, and their contributions should be encouraged on an equal basis. There is no sufficient reason for compelling greater levels of membership disclosure with

respect to such organizations than with respect to new or ad hoc amicus groups.

The Committee should therefore retain the existing "member exclusion" in Rule 29—which does not mandate disclosure of the contributions of *any* members—even if the rule provides that earmarked contributions of non-members need not be disclosed if they are less than $100. This approach would protect the First Amendment rights of new and existing membership associations and their members on an equal footing while providing latitude for ad hoc amicus groups to collect contributions for anonymously crowdfunded briefs.

II. The Proposed Motion Requirement

A. Rule 29 promotes judicial economy and robust amicus participation.

In its current form, Rule 29 requires counsel for prospective amici to obtain either leave of the court or consent of the parties. Fed. R. App. 29(a)(2). The option to file on consent gives counsel for both parties an opportunity to resolve any potential issues without unnecessarily involving the court.

In most cases, experienced lawyers consent to amicus filings "to avoid burdening the Court with the need to rule on the motion." Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 762 (2000); *see Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 n.1 (3d Cir. 2002) (Alito, J., in chambers) ("the same generally holds true in the courts of appeals as well"). But lawyers can and do object when circumstances warrant. For example, the Justice Department advises that although the United States will, in general, "freely grant its consent to the filing of amicus briefs," its attorneys "may condition consent on compliance with" local rules and standing orders "relating to briefing schedules, page lengths, or similar matters." U.S. Dep't of Justice, *Justice Manual* § 2-2.125 (2018). Similarly, private counsel may justifiably withhold consent where amicus participation would unduly delay or prejudice the adjudication of the original parties' rights.

The practice of freely granting consent in most cases reflects confidence among attorneys that the federal judiciary will reach the right result when all views are fully aired. As Justice Holmes explained long ago, it is "the theory of our Constitution" that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion); *see also United States v. Alvarez*, 567 U.S. 709, 729 (2012) (plurality) ("Truth needs neither handcuffs nor a badge for its vindication."); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("the remedy to be applied is more speech, not enforced silence"). While the Advisory Committee contends that "a would-be amicus does not have a [First Amendment] right to be heard in court" and frets that "the norm among counsel … to uniformly consent" results in too little "constraint," August Report at 20, 26, the reason most counsel freely consent absent exceptional circumstances is their confidence "that the opposition need not be silenced because truth will ultimately triumph," *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 419 n.7 (2d Cir. 1982); *see id.* ("Whoever knew truth put to the worse, in a free and open encounter?" (quoting J. Milton, *Areopagitica* 78, 126 (J.C. Suffolk ed. 1968) (alteration omitted)). Consistent with that view, experienced attorneys recognize that the long-term interests of their clients are best served when all are heard so that erroneous views can be confronted, not suppressed.

As explained below, the proposals to amend Rule 29 would sacrifice judicial economy for little if any offsetting benefit. Far from failing to provide a "meaningful constraint on amicus briefs," August Report at 26, the current Rule 29 is an effective screen that allows the parties to resolve most issues consistent with the value that all should be heard, and to involve the courts only when necessary.

B. The contemplated amendments to eliminate filing on consent and to bar "redundant" filings will undermine judicial economy.

The proposed amendments to Rule 29 would eliminate the common and accepted practice of filing amicus briefs on the consent of the parties and would instead require a motion for leave to file. August Report, Draft Proposal Rule 29(a)(2) (pp. 28–29). The proposed amendments would further require such motions to justify how "the brief is helpful and why it serves the purpose set forth in Rule 29(a)(2)," and would "disfavor[ ]" any brief that is "redundant with another amicus brief" or that does not bring to the court's attention "relevant matter not already mentioned by the parties." August Report, Draft Proposal Rule 29(a)(3)(B) & 29(a)(2) (pp. 28–29). These amendments are unnecessary and counterproductive.

1. Eliminating the consent option would move contrary to the Supreme Court's direction and would disserve efficient resolution of amicus participation issues.

To begin with, the proposed amendments start from the false premise that Rule 29 should do more to "filter" the number of amicus briefs that are filed. August Report at 25, 40 (note to Draft Proposal Rule 29). While there was a brief time "[i]n the late 1940s and early 1950s" when the Supreme Court "sought to curtail the filing of amicus curiae briefs," Kearney & Merrill, *supra*, 148 U. Pa. L. Rev. at 763, the Supreme Court has for the last seven-and-a-half decades taken an increasingly permissive approach toward amicus filings, *id.* at 763–65. Perhaps unsurprisingly, the Supreme Court's development of its open-door policy toward amici coincided with its rising protectiveness for free expression in general. *Compare id.* at 764 ("After the early 1960s, the attitude of the Court toward amicus filings in argued cases gradually became one of laissez-faire.") *with* Nadine Strossen, *The Paradox of Free Speech in the Digital World*, 61 Washburn L.J. 1, 1 (2021) ("The United States Supreme Court has continued a speech-protective trend dating back to the 1960s"). Today, the Supreme Court "freely allow[s] the filing of amicus briefs." August Report at 25. It does not require a motion or consent. *See* Supreme Court Rules 37.2, 37.3.

The Supreme Court's permissive approach to amicus briefs recognizes that they are often useful. Courts at all levels of the federal judicial system regularly "credit" and cite "helpful amicus brief[s]." *Stratton v. Bentley Univ.*, 113 F.4th 25, 43 n.12 (1st Cir. 2024); *see also, e.g., Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 764 (7th Cir. 2020) (describing the Chamber's amicus brief as "helpful" and "insight[ful]"). The Supreme Court has reminded lower courts that amici may rightly raise jurisdictional or other threshold issues overlooked by the parties, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) ("The Government's brief said nothing about the statute of limitations, but an amicus brief called the issue to the court's attention."); *accord United States v. Baltazar-Sebastian*, 990 F.3d 939, 943–44 (5th Cir. 2021) ("our jurisdiction is challenged not by [the defendant], but by an *amicus curiae*"), as well as "sharp[en] adversarial presentation of the issues" that are raised by the parties,

United States v. Windsor, 570 U.S. 744, 760–61 (2013).

Some of the Justices have highlighted the particular usefulness of amicus briefs in cases that involve technical, scientific, or historical issues. *See, e.g.*, Stephen G. Breyer, *The Interdependence of Science and Law*, 82 Judicature 24, 26 (1998). Another Justice has noted that amicus briefs may "collect background or factual references that merit judicial notice," "argue points deemed too far-reaching for emphasis by a party intent on winning a particular case," or "explain the impact a potential holding might have on an industry or other group." *Neonatology Assocs., P.A.*, 293 F.3d at 132 (Alito, J., in chambers). And every current Justice regularly cites amicus briefs in his or her opinions. In one recent term, the Justices cited amicus briefs in 65 percent of argued cases with amicus participation and signed majority opinions. *See* Anthony J. Franze & R. Reeves Anderson, *Amicus Curiae at the Supreme Court: Last Term and the Decade in Review*, The National Law Journal (Nov. 18, 2020), https://tinyurl.com/jswf2435.

The Supreme Court has even found that assessing the sheer number of amicus briefs filed in a particular case can be useful. In *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021), for example, the Court considered a First Amendment overbreadth challenge to a California statute that required charitable organizations to disclose the identity of their major donors to the state Attorney General's Office. The Court found that "[t]he gravity of the privacy concerns in th[at] context [was] further underscored by the filings of hundreds of organizations as amici curiae in support of the petitioners," observing that "these organizations span[ned] the ideological spectrum, and indeed the full range of human endeavors." *Id.* at 617. The Court reasoned that this high number of amicus briefs helped show the illegitimate sweep of the California statute, explaining that "[t]he deterrent effect feared by these organizations is real and pervasive, even if their concerns are not shared by every single charity operating or raising funds in California." *Id.*

The Advisory Committee acknowledges that its proposal to curtail amicus filing is out-of-step with Supreme Court practice, but it justifies that departure primarily based on perceived recusal issues in the courts of appeals. *See* August Report at 25–26. Respectfully, the contention that a motion requirement is necessary to solve those recusal issues is mistaken. Rule 29 already provides that a court may "prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification"—whether or not the amicus organization filed on consent or submitted a motion for leave to the court. Fed. R. App. P. 29(a)(2).[3] And courts routinely reject such filings, *see, e.g.*, Order filed July 9, 2024, *TikTok, Inc. v. Garland*, D.C. Cir. No. 24-1113 (ordering "stricken" amicus brief filed on consent that "would result in recusal of a member of the panel that has been assigned to the case"); *Hydro Res., Inc. v. U.S. EPA*, 608 F.3d 1131, 1143 n.7 (10th Cir. 2010) ("We deny … leave to file an amicus brief only because granting the motion would cause one or more members of this court to recuse themselves from the matter."), with some having formalized the practice in their local procedures, *see, e.g.*, D.C. Circuit Handbook of Practice and Internal Procedures § IX.A.4 (amended March 16, 2021) ("the Court will not accept an *amicus* brief where it would result in the recusal of a member of the panel"); 2nd Cir. R. 29.1 ("The court ordinarily will deny leave to file an amicus brief when … the filing of the brief might cause the

[3] This language, added by amendment in 2018, reflects the longstanding practice of the federal appellate courts. *See* 16AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3975 (5th ed. June 2024 update).

recusal of the judge.").[4]

In addition to being unnecessary to address recusal, a motions requirement will place substantial burdens on the courts, the parties, and amici. Indeed, the "burdens upon litigants and the Court" was one of the reasons the Supreme Court eliminated both its motion requirement and its consent requirement. *See* Revisions to Rules of the Supreme Court at 9 (Dec. 5, 2022) (Clerk's Comment to Rule 37), https://tinyurl.com/4sah4jyd. The Advisory Committee heard testimony that in the courts of appeals as many as 90% of current amicus filings rely on consent. Whatever the precise amount, the Committee acknowledges that under the current Rule 29 most participation is resolved through consent. August Report at 26. If that option is eliminated, then courts would be called upon to adjudicate leave in *every case*, and for *every amicus brief*, rather than only instances in which a party objects. The result would be a dramatic increase in the number of motions for leave that amici must file, that parties must respond to, and that courts must resolve.

Timing considerations further amplify this increased burden on the courts and litigants. Motions for leave require a decision "at a relatively early stage of the appeal" when it is "often difficult … to tell with any accuracy if a proposed amicus filing will be helpful." *Neonatology Assocs.*, 293 F.3d at 132 (Alito, J., in chambers). "Furthermore, such a motion may be assigned to a judge or panel of judges who will not decide the merits of the appeal, and therefore the judge or judges who must rule on the motion must attempt to determine, not whether the proposed amicus brief would be helpful to them, but whether it might be helpful to others who may view the case differently." *Id.* at 133. Such decisions are difficult to make without carefully studying all the merits briefs and issues, so, as then-Judge Alito explained, the better course is simply to accept amicus filings: "If an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief." *Id.*; *accord Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (Posner, J., in chambers) (explaining "many courts … would prefer to ignore amicus curiae briefs than to screen them"). And if motions for leave are decided before a merits panel is assigned, then the motions panel will plainly not be able to assess recusal in deciding whether to grant leave to file.

2. Enforcing the redundancy provision would place a significant administrative burden on amicus filers and courts.

The administrative burdens discussed above would be further compounded by the Advisory Committee's proposal to "disfavor[ ]" amicus briefs that are thought to be "redundant with another amicus brief" or with a "matter" raised by "the parties." *See* August Report, Draft Proposal Rule 29(a)(2) & 29(a)(3)(B) (28–29). Again, it will be time-consuming for judges to examine amicus motions and proposed briefs independent of the case, and that is doubly true if they must determine

[4] It was raised at the Advisory Committee's October 2024 meeting that the Ninth Circuit initially screens for recusals prior to making panel assignments, opening the door to potential gamesmanship by amici. That possibility appears remote: a party seeking to avoid a particular judge would need to guess what amicus might cause the judge to recuse and then convince that amicus to file—before knowing whether that judge would even have been assigned. To the extent this risk is plausible, a more direct solution would be to simply strike an amicus brief that could trigger a recusal (before or after panel assignment).

whether a prospective argument is wholly (or substantially) redundant or sheds some new light on a problem. After all, party presentation principles deter amici from raising entirely new issues, *see, e.g., Russo v. Bryn Mawr Tr. Co.*, 2024 WL 3738643, at *6 n.4 (3d Cir. Aug. 9, 2024), so there will be at least some repetition as amici show how the themes they advance are applicable to the parties' dispute. For seasoned advocates, this balance is often as much art as science. Requiring judges to spend their time reading motions with explanations about how a prospective amici's arguments fit within the framework of the parties' arguments without overlapping too much—when judges could just read the briefs instead—is likely to be a waste of already limited judicial resources. *See Neonatology Associates*, 293 F.3d at 133 (Alito, J. in chambers) ("the time required for skeptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merits stage if leave had been granted").

This proposal presents an even more significant administrative burden on courts with respect to redundancy *among* amici. In certain cases, large numbers of amicus organizations will submit briefs that may discuss similar issues. Judges will therefore not only have to assess whether an amicus brief is redundant with a party brief, but with the collection of other amicus briefs submitted for consideration. Focusing on redundancy will deprive courts of a diverse range of perspectives, despite the Supreme Court's recognition that amicus briefs from "organizations span[ning] the ideological spectrum" may itself be highly relevant to a court's resolution of the issues before it. *Americans for Prosperity Foundation*, 594 U.S. at 617; *see also* Transcript of Oral Argument at 73:1–6, *Williams v. Washington*, No. 23-191 (U.S. Oct. 7, 2024) (Justice Kavanaugh: "[W]e have amicus briefs from a wide variety of groups, from ACLU and Public Citizen to religious liberty groups, to the Chamber of Commerce, all of which say that your rule will really hinder federal civil rights claims from getting into state court.").

There is also no guidance in the proposal about what a court should do when amicus organizations are unable to eliminate the risk of redundancy through coordination—perhaps because they are not aware of every amicus organization that intends to file,[5] because the unique identity and perspective of the amicus organization is itself relevant to the issues before the court, or because certain amicus organizations are unwilling to forgo particular lines of argument. In a contest among various amici, judges may choose to grant the motion of whichever amicus organization filed first. "The spectacle of the race to the courthouse," the Administrative Conference has explained in another context subsequently ended by Congress, "is an unedifying one that tends to discredit the administrative and judicial processes and subject them to warranted ridicule." Admin. Conf. of the U.S., Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*, 45 Fed. Reg. 84,954 (Dec. 24, 1980); *see also Sacramento Mun. Util. Dist. v. FERC*, 683 F.3d 769, 770 (7th Cir. 2012) (Easterbrook, J.) (describing "unseemly races to the courthouse"). The first brief filed is not always the most helpful to the court, and the Advisory Committee should avoid adopting a rule that favors speed over high-quality advocacy. Judges should be free to review any amicus brief that persuasively addresses an

[5] This practical problem would also make it difficult or impossible for prospective amici to disclose "connections among amici," as some have wrongly suggested the Committee should additionally require. Comments of Sen. Sheldon Whitehouse, et al., at 3 (filed Sept. 12, 2024), https://tinyurl.com/2psp7fja. Furthermore, as others have rightly indicated, that significant burden delivers no offsetting benefits to the judicial process. *See* Comments of Sen. McConnell, et al. (filed Sept. 10, 2024), https://tinyurl.com/yv9xzh4b.

issue, regardless of when it was filed relative to other amicus briefs.

The cumulative impact of the proposed motion amendments would be to discourage amicus participation by putting a thumb on the scale against amicus briefs. That is, after all, its intent. Far from encouraging amicus briefs, the proposal explains when briefs are "disfavored." *See* August Report, Draft Proposal Rule 29(a)(2) & 29(a)(3)(B) (28–29). And it requires prospective amici to draft motions to explain the value of their arguments (without actually making them), to justify why the arguments are different from those presented by the parties (but not so different as to violate the party presentation rule), and to somehow assess whether other prospective amici have (or may) make similar arguments. This shift away from the current permissive requirements of Rule 29 makes it far less likely that judges will "err on the side of granting leave." *Neonatology Associates*, 293 F.3d at 133 (Alito, J. in chambers). And in turn, these burdens and the heightened risk of denial may discourage an amicus organization from submitting a brief at all.

That shift is monumental. With the vast majority of amicus briefs filed on consent, a burdensome and detailed motion requirement for each and every amicus brief would fundamentally change amicus practice in the courts of appeals. Unlike the current Rule 29, the goal of the proposed amendments is to "filter" the number of amicus briefs. August Report at 25; *see id.* at 40 ("the consent requirement fails to serve as a useful filter"). That is out of step with the open, speech-protective approach long favored by the Supreme Court and the courts of appeals, and the Committee should reject the proposed amendments.

* * *

The Chamber appreciates the careful and deliberate manner in which the Committee has approached these issues and is grateful for the opportunity to comment on the Committee's important work. Thank you for your consideration.

Respectfully,

Tara Morrissey
Senior Vice President and Deputy Chief Counsel
U.S. Chamber Litigation Center

TAB 7

Court Accountability

January 29, 2025

Submitted via Regulations.gov

The Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

Re: Proposed Amendments to Federal Rule of Appellate Procedure 29 (USC-RULES-AP-2024-0001)

Dear Judge Bates:

I write to express the views of Court Accountability on the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure that would make much-needed improvements to disclosures for *amicus curiae* briefs. We believe that these amendments serve as a necessary step towards a fairer and more transparent appellate process.

I. Importance of Transparency in Amicus Filings

At their best, amicus curiae briefs can play a vital role in appellate litigation by providing courts with diverse perspectives and expertise. As scholars have documented, however, amici can often act as alter egos of parties, with a range of negative consequences for judicial administration and fairness.[1] For instance, a party can use amici that are under its financial influence or control to circumvent page limits or advance arguments it prefers not to make itself.[2] Perhaps more troubling, amici and the parties or third-party interests that support them can essentially misguide a court—and the public—by appearing independent from parties with which they are associated, through financial connections or otherwise.[3] As the Advisory Committee appropriately recognized, "the identity of an amicus does matter, at least in some cases, to some judges," and "members of the public can use the disclosures [of amicus identity] to monitor the courts, thereby serving both the important governmental interest in appropriate accountability

[1] *See, e.g.,* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901 (2016); Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 Yale L.J.F. 141, 159-160 (2021).
[2] *See, e.g.*, Fed. R. App. P. 29 advisory committee's note to 2010 amendment (noting that the Rule 29 disclosure requirement "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs"); Comm. on Rules of Practice and Procedure, Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure, and the Federal Rules of Evidence ("Proposed Amendments") at 21 (Aug. 2024) ("[I]n our adversary system, parties are given a limited opportunity to persuade a court and should not be able to evade those limits by using a proxy.").
[3] Proposed Amendments at 21 ("[A] court should not be misled into thinking that an amicus is more independent of a party than it is.").

and public confidence in the courts."[4] This transparency rationale applies both to identifying the amicus and those who significantly fund it.

II. Shortcomings of the Current Rule 29 Disclosure Scheme

The current form of Rule 29 imposes a limited disclosure requirement on non-governmental amici. Non-government amici must disclose whether "a party's counsel authored the brief in whole or in part"; "a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief"; and "a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief."[5] The funding disclosures are triggered only for contributions earmarked for preparing or submitting the brief and do not reach contributions purportedly made to an amicus for its general fund or other purposes. The rule also exempts from disclosure a payment made by non-party "members" of an amicus, even if the payment is earmarked for the brief.[6]

The limitations of the funding disclosure regime allow meaningful financial entanglements to go undisclosed.[7] For example, a party can fund essentially the entire amicus operation of an organization, but as long as it does not earmark its contribution for the preparation or submission of a particular amicus brief filed by that organization, the organization's amicus filing need not disclose the party's contribution in a case involving that party.[8] Such disclosure-avoidance schemes have helped the proliferation of the "amicus machine," in which amici under the control or influence of a party flood the docket with highly coordinated briefs.[9]

III. Benefits of the Proposed Amendments

The proposed amendments make several improvements that will help deter gamesmanship to avoid amicus funding disclosure. The requirement for an amicus to disclose whether a party, its counsel, or any combination thereof has in the previous 12 months contributed or pledged to contribute 25 percent or more of its total revenue for its prior fiscal year will impose needed disclosure obligations on amici that are financially dependent on parties. Partially closing the member loophole recognizes that the fact that a funder is a member of an amicus should not shield that funder from being disclosed for earmarking funds to a particular amicus brief. Additionally, requiring amici to provide "a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will help the court" (and the date of creation if the amicus was created within the year) should help deter parties from establishing organizations solely to serve as amici.

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[4] Proposed Amendments at 20. *See also* Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. Rich. L. Rev. 361, 379 (2015) (noting that "some courts remain suspicious of amici curiae with close connections to a party").
[5] Fed. R. App. P. 29(a)(4)(E).
[6] Fed. R. App. P. 29(a)(4)(E)(iii).
[7] For examples of common entanglements among well-funded parties and amici, see Br. of Amicus Curiae Professor Paul M. Collins, Jr., in Support of Plaintiff-Appellee, *Epic Games, Inc. v. Google LLC*, No. 24-6256 (9th Cir. Jan 7, 2025), ECF No. 145
[8] *See, e.g.*, Whitehouse, *supra* n.1.
[9] *See* Larsen & Devins, *supra* n.1.

Overall, the proposed amendments enhance the adversarial process and promote fairness in appellate proceedings, improving access to information about the interests behind amicus briefs. The amendments provide courts with additional information to evaluate the credibility of amicus submissions. Disclosure of significant financial contributions helps courts distinguish between genuinely independent briefs and those influenced by undisclosed interests, which can unfairly advantage litigants by amplifying the arguments of deeper-pocketed parties.

Finally, as the Advisory Committee details, the Rule 29 amendments are fully consistent with legal precedent regarding funding disclosure, including *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021).[10] We dispute the premise that there is a right to fund amicus briefs anonymously or that disclosure obligations on such funding require strict scrutiny, not least because "a would-be amicus does not have a right to be heard in court."[11] Nonetheless, even under that standard, the government has a compelling interest in requiring disclosure of amicus funding for the reasons articulated in the Advisory Committee's memorandum and above.

IV. Further Suggested Improvements

We strongly support the proposed enhancements to Rule 29's amicus disclosure requirements. However, given the breadth of the risk that covert amicus influence and control pose to the integrity of the appellate process, we respectfully suggest additional improvements to the rule.

First, we believe that the 25-percent funding threshold is set too high, as it allows significant financial contributions below this level to remain undisclosed. For instance, a donor contributing 15 or 20 percent of an organization's revenue still exerts considerable influence on the amicus's operations and messaging.

Second, we support the request by Senator Sheldon Whitehouse and Representative Hank Johnson for a requirement of additional disclosure of financial links between amici. As Senator Whitehouse and Representative Johnson detail in their comment, such disclosures are needed to provide greater transparency into amicus machine operations that flood dockets with highly orchestrated briefs in support of well-funded interests, some of which essentially establish figurehead organizations to serve as plaintiffs,[12] recruit an individual to serve as plaintiff of convenience, or fund both the law firms bringing the case and the amici.[13] The suggestion by Senator Whitehouse and Representative Johnson for disclosure of connections among amici would bring needed transparency to these practices.

* * *

[10] We note that the decision in *Americans for Prosperity Foundation v. Bonta* was itself a product of a well-funded and well-coordinated amicus-machine effort. *See* Whitehouse, *supra* n.7, at 147-9.
[11] Proposed Amendments at 20.
[12] *See, e.g.*, Melissa Gira Grant, Who Exactly Is Behind the Supreme Court's Big Mifepristone Case?, The New Republic (March 7, 2024), https://newrepublic.com/article/179626/mifepristone-abortion-supreme-court-alliance-hippocratic-medicine.
[13] *See* Letter from Sheldon Whitehouse & Hank C. Johnson to John D. Bates (Sept. 12, 2024), https://www.whitehouse.senate.gov/wp-content/uploads/2024/09/2024-09-12-Amicus-Disclosure-Comment-FINAL.pdf.

The proposed amendments to Rule 29 represent a crucial step toward enhancing transparency and maintaining the integrity of appellate proceedings. We urge you to adopt them. Thank you very much for considering these comments.

Respectfully submitted,

Alexander Aronson
Executive Director
Court Accountability

TAB 8

January 13, 2025

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle Northeast
Washington, District of Columbia 20544

Re: Request for Comments on Proposed Amendments to Federal Rule of Appellate Procedure 29

Dear Judge Bates:

I am writing as chair of the DRI Center for Law and Public Policy's Amicus Committee to comment on the proposed amendments to Federal Rule of Appellate Procedure 29, namely (1) to urge rejection of the proposed amendment that would eliminate the ability of nongovernmental amici curiae to file briefs on consent of the parties and replace it with a requirement that the filing of all nongovernmental amicus briefs require court permission requirement in all instances; and (2) to relay some concerns regarding the structure and practicality of the proposed amendments regarding disclosures in Rules 29(a)(3)–(4), 29(b), and 29(c).

The DRI Center for Law and Public Policy

DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. DRI is committed to addressing issues germane to defense lawyers and the civil justice system and improving the civil justice system. Many of DRI's 14,000 members include attorneys who regularly practice in the federal courts of appeals.

In addition, the Center for Law and Public Policy is DRI's think tank and advocacy voice. The Center's Amicus Committee files almost a dozen amicus briefs each year in carefully selected United States Supreme Court, state supreme courts, and federal and state appellate court cases that present issues that are important to the civil justice system and to civil litigation defense attorneys and their clients. DRI firmly believes amicus briefs can provide valuable information to appellate

courts regarding the ramifications of their decisions, and context that may be important but not addressed (or well addressed) by the parties.

Recommended Amendment Regarding Leave of Court for Nongovernmental Amicus Briefs

On January 6, 2023, the DRI Center for Law and Public Policy wrote to recommend *eliminating* the requirement of consent of the parties or court permission for the filing of nongovernmental amicus curiae briefs, following the Supreme Court's lead in revising Supreme Court Rule 37 to eliminate parallel requirements in that court.

In announcing its rules change, which became effective on January 1, 2023, the Supreme Court Clerk explained that "[w]hile the consent requirement may have served a useful gatekeeping function in the past, it no longer does so, and compliance with the rule imposes unnecessary burdens upon the litigants and the Court."

The proposed amendments to FRAP 29(a), however, take the opposite approach—they propose to eliminate the filing of amicus briefs on consent of the parties, and to require a motion and court permission each and every time. For the reasons articulated by the Supreme Court when it revised its Rule 37, the proposed amendments to Rule 29(a) are unnecessary and will be unhelpful to the federal appellate courts.

Under current appellate practice, parties routinely consent to any and all amicus briefs as a matter of good form and professionalism. In those rare instances where party consent is withheld, motions for leave are almost never opposed and courts rule on them as routine matters. Because the proposed amendments would require a motion and court permission for every amicus brief, however, they invite a sea change in appellate practice with respect to amicus briefs. Parties may well view the motion requirement—particularly in combination with the new "disfavored" language in the proposed amendment to Rule 29(a)(2))—as an invitation to oppose amicus motions regularly on the grounds that they are not sufficiently helpful to the court. Should this occur, the courts will have to devote time and resources to deciding numerous contested motions about whether a given amicus brief meets the standard of helpfulness enough to allow it to be filed, instead of allowing the federal appellate courts to get to the heart of the matter—the merits of appeals based on the merits of the arguments before it—whether presented by the parties or amici. The proposed motion-and-permission mandate will not be beneficial to anyone: the courts, the parties, or potential amici.

Moreover, the reasons given by the Advisory Committee for requiring court permission for every amicus brief do not withstand scrutiny.

The first reason given by the Advisory Committee for rejecting the Supreme Court's no-consent/no-motion approach is that—somehow—the Supreme Court requirement that amicus briefs be filed in booklet form is a "modest filter" that justifies requiring motion practice for amicus briefs in the federal appellate courts. The Advisory Committee does not further explain this rationale, and the accuracy of this assertion most certainly is not self-evident. How is the filing of an amicus brief in a printed booklet format the equivalent of a mandatory motion-and-permission requirement in the federal appellate courts? The Advisory Committee does not say.

The second reason given by the Advisory Committee for rejecting the Supreme Court's no-consent/no-motion approach and requiring advance court permission is the stated purpose of protecting federal appellate judges from needing to recuse themselves following the filing of an amicus curiae brief that results in a conflict. But requiring advance court consent is entirely unnecessary for this purpose because Rule 29(a)(2) already authorizes a court of appeals to prohibit or strike the filing of an amicus brief that would result in a judge's disqualification.

The undercurrent of Advisory Committee's mandatory court permission amendment is that amicus briefs are bad or that there are too many of them, and thus barriers should be erected and costs imposed to solve this problem. But timely, rules-compliant amicus briefs that do not replicate party legal arguments enhance appellate decision-making and the judicial process by providing federal appellate courts with additional arguments and broader perspectives on the legal questions presented. Amicus briefs give organizations such as DRI a direct voice in appeals that present legal questions that affect, or are important to, their members. Federal courthouse doors should readily open to true friends of the court such as DRI. Accordingly, the proposed amendments that would delete the filing-by-consent rule and mandate motion practice should be rejected, and DRI urges the Advisory Committee to revisit the idea of adopting the Supreme Court's no-consent/no-motion approach.

Recommended Amendments Regarding Disclosures

As a national voluntary bar organization, DRI, through its DRI Center for Law and Public Policy, files amicus briefs on issues important to its members (civil litigation defense attorneys) and the civil justice system. DRI does not solicit nor accept funds for the preparation of any amicus brief. DRI members support the organization through yearly dues and, from those dues, its Amicus Committee is given a small, yearly budget allotment that it must then manage by carefully evaluating requests for amicus support and choosing only to file amicus briefs that it believes will be most helpful to the courts and supportive of the interests of its membership.

Accordingly, to the extent certain of the proposed amendments add to Rule 29's disclosure requirements in the hope of ferreting out possible undisclosed financial support earmarked for particular amicus briefs or presumed hidden identities behind organizations filing amicus briefs, the DRI Center for Law and Public Policy has no position about the relative merits of the substance of the proposed amended disclosure requirements.

The DRI Center for Law and Public Policy's Amicus Committee, however, does have an interest in ensuring that any disclosure requirements in Rule 29 are practical, straightforward, efficient, and easy to comply with, so that its limited budget is not dissipated by needlessly complex and impractical rules.

At present, Rule 29's disclosure rules are indeed practical, straightforward, efficient, and easy to comply with. Fed. R. App. P. 29(a)(4)(E) currently requires nongovernmental amici to provide:

> [A] statement that indicates whether:
>
> (i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

In other words, at present, those interested in filing an amicus curiae brief can quickly find, in one place, a short list of information that must be disclosed, and one set of easy instructions about how to comply with the disclosure requirement.

The proposed amendments, by contrast, have multiple duplicative and additive disclosure requirements spread across several subsections:

- A proposed amendment that would make the newly mandatory motion for permission to file an amicus brief also proposed a new motion disclosure requirement (proposed Rule 29(a)(3)(C)), but to determine the content of the required disclosures, that provision cross-references proposed Rules 29(a)(4)(A), (b), (c), and (e);
- The amicus brief that must accompany the motion also must have disclosures as specified in proposed Rule 29(a)(4)(F), but that provision again cross-references proposed Rules 29(b), (c), and (e);
- Turning to proposed Rule 29(b), (c), and (e) these require an amicus brief to include a statement with the traditional disclosures (such as whether a party or its counsel authored the brief in whole or in part), but also additional somewhat duplicative and overlapping disclosures about financial support earmarked for the brief; influence over the entity submitting the brief; and relationships to certain parties and nonparties;
- Then, swinging back to Rule 29(a)(4) (D) and (E), these proposed amendments contain yet more disclosure requirements that must go in the amicus brief, such as statements about the history, experience, and interests of the amicus curiae, and the date the amicus entity was created if in existence for less than 12 months.

There is no discernable reason for amendments that disperse all these new disclosure requirements throughout Rule 29. As a practical matter, all disclosure requirements should be straightforward, better organized, and centrally located within Rule 29 so that those interested in participating as amici can readily comply with the requirements and provide the information the Advisory Committee believes should be disclosed.

Respectfully submitted,

/s/ *Lisa M. Baird*
Lisa M. Baird, Chair
DRI Center for Law and Public Policy Amicus Committee

TAB 9

January 29, 2025

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle Northeast
Washington, District of Columbia 20544

Dear Judge Bates:

My name is Thomas Berry, and I am the director of the Cato Institute's Robert A. Levy Center for Constitutional Studies. I am submitting written testimony now, and I will also be submitting a comment on the proposed amendments within the next few days.

I urge the Committee not to adopt the proposed amendments. I agree entirely with the First Amendment and donor privacy concerns that have been ably addressed in others' comments. I would like to focus on the proposed requirement that all nongovernmental *amicus* filers in the federal appellate courts must receive leave of court. Other commenters have noted that this would add significantly to the federal appellate workload, forcing federal judges to read and rule on motions for leave to file when their time is better spent on other matters. My testimony will focus on what this change would mean from the perspective of a frequent *amicus* filer.

I direct Cato's *amicus* program, which is one of the most active *amicus* filers in the federal courts. We file roughly 60 *amicus* briefs per year in the federal courts, and I can conservatively say that there are at least three times that many cases where we *would* file if we had the resources and bandwidth. Drafting an *amicus* brief takes our shop at least a month from start to finish, during which time a junior attorney works *exclusively* on that case. I would estimate that each brief we file is the product of roughly 5 total weeks of dedicated attorney work time, including the time that I and other more senior attorneys spend editing and giving other guidance. Given the limited resources that all organizations have, we must make hard choices about which cases we use our attorneys' time on.

At present, we file roughly 20 percent of our federal briefs in the federal appellate courts and nearly all of the rest in the Supreme Court (with an occasional brief in the federal district courts). But if these proposed amendments took effect, we would have to seriously reconsider whether it would make sense to continue attempting to file in the federal appellate courts at all. If there were even a 1-in-4 chance that a brief we submitted in a federal appellate court would be rejected at the motion to leave stage and thus not even *read*, it would be difficult to justify dedicating significant resources to producing that brief.

Under the current Supreme Court rules, it is guaranteed that briefs submitted to the Supreme Court will be accepted for filing. As a steward of Cato's limited resources and our attorneys' limited time, it would be hard to justify gambling our time on producing an

appellate *amicus* brief that might not even be accepted for filing when we could instead spend that time producing a Supreme Court brief that would be guaranteed to be accepted.

Thus, I urge the Committee to consider a probable unintended consequence of this rule: that it would likely incentivize *amicus* filers to focus even more on the Supreme Court than they already do. And that is precisely the wrong direction for *amicus* filings to trend. From my own experience as a federal appellate law clerk, I saw that even in difficult and important cases, the federal appellate courts rarely receive *amicus* briefs. And when they do, they are usually far less in quantity than the Supreme Court would receive in a case asking the same question. If anything, the balance should be tilted toward encouraging the dedication of *more* amicus resources to the federal appellate courts and less to the Supreme Court. The federal appellate courts decide difficult and consequential cases every day, and they usually do so without the benefit of *amicus* help.

I urge the Committee to look to the Supreme Court as an example of the better approach to *amicus* briefs. Yes, it is more expensive to file *amicus* briefs at the Supreme Court than it is in the federal appellate courts, due to printing costs. Nonetheless, the Supreme Court routinely receives dozens of *amicus* briefs in its cases. If that were a distracting burden, the Supreme Court would have presumably made it even harder to file *amicus* briefs. But instead it did the opposite when it eliminated the consent-or-leave requirement for filing. Put simply, if a high quantity of *amicus* briefs were a burden, the Supreme Court would be the most urgently concerned with that burden as the court that receives by far the most *amicus* briefs per case. It is telling that the Supreme Court has not seen a need to restrict the number of *amicus* filings.

In my experience, when consent is denied and we are required to move for leave to file, our motion mirrors very closely the summary of the argument of our brief itself. In practice, it would be just as easy for a judge to read our summary of argument and decide whether to read further. That is what judges have done in the past, and they should be allowed to continue doing so without interposing an unnecessary motion stage.

Finally, I wish to note that the limited time and resources of *amicus* filers is itself a reason why *amicus* briefs tend not to be overly duplicative. In my experience, major filers on the same side of a case will check with each other to ensure that they are not repeating each other. That is the smart thing to do when we all have limited time and resources. If there is no unique angle to contribute in a case, I will not dedicate Cato's resources to producing a "me too" brief in that case. The rational interests of *amicus* filers largely serve to address concerns of duplicative briefs. There is no need for a motion stage to try to enforce an unpredictable rule against being overly duplicative.

Sincerely,

Thomas A. Berry
Director
Robert A. Levy Center for Constitutional Studies
Cato Institute

TAB 10

January 28, 2025

Honorable Judge D. Bates
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle NE
Washington, DC 20544

RE: Written Testimony on Proposed Changes to Federal Rule of Appellate Procedure Rule 29

Dear Judge Bates,

On behalf of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), we appreciate the opportunity to submit written testimony to the Advisory Committee on Appellate Rules about the Committee's proposed amendments to Federal Rules of Appellate Procedure Rule 29. LDF has extensive experience submitting amicus briefs to federal appellate courts. We write today to comment on two specific aspects of the Committee's proposed revision of Rule 29(a)(2) which, based on our experience, raise concerns and which we would respectfully ask the Committee to reconsider.

Many of the changes the Committee is considering to Rule 29(a) are beneficial and welcome. For example, we think the proposed standardized word limit of 6,500 for amicus briefs will provide helpful clarity and simplicity. And we think the proposed changes requiring amici to describe their history, experience, and interests will help the Court evaluate the credibility and helpfulness of amici. We appreciate the Committee's thoughtful efforts to set clear expectations and promote transparency, which will benefit both judges and litigants.

We are concerned, however, that the new language regarding the purpose of amicus briefs at the beginning of Rule 29(a)(2) would have unintended negative consequences. We have two primary concerns.

First, we are concerned that the requirement that amicus briefs be limited to "relevant matter not already mentioned by the parties" allows for too much room for misinterpretation or arbitrariness in its application. While we appreciate the Committee's goal of providing clearer guidance on what makes an amicus brief helpful, this language could be interpreted to discourage amici from discussing even the same issues or arguments as a party. In other words, the proposed language could be understood to say that any subject matter is off-limits if a party has merely "mentioned" it, even if only briefly or if the amicus believes that discussion to be insufficient in scope or misguided in analysis. As a result, amici might be deterred from filing briefs that would helpfully clarify or contextualize party arguments.

We foresee a real danger that this language will discourage, rather than promote, helpful amicus participation. LDF puts careful effort into writing amicus briefs that illuminate underexamined or underdeveloped issues in an appeal. But in doing so, we are always mindful

40 Rector Street
5th Floor
New York, NY 10006

700 14th Street NW
Suite 600
Washington, DC 20005

260 Peachtree Street NW
Suite 2300
Atlanta, GA 30303

naacpldf.org
212-965-2200

that American courts "follow the principle of party presentation." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). So even when our amicus briefs strive to provide important historical context, or to elaborate on the purposes or nuances of a legal doctrine with which we are familiar, our briefs generally expand upon a legal issue, a set of facts, a line of precedent, or some other "matter" that the parties have at the very least "mentioned" first. We worry that courts may interpret this language to refuse consideration of helpful and important amicus briefs simply because those briefs address matters that have already been "mentioned" by the parties.

We urge the Committee to delete the first sentence of the proposed amendments to Rule 29(a). If the Committee is inclined to include some version of this language, we recommend revised language that is more narrowly and precisely tailored to discourage amicus briefs that merely parrot merits briefs' arguments. For instance, the Committee could state: "An amicus curiae brief that brings to the court's attention relevant points, matters, authorities, or perspectives that are not redundant with the briefs filed the parties may help the court."

Second, we are concerned about the language disfavoring an amicus brief "that is redundant with another amicus brief." We understand the Committee's sensible goal of reducing the burdens imposed by extraneous and unhelpful briefs. This is a goal shared by LDF and other civil rights organizations who routinely serve as amici. That is why, already under the current rules, we often expend considerable effort attempting to proactively identify other likely amici and coordinating our efforts with other organizations when a case may attract interest from multiple prospective amici. As part of those proactive efforts, we commonly collaborate with other organizations to submit a joint brief on behalf of multiple amici if possible. For much the same reason judges disfavor reading superfluous briefs, most prospective amici try to avoid writing them.

However, we fear the specific language disfavoring amicus briefs that are "redundant with" one another will prove burdensome and impractical for litigants to navigate and courts to enforce. Even with the considerable time and effort LDF expends to proactively identify and coordinate with other potential amici, it is impossible to predict what other amicus briefs may be filed, or what they will argue. This is especially true because amicus briefs supporting the same party share the same deadline and thus most amicus briefs will be filed on the same day. Therefore, an amicus will often have no notice of what arguments would or would not be "redundant" before they file, and courts may lack a principled basis for deciding which of several amicus briefs deemed "redundant" to accept and which to reject. Moreover, the proposed rule risks exacerbating the burdens on courts, rather than alleviating them, because courts will have to review all proposed amicus briefs in order to police against "redundant" amicus submissions. This would be a time-consuming mode of review that is at best tangential to the merits of the case.

