ADVISORY COMMITTEE
ON
APPELLATE RULES

April 2, 2025

ADVISORY COMMITTEE ON APPELLATE RULES
Meeting of April 2, 2025
Atlanta, GA

Table of Contents

Table of Contents

TAB 1

TAB 1A

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Allison H. Eid United States Court of Appeals Denver, CO	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter	Associate Reporter
Honorable Rebecca B. Connelly United States Bankruptcy Court Harrisonburg, VA	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC	Professor Laura B. Bartell Wayne State University Law School Detroit, MI

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robin L. Rosenberg United States District Court West Palm Beach, FL	Professor Richard L. Marcus University of California College of the Law, San Francisco San Francisco, CA
	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable James C. Dever III United States District Court Raleigh, NC	Professor Sara Sun Beale Duke University School of Law Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Jesse M. Furman United States District Court New York, NY	Professor Daniel J. Capra Fordham University School of Law New York, NY

ADVISORY COMMITTEE ON APPELLATE RULES

Chair	Reporter
Honorable Allison H. Eid United States Court of Appeals Denver, CO	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Members

Linda Coberly, Esq. Winston & Strawn LLP Chicago, IL	George W. Hicks, Jr., Esq. Kirkland & Ellis LLP Washington, DC
Honorable Sarah Harris Acting Solicitor General (ex officio) United States Department of Justice Washington, DC	Professor Bert Huang Columbia Law School New York, NY
Honorable Leondra R. Kruger Supreme Court of California San Francisco, CA	Honorable Carl J. Nichols United States District Court Washington, DC
Honorable Sidney R. Thomas United States Court of Appeals Billings, MT	Honorable Richard C. Wesley United States Court of Appeals Geneseo, NY
Lisa B. Wright, Esq. Office of the Federal Public Defender Washington, DC	

Liaisons

Honorable Daniel A. Bress (*Bankruptcy*) United States Court of Appeals San Francisco, CA	Andrew J. Pincus, Esq. (*Standing*) Mayer Brown LLP Washington, DC

Clerk of Court Representative

Christopher Wolpert, Esq.
Clerk
United States Court of Appeals
Denver, CO

ADVISORY COMMITTEE ON APPELLATE RULES

Members	Position	District/Circuit	Start Date	End Date
Allison H. Eid Chair	C	Tenth Circuit	Member: 2024 Chair: 2024	---- 2027
Linda Coberly	ESQ	Illinois	2023	2026
George W. Hicks, Jr.	ESQ	Washington, DC	2022	2025
Sarah Harris*	DOJ	Washington, DC	----	Open
Bert Huang	ACAD	New York	2022	2025
Leondra R. Kruger	JUST	California	2021	2027
Carl J. Nichols	D	District of Columbia	2021	2027
Sidney R. Thomas	C	Ninth Circuit	2023	2025
Richard C. Wesley	C	Second Circuit	2020	2026
Lisa B. Wright	ESQ	Assistant Federal Public Defender (Appellate) (Washington, DC)	2019	2025
Edward Hartnett Reporter	ACAD	New Jersey	2018	2027

Principal Staff: Bridget Healy, 202-502-1820

* Ex-officio – Acting Solicitor General

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Staff

Office of the General Counsel – Rules Committee Staff
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, # 7-300
Washington, DC 20544
Main: 202-502-1820

Bridget M. Healy, Esq.
Counsel

S. Scott Myers, Esq.
Counsel

Kyle Brinker, Esq.
Rules Law Clerk

Shelly Cox
Management Analyst

Rakita Johnson
Administrative Analyst

FEDERAL JUDICIAL CENTER
Staff

Hon. John S. Cooke
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, # 6-100
Washington, DC 20544

Dr. Carly Giffin, Esq.
Research Associate
(Bankruptcy)

Marie Leary, Esq.
Senior Research Associate
(Appellate)

Dr. Timothy Lau, Esq.
Research Associate
(Evidence)

Dr. Elizabeth Wiggins, Esq.
Division Director
(Criminal)

Dr. Emery G. Lee, Esq.
Senior Research Associate
(Civil)

Dr. Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1B

	FRAP Item	Proposal	Source	Current Status
	16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Effective 12/2021
	17-AP-G	Rule 42(b)– dismissal of appeal on consent of all parties	Christopher Landau	Effective 12/2022
	18-AP-E	Privacy in Railroad Retirement Act cases	Railroad Retirement Board	Effective 12/2022
	None assigned	Rules for Future Emergencies Rules 2 and 4	Congress (CARES Act)	Effective 12/2023
	None assigned	Add Juneteenth to Rule 26	Congress	Effective 12/2023
	18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Effective 12/2024
6	21-AP-D	Costs on Appeal; Rule 39	Alan Morrison	Initial consideration of suggestion and subcommittee formed F21 Discussed at S22 meeting Discussed at F22 meeting Discussed at S23 meeting Draft approved for submission to Standing Committee S23 Draft approved for publication by Standing Committee June 23 Final approval for submission to Standing Committee S24 Approved by Standing Committee June 24 Approved by Judicial Conference Sept 24
6	None assigned	Appeals in Bankruptcy Cases; Rule 6	Bankruptcy Committee	Discussed at F22 meeting and subcommittee formed Discussed at S23 meeting Draft approved for submission to Standing Committee S23 Draft approved for publication by Standing Committee June 23 Final approval for submission to Standing Committee S24 Approved by Standing Committee June 24 Approved by Judicial Conference Sept 24
4	19-AP-C	IFP Standards	Sai	Initial consideration F19 Discussed at S20 meeting and subcommittee formed Discussed at F20 meeting

	FRAP Item	Proposal	Source	Current Status
				Discussed at S21 meeting Discussed at F21 meeting Discussed at S22 meeting Discussed at F22 meeting and held See 20-AP-D
4	20-AP-D	IFP Forms	Sai	Initial consideration F20 and referred to IFP subcommittee Discussed at S21 meeting Discussed at F21 meeting Discussed at S22 meeting Discussed at F22 meeting and held Draft approved for submission to Standing Committee S24 Draft approved for publication by Standing Committee June 24 Noted at F24 meeting
4	21-AP-B	IFP Forms	Sai	Initial consideration and referred to IFP subcommittee S21 Discussed at F21 meeting Discussed at S22 meeting Discussed at F22 meeting and held See 20-AP-D
4	21-AP-C	Amicus Disclosures	Senator Whitehouse & Representative Johnson	Issue noted and subcommittee formed F19 Initial consideration of suggestion S21 Discussed at F21 meeting Discussed at S22 meeting Discussed at F22 meeting Discussed at S23 meeting Discussed at F23 meeting Draft approved for submission to Standing Committee S24 Draft approved for publication by Standing Committee June 24 Discussed at F24 meeting
4	21-AP-G	Comment on 21-AP-C	Chamber of Commerce	Initial consideration S22 See 21-AP-C
4	21-AP-H	Comment on 21-AP-C	Senator Whitehouse & Representative Johnson	Initial consideration S22 See 21-AP-C
4	22-AP-A	Comment on 21-AP-C	Senator Whitehouse &	Initial consideration S22 See 21-AP-C

	FRAP Item	Proposal	Source	Current Status
			Representative Johnson	
4	23-AP-A	Rule 29; Amicus Briefs	DRI Center	Initial consideration and referred to amicus subcommittee S23
4	23-AP-B	Rule 29; Amicus Briefs	Atlantic Legal Foundation	Initial consideration and referred to amicus subcommittee S23
4	23-AP-I	Comment on 21-AP-C	Senator Whitehouse & Representative Johnson	Initial consideration and referred to amicus subcommittee S24
4	23-AP-K	Comment on 21-AP-C	Senator Whitehouse & Representative Johnson	Initial consideration and referred to amicus subcommittee S24
4	24-AP-A	Regulate expert information in amicus briefs	David DeMatteo	Initial consideration and referred to amicus subcommittee S24
1	21-AP-E	Electronic Filing by Pro Se Litigants	Sai	Initial consideration of suggestion and referred to reporters F21 Discussed at S22 meeting Discussed at F22 meeting Discussed at S23 meeting Discussed at F23 meeting Discussed at S24 meeting Discussed at F24 meeting
1	20-AP-C	Pro Se Electronic Filing	Usha Jain	Initial consideration F20 and tabled pending consideration by Civil Rules Committee Referred to reporters F21 See 21-AP-E
1	22-AP-E	Social Security Numbers in Court Filings	Senator Widen	Initial consideration S23 Discussed at S23 meeting Discussed at F23 meeting Discussed at S24 meeting Discussed at F24 meeting
1	22-AP-G	Intervention on Appeal	Stephen Sachs	Initial consideration and subcommittee formed S23 Discussed at F23 meeting Discussed at S24 meeting Discussed at F24 meeting

	FRAP Item	Proposal	Source	Current Status
1	23-AP-C	Intervention on Appeal	Judith Resnik	Initial consideration and subcommittee formed S23 See 22-AP-G
1	24-AP-B	Use of pseudonym for minors	DOJ	Initial consideration S24 See 22-AP-E
1	24-AP-G	Rule 15; premature petitions	Judge Randolph	Initial consideration and subcommittee formed S24 Discussed at F24 meeting
1	24-AP-C	Comment on 24-AP-B	American Association for Justice	Initial consideration F24 See 22-AP-E
1	24-AP-D	Comment on 21-AP-C	Chamber of Commerce	Initial consideration and referred to amicus subcommittee F24
1	24-AP-M	Rule 4; Reopening time to appeal	Judge Sutton Judge Gregory	Initial consideration and subcommittee formed F24
1	24-AP-L	Administrative stays	Will Havemann	Initial consideration and subcommittee formed F24
1	24-AP-N	Computing Time	Jack Metzler	Initial consideration S25
0	None assigned	Review of rules regarding appendices	Committee	Discussed at F17 meeting and a subcommittee formed to review Discussed at S18 meeting and removed from agenda Will reconsider in S21 Discussed at S21 meeting and postponed until S24 Discussed at S24 meeting and retained on agenda
0	22-AP-C	Third-Party Litigation Funding Disclosure	Lawyers for Civil Justice	Initial consideration F22 Discussed and held pending Civil Committee S23
0	22-AP-D	Comment on 22-AP-C	International Legal Finance Association	Initial consideration S23 See 22-AP-C
0	23-AP-J	PACER Access	Andrew Straw	Initial consideration and removed from agenda S24
0	24-AP-E	Rule 28; standards of review	Jonathan Cohen	Initial consideration and removed from agenda F24
0	24-AP-F	Comment on costs on appeal	Sai	Initial consideration and removed from agenda F24
0	24-AP-H	Name styling	Sai	Initial consideration and removed from agenda F24
0	24-AP-I	Common local rules as Federal Rules	Sai	Initial consideration and removed from agenda F24
0	24-AP-J	New federal common rules	Sai	Initial consideration and removed from agenda F24
0	24-AP-K	Standardize word and page equivalents	Sai	Initial consideration and removed from agenda F24

0 recently removed from agenda or deferred to future meeting
1 pending before Advisory Committee prior to public comment
2 approved by Advisory Committee and submitted to Standing Committee for publication
3 out for public comment
4 pending before Advisory Committee after public comment
5 final approval by Advisory Committee and submitted to Standing Committee
6 approved by Standing Committee
7 approved by SCOTUS

TAB 1C

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Effective December 1, 2024

REA History:

- Transmitted to Congress (Apr 2024)
- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Effective December 1, 2024

REA History:

- Transmitted to Congress (Apr 2024)
- Transmitted to Supreme Court (Oct 2023)
- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
EV 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new Rule 107.	EV 107

Effective (no earlier than) December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2024)

REA History:

- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2021. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. The amended form went into effect December 1, 2024.	

Effective (no earlier than) December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2024)

REA History:

- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 29	The proposed amendments to Rule 29 relate to amicus curiae briefs. The proposed amendments, among other things, would require all amicus briefs to include 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. In addition, they would require an amicus that has existed for less than 12 months to state the date the amicus was created. With regard to the relationship between a party and an amicus, two new disclosure requirements would be added. Also, the proposed amendments would retain the member exception in the current rule, but limit the exception to those who have been members for the prior 12 months. Finally, the proposed amendments would require leave of court for all amicus briefs, not just those at the rehearing stage.	Rule 32; Appendix
AP 32	The proposed amendments to Rule 32 would conform to the proposed amendments to Rule 29.	Rule 29
AP Appendix	The proposed amendments to the Appendix would conform to the proposed amendments to Rule 29.	Rule 29
AP Form 4	The proposed amendments to Form 4 would simplify Form 4, with the goal of reducing the burden on individuals seeking in forma pauperis status (IFP) while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.	
BK 1007	The proposed amendments to Rule 1007(c)(4) eliminate the deadlines for filing certificates of completion of a course in personal financial management. The proposed amendments to Rule 1007(h) clarify that a court may require a debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 115, 1207, or 1306 of the Bankruptcy Code.	
BK 3018	The proposed amendment to subdivision (c) would allow for more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case.	
BK 5009	The proposed amendments to Rule 5009(b) would provide an additional reminder notice to the debtors that the case may be closed without a discharge if the debtor's certificate of completion of a personal financial management course has not been filed.	
BK 9006	The proposed amendments conform to the proposed amendments to Rule 1007.	
BK 9014	The proposed amendment to Rule 9014(d) relaxes the standard for allowing remote testimony in contested matters to "cause and with appropriate safeguards." The current standard, imported from the trial standard in Civil Rule	

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	43(a), which is applicable across bankruptcy (in both contested matters and adversary proceedings) is cause "in compelling circumstances and with appropriate safeguards."	
BK 9017	The proposed amendment to Rule 9017 removes the reference to Civil Rule 43 leaving the proposed amendment to Rule 9014(d) to govern the standard for allowing remote testimony in contested matters, and Rule 7043 to govern the standard for allowing remote testimony in adversary proceedings.	
BK 7043	Rule 7043 is new and works with proposed amendments to Rules 9014 and 9017. It would make Civil Rule 43 applicable to adversary proceedings (though not to contested matters	
BK Official Form 410S1	The proposed changes would conform the form the pending amendments to Rule 3002.1 that are on track to go into effect on **December 1, 2025,** and would go into effect on the same date as the rule change.	
EV 801	The proposed amendment to Rule 801(d)(1)(A) would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403.	

TAB 1D

Legislation That Directly or Effectively Amends the Federal Rules
119th Congress
(January 3, 2025–January 3, 2027)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Litigation Transparency Act of 2025	**H.R. 1109** *Sponsor:* Issa (R-CA) *Cosponsors:* Collins (R-GA) Fitzgerald (R-WI)	CV 5, 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1109/BILLS-119hr1109ih.pdf **Summary:** Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to product to the court and other parties any such agreement.	• 02/07/2025: H.R. 1109 introduced in House; referred to Judiciary Committee
Alexandra's Law Act of 2025	**H.R. 780** *Sponsor:* Issa (R-CA) *Cosponsors:* Kiley (R-CA) Obernolte (R-CA)	EV 410	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr780/BILLS-119hr780ih.pdf **Summary:** Would permit a previous nolo contendere plea in a case involving death resulting from the sale of fentanyl to be used as evidence to prove in an 18 U.S.C. § 1111 or § 1112 case that the defendant had knowledge that the substance provided to the decedent contained fentanyl.	• 01/28/2025 introduced in House; referred to Judiciary and Energy & Commerce Committees
Protect the Gig Economy Act of 2025	**H.R. 100** *Sponsor:* Biggs (R-AZ)	CV 23	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr100/BILLS-119hr100ih.pdf **Summary:** Would add a requirement to Civil Rule 23(a) that a member of a class may sue or be sued as representative parties only if "the claim does not allege the misclassification of employees as independent contractors."	• 01/03/2025 introduced in House; referred to Judiciary Committee

Legislation Requiring Only Technical or Conforming Changes
118th Congress
(January 3, 2023–January 3, 2025)

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Rosa Parks Day Act	**H.R. 964** *Sponsor:* Sewell (D-AL) *Cosponsors:* 62 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/bill/119th-congress/house-bill/964/text?s=3&r=2&q=%7B%22search%22%3A%22federal+holiday%22%7D **Summary:** Would make Rosa Parks Day a federal holiday.	• 02/04/2025: Introduced in House; referred to Committee on Oversight & Government Reform
Lunar New Year Day Act	**H.R. 794** *Sponsor:* Meng (D-NY) *Cosponsors:* 39 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr794/BILLS-119hr794ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday.	• 01/28/2025: Introduced in House; referred to Committee on Oversight & Government Reform
Election Day Act	**H.R. 6267** *Sponsor:* Fitzpatrick (R-PA) *Cosponsor:* Dingell (D-MI)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr154/BILLS-119hr154ih.pdf **Summary:** Would make Election Day a federal holiday.	• 01/03/2025: Introduced in House; referred to Committee on Oversight & Government Reform

TAB 1E

Federal Judicial Center

Date: February 25, 2025

To: Advisory Committees on Rules of Practice and Procedure

From: Tim Reagan (Research)
Maureen Kieffer (Education)
Christine Lamberson (History)
Federal Judicial Center

Re: Federal Judicial Center Research and Education

This memorandum summarizes recent efforts by the Federal Judicial Center relevant to federal-court practice and procedure. Center researchers attend rules committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides; produces education programs for judges, court attorneys, and court staff; and provides public resources on federal judicial history.

RESEARCH

Completed Research for Rules Committees

Default and Default-Judgment Practices in the District Courts

At the request of the Civil Rules Committee, the Center studied district-court practices with respect to the entry of defaults and default judgments under Civil Rule 55 (www.fjc.gov/content/389994/default-and-default-judgment-practices-district-courts). In most districts, the clerk of court enters defaults, perhaps in consultation with chambers. District practices with respect to entry of default judgments for a sum certain were more varied; in many districts, the clerk of court never enters default judgments pursuant to the national rule.

Prior Convictions as Impeachment Evidence for Criminal Defendants

At the request of the Evidence Rules Committee, the Center prepared a research plan for surveying criminal defense attorneys on factors determining how defendants plead and whether they testify, consistency of rulings on whether criminal histories would be admissible for impeachment, and the predictive value of criminal history on defendants' truthfulness as witnesses. The committee decided to proceed with a proposal to amend Evidence Rule 609 without waiting for the research, which would have taken approximately two years.

Broadcasting Criminal Proceedings

The Center provided the Criminal Rules Committee with research support as it studied whether the proscription on remote public access to criminal proceedings should be amended. The committee decided not to pursue an amendment to that proscription at this time.

The Need for Redacted Social Security Numbers in Bankruptcy Cases

In light of proposals to fully redact Social Security numbers in public filings, rather than all but the last four digits, the Bankruptcy Rules Committee asked the Center to survey bankruptcy trustees and others on the need for partial Social Security numbers on certain public forms. Based on the results of the survey, the committee decided not to pursue a requirement for full redaction at this time, and it decided to continue to monitor treatment of the issue by other committees.

Remote Participation in Bankruptcy Contested Matters

The Center provided the Bankruptcy Rules Committee with research support as it studied remote participation in contested matters.

Current Research for Rules Committees

Intervention on Appeal

At the request of the Appellate Rules Committee, the Center is conducting research on interventions on appeal.

Bankruptcy Judges' Use of Masters

At the request of the Bankruptcy Rules Committee, the Center surveyed bankruptcy judges on how and whether they would use masters if they had the authority to do that.

Complex Criminal Litigation

As suggested by the Criminal Rules Committee, the Center is developing a collection of resources on complex criminal litigation as one of its curated websites.

Completed Research for Other Judicial Conference Committees

Redaction of Non-Government Party Names in Social Security and Immigration Case Documents

As part of its privacy study for the Committee on Court Administration and Case Management, the Center prepared a study of Social Security and immigration cases that (1) prepared a compilation of local rules and procedures on redacting non-government party names and (2) examined redaction in samples of publicly available dispositive documents (www.fjc.gov/content/391683/redaction-non-government-party-names-social-security-and-immigration-case-documents).

Civics Education and Outreach

A new curated website shows public-outreach and civics-education efforts by individual federal courts, as well as materials prepared by the Center and the Administrative Office (www.fjc.gov/content/388217/overview). The curated resources educate the public about the role, structure, function, and operation of the federal courts. The site includes an interactive map, created at the request of the Committee on the Judicial Branch, that displays highlighted civics-education resources and civics-program information pages on court websites. This may assist courts in developing or expanding their own civics efforts.

Remote Public Access to Court Proceedings

At the request of the Committee on Court Administration and Case Management, the Center conducted focus groups with district judges, magistrate judges, and bankruptcy judges to learn about their experiences providing remote public access to proceedings with witness testimony during the pandemic.

Current Research for Other Judicial Conference Committees

Evaluation of a Pilot Program in Which Comparative Sentencing Information Is Incorporated Into Presentence Investigation Reports

At the request of the Committee on Criminal Law, the Center is evaluating a two-year pilot program in which selected districts are incorporating comparative sentencing information from the Sentencing Commission's Judiciary Sentencing Information (JSIN) platform into presentence investigation reports.

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings.

Case Weights for Bankruptcy Courts

The Center has collected data and is conducting analyses for updating bankruptcy-court case weights. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The research was requested by the Committee on Administration of the Bankruptcy System.

Other Completed Research

United States District Courts' Local Rules and Procedures on Electronic Filing by Self-Represented Litigants

Prepared to supplement a planned episode of *Court to Court*, a documentary-style video program presented by the Center's Education

Division, this report compiles local rules and procedures in the ninety-four district courts on electronic filing by self-represented litigants (www.fjc.gov/content/391989/united-states-district-courts-local-rules-and-procedures-electronic-filing-self). More than two thirds of the courts permit self-represented litigants to use the court's electronic filing system at least on a case-by-case basis.

Science Resources

The Center maintains a curated website for federal judges with resources related to scientific information and methods (www.fjc.gov/content/326577/overview-science-resources). Recently added is information on dementia and the law (www.fjc.gov/content/385467/dementia-and-law).

JUDICIAL GUIDES

In Preparation

Manual for Complex Litigation

The Center is preparing a fifth edition of its *Manual for Complex Litigation* (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

Reference Manual on Scientific Evidence

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

Benchbook for U.S. District Court Judges

The Center is preparing a seventh edition of its *Benchbook for U.S. District Court Judges* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

HISTORY

Spotlight on Judicial History

Since 2020, the Center has posted twenty-five short essays about judicial history on a variety of topics (www.fjc.gov/history/spotlight-judicial-history). Recently posted are "Tort Claims Against the United States" (www.fjc.gov/history/spotlight-judicial-history/tort-claims-against-united-states) and "The Codification of Federal Statutes on the Judiciary" (www.fjc.gov/history/spotlight-judicial-history/federal-judicial-statutes).

Work of the Courts

Of the Center's seven essays on the work of the courts, the most recent two are "Foreign Treaties in the Federal Courts" (fjc.gov/history/work-courts/foreign-treaties-in-federal-courts) and "Juries in the Federal Judicial System" (www.fjc.gov/history/work-courts/juries-in-federal-judicial-system).

EDUCATION

Specialized Workshops

Reconstruction and the Constitution: A Historical Perspective

A two-day, in-person judicial workshop in Philadelphia on the Reconstruction Amendments included visits to the National Constitution Center; Independence Hall; the Old City Hall, where the Supreme Court met from 1791 to 1800; and Congress Hall, where Congress met from 1790 to 1800.

Ronald M. Whyte Intellectual Property Seminar

A four-day, in-person judicial workshop addressed the basics of patent, copyright, and trademark law; patent case management; and emerging issues in intellectual-property law. It was cosponsored by the Berkeley Center for Law and Technology.

Search and Surveillance Warrants in the Digital Age

This three-day, in-person program was designed for magistrate judges who handle criminal warrant applications as part of their day-to-day responsibilities.

Law and Technology Workshop for Judges

This three-day, in-person workshop addressed artificial intelligence and its regulation and governance, digital forensics, statistics in law and forensic evidence, technology and cognitive liberty, technology and the Fourth Amendment, access to justice, cybersecurity, and ethical and policy issues with artificial intelligence.

Distance Education

Evaluating Historical Evidence

The Center is offering judges a six-part interactive online series that provides tools for managing cases with significant historical evidence. Historians discuss historical methodology and provide practical tips on evaluating historical evidence, whether presented in the form of expert witnesses, amicus briefs, or litigant arguments. The first episode was "An Introduction: What Do Historians Do and How Do They Do It?"