Imposing this burdensome review on the Courts of Appeals is not necessary to achieve the Committee's goals, especially given the proposals to require all amici to seek leave from the Court to file, and to more fully describe their relevant history, experience, and how their brief will assist the Court when doing so. Those proposed revisions will meaningfully enhance the Court's ability to assess each potential amicus on its own individual merits and will provide a robust filter for unhelpful briefs.

40 Rector Street
5th Floor
New York, NY 10006

700 14th Street NW
Suite 600
Washington, DC 20005

260 Peachtree Street NW
Suite 2300
Atlanta, GA 30303

naacpldf.org
212-965-2200

LDF and the Committee share a common goal to ensure that amici are able to participate in ways that are helpful to the Courts of Appeals and do not impose needless burdens on judges. But it is also important that the Courts remain open to hearing a variety of perspectives and are able to benefit from genuine expertise. For these reasons, we think the Court should carefully consider further revisions to clarify the language in the first two sentences of proposed Rule 29(a)(2).

Sincerely,

/s/ Molly M. Cain
Molly M. Cain
Assistant Counsel

Janai S. Nelson
President and Director-Counsel
Samuel Spital
Rachel Kleinman
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Fl.
New York, NY 10006

Molly M. Cain
Michael Skocpol
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street NW, Ste. 600
Washington, DC 20005
(202) 682-1300
mcain@naacpldf.org

TAB 11

ATLANTIC LEGAL FOUNDATION

Lawrence S. Ebner
Executive Vice President & General Counsel
1701 Pennsylvania Ave., NW, Suite 200, Washington, DC 20006
202-872-0011 (o) • lawrence.ebner@atlanticlegal.org

November 6, 2024

Uploaded to Rulemaking Docket

Hon. John D. Bates
Chair, Committee on Rules of Practice
and Procedure
Judicial Conference of the United States
One Columbus Circle, NE
Washington, DC 20544

Re: USC-RULES-AP-2024-0001

Dear Judge Bates:

On behalf of the Atlantic Legal Foundation, I am submitting these comments on the proposed amendments to Federal Rule of Appellate Procedure 29. The Advisory Committee on Appellate Rules has indicated that it "is particularly interested in receiving comments on the proposal to eliminate the option to file an amicus brief on consent during a court's initial consideration of a case on the merits." These comments focus on that proposal, which we believe is both unwarranted and impractical, and should be rejected.

By way of background, the Atlantic Legal Foundation (atlanticlegal.org) is a nonprofit, nonpartisan, public interest law firm founded almost a half-century ago. We are a frequent filer of *amicus curiae* briefs in the federal courts of appeals as well as in the Supreme Court. Our amicus briefs address legal issues that align with one or more of our six advocacy mission areas: individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice.

We endeavor to foster the fundamental, judicially beneficial purpose of amicus briefs, as well as comply with the rules governing their preparation and submission. In particular, we strive to draft amicus briefs that enhance an appellate court's perspective on, and understanding of, the legal issues in a case, rather than duplicating the arguments presented by the supported party, and to the extent possible, by other *amici curiae.* We also believe that the federal rules should open the appellate process—and give a voice—to all organizations and individuals with an interest in the legal questions presented by a case. This can be accomplished only by rules that facilitate, not hinder, the filing of amicus briefs. Requiring a motion for leave would undermine this objective by deterring preparation and submission of worthwhile amicus briefs, in addition to unnecessarily burdening appellate judges.

My Law360 essay, ***Requiring Leave To File Amicus Briefs Is a Bad Idea*** (Apr. 4, 2024), discusses the practical problems and inevitable mischief that eliminating filing-with-consent, and requiring a motion for leave, would engender in federal courts of appeals. For example, requiring proposed amicus filers to demonstrate that the arguments and information in their already-drafted amicus briefs are "helpful" may encourage non-supported parties to oppose motions for leave in an effort to deprive courts of appeals of amicus briefs that offer persuasive arguments and/or useful information. Requiring a motion for leave also may motivate non-supported parties to attack amicus filers and perhaps their counsel simply for seeking to serve as a friend of the court.

Equally important, requiring a motion for leave would create uncertainty regarding whether a proposed amicus brief will be accepted for filing—uncertainty that may deter many nonprofit organizations such as the Atlantic Legal Foundation from investing their limited resources in researching and drafting briefs that would be helpful to courts of appeals.

The purported rationale offered by the Advisory Committee for the proposed motion-for leave requirement—enabling circuit judges to reject the filing of amicus briefs that would require their recusal—not only is a rare occurrence, but already is expressly addressed by Rule 29(a)(2) ("a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification"). It is important to note that the Code of Conduct that the Supreme Court's Justices adopted in November 2023 states that "Neither the filing of a brief *amicus curiae* nor the participation of counsel for *amicus curiae* requires a Justice's disqualification."

The current system works well: Except in unusual circumstances, litigating parties' appellate counsel routinely consent to the timely filing of amicus briefs; non-supported parties, if they wish, can address amicus arguments in their own merits briefs (which they typically decline to do); and the merits panel can afford a particular amicus

brief whatever weight it deserves. *Indeed, as the Atlantic Legal Foundation previously has suggested to the Advisory Committee, if Rule 29 is to be amended at all, it should be to adopt the Supreme Court's enlightened approach of allowing timely, rules-compliant amicus briefs to be filed without having to obtain the court's permission or even the parties' consent*. *See* Sup. Ct. R. 37, as amended Jan. 1, 2023.

Thank you for your consideration.

Sincerely,

/s/Lawrence S. Ebner
Lawrence S. Ebner
Executive Vice President & General Counsel
Atlantic Legal Foundation

TAB 12

No written testimony outline or comment
was submitted by the requested January 29, 2025
deadline.

TAB 13

No written testimony outline or comment
was submitted by the requested January 29, 2025
deadline.

TAB 14

The Heritage Foundation

214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400
heritage.org

January 28, 2025

The Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Bates:

We write to express our opposition to the proposed amendments to Federal Rule of Appellate Procedure 29—particularly the new and onerous disclosure regime for those who file amicus curiae briefs. These amendments have no practical justifications and likely violate the First Amendment to the U.S. Constitution. Problematically, as the Advisory Committee and Amicus Subcommittee repeatedly conceded, the amendments are grounded in the notion that judges decide issues based not solely on the law and the facts before them, but instead (at least sometimes) decide issues based on the identity of the individual making an argument or the identity of those associated with that individual. That is wrong—both morally and legally. Judges must decide each case solely on its merits. To do otherwise violates judicial integrity and ethics. If adopted, the proposed rule changes will seriously call into question the impartiality of the federal judiciary.

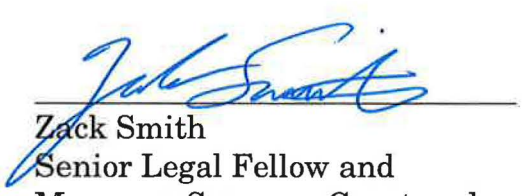
At bottom, this Committee appears to be proposing these amendments because of politics. The Advisory Committee and Amicus Subcommittee repeatedly invoked the unsubstantiated and partisan allegations Senator Sheldon Whitehouse (D-RI) and Representative Hank Johnson (D-GA) have pushed in their critiques of the supposed "dark money" network trying to influence the Supreme Court through amicus briefs. Recognizing that they could not get their proposed "reforms" passed through Congress, Whitehouse and Johnson shifted tactics and now seek to have the Judicial Conference do their dirty work for them. Do not fall for their trap!

Adopting the proposed amendments would needlessly drag the federal judiciary into a partisan political battle. For an in-depth discussion of the purposes and practices associated with amicus briefs, as well as the many practical and constitutional flaws with the proposed amendments, we have attached a recent legal memorandum we authored. But its conclusions can easily be summarized: the proposed amendments are unnecessary, are constitutionally questionable, and would undermine the federal judiciary's integrity and impartiality. We therefore

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400
heritage.org

respectfully urge this Committee to withdraw the proposed amendments to Federal Rule of Appellate Procedure 29.

Sincerely,



Zack Smith
Senior Legal Fellow and
Manager, Supreme Court and
Appellate Advocacy Program,
Edwin Meese III Center for
Legal and Judicial Studies

Seth J. Lucas
Senior Research Associate,
Edwin Meese III Center for
Legal and Judicial Studies

Enclosure:

ZACK SMITH & SETH LUCAS, LEGAL MEM. NO. 371, IT'S A TRAP! A (LIKELY UNCONSTITUTIONAL) SOLUTION IN SEARCH OF A PROBLEM: A PARTISAN PUSH FOR UNNEEDED AMICUS DISCLOSURE RULES (Jan. 24, 2025), https://www.heritage.org/the-constitution/report/its-trap-likely-unconstitutional-solution-search-problem-partisan-push.

The Heritage Foundation

LEGAL MEMORANDUM

No. 371 | JANUARY 24, 2025

EDWIN MEESE III CENTER FOR LEGAL & JUDICIAL STUDIES

It's a Trap! A (Likely Unconstitutional) Solution in Search of a Problem: A Partisan Push for Unneeded Amicus Disclosure Rules

Zack Smith and Seth Lucas

KEY TAKEAWAYS

Amicus briefs are used by progressives, conservatives, industries, activists, and others who want to have a voice in our judicial system.

The notion that judges should refuse to consider an argument because it might advance certain disfavored interests is incompatible with judicial integrity.

Judges should recognize that attempts to convince them otherwise are nothing more than a trap.

Introduction

As Admiral Akbar sailed the Rebel Fleet into what was supposed to be a surprise attack on the Death Star, he realized just in time that he had been tricked and lured into an unfavorable fighting position. In shock, he famously exclaimed: "It's a trap!"[1]

So too today are demands for more strident disclosure requirements for those who file amicus curiae briefs in the federal court system. Since Roman times, the amicus curiae—Latin for "friend of the court"—has played a variety of roles in Western legal systems. In the United States, the amicus brief has become a means for groups interested in a case's outcome to provide additional perspectives, information, or arguments. Amicus briefs are widely used by progressives, conservatives, industries, activists, and others who want to have a voice in our judicial system.

This paper, in its entirety, can be found at **https://report.heritage.org/lm371**

The Heritage Foundation | 214 Massachusetts Avenue, NE | Washington, DC 20002 | (202) 546-4400 | heritage.org

Lately, however, the amicus curiae has come under attack. Decrying recent judicial decisions with which they disagree, Senator Sheldon Whitehouse (D–RI), Representative Hank Johnson (D–GA), and others have insinuated without proof that these decisions were influenced by amicus curiae who, entangled in clandestine networks of dark money, are engaged in sinister efforts to manipulate the federal judiciary. The solution, they argue, is onerous disclosure and reporting requirements that expose every detail of an amicus's associations.

These proposals do not spring from a pure-hearted concern for good government and the judiciary's integrity. Instead, they are part of a broader partisan effort to undermine public confidence in the courts and harm perceived political enemies. Because of the obvious partisan politics at play, Whitehouse's and Johnson's ideas have gained little traction in the halls of Congress. So they have turned elsewhere. They have now asked the Judicial Conference of the United States—the governing body of the federal judiciary—to do their dirty work for them and enact via rule changes what they could not get Congress to enact.

Sadly, the Judicial Conference has fallen into their trap. Acquiescing to Whitehouse's and Johnson's demands, it has spent over three years studying and recommending changes in the current amicus disclosure regime in the lower federal courts. Now it has proposed rules that open the door for intense scrutiny of every dollar going to an amicus and every person or group with which an amicus associates—scrutiny that likely will have a chilling effect on the willingness of amici to file briefs. But unlike the Rebel Fleet, the Judicial Conference is chasing only the illusion of a Death Star. Not only do Whitehouse's and Johnson's proposed disclosures—and the proposed Judicial Conference rules changes inspired by them—suffer from constitutional and practical concerns, but they are also fundamentally a solution in search of a problem.

At the end of the day, Whitehouse and Johnson have placed themselves in a win-win position politically while placing the Judicial Conference in a lose-lose situation. If the proposed disclosure rule changes are adopted, Whitehouse and Johnson can declare political victory. If not, Whitehouse and Johnson can yet again rail against what they portray as a corrupt cabal of federal judges. Similarly, if the proposed rule changes are adopted, the Judicial Conference will have signed off on a constitutionally problematic solution to a nonexistent problem and needlessly injected the federal judiciary into partisan politics.

None of that needs to happen. The Judicial Conference can minimize the damage by stopping the train now and refusing to adopt the proposed rule

changes. To that end, this *Legal Memorandum* proceeds in four parts. The first reviews the role and evolution of the amicus curiae in our legal system and outlines the background of the current system against which Whitehouse and Johnson rage. The second discusses the current controversy around amicus disclosure rules both at the U.S. Supreme Court and within the lower federal courts and explains Whitehouse's and Johnson's failed efforts in Congress to change the current disclosure regime legislatively. The third outlines the Judicial Conference Rules Committee's specific proposal, and the fourth assesses the constitutional and practical concerns raised by those proposals.

The Role of the Amicus Curiae

History of the Amicus Curiae. Dating back to Roman times,[2] the amicus curiae has played a variety of roles throughout its history. Initially, the amicus curiae was seen as a disinterested bystander seeking to assist the court with information on relevant law or facts. In the United States, the amicus curiae emerged originally as an advocate for unrepresented interests, especially the interests of third parties. Today, at least at the U.S. Supreme Court, a new phenomenon has emerged: skilled advocates facilitating amicus participation to signal noteworthy petitions for certiorari and provide a curated and coherent body of perspectives to aid the Court in deciding a case.

Originally, the amicus curiae—Latin for "friend of the court"[3]—was viewed as a disinterested third party who sought to aid a court by proffering helpful information on law or facts relevant to a case.[4] One vintage dictionary explained that "[w]hen a judge is doubtful or mistaken in matter of law, a bystander may inform the court thereof as amicus curiae,"[5] which could be done, for example, by pointing to a case the court had not considered or of which it was unaware. Another explained that the "friend of the court" is "a bystander, who without having an interest in the cause," provides helpful information "on a point of law or of fact."[6] In an early example involving a case where the meaning of a particular statute was disputed, a member of Parliament who had been present when the statute was passed sought to inform the court of Parliament's intent.[7] In 1606, two amici earned a sharp rebuke for failing to "perform[] the office of a good friend or of a good informer" by omitting a clause from an Act of Parliament.[8]

Despite its professed disinterestedness, the role of amicus curiae also provided an avenue for third parties with an interest at stake in a case to participate in the case.[9] Common law systems in particular disfavored

third-party involvement in trials.[10] But in another early case, the amicus curiae represented the interest of a third party whose marital status would have been challenged by the suit, leading to exposure of the suit as collusive.[11] The role of the amicus curiae as a friend of the court and as representative of a third party thus overlapped.[12] In light of such examples, at least one scholar has argued that the amicus curiae role may have been a solution to the problem of representation of third parties in adversarial disputes.[13]

In the U.S. Supreme Court, the amicus curiae role developed early on as a device for advancing third-party interests.[14] In *Green v. Biddle*, a dispute over land holdings in Kentucky to which Kentucky was not a party, Kentucky instructed Henry Clay to appear as an amicus curiae and seek rehearing after the Supreme Court's decision in the case.[15] The Court first allowed the motion, granted it, and then later allowed Clay to argue the case.[16] Three decades later, the Court allowed the U.S. Attorney General to participate as an amicus curiae in *Florida v. Georgia* to speak on the public interests involved.[17] And in 1864, California's Attorney General filed a brief in a suit where the constitutionality of a California statute was at issue.[18] For a time, the Court also allowed third parties with cases pending elsewhere—or who were involved below but had not joined the appeal—to participate as amicus curiae or intervenors "depending on the situation and requests of the litigants or agreements of the counsel."[19]

A shift in the role of amicus curiae began to emerge in the early 1900s. Throughout the late 1800s and for the first decades of the 1900s, the authoring attorneys were seen and identified as the amicus curiae.[20] By the 1930s, however, this was replaced with identification of the sponsor of the brief as the amicus curiae.[21] Not only that, but amicus briefs became a tool to drive social and policy objectives. Under the leadership of Attorney General Charles Bonaparte, the Department of Justice increasingly sought to advance social change and public policies through amicus briefs. Increasingly, regulated industries, racial minorities, and organizations like the National Association for the Advancement of Colored People (NAACP) and American Civil Liberties Union (ACLU) also began to rely on the amicus brief to advance their interests as well as broader public interest goals.[22]

As the number of amicus briefs rose, the Supreme Court began to implement formal rules. In 1937, the Court formalized what was then common practice by requiring amici to obtain consent from the parties to file a brief or, if consent was denied, leave of the Court.[23] In 1949, the Court further expounded on these procedures, explaining that motions for leave to file were "not favored."[24] Subsequently, leave was granted less often, and the Solicitor General began to routinely deny consent.[25] Amicus participation

subsequently declined.[26] In 1957, faced with criticism from the Court for such rote denials, the Department of Justice clarified that it disfavored amicus briefs with academic or propaganda interest but would grant consent where the proposed amicus "has a concrete, substantial interest in the decision of the case" and sought to present "relevant arguments or materials which would not otherwise be submitted."[27] The number of briefs continued to rise, however, resulting in an 800 percent increase from the 1950s by the turn of the century and a 95 percent increase between 1995 and 2014.[28] In the early 1900s, amicus briefs "were filed in only about 10% of the Court's cases"; by the end of the century, they were filed in nearly 85 percent of argued cases.[29] In 2023, the Court eliminated the requirement for consent from the parties.[30]

With the rise of the "Supreme Court Bar," a new amicus curiae phenomenon has developed: the curation of amicus briefs to signal noteworthy petitions for certiorari or collectively provide additional information or perspectives not in a party's briefing.[31] As one article has explained:

> Today, elite, top-notch lawyers help shape the Court's docket by asking other elite lawyers to file amicus briefs requesting that the Court hear their case. When the Court grants certiorari (or "cert"), these very lawyers strategize about which voices the Court should hear and they pair these groups with other Supreme Court specialists to improve their chances with the Court.[32]

This curation of amici may take the form of an "amicus wrangler"—an amici recruiter.[33] But it may also take the form of an "amicus whisperer"—coordination of what briefs are filed, who joins those briefs, and what arguments the briefs raise.[34] In *Hamdan v. Rumsfeld*, for instance, Neal Katyal (who argued the case for the petitioner) not only worked relentlessly to discourage briefs he thought would "blunt the impact" of stronger briefs, but also arranged for David Remes (then with Covington & Burling) to oversee the amici's writing process so that the amici would stay on message.[35] This use of an "outside 'amicus whisperer'" not only aids advocates in tracking amici, scholars have since observed, but also ensures that "the person coordinating the amici message…has a lot more editing leeway without running afoul" of Supreme Court Rule 27.6 regarding party authorship or funding of amicus briefs.[36]

Amicus Curiae Influence in Theory and Practice. Scholars have proffered three theories about the impact of amicus briefs in courts. The first, the informational theory, views judges as "seeking to resolve cases in accordance with the requirements of the law" and thus views amicus briefs

as helpful when they contain new legal arguments or factual information.[37] The second, the attitudinal model, assumes that judges have "fixed ideological preferences" and rely on legal norms "only to rationalize outcomes after the fact."[38] In this model, amicus briefs that merely offer additional information are of little help to the judge.[39] Under the third model, the public interest or affected groups theory, amicus briefs are more akin to lobbyists or a public opinion barometer.[40] Both the fact that the brief was filed and the identities of the amici are important data points apart from the contents of the brief.[41] Amicus briefs under this third model are helpful to a judge insofar as they signal how interested groups want the case decided.[42] As explained below, however, this third theory is not valid—yet it appears to be the one adopted by the Judicial Conference.

Available data reveal that the role of amicus briefs is in reality complex. Across the federal judiciary, government amici are generally viewed as particularly helpful.[43] Similarly, "special interest groups are generally well regarded as amici curiae," but some scholars surmise that the value the Supreme Court places on the brief varies with a group's reputation for quality arguments and "the extent of their interest in the issue."[44] A majority of judges in one survey found a litigant's and amicus curiae's financial relationship "relevant to consideration of a proposed brief."[45] A majority of judges in the same survey viewed briefs offering new legal arguments or insights into the material impacts of a particular outcome on the amicus curiae's interest as "moderately or very helpful."[46]

The Supreme Court appears to view new relevant information absent from parties' briefing or the record as more helpful than lower courts do.[47] Slight majorities of judges affirmed that "the identity, prestige, or experience of the amicus" are "moderately or significantly influential."[48] But a survey of former Supreme Court clerks indicates that, at least at the high court, an amicus's identity or its counsel can serve as a heuristic for a presumption of the brief's quality.[49] The number of amicus briefs filed, however, appears to have little impact on a case's outcome except in narrow circumstances.[50]

The data are unclear as to exactly why some judges find relevant the parties' financial relationship to an amicus and the amicus's or its counsel's identity. If they are in fact playing identity politics and discounting a brief based solely on the identities of individuals or organizations with which the amicus is associated—as the Judicial Conference's rationale for its proposed rules suggests judges should do—those judges are likely violating judicial ethics and disregarding basic principles of justice. If they are considering those things to see whether the parties and an amicus are complying with

existing procedural rules, they are acting safely in their judicial role—but this means that the proposed rule changes are not needed. If what occurs at the Supreme Court is representative of anything, however, it suggests that the identity of an amicus or its counsel is a heuristic for the quality of arguments the judge or a clerk can expect in a brief. As former Justice Ruth Bader Ginsburg remarked, in her view, an attorney's experience "would be a likely barometer of the quality of arguments" in the brief.[51]

Thus, these and other data suggest that the informational theory more accurately, even if not fully, explains the impact of amicus briefs in the courts. As Professors Joseph Kearney and Thomas Merrill explain in the context of their 50-year survey of cases argued at the Supreme Court:

> Contrary to what the attitudinal model would predict, amicus briefs do appear to affect success rates in a variety of contexts. And contrary to what the interest group model would predict, we find no evidence to support the proposition that large disparities of amicus support for one side relative to the other side result in a greater likelihood of success for the supported party. In fact, it appears that amicus briefs filed by institutional litigants and by experienced lawyers—filers that have a better idea of what kind of information is useful to the Court—are generally more successful than are briefs filed by irregular litigants and less experienced lawyers. This is consistent with the legal model's prediction that amicus briefs have an influence to the extent they import valuable new information.[52]

In sum, although the identity of an amicus or its counsel may serve as a heuristic of the brief's quality, the value of the brief is—and should be—determined by the brief's quality and contents.

Current Controversy and Efforts by Whitehouse and Johnson

In recent years, some have questioned the usefulness and appropriateness of amicus briefs. Senator Whitehouse in particular has been a vocal critic of current practices—decrying the "flotillas of amicus briefs" that in his view amount to nothing more than inappropriate judicial lobbying.[53] He has asserted that "[a]nonymously funded, coordinated amicus efforts are just one component of a larger strategy to capture the federal judiciary for the benefit of a self-interested donor class and for Republican Party electoral interests."[54] He has advanced this partisan view despite the fact that one of the principal media reports he cited to support this proposition

admits that in the seven cases it reviewed, "the conservative parties had [only] a slight advantage, accounting for 50 percent of the amici curiae," while "46 percent [of amici filed in] support of the liberal parties and about 4 percent filed in support of neither party."[55] Nonetheless, Whitehouse has pursued changes in amicus disclosure rules as part of his larger institutional assault on the U.S. Supreme Court.[56] Representative Hank Johnson has joined him as a prominent proponent of those efforts.[57]

AMICUS Act. One notable effort has been Whitehouse's and Johnson's endeavor to impose onerous disclosure requirements on those who wish to file amicus briefs. In 2019, Whitehouse first introduced his Assessing Monetary Influence in the Courts of the United States (AMICUS) Act,[58] which he described as seeking "to address the problem of undisclosed judicial-branch lobbying by dark-money interests."[59] Johnson introduced an identical companion bill in the House.[60] Under the terms of his proposed act, "any person, including any affiliate of the person, that files not fewer than 3 total amicus briefs in any calendar year in the Supreme Court of the United States and the courts of appeals of the United States" would have to register with the Administrative Office of the United States Courts.[61] Registration would have to occur within 45 days of triggering the registration requirement (the filing of three amicus briefs), and the party would also have to register on January 1 "of the calendar year after the calendar year in which the amicus" submitted at least three briefs.[62]

The details that would have to be provided as part of this registration are extensive and intrusive. As part of the registration, the amicus filer would have to disclose its name, a general description of its business or activities, and the names of anyone who contributed to the preparation or submission of an amicus brief, the names of anyone who contributed at least 3 percent of the gross annual revenue for the previous calendar year (if the amicus is not an individual), and the names of anyone who contributed more than $100,000 to the amicus in the previous year. Additionally, the registrant would be required to include a statement of the general issue areas in which the amicus expects to engage and "to the extent practicable, specific issues that have, as of the date of the registration, already been addressed or are likely to be addressed in the amicus activities of the registrant."[63] The act would also require the Administrative Office of the U.S. Courts to make this information publicly available indefinitely on its website.[64] Anyone who knowingly failed to comply with these onerous registration and disclosure requirements would be subject to a civil fine of up to $200,000.

The Judicial Conference and Its Rulemaking Process. Whitehouse and Johnson are politicians. They know that their radical proposals have

little chance of passing either the Senate or the House as those bodies are currently composed. So they changed tack and decided to bully the judiciary into doing their dirty work for them. Essentially, they want the Judicial Conference of the United States (the judicial body responsible for making policy recommendations to the federal judiciary—including proposed rule changes) to adopt many, if not most or all, of their radical proposals.

By way of background, Congress created the Judicial Conference's predecessor organization in 1922 at the behest of then-Chief Justice William Howard Taft. Taft came to the position of Chief Justice after holding numerous executive positions—including the position of Chief Executive (President) of the United States—and sought to professionalize and optimize the administrative apparatus behind the federal courts. At his urging, Congress established the Conference of Senior Circuit Judges. "With the chief justice presiding, the senior judge (now known as chief judge) of each circuit court of appeals gathered to report on the judicial business of the federal courts and to advise Congress on possible improvements in judicial administration."[65] Eventually, with some changes in composition, this body expanded its responsibilities and became known as the Judicial Conference of the United States.[66] Included among its many responsibilities is a mandate to consider changes to the procedural rules governing litigation in federal courts. It does this by dividing and subdividing its work among various committees and subcommittees related to specific issue areas. Relevant to this issue, Whitehouse and Johnson have pressured the Committee on Rules of Practice and Procedure and its Advisory Committee on Appellate Rules to adopt their proposals.

This is a win-win maneuver for Whitehouse and Johnson. If the Judicial Conference adopts their policies, they keep their hands clean while chilling many of their perceived opponents who might want to weigh in on important cases. If it does not, Whitehouse and Johnson can continue to rail against the alleged capture and corruption of the federal judiciary, of which the Judicial Conference is a part.[67]

Rules Committee Response and Proposals

Amicus participation in federal courts of appeals is governed by Rule 29 of the Federal Rules of Appellate Procedure.[68] If the court is considering a case on the merits, an amicus seeking to file a brief in that case must disclose (1) its identity, (2) its interest in the case, (3) why its brief "is desirable" and "relevant," (4) certain corporate affiliations if the amicus is a corporation, (5) whether a party in the case or a party's counsel authored or directly funded

the brief, and (6) the identity of any person who directly funded a brief.[69] Rule 29 does not require disclosure if the person who funded the brief is the amicus, a member of the amicus, or the amicus's counsel.[70]

In October 2019, at a meeting of the Judicial Conference's Advisory Committee on the Appellate Rules, Judge Michael Chagares of the U.S. Court of Appeals for the Third Circuit initiated a discussion on Senator Whitehouse's AMICUS Act.[71] The ensuing discussion quickly noted that while current rules focus on direct funding of briefs, the proposed legislation would require certain amici to disclose their own sources of funding.[72] Questioning which organizations this could affect and noting that the bill could move through Congress quickly, the Committee members agreed to appoint a subcommittee "to deal with amicus disclosures."[73] In April 2020, the subcommittee reported that because the bill was not moving, no action appeared necessary other than additional research into who would be affected by its provisions.[74]

In September 2020, Scott Harris, Clerk of the U.S. Supreme Court, wrote to the Judicial Conference's Committee on Rules of Practice and Procedure about Rule 29.[75] Harris noted that the Court received a letter from Senator Whitehouse and Representative Johnson regarding disclosure requirements for amicus curiae briefs at the Court.[76] Harris then suggested that "in light of the similarity" between Supreme Court Rule 37.6 and Appellate Rule 29(a)(4)(e), both of which govern disclosure of the identity of whoever contributed money to fund a brief, the Committee "may wish to consider whether an amendment to Rule 29 is in order."[77] Harris further emphasized that "[t]he Committee's consideration would provide helpful guidance on whether an amendment to Supreme Court Rule 37.6 would be appropriate."[78] He did not say whether the Chief Justice—or any Justice for that matter—was involved or even interested in the question, though the Chief Justice does serve as head of the Judicial Conference.

In February 2021, after learning from Harris that he referred their letter to the Committee, Senator Whitehouse and Representative Johnson directly asked the Committee "to address the problem of inadequate funding disclosure requirements" for amicus briefs.[79] In their view, parties, amicus groups, and their funders had "exploited" the current rules "to exert anonymous influence" on the courts, "compromising judicial independence and the public perception thereof."[80] The letter cited four primary examples of such perceived exploitation: (1) donations by Google and Oracle to groups that participated as amici in *Google LLC v. Oracle American Inc.*;[81] (2) a foundation that funded both 11 organizations that filed amicus briefs and a law firm representing a party in *Friedrichs v. California Teachers*

Association;[82] (3) a funder who financially supported the Federalist Society as well as 13 amici in *Seila Law LLC v. CFPB*,[83] and (4) the U.S. Chamber of Commerce, which does not disclose either its members or "who is influencing the positions the Chamber takes in litigation."[84] The letter, as well as an attached article by Senator Whitehouse, argued that "wealthy and sophisticated players have exploited" the Supreme Court's rules to create "a massive, anonymous judicial lobbying program."[85] The letter did not assess whether the appellate rules governing conduct in the courts of appeals were similarly exploited,[86] but it did threaten that "a legislative solution may be in order to ensure much-needed transparency around judicial lobbying."[87]

Shortly thereafter, citing Harris's letter while denying that it acted under pressure, the Advisory Committee began to consider potential additional disclosure requirements.[88] The Committee pushed back on the idea that amicus briefs are like lobbying, noting that they are public and lobbying is done in private.[89] It also emphasized that neither public registration nor fines fall within the scope of the rulemaking process.[90] The Committee noted concerns, however, that parties could use amicus briefs that falsely appeared to be independent as a way to evade page limits—even though the current rule already addresses this problem.[91] Worrying about "the influence of 'dark money' on the amicus process," the Committee also noted other concerns that someone "with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus."[92]

On the other hand, the Committee also admitted that the First Amendment does allow anonymous speech.[93] Considering the then-recent decision in *Americans for Prosperity v. Bonta*, the Committee argued that the California law at issue there was different from amicus disclosures in four ways.[94]

- California's law and Rule 29 target different activities, and "[t]here can be little doubt" that more can be required of amicus filers than is required of charitable organizations generally.[95]

- Rule 29 and its Supreme Court counterpart already required disclosure of the identities of those who make direct contributions to fund a brief, and "[p]resumptively, the Court viewed those requirements as constitutional when it imposed them."[96]

- Rule 29 disclosures are already public, while California's mandated disclosures were meant to be confidential.[97]

- Rule 29's current 10 percent ownership and contribution disclosure threshold is higher than California's 2 percent or $5,000 disclosure threshold.[98]

Although the Subcommittee and the Advisory Committee initially considered requiring additional disclosures of who funds an amicus, members settled for additional disclosures solely regarding an amicus's identity, interests, and financial relationship to a party.[99] The Amicus Disclosure Subcommittee explained that "little if any support" existed for requiring disclosure of funding from nonparties not earmarked for a particular amicus brief.[100] One member also suggested holding the idea for "coordinat[ion] with disclosure of third-party litigation funding."[101] Regarding additional disclosures, the Subcommittee noted that requiring additional information on an amicus's identity and interests would aid the court and public in better evaluating how helpful a brief could be.[102] Similarly, it argued, certain levels of financial support by a party, such as majority ownership or control, would indicate that an amicus is not a "broad-based amicus."[103] Moreover, by requiring disclosure of members of an amicus who joined the amicus within the past year and then donated funds directly for an amicus brief, the draft rule would close an opportunity for parties to evade disclosure.[104]

Members repeatedly recognized, however, that no clear problem existed at the appellate level. Judge John Bates of the U.S. District Court for the District of Columbia and Ms. Danielle Spinelli both underscored that they had been "asked by the Supreme Court" to address the issue.[105] Ms. Spinelli argued that the Committee consequently "should be reluctant" to say that no problem existed and do nothing.[106] When pressed for examples, she emphasized "legitimate concerns about evasion and transparency" as well as "anecdotal evidence in the Supreme Court."[107] One member asked, without receiving a direct answer, whether judges were in fact misled "in a significant number of cases" about the identity of amici.[108] Another remarked that "[t]here may not be an actual problem without party behavior," even though broad agreement existed "that we should know if it does happen; there may be more of an issue with nonparty behavior, but less agreement about what to do about it."[109] Other members remarked that in their view, no problem exists.[110]

Nonetheless, the Advisory Committee forged ahead. In May 2024, the Committee distributed its final draft of the proposed amendments, which it published for public comment in August 2024. Among other changes, such as the word limit for amicus briefs, the amendments would impose four new requirements.[111]

- Amici other than the United States, an officer or agency of the United States, or a state must seek permission from the appeals court to file a brief.

- An amicus would need to disclose additional information about itself, such as its history and experience.

- An amicus would need to disclose whether a party or a party's counsel (1) has a majority interest in or majority control of the amicus or (2) contributed 25 percent or more of the amicus's revenue in the 12 months before the brief was filed.

- The amicus would need to reveal whether a person contributed $100 or more to fund the brief in the 12 months before the brief was filed unless the person was a member of the amicus for more than 12 months or if the amicus existed for less than 12 months (which, if so, the amicus must also disclose).

The Advisory Committee also laid out its final reasoning for the proposed amendments. Most of that reasoning focused on justifying the proposed disclosure requirements. Tellingly, however, the Committee hinged its arguments on the rather novel claim that the proposed disclosure requirements are just like campaign finance laws.[112] The disclosures, it explained, would help judges to "evaluate the submissions of those who seek to persuade them, in a way that is analogous to campaign finance disclosures that help voters evaluate those who seek to persuade them."[113] Carrying this theme forward, the Committee argued that disclosures would reveal whether an amicus "may be sufficiently susceptible to" a party's influence and that "[k]nowing who made a contribution that was earmarked for a brief provides information to evaluate that brief in a way analogous to the way that knowing who made a contribution to a candidate helps evaluate that candidate."[114] It further added that "views expressed in the amicus brief might be disproportionately shaped by the interests of that contributor" to the point that the brief functions "simply as a paid mouthpiece." Moreover, the Committee explained, the proposed amendments treat a new member of an amicus as a nonmember because someone could otherwise simply join an amicus as a way to underwrite a brief anonymously.[115] At bottom, the Committee concluded, because an amicus "does not have a right to be heard in court" and can speak elsewhere if it wishes, any burden the new rules might impose would be minimal.[116]

Assessing Current Reform Proposals

In light of the fact that this entire episode is, as noted, likely nothing more than a solution in search of a problem, the apparent constitutional and practical problems presented by the proposed solutions glare even more brightly.

- **Practical Concerns.** Additional disclosures are unnecessary. Recent challenges to the Supreme Court's amicus disclosure requirements as inadequate are rooted in policy disagreement with the Court's decisions and the belief that the Court should consider or discount arguments based on the identity of groups before it.[117] Pressure to adopt more sweeping disclosure requirements throughout the judiciary arises from unfounded concerns that individuals or groups are misleading courts with amicus briefs that veil hidden interests or create an illusion of broad support for certain outcomes. Neither Senator Whitehouse nor the committee members raised a single example of an undisclosed relationship between an amicus and another party that threatened the judiciary's integrity. With only one exception,[118] the examples of alleged abuses that Senator Whitehouse provided were of donors who gave money both to amici and to someone else who advocated for positions he disfavored. Such financial relationships are not problematic unless judges should decide cases based on the identity of who is on each side, which would upend judicial impartiality and undermine public trust.

- **Additional disclosure requirements are unnecessary from a practical perspective.** As committee members repeatedly noted, no clear problem actually exists. As an initial matter, the sweeping disclosures created by the Committee and pushed by Senator Whitehouse are not widespread. The Supreme Court lacks such requirements,[119] and no similar requirement is common in state courts. On the contrary, many states' rules for amicus participation require disclosures largely paralleling those required by Appellate Rule 29.[120]

  But aside from the lack of parallels, no evidence that parties are exploiting Rule 29—even occasionally—was ever presented by Senator Whitehouse, the Amicus Subcommittee, or the Advisory Committee. Senator Whitehouse's examples were generally of third parties that funded organizations that in turn became involved in litigation as

parties, counsel for a party, or amici. Only one example, in which Google and Oracle donated to eventual amici, showed a party relationship with amici. None revealed party control of an amicus, however. Similarly, throughout discussions about potential revisions in Rule 29, no Subcommittee or Advisory Committee member raised a single example of a party controlling or even unduly influencing an amicus. Members instead referenced only concerns—which they failed to support with instances of problematic amicus curiae behavior.

Consequently, it is not clear that the rules will stop or reveal any problematic behavior. A party truly committed to financially controlling amici will simply change its practices to evade disclosure under a modified Rule 29.[121] If the proposed changes are adopted, a judge who suspects that an amici's disclosure is insufficient, misleading, or outright false will still need to seek additional information. But a judge already has the power to remedy a Rule 29 violation, including by striking the noncompliant brief. Moreover, the additional burdens of disclosure, as well as the risk of nonparticipation, created by the proposed amendments are not counterbalanced by resolution of an actual problem.

- **Discouraging coordination of amicus briefs—including by parties—disserves judicial decision-making.** Coordination of amicus briefs is increasingly common and is accomplished through means other than financial control. The proposed amendments would therefore do nothing to reduce the level of influence a party or third party might have on the amicus process. Nor should they have such a deterring influence. Coordination—including by a party—aids courts by reducing duplicity and, when done by skilled advocates, by increasing the quality of the briefs.

  Amicus coordination by other means is a normal practice in appellate litigation, particularly at the Supreme Court. Evidence exists that amici were coordinated in *Roe v. Wade*.[122] Then-attorney Ruth Bader Ginsburg "was known for her skill at coordinating amici when she was litigating before the [Supreme] Court in the 1970s and 1980s."[123] Mary Bonauto, Legal Director of Gay & Lesbian Advocates & Defenders, coordinated amici in *United States v. Windsor*, as did supporters and opponents of the Affordable Care Act in *King v. Burwell* and the ACLU in *Hobby Lobby*.[124] Indeed, Big Law advocates recognize the necessity

of such coordination before the Supreme Court in particular—with one advocate going so far as to recruit a confidant at Covington & Burling to micromanage and control amici's collective message in *Hamdan v. Rumsfeld*.[125]

Such coordination appears to be helpful, not harmful. Judges and Justices alike have complained about repetitive "me too" briefs. Some courts have even adopted rules requiring some measure of coordination to prevent overlap in substance. As Allison Larsen and Neal Devins argue, at least at the Supreme Court, coordination of amicus briefs by specialized practitioners can aid the court by presenting information and perspectives that the practitioners know the Court will find helpful in reaching a decision.[126] The Justices themselves have viewed this as ensuring that they will hear the best arguments.[127] As Larsen and Devins further point out, the advocates engaged in such litigation and coordination are responding to the signals sent by the Justices in their opinions about what arguments would be most persuasive to them.[128] There is no reason to think that the situation is different in the lower courts. In fact, a majority of lower court judges have indicated that they find amicus briefs helpful when those briefs offer unique legal arguments or explain the impact of a case on an amicus's interests. Coordination seems to be in the interest of judges who want to hear those arguments—and as one member remarked, such coordination is expected.

- **The public and courts have no interest in knowing an amicus's financial sources, nor should they have such an interest.** No interest is served by mandating disclosure of an amicus's financial sources. The Committee was therefore right to drop the disclosure provisions regarding third-party funding sources or financial control. Unlike funds earmarked for a brief by donors who have an interest in what the brief says and thus, in a sense, have interests represented by the brief, general funding aims at advancing the overall mission of the organization. The organization is thus empowered to advance interests shared by its funders. An organization that veils its actual mission with an artificial one is already violating Rule 29 by lying to the court about its interests.

  Although disclosure of large funders of a specific amicus brief may help to reveal what interests an amicus brief truly advances, and thus

which interests may be impacted by the case, neither the public nor judges have an interest in knowing who is funding an organization generally. Under both dispute resolution theory and law declaration theory of judicial decision-making, third parties whose interests are affected by the outcome of a dispute are welcome to aid the court by presenting arguments or information that further delineate the issue so that the court can make an informed decision. That is, after all, the fundamental purpose of the amicus curiae, whether in 17th century England or 21st century America. Rules requiring disclosure of the individuals or organizations directly involved with a brief can—but do not necessarily—facilitate that role. An organization that is but a shell for a hidden interest (for example, a pro-business organization masquerading as a consumer interest group) would flatly violate Rule 29 as it currently exists if it created a false interest to cover its true interest.