Implications of Purdue Pharma *for Bankruptcy Judges*

A live webcast for bankruptcy judges discussed the implications of the Supreme Court's June 27, 2024, decision in *Harrington v. Purdue Pharma*

L.P., which held, "The bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seek to discharge claims against a nondebtor without the consent of affected claimants."

Court to Court

A documentary-style video program presenting innovation and creative problem solving by personnel in individual court units around the country, this program included as a recent episode "Transforming Justice: The Power of Drug Courts" (featuring Northern District of West Virginia Magistrate Judge Michael Aloi and Special Offender Specialist and U.S. Probation Officer Jill Henline).

Court Web

This monthly webcast included as recent episodes "Honoring the Past, Inspiring the Future—the 100th Anniversary of the Federal Probation Act" (featuring Northern District of Illinois Judge Edmond Chang, chair of the Criminal Law Committee, and District of Maryland Chief Probation Officer Leon Epps); "Neuroscience-Informed Decision-Making" (featuring retired District of Massachusetts Judge Nancy Gertner, now managing director of the Massachusetts General Hospital Center for Law, Brain & Behavior, and codirector and cofounder psychiatrist and lawyer Dr. Judith Edersheim); and "An Update on the Cardone Report after the 60th Anniversary of the CJA" (featuring District of New Hampshire Judge Landya B. McCafferty and Western District of Texas Judge Kathleen Cardone).

Term Talk

The Center presents periodic webcasts with the nation's top legal scholars discussing what federal judges need to know about the U.S. Supreme Court's most impactful decisions. Recent episodes included "*City of Grants Pass v. Johnson*; *McElrath v. Georgia*" (discussing status and conduct in the context of ordinances that punish sleeping and the absolute bar against retrying acquitted defendants even when there are inconsistent verdicts), "*Smith v. Arizona*; *Diaz v. United States*" (discussing guidelines for determining when reports prepared by analysts are testimonial and limitations on expert testimony about a defendant's mental state), "*Erlinger v. United States*; *Pulsifer v. United States*" (discussing the existence of a prior offense as a jury question and the requirements for safety-valve relief under the First Step Act), "*Chiaverini v. City of Napoleon*" (discussing how probable cause for one charge does not insulate other charges from a § 1983 malicious-prosecution claim), "*United States Trustee v. John Q. Hammons*; *Harrington v. Purdue Pharma L.P.*" (discussing the Supreme Court's rejection of the release of claims against third-party nondebtors without claimant consent and the Court's decision not to reimburse claimants for bounded nonuniformities), "*Fischer v. United States*; *Snyder v. United States*" (discussing the 2002 Sarbanes-Oxley Act as applied to January 6 defendants

and whether the amended federal bribery statute criminalizes gratuities), and "*Alexander v. S.C. State Conference of NAACP*; *Robinson v. Callais*" (discussing how courts should determine if race or party affiliation predominates in a legislature's redistricting and the uncertainty surrounding application of the *Purcell* principle).

Supreme Court Term in Review for Bankruptcy Judges

A 2024 webcast discussed some of the most significant Supreme Court decisions, including key bankruptcy cases.

Diocese Cases in Bankruptcy

This webcast for bankruptcy judges addressed the authority of the court, the scope of the automatic stay, and limitations of bankruptcy relief. It included discussion of the overarching themes of religion, trauma, procedural justice, confidence in the court system, and the inevitable media presence.

Consumer Case-Law Update for Bankruptcy Judges

This quarterly webcast features retired Western District of Tennessee Bankruptcy Judge William H. Brown discussing the latest consumer-bankruptcy case-law updates.

Business Case-Law Update for Bankruptcy Judges

This quarterly webcast features Professor Bruce Markell (a retired bankruptcy judge).

General Workshops

National Workshops for Trial-Court Judges

Three-day workshops are held for district judges in even-numbered years and annually for magistrate judges and bankruptcy judges respectively.

Circuit Workshops for U.S. Appellate and District Judges

The Center has recently put on three-day workshops for Article III judges in the Fourth and Ninth Circuits.

National Conference for Pro Se and Death Penalty Staff Attorneys

This three-day educational conference was most recently presented in 2024.

Orientation Programs

Orientation Programs for New Trial-Court Judges

The Center invites newly appointed trial-court judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, and judicial ethics. In addition, district judges learn about the sentencing process, magistrate judges learn about search warrants, and bankruptcy judges learn about the bankruptcy code. The second phase includes sessions on such topics as civil-

rights litigation, employment discrimination, security, self-represented litigants, relations with the media, and ethics.

Orientation for New Circuit Judges

Orientation programs for new circuit judges include a three-day program hosted by the Center and a program at New York University School of Law for both state and federal appellate judges.

Orientation for New Term Law Clerks

The Center offers online orientation to new term law clerks. Phase I is offered before the clerkship begins, and phase II is offered after the clerkship has begun.

TAB 1F

Subcommittee chairs in bold.
Shaded subcommittees inactive and likely to be disbanded.

APPELLATE RULES SUBCOMMITTEES

Amicus Subcommittee Linda Coberly Bert Huang Lisa Wright, Esq.	**Bankruptcy Appeals Subcommittee** George Hicks Bert Huang Justice Kruger
Costs on Appeal Subcommittee Mark Freeman **Judge Nichols** Judge Wesley	**IFP Form 4 Subcommittee** **Lisa Wright, Esq.** Bert Huang Justice Kruger
Intervention on Appeal Subcommittee Mark Freeman Bert Huang Justice Kruger (Tim Reagan FJC)	**Rule 15 Subcommittee** **Bert Huang** Mark Freeman Andrew Pincus
Reopen Time to Appeal Subcommittee George Hicks Judge Nichols Judge Wesley Chris Wolpert	**Administrative Stays Subcommittee** Mark Freeman Bert Huang Andrew Pincus

TAB 2

TAB 2A

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

January 7, 2025

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in a hybrid in-person and virtual session in San Diego, California, on January 7, 2025. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge Stephen Higginson
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Andrew J. Pincus, Esq.
Judge D. Brooks Smith
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Allison H. Eid, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Rebecca B. Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Jesse M. Furman, Chair
Professor Daniel J. Capra, Reporter

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Esq., Secretary to the Standing Committee; Bridget M. Healy, Esq., Rules Committee Staff Counsel; Shelly Cox and Rakita Johnson, Rules Committee Staff; Kyle Brinker, Law Clerk to the Standing Committee; John S. Cooke, Director, Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

OPENING BUSINESS

Judge John D. Bates, Chair of the Standing Committee, called the meeting to order and welcomed everyone, including Standing and advisory committee members, reporters, and consultants who were attending remotely. Judge Bates gave a special welcome to Judges Stephen Higginson and Joan Ericksen as the new Standing Committee members, although Judge Ericksen was unable to attend the meeting due to a scheduling conflict. Judge Bates also noted that Lisa Monaco was unable to attend the meeting.

Judge Bates informed the Committee that Thomas Byron, Secretary to the Standing Committee, would soon leave his position for a new career opportunity and thanked him for his invaluable contributions that helped guide the rules process over the prior several years. Professor Catherine Struve, reporter to the Standing Committee, also thanked Mr. Byron for his excellence as Secretary and recalled his dedication, insight, and collegiality when he served as the Department of Justice (DOJ) representative to the Appellate Rules Committee.

Judge Bates notified the Committee that Professors Bryan Garner and Joseph Kimble, consultants to the Standing Committee, authored a new book entitled Essentials for Drafting Clear Legal Rules. The book reflects lessons from the rules restyling project over the last 30 years and is an update on Professor Garner's previous publication on the same subject. The book is available for free download from the Rules Committees' style resources page on the uscourts.gov website, and the Administrative Office printed copies for the use of the Rules Committee members and reporters. Judge Bates added that Professors Garner and Kimble provided essential counsel to the rules committees during the restyling project as did Joseph Spaniol, who previously served as Secretary to the Standing Committee and as Deputy Director of the Administrative Office and Secretary of the Judicial Conference before his appointment as Clerk of the Supreme Court. Mr. Spaniol retired as Clerk in 1991 but has served as consultant to the rules committees.

Judge Bates also welcomed members of the public and press who were observing the meeting in person or remotely.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee approved the minutes of the June 4, 2024, meeting** with a correction that deleted the words "conducted a survey and" on page 23 of the minutes.

Mr. Byron reported that the latest set of proposed rule amendments took effect on December 1, 2024. A list of the rule amendments is included in the agenda book beginning on page 50. Mr. Byron also reported that the latest proposed rule amendments approved in the Standing Committee's June meeting are pending before the Supreme Court and, if approved, will be transmitted to Congress. Those amendments are on track to take effect on December 1, 2025, in the absence of congressional action. A list of the proposed rule amendments is included in the agenda book beginning on page 52.

Judge Bates noted that a December 2024 report on FJC research projects begins on page 79 of the agenda book. Dr. Tim Reagan explained that the FJC in November 2023 restarted its reports to the rules committees about work the FJC does. Because he has heard during meetings that education can be a useful alternative to rule amendments, these periodic reports now include

information about education as well as research conducted by the FJC. He also explained that the report does not discuss ongoing research for other Judicial Conference committees, but descriptions of such research will be included once the FJC completes the research and publishes the findings. Judge Bates thanked Dr. Reagan for the FJC's excellent work.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Professor Struve reported on this item and explained that the item has two parts.

The first part relates to paper service by a self-represented litigant. The current rules appear to say that self-represented litigants who file documents in paper form must effect traditional service of those papers on others in the case even if the other litigants also receive electronic copies through CM/ECF or its equivalent. The point of this first part would be to eliminate this duplicative and burdensome requirement for papers subsequent to the complaint.

The second part relates to access to a court's electronic filing system by self-represented litigants. The rules currently set a presumption that self-represented litigants lack access to the court's system unless the court acts to provide it. This part of the project would increase access for self-represented litigants by flipping the presumption: allowing self-represented litigants access unless the court acts to prohibit access. The proposal would also require a court to provide a reasonable alternative if the court acts in a general way to prohibit self-represented litigants from accessing the court's electronic-filing system. The proposal would allow a court to set reasonable exceptions and conditions on access.

Professor Struve noted that the Standing and advisory committees had been discussing this item for several meetings. The Appellate, Civil, and Criminal Rules Committees appeared open to proceeding toward recommending both parts for publication for public comment. On the other hand, the Bankruptcy Rules Committee supported the goals of the project but was skeptical about proceeding forward. One reason was that access for self-represented litigants to electronic filing systems is currently least prevalent in bankruptcy courts. Regarding the service component, bankruptcy practice is more likely to feature multiple self-represented litigants in one matter than practice in other levels of court. Self-represented litigants in bankruptcy court may include the debtor, small creditors, and some Chapter 5 trustees.

When there are multiple self-represented litigants, a self-represented filer who is not on the electronic filing system or receiving electronic notices will not be able to know which other litigants are also not receiving electronic notices and therefore require paper service. Because practice before district courts and courts of appeals is much less likely to feature multiple self-represented litigants in the same matter, this problem is not likely to afflict these courts. Accordingly, Professor Struve suggested that it might be prudent for the Bankruptcy Rules to take a different approach than the Appellate, Civil, and Criminal Rules. She asked the Standing Committee if it would be open to approving publication of a package of amendments to the Appellate, Civil, and Criminal Rules without similar proposals for amending the Bankruptcy Rules. Professor Struve noted that if this approach were taken, a question would arise as to how

courts would treat self-represented litigants when a bankruptcy matter is appealed to a district court or court of appeals.

Judge Connelly stated that the Bankruptcy Rules Committee supported the project's goals but that it had practical concerns. She indicated that if the other rules committees further explored the item, it could provide the Bankruptcy Rules Committee valuable guidance for future discussion.

Judge Bates asked whether the Committee would support approving publication of an amendment package that would effect these changes for the Appellate, Civil, and Criminal Rules without changing the service and filing approaches for self-represented litigants under the Bankruptcy Rules. He also asked whether it was necessary to discuss how to handle service and filing issues for self-represented litigants in bankruptcy appeals.

Professor Struve observed that some courts in bankruptcy appeals already allow self-represented litigants to access their electronic filing systems and exempt them from effecting paper service. She said that it does not appear that the courts in these instances are experiencing substantial difficulty, and if there are problems, the Committee has several options to resolve them.

Judge Bates commented that the Committee could set aside the bankruptcy appeals question and asked Professor Struve if a vote by the Standing Committee was needed. Professor Struve responded that she would like to hear any concerns that Committee members may have with the project.

A judge member thought that the Bankruptcy Rules taking a separate path did not raise a significant issue. He had discussed the proposal with the clerk of his court, who highlighted two features of the proposed amendments as crucial—namely, the provision permitting a court to use alternative means of providing electronic access for self-represented litigants and the provision recognizing the court's authority to withdraw a person's access to the electronic filing system. The clerk also pointed out the potential cost savings by eliminating the need to mail thousands of hardcopy letters to self-represented litigants. And he observed that as a court provides greater electronic access for self-represented litigants, the court's help desk grows in importance. The judge member turned the Committee's attention to draft Civil Rule 5(b)(3)(E)'s statement that electronic service under that provision is not effective if the sender learns that it did not reach the person to be served, and asked if this provision would require the sender to monitor the court's site.

Professor Struve commented that the member's question is a larger one that applies to the current rule. She observed that current Rule 5(b)(3)(E) is the provision that allows users of the court's electronic-filing system to rely on that system for making service, and that the provision seems to be working.

The judge member also pointed out that draft Rule 5(d)(3)(B)(iv) (authorizing the court to withdraw a person's access to the electronic filing system) appeared to be limited to self-represented litigants, and asked whether that was intended to suggest that the court lacked authority to withdraw a noncompliant lawyer's access to the system. Professor Struve acknowledged that subsection (B) is about self-represented litigants but stated that there was no intent to limit the

court's authority to withdraw a noncompliant lawyer's access; she noted that the working group could discuss ways to ensure that this provision did not give rise to a negative inference.

The judge member identified the National Center for State Courts as a source of helpful information about access to justice for self-represented litigants. Professor Struve agreed about the NCSC's expertise and invited Committee members to let her know if they thought that the NCSC should be consulted while the rule is in the development stage rather than waiting until the public comment period.

A judge member said that she supported moving forward with a proposed change to the Appellate, Civil, and Criminal Rules for the reasons previously stated.

Professor King asked whether the discussion of a different approach for the Bankruptcy Rules assumed that total uniformity (concerning service and filing) would be imposed as between the Civil and Criminal Rules. Professor Struve assured her that the project was not intended to achieve total uniformity among the service and filing provisions in the Civil, Criminal, and Appellate Rules; differences already exist among those provisions, and this project does not seek to eliminate them. Rather, the goal in preparing for the spring advisory committee meetings will be to transpose the key features shown in the Civil Rule 5 sketch into the relevant Appellate and Criminal Rules. Professor Marcus highlighted the question of how to treat appeals from a bankruptcy court. Professor Struve observed that appeals from bankruptcy courts to district courts are currently addressed by Bankruptcy Rule 8011, and she also noted that technical amendments to the Bankruptcy Rules will be required if the draft Civil Rule 5 is approved.

Joint Subcommittee on Attorney Admission

Professor Struve reported on this item, the report for which begins on page 113 of the agenda book. Professor Struve recalled that this item originated from an observation by Dean Alan Morrison and others that the district courts have varying approaches to attorney admission. To be admitted to the district court, some districts require attorneys to be admitted to the bar of the state that encompasses the district, and some of those states require attorneys to take their bar exam in order to be admitted to the state bar. The Subcommittee has been discussing possible ways to address this issue. One possible solution would be to follow the approach in Appellate Rule 46, which does not require admission to the bar of a state within the relevant circuit.

The Subcommittee has also heard a number of concerns from the Standing Committee and advisory committees. District courts regulate admission to protect the quality of practice in their districts, which is linked to concerns about protecting the interests of clients. State bar authorities and state courts might also have concerns with a national rule along these lines. In addition, the Subcommittee has discussed how a rule might interact with local counsel requirements.

Professor Struve thanked Professor Coquillette and Dr. Reagan for their research and expertise. She noted that a survey of circuit clerks was recently completed, which found that the clerks generally feel that Appellate Rule 46 works well for the courts of appeals. Professor Struve recognized, however, that practice before the courts of appeals differs from practice before the district courts. A request for input was posted on the website of the National Organization of Bar Counsel, but the Subcommittee did not receive any responses.

Professor Struve said that the Subcommittee was proposing a research program based on what Subcommittee members said would be helpful going forward, including consultation with chief district judges in select districts. One type of district on which these inquiries would focus would be districts that require admission to the bar of the encompassing state. Possible questions may include: why do you have this approach? How would you react to a national rule setting a more permissive standard for admission? And are there other measures that could address barriers to access? Inquiries to district courts that do not require in-state bar admission might ask whether their approach to attorney admission has caused any problems. Dean Morrison suggested also inquiring of judges who have handled multidistrict litigation (MDL) proceedings. Outreach to state bar authorities and practitioners could also be helpful.

Professor Coquillette recalled the history of the Standing Committee's study of a DOJ proposal for national rules governing attorney conduct in federal courts. After a question was raised about whether such a project would exceed the existing rulemaking authority under the Rules Enabling Act, Senator Leahy proposed a bill to give the Standing Committee the authority to promulgate rules of attorney conduct. State bar authorities opposed the idea of such national rules, and the Standing Committee decided not to promulgate rules of attorney conduct (other than rules like Civil Rule 11). Judge Bates commented that, consistent with Professor Coquillette's observations, the Committee likely will need to research its authority to regulate attorney admission.

A practitioner member recommended speaking to districts that require attorneys (even some attorneys who are admitted to the district court's bar) to associate with local counsel; such requirements, this member observed, may undermine a national admission rule. The member also recommended researching the Committee's authority to craft a rule regarding local counsel requirements. Professor Struve responded that the Subcommittee shared this concern and would continue to consider whether it could draft an effective admission rule without also addressing local counsel requirements.

A judge member commented that a Military Spouse J.D. Network analysis found that state bar rule changes have made it somewhat easier for military spouses to become state bar members. But the member cautioned that the provisions for military spouses vary widely among states and some rules are difficult to navigate. The member also identified fees as a barrier to access for military spouses because they relocate and join bar associations at a higher rate than other lawyers. The member wondered whether the Committee could make suggestions or provide guidance concerning measures such as fee waivers if it determines that it does not have authority to regulate attorney admission.

Judge Bates responded that the judiciary could offer suggestions, but the Judicial Conference would be better equipped and able to provide suggestions or guidance to district courts generally. The district courts may then adopt or not adopt a suggestion offered. Professor Struve observed that informal suggestions historically have varied by committee. For example, the chair of the Appellate Rules Committee has sent letters to chief circuit judges with some success. However, Professor Struve noted that this would likely be more difficult at the district level.

A judge member questioned whether the Committee should proceed any further on this item without first determining the Committee's rulemaking authority. Judge Bates responded that

the initial suggestion that gave rise to this item sketched multiple approaches, some broad and some narrow. Because a narrow approach might raise fewer rulemaking questions, the thinking was first to determine which approaches were potentially desirable before considering the question of authority to adopt those approaches. Professor Struve agreed that if the Subcommittee were to decide not to recommend rulemaking, it would obviate the need to delve into the question of the Committee's rulemaking authority.

Professor Coquillette noted that almost all district courts have already adopted rules governing attorney conduct (often by incorporating by reference the attorney conduct rules of the state in which the district court is located). Professor Struve observed that while Civil Rule 83 *cabins* local rulemaking authority, the local rules are adopted pursuant to a separate statutory provision (28 U.S.C. § 2071), such that an analysis of the authority for making national rules under 28 U.S.C. § 2072 would not necessarily call into question local rules regulating attorney conduct. Professor Coquillette agreed. Professor Bradt commented that research on the question of rulemaking authority is ongoing.

A judge member thought that the considerations differ depending on the area of law. For example, an attorney handling a federal criminal case need not know state law. In contrast, a civil attorney admitted to a federal district court but not the state encompassing that district court might have an incentive to steer the case toward federal court. He also raised concern about situations where a state-law claim is asserted in federal court (for example, in supplemental jurisdiction) but then dismissed (for instance, if the federal claim that supported subject-matter jurisdiction was dismissed); if the claimant's lawyer is not admitted to practice in the relevant state, then the federal-court dismissal leaves the client without a lawyer. Lastly, the member pointed out that the states fund their bar regulators by means of fees paid by the lawyers who are admitted to the state bar. Admitting out-of-state lawyers to practice in federal district courts within the state could increase the workload of state regulators without providing the funding to sustain that work. The member recommended reaching out to the Conference of Chief Justices or a similar body to receive the views of state regulatory authorities.

A practitioner member asked if input has been sought from MDL transferee judges, whose perspective could be beneficial because they frequently see lawyers from elsewhere who are not required to have local counsel and often are not admitted pro hac vice. Judge Bates agreed that the Subcommittee should consider making inquiries to MDL transferee judges; he observed that issues of attorney admission may differ as between leadership counsel and non-leadership counsel.

A judge member observed that federal district courts regularly refer attorney discipline issues to state bar authorities, and it would be important to receive the views of chief judges about this relationship.

Professor Marcus pointed out that the motivation and effect of the proposals currently under consideration differed in an important way from the ill-fated project on national rules of attorney conduct. In the national rules on attorney conduct project, the DOJ was seeking adoption of national rules that would override particular state attorney-conduct obligations in criminal cases that the DOJ did not like. The proposals currently being considered would not do that, and this distinction sheds important light on the question of rulemaking authority and illustrates the types of things that the rulemakers should stay away from. Professor Coquillette agreed.

Judge Bates thanked the Subcommittee and reporters for their work.

Potential Issues Related to the Privacy Rules

Mr. Byron reported on several privacy issues, the materials for which begin on page 150 in the agenda book. The project began in 2022 following a suggestion by Senator Ron Wyden to require the redaction of the complete social security number in public filings rather than only the redaction of the first five digits. A sketch of a proposed amendment (to Civil Rule 5.2) implementing this suggestion appears on page 155 of the agenda book. That potential amendment has been held pending consideration of additional privacy-related suggestions pending before the advisory committees.

Mr. Byron, working with the reporters, had also discussed other possible privacy-related issues (which had been identified based on a review of the history and functioning of the privacy rules). These issues included possible ambiguity and overlap in exemptions, the scope of waivers by self-represented litigants who fail to comply with redaction requirements, additional categories of protected information that could be subjected to redaction, and possible protection of other sensitive information. The working group's recommendation—that no rule amendments were warranted with respect to these other topics—was discussed at the fall 2024 meetings of the Bankruptcy, Civil, Criminal, and Appellate Rules Committees. The advisory committees generally thought that the issues did not raise a real-world problem demanding a rule amendment. Accordingly, the advisory committees determined not to add any of these issues to their agendas. In the fall 2024 Appellate Rules Committee meeting, however, the question was raised whether rulemaking should always be reactive or whether it should sometimes be preventive—that is, whether rulemaking is sometimes warranted to prevent real-world harm from ever occurring, in instances where the harm in question would be sufficiently serious to warrant the preventive approach.

A practitioner member observed that filings by self-represented litigants often include information that should not be on a public docket, such as their own social security numbers. This member suggested that there should be coordination between broadening access to electronic filing systems for self-represented litigants and protecting the privacy of personal information because self-represented litigants may unintentionally disclose their own personal information. Professor Struve asked if, currently, court staff screen paper filings submitted by self-represented litigants before the court staff uploads the filings into the electronic system. The member did not know whether court staff screen paper filings, but has seen filings several times this year that include personal information.

Returning to the question that had been voiced in the Appellate Rules Committee, Professor Hartnett noted that most rules concern the processing of cases and so the focus is on how the rules affect litigation itself. In these circumstances, it makes sense to be generally reluctant to amend the rules if courts and parties are able to resolve issues under the current rules. But the privacy rules are about avoiding collateral harm from the litigation system. For that reason, perhaps the mindset should be different regarding the need to identify a demonstrated harm.

A judge member agreed with the practitioner member's comments that allowing self-represented litigants greater access to electronic filing systems could lead to greater privacy

concerns. He also noted that this is an area where artificial intelligence could be helpful, yet privacy concerns are difficult to fully resolve post-filing because some entities review filings minutes after they are made public. This member also mentioned a different issue concerning filings under seal. Local circuit practices concerning sealed filings vary widely. The member thought that privacy concerns are most acute in criminal matters, particularly when the case involves cooperating defendants. If the district court accepts a guilty plea from a cooperating defendant and this is reflected in a sealed filing, it could be catastrophic for a local practice (for instance, of automatically unsealing a filing after a certain time period) to divulge that document.