There is, however, no problem with groups that share views on a legal or policy issue partnering generally, including through funding, and not disclosing those broader relationships when one or more file an amicus brief. Disclosure of the identities of general funders advances no public interest unless we want judges to make identity-based decisions—which would violate the rule of law and undermine judicial impartiality and fairness. Public trust of the judiciary does not depend on who has access to the courthouse—though it should be open to all. Nor does it depend on who makes certain arguments. Public trust instead depends on judges deciding a case fairly without bias either for or against any party.

Of course, we do not and should not want judges to approach the bench as tabula rasas. Every judge will and should have a philosophy of judging. But no one, living constitutionalist or textualist or otherwise, would argue that the identity of the party making an argument should determine whether the judge is or is not persuaded by that argument. It is one thing to look at the identity of an amicus or its attorneys as a heuristic for either the quality of the argument being made or the interests the brief will seek to advance. It is another thing to discount a brief's arguments because of who is making them—or who empowered the amicus, directly or indirectly, to make them.[129] The former is a technique for identifying good arguments; the latter injects identity politics into the proceedings of a court that should be impartial.

> Rule 29 aims to ensure that third parties can aid judges in understanding the contours of a case. The informational interest of politics—knowing who is trying to influence one's vote and why—is simply not present in the courts, nor should it be. In fact, with political figures seeking to investigate private citizens for constitutionally protected civic engagement,[130] it may serve the public interest more to veil rather than disclose amici's funding sources. Public criticism and the courage to face it are one thing, but violence by activists and unjustified scrutiny and harassment by politicians and federal bureaucrats for engaging in constitutionally protected civic engagement are another thing entirely. Anonymity is in the public interest in the latter circumstances.

Constitutional Concerns. If that were not enough, the proposals also suffer from constitutional concerns. Senator Whitehouse's AMICUS Act specifically provides that nothing in it should "be construed to prohibit or interfere with" someone's "right to petition the Government for the redress of grievances," "right to express a personal opinion," or "right of association, protected by the First Amendment of the Constitution of the United States."[131] But it seems that Whitehouse "doth protest too much."[132] The provisions of the proposed act and the Supreme Court's interpretation of the First Amendment cannot be reconciled—and the same can be said of the Rules Committee's recent proposals.

Aware of the constitutional concerns, the Advisory Committee engaged in a lengthy discourse about why, in its view, the proposed changes in Rule 29 pass constitutional muster.[133] Its analysis is perplexing and unconvincing. As Senators Mitch McConnell (R–KY), John Thune (R–SD), and John Cornyn (R–TX) pointed out, if the rule changes are implemented, it "will be a sorry sight to see the judiciary haled into its own courts for violating one of our most fundamental rights, but it will be necessary."[134]

- **Compelled disclosure is long disfavored under the First Amendment and Supreme Court precedent.** Compelled disclosure issues impinging on the First Amendment are nothing new. The Supreme Court confronted them in earnest during the fight against segregation and Jim Crow laws. In *NAACP v. Alabama*,[135] one of the seminal cases dealing with the issue, the Court held that the First Amendment prohibited the Alabama Attorney General from requiring the NAACP to turn over its membership lists. To put that demand in context, it is important to remember that NAACP members faced "economic

reprisals and violence" as a result of that organization's opening "an Alabama office that supported racial integration in higher education and public transportation."[136] The Alabama Attorney General's request for the group's membership lists was part of an effort to have a chilling effect on the group's activities. The Supreme Court later referred to this as a First Amendment "chilling effect in its starkest form."[137]

The Court subsequently addressed compelled disclosure issues primarily in the context of lobbying and campaign finance–related cases. In *Buckley v. Valeo*, the Court upheld the disclosure regime in the Federal Election Campaign Act, noting that three governmental interests could justify it: (1) providing voters with information to inform their choices, (2) deterring actual corruption or even the appearance of corruption, and (3) providing information needed to detect and investigate violations of the law.[138]

- **Proposals fail to meet the exacting scrutiny test.** The Supreme Court most recently addressed First Amendment concerns regarding compelled disclosures in *Americans for Prosperity Foundation v. Bonta*.[139] The California Attorney General had sought to require charitable organizations within the state to disclose the identities of their major donors by turning over certain tax documents. Several of these organizations objected and filed suit, arguing that this violated their First Amendment rights to associate freely with others. In a six-to-three decision, the U.S. Supreme Court agreed. Chief Justice John Roberts, writing for the majority, explained that "each governmental demand for disclosure brings with it an additional risk of chill,"[140] and because of that risk, courts apply "exacting scrutiny" when evaluating whether such demands for disclosure violate the First Amendment. Roberts explained that under "that standard, there must be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'"[141] For the first time, the Court clarified that while "exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest."[142] It is not quite strict scrutiny, but it is close.

  The Court further explained that "a dramatic mismatch" existed between the California Attorney General's stated goal of combatting charitable fraud and "the disclosure regime" he implemented.[143]

Moreover, the Court underscored that "a reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring"—which means that the more unnecessary a disclosure regime proves to be, the more likely it is that it cannot survive exacting scrutiny.[144] Even if one steps away from the tiers-of-scrutiny analysis, it is clear that the "text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously."[145]

- **The lack of a need for rules should end the analysis, and the analogy to campaign finance cases makes little sense.** As the Court has repeatedly stressed, in "the First Amendment context, fit matters."[146] Also, as explained above, even though the government might have an interest in requiring some disclosures from amicus filers, those interests are adequately served by the current regime implemented by Appellate Rule of Procedure 29. The lack of a need for enhanced disclosures, the arbitrary limits for disclosure in the new proposed regime, and the resulting lack of fit between any government interest and the proposed disclosures all counsel against them as violating the First Amendment.

  Perhaps this is why the Advisory Committee of the Judicial Conference attempted to analogize the proposed amendments to the campaign finance laws that the Supreme Court has upheld to justify courts' interest in knowing who is sponsoring the entities filing briefs in their proceedings. "Disclosure requirements in connection with amicus briefs," it argued, "serve an important government interest in helping courts evaluate the submissions of those who seek to persuade them, in a way that is analogous to campaign finance disclosures that help voters to evaluate those who seek to persuade them."[147] More troublingly, the Committee remarked that it rejected "the perspective that the only thing that matters in an amicus brief is the persuasiveness of the arguments in that brief, so that information about the amicus is irrelevant." It then emphasized that "the identity of the amicus does matter, at least in some cases, to some judges."[148]

  Think about that for a moment. Essentially, the Committee is justifying constitutionally suspect disclosure rules on the basis that some judges might care more about who is supporting certain positions than

they care about the merits of the arguments made. If so, it is shameful and blatant partisanship and a flagrant rejection of the idea that lady justice wears a blindfold. Because of this, it is doubtful that any individual judge would sign his or her name to such a statement—and if he or she did do so, it would likely be a sound basis for a judicial ethics complaint.

The Advisory Committee's campaign finance analogy is thus inapposite. Moreover, as Senators McConnell, Thune, and Cornyn have made clear, "courts are not Congress, litigation is not an election, and an appellate docket is not a free-for-all"—meaning that the "justifications for campaign-finance disclosure identified in *Buckley* do not apply here." As they further observed, that "the Advisory Committee saw fit to analogize the two reflects the judgment of a body that apparently understand neither campaigns nor judging."[149]

Conclusion

At the end of the day, courts are courts of law, not courts of public policy. For many judges, policy may play a role in judicial decision-making (for example, in evaluating the impact of a legal rule on various interests), but federal judges are bound to say what the law is, not what they think it ought to be. Under either a law declaration or a dispute resolution theory of judging, what matters is whether the judge decides a case according to law—not according to politics.

Judges have an interest in knowing whether the parties are playing by the rules. That, after all, is the purpose of disclosing whether a party authored or funded a brief. But any demand to know with whom an amicus otherwise associates should raise concerns about partiality and bias. The notion that judges should refuse to consider an argument because it might advance certain disfavored interests is incompatible with judicial integrity. Judges should recognize that attempts to convince them otherwise are nothing more than a trap.

Zack Smith is Senior Legal Fellow and Manager of the Supreme Court and Appellate Advocacy Program in the Edwin J. Meese III Center for Legal and Judicial Studies at The Heritage Foundation. **Seth Lucas** is Senior Research Associate in the Meese Center.

Endnotes

1. Star Wars: Return of the Jedi (1983), https://www.youtube.com/watch?v=wk-6DPrcMv4.
2. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access Efficiency, and Adversarialism*, 27 Rev. Litig. 669, 676 (2008).
3. *Amicus Curiae*, Black's Law Dictionary (11th ed. 2019).
4. Simard, *supra* note 2, at 676; Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 694–95 (1963).
5. Krislov, *supra* note 4, at 695 (quoting Holthouse's *Law Dictionary*).
6. *Id.* at 694 (quoting Abbott's *Dictionary of Terms and Phrases*).
7. *Id.* at 695 (citing Horton & Ruesby, Comb. 33, 90 Eng/Rep. 326 (K.B. 1686)).
8. *Id.* (quoting *The Prince's Case*, 8 Coke 1, 29a, 77 Eng. Rep. 481, 516 (1606)).
9. *See id.* at 696.
10. *See id.*
11. *Id.* at 696–97 (citing *Coxe v. Phillips*, 95 Eng. Rep. 152 (K.B. 1736)).
12. *Id.*
13. *Id.*
14. *Id.* at 699–700. Krislov explains that participating as an amicus curiae was one of several paths for third-party involvement at the time. *Id.* at 699 (citing Hersman, *Intervention in Federal Courts*, 61 Am. L. Rev. 1, 4–6 (1927)).
15. *Id.* at 699 (citing *Green v. Biddle*, 11 U.S. (7 Cranch) 116 (1812)). Note that 1821, when Clay appeared as an amicus curiae, was the first year the Court accepted written filings. Joseph Kearney & Thomas Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 744 n.1 (2000).
16. Krislov, *supra* note 4, at 699–700.
17. *Id.* at 701–02 (citing *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854)). The states objected, thus requiring the Court to decide on its own whether the Attorney General could participate. *Id.* What might have made this decision difficult was that the case fell under the Court's original jurisdiction, but, as Justice Curtis noted in a dissent, the United States had an interest in the suit and so was at least a quasi-party. *Id.* (citing *Florida*, 58 U.S. (17 How.) at 498)). Under Article III, Justice Curtis explained, all jurisdictional grants involving the United States as a party fell under the Court's appellate jurisdiction, not its original jurisdiction. *See Florida*, 58 U.S. (17 How.) at 504–05.
18. Krislov, *supra* note 4, 702.
19. *Id.* at 702–03.
20. *Id.* at 703.
21. *Id.*
22. *Id.* at 707–08; *see also*, *e.g.*, Tomiko Brown-Nagin, *In Memoriam: Justice Ruth Bader Ginsburg, The Last Civil Rights Lawyer on the Supreme Court*, 56 Harv. C.R.-C.L.L. Rev. 15, 15 (2021) ("The ACLU's Ginsburg-led campaign during the 1970s to dismantle laws that classified by sex followed the blueprint of the NAACP's Marshall-led campaign during the 1940s and 50s...."); Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 Harv. J.L. & Gender 251, 279 (2009) (observing that the Supreme Court decided *Reed v. Reed*, 404 U.S. 71 (1971), on the same grounds raised by Ginsburg and the ALCU as a secondary argument in an amicus brief).
23. *Id.* at 713.
24. *Id.* at 713–14.
25. *Id.*
26. Kearney & Merrill, *supra* note 15, at 763.
27. Krislov, *supra* note 4, at 715.
28. Kearney & Merrill, *supra* note 15, at 749; Allison Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L.R. 1901, 1902 & nn. 2–3 (2016).
29. Kearney & Merrill, *supra* note 15, at 744.
30. Scott Harris, *Revisions to Rules of the Supreme Court of the United States* (2022), https://www.supremecourt.gov/filingandrules/SummaryOfRuleChanges2023.pdf.
31. *See generally* Larsen & Devins, *supra* note 28.
32. Larsen & Devins, *supra* note 28, at 1903.

33. *Id.* at 1919.
34. *Id.* at 1924–26.
35. *Id.*
36. *Id.* at 1926.
37. Kearney & Merrill, *supra* note 15, at 748; *see* Simard, *supra* note 2, at 682; Larsen & Devins, *supra* note 28, at 1913.
38. Kearney & Merrill, *supra* note 15, at 748.
39. *Id.*
40. *Id.*; Larsen & Devins, *supra* note 28, at 1913; Simard, *supra* note 2, at 681.
41. Simard, *supra* note 2, at 681.
42. Kearney & Merrill, *supra* note 15, at 748.
43. *See* Simard, *supra* note 2, at 697; Kelly Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Politics 33, 46–49 (2004) (discussing former Supreme Court clerks' views on briefs filed by the U.S. Solicitor General, by states, and by other governmental entities).
44. Simard, *supra* note 2, at 698; Lynch, *supra* note 43, at 46–51.
45. Simard, *supra* note 2, at 700.
46. *Id.* at 690, 692.
47. *Id.* at 695.
48. *Id.* at 688.
49. *See* Lynch, *supra* note 43, at 46–47, 49–56.
50. *See* Simard, *supra* note 2, at 689–90 (explaining that a majority of judges viewed the number of amici or amicus briefs as having "little or no influence" on the dispute's outcome); Larsen & Devins, *supra* note 28, at 1940 (observing that "amicus participation at the cert stage serves as a valuable signal to law clerks [at the Supreme Court] in an era where circuit splits—the traditional dominant reasons for granting cert—are less common."); Lynch, *supra* note 43, at 61 (describing, in the view of former Supreme Court clerks, that the composition and quality of a brief filed by several amici is what matters, not the number of amici on the brief); Kearney & Merrill, *supra* note 15, at 801 (explaining that one or two amicus briefs on one side with none on the other can have some effect on the success of a petitioner, but that the effect "largely disappears" after the number rises to three or more briefs); *id.* (explaining that the Solicitor General enjoys a "heightened probability of success" as a party and amicus that can mask or overcome the effect of having one or two amicus briefs on one side with no amicus briefs on the other). Note that the rise of the Supreme Court Bar in recent years may have blunted the Solicitor General's "heightened probability of success" and thus shaped the effect of amicus briefs in cases where the Solicitor General participates as a party or amicus. *See* Larsen & Devins, *supra* note 28, at 1940 (explaining that the Supreme Court Bar has created "a broader reputation market.").
51. *Simard*, *supra* note 2, at 688.
52. Kearney & Merrill, *supra* note 15, at 750.
53. Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 Yale L.J.F. 141, 162 (2021).
54. *Id.* at 153 (citations omitted).
55. Heidi Przybyla, *"Plain Historical Falsehoods": How Amicus Briefs Bolstered Supreme Court Conservatives*, Politico (Dec. 3, 2023), https://www.politico.com/news/2023/12/03/supreme-court-amicus-briefs-leonard-leo-00127497; *see also* Heidi Przybyla, *Judiciary Democrats Call for Stronger Transparency on Amicus Brief Funding*, Politico (Dec. 15, 2023), https://www.politico.com/live-updates/2023/12/15/congress/whitehouse-on-amicus-briefs-conservative-scotus-00132056 (noting that in "a Dec. 14 letter to the Judicial Conference, the policymaking body for federal courts, Sen. Sheldon Whitehouse of Rhode Island and Rep. Hank Johnson for Georgia, said a POLITICO investigation published earlier this month illustrates the need for such reforms").
56. *See, e.g.*, Robert Barnes, *Warning or Threat? Democrats Ignite Controversy with Supreme Court Brief in Gun Case,* Wash. Post (Aug. 16, 2019), https://www.washingtonpost.com/politics/courts_law/warning-or-threat-democrats-ignite-controversy-with-supreme-court-brief-in-gun-case/2019/08/16/2ec96ef0-c039-11e9-9b73-fd3c65ef8f9c_story.html (noting that Senator Whitehouse and several of his Democratic colleagues filed an amicus brief with the Court that could be "characterized as both a brassy reality check and unprecedented political bullying"); *see also* Michael Macagnone, *Supreme Court Ethics Code Doesn't Satisfy Democratic Appetite for Legislation,* Roll Call (Nov. 14, 2023), https://rollcall.com/2023/11/14/supreme-court-ethics-code-doesnt-satisfy-democratic-appetite-for-legislation/ (describing Senator Whitehouse as "the main Senate backer for Supreme Court ethics legislation").
57. Hank's Court Reform Platform, Hank Johnson for Congress, https://hankforcongress.com/hanks-court-reform-platform/ (last accessed Aug. 6, 2024).
58. S. 1411, 116th Cong. (2019).
59. Whitehouse, *A Flood of Judicial Lobbying*, *supra* note 53, at 142.

60. H.R. 3993, 116th Cong. (2019) (identical companion House bill).
61. S. 1411, 116th Cong. (2019).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Administrative Bodies: Judicial Conference of the United States, 1948–Present*, Federal Judicial Center, https://www.fjc.gov/history/administration/administrative-bodies-judicial-conference-united-states-1948-present (last visited Jan. 10, 2025).
66. Zack Smith & Matthew Turner, *Time for Scrutiny of DEI Policies of Administrative Office of US Courts, Judicial Conference*, Daily Signal (Nov. 6, 2023), https://www.dailysignal.com/2023/11/06/time-for-scrutiny-of-dei-policies-of-administrative-office-of-us-courts-judicial-conference/ (briefly recounting the current composition of the Judicial Conference).
67. Sheldon Whitehouse, Speech, The Scheme 28: The Judicial Conference, https://www.whitehouse.senate.gov/news/speeches/the-scheme-28-the-judicial-conference/; *see also No Friend-of-the Court Senator*, Wall St. J. (updated Feb. 25, 2019, 2:26 pm ET), https://www.wsj.com/articles/no-friend-of-the-court-senator-11551046568?mod=article_inline (noting that "Mr. Whitehouse is ginning up this fuss now because he wants to discredit the Roberts Court as somehow politically corrupt").
68. Fed. R. App. P. 29.
69. *Id.*
70. *Id.*
71. Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 2 (Oct. 30, 2019) [hereinafter *Oct. 2019 Minutes*], https://www.uscourts.gov/sites/default/files/minutes_of_the_october_2019_meeting_of_the_advisory_committee_on_appellate_rules_final_0.pdf; Of course, Whitehouse introduced the Act only after he had sent a letter to Chief Justice John Roberts and Supreme Court Clerk Scott Harris notifying them that he intended to do so and letting them know that in his view, "a legislative solution may be in order to put all *amicus* funders on an equal playing field." Letter from U.S. Senator Sheldon Whitehouse to Chief Justice John G. Roberts, Jr. and Supreme Court Clerk Scott Harris (Jan. 4, 2019), https://www.whitehouse.senate.gov/wp-content/uploads/imo/media/doc/1.4.19%20Letter%20to%20Chief%20Justice%20Roberts.pdf.
72. *Oct. 2019 Minutes*, *supra* note 71, at 2.
73. *Id.*
74. Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 2 (Apr. 3, 2020), https://www.uscourts.gov/sites/default/files/final_-_minutes_of_the_april_3_2020_meeting_of_the_advisory_committee_on_appellate_rules_0.pdf.
75. Letter from Supreme Court Clerk Scott Harris to Judge David Campbell and Judge John Bates (Sept. 18, 2020), in Agenda Book, Advisory Committee on Rules of Appellate Procedure 151 (Apr. 7, 2021) [hereinafter Apr. 2021 Agenda Book], https://www.uscourts.gov/sites/default/files/appellate_agenda_book_spring_2021_final.pdf.
76. *Id.*
77. *Id.*
78. *Id.*
79. Letter from U.S. Senator Sheldon Whitehouse and U.S. Representative Henry Johnson, Jr., to Judge John Bates (Feb. 23, 2021), in Apr. 2021 Agenda Book, *supra* note 75, at 153.
80. *Id.* at 155–58.
81. 593 U.S. 1 (2021).
82. 578 U.S. 1 (2016).
83. 591 U.S. 197 (2020).
84. *Id.* at 158.
85. *Id.*
86. *See id.* at 153.
87. *Id.* at 160.
88. Memorandum from Judge Jay Bybee, Chair of the Advisory Committee on Appellate Rules, to Judge John Bates, Chair, Committee on Rules of Practice and Procedure, at 6 (Dec. 8, 2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_appellate_rules_-_december_2021_0.pdf ("At the June meeting of the Standing Committee, the Advisory Committee reported that it had begun careful exploration of whether additional disclosures should be required.").
89. *Id.*

90. *Id.*
91. *Id.* at 6–7.
92. *Id.* at 7.
93. Memorandum from AMICUS Act Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure, at 6 (Mar. 12, 2021), in Apr. 2021 Agenda Book, *supra* note 75, at 133–42.
94. Memorandum from Judge Jay Bybee, *supra* note 88, at 10.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 11.
99. *See* Memorandum from AMICUS Act Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure, at 9–11 (Sept. 8, 2021), in Agenda Book: Advisory Committee on Rules of Appellate Procedure 153–73 (Oct. 7, 2021), https://www.uscourts.gov/sites/default/files/2021-10-07_appellate_rules_agenda_book_0.pdf; Memorandum from Judge Jay Bybee, Chair of the Advisory Committee on Appellate Rules, to Judge John Bates, Chair, Committee on Rules of Practice and Procedure, at 5–8 (Dec. 6, 2023), in Agenda Book: Advisory Committee on Rules of Appellate Procedure 219–27 (Jan. 4, 2021), https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for_standing_committee_meeting_final_0.pdf.
100. Memorandum from Amicus Disclosure Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure, at 4 (Mar. 3, 2023), in Agenda Book: Advisory Committee on Rules of Appellate Procedure 166 (Mar. 29, 2023) [hereinafter Mar. 2023 Agenda Book], https://www.uscourts.gov/sites/default/files/2023-03_appellate_rules_committee_agenda_book_final_updated_3-21_0.pdf.
101. Memorandum from Amicus Disclosure Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure, at 4 (Mar. 3, 2023), in Mar. 2023 Agenda Book, *supra* note 100, at 163–67.
102. *Id.* at 2–3.
103. *Id.* at 3.
104. *Id.* at 4.
105. Advisory Committee on Appellate Rules, Minutes of the Advisory Committee on Appellate Rules, at 6 (Oct. 7, 2021) [hereinafter Oct. 2021 Minutes], https://www.uscourts.gov/sites/default/files/final_-_minutes_appellate_rules_committee_fall_2021_1.pdf.
106. *Id.*
107. *Id.*; Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 4 (Mar. 30, 2022) [hereinafter *Mar. 2022 Minutes*], https://www.uscourts.gov/sites/default/files/2022-04_appellate_rules_meeting_minutes_final_0.pdf.
108. Advisory Committee on Appellate Rules, Minutes of the Advisory Committee on Appellate Rules, at 7 (October 13, 2022) [hereinafter *Oct. 2022 Minutes*], https://www.uscourts.gov/sites/default/files/2022-10_appellate_rules_committee_meeting_minutes_final_0.pdf.
109. Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 5 (Oct. 19, 2023) [hereinafter *Oct. 2023 Minutes*], https://www.uscourts.gov/sites/default/files/2023-10_minutes_appellate_rules_committee_fall_2023_final.pdf.
110. *See Oct. 2021 Minutes*, *supra* note 107, at 6 ("Mr. Byron asked if the subcommittee was making a recommendation, and Ms. Spinelli answered that it was not making one. Mr. Byron thought that this was telling; he doesn't see a problem that needs to be addressed in the appellate rules."); *Mar. 2022 Minutes*, *supra* note 107, at 7–8 (seeing no problem with existing rules regarding party control); Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 10 (March 29, 2023) [hereinafter *Mar. 2023 Minutes*]; https://www.uscourts.gov/sites/default/files/2023-03_advisory_committee_on_appellate_rules_meeting_minutes_final_0.pdf.
111. *See generally* Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure, and the Federal Rules of Evidence 20–45 (2024) [hereinafter Proposed Amendments], https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2024.pdf.
112. This argument does not appear to have been raised at any point during the development of the proposed amendments—and stands in stark contrast to concerns about "dark money," "transparency," or whether an amicus is "broad-based." *See generally*, *e.g.*, *Oct. 2019 Minutes*, *supra* note 71 (no mention of elections or campaign finance); *Mar. 2023 Minutes*, *supra* note 110, at 13 (mentioning campaign finance only in reference to difficulty in forming "ironclad rules"); Committee on Rules of Practice and Procedure, *Minutes*, at 10 (Jan. 4, 2023), https://www.uscourts.gov/sites/default/files/2023-01_standing_committee_meeting_minutes_final.pdf (referencing campaign finance only in brief comment making comparison of draft rules to disclosures "required for dark-money contributions to political campaigns").
113. Proposed Amendments, *supra* note 111, at 20.
114. *Id.* at 22–24.
115. *Id.* at 24.
116. *Id.* at 20.

117. *See, e.g.*, Senator Sheldon Whitehouse, *Dark Money and U.S. Courts: The Problem and Solutions*, 57 HARV. J. ON LEGIS. 273 (2020) (describing how amici funded by "dark money" are helping to shape what he views as problematic decisions by the U.S. Supreme Court).
118. *See infra* "Additional disclosure requirements are unnecessary from a practical perspective."
119. *See* SUP. CT. R. 37.
120. *See*, *e.g.*, ARIZ. R. CIV. APP. P. 16(b)(3) (requiring identification of the sponsor, the sponsor's interest, and anyone "other than members of the sponsoring group or organization that provided financial resources for the preparation of the brief."); ARK. SUP. CT. R. 4-6(c) (requiring disclosure of "every person or entity, other than the amicus curiae, its members, or its counsel, who…collaborated in [the brief's] preparation" in addition to requirements paralleling Rule 29); CAL. R. CT. 8.200(c) (paralleling Rule 29); MINN. R. CIV. APP. P. 129.03 (paralleling Rule 29); N.C. R. APP. P. 28.1(b)(3) (requiring disclosure of "every person or entity (other than the amicus curiae, its members, or its counsel) who helped write the brief or who contributed money for its preparation"); N.D. R. APP. P. 29(4) (listing same requirements as Federal Rule of Appellate Procedure 29); N.M. R. APP. P. 12-320(C) (paralleling Rule 29); N.Y. CT. APP. R. 500.23(a)(4) (including similar disclosure requirements but without the membership exception contained in Rule 29); W. VA. R. APP. P. 30(e)(5) (paralleling Rule 29). *But see* Ill. Sup. Ct. R. 345 (listing no disclosure requirements); NEV. R. APP. P. 29 and NEV. R. APP. P. 26.1 (containing no disclosure requirements similar to those in Rule 29); TEX. R. APP. P. 11 (requiring disclosure of "the source of any fee paid or to be paid for preparing the brief").
121. *See Oct. 2022 Minutes*, *supra* note 108, at 5 (discussing the possibility that under the proposed rule regarding disclosure of financial relationships with nonparties, some organizations could change their funding structure).
122. Larsen & Devins, *supra* note 28, at 1920.
123. *Id.*
124. *Id.* at 1920–22.
125. *Id.* at 1920, 1924–26.
126. *Id.* at 1954–57.
127. *Id.* at 1957.
128. *Id.* at 1963.
129. One example is Senator Whitehouse's argument in his own amicus brief that the Supreme Court should discount briefs filed in *Moore v. Harper* by amici who previously supported Donald Trump's efforts to challenge the results of the 2020 election. *See* Brief of Amici Curiae U.S. Senator Sheldon Whitehouse and Representative Henry "Hank" Johnson, Jr. In Support of Respondents, *Moore v. Harper*, 600 U.S. 1 (2022) (No. 21-1271).
130. The recent weaponization of American government against its own citizens—and even political figures in government—is now an undisputable fact. For example, when the National School Boards Association called for parent protests at school board meetings to be treated as the "equivalent" of "domestic terrorism," then-Attorney General Merrick Garland called for the FBI to begin investigating parents who engaged in those protests. Kendall Tietz, *Merrick Garland Directs FBI to Target Parents Responsible for "Disturbing Spike in Harassment, Intimidation" Against Schools*, DAILY SIGNAL (Oct. 5, 2021), https://www.dailysignal.com/2021/10/05/merrick-garland-directs-fbi-to-target-parents-responsible-for-disturbing-spike-in-harassment-intimidation-against-schools/. The Biden Administration's Department of Justice unsuccessfully prosecuted Mark Houck, who was praying with his son near an abortion clinic, for merely attempting to protect his son from a clinic worker shouting obscenities. *"Long Guns Pointed at Me and My 7 Children": Pro-Life Dad Tells Lawmakers About Arrest*, DAILY SIGNAL (May 16, 2023), https://www.dailysignal.com/2023/05/16/pro-life-dad-mark-houck-tells-lawmakers-about-arrest/. A Richmond FBI field office was forced to rescind a report targeting for "mitigation" several Catholic groups listed by the discredited Southern Poverty Law Center as "hate groups." Tyler O'Neil, *Breaking: FBI Rescinds Memo Citing Southern Poverty Law Center After Daily Signal Report*, DAILY SIGNAL (Feb. 9, 2023), https://www.dailysignal.com/2023/02/09/breaking-fbi-rescinds-radical-traditionalist-catholic-ideology-document-citing-southern-poverty-law-center/. And that's not to mention Senator Chuck Schumer threatening *public* figures, Justices Brett Kavanaugh and Neil Gorsuch, that they would "reap the whirlwind" if they ruled in a way disfavored by abortion proponents. Ian Millhiser, *The Controversy Over Chuck Schumer's Attack on Gorsuch and Kavanaugh, Explained*, VOX (Mar. 5, 2020), https://www.vox.com/2020/3/5/21165479/chuck-schumer-neil-gorsuch-brett-kavanaugh-supreme-court-whirlwind-threat. The list could go on.
131. S. 1411, 116th Cong. (2019).
132. WILLIAM SHAKESPEARE, HAMLET act 3, sc.2.
133. *See* PROPOSED AMENDMENTS, *supra* note 111, at 11–21.
134. Comment Letter from Senators Mitch McConnell, John Thune, and John Cornyn on Proposed Amendments to Federal Rule of Appellate Procedure 29 (Sept. 10, 2024) [hereinafter McConnell et al. Comment Letter], https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0008.
135. 357 U.S. 449, 462 (1958).
136. *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 606 (2021) (citing *NAACP v. Alabama ex rel. Patterson,* 357 U.S. at 462).
137. *Id.*
138. 424 U.S. 1 (1976); *see also Citizens United v. Federal Election Comm'n*, 558 U.S. 210 (2010) (ruling unconstitutional certain restrictions on independent corporate expenditures but upholding the Bipartisan Campaign Finance Act's disclosure regime).

139. 594 U.S. 595 (2021).
140. *Id.* at 618.
141. *Id.* at 596 (quoting *Doe v. Reed,* 561 U.S. 186, 196 (2010)).
142. *Id.* at 608.
143. *Id.* at 612.
144. *Id.*
145. *Id.* at 619–20 (Thomas, J., concurring); see also Joel Alicea & John Ohlendorf, *Against the Tiers of Scrutiny*, Nat'l Aff., Fall 2019, at 72.
146. *Americans for Property Foundation*, 594 U.S. at 609 (citing *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014)).
147. McConnell et al. Comment Letter, *supra* note 134, at 20.
148. Proposed Amendments, *supra* note 111, at 20.
149. McConnell et al. Comment Letter, *supra* note 134, at 107.

TAB 15

December 10, 2024

Via Electronic Submission System

Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
1 Columbus Circle, N.E.
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

RE: Constitutional and Practical Concerns with Proposed Amendments to Federal Rule of Appellate Procedure 29 (USC-RULES-AP-2024-0001).

Dear Judge Bates:

On behalf of National Taxpayers Union Foundation ("NTUF")[1] and People United for Privacy Foundation ("PUFPF"),[2] we submit these written comments to the Proposed Amendments to Federal Rule of Appellate Procedure 29.[3]

NTUF's Taxpayer Defense Center advocates for taxpayers in the courts—upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce. The Taxpayer Defense Center handles direct litigation as well as occasionally offering its expertise to federal and state tribunals as *amicus curiae*. The proposed changes to Federal Rule of Appellate Procedure 29 endanger the Taxpayer Defense Center's ability to offer its insight in complex tax and fiscal cases dealing with subtle areas of constitutional law, tax law, and policy.

[1] Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life.

[2] People United for Privacy Foundation's vision is an America where all people can freely and privately support ideas and nonprofits they believe in, so that all sides of a debate will be heard, individuals won't face retribution for supporting important causes, and all organizations maintain the ability to advance their missions because the privacy of their supporters is protected.

[3] Judicial Conference of the United States, Advisory Committees on Appellate, Bankruptcy, and Evidence Rules; Hearings of the Judicial Conference 89 Fed. Reg. 61498 (July 31, 2024). The text of the proposed amendments and the reasoning thereto are available at Comm. On R. of Practice and Proc. of the Judicial Conf. of the United States, Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure and the Federal Rules of Evidence (Aug. 2024) ("Proposed Amendments") https://www.uscourts.gov/file/78921/download.

PUFPF pursues a holistic reform strategy to advance federal solutions to codify personal privacy rights nationally. Through broad-based, durable coalitions that represent Americans of all beliefs, we teach citizens and policymakers why donor privacy is essential to public debate about the best ways forward for our country. PUFPF submitted comments to the Committee on a previous iteration of the proposed amendments to express concern about the dubious constitutionality and detrimental impact of the contemplated disclosures for *amici*.[4]

NTUF and PUFPF track the important need for donor privacy,[5] applying decades of Supreme Court protections for nonprofit groups. We write to the Committee that the Proposed Amendments fail First Amendment's "exacting scrutiny" standard. The Judicial Conference has shown neither a weighty enough interest nor that the Proposed Amendments are tailored to that interest. Therefore, the Proposed Amendments fail exacting scrutiny. NTUF requests an opportunity to present oral testimony as well.

I. The Proposed Amendments Fail Exacting Scrutiny.

Under *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021) ("*AFPF*") and other landmark cases dating back to the Civil Rights Era,[6] the Judicial Conference must show the Proposed Amendments survive "exacting scrutiny." Exacting scrutiny "requires that there be a substantial relation between the disclosure requirement and a sufficiently important governmental interest" and that "the disclosure requirement be narrowly tailored to the interest it promotes." *Id.* at 611. Any expansion of the existing disclosure framework would need to meet this high standard of judicial scrutiny. This will be even more strenuous for any proposal for public disclosure of nonprofit supporters.

The Supreme Court has long recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and that there is a "vital relationship between freedom to associate and privacy in one's associations." *NAACP*, 357 U.S. at 460-61, 462. This language recognizes two rights: (1) to engage in debate concerning public policies and issues, and (2) to effectuate that right, to associational privacy. Furthermore, freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference," such as registration

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[4] *See*, Brian Hawkins, *Keeping the Courts Open to Americans Who Prize Their Privacy*, PUFPF (April 3, 2023) https://unitedforprivacy.com/keeping-the-courts-open-to-americans-who-prize-their-privacy/.

[5] *See, e.g.*, Tyler Martinez, *Recent Minibus Keeps Key Budget Riders to Protect Donor Privacy*, NTUF (Mar. 25, 2024) https://www.ntu.org/foundation/detail/recent-minibus-keeps-key-budget-riders-to-protect-donor-privacy; Tyler Martinez, *In Defense of Private Foundations, Donor Advised Funds, and Private Giving*, NTUF (July 26, 2022) https://www.ntu.org/foundation/detail/in-defense-of-private-foundations-donor-advised-funds-and-private-giving.

[6] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *Talley v. California*, 362 U.S. 60 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

and disclosure requirements and the attendant sanctions for failing to disclose. *Bates*, 361 U.S. at 523; *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) (noting that the freedoms of speech and association are "delicate and vulnerable" to "[t]he threat of sanctions [which] may deter their exercise almost as potently as the actual application of sanctions").

In *NAACP v. Alabama*, the Supreme Court protected the right to privacy of association—there from disclosure of an organization's contributors—by subjecting "state action which may have the effect of curtailing the freedom to associate… to the closest scrutiny." 357 U.S. at 460–61; *see also id*. at 462 (noting that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective… restraint on freedom of association…"). Demanding donor lists should not be taken lightly, and that is why the Supreme Court has demanded that disclosure laws, such as the Proposed Amendments, survive exacting scrutiny.

Exacting scrutiny is "not a loose form of judicial review." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014). It is instead a "strict test," *Buckley*, 424 U.S. 66, requiring an analysis of the burdens imposed, and whether those burdens advance the government's stated interest because, "[i]n the First Amendment context, fit matters." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) (Roberts, C.J., controlling opinion). Such heightened review ensures that laws do not "cover[] so much speech" that they undermine "the values protected by the First Amendment." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165-66 (2002).

Here, the Committee must show that this new, detailed donor disclosure regime survives exacting scrutiny. But the memorandum for the Proposed Amendments only asserts a general interest in the information relating to who supports organizations that file *amicus* briefs and fails to show how the government's proposal is narrowly tailored to that interest. The Committee, therefore, should be wary of adopting the Proposed Amendments.

A. The Proposed Amendments Provide No Substantial Government Interest.

The Proposed Amendments aim to substantially expand the regulation and disclosure demands for filers of *amicus curiae* briefs. But aside from some conclusory statements, the Proposed Amendments have not offered a substantial government interest in the need for intrusive (and universal) donor disclosure, nor the need for that disclosure to be in the *amicus* brief. The Proposed Amendments therefore fail exacting scrutiny at the very first step.

The Supreme Court ardently protects our First Amendment rights, especially in public policy discussion. The Court has long held that "'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'" *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The Supreme Court has also recognized the need to protect the freedom of association from undue disclosure to the government and has consistently shielded organizational donors and supporters from the generalized donor disclosure found in campaign finance law.

If a law impacting core First Amendment freedoms is novel, and not merely a retread of already-approved interests and tailoring, then the government must provide concrete evidence that the new law also survives the heightened scrutiny. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377,

391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"). And the high Court has rejected "mere conjecture as adequate to carry a First Amendment burden." *Id*. at 392. Instead, the government must prove the strength of its interest. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995) ("[W]hen the Government defends a regulation on speech as a means to… prevent anticipated harms, it must do more than simply posit the existence of a disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural") (citation and punctuation omitted).

What does such a showing of substantial interest look like? Congress sought to significantly expand the disclosure regime for campaign-related speech, regulating "candidate advertisements masquerading as issue ads" that aired shortly before an election. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 132 (2002) (citation and quotation marks omitted). In campaign finance parlance, these are known as "electioneering communications" and, prior to 2002, were never regulated. Applying exacting scrutiny, that innovation required a significant showing, and the government needed to build a 100,000-page record in order to demonstrate that, at least facially, its law was appropriately tailored to a real and concrete problem. *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (three-judge court) (per curiam); *cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 332 (2010) (discussing and citing 100,000-page record amassed by dozens of litigants in *McConnell*).

This means campaign finance cases are well-trod, and the law is relatively settled on the types of interests at stake there. But when the government tries to rely upon non-political spending to demand financial disclosure, it often fails heightened scrutiny. *AFPF* is a prime example. There, the California Attorney General demanded that charitable organizations disclose to the Office the identities of their major donors (listed on Schedule B of IRS Form 990). *AFPF*, 594 U.S. at 600. The state claimed that disclosure of donors was necessary for law enforcement purposes, but not for regulation of political campaigns. *See id*. at 604–05. The *AFPF* Court recognized that much of the case law is developed by campaign finance disclosure. *Id*. at 608. But the Court did not rely on the case law of political campaigns to justify non-political donor disclosure: indeed, just the opposite. The Court took a fresh look at what was being regulated and the threat to the associational freedoms of the charities' donors in the case. *See id*. at 611–12. The Court ultimately rejected the assertion of a general law enforcement interest. *See id*. at 614–15.

The Committee has thus far made no similar showing on why the Rule 29 disclosures should go from minimal certifications that the *parties to the case* have not interfered to on-page detailed donor disclosure of the organization writing the *amicus* brief. Far from the 100,000-page record in *McConnell*, the Proposed Amendments offer one paragraph of speculation and conclusory assertion that "the identity of an amicus does matter, at least in some cases, to some judges." Proposed Amendments at 20. Further, the Proposed Amendments assert that "members of the public can use the disclosures to monitor the courts" and thus assert a "governmental interest in appropriate accountability and public confidence of the courts." *Id*. Taking each in turn, the asserted government interest here is simply not weighty.

First, the identity of the *amicus* is not the same as the identity of the *amicus* organization's donors. Already, Federal Rule of Appellate Procedure 29(a)(4)(D) requires "a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file."

The existing Rule further requires detailed statements on whether a party's counsel authored the brief (in whole or in part), whether a party or party's counsel paid for the preparing and submitting of the brief, and whether any other person contributed money for the specific *amicus* brief. FRAP 29(a)(4)(E). These provisions require *amici* to disclose who they are, what their interest is, and whether they are proxies for a party or someone else. Thus, the information the Proposed Amendments seek already exist in the law.

Second, mere passing curiosity from the public is not a substantial interest in disclosure. People want to know all sorts of things about the government,[7] but public interest does not automatically withstand First Amendment scrutiny. With civil society groups, the government often asserts that the public often wants to know the funding of such organizations, though that is somewhat in doubt in the academic literature. *See, e.g.*, DAVID M. PRIMO AND JEFFERY D. MILYO, CAMPAIGN FINANCE AND AMERICAN DEMOCRACY WHAT THE PUBLIC REALLY THINKS AND WHY IT MATTERS 5 (U. Chicago P. 2020) (academic examination where authors conducted intensive public surveys on campaign finance disclosure and concluded "public opinion simply does not offer a strong foundation for expanding campaign finance regulations: the argument that reform will improve trust in government or public perceptions of democracy does not hold up in the data"). Even if that were true, the focus on protecting the integrity of the courts should be, and must be, on the conduct of the judges themselves, not making private groups prove they have no nefarious motives.

Relatedly, the Proposed Amendments will mislead rather than enlighten the public. "Junk disclosure" is produced when the government demands more than the names of people who give to influence a specific case (the current Rule 29) to include those who give to nonprofits that perform a variety of functions (the proposed changes to Rule 29). Divorcing the disclosure from any actual intent that the money be used to influence a specific court case implies agreement where there may be none. This is compounded when a donation is given far in advance of any decision by a nonprofit to write an *amicus* brief or when a donor may oppose the nonprofit's specific speech. For example, a donor may give to the American Civil Liberties Union because of the history of the ACLU in fighting speech restrictions, but that cannot infer that the donor necessarily agrees with all the stances of the organization—on things like national security, reproductive/life issues, and other areas in the ACLU's large portfolio.

Finally, the threats to civil society groups for taking controversial positions on matters of public concern are real. In *AFPF*, the trial court found credible evidence of threats and harassment for the organization, including death threats to the CEO. *AFPF*, 594 U.S. at 604. Employees at the left-leaning New York Civil Liberties Union and center-right Goldwater Institute faced threats and harassment at their workplaces—and at their homes—due to their organizations' positions. *See*

[7] For example, questions from the public were so pervasive on the assassination of President John F. Kennedy that Congress passed a specific statute to deal with records requests on the topic. *See, e.g.*, U.S. Dept. of Justice Office of Information Policy, "FOIA Update: Agencies Implement New JFK Statute" Website[7] (Jan. 1, 1993) (discussing the President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, 106 Stat. 3443 (Oct. 26, 1992) *codified at* 44 U.S.C. § 2107 note. This same codification also houses disclosure for "Unidentified Anomalous Phenomena Records." 44 U.S.C. § 2107 note. But neither could necessarily justify disclosure of the private financial affairs of Americans to the rest of the public.

Donna Lieberman and Irum Taqi, "Testimony of Donna Lieberman and Irum Taqi on Behalf of the New York Civil Liberties Union Before the New York City Council Committee on Governmental Operations Regarding Int. 502-b, in Relation to the Contents of a Lobbyist's Statement of Registration," New York Civil Liberties Union (Apr. 11, 2007);[8] Tracie Sharp and Darcy Olsen, "Beware of Anti-Speech Ballot Measures," *The Wall Street Journal* (Sept. 22, 2016).[9] The list can go on, but all of the examples point to the same conclusion: in our current volatile political atmosphere, disclosure carries real danger to supporters of organizations speaking on hot-button issues. If the private information of donors to nonprofit groups were forcibly reported to the judiciary, these citizens would similarly be at risk.

With no substantial interest shown, at least on this record, and the practical issues with the new language, we suggest that the Committee not adopt the Proposed Amendments. Neither the public, nor the courts, nor the *amicus* community benefit from such broad disclosure rules. More importantly, as currently drafted and justified, the Proposed Amendments do not survive exacting scrutiny analysis.

B. The Proposed Amendments are not Properly Tailored.

To suggest the proposed language is constitutionally sound, the Proposed Amendments rely on the campaign finance cases decided after *AFPF*. Proposed Amendments 17–19. Campaign finance cases are some of the most common challenges to donor disclosure. But just because campaign finance is held to be narrowly tailored disclosure does not mean that other intrusive disclosure regimes are so properly tailored. *See, e.g.*, *AFPF*, 594 U.S. at 608 (recognizing "exacting scrutiny is not unique to electoral disclosure regimes" and therefore "[r]egardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny").

As the Supreme Court observed in *Buckley*, laws regulating speech must be drafted with precision, otherwise they force speakers to "hedge and trim" their preferred message. *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Thus, to "pass First Amendment scrutiny," the government must show the regulation is "tailored" to the government's "stated interests" for that regulation of core First Amendment activity. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002). Just because post-*AFPF* cases centered on campaign finance disclosures does not automatically mean that the tailoring analysis for donor disclosure for those who write *amicus* briefs is also constitutional.

The Supreme Court has repeatedly held that "First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *cf. Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468–469 (2007) ("*WRTL II*") (Roberts, C.J., controlling op.) (quoting same); In re *Primus*, 436 U.S. 412, 432–33 (1978) (quoting same); *Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (quoting same); *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 604 (1967) (quoting same). In *Rankin v. McPherson*, the Supreme Court held that discussion of public policy must also be protected with this same "breathing space." 483 U.S. 378, 387 (1987) ("'Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the

[8] *Available at:* http://www.nyclu.org/content/contents-of-lobbyists-statement-of-registration.
[9] *Available at*: http://www.wsj.com/articles/beware-of-anti-speech-ballot-measures-1474586180.

implementation of it must be similarly protected'") (quoting *Bond v. Floyd*, 385 U.S. 116, 136 (1966)). *Amicus* briefs feature discussion of public affairs that need such breathing space.

That is because "'[t]he freedom of speech … guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.'" *WRTL II*, 551 U.S. at 469 (Roberts, C.J.) (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978)) (ellipsis in *WRTL II*, brackets added). These principles reflect the "'national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Buckley*, 424 U.S. at 14 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Therefore, "under exacting scrutiny, a commitment to free speech requires governments to 'employ not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" *Wash. Post v. McManus*, 944 F.3d 506, 521 (4th Cir. 2019) (quoting *McCutcheon*, 572 U.S. at 218, and *Bd. Of Trs. Of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)) (internal brackets omitted).

The Supreme Court's tailoring analysis for campaign finance cases in *Buckley* was straightforward: organizations with the "major purpose" of supporting or opposing political candidates are also subject to campaign finance disclosure. *Buckley*, 424 U.S. at 79. Thus, candidate committees, political committees, and issue committees are all focused on engaging in electoral politics. Generalized donor disclosure makes sense in the context of such organizations with "the major purpose" of politics because donors *intend* their funds to be used for political purposes. The IRS would put such organizations in the § 527 category.

But if an organization is *neither* controlled by a candidate *nor* has as its "major purpose" speech targeting electoral outcomes, then disclosure is appropriate only for activity that is "unambiguously campaign related." *Id*. at 81. That is, when (1) the organization makes "contributions earmarked for political purposes... and (2) when [an organization] make[s] expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id*. at 80 (emphasis added).[10] Such limited disclosure is appropriate because it involves "spending that is unambiguously related" to electoral outcomes. *Id*. at 80. *Buckley* held that comprehensive disclosure can be required of groups only insofar as those groups exist to engage in unambiguously campaign related speech. *Id*. at 81.

While the Supreme Court upheld certain disclosure outside the major purpose framework in *Citizens United*, 558 U.S. at 369, it addressed only a narrow form of disclosure. The Court merely upheld the disclosure of a federal electioneering communication report, which disclosed the *entity making the expenditure* and the purpose of the expenditure. 52 U.S.C. §§ 30104(f)(2)(A) through (D). Donor disclosure in the context of what *Citizens United* approved was based only on donors who earmarked their funds for electioneering communications about political candidates. *Id*. And this entire disclosure regime's tailoring was justified by a 100,000-page record.

[10] The *Buckley* Court narrowly defined "expressly advocate" to encompass only "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Id*. at 80 n.108 (incorporating by reference *id*. at 44 n.52).

Exacting scrutiny rejects mere conjecture that a law is properly tailored. Furthermore, just because campaign finance laws are narrowly tailored does not mean other disclosure laws are properly tailored. In *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, the *en banc* Eighth Circuit struck down a law requiring independent expenditure funds to have "virtually identical regulatory burdens" to those imposed on political committees. 692 F.3d 864, 872 (8th Cir. 2012) (en banc). In that case, "Minnesota ha[d], in effect, substantially extended the reach of [political committee]-like regulation to *all* associations that *ever* make independent expenditures." *Id*. (emphasis in original). Minnesota's regulations included having to file periodic reports, even if the fund no longer engaged in political activity. *Id*. at 873 ("Perhaps most onerous is the ongoing reporting requirement. Once initiated, the requirement is potentially perpetual regardless of whether the association ever again makes an independent expenditure."). Ultimately, the *Swanson* court required "the major purpose" test to ensure that only political organizations face that burden—and not organizations that lack such a major purpose. *Id*. at 877.

Nor is the *en banc* Eighth Circuit an outlier. The decisions of other federal courts implementing this standard underscore that the informational interest extends only to "spending that is unambiguously campaign related." *Buckley*, 424 U.S. at 80–81. For example, in *Wisconsin Right to Life, Inc. v. Barland*, the Seventh Circuit stated that "[t]o protect against an unconstitutional chill on issue advocacy by independent speakers, *Buckley* held that campaign-finance regulation must be precise, clear, and may only extend to speech that is 'unambiguously related to the campaign of *a particular federal candidate*.'" 751 F.3d 804, 811 (7th Cir. 2014) (quoting *Buckley*, 424 U.S. at 80) (emphasis added). The Fourth Circuit also used *Buckley*'s unambiguously campaign related standard in finding North Carolina's "political committee" definition overbroad and vague. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 290 (4th Cir. 2008). And, in the words of the Tenth Circuit, "[i]n *Buckley*, the Court held that the reporting and disclosure requirements… survived 'exacting scrutiny' so long as they were construed to reach only that speech which is 'unambiguously campaigned related.'" *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010) (citing *Buckley*, 424 U.S. at 79–81). The *en banc* Fifth Circuit also agrees that disclosure must be tied to unambiguously campaign related activity. *Republican Nat'l Comm. v. Fed. Election Comm'n (*In re *Anh Cao)*, 619 F.3d 410, 418 (5th Cir. 2010) (en banc) ("*Buckley* does not permit non-campaign-related speech to be regulated.").

Here the Committee, if it promulgated these Proposed Amendments, would need to show there is a "substantial relation between the disclosure requirement and a sufficiently important governmental interest" and "the disclosure requirement be narrowly tailored to the interest it promotes." *AFPF*, 594 U.S. at 611. The Committee could not rely only on campaign finance cases because directly giving money to a politician is materially different than merely supporting an organization that later may lend its expertise to the judiciary in a formal *amicus curiae* brief. The latter is far more attenuated than the fears of *quid pro quo* direct contributions to members of Congress or the President. The Proposed Amendments fail exacting scrutiny.

II. There are no Alternative Channels for *Amicus* Arguments.

The Proposed Amendments assert that direct prohibitions or indirect chilling of speech is not at issue here because they "do not prevent anyone from speaking out…about how a court should decide a case," and then listed alternatives such as books, articles, podcasts, blogs, advertisements, and social media. Proposed Amendments at 20. But "it cannot be assumed that

'alternative channels' are available." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981). Only *amicus* briefs bring to the court's attention an organization's analysis for a particular case to be decided.

Metromedia is illustrative, because it dealt with restrictions on billboards. The Supreme Court held that "'[a]lthough in theory sellers remain free to employ a number of different alternatives, in practice [certain products are] not marketed through leaflets, sound trucks, demonstrations, or the like.'" *Id*. (quoting *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 (1977)). That is because "[t]he options to which sellers realistically are relegated... involved more cost and less autonomy" than their preferred method. *Id*. (quoting *Linmark*).

So too here. What matters is where best to show the detailed legal arguments to the court. No one really believes that a judge will be swayed by a good social media post about a case. Indeed, the Model Code of Judicial Conduct 2.9(A) instructs that judges should not "consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending matter." The ABA has further counseled against independent judicial research on the Internet (which would include social media). *See, generally*, ABA Formal Op. 478: Independent Factual Research by Judges Via the Internet (Dec. 9, 2017).[11] And the practicalities of the Internet are absurd: surely the Committee does not wish organizations to target social media and advertising directly to judges to try to sway their votes on cases. To the extent that the Proposed Amendments hope that alternative channels can give information on facts or mixed questions of law and facts, that counsels that the Internet is not good enough for an *amicus* to get their information properly before the court.

Nor is a book or law review article on an emerging case practical at all since the time between writing the long-form piece and publication will very likely stretch beyond the court's time writing the opinion in the case. While some issues percolate for years in legal academia, the material is written for general audiences, not how to apply the law to a specific case. Even then, new issues often arise on interlocutory appeals of grants or denials of preliminary injunctions and other fast-track procedural postures. It blinks reality to think a book or law review article can be written and published in time, or that a court will look to either in deciding the case at hand.

Amicus briefs bridge the gap between deep thinking about the trends in the law or detailed subject matter expertise with the case-specific recommendations needed by judges to resolve the controversy at hand. NTUF, as a tax and fiscal policy focused organization, deals with this all the time. NTUF has lent it expertise in cases ranging from the Mandatory Repatriation Tax of the Tax Cuts and Jobs Act to the Economic Substance Doctrine to how to allocate income and deductions among large multinational corporations. *See, e.g.* Br. of NTUF as *Amicus Curiae* in Support of Neither Party, *Moore v. United States* (U.S. No. 22-800, Sept. 6, 2023);[12] *Amicus Curiae* Br. of NTUF in Support of Appellant Liberty Global, Inc. and Reversal (10th Cir. No. 23-1410, May 7,

[11] *Available at*: https://www.abajournal.com/images/main_images/FO_478_FINAL_12_07_17.pdf.
[12] *Available at*: https://www.supremecourt.gov/DocketPDF/22/22-800/279088/20230907135608976_NTUF%20Amicus%20-%20Moore%20v%20United%20States%20for%20filing.pdf.

2024);[13] *Amicus Curiae* Br. of NTUF in Support of Appellant 3M Company and Subsidiaries and Reversal (8th Cir. No. 23-3772, Feb. 14, 2024).[14] There is real value in having courts hear tax policy experts on arcane and complex areas of tax law. But the only way to be heard for sure is to file a brief as *amicus curiae*. NTUF, however, will protect the privacy of its donors and therefore may not be able to continue to help courts suss out complex matters if the Proposed Amendments take effect.

Regardless, the Committee should remember that it is the *government's burden* to prove its law is narrowly tailored and that the state has no alternative than to regulate speech. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 797 (3rd ed. 2006) ("The government's burden when there is an infringement of a fundamental right is to prove that no other alternative, less intrusive of the right, can work."). Requiring all potential *amici* prove that every other channel does not work is misplacing the burden—to the advantage of those in power. The First Amendment, and the well-established doctrines on heightened scrutiny, exist to make the government prove the need for regulation, not the citizen's need for freedom.

III. NTUF Requests to Present Oral Testimony.

The Proposed Amendments trigger complex First Amendment analysis under decades of Supreme Court and Circuit Courts of Appeal precedent. They also implicate areas of sensitive public policy and possible unintended consequences. Oral testimony from National Taxpayers Union Foundation therefore may be helpful to the Committee. Therefore, we request the chance to present oral testimony on either January 10, 2025, February 14, 2025, or any other date the Committee so chooses.

* * *

Thank you for considering our comments. We look forward to answering any questions and working with you and your staff on these significant rule changes.

Respectfully submitted,

Tyler Martinez,
Senior Attorney
NATIONAL TAXPAYERS UNION FOUNDATION

Matt Nese,
Vice President
PEOPLE UNITED FOR PRIVACY FOUNDATION

[13] *Available at*: https://www.ntu.org/library/doclib/2024/05/NTUF-Amicus-Liberty-Global-Inc-v-United-States-AS-FILED.pdf.
[14] *Available at*: https://www.ntu.org/library/doclib/2024/02/NTUF-Amicus-Brief-3M-v-CIR.pdf.

TAB 16

PUBLIC JUSTICE
IMPACT. CHANGE.

January 29, 2025

Submitted via email

Honorable John D. Bates Chair
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, District of Columbia 20544
RulesCommittee_Secretary@ao.uscourts.gov

RE: Proposed Amendments to Federal Rule of Appellate Procedure 29

Judge Bates:

On behalf of Public Justice, Sharon M. McGowan intends to present the following testimony at the February 14, 2025, hearing of the Committee on Rules of Practice and Procedure.

Testimony of Sharon M. McGowan, Public Justice

My name is Sharon McGowan, and I appear before you today in my capacity as Chief Executive Officer of Public Justice. Founded in 1982, Public Justice is a nonprofit and nonpartisan legal advocacy organization that focuses, among other things, on preserving access to justice for civil litigants. While we provide direct representation as counsel in many of our cases, we also regularly file amicus briefs in the federal courts of appeals.

We appreciate this opportunity to comment on the proposed amendments to the Federal Rules of Appellate Procedure. While we recognize the Committee's desire to know more about the identities (and the interests) of non-parties, and particularly non-party organizations, filing amicus briefs in the federal courts, we do not take a position on the Committee's proposal to alter the disclosure requirements in FRAP 29 for prospective amici. We would, however, urge the Committee to reconsider its proposal to require motions for leave to file all non-governmental amicus briefs. The current package of proposed amendments to FRAP 29 seem to have connected the consent requirement to the Committee's concerns about disclosure and recusals, but we believe that these issues should be decoupled.

Specifically, requiring motions for leave to file regardless of consent at the initial merits stage is not necessary to prevent recusal, may prematurely eliminate helpful briefing, and undermines larger efforts by the courts to promote cooperation, instead promoting additional and unnecessary litigation.

publicjustice.net
National Headquarters
1620 L Street NW, Suite 630, Washington DC 20036
(202) 797-8600 phone • (202) 232-7203 fax
West Coast Office
475 14th Street, Suite 610, Oakland, CA 94612
(510) 622-8150 phone

First, Public Justice understands that the committee is concerned with amicus briefs forcing recusal, but the existing amicus rule addresses that concern. Existing Rule 29(a)(2) permits a court of appeals to strike an amicus brief at any time if it would result in a judge's disqualification. In other words, it is already true that amicus briefs need not force recusal, regardless of whether the brief was filed on consent or contingent on a motion. Also, all the information that points to whether recusal is proper is contained in the brief itself—the motion provides no additional information relevant to recusal. *See* Proposed Fed. R. App. P. 29(a)(3) (listing requirements for motion). Moreover, motions for leave to file amicus briefs are often filed and ruled on well before the panel hearing the merits is assigned, too soon to know whether a brief, if accepted, would force recusal.

Second, the committee expressed that motions may useful as a tool to screen out unhelpful or duplicative amicus briefs. But because motions for leave to file amicus briefs are often considered well before the panel hearing the merits is assigned, and are frequently decided by the clerk or a motions panel, they are unlikely to further that goal either. *See, e.g.*, 4th Cir. R. 27(e) (assigning motions filed prior to assignment of hearing panels to a motions panel); 8th Cir. I.O.P. I.D.3 (same). As such, the members of the court in the best position to determine whether an amicus brief is likely to be helpful to the court—namely, the panel that will be considering the case on the merits—are often not those deciding whether to grant motions for leave to file amicus briefs. As a result, truly useful amicus briefs may be screened out before any member of the court has an opportunity to understand the breadth of the merits and unhelpful amicus briefs may be permitted to proceed. Motions for leave to file are simply not an effective screening tool.

Our own experience here at Public Justice illustrates these points. In one case, we filed a motion for leave to file an amicus brief in the Eighth Circuit, which was opposed on the basis that our brief would be generally duplicative of a party's briefing. *See Doe v. Trs. of the Neb. State Colls.*, No. 22-1814 (8th Cir.). Just one day after briefing on the motion was complete, but before the completion of merits briefing (and well before the assignment of a merits panel) the motion was granted. In another case in the Tenth Circuit, we filed an opposed motion for leave to file a brief in support of neither party— meaning that it was filed before the appellee had even submitted its brief—that was provisionally granted one day after the motion briefing was complete. *See Thornton v. Tyson Foods, Inc.*, No. 20-2124 (10th Cir.). That motion was decided by a two-judge motions panel that had no overlap with the merits panel. And in a Sixth Circuit case, we filed a motion for leave after one of the parties declined to consent, but the party did not file an opposition, and the clerk granted the motion, *Huang v. Ohio State Univ.*, No. 23-3469 (6th Cir.). In all of these cases, our being forced to file a motion merely resulted in our request being added to the workload of the motions panel or clerk, when the merits panel would have been far better positioned to determine whether our brief was helpful to its consideration of the issues. In fact, in the Sixth Circuit example that I mentioned, the merits panel affirmatively stated during argument that it found our brief helpful in deciding the case.

But even putting aside the question of who would rule on such a motion for leave (a motions panel or the merits panel), no denying or granting of additional motions is needed for the merits panel to decide which briefs are valuable and should be given careful

consideration, and which should be disregarded. The panel can simply do so without the parties having to litigate—and the court having to decide—whether they should be permitted to file their brief in the first place. As the committee is well aware, that is now the practice of the Supreme Court: It permits all amicus briefs to be filed without consent or motion and considers their contents if they are useful and ignores them if they are not.

That brings me to my third and final point. At a time when the courts are trying to promote cooperation and consultation among counsel to decrease litigation expense, delay, and strain on judicial resources, this amendment tacks in the opposite direction. Requiring these additional motions does not produce any clear benefit: It will not solve recusal concerns and is not an effective means of screening for utility to the court. All it will do is require more litigation time and expense. Moreover, imposing this motion requirement potentially opens the door for substantially more (and unwarranted) opposition to the filing of amicus briefs, which would also demand more of the court's time, not only with respect to deciding whether to accept the brief at all, but also in refereeing the attendant requests for extensions of time, and other disputes that motion practice can sometimes manifest.

In closing, the proposed changes to the motion requirements will not solve the concerns articulated by the committee, but it will cause unnecessary headaches for amici, parties, and the court. For these reasons, Public Justice urges the committee to decline to require motions for leave to file amicus briefs in all cases.

Respectfully submitted,

Sharon M. McGowan
Chief Executive Officer
Public Justice

TAB 17

555 12th Street NW, Suite 1001
Washington, D.C. 20004

1-800-552-5342
NFIB.com

Via www.regulations.gov
and U.S. First Class Mail

December 30, 2024

The Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle NE
Washington, D.C. 20544

Dear Judge Bates:

RE: Proposed Amendments to Federal Rule of Appellate Procedure 29

The National Federation of Independent Business (NFIB)[1] submits these comments in response to the proposed amendments to Federal Rule of Appellate Procedure 29, published by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("the Committee").[2] NFIB opposes the proposed amendments and requests that the Committee withdraw them.

Introduction

The purpose of an amicus curiae, or "friend of the court," brief is to do exactly what its name suggests: to help a judge come to a decision. Amicus briefs allow interested parties to inform courts about legal arguments and implications of those arguments

[1] NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty States hear the voice of small business as they formulate public policies.

[2] Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to Federal Rules (Aug. 2024), available at https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2024.pdf.

which, absent amicus briefs, may go unconsidered. Through amicus briefs, judges are more informed and better able to consider all aspects of a legal dispute.

NFIB, through its Small Business Legal Center, represents the interests of NFIB members in the nation's courts with litigation and amicus briefs. NFIB's members are not billionaires, celebrities, or people of national political influence. They are small business owners, a category to which 99% of America's businesses belong.

The outcome of much litigation affects small business owners. Yet an average small business owner cannot afford to file a lawsuit every time an objectionable law or controversy arises that may affect the owner's business. Most do not have the time, resources, or the expertise to write an amicus brief. To ensure that small business owners, who otherwise would not have a voice, are heard, the NFIB Legal Center regularly files amicus briefs.

The proposed changes to Rule 29 would raise significant financial and other hurdles that would stifle the voice of small businesses in federal courts and would be nothing short of devastating for amicus filers like NFIB.

First, the proposal eliminates the option to file amicus briefs by consent of the parties, and instead requires an amicus to file a motion for leave of the court to file a brief. As it currently stands, amici only have to undergo an informal, simple, and free process before filing a brief: send an email to counsel requesting consent and wait for confirmation. In contrast, the new standard would require amici to file a motion every time, which is both costly and time-consuming.

As if this weren't enough of a burden for amici, the standard by which motions are granted or denied would also be raised; amicus briefs would have to meet the vague threshold purpose of "bring[ing] to the court's attention relevant matter not already mentioned by the parties."[3] Amicus briefs that do not meet this purpose or that are "redundant with another amicus brief" are "disfavored."[4] The motion must explain why the brief is "helpful" and why it serves the Rule's purpose.[5] The brief itself must include a description of the "identity, history, experience, and interests" of the amicus organization, and an "explanation of how the brief and the perspective of the amicus will help the court."[6]

The amendments are unnecessary, burdensome, and will prevent amici from having the chance to weigh in on important legal matters. They should be withdrawn and instead,

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[3] Proposed Rule 29(a)(2).

[4] *Id.*

[5] Proposed Rule 29(a)(3)(B).

[6] Proposed Rule 29(a)(4)(D).

for the sake of clarity and uniformity in the federal courts, the Committee should adopt the same standards that the U.S. Supreme Court has adopted for amicus briefs.

The Proposed "Relevant" and "Helpful" Standards are Subjective and Will Produce a Chilling Effect

The old yard sale maxim applies to both antiques and amicus briefs: one man's trash is another man's treasure. What one judge finds "relevant" and "helpful," another may find irrelevant and unhelpful. This applies not only to amicus briefs, but also the parties' briefs. Every judicial opinion, to some extent, is a decision about the degree of helpfulness and relevance of the briefs submitted.

To introduce an artificial helpfulness and relevance standard at the outset of filing an amicus brief will interrupt this essential process and harm amici. The standards will drain amici's time and resources on countless briefs that may never be accepted for filing. Amici would draft briefs with cogent arguments, only to discover that a judge considered the arguments unhelpful (i.e., not in line with the decision to come) and rejected it for filing. The proposed standards can thus only lead to one of two possible outcomes:

1) Amici will be more likely to submit a brief in cases where they suspect that the judge would favor the arguments in the brief;[7]

or

2) The standards will intimidate amici, preventing them from drafting briefs if they suspect that a court would not be receptive to their arguments. If, in certain courts, the risk of having a brief rejected is too high to justify the cost of drafting one, amici are likely to refrain from submitting. They would effectively be silenced.

Considering that having a developed record—whether the arguments in the briefs are in accord with the judge's line of thinking or not—aids a judge's decision, the Committee should not adopt a standard that will most assuredly result in fewer amicus briefs and a less-developed record.

The importance of amicus briefs becoming part of the record cannot be overstated. Even if a brief fails to persuade a majority, it often informs dissenting opinions, which are themselves cited and used to develop the law. Or, failing that, a strong amicus brief may persuade other lawyers who will further its arguments in other cases. An amicus brief is thus a part of the legal conversation, even if it doesn't affect the outcome of the

[7] Ironically, this is the exact situation which some commenters who support the proposed amendments fear: a so-called "flotilla of amici" arriving to influence the opinions of judges who are seen as friendly to an amici's viewpoint. *See* Comment from Senator Sheldon Whitehouse & Congressman Hank Johnson, USC-RULES-AP-2024-0001-0006 (Sep. 13, 2024). Though this idea is as imaginary as it is insulting to the integrity of judges, the proposed amendments would make dockets look more like echo chambers, which would do less than nothing to alleviate those commenters' purported concerns.

case in which it's filed. Trimming a brief off the docket due to unhelpfulness and irrelevance (i.e., disagreement with its content) unfairly removes it from the greater discussion and can only be seen as a punitive measure.

If the problem truly is that there are too many briefs, and gatekeeping is required, a better solution is the one we currently have: if a judge doesn't think a brief is helpful, he or she is free to repudiate its logic in a decision, or to skim it and toss it aside.

The Proposed Motion Requirement Will Impose Unwieldly Costs for Amici

Amicus briefs are authored by a wide variety of individuals and organizations, including nonprofit organizations like the NFIB Legal Center, law firms, and academics. While some of these groups may have large resource pools, most, especially in the field of nonprofits and public interest law firms, do not. Many of these organizations are under limited resources and are tightly staffed, usually operating with a small team of attorneys.

If a nonprofit or public interest firm only has three or four attorneys, it is highly unlikely that between them, they have the requisite state bar licenses to file in every circuit court of appeals. Put simply, a nonprofit's lawyers cannot be barred in every jurisdiction in which the organization has an interest in filing an amicus brief. Hiring an attorney barred in the jurisdiction as local counsel becomes a necessity for filing the brief.

However, local counsel is expensive, generally costing thousands of dollars just to format and file a brief. This assumes, of course, that the local counsel does not make any substantive additions, which could raise the cost to the tens of thousands. Add in a motion on top of the filing, with its required explanation—almost an argument in itself—about how the brief will help the court, and costs will soar. This will undoubtedly increase the price tag for hiring local counsel. As a result, the motion requirement will greatly reduce the number of amicus briefs that nonprofit organizations are able to file.

If the Committee is worried about the problem of consent requirements creating uncertainty, as it states in the notes, it should not crowd nonprofits out by demanding a more expensive approach in all circumstances. It should instead consider the less burdensome alternative of eliminating even consent requirements, thereby saving the parties, amici, their attorneys, and the court the time and expense of, respectively, approving, paying for, preparing and filing, and reviewing an entirely unnecessary motion.

The Proposed Amendments Are Out of Keeping with the Supreme Court's New Amicus Rules

The proposed changes to Rule 29 make even less sense considering that the United States Supreme Court has recently decided to forgo not only a motion requirement, but

also a consent requirement, for the filing of amicus briefs.[8] If the Committee plans to depart from the nation's highest court and run in the complete opposite direction on the same procedural matters which that Court also faces, it should present evidence of extraordinary circumstances and burdens that the Court does not face. Such evidence is probably scarce or nonexistent.

In the past decade and a half, the number of amicus briefs at the Supreme Court has skyrocketed. From 2011 to 2020, more than 8,000 amicus briefs were filed at the Supreme Court, with amici present in 96 percent of merits cases.[9] The Court, for its part, must have found these briefs worth engaging with on some level, because the justices cited them in more than half of their decisions.[10] Against this backdrop, the Court has dropped, instead of raised, barriers to filing amicus briefs.

Given that the federal courts of appeal are, as the Committee acknowledges, burdened with far fewer amicus briefs than the Supreme Court, this divergent approach does not add up. If the courts of appeal received a greater number of briefs, it would make sense to try to control the number—but given that they receive fewer, there is no reasonable explanation for a proposal that would further diminish the number of briefs.

There is no ongoing crisis of high quantity or low-quality briefs that would justify this departure. Far from it, it seems that amicus briefs have been effective and helpful for judges. They are discussed in oral arguments and often even addressed in opinions. The Supreme Court finds amicus briefs—of which it receives an extraordinary number—so helpful that they have made it easier, not harder, to file them. The Committee's proposed rule appears to be a "solution" in search of a problem.

Confusion abounds when unnecessary procedural barriers are put in place, especially those that have the potential to silence members of the public in an unpredictable manner. The Supreme Court has already solved the issue: eliminate motion and consent requirements and allow the public to weigh in, so long as amicus briefs are properly formatted and timely filed. If the Committee were to adopt the Supreme Court's approach, federal courts would speak with one, consistent voice on the topic of amicus filings, rather than having conflicting amicus procedures. The Committee should not bifurcate the rules with a needless contradiction.

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[8] *See* Supreme Court, *Memorandum to Those Intending to File an Amicus Curiae Brief in the Supreme Court of the United States* (Jan. 2023).

[9] Anthony J. Franze and R. Reeves Anderson, Amicus Curiae at the Supreme Court: Last Term and the Decade in Review, THE NATIONAL LAW JOURNAL (Nov. 18, 2020).

[10] *See id.*

Conclusion

For the foregoing reasons, NFIB requests that the Committee withdraw the proposed amendments to Rule 29 and instead adopt the United States Supreme Court's rules for filing amicus briefs.

Sincerely,

Elizabeth A. Milito

Elizabeth A. Milito, Esq.
Executive Director,
NFIB Small Business Legal Center

Approved for filing:

David S. Addington
Executive Vice President
and General Counsel, NFIB

TAB 18

No written testimony outline or comment
was submitted by the requested January 29, 2025
deadline.

TAB 19

American Property Casualty Insurance Association
INSURING AMERICA apci.org

Claire Howard
SVP, General Counsel and Corporate Secretary

January 10, 2025

Submitted via https://www.regulations.gov

Honorable John D. Bates, Chair
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
Washington, D.C., 20544

Re: Proposed Amendments to Federal Rule of Appellate Procedure 29

Dear Judge Bates:

The American Property Casualty Insurance Association ("APCIA") writes to express its strong opposition to the Committee on Rules of Practice and Procedure's (the "Committee") proposal to amend Federal Rule of Appellate Procedure 29(a)(2). If adopted, the proposed rule will eliminate the option of filing an amicus brief on consent during a court's initial consideration of a case on the merits.

APCIA is the primary national trade association for home, auto, and business insurers, with a legacy dating back 150 years. APCIA's member companies represent 65% of the U.S. property casualty insurance market and write more than $673 billion in premiums annually. On issues of importance to the property and casualty insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members and their policyholders in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before state and federal courts. Amicus filings allow APCIA to share its broad national perspective with the judiciary on matters that shape and develop the law.

APCIA has a robust amicus and judicial advocacy program having filed more than 80 amicus briefs in federal courts since 2020, including in each of the 12 U.S. Courts of Appeals and the United States Supreme Court. In its role as amicus curiae, APCIA educates courts regarding the broader business context of issues presented, identifies legal, logistical and public policy consequences of potential decisions, offers added data driven insight and analysis, and cites additional authority that might otherwise escape a court's attention. Drawing on the experience of its member companies, APCIA offers a unique perspective and considerable expertise to assist courts in resolving reserved questions. APCIA's perspective can be particularly helpful in federal courts given insurance matters are primarily litigated in and the business of insurance is largely regulated at the state level.[1]

Federal courts have repeatedly recognized the critical role amici like APCIA can play in addressing public policy issues concerning the insurance market. For instance, last year the United States Supreme Court twice cited APCIA's amicus brief in its unanimous decision in *Truck Insurance Exch. v. Kaiser Gypsum Co., Inc.*, 602 U.S. at 281, 282, 114 S.Ct. at 1426, 1427. APCIA has also been invited by several federal courts of appeal to participate in oral arguments as amici .[2]

The Committee's proposal to amend Rule 29(a)(2) by eliminating the option to file an amicus brief on consent threatens to limit the valuable role APCIA and other amici serve. The proposed amendments, including the new disclosure requirements, would infringe on First Amendment associational rights, threaten to discount the speech of nonparties, and have a chilling effect on amicus activity. As a result, federal courts of appeal would be deprived of critical context, insight and analysis. It would also have adverse consequences for the public, as courts would have less access to information regarding the potential public policy consequences of their decisions.

[1] *See* McCarron-Ferguson Act of 1945, 15 U.S.C. §§ 1101-1015.

[2] *See, e.g., Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 22 F.4th 450 (5th Cir. 2022); *SAS Int'l v. General Star Indem. Co.*, 36 F.4th 23 (1st Cir. 2022); *Rose's 1, LLC v. Erie Ins. Exch.*, 290 A.3d 52 (D.C. Cir. 2023).

In its May 13, 2024, memorandum to the Committee, the Advisory Committee on Appellate Rules ("Advisory Committee") asserted that the "unconstrained filing of amicus briefs in courts of appeals would produce recusal issues" and that "consent is not a meaningful constraint on amicus briefs because the norm among counsel is to uniformly consent without seeing the amicus brief." The Advisory Committee did not cite any studies or research to support either claim.[3] The Advisory Committee does, however, refer to the Committee on Code of Conduct Advisory Opinion No. 63: Disqualification Based on Interest in Amicus that is a Corporation to support its assertions. Advisory Opinion No. 63 applies narrowly to amicus briefs filed by *corporations*. It does not apply broadly to tax-exempt organizations like APCIA, a registered 501(c)(6), and for good reason. Tax-exempt organizations do not present the type of financial or other conflicts contemplated in Advisory Opinion No. 63 (and Federal Rule of Appellate Procedure 26.1) that would require recusal. Nevertheless, the proposed amendment treats all amici identically even though recusal would arise only under limited circumstances.

The proposed amendment also presents an unnecessary, unworkable, subjective standard to assess which amicus briefs would be helpful to or disfavored by the court. The draft Committee notes explain that the proposed amendment seeks to prevent the filing of "unhelpful briefs," which are those that fail to "bring[] to the court's attention relevant matter not already mentioned by the parties. . . ." It is unclear whether "mentioned" as used in the proposed amendment means a passing reference in a party's brief to a legal concept or effect of a ruling or is something more substantive. Rather than unnecessarily amend the rule and create an unworkable, subjective standard, the Committee should leave the rule unchanged and allow courts of appeal judges to do what they have always done – determine for themselves which amicus briefs are helpful. The lack of a clear standard that can be easily and uniformly applied will result in fewer amicus briefs being filed, which would be detrimental to federal courts of appeal and the public. APCIA therefore recommends maintaining Rule 29's current permissive filing standard.

Requiring amici to seek leave of court to file will inevitably decrease the number of amicus briefs that are filed. The proposed amendment would erect an unnecessary barrier to entry and create uncertainty. If an organization is unsure that its motion will be granted, then it is less likely to incur the time and expense to prepare an amicus brief. This will become more acute if an organization's motion for leave is denied. If that happens more than once, then a reasonable organization would reevaluate whether to continue spending limited resources on amicus briefs. This would be damaging to their members and to the federal courts, as those who play the classic role of amici would fall by the wayside. It also would be damaging to the public, since many amicus briefs that are filed address the broader potential impacts of a court's decision.

The proposed amendment to Rule 29(a)(2) would invite increased opposition from parties in motion practice and create an administrative burden for courts of appeal staff and judges. The proposed amendments would strain judicial resources as courts would be required to docket, review and decide on hundreds, if not thousands, of motions for leave each year.

Maintaining the current rule or following the United States Supreme Court's lead in eliminating the current Rule's requirement either to receive leave of court or obtain consent of the parties to file, as the Committee was initially inclined to do, would be the better path.

Thank you for the opportunity to comment and for your consideration.

Very truly yours,

Claire Howard

Claire Howard
Senior Vice President, General Counsel and Corporate Secretary

[3] The present rule allows, in the Committee's own words, the "unconstrained filing of amicus briefs." *See* Preliminary Draft of Proposed Amendments to Federal Rules (August 2024) at p. 26. If the current rule "produce[d] recusal issues," as the Committee suggests, then it begs the question why the Committee was initially inclined to "follow the Supreme Court's lead here" and eliminate the current Rule's requirement either to receive leave of court or obtain consent of the parties to file. *Id*. at p. 25.

TAB 20

The Heritage Foundation

214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400
heritage.org

January 28, 2025

The Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Bates:

We write to express our opposition to the proposed amendments to Federal Rule of Appellate Procedure 29—particularly the new and onerous disclosure regime for those who file amicus curiae briefs. These amendments have no practical justifications and likely violate the First Amendment to the U.S. Constitution. Problematically, as the Advisory Committee and Amicus Subcommittee repeatedly conceded, the amendments are grounded in the notion that judges decide issues based not solely on the law and the facts before them, but instead (at least sometimes) decide issues based on the identity of the individual making an argument or the identity of those associated with that individual. That is wrong—both morally and legally. Judges must decide each case solely on its merits. To do otherwise violates judicial integrity and ethics. If adopted, the proposed rule changes will seriously call into question the impartiality of the federal judiciary.

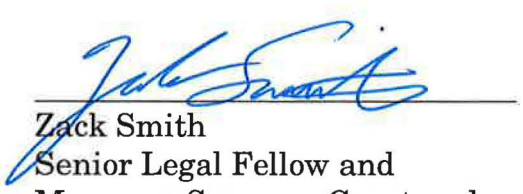
At bottom, this Committee appears to be proposing these amendments because of politics. The Advisory Committee and Amicus Subcommittee repeatedly invoked the unsubstantiated and partisan allegations Senator Sheldon Whitehouse (D-RI) and Representative Hank Johnson (D-GA) have pushed in their critiques of the supposed "dark money" network trying to influence the Supreme Court through amicus briefs. Recognizing that they could not get their proposed "reforms" passed through Congress, Whitehouse and Johnson shifted tactics and now seek to have the Judicial Conference do their dirty work for them. Do not fall for their trap!

Adopting the proposed amendments would needlessly drag the federal judiciary into a partisan political battle. For an in-depth discussion of the purposes and practices associated with amicus briefs, as well as the many practical and constitutional flaws with the proposed amendments, we have attached a recent legal memorandum we authored. But its conclusions can easily be summarized: the proposed amendments are unnecessary, are constitutionally questionable, and would undermine the federal judiciary's integrity and impartiality. We therefore

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400
heritage.org

respectfully urge this Committee to withdraw the proposed amendments to Federal Rule of Appellate Procedure 29.