Mr. Byron responded that the member highlighted an example of a concern that would be included in the fourth category of other sensitive information beyond the current scope of the privacy rules. The current privacy requirements are fairly targeted to narrow redaction requirements for information like home addresses. He emphasized that he was not discouraging discussion of protecting other information. Rather, those ideas are simply in a separate category.

Professor Beale noted that redactions for social security numbers and privacy protections for minors were on the Committee's agenda for discussion later in the meeting.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Furman and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met on November 8, 2024, in New York, NY. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 160.

Information Items

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay). Judge Furman noted a proposed amendment to Rule 801(d)(1)(A) was out for public comment. The proposed amendment would provide that all prior inconsistent statements by a testifying witness are admissible over a hearsay objection. Two comments had been submitted thus far, including a comment by the Federal Magistrate Judges Association that supports the proposed amendment. The FMJA supported the proposal on the grounds that it would make the rule consistent with Rule 801(d)(1)(B) and would reduce confusion.

Rule 609 (Impeachment by Evidence of a Criminal Conviction). Judge Furman reported that the Advisory Committee continues to consider a proposal to amend Rule 609(a)(1)(B). Rule 609(a)(1) addresses the impeachment use of evidence of a witness's prior felony conviction. Rule 609(a)(1)(A) addresses cases in which the witness is not a criminal defendant. Rule 609(a)(1)(B) addresses criminal cases in which the witness is a defendant and allows admission of the evidence if its probative value outweighs its prejudicial effect. The Advisory Committee previously rejected a proposal to abrogate Rule 609(a)(1) altogether. In the wake of that decision, the Advisory Committee agreed to consider a more modest amendment that would alter Rule 609(a)(1)(B)'s balancing test to make it less likely that courts would admit highly prejudicial and minimally probative evidence of convictions against criminal defendants.

Specifically, the proposal being discussed would add the word "substantially" before the word "outweighs" in Rule 609(a)(1)(B). The Advisory Committee members who were present at

the November meeting were evenly divided on whether to further consider the proposal. One member was absent. The proposal was supported by the federal public defender representative and opposed by the DOJ. There was a general acknowledgement that some courts are admitting highly inflammatory prior convictions similar to the charged crime, contrary to what was intended by the rule, but there was disagreement about the magnitude of that problem. The magnitude of the problem could be difficult to identify because this often does not get further than a district court ruling, which may not be in writing or reported. There is also some evidence that decisions in this area deter defendants from taking the stand.

The FJC identified research approaches to further examine this question but concluded that the only fruitful approach may be sending a nationwide questionnaire to defense counsel. The Advisory Committee agreed unanimously not to use that approach given the low probability that it would yield useful data.

The Advisory Committee agreed to discuss the proposed amendment again at its Spring meeting. The member who was absent at the Fall meeting had previously voted in favor of abrogating Rule 609(a)(1) altogether and supported proceeding with the Rule 609(a)(1)(B) amendment.

Artificial Intelligence (AI) and Deepfakes. In the fall of 2023, the Advisory Committee began considering challenges posed by the development of AI, and the Advisory Committee is focusing on two issues. The first issue is authenticity and the problem of deepfakes. The second issue is reliability when machine learning evidence is admitted without supporting expert testimony.

At the November meeting, informed by an excellent memorandum by Professor Capra, the Advisory Committee considered whether and how to proceed with potential rulemaking to address these concerns. There was a consensus that AI presents real issues of concern for the Rules of Evidence and that there are strong arguments for taking a hard look at the rules. At the same time, there was concern that the development of AI could outpace the rulemaking process. It was also noted that the rules have already shown the flexibility to meet the challenges of evolving technology in other instances, for example with respect to social media.

The Advisory Committee discussed a number of proposals and agreed that two paths warrant further consideration. First, regarding reliability, the Advisory Committee tentatively agreed on a proposed amendment that would create a new rule, Rule 707, that would essentially apply the Rule 702 standard to evidence that is the product of machine learning. The proposal is set out on page 162 of the agenda book. The rule would exempt the output of basic scientific instruments or routinely relied upon commercial software. The Advisory Committee is considering whether to further explain the scope of the exemptions. The Advisory Committee rejected proposals to instead address the reliability issue in Chapter 9 of the rules, which concern authentication.

A judge member expressed support for taking up the topic of machine-generated evidence and agreed that the key admissibility question is reliability. He stressed the need for careful attention to the exemptions in the proposed draft rule. He queried whether DNA and blood testing would fall under an exemption and asked if Professor Roth was assisting the Advisory Committee

because she authored an excellent article about safeguards in this area. Professor Capra and Judge Furman said that she was. Professor Capra noted that Professor Roth had made a presentation on AI to the Committee and assisted in drafting the sketch of Rule 707 and its accompanying committee note. Professor Capra said that he and Professor Roth agreed that the commercial software exception may be too broad, and they are working on language that the Advisory Committee can consider at its next meeting. He also questioned whether an exception in the text is necessary to prevent courts from holding hearings on evidence related to common instruments such as thermometers.

Judge Bates noted the statement in the agenda book that disclosure issues relating to machine learning were better addressed in either the Civil or Criminal Rules, not the Evidence Rules, and that the issue should be brought to the attention of those respective Advisory Committees for their parallel consideration. He asked about the plan moving forward and any coordination among the committees.

Professor Capra said that he and Professor Beale had discussed the topic; the major issue concerns disclosure of source codes and trade secrets. These, he and Judge Furman said, are disclosure questions rather than evidence questions. But, Professor Capra reported, the discussions are at the preliminary stage.

Judge Bates noted that if coordination is important, then the discussions should progress beyond the preliminary stage. Professor Capra and Judge Furman agreed. Professor Beale said that the Criminal Rules Committee has not yet considered the issue.

Professor Marcus observed that the Civil Rules Committee, likewise, has not yet considered the issue. He noted the practice of using technology-assisted review when responding to discovery requests under Civil Rule 34. There has been a debate about whether a responding party must disclose the details of such technology-assisted review.

Judge Furman said that the Advisory Committee intends to come back to the Standing Committee seeking permission to publish the proposed new Rule 707 for public comment.

Second, regarding deepfakes, the Advisory Committee agreed that this is an important issue but is not sure that it requires a rule amendment at this time. At bottom, deepfakes are a sophisticated form of video or audio generated by AI. So they are a form of forgery, and forgery is a problem that courts have long had to confront—even if the means of creating the forgery and the sophistication of the forged evidence are now different. The Advisory Committee thus generally thought that courts have the tools to address the problem, as courts demonstrated when first confronting the authenticity of social media posts.

That said, the Advisory Committee also thought that it should take steps to develop an amendment it could consider in the event that courts are suddenly confronted with significant deepfake problems that the existing tools cannot adequately address. Accordingly, the Advisory Committee intends further work on the proposed rule found in the agenda book at page 163. This proposed Rule 901(c) would place the burden on the opponent of evidence to make an initial showing that a reasonable person could find that the evidence is fabricated. After such an initial

showing, the burden would shift to the proponent to show by a preponderance of the evidence that the evidence was not fabricated.

The Advisory Committee will continue to monitor developments to assess the need for rulemaking and think about definitional issues, such as what would be subject to the rule. Some proposals submitted would apply this kind of rule to all visual evidence whether or not it was generated by AI, but the Advisory Committee generally agreed that such proposals were too broad.

Judge Bates asked for confirmation that the Advisory Committee's plan is to consider an approach similar to the draft Rule 901(c) but not yet seek the Standing Committee's approval for publication. Judge Furman said that was correct.

Judge Furman said that the Advisory Committee also discussed the "liar's dividend" – that is, a situation where counsel objects to genuine evidence, attempting to create a reasonable doubt in a criminal case and arguing that the evidence may have been faked. Ultimately, the Advisory Committee thought that this was not an issue for the Rules of Evidence.

A judge member commented that the memorandum (in discussing the sketch of the possible Rule 901(c)) first mentions that the opponent of AI evidence must make an initial showing that there is something suspicious about the item, which seems like a reasonable suspicion or probable cause standard; but then the memo goes on to say the showing must be enough for a reasonable person to find that the evidence is fabricated, which sounds instead like a preponderance standard. The member stated that these two formulations are in tension and questioned whether it would be possible for someone to meet the preponderance test without more information or discovery. Judge Furman said that the Advisory Committee will take the member's comment under advisement.

False Accusations. Judge Furman reported that, prompted by a suggestion, the Advisory Committee considered whether to propose a rule amendment to address false accusations of sexual misconduct, either by an amendment to Evidence Rule 412 or a new Rule 416. As between these alternatives, the Advisory Committee agreed that a new rule would be preferable, but the Advisory Committee ultimately decided not to pursue an amendment and to take the issue off its agenda. These issues more often occur in state and military courts—which would be unlikely to adopt a federal model and which have existing tools adequate to address the issue.

Rule 404 (Character Evidence; Other Crimes, Wrongs, or Acts). Judge Furman reported that this item was prompted by a suggestion asserting that courts are admitting evidence of uncharged acts of misconduct even where the probative value of the act depends on a propensity inference. The Advisory Committee considered amending Rule 404(b) to require the government to show that the probative value of the other act evidence does not depend on such an inference. Over the objection of the federal public defender representative, the Advisory Committee decided not to pursue an amendment and to remove this item from its agenda.

Members noted that Rule 404(b)'s notice requirement was amended in 2020 to require the government to articulate a non-propensity purpose for bad act evidence, and the Advisory Committee thought that it should wait to see how courts apply the new amendment. Some Advisory Committee members also thought that some examples cited by the suggestion were

proper applications of Rule 404(b). In addition, the DOJ strongly opposed an amendment because, it argued, the 2020 amendment was the product of substantial work and compromise.

Judge Furman said that the Advisory Committee will continue to monitor developments in this area.

Rule 702 and Peer Review. Judge Furman reported that the Advisory Committee considered a suggestion to amend Rule 702 to address the role of peer review as set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), and Rule 702's 2000 committee note. Under *Daubert* and the committee note, the existence of peer-review is relevant to a court's determination of the reliability of an expert's methodology, and thus the admissibility of expert testimony. The attorneys argued that this is problematic because many studies cannot be replicated.

The Advisory Committee decided not to pursue an amendment and to remove the item from the agenda. The consensus of committee members was that Rule 702 is general: it does not mention particular factors. The Advisory Committee thought that singling out a particular factor in the text would be awkward and potentially problematic. Moreover, courts have exercised appropriate discretion in connection with the peer review factor and there is not a problem warranting an amendment.

***The Supreme Court's Decisions in* Diaz v. United States *and* Smith v. Arizona.** Judge Furman stated that the Advisory Committee discussed two recent Supreme Court decisions pertaining to the Rules of Evidence. First, in *Diaz v. United States*, 602 U.S. 526 (2024), the Court addressed whether Rule 704(b) prohibited expert testimony in a drug smuggling case that "most people" who transport drugs across the border do so knowingly. The Court found no error because the expert's testimony was based on probability and not certainty. The Advisory Committee determined that the case did not warrant an amendment to the rule and that the Court's result was consistent with the language and intent of the rule.

Second, in *Smith v. Arizona*, 602 U.S. 779 (2024), a forensic expert testified to a positive drug test by relying on the testimonial hearsay of another analyst, and the other analyst's findings were disclosed to the jury. The Court held that the expert's disclosure to the jury of testimonial hearsay violated the defendant's right to confrontation, even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert's opinion. Here, too, the Advisory Committee determined that an amendment is not presently necessary. There was some concern about whether the case could be construed to apply to reliance in addition to disclosure. If there were a constitutional bar on an expert's reliance on other experts' findings, an amendment to Rule 703 to prohibit reliance on testimonial hearsay in a criminal case would likely be necessary. Judge Furman said that the Advisory Committee will continue to monitor developments and how the case is applied in the lower courts.

Rule 902 and Tribal Certificates. Judge Furman reported that the Advisory Committee received a suggestion to consider adding federally recognized Indian tribes to the list of entities in Evidence Rule 902(1), which provides that domestic public records that are sealed and signed are self-authenticating. The list does not include Indian tribes, which means that a party who seeks to offer a record from a federally recognized Indian tribe must use another route to authenticate such evidence.

The Advisory Committee previously considered the issue and did not take action, but recent developments have arguably made this a live issue again, most notably, the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020). In addition, at least two recent decisions by courts of appeals held that the prosecution unsuccessfully attempted to establish Indian status through the business records exception.