Sincerely,



Zack Smith
Senior Legal Fellow and
Manager, Supreme Court and
Appellate Advocacy Program,
Edwin Meese III Center for
Legal and Judicial Studies

Seth J. Lucas
Senior Research Associate,
Edwin Meese III Center for
Legal and Judicial Studies

Enclosure:

ZACK SMITH & SETH LUCAS, LEGAL MEM. NO. 371, IT'S A TRAP! A (LIKELY UNCONSTITUTIONAL) SOLUTION IN SEARCH OF A PROBLEM: A PARTISAN PUSH FOR UNNEEDED AMICUS DISCLOSURE RULES (Jan. 24, 2025), https://www.heritage.org/the-constitution/report/its-trap-likely-unconstitutional-solution-search-problem-partisan-push.

The Heritage Foundation

LEGAL MEMORANDUM

No. 371 | JANUARY 24, 2025

EDWIN MEESE III CENTER FOR LEGAL & JUDICIAL STUDIES

It's a Trap! A (Likely Unconstitutional) Solution in Search of a Problem: A Partisan Push for Unneeded Amicus Disclosure Rules

Zack Smith and Seth Lucas

KEY TAKEAWAYS

Amicus briefs are used by progressives, conservatives, industries, activists, and others who want to have a voice in our judicial system.

The notion that judges should refuse to consider an argument because it might advance certain disfavored interests is incompatible with judicial integrity.

Judges should recognize that attempts to convince them otherwise are nothing more than a trap.

Introduction

As Admiral Akbar sailed the Rebel Fleet into what was supposed to be a surprise attack on the Death Star, he realized just in time that he had been tricked and lured into an unfavorable fighting position. In shock, he famously exclaimed: "It's a trap!"[1]

So too today are demands for more strident disclosure requirements for those who file amicus curiae briefs in the federal court system. Since Roman times, the amicus curiae—Latin for "friend of the court"—has played a variety of roles in Western legal systems. In the United States, the amicus brief has become a means for groups interested in a case's outcome to provide additional perspectives, information, or arguments. Amicus briefs are widely used by progressives, conservatives, industries, activists, and others who want to have a voice in our judicial system.

This paper, in its entirety, can be found at **https://report.heritage.org/lm371**

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Lately, however, the amicus curiae has come under attack. Decrying recent judicial decisions with which they disagree, Senator Sheldon Whitehouse (D–RI), Representative Hank Johnson (D–GA), and others have insinuated without proof that these decisions were influenced by amicus curiae who, entangled in clandestine networks of dark money, are engaged in sinister efforts to manipulate the federal judiciary. The solution, they argue, is onerous disclosure and reporting requirements that expose every detail of an amicus's associations.

These proposals do not spring from a pure-hearted concern for good government and the judiciary's integrity. Instead, they are part of a broader partisan effort to undermine public confidence in the courts and harm perceived political enemies. Because of the obvious partisan politics at play, Whitehouse's and Johnson's ideas have gained little traction in the halls of Congress. So they have turned elsewhere. They have now asked the Judicial Conference of the United States—the governing body of the federal judiciary—to do their dirty work for them and enact via rule changes what they could not get Congress to enact.

Sadly, the Judicial Conference has fallen into their trap. Acquiescing to Whitehouse's and Johnson's demands, it has spent over three years studying and recommending changes in the current amicus disclosure regime in the lower federal courts. Now it has proposed rules that open the door for intense scrutiny of every dollar going to an amicus and every person or group with which an amicus associates—scrutiny that likely will have a chilling effect on the willingness of amici to file briefs. But unlike the Rebel Fleet, the Judicial Conference is chasing only the illusion of a Death Star. Not only do Whitehouse's and Johnson's proposed disclosures—and the proposed Judicial Conference rules changes inspired by them—suffer from constitutional and practical concerns, but they are also fundamentally a solution in search of a problem.

At the end of the day, Whitehouse and Johnson have placed themselves in a win-win position politically while placing the Judicial Conference in a lose-lose situation. If the proposed disclosure rule changes are adopted, Whitehouse and Johnson can declare political victory. If not, Whitehouse and Johnson can yet again rail against what they portray as a corrupt cabal of federal judges. Similarly, if the proposed rule changes are adopted, the Judicial Conference will have signed off on a constitutionally problematic solution to a nonexistent problem and needlessly injected the federal judiciary into partisan politics.

None of that needs to happen. The Judicial Conference can minimize the damage by stopping the train now and refusing to adopt the proposed rule

changes. To that end, this *Legal Memorandum* proceeds in four parts. The first reviews the role and evolution of the amicus curiae in our legal system and outlines the background of the current system against which Whitehouse and Johnson rage. The second discusses the current controversy around amicus disclosure rules both at the U.S. Supreme Court and within the lower federal courts and explains Whitehouse's and Johnson's failed efforts in Congress to change the current disclosure regime legislatively. The third outlines the Judicial Conference Rules Committee's specific proposal, and the fourth assesses the constitutional and practical concerns raised by those proposals.

The Role of the Amicus Curiae

History of the Amicus Curiae. Dating back to Roman times,[2] the amicus curiae has played a variety of roles throughout its history. Initially, the amicus curiae was seen as a disinterested bystander seeking to assist the court with information on relevant law or facts. In the United States, the amicus curiae emerged originally as an advocate for unrepresented interests, especially the interests of third parties. Today, at least at the U.S. Supreme Court, a new phenomenon has emerged: skilled advocates facilitating amicus participation to signal noteworthy petitions for certiorari and provide a curated and coherent body of perspectives to aid the Court in deciding a case.

Originally, the amicus curiae—Latin for "friend of the court"[3]—was viewed as a disinterested third party who sought to aid a court by proffering helpful information on law or facts relevant to a case.[4] One vintage dictionary explained that "[w]hen a judge is doubtful or mistaken in matter of law, a bystander may inform the court thereof as amicus curiae,"[5] which could be done, for example, by pointing to a case the court had not considered or of which it was unaware. Another explained that the "friend of the court" is "a bystander, who without having an interest in the cause," provides helpful information "on a point of law or of fact."[6] In an early example involving a case where the meaning of a particular statute was disputed, a member of Parliament who had been present when the statute was passed sought to inform the court of Parliament's intent.[7] In 1606, two amici earned a sharp rebuke for failing to "perform[] the office of a good friend or of a good informer" by omitting a clause from an Act of Parliament.[8]

Despite its professed disinterestedness, the role of amicus curiae also provided an avenue for third parties with an interest at stake in a case to participate in the case.[9] Common law systems in particular disfavored

third-party involvement in trials.[10] But in another early case, the amicus curiae represented the interest of a third party whose marital status would have been challenged by the suit, leading to exposure of the suit as collusive.[11] The role of the amicus curiae as a friend of the court and as representative of a third party thus overlapped.[12] In light of such examples, at least one scholar has argued that the amicus curiae role may have been a solution to the problem of representation of third parties in adversarial disputes.[13]

In the U.S. Supreme Court, the amicus curiae role developed early on as a device for advancing third-party interests.[14] In *Green v. Biddle*, a dispute over land holdings in Kentucky to which Kentucky was not a party, Kentucky instructed Henry Clay to appear as an amicus curiae and seek rehearing after the Supreme Court's decision in the case.[15] The Court first allowed the motion, granted it, and then later allowed Clay to argue the case.[16] Three decades later, the Court allowed the U.S. Attorney General to participate as an amicus curiae in *Florida v. Georgia* to speak on the public interests involved.[17] And in 1864, California's Attorney General filed a brief in a suit where the constitutionality of a California statute was at issue.[18] For a time, the Court also allowed third parties with cases pending elsewhere—or who were involved below but had not joined the appeal—to participate as amicus curiae or intervenors "depending on the situation and requests of the litigants or agreements of the counsel."[19]

A shift in the role of amicus curiae began to emerge in the early 1900s. Throughout the late 1800s and for the first decades of the 1900s, the authoring attorneys were seen and identified as the amicus curiae.[20] By the 1930s, however, this was replaced with identification of the sponsor of the brief as the amicus curiae.[21] Not only that, but amicus briefs became a tool to drive social and policy objectives. Under the leadership of Attorney General Charles Bonaparte, the Department of Justice increasingly sought to advance social change and public policies through amicus briefs. Increasingly, regulated industries, racial minorities, and organizations like the National Association for the Advancement of Colored People (NAACP) and American Civil Liberties Union (ACLU) also began to rely on the amicus brief to advance their interests as well as broader public interest goals.[22]

As the number of amicus briefs rose, the Supreme Court began to implement formal rules. In 1937, the Court formalized what was then common practice by requiring amici to obtain consent from the parties to file a brief or, if consent was denied, leave of the Court.[23] In 1949, the Court further expounded on these procedures, explaining that motions for leave to file were "not favored."[24] Subsequently, leave was granted less often, and the Solicitor General began to routinely deny consent.[25] Amicus participation

subsequently declined.[26] In 1957, faced with criticism from the Court for such rote denials, the Department of Justice clarified that it disfavored amicus briefs with academic or propaganda interest but would grant consent where the proposed amicus "has a concrete, substantial interest in the decision of the case" and sought to present "relevant arguments or materials which would not otherwise be submitted."[27] The number of briefs continued to rise, however, resulting in an 800 percent increase from the 1950s by the turn of the century and a 95 percent increase between 1995 and 2014.[28] In the early 1900s, amicus briefs "were filed in only about 10% of the Court's cases"; by the end of the century, they were filed in nearly 85 percent of argued cases.[29] In 2023, the Court eliminated the requirement for consent from the parties.[30]

With the rise of the "Supreme Court Bar," a new amicus curiae phenomenon has developed: the curation of amicus briefs to signal noteworthy petitions for certiorari or collectively provide additional information or perspectives not in a party's briefing.[31] As one article has explained:

> Today, elite, top-notch lawyers help shape the Court's docket by asking other elite lawyers to file amicus briefs requesting that the Court hear their case. When the Court grants certiorari (or "cert"), these very lawyers strategize about which voices the Court should hear and they pair these groups with other Supreme Court specialists to improve their chances with the Court.[32]

This curation of amici may take the form of an "amicus wrangler"—an amici recruiter.[33] But it may also take the form of an "amicus whisperer"—coordination of what briefs are filed, who joins those briefs, and what arguments the briefs raise.[34] In *Hamdan v. Rumsfeld*, for instance, Neal Katyal (who argued the case for the petitioner) not only worked relentlessly to discourage briefs he thought would "blunt the impact" of stronger briefs, but also arranged for David Remes (then with Covington & Burling) to oversee the amici's writing process so that the amici would stay on message.[35] This use of an "outside 'amicus whisperer'" not only aids advocates in tracking amici, scholars have since observed, but also ensures that "the person coordinating the amici message…has a lot more editing leeway without running afoul" of Supreme Court Rule 27.6 regarding party authorship or funding of amicus briefs.[36]

Amicus Curiae Influence in Theory and Practice. Scholars have proffered three theories about the impact of amicus briefs in courts. The first, the informational theory, views judges as "seeking to resolve cases in accordance with the requirements of the law" and thus views amicus briefs

as helpful when they contain new legal arguments or factual information.[37] The second, the attitudinal model, assumes that judges have "fixed ideological preferences" and rely on legal norms "only to rationalize outcomes after the fact."[38] In this model, amicus briefs that merely offer additional information are of little help to the judge.[39] Under the third model, the public interest or affected groups theory, amicus briefs are more akin to lobbyists or a public opinion barometer.[40] Both the fact that the brief was filed and the identities of the amici are important data points apart from the contents of the brief.[41] Amicus briefs under this third model are helpful to a judge insofar as they signal how interested groups want the case decided.[42] As explained below, however, this third theory is not valid—yet it appears to be the one adopted by the Judicial Conference.

Available data reveal that the role of amicus briefs is in reality complex. Across the federal judiciary, government amici are generally viewed as particularly helpful.[43] Similarly, "special interest groups are generally well regarded as amici curiae," but some scholars surmise that the value the Supreme Court places on the brief varies with a group's reputation for quality arguments and "the extent of their interest in the issue."[44] A majority of judges in one survey found a litigant's and amicus curiae's financial relationship "relevant to consideration of a proposed brief."[45] A majority of judges in the same survey viewed briefs offering new legal arguments or insights into the material impacts of a particular outcome on the amicus curiae's interest as "moderately or very helpful."[46]

The Supreme Court appears to view new relevant information absent from parties' briefing or the record as more helpful than lower courts do.[47] Slight majorities of judges affirmed that "the identity, prestige, or experience of the amicus" are "moderately or significantly influential."[48] But a survey of former Supreme Court clerks indicates that, at least at the high court, an amicus's identity or its counsel can serve as a heuristic for a presumption of the brief's quality.[49] The number of amicus briefs filed, however, appears to have little impact on a case's outcome except in narrow circumstances.[50]

The data are unclear as to exactly why some judges find relevant the parties' financial relationship to an amicus and the amicus's or its counsel's identity. If they are in fact playing identity politics and discounting a brief based solely on the identities of individuals or organizations with which the amicus is associated—as the Judicial Conference's rationale for its proposed rules suggests judges should do—those judges are likely violating judicial ethics and disregarding basic principles of justice. If they are considering those things to see whether the parties and an amicus are complying with

existing procedural rules, they are acting safely in their judicial role—but this means that the proposed rule changes are not needed. If what occurs at the Supreme Court is representative of anything, however, it suggests that the identity of an amicus or its counsel is a heuristic for the quality of arguments the judge or a clerk can expect in a brief. As former Justice Ruth Bader Ginsburg remarked, in her view, an attorney's experience "would be a likely barometer of the quality of arguments" in the brief.[51]

Thus, these and other data suggest that the informational theory more accurately, even if not fully, explains the impact of amicus briefs in the courts. As Professors Joseph Kearney and Thomas Merrill explain in the context of their 50-year survey of cases argued at the Supreme Court:

> Contrary to what the attitudinal model would predict, amicus briefs do appear to affect success rates in a variety of contexts. And contrary to what the interest group model would predict, we find no evidence to support the proposition that large disparities of amicus support for one side relative to the other side result in a greater likelihood of success for the supported party. In fact, it appears that amicus briefs filed by institutional litigants and by experienced lawyers—filers that have a better idea of what kind of information is useful to the Court—are generally more successful than are briefs filed by irregular litigants and less experienced lawyers. This is consistent with the legal model's prediction that amicus briefs have an influence to the extent they import valuable new information.[52]

In sum, although the identity of an amicus or its counsel may serve as a heuristic of the brief's quality, the value of the brief is—and should be—determined by the brief's quality and contents.

Current Controversy and Efforts by Whitehouse and Johnson

In recent years, some have questioned the usefulness and appropriateness of amicus briefs. Senator Whitehouse in particular has been a vocal critic of current practices—decrying the "flotillas of amicus briefs" that in his view amount to nothing more than inappropriate judicial lobbying.[53] He has asserted that "[a]nonymously funded, coordinated amicus efforts are just one component of a larger strategy to capture the federal judiciary for the benefit of a self-interested donor class and for Republican Party electoral interests."[54] He has advanced this partisan view despite the fact that one of the principal media reports he cited to support this proposition

admits that in the seven cases it reviewed, "the conservative parties had [only] a slight advantage, accounting for 50 percent of the amici curiae," while "46 percent [of amici filed in] support of the liberal parties and about 4 percent filed in support of neither party."[55] Nonetheless, Whitehouse has pursued changes in amicus disclosure rules as part of his larger institutional assault on the U.S. Supreme Court.[56] Representative Hank Johnson has joined him as a prominent proponent of those efforts.[57]

AMICUS Act. One notable effort has been Whitehouse's and Johnson's endeavor to impose onerous disclosure requirements on those who wish to file amicus briefs. In 2019, Whitehouse first introduced his Assessing Monetary Influence in the Courts of the United States (AMICUS) Act,[58] which he described as seeking "to address the problem of undisclosed judicial-branch lobbying by dark-money interests."[59] Johnson introduced an identical companion bill in the House.[60] Under the terms of his proposed act, "any person, including any affiliate of the person, that files not fewer than 3 total amicus briefs in any calendar year in the Supreme Court of the United States and the courts of appeals of the United States" would have to register with the Administrative Office of the United States Courts.[61] Registration would have to occur within 45 days of triggering the registration requirement (the filing of three amicus briefs), and the party would also have to register on January 1 "of the calendar year after the calendar year in which the amicus" submitted at least three briefs.[62]

The details that would have to be provided as part of this registration are extensive and intrusive. As part of the registration, the amicus filer would have to disclose its name, a general description of its business or activities, and the names of anyone who contributed to the preparation or submission of an amicus brief, the names of anyone who contributed at least 3 percent of the gross annual revenue for the previous calendar year (if the amicus is not an individual), and the names of anyone who contributed more than $100,000 to the amicus in the previous year. Additionally, the registrant would be required to include a statement of the general issue areas in which the amicus expects to engage and "to the extent practicable, specific issues that have, as of the date of the registration, already been addressed or are likely to be addressed in the amicus activities of the registrant."[63] The act would also require the Administrative Office of the U.S. Courts to make this information publicly available indefinitely on its website.[64] Anyone who knowingly failed to comply with these onerous registration and disclosure requirements would be subject to a civil fine of up to $200,000.

The Judicial Conference and Its Rulemaking Process. Whitehouse and Johnson are politicians. They know that their radical proposals have

little chance of passing either the Senate or the House as those bodies are currently composed. So they changed tack and decided to bully the judiciary into doing their dirty work for them. Essentially, they want the Judicial Conference of the United States (the judicial body responsible for making policy recommendations to the federal judiciary—including proposed rule changes) to adopt many, if not most or all, of their radical proposals.

By way of background, Congress created the Judicial Conference's predecessor organization in 1922 at the behest of then-Chief Justice William Howard Taft. Taft came to the position of Chief Justice after holding numerous executive positions—including the position of Chief Executive (President) of the United States—and sought to professionalize and optimize the administrative apparatus behind the federal courts. At his urging, Congress established the Conference of Senior Circuit Judges. "With the chief justice presiding, the senior judge (now known as chief judge) of each circuit court of appeals gathered to report on the judicial business of the federal courts and to advise Congress on possible improvements in judicial administration."[65] Eventually, with some changes in composition, this body expanded its responsibilities and became known as the Judicial Conference of the United States.[66] Included among its many responsibilities is a mandate to consider changes to the procedural rules governing litigation in federal courts. It does this by dividing and subdividing its work among various committees and subcommittees related to specific issue areas. Relevant to this issue, Whitehouse and Johnson have pressured the Committee on Rules of Practice and Procedure and its Advisory Committee on Appellate Rules to adopt their proposals.

This is a win-win maneuver for Whitehouse and Johnson. If the Judicial Conference adopts their policies, they keep their hands clean while chilling many of their perceived opponents who might want to weigh in on important cases. If it does not, Whitehouse and Johnson can continue to rail against the alleged capture and corruption of the federal judiciary, of which the Judicial Conference is a part.[67]

Rules Committee Response and Proposals

Amicus participation in federal courts of appeals is governed by Rule 29 of the Federal Rules of Appellate Procedure.[68] If the court is considering a case on the merits, an amicus seeking to file a brief in that case must disclose (1) its identity, (2) its interest in the case, (3) why its brief "is desirable" and "relevant," (4) certain corporate affiliations if the amicus is a corporation, (5) whether a party in the case or a party's counsel authored or directly funded

the brief, and (6) the identity of any person who directly funded a brief.[69] Rule 29 does not require disclosure if the person who funded the brief is the amicus, a member of the amicus, or the amicus's counsel.[70]

In October 2019, at a meeting of the Judicial Conference's Advisory Committee on the Appellate Rules, Judge Michael Chagares of the U.S. Court of Appeals for the Third Circuit initiated a discussion on Senator Whitehouse's AMICUS Act.[71] The ensuing discussion quickly noted that while current rules focus on direct funding of briefs, the proposed legislation would require certain amici to disclose their own sources of funding.[72] Questioning which organizations this could affect and noting that the bill could move through Congress quickly, the Committee members agreed to appoint a subcommittee "to deal with amicus disclosures."[73] In April 2020, the subcommittee reported that because the bill was not moving, no action appeared necessary other than additional research into who would be affected by its provisions.[74]

In September 2020, Scott Harris, Clerk of the U.S. Supreme Court, wrote to the Judicial Conference's Committee on Rules of Practice and Procedure about Rule 29.[75] Harris noted that the Court received a letter from Senator Whitehouse and Representative Johnson regarding disclosure requirements for amicus curiae briefs at the Court.[76] Harris then suggested that "in light of the similarity" between Supreme Court Rule 37.6 and Appellate Rule 29(a)(4)(e), both of which govern disclosure of the identity of whoever contributed money to fund a brief, the Committee "may wish to consider whether an amendment to Rule 29 is in order."[77] Harris further emphasized that "[t]he Committee's consideration would provide helpful guidance on whether an amendment to Supreme Court Rule 37.6 would be appropriate."[78] He did not say whether the Chief Justice—or any Justice for that matter—was involved or even interested in the question, though the Chief Justice does serve as head of the Judicial Conference.

In February 2021, after learning from Harris that he referred their letter to the Committee, Senator Whitehouse and Representative Johnson directly asked the Committee "to address the problem of inadequate funding disclosure requirements" for amicus briefs.[79] In their view, parties, amicus groups, and their funders had "exploited" the current rules "to exert anonymous influence" on the courts, "compromising judicial independence and the public perception thereof."[80] The letter cited four primary examples of such perceived exploitation: (1) donations by Google and Oracle to groups that participated as amici in *Google LLC v. Oracle American Inc.*;[81] (2) a foundation that funded both 11 organizations that filed amicus briefs and a law firm representing a party in *Friedrichs v. California Teachers*

Association;[82] (3) a funder who financially supported the Federalist Society as well as 13 amici in *Seila Law LLC v. CFPB*,[83] and (4) the U.S. Chamber of Commerce, which does not disclose either its members or "who is influencing the positions the Chamber takes in litigation."[84] The letter, as well as an attached article by Senator Whitehouse, argued that "wealthy and sophisticated players have exploited" the Supreme Court's rules to create "a massive, anonymous judicial lobbying program."[85] The letter did not assess whether the appellate rules governing conduct in the courts of appeals were similarly exploited,[86] but it did threaten that "a legislative solution may be in order to ensure much-needed transparency around judicial lobbying."[87]

Shortly thereafter, citing Harris's letter while denying that it acted under pressure, the Advisory Committee began to consider potential additional disclosure requirements.[88] The Committee pushed back on the idea that amicus briefs are like lobbying, noting that they are public and lobbying is done in private.[89] It also emphasized that neither public registration nor fines fall within the scope of the rulemaking process.[90] The Committee noted concerns, however, that parties could use amicus briefs that falsely appeared to be independent as a way to evade page limits—even though the current rule already addresses this problem.[91] Worrying about "the influence of 'dark money' on the amicus process," the Committee also noted other concerns that someone "with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus."[92]

On the other hand, the Committee also admitted that the First Amendment does allow anonymous speech.[93] Considering the then-recent decision in *Americans for Prosperity v. Bonta*, the Committee argued that the California law at issue there was different from amicus disclosures in four ways.[94]

- California's law and Rule 29 target different activities, and "[t]here can be little doubt" that more can be required of amicus filers than is required of charitable organizations generally.[95]

- Rule 29 and its Supreme Court counterpart already required disclosure of the identities of those who make direct contributions to fund a brief, and "[p]resumptively, the Court viewed those requirements as constitutional when it imposed them."[96]

- Rule 29 disclosures are already public, while California's mandated disclosures were meant to be confidential.[97]

- Rule 29's current 10 percent ownership and contribution disclosure threshold is higher than California's 2 percent or $5,000 disclosure threshold.[98]

Although the Subcommittee and the Advisory Committee initially considered requiring additional disclosures of who funds an amicus, members settled for additional disclosures solely regarding an amicus's identity, interests, and financial relationship to a party.[99] The Amicus Disclosure Subcommittee explained that "little if any support" existed for requiring disclosure of funding from nonparties not earmarked for a particular amicus brief.[100] One member also suggested holding the idea for "coordinat[ion] with disclosure of third-party litigation funding."[101] Regarding additional disclosures, the Subcommittee noted that requiring additional information on an amicus's identity and interests would aid the court and public in better evaluating how helpful a brief could be.[102] Similarly, it argued, certain levels of financial support by a party, such as majority ownership or control, would indicate that an amicus is not a "broad-based amicus."[103] Moreover, by requiring disclosure of members of an amicus who joined the amicus within the past year and then donated funds directly for an amicus brief, the draft rule would close an opportunity for parties to evade disclosure.[104]

Members repeatedly recognized, however, that no clear problem existed at the appellate level. Judge John Bates of the U.S. District Court for the District of Columbia and Ms. Danielle Spinelli both underscored that they had been "asked by the Supreme Court" to address the issue.[105] Ms. Spinelli argued that the Committee consequently "should be reluctant" to say that no problem existed and do nothing.[106] When pressed for examples, she emphasized "legitimate concerns about evasion and transparency" as well as "anecdotal evidence in the Supreme Court."[107] One member asked, without receiving a direct answer, whether judges were in fact misled "in a significant number of cases" about the identity of amici.[108] Another remarked that "[t]here may not be an actual problem without party behavior," even though broad agreement existed "that we should know if it does happen; there may be more of an issue with nonparty behavior, but less agreement about what to do about it."[109] Other members remarked that in their view, no problem exists.[110]

Nonetheless, the Advisory Committee forged ahead. In May 2024, the Committee distributed its final draft of the proposed amendments, which it published for public comment in August 2024. Among other changes, such as the word limit for amicus briefs, the amendments would impose four new requirements.[111]

- Amici other than the United States, an officer or agency of the United States, or a state must seek permission from the appeals court to file a brief.

- An amicus would need to disclose additional information about itself, such as its history and experience.

- An amicus would need to disclose whether a party or a party's counsel (1) has a majority interest in or majority control of the amicus or (2) contributed 25 percent or more of the amicus's revenue in the 12 months before the brief was filed.

- The amicus would need to reveal whether a person contributed $100 or more to fund the brief in the 12 months before the brief was filed unless the person was a member of the amicus for more than 12 months or if the amicus existed for less than 12 months (which, if so, the amicus must also disclose).

The Advisory Committee also laid out its final reasoning for the proposed amendments. Most of that reasoning focused on justifying the proposed disclosure requirements. Tellingly, however, the Committee hinged its arguments on the rather novel claim that the proposed disclosure requirements are just like campaign finance laws.[112] The disclosures, it explained, would help judges to "evaluate the submissions of those who seek to persuade them, in a way that is analogous to campaign finance disclosures that help voters evaluate those who seek to persuade them."[113] Carrying this theme forward, the Committee argued that disclosures would reveal whether an amicus "may be sufficiently susceptible to" a party's influence and that "[k]nowing who made a contribution that was earmarked for a brief provides information to evaluate that brief in a way analogous to the way that knowing who made a contribution to a candidate helps evaluate that candidate."[114] It further added that "views expressed in the amicus brief might be disproportionately shaped by the interests of that contributor" to the point that the brief functions "simply as a paid mouthpiece." Moreover, the Committee explained, the proposed amendments treat a new member of an amicus as a nonmember because someone could otherwise simply join an amicus as a way to underwrite a brief anonymously.[115] At bottom, the Committee concluded, because an amicus "does not have a right to be heard in court" and can speak elsewhere if it wishes, any burden the new rules might impose would be minimal.[116]

Assessing Current Reform Proposals

In light of the fact that this entire episode is, as noted, likely nothing more than a solution in search of a problem, the apparent constitutional and practical problems presented by the proposed solutions glare even more brightly.

- **Practical Concerns.** Additional disclosures are unnecessary. Recent challenges to the Supreme Court's amicus disclosure requirements as inadequate are rooted in policy disagreement with the Court's decisions and the belief that the Court should consider or discount arguments based on the identity of groups before it.[117] Pressure to adopt more sweeping disclosure requirements throughout the judiciary arises from unfounded concerns that individuals or groups are misleading courts with amicus briefs that veil hidden interests or create an illusion of broad support for certain outcomes. Neither Senator Whitehouse nor the committee members raised a single example of an undisclosed relationship between an amicus and another party that threatened the judiciary's integrity. With only one exception,[118] the examples of alleged abuses that Senator Whitehouse provided were of donors who gave money both to amici and to someone else who advocated for positions he disfavored. Such financial relationships are not problematic unless judges should decide cases based on the identity of who is on each side, which would upend judicial impartiality and undermine public trust.

- **Additional disclosure requirements are unnecessary from a practical perspective.** As committee members repeatedly noted, no clear problem actually exists. As an initial matter, the sweeping disclosures created by the Committee and pushed by Senator Whitehouse are not widespread. The Supreme Court lacks such requirements,[119] and no similar requirement is common in state courts. On the contrary, many states' rules for amicus participation require disclosures largely paralleling those required by Appellate Rule 29.[120]

  But aside from the lack of parallels, no evidence that parties are exploiting Rule 29—even occasionally—was ever presented by Senator Whitehouse, the Amicus Subcommittee, or the Advisory Committee. Senator Whitehouse's examples were generally of third parties that funded organizations that in turn became involved in litigation as

parties, counsel for a party, or amici. Only one example, in which Google and Oracle donated to eventual amici, showed a party relationship with amici. None revealed party control of an amicus, however. Similarly, throughout discussions about potential revisions in Rule 29, no Subcommittee or Advisory Committee member raised a single example of a party controlling or even unduly influencing an amicus. Members instead referenced only concerns—which they failed to support with instances of problematic amicus curiae behavior.

Consequently, it is not clear that the rules will stop or reveal any problematic behavior. A party truly committed to financially controlling amici will simply change its practices to evade disclosure under a modified Rule 29.[121] If the proposed changes are adopted, a judge who suspects that an amici's disclosure is insufficient, misleading, or outright false will still need to seek additional information. But a judge already has the power to remedy a Rule 29 violation, including by striking the noncompliant brief. Moreover, the additional burdens of disclosure, as well as the risk of nonparticipation, created by the proposed amendments are not counterbalanced by resolution of an actual problem.

- **Discouraging coordination of amicus briefs—including by parties—disserves judicial decision-making.** Coordination of amicus briefs is increasingly common and is accomplished through means other than financial control. The proposed amendments would therefore do nothing to reduce the level of influence a party or third party might have on the amicus process. Nor should they have such a deterring influence. Coordination—including by a party—aids courts by reducing duplicity and, when done by skilled advocates, by increasing the quality of the briefs.

  Amicus coordination by other means is a normal practice in appellate litigation, particularly at the Supreme Court. Evidence exists that amici were coordinated in *Roe v. Wade*.[122] Then-attorney Ruth Bader Ginsburg "was known for her skill at coordinating amici when she was litigating before the [Supreme] Court in the 1970s and 1980s."[123] Mary Bonauto, Legal Director of Gay & Lesbian Advocates & Defenders, coordinated amici in *United States v. Windsor*, as did supporters and opponents of the Affordable Care Act in *King v. Burwell* and the ACLU in *Hobby Lobby*.[124] Indeed, Big Law advocates recognize the necessity

of such coordination before the Supreme Court in particular—with one advocate going so far as to recruit a confidant at Covington & Burling to micromanage and control amici's collective message in *Hamdan v. Rumsfeld*.[125]

Such coordination appears to be helpful, not harmful. Judges and Justices alike have complained about repetitive "me too" briefs. Some courts have even adopted rules requiring some measure of coordination to prevent overlap in substance. As Allison Larsen and Neal Devins argue, at least at the Supreme Court, coordination of amicus briefs by specialized practitioners can aid the court by presenting information and perspectives that the practitioners know the Court will find helpful in reaching a decision.[126] The Justices themselves have viewed this as ensuring that they will hear the best arguments.[127] As Larsen and Devins further point out, the advocates engaged in such litigation and coordination are responding to the signals sent by the Justices in their opinions about what arguments would be most persuasive to them.[128] There is no reason to think that the situation is different in the lower courts. In fact, a majority of lower court judges have indicated that they find amicus briefs helpful when those briefs offer unique legal arguments or explain the impact of a case on an amicus's interests. Coordination seems to be in the interest of judges who want to hear those arguments—and as one member remarked, such coordination is expected.

- **The public and courts have no interest in knowing an amicus's financial sources, nor should they have such an interest.** No interest is served by mandating disclosure of an amicus's financial sources. The Committee was therefore right to drop the disclosure provisions regarding third-party funding sources or financial control. Unlike funds earmarked for a brief by donors who have an interest in what the brief says and thus, in a sense, have interests represented by the brief, general funding aims at advancing the overall mission of the organization. The organization is thus empowered to advance interests shared by its funders. An organization that veils its actual mission with an artificial one is already violating Rule 29 by lying to the court about its interests.

  Although disclosure of large funders of a specific amicus brief may help to reveal what interests an amicus brief truly advances, and thus

which interests may be impacted by the case, neither the public nor judges have an interest in knowing who is funding an organization generally. Under both dispute resolution theory and law declaration theory of judicial decision-making, third parties whose interests are affected by the outcome of a dispute are welcome to aid the court by presenting arguments or information that further delineate the issue so that the court can make an informed decision. That is, after all, the fundamental purpose of the amicus curiae, whether in 17th century England or 21st century America. Rules requiring disclosure of the individuals or organizations directly involved with a brief can—but do not necessarily—facilitate that role. An organization that is but a shell for a hidden interest (for example, a pro-business organization masquerading as a consumer interest group) would flatly violate Rule 29 as it currently exists if it created a false interest to cover its true interest.

There is, however, no problem with groups that share views on a legal or policy issue partnering generally, including through funding, and not disclosing those broader relationships when one or more file an amicus brief. Disclosure of the identities of general funders advances no public interest unless we want judges to make identity-based decisions—which would violate the rule of law and undermine judicial impartiality and fairness. Public trust of the judiciary does not depend on who has access to the courthouse—though it should be open to all. Nor does it depend on who makes certain arguments. Public trust instead depends on judges deciding a case fairly without bias either for or against any party.

Of course, we do not and should not want judges to approach the bench as tabula rasas. Every judge will and should have a philosophy of judging. But no one, living constitutionalist or textualist or otherwise, would argue that the identity of the party making an argument should determine whether the judge is or is not persuaded by that argument. It is one thing to look at the identity of an amicus or its attorneys as a heuristic for either the quality of the argument being made or the interests the brief will seek to advance. It is another thing to discount a brief's arguments because of who is making them—or who empowered the amicus, directly or indirectly, to make them.[129] The former is a technique for identifying good arguments; the latter injects identity politics into the proceedings of a court that should be impartial.

> Rule 29 aims to ensure that third parties can aid judges in understanding the contours of a case. The informational interest of politics—knowing who is trying to influence one's vote and why—is simply not present in the courts, nor should it be. In fact, with political figures seeking to investigate private citizens for constitutionally protected civic engagement,[130] it may serve the public interest more to veil rather than disclose amici's funding sources. Public criticism and the courage to face it are one thing, but violence by activists and unjustified scrutiny and harassment by politicians and federal bureaucrats for engaging in constitutionally protected civic engagement are another thing entirely. Anonymity is in the public interest in the latter circumstances.

Constitutional Concerns. If that were not enough, the proposals also suffer from constitutional concerns. Senator Whitehouse's AMICUS Act specifically provides that nothing in it should "be construed to prohibit or interfere with" someone's "right to petition the Government for the redress of grievances," "right to express a personal opinion," or "right of association, protected by the First Amendment of the Constitution of the United States."[131] But it seems that Whitehouse "doth protest too much."[132] The provisions of the proposed act and the Supreme Court's interpretation of the First Amendment cannot be reconciled—and the same can be said of the Rules Committee's recent proposals.

Aware of the constitutional concerns, the Advisory Committee engaged in a lengthy discourse about why, in its view, the proposed changes in Rule 29 pass constitutional muster.[133] Its analysis is perplexing and unconvincing. As Senators Mitch McConnell (R–KY), John Thune (R–SD), and John Cornyn (R–TX) pointed out, if the rule changes are implemented, it "will be a sorry sight to see the judiciary haled into its own courts for violating one of our most fundamental rights, but it will be necessary."[134]

- **Compelled disclosure is long disfavored under the First Amendment and Supreme Court precedent.** Compelled disclosure issues impinging on the First Amendment are nothing new. The Supreme Court confronted them in earnest during the fight against segregation and Jim Crow laws. In *NAACP v. Alabama*,[135] one of the seminal cases dealing with the issue, the Court held that the First Amendment prohibited the Alabama Attorney General from requiring the NAACP to turn over its membership lists. To put that demand in context, it is important to remember that NAACP members faced "economic

reprisals and violence" as a result of that organization's opening "an Alabama office that supported racial integration in higher education and public transportation."[136] The Alabama Attorney General's request for the group's membership lists was part of an effort to have a chilling effect on the group's activities. The Supreme Court later referred to this as a First Amendment "chilling effect in its starkest form."[137]

The Court subsequently addressed compelled disclosure issues primarily in the context of lobbying and campaign finance–related cases. In *Buckley v. Valeo*, the Court upheld the disclosure regime in the Federal Election Campaign Act, noting that three governmental interests could justify it: (1) providing voters with information to inform their choices, (2) deterring actual corruption or even the appearance of corruption, and (3) providing information needed to detect and investigate violations of the law.[138]

- **Proposals fail to meet the exacting scrutiny test.** The Supreme Court most recently addressed First Amendment concerns regarding compelled disclosures in *Americans for Prosperity Foundation v. Bonta*.[139] The California Attorney General had sought to require charitable organizations within the state to disclose the identities of their major donors by turning over certain tax documents. Several of these organizations objected and filed suit, arguing that this violated their First Amendment rights to associate freely with others. In a six-to-three decision, the U.S. Supreme Court agreed. Chief Justice John Roberts, writing for the majority, explained that "each governmental demand for disclosure brings with it an additional risk of chill,"[140] and because of that risk, courts apply "exacting scrutiny" when evaluating whether such demands for disclosure violate the First Amendment. Roberts explained that under "that standard, there must be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'"[141] For the first time, the Court clarified that while "exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest."[142] It is not quite strict scrutiny, but it is close.

  The Court further explained that "a dramatic mismatch" existed between the California Attorney General's stated goal of combatting charitable fraud and "the disclosure regime" he implemented.[143]

Moreover, the Court underscored that "a reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring"—which means that the more unnecessary a disclosure regime proves to be, the more likely it is that it cannot survive exacting scrutiny.[144] Even if one steps away from the tiers-of-scrutiny analysis, it is clear that the "text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously."[145]

- **The lack of a need for rules should end the analysis, and the analogy to campaign finance cases makes little sense.** As the Court has repeatedly stressed, in "the First Amendment context, fit matters."[146] Also, as explained above, even though the government might have an interest in requiring some disclosures from amicus filers, those interests are adequately served by the current regime implemented by Appellate Rule of Procedure 29. The lack of a need for enhanced disclosures, the arbitrary limits for disclosure in the new proposed regime, and the resulting lack of fit between any government interest and the proposed disclosures all counsel against them as violating the First Amendment.

  Perhaps this is why the Advisory Committee of the Judicial Conference attempted to analogize the proposed amendments to the campaign finance laws that the Supreme Court has upheld to justify courts' interest in knowing who is sponsoring the entities filing briefs in their proceedings. "Disclosure requirements in connection with amicus briefs," it argued, "serve an important government interest in helping courts evaluate the submissions of those who seek to persuade them, in a way that is analogous to campaign finance disclosures that help voters to evaluate those who seek to persuade them."[147] More troublingly, the Committee remarked that it rejected "the perspective that the only thing that matters in an amicus brief is the persuasiveness of the arguments in that brief, so that information about the amicus is irrelevant." It then emphasized that "the identity of the amicus does matter, at least in some cases, to some judges."[148]

  Think about that for a moment. Essentially, the Committee is justifying constitutionally suspect disclosure rules on the basis that some judges might care more about who is supporting certain positions than

they care about the merits of the arguments made. If so, it is shameful and blatant partisanship and a flagrant rejection of the idea that lady justice wears a blindfold. Because of this, it is doubtful that any individual judge would sign his or her name to such a statement—and if he or she did do so, it would likely be a sound basis for a judicial ethics complaint.

The Advisory Committee's campaign finance analogy is thus inapposite. Moreover, as Senators McConnell, Thune, and Cornyn have made clear, "courts are not Congress, litigation is not an election, and an appellate docket is not a free-for-all"—meaning that the "justifications for campaign-finance disclosure identified in *Buckley* do not apply here." As they further observed, that "the Advisory Committee saw fit to analogize the two reflects the judgment of a body that apparently understand neither campaigns nor judging."[149]

Conclusion

At the end of the day, courts are courts of law, not courts of public policy. For many judges, policy may play a role in judicial decision-making (for example, in evaluating the impact of a legal rule on various interests), but federal judges are bound to say what the law is, not what they think it ought to be. Under either a law declaration or a dispute resolution theory of judging, what matters is whether the judge decides a case according to law—not according to politics.

Judges have an interest in knowing whether the parties are playing by the rules. That, after all, is the purpose of disclosing whether a party authored or funded a brief. But any demand to know with whom an amicus otherwise associates should raise concerns about partiality and bias. The notion that judges should refuse to consider an argument because it might advance certain disfavored interests is incompatible with judicial integrity. Judges should recognize that attempts to convince them otherwise are nothing more than a trap.

Zack Smith is Senior Legal Fellow and Manager of the Supreme Court and Appellate Advocacy Program in the Edwin J. Meese III Center for Legal and Judicial Studies at The Heritage Foundation. **Seth Lucas** is Senior Research Associate in the Meese Center.

Endnotes

1. Star Wars: Return of the Jedi (1983), https://www.youtube.com/watch?v=wk-6DPrcMv4.
2. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access Efficiency, and Adversarialism*, 27 Rev. Litig. 669, 676 (2008).
3. *Amicus Curiae*, Black's Law Dictionary (11th ed. 2019).
4. Simard, *supra* note 2, at 676; Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 694–95 (1963).
5. Krislov, *supra* note 4, at 695 (quoting Holthouse's *Law Dictionary*).
6. *Id.* at 694 (quoting Abbott's *Dictionary of Terms and Phrases*).
7. *Id.* at 695 (citing Horton & Ruesby, Comb. 33, 90 Eng/Rep. 326 (K.B. 1686)).
8. *Id.* (quoting *The Prince's Case*, 8 Coke 1, 29a, 77 Eng. Rep. 481, 516 (1606)).
9. *See id.* at 696.
10. *See id.*
11. *Id.* at 696–97 (citing *Coxe v. Phillips*, 95 Eng. Rep. 152 (K.B. 1736)).
12. *Id.*
13. *Id.*
14. *Id.* at 699–700. Krislov explains that participating as an amicus curiae was one of several paths for third-party involvement at the time. *Id.* at 699 (citing Hersman, *Intervention in Federal Courts*, 61 Am. L. Rev. 1, 4–6 (1927)).
15. *Id.* at 699 (citing *Green v. Biddle*, 11 U.S. (7 Cranch) 116 (1812)). Note that 1821, when Clay appeared as an amicus curiae, was the first year the Court accepted written filings. Joseph Kearney & Thomas Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 744 n.1 (2000).
16. Krislov, *supra* note 4, at 699–700.
17. *Id.* at 701–02 (citing *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854)). The states objected, thus requiring the Court to decide on its own whether the Attorney General could participate. *Id.* What might have made this decision difficult was that the case fell under the Court's original jurisdiction, but, as Justice Curtis noted in a dissent, the United States had an interest in the suit and so was at least a quasi-party. *Id.* (citing *Florida*, 58 U.S. (17 How.) at 498)). Under Article III, Justice Curtis explained, all jurisdictional grants involving the United States as a party fell under the Court's appellate jurisdiction, not its original jurisdiction. *See Florida*, 58 U.S. (17 How.) at 504–05.
18. Krislov, *supra* note 4, 702.
19. *Id.* at 702–03.
20. *Id.* at 703.
21. *Id.*
22. *Id.* at 707–08; *see also*, *e.g.*, Tomiko Brown-Nagin, *In Memoriam: Justice Ruth Bader Ginsburg, The Last Civil Rights Lawyer on the Supreme Court*, 56 Harv. C.R.-C.L.L. Rev. 15, 15 (2021) ("The ACLU's Ginsburg-led campaign during the 1970s to dismantle laws that classified by sex followed the blueprint of the NAACP's Marshall-led campaign during the 1940s and 50s...."); Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 Harv. J.L. & Gender 251, 279 (2009) (observing that the Supreme Court decided *Reed v. Reed*, 404 U.S. 71 (1971), on the same grounds raised by Ginsburg and the ALCU as a secondary argument in an amicus brief).
23. *Id.* at 713.
24. *Id.* at 713–14.
25. *Id.*
26. Kearney & Merrill, *supra* note 15, at 763.
27. Krislov, *supra* note 4, at 715.
28. Kearney & Merrill, *supra* note 15, at 749; Allison Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L.R. 1901, 1902 & nn. 2–3 (2016).
29. Kearney & Merrill, *supra* note 15, at 744.
30. Scott Harris, *Revisions to Rules of the Supreme Court of the United States* (2022), https://www.supremecourt.gov/filingandrules/SummaryOfRuleChanges2023.pdf.
31. *See generally* Larsen & Devins, *supra* note 28.
32. Larsen & Devins, *supra* note 28, at 1903.

33. *Id.* at 1919.
34. *Id.* at 1924–26.
35. *Id.*
36. *Id.* at 1926.
37. Kearney & Merrill, *supra* note 15, at 748; *see* Simard, *supra* note 2, at 682; Larsen & Devins, *supra* note 28, at 1913.
38. Kearney & Merrill, *supra* note 15, at 748.
39. *Id.*
40. *Id.*; Larsen & Devins, *supra* note 28, at 1913; Simard, *supra* note 2, at 681.
41. Simard, *supra* note 2, at 681.
42. Kearney & Merrill, *supra* note 15, at 748.
43. *See* Simard, *supra* note 2, at 697; Kelly Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Politics 33, 46–49 (2004) (discussing former Supreme Court clerks' views on briefs filed by the U.S. Solicitor General, by states, and by other governmental entities).
44. Simard, *supra* note 2, at 698; Lynch, *supra* note 43, at 46–51.
45. Simard, *supra* note 2, at 700.
46. *Id.* at 690, 692.
47. *Id.* at 695.
48. *Id.* at 688.
49. *See* Lynch, *supra* note 43, at 46–47, 49–56.
50. *See* Simard, *supra* note 2, at 689–90 (explaining that a majority of judges viewed the number of amici or amicus briefs as having "little or no influence" on the dispute's outcome); Larsen & Devins, *supra* note 28, at 1940 (observing that "amicus participation at the cert stage serves as a valuable signal to law clerks [at the Supreme Court] in an era where circuit splits—the traditional dominant reasons for granting cert—are less common."); Lynch, *supra* note 43, at 61 (describing, in the view of former Supreme Court clerks, that the composition and quality of a brief filed by several amici is what matters, not the number of amici on the brief); Kearney & Merrill, *supra* note 15, at 801 (explaining that one or two amicus briefs on one side with none on the other can have some effect on the success of a petitioner, but that the effect "largely disappears" after the number rises to three or more briefs); *id.* (explaining that the Solicitor General enjoys a "heightened probability of success" as a party and amicus that can mask or overcome the effect of having one or two amicus briefs on one side with no amicus briefs on the other). Note that the rise of the Supreme Court Bar in recent years may have blunted the Solicitor General's "heightened probability of success" and thus shaped the effect of amicus briefs in cases where the Solicitor General participates as a party or amicus. *See* Larsen & Devins, *supra* note 28, at 1940 (explaining that the Supreme Court Bar has created "a broader reputation market.").
51. *Simard*, *supra* note 2, at 688.
52. Kearney & Merrill, *supra* note 15, at 750.
53. Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 Yale L.J.F. 141, 162 (2021).
54. *Id.* at 153 (citations omitted).
55. Heidi Przybyla, *"Plain Historical Falsehoods": How Amicus Briefs Bolstered Supreme Court Conservatives*, Politico (Dec. 3, 2023), https://www.politico.com/news/2023/12/03/supreme-court-amicus-briefs-leonard-leo-00127497; *see also* Heidi Przybyla, *Judiciary Democrats Call for Stronger Transparency on Amicus Brief Funding*, Politico (Dec. 15, 2023), https://www.politico.com/live-updates/2023/12/15/congress/whitehouse-on-amicus-briefs-conservative-scotus-00132056 (noting that in "a Dec. 14 letter to the Judicial Conference, the policymaking body for federal courts, Sen. Sheldon Whitehouse of Rhode Island and Rep. Hank Johnson for Georgia, said a POLITICO investigation published earlier this month illustrates the need for such reforms").
56. *See, e.g.*, Robert Barnes, *Warning or Threat? Democrats Ignite Controversy with Supreme Court Brief in Gun Case,* Wash. Post (Aug. 16, 2019), https://www.washingtonpost.com/politics/courts_law/warning-or-threat-democrats-ignite-controversy-with-supreme-court-brief-in-gun-case/2019/08/16/2ec96ef0-c039-11e9-9b73-fd3c65ef8f9c_story.html (noting that Senator Whitehouse and several of his Democratic colleagues filed an amicus brief with the Court that could be "characterized as both a brassy reality check and unprecedented political bullying"); *see also* Michael Macagnone, *Supreme Court Ethics Code Doesn't Satisfy Democratic Appetite for Legislation,* Roll Call (Nov. 14, 2023), https://rollcall.com/2023/11/14/supreme-court-ethics-code-doesnt-satisfy-democratic-appetite-for-legislation/ (describing Senator Whitehouse as "the main Senate backer for Supreme Court ethics legislation").
57. Hank's Court Reform Platform, Hank Johnson for Congress, https://hankforcongress.com/hanks-court-reform-platform/ (last accessed Aug. 6, 2024).
58. S. 1411, 116th Cong. (2019).
59. Whitehouse, *A Flood of Judicial Lobbying*, *supra* note 53, at 142.

60. H.R. 3993, 116th Cong. (2019) (identical companion House bill).
61. S. 1411, 116th Cong. (2019).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Administrative Bodies: Judicial Conference of the United States, 1948–Present*, Federal Judicial Center, https://www.fjc.gov/history/administration/administrative-bodies-judicial-conference-united-states-1948-present (last visited Jan. 10, 2025).
66. Zack Smith & Matthew Turner, *Time for Scrutiny of DEI Policies of Administrative Office of US Courts, Judicial Conference*, Daily Signal (Nov. 6, 2023), https://www.dailysignal.com/2023/11/06/time-for-scrutiny-of-dei-policies-of-administrative-office-of-us-courts-judicial-conference/ (briefly recounting the current composition of the Judicial Conference).
67. Sheldon Whitehouse, Speech, The Scheme 28: The Judicial Conference, https://www.whitehouse.senate.gov/news/speeches/the-scheme-28-the-judicial-conference/; *see also No Friend-of-the Court Senator*, Wall St. J. (updated Feb. 25, 2019, 2:26 pm ET), https://www.wsj.com/articles/no-friend-of-the-court-senator-11551046568?mod=article_inline (noting that "Mr. Whitehouse is ginning up this fuss now because he wants to discredit the Roberts Court as somehow politically corrupt").
68. Fed. R. App. P. 29.
69. *Id.*
70. *Id.*
71. Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 2 (Oct. 30, 2019) [hereinafter *Oct. 2019 Minutes*], https://www.uscourts.gov/sites/default/files/minutes_of_the_october_2019_meeting_of_the_advisory_committee_on_appellate_rules_final_0.pdf; Of course, Whitehouse introduced the Act only after he had sent a letter to Chief Justice John Roberts and Supreme Court Clerk Scott Harris notifying them that he intended to do so and letting them know that in his view, "a legislative solution may be in order to put all *amicus* funders on an equal playing field." Letter from U.S. Senator Sheldon Whitehouse to Chief Justice John G. Roberts, Jr. and Supreme Court Clerk Scott Harris (Jan. 4, 2019), https://www.whitehouse.senate.gov/wp-content/uploads/imo/media/doc/1.4.19%20Letter%20to%20Chief%20Justice%20Roberts.pdf.
72. *Oct. 2019 Minutes*, *supra* note 71, at 2.
73. *Id.*
74. Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 2 (Apr. 3, 2020), https://www.uscourts.gov/sites/default/files/final_-_minutes_of_the_april_3_2020_meeting_of_the_advisory_committee_on_appellate_rules_0.pdf.
75. Letter from Supreme Court Clerk Scott Harris to Judge David Campbell and Judge John Bates (Sept. 18, 2020), in Agenda Book, Advisory Committee on Rules of Appellate Procedure 151 (Apr. 7, 2021) [hereinafter Apr. 2021 Agenda Book], https://www.uscourts.gov/sites/default/files/appellate_agenda_book_spring_2021_final.pdf.
76. *Id.*
77. *Id.*
78. *Id.*
79. Letter from U.S. Senator Sheldon Whitehouse and U.S. Representative Henry Johnson, Jr., to Judge John Bates (Feb. 23, 2021), in Apr. 2021 Agenda Book, *supra* note 75, at 153.
80. *Id.* at 155–58.
81. 593 U.S. 1 (2021).
82. 578 U.S. 1 (2016).
83. 591 U.S. 197 (2020).
84. *Id.* at 158.
85. *Id.*
86. *See id.* at 153.
87. *Id.* at 160.
88. Memorandum from Judge Jay Bybee, Chair of the Advisory Committee on Appellate Rules, to Judge John Bates, Chair, Committee on Rules of Practice and Procedure, at 6 (Dec. 8, 2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_appellate_rules_-_december_2021_0.pdf ("At the June meeting of the Standing Committee, the Advisory Committee reported that it had begun careful exploration of whether additional disclosures should be required.").
89. *Id.*

90. *Id.*
91. *Id.* at 6–7.
92. *Id.* at 7.
93. Memorandum from AMICUS Act Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure, at 6 (Mar. 12, 2021), in Apr. 2021 Agenda Book, *supra* note 75, at 133–42.
94. Memorandum from Judge Jay Bybee, *supra* note 88, at 10.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 11.
99. *See* Memorandum from AMICUS Act Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure, at 9–11 (Sept. 8, 2021), in Agenda Book: Advisory Committee on Rules of Appellate Procedure 153–73 (Oct. 7, 2021), https://www.uscourts.gov/sites/default/files/2021-10-07_appellate_rules_agenda_book_0.pdf; Memorandum from Judge Jay Bybee, Chair of the Advisory Committee on Appellate Rules, to Judge John Bates, Chair, Committee on Rules of Practice and Procedure, at 5–8 (Dec. 6, 2023), in Agenda Book: Advisory Committee on Rules of Appellate Procedure 219–27 (Jan. 4, 2021), https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for_standing_committee_meeting_final_0.pdf.
100. Memorandum from Amicus Disclosure Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure, at 4 (Mar. 3, 2023), in Agenda Book: Advisory Committee on Rules of Appellate Procedure 166 (Mar. 29, 2023) [hereinafter Mar. 2023 Agenda Book], https://www.uscourts.gov/sites/default/files/2023-03_appellate_rules_committee_agenda_book_final_updated_3-21_0.pdf.
101. Memorandum from Amicus Disclosure Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure, at 4 (Mar. 3, 2023), in Mar. 2023 Agenda Book, *supra* note 100, at 163–67.
102. *Id.* at 2–3.
103. *Id.* at 3.
104. *Id.* at 4.
105. Advisory Committee on Appellate Rules, Minutes of the Advisory Committee on Appellate Rules, at 6 (Oct. 7, 2021) [hereinafter Oct. 2021 Minutes], https://www.uscourts.gov/sites/default/files/final_-_minutes_appellate_rules_committee_fall_2021_1.pdf.
106. *Id.*
107. *Id.*; Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 4 (Mar. 30, 2022) [hereinafter *Mar. 2022 Minutes*], https://www.uscourts.gov/sites/default/files/2022-04_appellate_rules_meeting_minutes_final_0.pdf.
108. Advisory Committee on Appellate Rules, Minutes of the Advisory Committee on Appellate Rules, at 7 (October 13, 2022) [hereinafter *Oct. 2022 Minutes*], https://www.uscourts.gov/sites/default/files/2022-10_appellate_rules_committee_meeting_minutes_final_0.pdf.
109. Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 5 (Oct. 19, 2023) [hereinafter *Oct. 2023 Minutes*], https://www.uscourts.gov/sites/default/files/2023-10_minutes_appellate_rules_committee_fall_2023_final.pdf.
110. *See Oct. 2021 Minutes*, *supra* note 107, at 6 ("Mr. Byron asked if the subcommittee was making a recommendation, and Ms. Spinelli answered that it was not making one. Mr. Byron thought that this was telling; he doesn't see a problem that needs to be addressed in the appellate rules."); *Mar. 2022 Minutes*, *supra* note 107, at 7–8 (seeing no problem with existing rules regarding party control); Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 10 (March 29, 2023) [hereinafter *Mar. 2023 Minutes*]; https://www.uscourts.gov/sites/default/files/2023-03_advisory_committee_on_appellate_rules_meeting_minutes_final_0.pdf.
111. *See generally* Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure, and the Federal Rules of Evidence 20–45 (2024) [hereinafter Proposed Amendments], https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2024.pdf.
112. This argument does not appear to have been raised at any point during the development of the proposed amendments—and stands in stark contrast to concerns about "dark money," "transparency," or whether an amicus is "broad-based." *See generally*, *e.g.*, *Oct. 2019 Minutes*, *supra* note 71 (no mention of elections or campaign finance); *Mar. 2023 Minutes*, *supra* note 110, at 13 (mentioning campaign finance only in reference to difficulty in forming "ironclad rules"); Committee on Rules of Practice and Procedure, *Minutes*, at 10 (Jan. 4, 2023), https://www.uscourts.gov/sites/default/files/2023-01_standing_committee_meeting_minutes_final.pdf (referencing campaign finance only in brief comment making comparison of draft rules to disclosures "required for dark-money contributions to political campaigns").
113. Proposed Amendments, *supra* note 111, at 20.
114. *Id.* at 22–24.
115. *Id.* at 24.
116. *Id.* at 20.

117. *See, e.g.*, Senator Sheldon Whitehouse, *Dark Money and U.S. Courts: The Problem and Solutions*, 57 HARV. J. ON LEGIS. 273 (2020) (describing how amici funded by "dark money" are helping to shape what he views as problematic decisions by the U.S. Supreme Court).
118. *See infra* "Additional disclosure requirements are unnecessary from a practical perspective."
119. *See* SUP. CT. R. 37.
120. *See*, *e.g.*, ARIZ. R. CIV. APP. P. 16(b)(3) (requiring identification of the sponsor, the sponsor's interest, and anyone "other than members of the sponsoring group or organization that provided financial resources for the preparation of the brief."); ARK. SUP. CT. R. 4-6(c) (requiring disclosure of "every person or entity, other than the amicus curiae, its members, or its counsel, who…collaborated in [the brief's] preparation" in addition to requirements paralleling Rule 29); CAL. R. CT. 8.200(c) (paralleling Rule 29); MINN. R. CIV. APP. P. 129.03 (paralleling Rule 29); N.C. R. APP. P. 28.1(b)(3) (requiring disclosure of "every person or entity (other than the amicus curiae, its members, or its counsel) who helped write the brief or who contributed money for its preparation"); N.D. R. APP. P. 29(4) (listing same requirements as Federal Rule of Appellate Procedure 29); N.M. R. APP. P. 12-320(C) (paralleling Rule 29); N.Y. CT. APP. R. 500.23(a)(4) (including similar disclosure requirements but without the membership exception contained in Rule 29); W. VA. R. APP. P. 30(e)(5) (paralleling Rule 29). *But see* Ill. Sup. Ct. R. 345 (listing no disclosure requirements); NEV. R. APP. P. 29 and NEV. R. APP. P. 26.1 (containing no disclosure requirements similar to those in Rule 29); TEX. R. APP. P. 11 (requiring disclosure of "the source of any fee paid or to be paid for preparing the brief").
121. *See Oct. 2022 Minutes*, *supra* note 108, at 5 (discussing the possibility that under the proposed rule regarding disclosure of financial relationships with nonparties, some organizations could change their funding structure).
122. Larsen & Devins, *supra* note 28, at 1920.
123. *Id.*
124. *Id.* at 1920–22.
125. *Id.* at 1920, 1924–26.
126. *Id.* at 1954–57.
127. *Id.* at 1957.
128. *Id.* at 1963.
129. One example is Senator Whitehouse's argument in his own amicus brief that the Supreme Court should discount briefs filed in *Moore v. Harper* by amici who previously supported Donald Trump's efforts to challenge the results of the 2020 election. *See* Brief of Amici Curiae U.S. Senator Sheldon Whitehouse and Representative Henry "Hank" Johnson, Jr. In Support of Respondents, *Moore v. Harper*, 600 U.S. 1 (2022) (No. 21-1271).
130. The recent weaponization of American government against its own citizens—and even political figures in government—is now an undisputable fact. For example, when the National School Boards Association called for parent protests at school board meetings to be treated as the "equivalent" of "domestic terrorism," then-Attorney General Merrick Garland called for the FBI to begin investigating parents who engaged in those protests. Kendall Tietz, *Merrick Garland Directs FBI to Target Parents Responsible for "Disturbing Spike in Harassment, Intimidation" Against Schools*, DAILY SIGNAL (Oct. 5, 2021), https://www.dailysignal.com/2021/10/05/merrick-garland-directs-fbi-to-target-parents-responsible-for-disturbing-spike-in-harassment-intimidation-against-schools/. The Biden Administration's Department of Justice unsuccessfully prosecuted Mark Houck, who was praying with his son near an abortion clinic, for merely attempting to protect his son from a clinic worker shouting obscenities. *"Long Guns Pointed at Me and My 7 Children": Pro-Life Dad Tells Lawmakers About Arrest*, DAILY SIGNAL (May 16, 2023), https://www.dailysignal.com/2023/05/16/pro-life-dad-mark-houck-tells-lawmakers-about-arrest/. A Richmond FBI field office was forced to rescind a report targeting for "mitigation" several Catholic groups listed by the discredited Southern Poverty Law Center as "hate groups." Tyler O'Neil, *Breaking: FBI Rescinds Memo Citing Southern Poverty Law Center After Daily Signal Report*, DAILY SIGNAL (Feb. 9, 2023), https://www.dailysignal.com/2023/02/09/breaking-fbi-rescinds-radical-traditionalist-catholic-ideology-document-citing-southern-poverty-law-center/. And that's not to mention Senator Chuck Schumer threatening *public* figures, Justices Brett Kavanaugh and Neil Gorsuch, that they would "reap the whirlwind" if they ruled in a way disfavored by abortion proponents. Ian Millhiser, *The Controversy Over Chuck Schumer's Attack on Gorsuch and Kavanaugh, Explained*, VOX (Mar. 5, 2020), https://www.vox.com/2020/3/5/21165479/chuck-schumer-neil-gorsuch-brett-kavanaugh-supreme-court-whirlwind-threat. The list could go on.
131. S. 1411, 116th Cong. (2019).
132. WILLIAM SHAKESPEARE, HAMLET act 3, sc.2.
133. *See* PROPOSED AMENDMENTS, *supra* note 111, at 11–21.
134. Comment Letter from Senators Mitch McConnell, John Thune, and John Cornyn on Proposed Amendments to Federal Rule of Appellate Procedure 29 (Sept. 10, 2024) [hereinafter McConnell et al. Comment Letter], https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0008.
135. 357 U.S. 449, 462 (1958).
136. *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 606 (2021) (citing *NAACP v. Alabama ex rel. Patterson,* 357 U.S. at 462).
137. *Id.*
138. 424 U.S. 1 (1976); *see also Citizens United v. Federal Election Comm'n*, 558 U.S. 210 (2010) (ruling unconstitutional certain restrictions on independent corporate expenditures but upholding the Bipartisan Campaign Finance Act's disclosure regime).

139. 594 U.S. 595 (2021).
140. *Id.* at 618.
141. *Id.* at 596 (quoting *Doe v. Reed,* 561 U.S. 186, 196 (2010)).
142. *Id.* at 608.
143. *Id.* at 612.
144. *Id.*
145. *Id.* at 619–20 (Thomas, J., concurring); see also Joel Alicea & John Ohlendorf, *Against the Tiers of Scrutiny*, Nat'l Aff., Fall 2019, at 72.
146. *Americans for Property Foundation*, 594 U.S. at 609 (citing *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014)).
147. McConnell et al. Comment Letter, *supra* note 134, at 20.
148. Proposed Amendments, *supra* note 111, at 20.
149. McConnell et al. Comment Letter, *supra* note 134, at 107.

TAB 21

GERSON H. SMOGER, Ph.D.

SMOGER & ASSOCIATES

4228 Hallmark Drived
DALLAS, TEXAS 75229
(510) 531-4529
Gerson@texasinjurylaw.com

January 29, 2025

The Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle Northeast
Washington D.C. 20544

Dear Judge Bates,

I am writing to express my own views on the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure, including: 1) the proposal to eliminate the ability to file an amicus brief when the parties have consented to its filing; (2) the proposal to deal with redundant amicus briefs; and 3) the proposals regarding the financial disclosure requirements by amici and their underlying funders. In preparing this statement, I have read the other submissions and will endeavor to do my best to avoid the type of redundancy this Committee reasonably abhors.

I write this from the perspective of someone who has written scores of amicus briefs over the past 30 years. These have included: 1) groups of individuals with very specific expertise, ranging, for example, from constitutional law professors to all of the editors of the New England Journal of Medicine to preeminent First Amendment scholars to the world's leading marine biologists; and 2) a plethora of non-profit, labor, and trade associations, ranging, for example, from the American Medical Association to Berkeley Law's Civil Justice Research Initiative to the American Cancer Society to Physicians for Human Rights. All the briefs that I have written over these many years have been entirely on a *pro bono* basis.

There are only a few things that I can add to what has already been said about the proposal to eliminate the ability to file an amicus brief when the parties have consented to the filing. If I am reading correctly, the change is opposed by: defense-oriented legal/lobbying organizations (US Chamber of Commerce, Washington Legal Foundation, Atlantic Legal Foundation, Federation of Defense and Corporate Counsel); trade groups (SIFMA, American Property Casualty Insurance Association, American Counsel for Life Insurers, California

Academy of Appellate Lawyers); and those that might be described as more consumer-side (Stephen J. Herman, Maria Diamond, Court Accountability). One might say that achieving any consensus from this group is an achievement all by itself. But it does demonstrate that practitioners see no benefit and only problems conferred by the rule change.

I agree with the expansive analysis provided by the California Academy of Appellate Lawyers. I would add that preparing an amicus brief designed to inform the court takes an enormous amount of time and work. Preparing a motion that is more than *pro forma* would take more. Experienced parties understand this in giving consent. As to the Committee's fear that a motion averts a conflict being created, isn't FRAP 29(a)(2) enough? In any case, why would a motion that advocates for the acceptance of a brief cure that particular problem? Certainly, the conflict would never be highlighted by the motion.

Further, amicus briefs serve more purposes than I believe were in the Committee's note. For instance, they enhance transparency to both the court and the public when controversial issues are before the court. The potential for a wrath of one-sided denials might serve to chill that healthy dialogue and frame the issue as being more one-sided than it truly is. Additionally, while courts have to wrestle with the merits of the particular case before the court, amicus briefs can alert the court that how a decision is written may have untoward effects on other matters. This is a frequent purpose for amicus briefs for both plaintiffs and defendants. It can be true both legally and factually, particularly when a court is considering a motion on the pleadings of an undeveloped record.

As may seem obvious, I agree with the Federation of Defense and Corporate Counsel when they write: "We strongly believe that the better course of action would be for the Committee to propose an amendment that would bring Rule 29 in conformance with Supreme Court Rule 37, as amended January 1, 2023, which allows for the timely filing of amicus briefs without the court's permission or the parties' consent."

Secondly, on the issue that has been described as "content restrictions," my reading is that this has been met with a mixed and confused reaction. While I understand and absolutely agree with the desire to reduce redundancy, I have doubts about whether the proposed amendment will achieve this desired endpoint. Essentially, the amendment includes only guidance and fortunately not a mandate

that briefs "bring to the court's attention relevant matters not already mentioned by the parties" in order to "help the court." It follows that up by saying that amicus briefs that do not serve this purpose or that are "redundant with another amicus brief" are "disfavored."

In considering my experiences with briefs for non-profits and scholars, I can say that most amicus briefs get finished at the last minute ("work expands to fill available time"). Often, we as writers do not even know who else is writing and, even when we do know, by the time we see another brief it is too late to change the one that by that time has already been sent to our clients for review. This makes it a daunting task to know whether our briefs are redundant of other briefs. On the other hand, given that amicus briefs are due seven days later than merits briefs, I would think that we should be able to excise arguments that are clearly legally and factually redundant of the main merits brief we are supporting.

Finally, as to the third issue, it seems clear that there is a demarcation regarding the financial disclosure rules. For the most part, those who believe they or their clients and members might have to disclose are the ones who have the most problems with the rule. Do I think they should have problems with the 25-percent funding threshold? While, it is a welcome start, it is clearly set too high. I can't imagine it coming into play at this level for any larger entities. Corporate and trade interests with similar interests share funding for the same desired court result, regardless of the specifics of the matter that is before the court. Nevertheless, as I said, this is an important first step.

Also important is the 12-month rule. I was counsel of record for Senator Whitehouse and Representative Johnson in their "Brief of Amici Curiae U.S. Senator Sheldon Whitehouse and Representative Henry "Hank" Johnson, Jr. in Support of Respondents, 33, *Moore v. Harper*, 600 U.S. 1 (2023) (No. 21-1271) which they mention in their submission. The amicus brief details a remarkable panoply of recently formed organizations assembled for the single-issue purpose of the case before the court.

That case also provides a clear example of links between amici that any court reviewing the many amicus submissions should have been made aware of. Thus, I clearly support the submissions of Senator Whitehouse and Representative Johnson on their point that certainly the Committee can and should require amici to disclose at minimum major donors funding multiple amici.

Lastly, I would like to thank you for your time and the ability to contribute to this dialogue.

Sincerely,

Gerson H. Smoger/s

Gerson H. Smoger

GHS/lc

TAB 22

AMERICAN ASSOCIATION FOR JUSTICE®
The Association for Trial Lawyers

Statement of Tad Thomas

Past-President, American Association for Justice
Chair, Legal Affairs Committee

Before the Advisory Committee on Appellate Rules
February 14, 2025

Thank you for providing an opportunity to comment on the proposed amendments to Rule 29 on briefs of amici curiae. My name is Tad Thomas, and I am a past-president of the American Association for Justice (AAJ) and the current chair of AAJ's Legal Affairs Committee, which oversees AAJ's amicus curiae program, as well as its positions on rules amendments. AAJ is the world's largest plaintiff trial bar association whose core mission is to protect the Seventh Amendment right to trial by jury. I am the founder of Thomas Law Offices with offices in Louisville, KY; Cincinnati, OH; Columbia, MO; Des Moines, IA; and Chicago, IL. My law firm of 16 lawyers tries trucking, nursing home, medical malpractice, and other personal injury and wrongful death cases around the country. As a practicing trial lawyer, I appreciate the role that amicus briefs play in educating the court regarding critical legal issues. In addition to my testimony today, AAJ has filed a public comment.

AAJ supports the proposed amendments' goal for increased transparency and strongly believes that the true identity of amici should be easy to determine by the courts, the parties, and the public. Amici should not hide behind sham identities with names that do not accurately represent their core beliefs and intentions.

AAJ's main concern is with Section "(a)(2)" of the proposed amendments—the removal of the party consent provision and the addition of the "Purpose" provision. We believe this section requires substantial revision.

The Removal of Party Consent

A vast majority of permissions to file in the federal courts are obtained through party consent. Last year, AAJ filed 10 out of 11 federal circuit court briefs[1] through party consent. However, if party consent is not permitted and permission for leave to file from the court is the only option, it can burden the courts and lead to unnecessary motion practice. Indeed, AAJ strenuously cautions against going down this path due to our recent experience in the Eleventh Circuit in *Eboni Williams, et al. v. Gerald Shapiro, et al*. (Case No. 24-11192).[2]

After defense counsel withheld consent to AAJ's amicus brief filing, we filed a motion for leave of court, detailing the association's identity and the purpose of the brief. Defense counsel

[1] AAJ files between 25-30 briefs annually, with approximately 45% filed in the federal appellate courts. The remaining briefs are mostly filed in the United States Supreme Court and state supreme courts.
[2] AAJ's Motion for Leave to File, Defendants-Appellants' Opposition to Motion to File, AAJ's Reply, and the Eleventh Circuit's Order Granting Leave to File are attached as exhibits to AAJ's public comment.

responded by filing an opposition to the motion, arguing that AAJ should be denied leave because, in their opinion, our filing would add "nothing new" to the briefing. Indeed, the opposition went so far as to list all the authorities AAJ and the Plaintiffs-Appellees mutually relied upon in an attempt to demonstrate the duplicative nature of the AAJ amicus brief. While Defendants-Appellants wrongly accused AAJ's brief of "regurgitat[ing] arguments made by Plaintiffs-Appellees," AAJ's brief provided a broader historical perspective on the common law of contracts than that found in the parties' briefs. Surely the courts would not be aided if the federal rules prohibited amici and parties from citing the same case law or from providing a broader perspective on the legal issue(s) at hand. (Indeed, amici may even disagree about what the same case law means.) The defense opposition also wrongly claimed that FRAP 29 prohibited AAJ from filing an amicus brief because counsel for the Plaintiffs-Appellees were dues-paying members of the association. AAJ filed a reply rebutting those arguments and citing this Committee's 2010 Advisory Note explicitly excluding general membership dues from those funds intended to fund the preparation or submission of an amicus brief. The court granted AAJ's motion three weeks later.

If an appellate court really does not want to spend time reading a brief, it does not have to do so—even with party consent. *But a rule requiring court permission will create additional work for the courts, requiring them to read and consider the contents of briefs*. As our recent experience in the Eleventh Circuit suggests, we highly recommend that you remove consent, accepting all briefs filed. Because there is no requirement for the court to read all the briefs—only those that would be helpful—the court could reject any briefs that would result in disqualifications. And if that seems too unwieldly, then party consent should be retained. In no case should the rule default to court permission required to file an amicus brief.

The Addition of Purpose Provisions

AAJ also highly recommends removing or simplifying the proposed "Purpose" section as it, too, will lead to unintended consequences. The "Purpose" section essentially places a value judgment on certain types of briefs with the first sentence favoring "relevant matter not mentioned by the parties" and the second sentence disfavoring "redundancy." How are the federal courts going to accomplish these goals without reading the briefs and determining which briefs should be filed? In a rule with a laudable goal of transparency, the "Purpose" section text is a misguided prompt that could promote favoritism for certain well-known or well-heeled amici at the expense of lesser-known or resourced-strapped ones.

Additionally, the "Purpose" section would be hard to execute in practice. Even with some coordination, amici will not always know who is preparing a brief and what issue(s) the brief will cover. Will there be a race to the courthouse with the first amici to seek permission to receive approval, possibly denying the court an opportunity to read a better crafted brief from a renowned legal scholar on the same topic? Or will the court wait until all briefs have been submitted, review for redundancy and uniqueness, and except only a few? Under the first scenario, the court may deprive itself of helpful legal augmentation. In the second scenario, the courts must expend considerable effort to determine which briefs may be filed, proposed amici have spent substantial time and resources on briefs that may not ultimately be docketed, and lesser-known amici may be crowded out in favor of more prominent filers.

There is also the very real problem of interpretation. What does "relevant matter not

mentioned by the parties" encompass? The Committee Note merely restates the text of the rule. The rule probably does not overreach to include case cites, but that will surely be argued as our recent experience in the Eleventh Circuit demonstrates. What about a brief that expounds upon the precedent or history of a particular issue in a case? Would that be considered an issue already covered by the parties? How about a brief that clarifies the issues of an under-resourced party's brief? What about similar briefs from amici with diametrically opposed legal or political philosophies to illustrate consensus considerations to the court? All these scenarios seem very likely but it's unclear how they will be handled and could result in significant practice discrepancies among the circuits.

If the Appellate Committee believes that a "purpose" statement would be helpful, then AAJ urges that the drafting be as simple as possible:

> **(2) When Permitted.** An amicus curiae brief that brings to the court's attention relevant matter may help the court.

* * * *

In conclusion, we favor the elimination of permission to file, which, of course, does not mean that any brief needs to be read. If that seems like a step too far, AAJ strongly urges that language eliminating the option to file upon party consent be restored. Requiring the court to act as the sole source of permission will lead to increased and potentially frivolous motion practice and is an unnecessary time waste for courts, parties, and amici. Additionally, AAJ strongly urges modifications to the Purpose section of the rule to prevent unnecessary confusion and uncertainty across circuit courts. I would be happy to answer any questions.

AMERICAN ASSOCIATION FOR JUSTICE®
The Association for Trial Lawyers

January 30, 2025

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Amendments to FRAP 29 Brief of an Amicus Curiae

Dear Members of the Committee on Rules of Practice and Procedure:

The American Association for Justice ("AAJ") submits this comment regarding the proposed amendments to FRAP 29 (Brief of an Amicus Curiae) by the Advisory Committee on Appellate Rules ("Appellate Committee"). AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury and wrongful death actions, employment rights cases, consumer cases, class actions, and other civil actions, and regularly represent clients in multidistrict litigation proceedings, both in leadership and non-leadership positions. As a matter of policy, AAJ supports making it easy for both the public and courts to determine the true identities and interests of amici curiae. However, AAJ has several concerns with the proposed amendments, as described in this Comment, and urges the Appellate Committee to revise and redraft parts of the rule text.

I. AAJ Regularly Files Amicus Briefs in the Federal Courts.

AAJ maintains a robust amicus curiae program, through which the association files briefs in state and federal appellate courts to promote and defend foundational access-to-justice principles, including the Seventh Amendment right to trial by jury in civil cases. AAJ files amicus briefs in myriad practice areas and case types, including product liability claims, class actions and MDLs, child sex abuse cases, civil rights violations, securities fraud actions, and personal injury claims. Although AAJ commonly files independently, the association joins state-based and national organizations as co-amici in nearly half of all briefs filed each year.

Between January 1, 2023, and December 31, 2024, AAJ filed 47 amicus curiae briefs nationwide, of which 45% were filed in federal circuit courts of appeals. Those briefs addressed a wide variety of complex legal questions facing federal litigants and jurists, including issues related to class certification requirements, state sovereign immunity,

federal preemption, Section 230 immunity, mass arbitration, securities fraud, and the effective vindication of statutory rights. While most of these briefs were filed during the merits stage of each case, AAJ does file amicus briefs in support of or opposition to petitions for rehearing en banc under certain circumstances.

II. The Filing of Amicus Briefs Should Not Be Discouraged or Dissuaded by the Courts.

The Committee Note correctly states that most parties follow "a norm of granting consent to anyone who asks." Indeed, this has been AAJ's experience in 99% of amicus filings over the last two years. However, the Committee Note continues that "As a result, the consent requirement fails to serve as a useful filter." In AAJ's opinion, a proposed rule on disclosure has veered into an exercise of the appellate courts inappropriately and prematurely evaluating the content of amicus briefs. In most other matters, AAJ would be hard pressed to find that its position aligns with that of the Washington Legal Foundation (WLF). Yet on these proposed amendments, AAJ's position supports the comment filed by WLF:

> [T]here is no need to decrease the number of amicus briefs in the courts of appeals. Judges have efficient processes for filtering amicus briefs and disregard briefs that they or their clerks find unhelpful. In other words, judges do not—and need not—give each amicus brief equal consideration.[1]

Importantly, the Supreme Court has taken the *opposite* approach, authorizing the filing of all briefs and eliminating the consent requirement. AAJ believes that this approach is preferable for all federal courts of appeals and does not implicate sufficiently significant recusal concerns in the vast majority of merits-stage cases. Indeed, the act of filing an amicus curiae brief does not in and of itself demand that the brief be read or given equal attention or weight by the court. The fundamental role of the court as final arbiter is not supplanted by the filing of an amicus brief. Likewise, the parties' mutual consent to such a filing is a courtesy and does not usurp the court's authority to determine what is and is not relevant to the resolution of a given case. If the appellate rule were to echo the Supreme Court's approach by signaling to the public *all amici* are welcome to file, the federal judiciary would avoid the appearance of playing favorites early on—a possible outcome of requiring the courts to provide permission, especially when combined with the new text on "Purpose" (discussed below), which suggests that the court should actively disfavor briefs that are redundant.[2]

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[1] Washington Legal Foundation, Comment Letter on Proposed Rule 29 on Amicus Briefs, at 2 (Aug. 19, 2024), https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0004 [hereinafter WLF Comment].

[2] In this scenario, the court may then be left with a less substantive or fulsome brief by granting permission to the first party who requested leave to file an amicus brief on a particular issue when subsequent amici may be better equipped or knowledgeable on the same issue or may represent different but important interests not otherwise brought to the court's attention. The other option, which seems completely unworkable, would require the court to wait until right before the time for filing briefs expires, and then grant permission only to those briefs it wants on the docket. This, however, would be extremely burdensome, requiring courts to thoroughly review requests and forcing amici, who may not ultimately be permitted to file, to spend time and resources on brief preparation in case the court accepts their brief.

In an age when information is more readily available and accessible to parties and the public, it seems like a strange choice to place the burden of granting leave on the already overburdened appellate courts when the existing system of consent-based filings not only functions well, but also encourages litigants *to cooperate* with each other, saving the parties and the public significant time and money.