At the fall 2024 Advisory Committee meeting, some members thought that this is not a problem with the rules but rather a failure by prosecutors to do what they must to authenticate the documents under existing rules, such as properly lay a foundation for the business records exception. In addition, there was a concern about whether all federally recognized tribes have resources and recordkeeping akin to those of the entities currently encompassed in Rule 902(1). The Advisory Committee will discuss these issues at its Spring meeting with further input from the DOJ.

Judge Bates thanked Judge Furman and Professor Capra for their report.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Eid and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 9, 2024, in Washington, DC. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 193.

Information Items

Proposed amendments to Rule 29, dealing with amicus briefs, along with conforming amendments to Rule 32 and the Appendix of Length Limits, and proposed amendments to Form 4, the form used for applications to proceed in forma pauperis (IFP), were published for public comment in August 2024. The public comment period closes February 17. The Advisory Committee will be holding a hearing on the issues on February 14, where 16 witnesses are expected to testify.

Proposed Amendment to Form 4 (Affidavit Accompanying Motion for Permission to Appeal IFP). Judge Eid commented that the amended Form 4 is similar to, but less intrusive than, the existing form. She observed that only one comment had been submitted on the proposal (that comment is favorable), and five people are expected to testify about the proposal at the hearing. After considering comments and testimony and making any necessary changes, the Advisory Committee expects to present the proposed amended Form 4 for final approval in June.

Proposed Amendment to Rule 29 (Brief of an Amicus Curiae). Judge Eid reported that the Advisory Committee had received over a dozen comments on the Rule 29 proposal and at least 11 people are expected to testify about the proposal at the February hearing. Judge Eid explained that the proposal makes two main changes.

The first change relates to disclosures. Under the proposal, an amicus would have to disclose whether a party to the case provides it with 25% or more of the amicus's annual revenue. In addition, the current rule requires an amicus to disclose whether a nonmember made

contributions earmarked for a that brief. The proposal would extend this requirement to someone who recently became a member.

The second change relates to a motion requirement. The current rule permits an amicus to file a brief at the initial stage either by consent or by motion. The Advisory Committee's proposal would remove the consent option. Judge Eid noted that, at the Standing Committee's June 2024 meeting, members expressed concern that this proposal would create more work for judges by generating unnecessary motions. Judge Eid and Professor Hartnett reported these concerns to the Advisory Committee at its fall 2024 meeting; at that meeting, the Advisory Committee also heard that the Second, Ninth, and Tenth Circuits supported requiring a motion.

Judge Eid explained the second change's interaction with recusals. She explained that, in some circuits, filing an amicus brief by consent can block a case from being assigned to a judge and that this could occur without any judicial intervention (before the case is assigned to a panel). In such circuits, imposing a motion requirement would provide the opportunity for a judge to decide whether to disallow the brief because it would cause a recusal. Judge Eid noted that there is a tradeoff: imposing a motion requirement creates extra work but it creates the opportunity for judicial intervention. The Advisory Committee has asked its Clerk representative to survey the circuit clerks about their circuits' practices. The Advisory Committee is likely to consider proposing a rule that would eliminate the consent option unless a circuit opts to permit filings on consent.

A judge member asked Judge Bates whether the rules can allow circuits to opt out. Judge Bates, Judge Eid, and Professor Struve responded that it is not always an option but that in appropriate circumstances the rules can allow circuits to opt out.

Judge Bates noted that the question of changing this feature of the current rule initially arose because the Supreme Court changed its practice. The Supreme Court, though, accepts amicus briefs without any requirement. He observed that the proposed change to Rule 29 goes in the opposite direction.

A practitioner member supported setting a rule with which all circuits would be comfortable. He suggested a default rule requiring a motion but allowing circuits to permit filing by consent. Judge Eid responded that the Advisory Committee will consider that approach.

Professor Hartnett asked a judge member if she would be comfortable with a rule that includes an opt-out provision for circuits, given her concerns expressed at the last meeting. The judge member responded that an opt out would be a reasonable approach because courts may have different issues with the proposed rule and some courts receive more amicus briefs than others.

Rule 15 and the "Incurably Premature" Doctrine. Judge Eid reported that this item stems from a suggestion to fix a potential trap for the unwary. Under the incurably premature doctrine, if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, then a petition to review that agency decision is not just held in the court of appeals awaiting the agency's decision on the motion to reconsider. Rather, the petition for review is dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider. Judge Eid observed that Appellate Rule 4 used to work in a similar fashion, but it was

amended to provide that such a premature notice of appeal becomes effective when the post-judgment motion is decided.

Judge Eid reported that the Advisory Committee is considering whether to make a similar amendment to Rule 15. She noted that the Advisory Committee had previously studied such a proposal but that the earlier proposal had been opposed by the D.C. Circuit. Judge Eid predicted that the Advisory Committee might seek permission, at the Standing Committee's June meeting, to publish such a proposal for comment.

A judge member noted that a difference between Rule 4 and Rule 15 is that statutory jurisdictional provisions govern court review of the decisions of some agencies. She wondered whether a court could defer consideration of a petition that the court had no jurisdiction to decide when the petition was filed. In addition, based on the volume of petitions her court receives, this could be a burden on the clerk's office. She offered to raise the issue with her colleagues. Judge Eid thanked the member and invited her to ask her colleagues about the topic.

Intervention on Appeal. Judge Eid noted that the discussion of this item appears in the agenda book beginning on page 196. She observed that members of the Advisory Committee thought it would be helpful to have a rule addressing intervention on appeal, but that they also had concerns that adopting such a rule might increase the volume of requests to intervene on appeal. Judge Eid suggested that intervention does not typically pose difficult issues in connection with petitions in the court of appeals for review of agency determinations. Instead, problems have manifested in some cases where a plaintiff sues to challenge a government policy and then there is a subsequent change in administration of the government whose policy is under challenge. Problems have also arisen in some cases where a plaintiff seeks a "universal" remedy, that is, one that would benefit nonparties as well as parties. She said that the Advisory Committee continues to monitor developments and that the FJC is conducting research to help inform the Advisory Committee.

Judge Eid commented that the Advisory Committee thought it might be able to craft a rule that would structure the analysis, provide guidance, and limit the range of debates on the issue. Ultimately, a rule could make clear that intervention on appeal should be rare. The Advisory Committee is waiting for the FJC's research and may take up this item next year. A judge member noted the current lack of guidance for attorneys; this member suggested that a rule could usefully say: "intervention on appeal should be rare, requests must be timely, and intervening on appeal is not a substitute for amicus participation."

A member stated that he did not like the idea of avoiding rulemaking on a topic merely to discourage the practice that the potential rule would address. He suggested that it would be better to adopt a rule that would provide more guidance on the issue while including the caveat that intervention on appeal should be rarely used.

Rule 4 and Reopening Time to Appeal. Judge Eid reported that the Advisory Committee has begun considering a suggestion to address various issues involving reopening the time to appeal under Rule 4(a)(6). The suggestion seeks to clarify whether a single document can serve as a motion to reopen the time to appeal and then (once the motion is granted) as the notice of appeal. Relatedly, the suggestion seeks to clarify whether a notice of appeal must be filed after a motion

to reopen the time to appeal has been granted. Judge Eid said that the Advisory Committee has just begun to look at this issue.

Rule 8 and Administrative Stays. Judge Eid reported that the Advisory Committee is in the preliminary stages of considering a suggestion to amend Rule 8. A proposed rule could make clear the purpose and proper duration of an administrative stay.

A judge member recommended receiving input from chief circuit judges on the topic. He commented that Professor Rachel Bayefsky authored a superb article on administrative stays.

Other Items. Judge Eid reported that the Advisory Committee decided to remove several items from its agenda, including a suggestion to prohibit the use of all capital letters for the names of persons, a suggestion to move common local rules to national rules, a suggestion to create a set of common national rules that would collect the provisions that are the same across the different sets of national rules, a suggestion to standardize page equivalents for word limits, and a suggestion regarding standards of review.

Judge Bates thanked Judge Eid and Professor Hartnett for their report.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 12, 2024, in Washington, DC. The Advisory Committee presented action items for publication of one rule and one official form, as well as four information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 223.

Action Items

Publication of Proposed Amendment to Rule 2002 (Notices). Judge Connelly reported on this item. The text of the proposed amendment begins on page 229 of the agenda book, and the written report begins on page 224. Rule 2002 requires the clerk to provide notice of an extensive list of items or actions that occur in every bankruptcy case. Rule 2002(o) provides that the caption of the notices under this rule shall comply with Rule 1005, which governs the caption of the petition that initiates a bankruptcy case. Rule 1005 requires the petition's caption to include information such as the debtor's name, other names the debtor has used, and the last four digits of the debtor's social security number or taxpayer-identification number. By incorporating Rule 1005's requirements, Rule 2002(o) requires that Rule 2002 notices include this information also. Judge Connelly stated that including this information in such notices is onerous and exposes sensitive information.

The proposed amendment would change Rule 2002(o) to eliminate the cross-reference to Rule 1005 and instead require that the caption comply with Official Form 416B. The result would be to require an ordinary short title caption consisting of the name, case number, chapter of bankruptcy, and the title of item being noticed.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 2002 for public comment.**

Publication of Proposed Amendment to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy). Judge Connelly reported on this item. The text of the proposed amendment begins on page 231 of the agenda book, and the written report begins on page 225. Form 101 is the initial form for filing a bankruptcy case. The form currently has a field for disclosing the debtor's employer identification number, requesting "Your Employer Identification Number (EIN), if any." Commonly, pro se filers are mistakenly providing the EIN of their employers. When multiple debtors file petitions listing the same EIN, the system erroneously flags them as repeat filers.

The proposed amendment would change the language in Form 101 to say: "EIN (Employer Identification Number) issued to you, if any. Do NOT list the EIN of any separate legal entity such as your employer, a corporation, partnership, or LLC that is not filing this petition."

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Official Form 101 for public comment.**

Information Items

Judge Connelly reported on four topics being considered by the Advisory Committee. The written report begins on page 225 of the agenda book.

Suggestion to Require Full Redaction of Social Security Numbers in Court Filings. Judge Connelly reported that the Advisory Committee has been studying whether the Bankruptcy Rules should continue to provide for disclosure of the last four digits of social security numbers in bankruptcy filings but has decided not to take action at this time. Judge Connelly noted the invaluable work of the FJC, which conducted an extensive study on the disclosure of social security numbers in federal court filings.

The Advisory Committee also conducted its own study by identifying the official bankruptcy forms that disclose the last four digits of social security numbers. Currently, several official forms require the disclosure of these last four digits. The FJC surveyed stakeholders, asking for input about the possible impact of eliminating the last four digits on the forms. Judge Connelly said that it may be critical to obtain this information to precisely determine the individuals who are or have been in bankruptcy because this allows creditors to accurately file claims, know to take no action on debts due to the automatic stay, or know that a debt has been discharged. Indeed, the stakeholders surveyed said that the last four digits on the official forms are essential. The numbers on some forms were essential to all stakeholders, and the numbers on all forms were essential to some stakeholders. Judge Connelly observed that there does not appear to be an effective means for identifying individuals without the last four digits of social security numbers, since it is not uncommon for multiple individuals with the same name to file for bankruptcy.

The Advisory Committee thus decided not to take action because it did not identify a real-world harm from disclosure of the last four digits in bankruptcy cases but did identify a harm in not disclosing this information. Although the FJC study did find disclosures of some full social security numbers in bankruptcy cases, those disclosures occurred despite the current rules, so rule amendments would not address that issue. Judge Connelly commented that the Advisory Committee will monitor developments in the other advisory committees and may revisit the issue if a time comes when stakeholders can effectively identify debtors without the need for the last four social security number digits.

Suggestion to Propose a Rule Requiring Random Assignment of Mega Bankruptcy Cases Within a District. Judge Connelly reported that the Advisory Committee received suggestions for a rule to require random assignment of bankruptcy cases designated as mega bankruptcy cases. She noted that the Committee on the Administration of the Bankruptcy System and the Committee on Court Administration and Case Management are considering similar issues. Accordingly, the Advisory Committee will defer any action on this item until it receives guidance from the other committees.

Suggestions to Allow Appointment of Masters in Bankruptcy Cases and Proceedings. Judge Connelly observed that under Bankruptcy Rule 9031, special masters cannot be appointed by a bankruptcy court. Two suggestions propose an amendment to Rule 9031 to allow for the appointment of masters in bankruptcy cases. She recalled that the Advisory Committee has considered, and rejected, many similar suggestions in previous decades. The Advisory Committee continues to consider the issue with this history in mind. Judge Connelly also noted that the FJC will survey bankruptcy judges to help identify the need and potential use for masters. The Advisory Committee should have the survey results by the June meeting.

Judge Connelly said that one issue raised was whether bankruptcy judges, being non-Article-III judges, would have the authority to appoint masters.

Recommendation Concerning Proposed Amendment to Official Form 318 (Discharge of Debtor in a Chapter 7 Case) and Director's Forms 3180W (Chapter 13 Discharge) and 3180WH (Chapter 13 Hardship Discharge). Judge Connelly reported that the Advisory Committee received a suggestion for an amendment to the bankruptcy form Order of Discharge. The form establishes that a debtor has been discharged of its debts. The suggestion proposes adding language to the form that would notify the recipient that there may be unclaimed funds and that they can check the Unclaimed Funds Locator to ascertain whether they are entitled to any.

Currently, unclaimed funds are paid into the Treasury and kept until the claimant retrieves the funds. Judge Connelly acknowledged that this is a problem that needs to be addressed, but that the Advisory Committee decided to take no action on this particular suggestion. The Advisory Committee had several reasons, one of which is a timing issue. A bankruptcy discharge order is issued once the debtor is eligible for a discharge, but the unclaimed funds are not paid into the Treasury until a trustee's disbursements have gone stale. In a Chapter 7 case, this could be years after the debtor receives their personal discharge. In a Chapter 13 case, it could still be six months after the debtor's last payment to the trustee. In either event, there likely are not unclaimed funds available when the discharge order is issued. Thus, the proposed notice would be confusing or misleading.

Judge Bates thanked Judge Connelly and the Advisory Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus and Bradt presented the report of the Advisory Committee on Civil Rules, which last met on October 10, 2024, in Washington, DC. The Advisory Committee presented two action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 268.

Judge Rosenberg reported that the Judicial Conference approved the proposed amendments to Rules 16 and 26 and the proposed new Rule 16.1. The Judicial Conference sent the proposals to the Supreme Court. If the Supreme Court approves the proposals and forwards them to Congress, the proposals will be on track to take effect on December 1, 2025, absent contrary action by Congress.

Action Items

Publication of Proposed Amendment to Rule 81(c) Concerning Jury-Trial Demands in Removed Actions. Judge Rosenberg reported on this item. The text of the proposed amendment begins on page 292 of the agenda book, and the written report begins on page 271. Before 2007, Rule 81(c) said: "If state law does not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." This excused a jury demand only when the case was removed from a state court that never requires a jury demand. But in the 2007 restyling, the verb "does" was changed to "did." This restyling could produce confusion when a case is removed from a state court that has a jury demand requirement but permits that demand later in the litigation. Accordingly, the Advisory Committee considered amendment to remove any uncertainty about whether and when a jury demand must be made after removal.

At the Advisory Committee's October meeting, it recommended a proposed amendment to require a jury demand in all removed cases by the deadline set forth in Rule 38. A point made during that meeting was that even when a party fails to meet the Rule 38 deadline, the court may nevertheless order a jury trial under Rule 39(b).

The Advisory Committee unanimously voted to recommend for publication the draft amendment to Rule 81(c) and its accompanying committee note. The Advisory Committee rejected the alternative proposal to return to the language in place before the 2007 change.

Professor Marcus observed that the existing rule creates uncertainty about when a jury demand is required and said that this proposed amendment removes that uncertainty by requiring a jury demand in accordance with Rule 38. Professor Cooper agreed and clarified that a party need not make a jury demand after removal if the party already made a demand before removal.

A practitioner member asked if the first line in the proposed Rule 81(c)(3)(B) should be in the past tense ("If no demand was made") rather than the current draft language ("If no demand is made"). Professor Garner's initial response was that the phrase should be in the present perfect

tense ("has been made") because it refers to the present status of something that has occurred. The practitioner member noted that using the present perfect tense would match the following sentence.

Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 81 for public comment**, with the change on page 292, line 14 in the agenda materials from "is" to "has been."

Publication of Proposed Amendment to Rule 41 (Dismissal of Actions). Judge Rosenberg reported on this item. The text of the proposed amendment begins on page 288 of the agenda book, and the written report begins on page 274. However, during the meeting a restyled version of the proposed amendment was displayed on the screen, reflecting input of the style consultants subsequent to the publication of the agenda book. Judge Rosenberg reported that courts widely disagreed on the interpretation of Rule 41(a). Although the rule is titled "Dismissal of Actions" and describes when a plaintiff may dismiss an action, many courts use the rule to dismiss less than an entire action. After several years of study, feedback, and deliberation, the Advisory Committee determined that the rule should be amended to permit dismissal of one or more claims in a case rather than permitting the dismissal of only the entire action. The Advisory Committee also concluded that the rule should be clarified to require that only current parties to the litigation must sign a stipulation of dismissal of a claim.

During the Subcommittee's outreach, there was no opposition to such an amendment, and the proposed change would provide nationwide uniformity and conform to the practice of most courts. Further, the proposed amendment would help simplify complex cases and support judicial case management. Accordingly, the Advisory Committee unanimously recommended for publication the proposed amendment to Rule 41.

Judge Rosenberg said that the proposed rule amendment differs slightly from the draft shown in the agenda book. Where the agenda book draft language refers to "a claim or claims" in lines 7-8, 19, and 41-42 (pages 288-90), the restyled amendment proposal refers instead to "one or more claims."

Professor Bradt said that a concern was raised regarding the use of the term "opposing party" in Rule 41(a)(1)(A)(i). The concern was that the term could be ambiguous with respect to who would be the party whose service of an answer or a motion for summary judgment would trigger the end of the period in which one could unilaterally dismiss a claim. The Advisory Committee ultimately declined to change this language because of its common use in other rules, all of which have a fairly clear definition of opposing party as being the party against whom the claim is asserted.

Judge Bates asked whether it would be inconsistent to use instead the term "opposing party on the claim." Professor Bradt recalled that the Advisory Committee discussed similar suggestions at its October meeting. The Advisory Committee agreed that adding such language would not introduce any problems but that the additional language would be redundant. Professor Kimble emphasized the importance of using consistent language in the rules.

Judge Rosenberg asked about adding language in the committee note to make clear that the rule refers to the opposing party to the claim. Professor Kimble responded that he would not have

a similar concern if the additional language were placed in the committee note. Professor Bradt said that the Advisory Committee declined to add the additional language to promote consistent usage in the rules and noted that no responses to the Advisory Committee's outreach expressed any confusion. He said that the Advisory Committee could learn about confusion during the public comment period. Professor Cooper opposed adding the additional language to the rule text but suggested using "party opposing the claim" if the Advisory Committee decides to address the matter in the committee note.

Judge Rosenberg asked Judge Bates if he thought an additional sentence for the committee note should be drafted. Judge Bates saw no reason not to draft the additional language for the committee note if Judge Rosenberg, Professor Marcus, and Professor Bradt thought the addition would be beneficial.

A practitioner member asked about the conforming change in Rule 41(d). He observed that term "action" still appears in the rule. He thought that "of that previous action" in Rule 41(d)(1) was unclear (because it is intended to refer to the initial phrase in Rule 41(d), which as amended would now say "a claim" rather than "an action") and suggested that Rule 41(d) could instead use the phrase "of the previous action where the claim was raised." In addition, he observed that the draft committee note stated that references to action have been replaced and suggested that this language be adjusted if the rule retains some references to actions.

Professor Bradt responded that it was intentional to retain "action" in Rule 41(d) to make clear that the rule refers to a new case being filed. He said that the member's suggested additional language would not cause harm and offered instead "of that previous action in which one or more claims was voluntarily dismissed." Professor Bradt asked the member if this would clarify the rule. The member said that he was not devoted to any specific language but thought some clarification would be helpful and added that "the previous action" may be preferable to "that previous action."

Professor Kimble suggested "that previous action in which the claim was voluntarily dismissed." Professor Bradt and the member agreed. Professor Garner asked if the party would become responsible for all the costs of the action if one claim were dropped. Professor Bradt responded that ordinarily the party would only be responsible for the cost associated with the dismissed claim, but the court would retain the ability to impose the costs of the entire action. Professor Garner said that, as a style matter, "the" is preferable to "that." This would yield the phrase "of the previous action in which a claim was voluntarily dismissed."

Judge Bates questioned whether "voluntarily" would be appropriate to use in Rule 41(d). Professor Bradt responded that Rule 41(d) applies to voluntary dismissals but not involuntary dismissals and said that the proposed amendment does not seek to change that feature of Rule 41(d). Professor Cooper agreed that Rule 41(d) covers all dismissals under Rule 41(a), even if the plaintiff needs a court order, but Rule 41(d) does not include involuntary dismissals under Rule 41(b). Judge Bates observed that the headings of Rule 41(a)(1) and (2) distinguish between voluntary dismissals "By the Plaintiff" (Rule 41(a)(1)) and voluntary dismissals "By Court Order" (Rule 41(a)(2)).

Professors Cooper and Kimble commented that "previous" is unnecessary. To clarify the committee note, Professor Bradt suggested one additional word: adding "some" before "references

to 'action.'" He asked if this would clarify that the proposed change does not eliminate all references to action. Professor Capra disagreed with adding "some" to the committee note and suggested that it refer to the provisions actually changed.

Professor King suggested working on the proposal further and seeking publication at the Standing Committee's June meeting. Professor Capra agreed with Professor King. Professor Kimble also agreed and said that the style consultants would like to take more time to consider the proposed language. Judge Bates observed that the Standing Committee could consider the proposal with updated language at its June meeting for publication in August. Judge Rosenberg and Professor Bradt agreed with this plan.

Professor Bradt summarized the items that the Advisory Committee will work on. First, revising the committee note to clarify that some but not all references to "action" are being replaced. Second, considering the addition of rule text or a sentence in the committee note to clarify what is meant by "opposing party" in Rule 41(a)(1)(A)(i). Third, revising the proposed amendment to Rule 41(d)(1) to clarify its application to voluntary dismissals with or without court orders and to make clear the court's authority in the subsequent action to require the plaintiff to pay all or part of the costs related to the prior action in which they voluntarily dismissed the claim.

Professor Hartnett wondered how "and remain in the action" in the proposed Rule 41(a)(1)(A)(ii) interacts with Rule 54(b). For example, consider a situation where a plaintiff sues two defendants, and the court grants one defendant's motion to dismiss the claims against it. Absent a Rule 54(b) certification, that defendant remains in the action – for purposes of the application of the final-judgment requirement for taking an appeal – until the disposition of the claims against the remaining defendant. However, Professor Hartnett thought, the Advisory Committee appears to intend "remain in the action" to mean something different in Rule 41. Professor Hartnett expressed concern that this could cause confusion.

Professor Bradt asked if Professor Harnett had a proposal to solve this issue. Professor Hartnett said his initial reaction was to drop the proposed additional language. Professor Marcus explained that the proposal was in response to cases where parties no longer involved in the case refused to stipulate to a dismissal. Professor Bradt added that a problem also arises where a party no longer involved in the case cannot be found to obtain their signature for a dismissal.

Professor Bradt said that the Advisory Committee will continue to work on the proposed amendment and will present a revised proposal at the Standing Committee's June meeting. Judge Rosenberg agreed.

Information Items

Judge Rosenberg reported on the work of the Advisory Committee's subcommittees as well as a few other information items. These items are described in the written report beginning on page 276 of the agenda book.

Rule 45(b) and the Manner of Service of Subpoenas. Judge Rosenberg reported that the Discovery Subcommittee continues to consider the problems that can result from Rule 45(b)(1)'s directive that service of a subpoena depends on "delivering a copy to the named person." As to

potential alternative methods of service, the Subcommittee determined to leave the decision of what to employ for a given witness to the presiding judge.

The Subcommittee is also considering the requirement that when a subpoena requires attendance by the person served, the witness fees and mileage be "tendered" to the witness. The Subcommittee is studying two options. The first option is retaining the obligation to tender fees but not as part of service. The second option is eliminating the obligation to tender the fees.

Judge Rosenberg invited feedback on the issues of tendering fees at time of service and also whether the rule should be amended to require that the subpoena be served at least 14 days before the date on which the person is commanded to attend. Professor Marcus noted that the Subcommittee will also be looking at filing under seal.