A. The stated justification for the rule is unfounded and not borne out by the proposed amendments.

The purported justification for the rule is to increase efficiency by avoiding unhelpful or unnecessary amicus briefs. However, the proposed rule would have the opposite effect, forcing the court to read all briefs and assess the relevance or redundancy of their content to determine whether to grant leave to file.[3] This approach is exceedingly time-consuming and inefficient for the courts and the public alike. In many cases, requiring amici to file motions for leave of court will result in burdensome and expensive motion practice for parties and amici. It would be more efficient to allow all briefs to be filed and only read what is helpful or of interest to the court, rather than wasting judicial time and resources determining whether an amicus brief is sufficiently relevant to a case before the court may fully be ready to make that determination. Indeed, this is the basis for the change to the Supreme Court rules, which permit the filing of briefs without consent.[4]

The other stated justification—to avoid conflicts and recusals—does not address an existing problem in merits-stage cases. The current rule clearly states that "a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification."[5] If concerns remain regarding disqualification of judges during en banc proceedings, then AAJ encourages the Committee and affected jurisdictions to consider whether there is another way to address disqualification without limiting existing options or increasing the work for both parties and the court.[6]

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[3] The Committee Note states, "Under the amendment, all nongovernmental parties must file a motion, eliminating uncertainty and providing a filter on the filing of unhelpful briefs." Thus, the Appellate Committee intends for the court to read or at least minimally review briefs to determine whether the brief would be helpful to the court.

[4] The Supreme Court Clerk's commentary to the proposed amendments explains the purpose of this revision: "While the consent requirement may have served a useful gatekeeping function in the past, it no longer does so, and compliance with the rule imposes unnecessary burdens upon litigants and the Court." Proposed Rules of the Supreme Court of the United States: Redline/Strikeout Version, at 9 (Mar. 2022), https://www.supremecourt.gov/filingandrules/2021_Proposed_Rules_Changes-March_2022-redline_strikeout_version.pdf.

[5] The proposed amendment seems to make this even clearer by placing the prohibition against disqualifying briefs in a separate sentence: "The court may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification."

[6] For example, the WLF suggests that a timing provision be added to the consent requirement to eliminate the problem of parties not responding to amici. WLF Comment, *supra*, at 4. The WLF also proposes that consent be presumed unless a party opposes the request within two business days. *Id.* AAJ suggests that such a timing rule could also be limited to en banc proceedings, which seem to be the motivation behind the proposed amendment on consent.

One option that may warrant consideration is to add language specifically on recusal to the Rule, similar to D.C. Cir. R. 29(b).[7] While AAJ agrees with the U.S. Chamber of Commerce Litigation Center—an organization that AAJ routinely disagrees with on the merits of legal issues—that the current Rule 29 is adequate for striking briefs that would result in a judge's disqualification, the language could be tightened to address concerns raised by appellate courts without eliminating party consent. The comment submitted by the California Academy of Appellate Lawyers specifically addresses the recusal issue.[8]

B. Party consent is a feature, not a bug, of the current federal rule that encourages cooperation and professional courtesy between litigants.

Only rarely does AAJ fail to obtain consent to file from the parties. (A recent example is detailed in section D below.) AAJ believes that the simplest way to solve this problem is to remove consent altogether, similar to the rule established by the Supreme Court. However, if the Appellate Rules Committee should decide that it would prefer to retain a consent provision for the federal appellate courts, then AAJ strongly recommends that filing by consent of the parties remains an option for amici.

Due to the time, expense, and expertise necessary to prepare an amicus brief, the committee should assume, and FRAP 29 should operate from a perspective of, positive intent rather than fearing a few bad actors. This is especially true where there is no evidence that the consent provision is an issue for litigants or courts and no guarantee that any brief—let alone the brief of an actor or entity trying to conceal their true identity—would be considered persuasive by a court.

C. The statement of purpose is unnecessary and unworkable.

In addition to eliminating consent by the parties, the rule adds *two* sentences regarding "Purpose" to section (a)(2), an unnecessary addition to a rule amendment regarding "the procedure for filing amicus briefs, including to the disclosure requirements."[9] Both sentences are unfortunate and unnecessary content restrictions to the rule.

> An amicus curiae brief that brings to the court's attention relevant matter not already mentioned by the parties may help the court. An amicus brief that

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[7] *See* D.C. Cir. R. 29(b) ("Leave to participate as amicus will not be granted and an amicus brief will not be accepted if the participation of amicus would result in the recusal of a member of the panel that has been assigned to the case.").

[8] "[T]he court should simply end the internal practice of asking clerks not to assign cases to a judge based on the filing of an amicus brief in the case. Judges could review assigned cases when they receive them, including any amicus briefs, and then either strike the amicus brief or not. This process would be virtually identical to asking each member of the assigned panel to review a pending motion for leave, except that no motion would be necessary." California Academy of Appellate Lawyers, Comment Letter on Proposed Rule 29 on Amicus Briefs, at 3 (Jan. 27, 2025), https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0027.

[9] See the first sentence of the Committee Note summarizing the justification for the amendment. The amendment to (a)(2) adding the "Purpose" to the Rule 29 is not addressed in the Committee Note until "Subdivision (a)" of the Committee Note.

> does not serve this purpose—or that is redundant with another amicus brief—is disfavored.

While both sentences are objectionable, the second sentence is especially concerning. On a practical level, do the appellate courts really want to police briefs for redundancy when a motion is made to file? How would a court, or perhaps the clerk in some circuits, even be aware that a brief is redundant before the actual filing? What if a brief is somewhat redundant and somewhat unique? And if the court were to take this direction, it would certainly not be time well spent.

On a substantive level, it may be helpful for a court to consider that parties who do not normally share the same legal perspective have a similar viewpoint on key legal or constitutional issues. It may, for example, be helpful to know when libertarian-leaning or conservative organizations share commonality with more progressive organizations.[10] A coalition of so-called "strange bedfellows" briefs may help the court assess the breadth and depth of thinking from important segments of the legal community or the general public. AAJ again finds itself agreeing with the U.S. Chamber Litigation Center:

> Focusing on redundancy will deprive courts of a diverse range of perspectives, despite the Supreme Court's recognition that amicus briefs from 'organizations span[ning] the ideological spectrum' may itself be highly relevant to a court's resolution of the issues before it.[11]

Moreover, amicus briefs can often reinforce or reframe information provided by the parties. This may be particularly helpful in cases where the parties' brief is disorganized or fails to make the cogent arguments expected at the highest levels of appellate practice. Briefs that reinforce a party's merits brief can be particularly helpful in appeals involving litigants with limited resources. In fact, the D.C. Circuit specifically references these briefs in their local rule.[12]

D. Removing the consent provision, coupled with adding "purpose" sentences, will lead to increased motion practice.

If consent must always be obtained from the court—and the purpose of the brief is to avoid redundancy—then the court may receive motions opposing the filing of the brief. AAJ experienced this firsthand in a recent appeal before the Eleventh Circuit involving an ERISA

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[10] *See* Brief for the American Association for Justice, The Cato Institute, The Due Process Institute, Law Enforcement Action Partnership, Reason Foundation, and the R Street Institute as Amici Curiae Supporting Petitioner, *Torres v. Madrid*, 592 U.S. 306 (No. 19-292), 2020 WL 635299, https://www.justice.org/resources/research/torres-v-madrid.

[11] U.S. Chamber of Commerce Litigation Center, Comment Letter on Proposed Rule 29 on Amicus Briefs, at 11 (Dec. 19, 2024), https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0018.

[12] D.C. Cir. R. 29(a) ("The brief must avoid repetition of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief and *focus on points not made or adequately elaborated upon* in the principal brief, although relevant to the issues before this court.") (emphasis added).

issue about whether to uphold an "effective vindication" clause over defendant's arbitration agreement. After defense counsel withheld consent to AAJ's amicus brief filing, we filed a motion for leave of court, detailing the association's identity and the purpose of the brief—to provide a broader perspective on the common law of contracts than that found in the parties' briefs, and specifically the broader history and impact of the effective vindication doctrine in the common law of contracts predating the Federal Arbitration Act. Defense counsel responded by filing an opposition to the motion, arguing that AAJ should be denied leave because, in their opinion, our filing would add "nothing new" to the briefing. Indeed, the brief went so far as to list all the authorities AAJ and the Plaintiffs-Appellees mutually relied upon in an attempt to demonstrate the duplicative nature of the amicus brief. Surely the courts would not be aided if the federal rules prohibited amici and parties from citing the same case law. The defense opposition also claimed that FRAP 29 prohibited AAJ from filing an amicus brief in the case because plaintiff counsel were dues-paying members of the association. AAJ filed a reply rebutting those arguments and citing this Committee's 2010 Advisory Note explicitly excluding general membership dues from those funds intended to fund the preparation or submission of an amicus brief. The court granted AAJ's motion three weeks later.

As this example demonstrates, baseless arguments can be proffered in opposition to amicus briefs and debated through costly and time-consuming motion practice. Neither defense argument against AAJ's motion for leave held water, yet the court was burdened with wading through numerous filings to determine whether FRAP 29 permitted the filing. This example could be the harbinger of things to come if the rule amendment essentially always defaults to the court to obtain leave to file a brief. Does the court really want to read briefs for redundancy? Or would it not be better to accept all briefs, as is the practice of the Supreme Court? The latter would avoid motions practice and the need to read briefs except those of interest to the court. This process also prevents any appearance of favoritism by the court, removing the court from potentially accepting some briefs but not others.

Proposed (a)(2) as rewritten:

> **(2) Purpose: When Permitted.** An amicus curiae brief that brings to the court's attention relevant matter may help the court. [The brief [[must]] [[should]] focus on relevant points not made or adequately elaborated upon in the principal brief.][13] The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only with ~~by~~ leave of court or if the brief states that all parties have consented to its filing~~, but a court of appeals~~. "The court may prohibit the filing of or may strike an amicus brief that would result in judge's disqualification or recusal."

Proposed (a)(3)(B) would then be modified as follows:

[13] AAJ believes a simple statement of "Purpose" sentence is sufficient. This second bracketed sentence is an option to consider should the Appellate Committee believe that additional direction is warranted. It is based on the D.C. Cir. Rule 29(b), discussed *supra*.

> **(B)** the reason ~~why an amicus~~ the brief is helpful ~~desirable~~ and why the matters asserted are relevant to the disposition of the case.

Due to both its recent experience in the Eleventh Circuit and its overall participation in the rules amendment process where uniformity is valued and preferred, AAJ urges the Appellate Committee to carefully consider the comments and testimony provided. Indeed, it is authored by organizations who frequently and vociferously disagree on the merits yet completely agree about preserving filing by consent. It would be a mistake to address this commonality by eliminating consent in the federal rule but allowing Circuits to restore the provision incrementally through local rule. An opt-in by local rule would ensure inconsistency, creating additional hardship for smaller organizations and entities who file amicus briefs infrequently in the federal courts.

E. Conciseness matters when it comes to disclosures.

AAJ generally supports the broader disclosure requirements of (a)(4)(D) to ensure that the court and the public can assess the helpfulness of an amicus brief. To that end, AAJ recommends some small minor word modifications, tightening both the proposed text and the accompanying Committee Note, which are meant to help the court and the public decipher amici with "anodyne or potentially misleading names."[14] First, AAJ recommends shortening the following in (a)(4)(D): ". . . together with an explanation of how the brief and the perspective of the amicus will help the court."

Second, by using the conjunctive "and," the rule seems to suggest two disclosures: (1) how the brief will help the court; and (2) how the perspective of the amicus will help the court. These seem redundant, so if the Appellate Committee believes there is a difference, it needs to be clarified. Otherwise, AAJ recommends keeping "the perspective of the amicus" because that wording focuses more closely on disclosing the true identity of the person or entity submitting the brief.

Proposed (a)(4)(D) would be modified as follows:

> **(D)** a concise ~~statement~~ description of the identity, history, experience, and interests of the amicus curiae, ~~its interest in the case and the source of its authority to file~~ together with an explanation of how the perspective of the amicus will help the court;

III. Financial Disclosures for Amici Should Be Reasonable and Fair.

The origins of the proposed rule were additional disclosures for amici, which seems like a reasonable goal, and AAJ is supportive of courts and the public knowing the identity of

[14] In addition to the American Association for Justice, the word "justice" appears fairly frequently in the names of amici, including other consumer friendly groups such as Public Justice and the Alliance for Justice. For the unfamiliar, AAJ has to explain why Lawyers for Civil Justice (LCJ) does not represent the interests of AAJ members and indeed, most often takes a position at odds with the interests of AAJ members.

amici. As drafted, the proposed amendments provide different disclosure requirements for the relationship between a party and amicus than that of a nonparty and amicus, with justification provided in the Committee Note:

> [T]here is an additional interest in disclosing the relationship between a party and an amicus: the court's interest in evaluating whether an amicus is serving as a mouthpiece for a party, thereby evading limits imposed on parties in our adversary system and misleading the court about the independence of an amicus.

While the justification for the different treatment seems imminently reasonable, AAJ questions whether the proposed rule text is fairly constructed in practice, as the disclosure burden on nonparties seems more arduous.

Subdivision (b)(4) requires disclosure of whether a party, its counsel, or any combination of parties or counsel either has contributed or pledged to contribute 25% or more of the revenue of an amicus. In contrast, the rule for non-parties is set at $100 if a contribution is specifically earmarked for a brief. This seems like a far more stringent disclosure rule for non-parties, who are less likely to influence a party than a party or its counsel contributing to an amicus.

This is best illustrated by making a cost comparison. To prepare this comment, AAJ spoke to regular filers of amicus briefs who represent plaintiffs, regardless of whether the plaintiff is the appellant or appellee for the appeal, to get a realistic price range for brief preparation. Respondents noted that the range is between $25,000 and $150,000, with the average cost of an amicus brief standing at around $50,000. Costs for brief preparation for the corporate defense bar are often even greater.

Take for instance an amicus brief at the inexpensive end of the scale, costing $25,000. Under the (b)(4) proposed rule, an amicus would disclose any contribution made by a party or its counsel who funded the brief at $6,250 or more, but a substantial contribution of $5,000 would not have to be disclosed. Thus, the brief could easily be funded by five people contributing $5,000 each and avoid disclosure entirely, even if three of the five contributors were parties to the litigation. Alternatively, if a non-party recruited people to contribute specifically to an earmarked brief, they could solicit 250 donors at $100 each to reach $25,000. Perhaps a few donors would contribute more to an issue of utmost importance.

A more realistic example would set the cost of the brief at $50,000. With that higher total amount, a contribution of $12,500 or more made by a party or its counsel would have to be disclosed (but a contribution of 20% or $10,000, which is still a substantial amount, would not be disclosed). Under these circumstances, it's very likely that "passing the hat" would include a higher ask of the most generous donors, but would result in numerous donors exceeding the $100 threshold for disclosure, disproportionately impacting smaller organizations without a wealthy donor base, yet still failing to address the issue of amici manufactured for the sole purpose of supporting a party in the case.

One way to solve the discrepancy would be to raise the threshold for nonparties to $1000, which seems to more fairly align the disclosures, particularly for nonprofits and others with fewer resources.

IV. Conclusion.

AAJ supports making it easier for the courts and the public to determine the true identity of amici and to assist the courts and the public understand who has authored the brief and their relationship to the parties. We urge the Appellate Committee to consider the elimination of permission to file by motion of the court, which, of course, does not mean that any brief needs to be read. If that seems like a step too far, AAJ strongly urges that language eliminating parties' permission to file be restored. Requiring the court to be the sole source of permission will lead to motion practice and is an unnecessary waste of time and resources for both courts and amici. Additionally, AAJ strongly urges modifications to the "Purpose" section of the rule. It is impossible for an amicus to know ahead of filing whether or not its brief is redundant with another brief. It can also be helpful for briefs to augment and supplement arguments made by the parties. Finally, AAJ encourages the Appellate Committee to consider a reasonable disclosure amount for nonparties.

Please direct any questions regarding these comments to Susan Steinman, Senior Director for Policy & Senior Counsel, at susan.steinman@justice.org.

Respectfully submitted,

Lori Andrus
President
American Association for Justice

ATTACHMENT 1

No. 24-11192

In the United States Court of Appeals for the Eleventh Circuit

EBONI WILLIAMS, *et al.*,

Plaintiffs-Appellees,

v.

GERALD SHAPIRO, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 1:23-cv-03236-VMC (Hon. Victoria Marie Calvert)

MOTION OF AMERICAN ASSOCIATION FOR JUSTICE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

LORI ANDRUS
President
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(415) 986-1400
lori.andrus@justice.org

JEFFREY R. WHITE
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* the American Association for Justice certifies that it is a non-profit organization. It has no parent corporation or publicly owned corporation that owns 10% or more of its stock.

Respectfully submitted this 4th day of October 2024.

/s/ Jeffrey R. White

JEFFREY R. WHITE
Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rules 26.1-1, 26.1-2, 28-1(b), and 29-2, undersigned counsel for *amicus curiae* gives notice of the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

A360 Holdings LLC (Appellant)

A360 Profit Sharing Plan (Appellee)

American Association for Justice (Amicus Curiae)

Argent Financial Group, Inc. (100% owner of Argent Trust Company)

Argent Trust Company (Appellant)

Bailey III, Harry B. (Counsel for Appellees)

Berman Fink Van Horn P.C. (Counsel for Appellants)

Brinkley, Scott (Appellant)

Calvert, Honorable Victoria M. (United States District Court Judge)

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Foley & Lardner (Counsel for Appellants)

Harrington III, Robert Earl (Counsel for Appellees)

Herring, Shadrin (Appellee)

Hill, Brandon J. (Counsel for Appellees)

Holland & Knight LLP (Counsel for Appellant Argent Trust Company)

House, Bryan B. (Counsel for Appellants)

JonesGranger (Counsel for Appellees)

Kovelesky, Tina, (Appellee)

Lee, Jennifer Kim (Counsel for Appellees)

McCarthy, Chelsea Ashbrook (Counsel for Appellant Argent Trust Company)

Origin Bancorp, Inc. (Publicly traded company that owns more than 10% of common stock of Argent Financial Group Inc.)

Ridley, Eileen R. (Counsel for Appellants)

Morgan & Morga (Counsel for Appellees)

Shapiro, Gerald (Appellant)

Shoemaker, Paula Mays (Appellee)

Thomson, Mark E. (Counsel for Appellees)

Wenzel Fenton Cabassa, P.A. (Counsel for Appellees)

Williams, Eboni (Appellee)

White, Jeffrey R. (Counsel for Amicus Curiae)

Wozniak, Todd D. (Counsel for Appellant Argent Trust Company)

To the best of the undersigned counsel's knowledge, no other persons, association of persons, firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

Respectfully submitted this 4th day of October 2024.

/s/ Jeffrey R. White

JEFFREY R. WHITE
Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29 and Eleventh Circuit Local Rule 29-1, proposed *amicus curiae* the American Association for Justice respectfully moves this Court for leave to file the accompanying Brief of *Amicus Curiae* in Support of Plaintiffs-Appellees. Defendants-Appellants have withheld their consent to the filing of this brief. In support of its Motion, AAJ states as follows:

1. The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including ERISA actions. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

2. AAJ members represent many Americans seeking to vindicate the rights that Congress has enacted for their benefit, not only in ERISA, the statutory cause of action involved in this case, but in many other federal statutes. AAJ is concerned that adoption of appellants' radical proposal—that powerful corporations should be able to use private contracts to erase the rights created by Congress—will

undermine the ability of our elected representatives to advance the public good.

3. A central question in this appeal is whether the Supreme Court's "effective vindication" doctrine, which invalidates any arbitration provision that operates as a "prospective waiver of a party's right to pursue statutory remedies," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985), precludes enforcement of the arbitration provision in this case. Defendants contend that the doctrine is narrow and not controlling. AAJ agrees with Plaintiffs' defense of the district court's application of the doctrine to Defendants' ERISA retirement plan. However, AAJ presents a much broader perspective to this Court.

4. The effective vindication doctrine is rooted in a settled principle of the common law of contracts. Long before the enactment of the Federal Arbitration Act, courts widely and broadly held that waivers of statutory protections enacted for the public good and waivers of legislatively created causes of action are invalid and void as against public policy. This principle precludes enforcement of Defendants' arbitration agreement, as it would preclude any other contract to waive plan participants' ERISA cause of action.

5. AAJ believes that this added perspective will assist the Court in addressing an important issue raised by the parties in this case.

For the foregoing reasons, AAJ respectfully requests that this Court grant this Motion and accept the attached *amicus curiae* brief for consideration in this case.

Dated: October 4, 2024

Respectfully submitted,

/s/ *Jeffrey R. White*

Jeffrey R. White
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae
American Association for Justice

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LORI ANDRUS
President
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(415) 986-1400
lori.andrus@justice.org

JEFFREY R. WHITE
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

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/s/ Jeffrey R. White

JEFFREY R. WHITE
Counsel for Amicus Curiae

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Respectfully submitted this 4th day of October 2024.

/s/ Jeffrey R. White

JEFFREY R. WHITE
Counsel for Amicus Curiae

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including ERISA actions. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ addresses this Court with respect to an issue of crucial concern to all Americans for whom Congress has enacted statutory rights along with civil enforcement means to protect those rights—not only in ERISA, but also in many other consumer protection and worker protection laws. Those protections ring hollow if millions of American workers and their families have no forum to effectively vindicate their statutory rights. AAJ urges this Court to reject the notion that companies should be free to use their dominant position to privately contract their way out of the accountability Congress has legislated for the public good.

[1] No counsel for any party authored this brief in whole or in part. Apart from the *amicus curiae*, no person, party, or party's counsel contributed money intended to fund the brief's preparation and submission.

SUMMARY OF ARGUMENT

1. The validity and enforceability of contract waivers of statutory rights is an issue of great importance far beyond the ERISA plan in this case. Many workers and consumers depend upon the rights Congress has legislated for their protection. Those rights ring hollow if companies and individuals are allowed to privately contract their way out of accountability. AAJ urges this Court to reject the notion that the Federal Arbitration Act (FAA) requires enforcement of such waivers, which have long been viewed as invalid as a matter of general contract law.

The A360 retirement plan in this case expressly prohibits participants from exercising their right under ERISA § 502(a)(2) to bring a representative suit on behalf of the plan to recover losses to the plan due to breach of fiduciary duty. This prospective waiver flatly violates the Supreme Court's rule against arbitration provisions that prevent parties from effectively vindicating their statutory rights. Individual actions for losses limited to individual accounts do not permit participants to effectively vindicate their right to sue for plan-wide relief on behalf of the plan.

Defendants' arguments that the effective vindication doctrine does not apply to the A360 retirement plan are not persuasive. First, Defendants attempt to characterize the right to bring a representative suit as procedural in the same manner that the right to bring class actions or collective actions is procedural, and therefore waivable. The Supreme Court has squarely addressed this fallacious argument. As

the Court has stated, class and collective action procedures allow plaintiffs to aggregate their substantive law claims; eliminating those procedural mechanisms does not alter the claims' substantive merits. Precluding representative actions, by contrast, eliminates the litigant's substantive right entirely. Additionally, class action waivers are enforced under the FAA because the formal protections needed to protect absent claimants undermine the simplicity and informality of arbitration. Representative suits do not present those obstacles, and so the FAA does not require enforcement of waivers of representative suits.

Second, the Supreme Court's decision in *LaRue v. DeWolff, Boberg & Associates., Inc*., 552 U.S. 248 (2008), did not eliminate an ERISA plan participant's right to bring a representative lawsuit on the plan's behalf for plan-wide relief. *LaRue* held that § 502(a)(2) permits suits for the loss of value of plan assets in individual accounts for participants in defined contribution plans. The Court made clear that this remedy is *in addition to*, not instead of, suits seeking plan-wide relief.

In short, the effective vindication doctrine is directly applicable to the A360 Plan in this case, which is consequently invalid and unenforceable.

2. The effective vindication doctrine is firmly grounded in the long-recognized principle of general contract law that waivers of statutory protections enacted for the public good are void and unenforceable. Congress enacted the FAA as an "equal treatment rule" to make agreements to arbitrate as enforceable as any other contract,

but not more so; Section 2 authorizes courts to reject arbitration agreements on grounds that would render "any contract" unenforceable. 9 U.S.C. § 2.

One such common-law defense that long predates the FAA is that private contracts will not be enforced to undermine statutory rights the legislature has enacted for the public good. For example, this general contract defense was applicable in connection with "exemption acts" that protected certain property from attachment or seizure due to debt default. Lenders and sellers responded by requiring borrowers and installment buyers to waive those statutory protections.

Courts in many states held such contractual waivers invalid and unenforceable on public policy grounds. As those common-law judges explained, enforcing such waivers would allow private parties with dominant bargaining power to render legislation enacted for the public good ineffective. The Supreme Court's effective vindication doctrine is rooted in this contract-law tradition.

3. Contract waivers of the right to bring a statute-created cause of action have long been deemed invalid and unenforceable, particularly in employer-employee contracts. The tremendous rise in on-the-job deaths and injuries that accompanied the Industrial Revolution gave rise to the development of tort law negligence doctrines. Employers—most notably railroads—persuaded the common-law courts to adopt an "unholy trinity" of defenses: the fellow-servant rule, comparative negligence, and assumption of the risk. To counter these defenses, most state

legislatures enacted Employers' Liability statutes establishing a cause of action for wrongful death or injury to workers due to negligence, including that of a fellow employee. In response, many employers inserted into their employment contracts a waiver of the statutory right to bring an Employers' Liability lawsuit.

Courts around the country invariably held those waivers—including waivers of statutory rights to bring representative lawsuits, such as actions for wrongful death caused by a fellow employee—void and unenforceable as against public policy. The courts' reasoning that public policy must not be outdone by private agreements is as compelling today as it was prior to the FAA's enactment.

ERISA now protects 153 million workers, retirees, and dependents whose financial future depends upon the effectiveness of the civil enforcement scheme Congress put in place. This Court should not allow companies and individuals who control retirement plans to write their own immunity into plan documents.

ARGUMENT

I. THE FAA PRESERVES PLAINTIFFS' RIGHT TO EFFECTIVELY VINDICATE THEIR FEDERAL STATUTORY RIGHTS, INCLUDING THE RIGHT TO RECOVER PLAN LOSSES DUE TO BREACH OF FIDUCIARY DUTY.

A. The Waiver Provisions Inserted into the ERISA Plan Deprive Participants and Beneficiaries of the Statutory Rights Congress Enacted for Their Protection.

Plaintiffs in this case, participants in the A360, Inc. Employee Stock Ownership Plan ("Plan"), allege that the Plan's fiduciaries arranged the sale of the

Plan's A360 stock below its fair market value, resulting in profits for themselves and losses to the Plan and its beneficiaries. *Williams v. Shapiro*, No. 1:23-cv-03236-VMC, 2024 WL 1208297, at *13 (N.D. Ga. Mar. 20, 2024) [hereinafter "Dist. Ct. Op."]. They brought suit under ERISA §§ 502(a)(2) and 409(a), seeking, inter alia, to recover those losses on behalf of the Plan. Defendants moved to compel arbitration based on the Third Amendment to the plan document (adopted on the day the Plan was terminated), which requires that claims not only be arbitrated, but also "brought solely in the Claimant's individual capacity and not in a representative capacity or on a class, collective, or group basis." *Id.* at *8.

The district court denied Defendants' motion, holding the arbitration and waiver provision "invalid under the effective vindication doctrine." *Id.* at *35. Because the provision by its terms was not severable, the court denied enforcement of the arbitration agreement in its entirety. *Id.* at *36. The application of that doctrine is central to Defendants' appeal to this Court.

The Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. 93-406, Title I, § 502, 88 Stat. 891 (codified as amended at 29 U.S.C. § 1132) provides retirement plan participants broad remedies for breach of fiduciary duty. Under ERISA § 502(a)(2), a participant may sue "for appropriate relief under § 409," *id.*, which, in turn, makes fiduciaries "personally liable to make good to [the] plan *any* losses to the plan." ERISA § 409, 88 Stat. at 886 (codified as amended at 29 U.S.C.

§ 1109). Importantly, "actions for breach of fiduciary duty" are "brought in a representative capacity on behalf of the plan as a whole." *See Mass. Mut. Life. Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985).

The Plan, however, expressly bars plaintiffs from bringing such a representative suit action for reimbursement to the plan of plan-wide losses. The district court correctly held that this attempt to waive Plaintiffs' statutory rights violated the "effective vindication" doctrine.

For much of the twentieth century, the prevailing view held that agreements to arbitrate federal statutory claims were not enforceable under the FAA. *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427 (1953). In 1985, the Court changed its view, explaining that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," but merely "submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The Court cautioned that the FAA permits enforcement of arbitration agreements only "so long as the prospective litigant *effectively may vindicate its statutory cause of action* in the arbitral forum." *Id.* at 637 (emphasis added). In that way, "the statute will continue to serve both its remedial and deterrent function." *Id.* If the arbitration agreement "operated . . . as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against

public policy." *Id.* at 637 n.19.

This Court can affirm on that basis alone. The Supreme Court has made clear that its effective vindication doctrine "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013). *See also Hudson v. P.I.P. Inc.*, 793 F. App'x 935, 938 (11th Cir. 2019). That is precisely what the Third Amendment to the Plan does in this case.

B. The Right to Bring a Representative Action on Behalf of the Plan Is Not Procedural or Waivable.

Defendants contend that the effective vindication doctrine does not apply to their waiver provision because Plaintiffs' § 502(a)(2) right to bring a representative lawsuit is not substantive, but merely procedural. Brief of Defendants-Appellants ("Defs.' Br.") 5, 21. This is plainly wrong.

Representative causes of action are defined by substantive law. *E.g.*, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 227 (1986) (holding that state substantive law applied to wrongful death on the high seas action); *City of Cambridge Ret. Sys. v. Ersek*, 921 F.3d 912, 918 (10th Cir. 2019) (holding that the sufficiency of shareholders' derivative action complaint "depends upon the substantive law of the state"). *See also Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 657 (2022) (referring to representative suits as "part of the basic architecture of much of substantive law"). The representative suit authorized by Congress in ERISA is

likewise substantive and serves both a "remedial and deterrent function." *Mitsubishi*, 473 U.S. at 637.

Defendants argue instead that representative actions belong in the same basket as class actions or collective actions. Defendants insist that Plaintiffs are "seeking to have a class action certified, but that is a procedural right that can be waived." Defs.' Br. 27 (citing *Italian Colors*, 570 U.S. at 234–35); *see also id.* at 24 (referring to the Plan provision as a "class waiver" or waiver of "collective action"); *id.* at 42 ("Defendants urge this Court to find that Plaintiffs do not have a nonwaivable, statutory right to seek monetary relief on behalf of absent Plan participants or their Plan accounts.").

At the outset, it should be clear that Plaintiffs' class action claims are permissible, but not because the *class action* waiver is invalid; They are permissible because the ban on *representative* suits is invalid and by its terms nonseverable, rendering the entire arbitration procedure "null and void." Dist. Ct. Op. at *9–10. Defendants are unhappy with a litigation problem of their own making.

More to the point, the right to bring a representative action simply does not belong in the same basket as a right to pursue claims on a class action or collective action basis. The Court in *American Express Co. v. Italian Colors Restaurant* made clear that the right to class certification by meeting the requirements of Federal Rule Civil Procedure 23 is procedural because the rule does not vest claimants with any

substantive right. 570 U.S. at 236. Class actions are simply procedural mechanisms for aggregating a multitude of persons with similar substantive claims in a single civil action, and an individual could obtain the same relief even if the class action procedure were unavailable. *Id.* at 236–37. The waiver in this case, by contrast, prohibits representative actions as well as individual suits seeking plan-wide relief, making that substantive remedy unavailable entirely.

Additionally, as the Court made clear, representative suits are not like class actions or collective actions because they do not interfere with the FAA's informality. Class action waivers are enforceable because arbitration on a class or collective basis would transform the "individualized and informal . . . arbitration process" into the "litigation it was meant to displace." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 508–09 (2018). *See also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011) (stating that parties may agree to arbitrate using class action procedures, but that "is not arbitration as envisioned by the FAA").

The Court explained that the aggregation of a multitude of individual claims, with the procedural formalities necessary to protect the rights of the numerous absent plaintiffs who will be bound by the outcome, "interfere[s] with a fundamental attribute of arbitration." *Epic Sys.*, 584 U.S. at 508. In the Court's view, requiring an arbitration to comply with class action procedures would threaten to mire the process in a "procedural morass." *Concepcion*, 563 U.S. at 348; *Italian Colors*, 570 U.S. at

238. Because they are multi-party, collective proceedings share those same risks. *Epic Sys.*, 584 U.S. at 508.

By contrast, representative actions pose none of these problems. The Court addressed precisely this issue in *Viking River Cruises, Inc. v. Moriana*. There, the plaintiff sued her former employer under the Private Attorney General Act (PAGA), alleging that her final wages violated provisions of the California Labor Code. 596 U.S. at 653. The employer moved to compel arbitration under her employment agreement, which provided that the parties "could not bring any dispute as a class, collective, or representative action under PAGA." *Id.* at 639.

Justice Alito, writing for the majority, noted that California courts viewed PAGA actions as a "type of *qui tam* action," *id.* at 644, that is, a "representative action" in which the employee-plaintiff sues as an "agent or proxy" of the State. Unlike the class-action plaintiff, who "represents a multitude of absent individuals," the PAGA plaintiff "represents a single principal." *Id.* at 655. As a result of this structural difference, representative "PAGA suits exhibit virtually none of the procedural characteristics of class actions," designed to protect absent class members. *Id.* Instead, it is the type of one-on-one representative action that is "part of the basic architecture of much of substantive law," like shareholder-derivative

suits and wrongful-death actions. *Id.* at 657.[2] The Court concluded that the FAA does not "mandate the enforcement of waivers of representative capacity." *Id.*[3]

Plaintiff's ERISA action in this case is likewise a representative action by a single claimant on behalf of a single party, the Plan. The FAA does not require a court to enforce a purported waiver of Plaintiff's right to bring that suit.

C. ERISA Does Not Bar a Plan Participant from Bringing a Representative Suit on Behalf of the Plan to Redress the Plan's Losses.

Defendants also contend that the effective vindication doctrine is inapplicable because, following the Court's decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008), an ERISA participant no longer has a right to bring a representative suit on behalf of the plan as a whole. Rather, "a participant suing to remedy the harm caused by a fiduciary breach can pursue the ERISA § 502(a)(2) claim on behalf of her individual plan account *only*." Defs.' Br. 27 (emphasis added).

It is plainly not so. The right to bring a representative action seeking plan-

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[2] The Court also noted, relevant to this case, that "although the statute gives other affected employees a future interest in the penalties awarded in an action, that interest does not make those employees 'parties' in any of the senses in which absent class members are." *Id.*

[3] Plaintiff also sought penalties under PAGA based on violations of the Labor Code involving other employees. The Court stated that such joinder of multiple claims *was* similar to class action procedure, and the FAA required enforcement of waivers of such PAGA actions. Because California law did not permit separating the representative from non-individual claims, the state's broad ban on waivers of PAGA actions could not stand. *Id.* at 662–63.

wide relief remains a substantive right under ERISA §§ 502(a)(2) and 409(a). The *LaRue* Court held that a plaintiff seeking to recover losses to their own account due to a breach of fiduciary duty is cognizable under § 502(a)(2), separate from and *in addition to* the remedy of plan-wide relief previously recognized by the Court in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985).

In *Russell*, the plaintiff was a participant in a defined benefit plan. *Id.* at 148. She alleged that the fiduciary improperly processed her claim for disability benefits, causing a significant delay in her receipt of the promised benefit amount, and consequential damages. *Id.* at 137–38. Justice Stevens, writing for the Court, held that § 502(a)(2) provides "remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." *Id.* at 142. Recovery of Russell's consequential damages would not "inure to the benefit of the plan as a whole." *Id.* at 140.

By the time the Court decided *LaRue*, the "landscape ha[d] changed." 552 U.S. at 254. Mr. LaRue was a participant in a defined contribution plan. He had an individual account, and his benefit was determined by the value of the stocks in that account. *Id.* at 250–51. He alleged the fiduciary's failure to carry out his investment directions caused his account to lose value. The Court, again through Justice Stevens, held that § 502(a)(2) "authorize[s] recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." *Id.* at 256.

Nowhere did the Court suggest that a plan participant could no longer sue to recover losses to the "entire plan." *Id.* at 254. Rather, the *LaRue* Court *expanded* its view of the remedies available under § 502(a)(2) to include losses to a small portion of the plan assets in a single account, as well as losses to the plan as a whole. *Id.* at 253. The Court made clear that either remedy could be pursued in a representative lawsuit. *Id.* at 256 (Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409.").

Plainly, the contractual waiver at issue is invalid and unenforceable because it prevents participants and beneficiaries from effectively vindicating their explicit ERISA right to bring a representative lawsuit to recover losses to the entire A360 Plan.

II. THE COMMON LAW OF CONTRACTS HAS LONG RECOGNIZED THAT CONTRACTUAL WAIVERS OF STATUTORY PROTECTIONS ENACTED FOR THE PUBLIC GOOD ARE VOID AND UNENFORCEABLE.

Defendants largely discount or ignore entirely the plain meaning of the Supreme Court's pronouncement that if an arbitration provision operated "as a prospective waiver of a party's right to pursue statutory remedies," it would be invalid and unenforceable under the FAA. *Mitsubishi*, 473 U.S. at 637 n.19. Defendants instead vigorously insist that "liberal federal policy favor[s] arbitration agreements," Defs.' Br. 15, 29–30, and the arbitration agreement—including the

waiver of the right to bring representative suits—must be "enforced as written." *Id.* at 15, 19, 21.

These general statements cannot bear the weight Defendants would have them support in this case. Congress did not mandate arbitration at all costs. Congress enacted the FAA to make agreements to arbitrate disputes "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). *See also Epic Sys.*, 584 U.S. at 507 ("[Section 2 of the FAA] establishes a sort of 'equal-treatment' rule for arbitration contracts"); *Kindred Nursing Ctrs. L. P.* v. *Clark*, 581 U.S. 246, 251 (2017) (same). The FAA enforces agreements "to settle by arbitration"; it must not be gamed to shut the doors of both the courthouse and the arbitral forum to legitimate claimants. Defendants seek precisely that outcome in this case. 9 U.S.C. § 2.

The district court correctly ruled that Defendants' contractual waiver of the right to bring a representative lawsuit is invalid and unenforceable under the Supreme Court's "effective vindication" doctrine. Dist. Ct. Op. at *35.

The Supreme Court did not invent this doctrine out of whole cloth. As the authorities relied upon by the Court suggest, the doctrine is firmly rooted in the long-settled principle of contract law that, as a matter of "public policy," courts will not enforce contracts that waive statutory legal rights. *See Mitsubishi*, 473 U.S. at 637 n.19 (citing *Redel's Inc. v. Gen. Elec. Co.*, 498 F.2d 95, 99 (5th Cir. 1974) (holding

that inserting a liability waiver in franchise agreement "to bar private antitrust actions arising from subsequent violations is clearly against public policy"); *Gaines v. Carrollton Tobacco Bd. of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967) (holding that an agreement "to waive [treble damages for] future violations of the antitrust laws, would be invalid on public policy grounds"); and *Fox Midwest Theatres v. Means*, 221 F.2d 173, 180 (8th Cir. 1955) (holding that a contract provision "to absolve one party from liability for future violations of the anti-trust statutes against another would to that extent be void as against public policy")).

Finally, the *Mitsubishi* Court's footnote cites to 15 *Williston on Contracts* § 1750A (3d ed. 1972). Professor Williston there summarized the common-law principle that a contract provision that has the effect of conferring complete immunity on one party will be held void if the agreement is (1) violative of a statute, (2) contrary to a substantial public interest, or (3) gained through inequality of bargaining power. *Id.* This anti-waiver principle of the common law of contracts has a long history. Congress 'legislate[s] against a background of common-law adjudicatory principles.'" *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)), and "Congress is presumed to be knowledgeable about existing case law pertinent to any legislation it enacts." *United States v. Bryant*, 996 F.3d 1243, 1259 (11th Cir. 2021) (quoting *United States v. Phillips*, 19 F.3d 1565, 1581 (11th Cir. 1994)). In

this instance, contract law prior to the FAA recognized as a general principle that contract waivers of rights conferred by statute are void and unenforceable.

The mid-nineteenth century to early- twentieth century could be called the "freedom of contract era." The dominant view postulated that all risk, whether of economic loss, personal injury, or even death, could be managed by the marketplace and reflected in the contractually agreed price of goods or labor. Ryan Martins, Shannon Price, & John Fabian Witt, *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 Cardozo L. Rev. 1265, 1269–75 (2020). *See also* Melvin L. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 163 (1953) (stating that the "period intervening between the beginning in America of the railway epoch and the final enactment of the Federal Employers' Liability Act in 1908, saw the rise and fall of *laissez faire*"). Nevertheless, contract law did not give free license for abusive practices seeking private profit at the expense of public good.

For example, the California legislature commanded in 1872 that "a law established for a public reason cannot be contravened by a private agreement." Cal. Civ. Code § 3513 (West). Under this anti-waiver rule, the California Supreme Court explained, "there can be no effectual waiver by the parties of any restriction established by law for the benefit of the public." *Grannis v. Super. Ct. of S.F.*, 146 Cal. 245, 253 (1905). *See* Myriam Gilles & Gary Friedman, *Unwaivable: Public*

Enforcement Claims and Mandatory Arbitration, 89 Fordham L. Rev. 451 (2020) (tracing the nineteenth-century origins of California's anti-waiver laws).

Legislatures around the country enacted legislation during this period to protect vulnerable individuals from the consequences of unfair contracts or simple misfortune, and courts around the country invalidated contract provisions purporting to waive the protections of those enactments. One example involved "exemption acts," statutes that exempted certain property (such as household goods) from seizure or attachment for non-payment of debts. Lenders and vendors responded by inserting into loan agreements and installment sales agreements provisions in which the borrower/buyer purportedly waived these statutory protections. Courts in many states held such contractual waivers void as against public policy. *E.g.*, *Recht v. Kelly*, 82 Ill. 147, 148 (1876) (citing cases). As the Supreme Court of Florida declared:

> In view of the recognized policy of the States in enacting exemption laws and of the practically universal concurrence of the authorities on the identical question, our conclusion is that the "waiver" of the benefit and protection of the exemption laws contained in this note is not valid to defeat a claim of exemption.

Carter's Adm'rs v. Carter, 20 Fla. 558, 570–71 (1884).

Similarly, the Supreme Court of Tennessee, surveying the decisions from other jurisdictions, concluded that "the main current of judicial enunciation is against the validity of such contracts." *Mills v. Bennett*, 30 S.W. 748, 749 (Tenn. 1895). Such a private contract "contravenes a sound public policy, and, if enforced,

abrogates the exemption statutes." *Id.* The New York Court of Appeals agreed, holding waivers of the statutory exemptions invalid as "inconsistent with the public policy which the legislative act manifested." *Crowe v. Liquid Carbonic Co*., 102 N.E. 573, 575 (1913). Courts reasoned, pragmatically, that judicial enforcement of such provisions would invite creditors to insert them into every contract, with the result that "the exemption law of the state would be virtually obsolete." *Moxley v. Ragan*, 73 Ky. 156, 158 (1874).

The Supreme Court's "effective vindication" doctrine is firmly rooted in the broader common-law rule that waivers of statutory protections enacted in the public interest are void. That general principle, which stands as a defense to the enforcement of "any contract," renders the A360 Plan waiver of Plaintiffs' right to bring a representative action seeking plan-wide relief unenforceable. 9 U.S.C. § 2.

III. CONTRACTUAL WAIVERS OF THE RIGHT TO BRING A STATUTORY CAUSE OF ACTION HAVE HISTORICALLY BEEN HELD TO BE VOID AND UNENFORCEABLE, PARTICULARLY IN EMPLOYMENT CONTRACTS.

An even closer analog to the present case involves the general principle that courts will refuse to enforce provisions—particularly in employment contracts—that purport to show one party has waived the right to assert a statutory cause of action that the legislature has put in place to protect such parties. Such overreaching "agreements" have long been widely condemned as void and unenforceable—in contracts having nothing to do with arbitration and long before the FAA—as a matter

of public policy.

From 1870 to 1910, industrialization transformed the United States into "the world's premier economic power," bringing progress and higher living standards to Americans nationwide. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717, 1748 (1981). But the "dark and bitter" underside to this story is told in the sudden increase of workers who were killed and injured by huge machines lacking basic safety protections. *See generally* Griffith, *supra*, at 163. "In the second half of the nineteenth century, the United States experienced an accident crisis like none the world had ever seen and like none any Western nation has witnessed since." John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 Harv. L. Rev. 690, 694 (2001).

Much of the struggle for accountability for on-the-job accidents–and, therefore, greater workplace safety—involved railroad workers. During this period, railroads dominated all facets of the American economy, and the perils faced by railroad workers were excessive, even by the norms of the time. The rates of death and serious injury to railroad workers were "astronomical," accounting for an estimated sixty-four percent of all occupational fatalities. Walter Licht, *Working for the Railroad: The Organization of Work in the Nineteenth Century* 124–29 (1983). In 1890, one railroad worker in every three hundred was killed on the job. Among

freight railroad brakemen, one in every hundred died in work accidents *each year*. Witt, *supra*, at 694–95. *See also* Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 Harv. J. on Legis. 79, 81 (1992) ("The injury rate among railroad employees in the late nineteenth century was horrific—the average life expectancy of a switchman was seven years, and a brakeman's chance of dying from natural causes was less than one in five.").

Workers and their families could bring personal injury lawsuits, but the railroads and their well-paid legal departments also dominated the development of tort law. As one scholar summarized, the "principal thrust of late nineteenth century doctrines was to restrict, rather than to expand, the compensatory function of the law of torts." G. Edward White, *Tort Law in America: An Intellectual History* 61 (1980).

The most effective defenses that the railroads' lawyers persuaded the common-law courts to adopt were the "unholy trinity" of contributory negligence, the fellow-servant doctrine, and assumption of the risk. W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 80, at 569 (5th ed. 1984). *See* Lawrence M. Friedman, *A History of American Law* 412–14 (1973) (tracing the history of these doctrines). As a result, at a time when the number of workers killed and injured on the job was scandalously high and rising, "a large proportion of industrial accidents went uncompensated." *Haman v. Allied Concrete Prod., Inc.*, 495 P.2d 531, 534 (Alaska 1972) (citing Arthur Larson, *Law of Workmen's Compensation* § 4.50, at

28–30 (1968)). The broad application of the "unholy triangle" of defenses "approached the position that corporate enterprise would be flatly immune from actions sounding in tort." Friedman, *supra*, at 417.

Lawyers representing injured workers attempted to counter these defenses, but labor's advocates had greater success in statehouses than in courthouses. "Beginning with the Act of the Georgia legislature of 1855 abrogating the fellow-servant defense for railway companies, numerous and other similar Acts cutting down defenses of the employer were enacted in some 25 States prior to enactment of any Workmen's Compensation Acts." *Kamanu v. E.E. Black, Ltd.*, 41 Haw. 442, 451–52 (1956); *see also Haman*, 495 P.2d at 533–34.[4]

While their statutory text varied from state to state, the purpose and effect of these Employers' Liability statutes was to bestow upon employees (in some instances only railroad workers; in others, workers more generally) a right to sue their employers for personal injuries or deaths caused by co-employees. Some statutes also provided a negligence cause of action that limited or eliminated the common-law defenses of contributory negligence and assumption of the risk. *See generally* Wex S. Malone, *American Fatal Accident Statutes-Part I: The Legislative*

[4] The House Committee on the Judiciary, in connection with its consideration of the proposed Federal Employers' Liability Act, issued a report reviewing the elements of the various state Employers' Liability statutes and reprinting the text of the relevant laws of forty-one states. *See* Liability of Employers, H. Rep. No. 1386, 60th Cong., 1st Sess. 30–72 (1908).

Birth Pains, 4 Duke L.J. 673, 710–18 (1965).

The Supreme Court upheld the constitutionality of such legislation, holding in *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205 (1888), that the Kansas statute—which imposed liability on railroads for injury caused by a fellow employee—did not amount to a "taking" under the Fourteenth Amendment because the company had no property interest in the enforcement of such prospective waivers. *Id*. at 208.

Employers and their legal departments responded with "widespread attempts . . . to contract themselves out of the liabilities the acts were intended to impose." *Duncan v. Thompson*, 315 U.S. 1, 6 (1942). They did so by inserting into their employment contracts provisions whereby the worker "agreed" to waive the right to bring an injury lawsuit based on the negligence of a fellow servant. And the states, in turn, "adopted measures invalidating agreements [that] attempted to exempt employers from liability." *Id.*

Invariably, courts around the country held such prospective waivers of workers' statutory right to sue void and unenforceable. As one commentator noted at the time, both the "modern view" and the "weight of authority" in the United States hold that "Contracts to waive the protection afforded by Employers' Liability Statutes against negligence of fellow-servants . . . are held to be against public policy." *Master and Servant — Duty of Master to Provide Safe Appliances — Contracts Limiting Liability*, 18 Harv. L. Rev. 316, 317 (1905).

A leading decision by the Ohio Supreme Court is typical in its reasoning and temperament:

> [I]t only remains for us to inquire whether railroad companies may ignore or contravene [public] policy by private compact with their employes [sic], stipulating that they shall not be held to a liability for the negligence of their servants which public policy demands should attach to them. The answer is obvious. Such liability . . . has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to more private interests and agreements.

Lake Shore & M.S.R. Co. v. Spangler, 8 N.E. 467, 469–70 (Ohio 1886). Similarly, in *Mumford v. Chicago, R.I. & P.R. Co.*, 104 N.W. 1135, 1137–38 (Iowa 1905), the Supreme Court of Iowa refused on public policy grounds to enforce a waiver of the right to bring an Employers' Liability cause of action for job injuries caused by the negligence of a coworker. To allow prospective waiver of the statute's protections would render the legislature "so seriously crippled that it is well–nigh impotent." *Id.* at 1138. The Iowa court rejected defendant's reliance on "freedom of contract" and on the then-recent decision in *Lochner v. New York*, 198 U.S. 45 (1905):

> [L]iberty under law [is] not absolute license. It is freedom frequently restrained by law for the common good. Surely a corporation, . . . may be compelled to respond in damages for the negligence of its employees, notwithstanding any contract it may make or attempt to make relieving itself from such responsibility or restricting its liability therefor.

Id.

Significantly for this case, some states creating a representative cause of action for the wrongful death of worker incorporated the general contract anti-waiver

principle into the legislation itself. For example, the California Assembly provided in 1885:

> When death . . . results from an injury to an employee . . . the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof for and on behalf and for the benefit of the [survivors]. . . . Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void."

Cal. Civ. Code § 1970 (West). *See also Hancock v. Norfolk & W. Ry. Co.*, 32 S.E. 679, 680 (N.C. 1899), upholding the validity North Carolina's statutory cause of action for the death of a railroad employee due to the negligence of a coworker, including the provision that "any contract or agreement, express or implied, made by any such employee, to waive the benefit of that law shall be void." *Id*. at 680.

When Congress enacted the Federal Employers' Liability Act (FELA) of 1908, ch. 149, 35 Stat. 65 (codified as amended at 45 U.S.C. § 51 *et seq.*), it included both a statutory cause of action for injured railroad workers and an expansive version of the common-law anti-waiver rule: "Any contract, . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void." 45 U.S.C. § 55.

Ultimately, the states placed the right to compensation for job-related deaths and injuries entirely beyond the reach of contractual waivers by the universal adoption of workers' compensation statutes. Martins et al., *supra*, at 1276. The Supreme Court's effective vindication doctrine, which condemns prospective

waivers of the right to bring causes of action established by Congress, is a reaffirmation of this historical and well-settled ground for invalidating "any contract." 9 U.S.C. § 2.

CONCLUSION

Congress enacted ERISA to put an end to the draining of workers' retirement savings due to mismanagement and malfeasance. Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, *in* Special Comm. on Aging, U.S. Senate, 98th Cong., 2d Sess., *The Employee Retirement Income Security Act of 1974: The First Decade* 8 (Comm. Print 1984). Currently ERISA plans "cover 153 million workers, retirees, and dependents who participate in private sector pension and welfare plans that hold an estimated $12.8 trillion in assets." Emp. Benefits Sec. Admin., U.S. Dep't of Labor, *EBSA Restores Over $1.4 Billion to Employee Benefit Plans, Participants, and Beneficiaries* (Oct. 14, 2022), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.

The financial future for millions of workers and their families depends on the effectiveness of ERISA's "comprehensive civil enforcement scheme." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 42 (1987). Defendants ask this Court to allow companies and individuals who control their employees' retirement plans to write their own immunity into plan documents. This Court should not allow private contracting parties to undo the safeguards and protections that Congress has put in

place for the public good.

For the foregoing reasons, AAJ urges this Court to affirm the judgment below.

Dated: October 4, 2024

Respectfully submitted,

/s/ *Jeffrey R. White*

Jeffrey R. White
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae
American Association for Justice

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because this brief contains 6,492 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman type style.

CERTIFICATE OF SERVICE

I, hereby certify that on this day, October 4, 2024, a true and correct copy of the foregoing document was filed with the Clerk of Court and electronically served on counsel of record for all parties using the CM/ECF system of the United States Court of Appeals for the Eleventh Circuit. All participants in this case are registered CM/ECF users.

Date: October 4, 2024

/s/ *Jeffrey R. White*
JEFFREY R. WHITE

ATTACHMENT 2

No. 24-11192

In the United States Court of Appeals for the Eleventh Circuit

EBONI WILLIAMS, *et al.*,

Plaintiffs-Appellees,

v.

ARGENT TRUST COMPANY, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 1:23-cv-03236-VMC

DEFENDANTS-APPELLANTS' OPPOSITION TO MOTION OF AMERICAN ASSOCIATION FOR JUSTICE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

Todd D. Wozniak
HOLLAND & KNIGHT LLP
1180 West Peachtree Street NW, Suite 1800
Atlanta, GA 30309
404-817-8431
todd.wozniak@hklaw.com

Chelsea Ashbrook McCarthy
HOLLAND & KNIGHT LLP
150 N. Riverside Plaza, Suite 2700

Chicago, IL 60606
chelsea.mccarthy@hklaw.com

Counsel for Defendant-Appellant Argent Trust Company

Bryan B. House
FOLEY & LARDNER LLP
777 East Wisconsin Ave.
Milwaukee, Wisconsin 53202
Telephone: 414-297-5554
bhouse@foley.com

Eileen R. Ridley
FOLEY & LARDNER LLP
555 California St., 17th Floor
San Francisco, California 94104
Telephone: 415-438-6469
eridley@foley.com

Counsel for Defendants-Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

CERTIFICATE OF INTERESTED PERSONS

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rules 26.1-1 and 26.1-2 of the Rules of the United States Court of Appeals for the Eleventh Circuit, undersigned counsel for Appellants give notice of the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal:

A360 Holdings LLC, Appellant

A360 Profit Sharing Plan, Appellee

Argent Financial Group, Inc., 100% owner of Argent Trust Company

Argent Trust Company, Appellant

Bailey III, Harry B., Counsel for Appellees

Berman Fink Van Horn P.C., Counsel for Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

Brinkley, Scott, Appellant

Calvert, Honorable Judge Victoria M., United States District Court Judge

Dearing, Lea C., Counsel for Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

Dunn Harrington LLC, Counsel for Appellees

Edelman, Marc R., Counsel for Appellees

Engstrom, Carl, Counsel for Appellees

Engstrom Lee, Counsel for Appellees

Fink, Benjamin, Counsel for Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

Foley & Lardner, Counsel for Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

Harrington III, Robert Earl, Counsel for Appellees

Herring, Shadrin, Appellee

Hill, Brandon J., Counsel for Appellees

Holland & Knight LLP, Counsel for Appellant Argent Trust Company

House, Bryan B., Counsel for Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

JonesGranger, Counsel for Appellees

Kovelesky, Tina, Appellee

Lee, Jennifer Kim, Counsel for Appellees

McCarthy, Chelsea Ashbrook, Counsel for Appellant Argent Trust Company

Origin Bancorp, Inc., publicly-traded company, owns more than 10% of common stock of Argent Financial Group Inc.

Ridley, Eileen R., Counsel for Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

Morgan & Morgan, Counsel for Appellees

Shapiro, Gerald, Appellant

Shoemaker, Paula Mays, Appellee

Thomson, Mark E., Counsel for Appellees

Wenzel Fenton Cabassa, P.A., Counsel for Appellees

Williams, Eboni, Appellee

Wozniak, Todd D., Counsel for Appellant Argent Trust Company

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 through 26.1-3, Appellants make the following disclosures:

Argent Trust Company is a private Tennessee Corporation wholly owned by Argent Financial Group, Inc. No public company is an owner of 10% or more of the stock of Argent Trust Company.

A360 Holdings LLC is a private limited liability company. No public company is an owner of 10% or more of the stock of A360 Holdings LLC.

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TABLE OF AUTHORITIES

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Defendants-Appellants Argent Trust Company, Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC respectfully submit this response in opposition to the Motion of American Association for Justice ("AAJ") for Leave to File Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees. ECF No. 32-1.

A motion for leave to file an *amicus* brief is required to state "(1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b). Specifying a movant's interest allows the Court to evaluate whether it is appropriate to accept the brief—such as "when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

The AAJ's brief raises two issues related to the AAJ's interest in the present appeal that warrant the Court denying its leave to file an *amicus* brief. First, the AAJ fails to show it has "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide" because the AAJ's *amicus* brief simply regurgitates arguments already made by Plaintiff-Appellees and

the Department of Labor (the "DOL"). Second, counsel for Plaintiffs-Appellees are members of AAJ who pay membership dues, meaning Plaintiffs-Appellees partially funded AAJ's purported third-party *amicus* brief.

ARGUMENT AND ANALYSIS

AAJ's motion for leave to file its *amicus curiae* brief should be denied. AAJ's brief neither adds to the arguments already before this Court nor is AAJ impartial in its relationship to Plaintiffs-Appellees.

I. AAJ's *Amicus* Brief Adds Nothing New.

AAJ does not assert new arguments or additional perspective whereby it contributes something not already before the Court, as it must to satisfy Rule 29(b). The thrust of AAJ's *amicus* brief is the same argument made by both Plaintiffs-Appellees and the Department of Labor who has already filed an *amicus* brief: that the "effective vindication doctrine is directly applicable to the A360 Plan, which is consequently invalid and unenforceable" and that waivers of statutory rights are void and unenforceable. (*Compare* ECF No. 32-2 ("AAJ *Amicus* Brief") at 2-5 *with* ECF No. 26 ("Plaintiffs-Appellees Brief") at 12-14.) This is simply a rehashing of Plaintiffs-Appellees' arguments. AAJ also relies on the same legal authorities of Plaintiffs-Appellees and the DOL, demonstrating that the *amicus* brief is "essentially duplicating" Plaintiffs-Appellees and the DOL's brief. *See Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (noting that a judge will

deny permission to file an amicus brief that essentially duplicates a party's brief). For example, AAJ relies on the following authorities also relied upon by Plaintiffs-Appellees and the DOL: *Am. Exp. Co. v. Italian Colors Rest.*, *AT&T Mobility LLC v. Concepcion*, *Epic Sys. Corp. v. Lewis*, *Hudson v. P.I.P., Inc.*, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, *Mass Mut. Life Ins. Co. v. Russell*, *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, and *Viking River Cruises, Inc. v. Moriana*. This overlap in authorities demonstrates the true nature of AAJ's duplicative brief, which merely rehashes Plaintiffs-Appellees' arguments and improperly gives Plaintiffs-Appellees more pages to put ink to paper. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) ("[A]micus briefs are often used as a means of evading the page limitations on a party's briefs.") (citation omitted).

A multitude of reasons exist to deny a duplicative *amicus* brief: "judges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process." *Id.* (citation omitted). Given that AAJ's *Amicus* brief does not advance the matters before this Court and that the DOL has

already filed an *amicus* brief addressing the same issues the AAJ seeks to address, AAJ's motion for leave should be denied.

II. Counsel For Plaintiffs-Appellees At Least Partially Funded AAJ's *Amicus* Brief.

Additionally, pursuant to Fed. R. App. P. 29(a)(2), AAJ's brief must include a statement that "indicates whether . . . a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief . . . ." AAJ's statement is found in footnote 1 of its *Amicus* brief: "No counsel for any party authored this brief in whole or in part. Apart from the *amicus curiae*, no person, party, or party's counsel contributed money intended to fund the brief's preparation and submission."

Yet, Plaintiffs-Appellees' counsel Engstrom Lee and Morgan & Morgan are both dues paying members of AAJ, a self-described "plaintiff trial bar." (*See* Decl. of Chelsea Ashbrook McCarthy at Exs. 1– 2; ECF No. 32-1 at ¶ 1.) The amici fail to mention that both law firms pay membership dues to the AAJ. Under these circumstances, the *amicus* brief is tainted by the financial interests of counsel for Plaintiffs-Appellees. *See Glassroth*, 347 F.3d at 919 (finding that an amicus brief should not be underwritten by a party and discouraging work done by parties in connection with supporting amicus briefs).

CONCLUSION

For all these reasons, this Court should deny AAJ's motion for leave.

October 14, 2024

Respectfully submitted,

ARGENT TRUST COMPANY

By: */s/ Chelsea Ashbrook McCarthy*

Chelsea Ashbrook McCarthy
HOLLAND & KNIGHT LLP
150 N. Riverside Plaza Suite 2700
Chicago, Illinois 60606
Telephone: 312-715-5768
chelsea.mccarthy@hklaw.com

Todd D. Wozniak
HOLLAND & KNIGHT LLP
Regions Plaza
1180 West Peachtree Street NW
Suite 1800
Atlanta, GA 30309
Telephone: 404-817-8500
todd.wozniak@hklaw.com
Georgia Bar No. 777275

GERALD SHAPIRO, SCOTT BRINKLEY, A360 HOLDINGS LLC

By: */s/ Bryan B. House*

Bryan B. House
FOLEY & LARDNER LLP
777 East Wisconsin Ave.
Milwaukee, Wisconsin 53202
Telephone: 414-297-5554
bhouse@foley.com

Eileen R. Ridley
FOLEY & LARDNER LLP
555 California St., 17th Floor
San Francisco, California 94104
Telephone: 415-438-6469
eridley@foley.com

CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this reply brief contains 943 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This reply brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type requirements of Fed R. App. P. 32(a)(6) because this reply brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2302 with a 14-point font named Times New Roman.

/s/ Chelsea Ashbrook McCarthy
Chelsea Ashbrook McCarthy

Counsel for Defendant-Appellant
Argent Trust Company

CERTIFICATE OF SERVICE

This is to certify that the foregoing document has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on October 14, 2024 on all registered counsel of record, and has been transmitted to the Clerk of the Court.

/s/ Chelsea Ashbrook McCarthy
Chelsea Ashbrook McCarthy

Counsel for Defendant-Appellant
Argent Trust Company

No. 24-11192

In the United States Court of Appeals
for the Eleventh Circuit

EBONI WILLIAMS, *et al.*,

Plaintiffs-Appellees,

v.

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On Appeal from the United States District Court
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No. 1:23-cv-03236-VMC

DECLARATION OF CHELSEA ASHBROOK MCCARTHY IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION OF AMERICAN ASSOCIATION FOR JUSTICE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

I, Chelsea Ashbrook McCarthy, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury under the laws of the United States of America that the following is true and correct and based upon my personal knowledge, and if called and sworn as a witness at trial or any other hearing before this Court, I would and could competently testify as set forth herein:

1. I am counsel for Defendant-Appellant Argent Trust Company.

2. On October 14, 2024, I located Exhibits 1 and 2 on the website of the American Association for Justice ("AAJ") showing that Morgan & Morgan and Carl Engstrom are both members of the AAJ.

3. The AAJ website states that members of the organization pay dues which cover 12 months of membership. https://www.justice.org/membership (last visited Oct. 14, 2024).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 14, 2024 in Chicago, Illinois.

/s/ Chelsea Ashbrook McCarthy
Chelsea Ashbrook McCarthy

Exhibit 1

AMERICAN ASSOCIATION FOR JUSTICE
The Association for Trial Lawyers

FIND A MEMBER - SEARCH RESULTS

Listings 1 - 25 of 40
Return to Main Search

Refine by...

Dan Morgan, Matt Morgan, Ultima Morgan, John Morgan, and Mike Morgan

Morgan & Morgan
Mike Morgan
20 N. Orange Ave., Ste. 1600
Orlando, FL 32801
P: (407)420-1414 • F: (407)425-8171
W: http://www.forthepeople.com

AAJ LEADERS FORUM®
BENEFACTOR

Areas of Practice:
Breach of Contract; Burn Injury; Business Litigation; Civil Rights; Class Actions; Deaf/Disability Rights; Debt Collection Harassment; Insurance Claims; Labor/Employment; Mass Torts; Medical Malpracti...
Read more info...

Robert F. Wilkins Esq.
Morgan & Morgan
4450 Old Canton Rd., Ste. 200
Jackson, MS 39211
P: (601)503-1654 • F: (601)503-1607
E: rocky@forthepeople.com
W: http://www.forthepeople.com
Admitted to the bar in 1999

AAJ LEADERS FORUM®
BENEFACTOR

Areas of Practice:
Motor Vehicle; Personal Injury; Premises Liability; Prod

Read more info...

C. Todd Alley Esq.
Morgan & Morgan
201 N. Franklin St. 7th Fl.
Tampa, FL 33602-5157
Phone: (813)223-5505
Fax: (813)224-0373
E-mail: talley@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 1981

Antonio Arzola
Morgan & Morgan
201 N. Franklin St.
Tampa, FL 33602
Phone: (813)229-4027
E-mail: ararzola@forthepeople.com
Admitted to the bar in 2022

Patrick A. Barthle II
Morgan & Morgan
201 N. Franklin St., 7th Fl.
Tampa, FL 33602
Phone: (813)229-4023
Fax: (813)222-4708
E-mail: PBarthle@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2012

James Garrett Biggart II
Morgan & Morgan
4401 Belle Oaks Dr., Ste. 300
North Charleston, SC 29405
Phone: (850)445-3036
Fax: (850)270-9006
E-mail: JBiggart@ForThePeople.com
Admitted to the bar in 1994

Bernie Brannan
Morgan & Morgan
216 Summit Blvd., Ste. 300
Birmingham, AL 35223
E-mail: jbrannan@forthepeople.com
Admitted to the bar in 2010

Francesca Kester Burne
Morgan & Morgan
201 N. Franklin St., 7th Fl.
Tampa, FL 33602
Phone: (813)223-5505
E-mail: fkester@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2017

Kevin Butler
Morgan & Morgan
20 N. Orange Ave., Ste. 1600
Orlando, FL 32801
Phone: (321)662-2367
E-mail: kbutler@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2015

Preston P. Cahill
Morgan & Morgan
333 W. Vine St., Ste. 1200
Lexington, KY 40507
Phone: (859)899-8791
Fax: (859)899-8812
E-mail: pcahill@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2018

Amira Cheikh-Khalil
Morgan & Morgan
820 Main Ln., Apt. 1145
Orlando, FL 32801
Phone: (407)840-5582
Fax: (407)425-8171
E-mail: amira@forthepeople.com

Web Page: https://www.forthepeople.com/
Admitted to the bar in 2024

Alexander M. Clem
Morgan & Morgan
20 N. Orange Ave., Ste. 1600
Orlando, FL 32801
Phone: (407)420-1414
Fax: (407)245-3333
Toll-Free: (800)454-6825
E-mail: aclem@forthepeople.com
Web Page: http://www.forthepeople.com
Admitted to the bar in 1991

Jack T. Cook
Morgan & Morgan
20 N. Orange Ave., Ste. 1600
Orlando, FL 32801
Phone: (407)420-6926
Fax: (407)425-8171
E-mail: jcook@forthepeople.com
Web Page: http://www.forthepeople.com
Admitted to the bar in 2011

Andrew Parker Felix Esq.
Morgan & Morgan
20 N. Orange Ave., Ste. 1600
Orlando, FL 32801
Phone: (407)420-1414
Fax: (407)425-8171
E-mail: andrew@forthepeople.com
Web Page: http://www.forthepeople.com
Admitted to the bar in 2003

Erby Fischer
Morgan & Morgan
216 Summit Blvd., Ste. 300
Birmingham, AL 35243
Phone: (205)423-8504
Fax: (205)423-8510
E-mail: efischer@forthepeople.com
Admitted to the bar in 1996

Conor Flynn
Morgan & Morgan
525 NE 4th St.
Gainesville, FL 32601
Phone: (207)710-6323
Fax: (407)425-8171
E-mail: conor.flynn@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2018

J. Matthew French
Morgan & Morgan
200 N. Broadway, Ste. 720
Saint Louis, MO 63102
Phone: (314)955-1032
Fax: (407)425-8171
E-mail: mfrench@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2022

Michael Murphy Gallagher
Morgan & Morgan
5106 Crawford St. Unit A
Houston, TX 77004-5894
Phone: (689)219-2333
E-mail: michaelgallagher@forthepeople.com
Admitted to the bar in 2003

Mark R. Hanson
Morgan & Morgan
1700 Palm Beach Lakes Blvd., Ste. 500
West Palm Beach, FL 33401
Phone: (561)764-2236
Fax: (561)799-5763
Toll-Free: (866)522-6842
E-mail: mark.hanson@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 1986

Robert L. Hendrix
Morgan & Morgan
408 12th St.

Columbus, GA 31901
Phone: (706) 478-1951
Fax: (706) 478-1953
E-mail: RHendrix@ForThePeople.com
Web Page: http://Stottlemyerhendrix.com
Admitted to the bar in 2003

Thomas Joseph Jerla Jr.
Morgan & Morgan
8151 Peters Rd., Ste. 4000
Plantation, FL 33324
Phone: (786)236-7508
E-mail: tjerlajr@forthepeople.com
Admitted to the bar in 2002

Steven J. Jones
Morgan & Morgan
2355 E. Camelback Rd., Ste. 335
Phoenix, AZ 85020
Phone: (716)471-1204
E-mail: steven.jones@forthepeople.com
Web Page: http://www.forthepeople.com/
Admitted to the bar in 2014

Abdul Hameed Khan-Tareen
Morgan & Morgan
1901 Pennsylvania Ave. NW, Ste. 300
Washington, DC 20006
Phone: (202)772-0562
E-mail: akhantareen@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2019

William Lewis
Morgan & Morgan
1700 Palm Beach Lakes Blvd., Ste. 500
West Palm Beach, FL 33401
Phone: (561)227-5859
E-mail: wlewis@forthepeople.com
Admitted to the bar in 2009

Fan Li
Morgan & Morgan
20 N. Orange Ave. Ste. 1600
Orlando, FL 32801
Phone: (407)418-1056
Fax: (954)523-4803
E-mail: fan.li@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2015

Listings 1 - 25 of 40

AAJ'S VISION IS JUSTICE FOR ALL.

View the AAJ Privacy Policy and Accessibility Statement.

777 6th Street, NW, Suite 200, Washington, DC 20001
800.424.2725 202.965.3500

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Exhibit 2

AMERICAN ASSOCIATION FOR JUSTICE
The Association for Trial Lawyers

FIND A MEMBER - SEARCH RESULTS

Listings 1 - 1 of 1
Return to Main Search

Refine by...

Carl Engstrom
Engstrom Lee LLC
323 Washington Ave N., Ste. 200
Minneapolis, MN 55401-1118
Phone: (612)699-4703
E-mail: cengstrom@engstromlee.com
Admitted to the bar in 2014

Listings 1 - 1 of 1

AAJ'S VISION IS JUSTICE FOR ALL.

ATTACHMENT 3

No. 24-11192

In the United States Court of Appeals for the Eleventh Circuit

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Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 1:23-cv-03236-VMC (Hon. Victoria Marie Calvert)

REPLY OF AMERICAN ASSOCIATION FOR JUSTICE TO DEFENDANTS-APPELLANTS' OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

LORI ANDRUS
President
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(415) 986-1400
lori.andrus@justice.org

JEFFREY R. WHITE
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* the American Association for Justice certifies that it is a non-profit organization. It has no parent corporation or publicly owned corporation that owns 10% or more of its stock.

Respectfully submitted this 18th day of October 2024.

/s/ Jeffrey R. White

JEFFREY R. WHITE
Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rules 26.1-1, 26.1-2, 28-1(b), and 29-2, undersigned counsel for *amicus curiae* gives notice of the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

A360 Holdings LLC (Appellant)

A360 Profit Sharing Plan (Appellee)

American Association for Justice (Amicus Curiae)

Argent Financial Group, Inc. (100% owner of Argent Trust Company)

Argent Trust Company (Appellant)

Bailey III, Harry B. (Counsel for Appellees)

Berman Fink Van Horn P.C. (Counsel for Appellants)

Brinkley, Scott (Appellant)

Calvert, Honorable Victoria M. (United States District Court Judge)

Dearing, Lea C. (Counsel for Appellants)

Dunn Harrington LLC (Counsel for Appellees)

Edelman, Marc R. (Counsel for Appellees)

Engstrom, Carl (Counsel for Appellees)

Engstrom Lee (Counsel for Appellees)

Fink, Benjamin (Counsel for Appellants)

Foley & Lardner (Counsel for Appellants)

Harrington III, Robert Earl (Counsel for Appellees)

Herring, Shadrin (Appellee)

Hill, Brandon J. (Counsel for Appellees)

Holland & Knight LLP (Counsel for Appellant Argent Trust Company)

House, Bryan B. (Counsel for Appellants)

JonesGranger (Counsel for Appellees)

Kovelesky, Tina, (Appellee)

Lee, Jennifer Kim (Counsel for Appellees)

McCarthy, Chelsea Ashbrook (Counsel for Appellant Argent Trust Company)

Origin Bancorp, Inc. (Publicly traded company that owns more than 10% of common stock of Argent Financial Group Inc.)

Ridley, Eileen R. (Counsel for Appellants)

Morgan & Morgan (Counsel for Appellees)

Shapiro, Gerald (Appellant)

Shoemaker, Paula Mays (Appellee)

Thomson, Mark E. (Counsel for Appellees)

Wenzel Fenton Cabassa, P.A. (Counsel for Appellees)

Williams, Eboni (Appellee)

White, Jeffrey R. (Counsel for Amicus Curiae)

Wozniak, Todd D. (Counsel for Appellant Argent Trust Company)

To the best of the undersigned counsel's knowledge, no other persons, association of persons, firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

Respectfully submitted this 18th day of October 2024.

/s/ Jeffrey R. White

JEFFREY R. WHITE
Counsel for Amicus Curiae

The American Association for Justice ("AAJ") respectfully submits this Reply to Defendants-Appellants' Opposition to AAJ's Motion for Leave to File Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees.

ARGUMENT

I. AAJ'S PROPOSED BRIEF PRESENTS A UNIQUE PERSPECTIVE AND ADDITIONAL ARGUMENTS THAT ARE RELEVANT TO THE DISPOSITION OF THIS CASE.

Defendants assert, first, that "AAJ does not assert new arguments or additional perspective whereby it contributes something not already before the Court, as it must to satisfy [Federal Rule of Appellate Procedure] 29(b)." Defendants-Appellants' Opposition to Motion of American Association for Justice for Leave fo File Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees ("Defs.' Opp.") at 2.

Rule 29(b) imposes no such litmus test. Rather, a motion for leave to file an *amicus* brief must state "(1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b).

Moreover, the content of AAJ's proposed brief clearly refutes Defendants' objection. AAJ members are trial attorneys who represent workers, consumers, and small businesses seeking to secure their rights under various federal statutes. They bring to this Court a far broader perspective on the Supreme Court's "effective vindication" doctrine than that of the parties, who are focused exclusively on the

application of that doctrine to ERISA actions. As AAJ explains in Part I, the statutory rights of numerous workers and consumers under laws enacted by Congress for their protection "will ring hollow" if Defendants are permitted to use their considerable leverage to extract contractual waivers from ERISA participants and beneficiaries. Brief for American Association for Justice as Amicus Curiae Supporting Plaintiffs-Appellees ("AAJ Br.") at 5.

In addition, Parts II and III of AAJ's brief outlines in detail the foundation of the "effective vindication" doctrine in the common law of contracts, long before Congress enacted the Federal Arbitration Act. AAJ Br. at 14–25. Neither party delves into these common-law origins.

Defendants instead urge this Court to impose additional and very restrictive conditions on acceptable amicus briefs as suggested in an in-chambers opinion by a single judge in another circuit. Defs.' Opp. at 1 (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.)). Other courts have rejected such a view as both unwise and ineffective. *See Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132–33 (3d Cir. 2002) (Alito, J.). This Court should adhere to the "predominant practice in the courts of appeals," which is "to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted." *Id.* at 133.

II. MEMBERSHIP OF PLAINTIFFS' COUNSEL IN AAJ DOES NOT VIOLATE RULE 29.

Defendants' second ground for objection is wholly meritless. Defendants complain that one or more of the attorneys representing Plaintiffs-Appellees in this action are dues-paying members of AAJ. As such, Defendants assert that "the *amicus* brief is tainted by the financial interests of counsel." Defs.' Opp. at 4. Defendants' sole authority, incongruously, is *Glassroth v. Moore*, 347 F.3d 916 (11th Cir. 2003), which stated that *amicus* briefs "should not be underwritten" by a *party*. *Id.* at 919. Quite obviously, an AAJ member's annual dues payment, while supporting all of AAJ's activities, is not "money that was *intended to fund preparing or submitting the brief*." Fed. R. App. P. 29(a)(2) (emphasis added).

Rule 29 itself puts to rest any question as to whether membership dues could be encompassed by the rule by requiring disclosure of any "person—*other than* the amicus curiae, *its members*, or its counsel—contributed money that was intended to fund preparing or submitting the brief." Fed. R. App. P. 29(a)(4)(E)(iii) (emphasis added). Moreover, to erase any possible, lingering notion that membership dues create a troubling financial interest, the 2010 Advisory Committee Note states:

> [The rule] requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's *payment of general membership dues to an amicus* need not be disclosed."

Fed. R. App. P. 29 advisory committee's note to 2010 amendments (emphasis added). Indeed, the Advisory Committee cited *Glassroth v. Moore* in the following paragraph to underscore the purpose of the disclosure requirement "to deter counsel from using an amicus brief to circumvent page limits." *Id.* As AAJ has attested that counsel for Plaintiffs-Appellants has neither authored the proposed *amicus* brief in whole or in part, nor contributed any money intended to fund the brief, *see* AAJ Br. at 1 n.1, the Court's opinion in *Glassroth* is inapplicable in this case and the brief is permissible under both Federal Rule of Appellate Procedure 29 and Eleventh Circuit Local Rule 29-1.

CONCLUSION

For these reasons, this Court should grant AAJ's Motion Leave to File Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees.

Dated: October 18, 2024

Respectfully submitted,

/s/ *Jeffrey R. White*

Jeffrey R. White
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Proposed Amicus Curiae
American Association for Justice

ATTACHMENT 4

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-11192

EBONI WILLIAMS,
DEBBIE SHOEMAKER,
PAULA MAYS,
TINA KOVELESKY,
SHADRIN HERRING,
as representatives of a class of similarly
situated persons, and on behalf of the
A360, Inc. Profit Sharing Plan f.k.a.
A360, Inc. Employee Stock Ownership Plan,

Plaintiffs-Appellees,

versus

GERALD SHAPIRO,
SCOTT BRINKLEY,
ARGENT TRUST ARGENT TRUST COMPANY,
A360 HOLDINGS LLC,

Defendants-Appellants,

JAMIE ZELVIN, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:23-cv-03236-VMC

ORDER:

The "Motion of American Association for Justice for Leave to File Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees" is GRANTED.

/s/ Nancy G. Abudu
UNITED STATES CIRCUIT JUDGE

TAB 23

No written testimony outline or comment
was submitted by the requested January 29, 2025
deadline.

TAB 24

January 14, 2025

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle NE
Washington, District of Columbia 20544

Re: Comments on Proposed Changes to Federal Rule of Appellate Procedure 29

Dear Judge Bates:

The American Council of Life Insurers (ACLI) writes to express our views concerning changes considered to Federal Rule of Appellate Procedure 29 (Rule 29). ACLI submits 3-5 amicus briefs per year in federal courts across the nation, and our association and its member companies have a strong interest in any modifications to Rule 29.

Amicus briefs play a crucial role in the judicial process by providing additional perspectives, expert insights, and valuable context that may assist the court in reaching a well-informed decision. Any changes to Rule 29 that hinder or discourage the filing of amicus briefs should, in our view, be avoided.

Perspective and Public Policy

ACLI's amicus briefs always strive to avoid making repetitive arguments that have already been briefed before the court. Our association has decades of experience working with our member life insurance companies in a wide array of endeavors. ACLI's primary role is one of advocacy, and in this context, we gather and analyze data, confer with employees of life insurers, monitor product development and consumer trends, and work with public policy makers in crafting laws, regulations, and administrative information. This experience allows ACLI to inform the court as to industry's view of potential rulings, and the impact(s) of those rulings upon consumers and other stakeholders. This leads to a more robust legal discourse by introducing relevant research, statistics, and legal precedents that may not be covered by the parties involved.

Chilling Effects of Proposed Changes

Amicus briefs are a way for interested and impacted individuals to express their views to the court, which is important to accomplish openness in the appellate process. The proposed changes to Rule 29 would, among other things, eliminate the option to file an amicus brief by consent. Further,

American Council of Life Insurers | 101 Constitution Ave, NW, Suite 700 | Washington, DC 20001-2133

the proposed changes would require (both in the motion and brief) specified statements of interest and assurances pertaining to the content of the brief. Where the parties would prefer to consent to the filing of amicus briefs, there does not seem a mechanism for the court to grant permission. Nor is it clear how a court is supposed to weigh the mandated descriptive information regarding the expertise and content offered by the aspiring amicus. At a minimum, additional disclosure and motion requirements will add costs to no apparent benefit.

The current Rule 29 adequately requires disclosures that prevent "dark" or "secret" money from funding amici. Specifically, disclosure must be made if a party's counsel substantially authored the amicus brief, the party contributed funds towards the brief, or if a third-party contributed funding of the brief. (Fed. Rule 29(a)(4)(e)). These provisions ensure that the amicus is being filed by the person or entity identified as the amicus author. It also brings to light any attempt by the party to circumvent page limitations, or to "ghost write" a brief using an unrelated organization as cover. The proposed changes do not seem in the interests of judicial efficiency, nor of the public interest.

Thank you for the opportunity to provide these comments regarding Rule 29. In closing, we urge that any changes be minimal, and ideally Rule 29 be left to operate effectively as it has for many years.

Sincerely,

Kirsten Wolfford
Counsel
American Council of Life Insurers