Professor King observed that Rule 45(b) is similar to Criminal Rule 17(d) (on service of subpoenas in criminal cases). She suggested that the committees coordinate during the drafting process. However, she acknowledged that different considerations may affect the criminal and civil service rules.

Rule 45(c) and Subpoenas for Remote Testimony. Judge Rosenberg reported that the Advisory Committee received a suggestion to relax the constraints on the use of remote testimony. The Advisory Committee will monitor comments submitted on the proposed bankruptcy rule amendments that would permit the use of remote testimony for contested matters in bankruptcy court.

Judge Rosenberg said that the Advisory Committee will continue to consider an amendment to Rule 45(c) to clarify that a court can use its subpoena power to require a distant witness to provide testimony once it determines that remote testimony is justified under the rules. This issue came to the Advisory Committee's attention because of a Ninth Circuit ruling, *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), holding that current Rule 45 does not permit a court that finds remote testimony justified under Rule 43 to compel a distant witness to provide that testimony by subpoena. The Subcommittee is inclined to recommend an amendment that would provide that when a witness is directed to provide remote testimony, the place of attendance is the place the witness must go to provide that testimony.

Judge Bates observed that no public comments had been submitted so far on the bankruptcy rule amendment relating to remote testimony in contested matters.

A judge member said that he disagreed with the Ninth Circuit's decision but that given the ruling, he thought an amendment to the rule is necessary. He asked how an amendment might affect the definition of unavailability in Rule 32 (concerning use of depositions). Professor Marcus responded that the Committee is discussing the issue of unavailability under Rule 32 as well as under Evidence Rule 804 (concerning the hearsay exception for unavailability). He explained that the Committee did not intend the change to Rule 45 to affect the interpretation of unavailability under Rules 32 or 804 and suggested that the committee note could make that clear.

Another judge member commented that even if no comments are received on the bankruptcy rule, many others are experimenting with remote proceedings, such as state courts and immigration courts. He suggested that there was no good reason to delay in moving ahead with

remote proceedings. Judge Rosenberg responded that the Subcommittee initially considered proposing changes to Rule 45 and Rule 43 together but now thinks it will take more time to discuss changes to Rule 43 because a proposed change to Rule 43 would be more controversial. The Advisory Committee was in the process of gathering other perspectives on remote testimony, like those from the American Association for Justice and the Lawyers for Civil Justice. Professor Marcus emphasized that the Committee is not delaying consideration of remote testimony but rather the Committee feels urgency to move forward with an amendment to address *In re Kirkland*.

A member cautioned against overreading the lack of comments received so far for the bankruptcy rule amendment, since the amendment relates only to contested matters and not adversary proceedings. Further, bankruptcy courts have comfortably used remote technology for a long time. The bankruptcy responses therefore provide little guidance on a possible reaction to remote proceedings in non-bankruptcy civil cases. Professor Marcus agreed. Judge Connelly said that although no comments had been submitted yet, the Bankruptcy Rules Committee expects comments before the end of the notice period. Judge Connelly also noted that the bankruptcy rule amendments may have limited impact because contested matters are often akin to motion practice in district court.

Judge Bates observed that the Advisory Committee was considering issues across Rules 43 and 45. And because remote testimony is a broader issue than the issue regarding subpoenas, he urged the Advisory Committee to be cognizant of that and not let the subpoena consideration drive the analysis.

Rule 55 and the Use of the Verb "Must" with Regard to Action by Clerk. Judge Rosenberg reported that Rule 55(a) says that if the plaintiff can show that the defendant has failed to plead or otherwise defend, "the clerk must enter the party's default." Rule 55(b)(1) says that if "the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk … must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing." The Advisory Committee had found that the command in Rule 55(a) does not correspond to what is happening in many districts. FJC research shows wide variations among district courts in how they handle applications for entry of default or default judgment.

The Advisory Committee discussed whether to amend Rule 55. Some members favored changing "must" to "may" to protect clerks from pressure when there are serious questions about whether entry is appropriate. However, some members thought that "may" would create ambiguity. Judge Rosenberg said that the Advisory Committee is in the early stages of discussing this issue. Professor Marcus added that this command that some clerks find unnerving has been in the rule since 1938.

A judge member thought that there are two separate issues: the pressure on clerks to make a decision they feel uncomfortable making and whether entry should be mandatory. Professor Marcus responded that a number of districts have provisions allowing the clerk to act or refer the matter to the court.

At this point in the Civil Rules Committee's report, the discussion was paused in order to allow the Criminal Rules Committee to make its report (described below). The Civil Rules Committee's presentation resumed thereafter with the discussion of third party litigation funding.

Third Party Litigation Funding. Judge Rosenberg reported that a subcommittee was recently appointed to study the topic. Third party litigation funding first appeared on the Advisory Committee's agenda in 2014, primarily in the context of multidistrict litigation. Since then, litigation funding activity has increased and evolved. The Subcommittee has met once so far to plan its examination of the topic. It will examine, among other things, the model in place in the District of New Jersey, which adopted a local rule calling for disclosure. The Wisconsin legislature included a disclosure rule in its tort reform discovery package. The Subcommittee is only studying and monitoring the issue and does not anticipate making any proposals in the near future.

A practitioner member noted that disclosures have been required by some judge-made rules in Delaware courts, and also suggested that it may be helpful to examine arbitration practices, where mandatory disclosure of third-party litigation funding is the norm. Judge Rosenberg asked if discovery ensues after such disclosures and whether the disclosures are ex parte. The member replied that he did not know about discovery, but he thought that the disclosures are not ex parte because they are designed to provide information for conflict-of-interest purposes.

Another practitioner member observed that in his practice, he often wonders if there is a funder involved and it is very difficult to get discovery about that information. He commented that there may be reasons why information on funding should never be disclosed to a jury, but he expressed concern that funders exercise control over claims. The attorney may even be associated with the funder before the attorney is associated with their client. The member said that funders can make resolving a case more difficult. He recounted a case where a funder loaned a company a large sum of money secured by existing and future claims, caused the company to file claims, and then prevented the company from settling their claims. He thought that some sort of discovery into the funder relationship should be permitted.

Judge Rosenberg invited the member to share persons or organizations with whom it would be helpful to speak. She said that the Subcommittee is eager to learn how pervasive funding is, what constitutes litigation funding, how it could be defined, and what, if anything, the rulemakers should do about it. The Subcommittee knows that funding can be problematic from a recusal standpoint and a control standpoint, but it needs to understand the breadth and pervasiveness of the problem.

Professor Marcus observed that a court presumably could order discovery on funding even without a new rule on point and he asked why they do not always do so. As to recusal, Professor Marcus recalled a judge during a prior discussion stating that not very many judges invest in hedge funds. He asked what a judge is supposed to do upon learning of funding. A practitioner member replied that the Subcommittee should look into the breadth of litigation funders because he suspected that litigation funders include not only hedge funds, but also other entities such as insurance companies. Thus, the member said, funding does pose potential recusal issues. He also said that in his experience the trend is generally not to allow discovery on the issue unless a party can come forward with some specific reason to believe that something untoward is going on.

Another practitioner member agreed. He said that an objection is often made arguing that funding arrangements are matters between the funder and client, and the opposing party should not receive the information even if it is needed to determine whether the court should recuse. The member framed this as a chicken and egg problem: the opposing party may be able to articulate a

basis for funding concerns only after receiving information about the funding arrangement. He repeated that most courts do not allow discovery into the issue because it is seen as a fishing expedition.

Professor Hartnett commented on the disclosure rule in the District of New Jersey. He said that he is a member of the Lawyers' Advisory Committee that developed and drafted the rule ultimately promulgated by the district. He offered to facilitate a meeting with the Lawyers' Advisory Committee. Judge Rosenberg said that the FJC has been in touch with the district's Clerk of Court to learn the types of disclosures being made under the local rule and how judges use the information disclosed.

Professor Coquillette observed that this is another area where a rules committee's work overlaps with another rulemaking system because this issue is covered by state disciplinary rules, particularly when lawyers and their clients have differing interests.

A member cautioned that the term third party litigation funding captures a broad and varied set of arrangements. It may be on the plaintiff or defense side, it may be framed as insurance, and parties offering funding can include hedge funds and private equity firms. To craft a rule, even if it relates only to disclosures, one must determine what the funding device is and what type of concern it raises. If the concern is about control, the member agreed with Professor Coquillette that there could be other ways of addressing that concern or that any rulemaking could be narrow and targeted. But he thought that unless a disclosure rule was limited to seeking a very narrow set of information about control, it could be difficult to craft a rule that would be both meaningful and long-lasting. Judge Bates recalled that the scope of third-party litigation funding was an initial question that the Advisory Committee confronted many years ago. The member also noted that some states have abolished champerty as an operative doctrine, while other states still enforce champerty restrictions.

Cross-Border Discovery Subcommittee. Judge Rosenberg reported that the Subcommittee was formed in response to a proposal urging study of cross-border discovery with an eye toward possible rule changes to improve the process. The Subcommittee is focused on foreign discovery under 28 U.S.C. § 1781 and the Hague Convention from litigants that are parties to U.S. litigation. The Subcommittee has met with bar groups, and Subcommittee members will attend the Sedona Conference Working Group 6, which focuses on cross-border discovery issues. The Subcommittee will continue to reach out to groups and participate in relevant meetings, though it does not anticipate making any proposals in the near future. Professor Marcus confirmed that he will attend the Sedona Conference meeting and said that it is not clear whether there is widespread support for rulemaking in this area.

Rule 7.1 Subcommittee. Judge Rosenberg reported that the Subcommittee is considering whether to expand the disclosures required of nongovernmental corporations. She said that the current rule, which requires that nongovernmental corporations disclose any parent corporation and any publicly held corporation owning 10% or more of its stock, does not provide enough information for judges to evaluate their statutory obligations in all cases. The Subcommittee seeks to ensure that any proposed rule helps judges evaluate their obligations and is consistent with recently issued Codes of Conduct Committee guidance. The guidance indicates that a judge has a

financial interest requiring recusal if the judge has a financial interest in a parent that "controls" a party. The current rule likely requires disclosure of most such circumstances but not all.

Judge Rosenberg said that the Subcommittee is considering an amendment requiring disclosure based on a financial interest. In addition to the current disclosure requirements, the amendment would also require corporate parties to disclose any publicly held business organization that directly or indirectly controls the party. The Subcommittee hopes to present a proposed amendment and committee note for Advisory Committee consideration at the Advisory Committee's April meeting. Professor Bradt added that the Subcommittee continues outreach to likely affected parties, including organizations of general counsel.

Use of the Term "Master" in the Rules. Judge Rosenberg reported that the American Bar Association had submitted a suggestion to remove the word "master" from Rule 53 and other places. The Academy of Court-Appointed Neutrals and the American Association for Justice submitted supporting suggestions. At its October meeting, the Advisory Committee decided to keep the matter on its agenda for monitoring, but it does not anticipate making any proposals in the near future.

Professor Marcus noted that "master" appears in many rules. It appears in Rule 53, at least six other Civil Rules, the Supreme Court's rules, and several federal statutes. Professor Marcus asked whether the term should be removed from the Civil Rules, and if so, what should replace it. The Academy of Court-Appointed Neutrals suggested "court-appointed neutral," but this does not seem to describe persons who can do the many things that Rule 53 masters can do, such as make rulings.

Professor Garner commented that there are about 12 or 13 different contexts in which master historically has been used. He thought that the suggestions may be focusing on one historical use of the term. Professor Garner authored an article on the topic and offered to share it with the Advisory Committee.

A judge member commented that the issue is whether the term should be used or not. This member thought that if there are many appropriate uses of the term, then that would be a reason not to make a change. But if the term has become offensive, then the Advisory Committee should amend the rules. A practitioner member agreed that this should be the focus. This member stressed that it is important to look for a replacement term that would have the same utility: the term "master" has become a term of art with a particular meaning in litigation that terms like "neutral" do not capture. The member said that the term "master" is obsolete but that it is difficult to think of a replacement.

Another judge member asked whether states continue to use the term and, if not, what terms they have replaced it with. Professor Marcus recalled that a submission referred to recent changes elsewhere and noted that the Academy of Court-Appointed Neutrals was previously called the Academy of Court-Appointed Masters. He also said that the AAJ suggestion did not suggest a proposed substitute term. Professor Marcus suggested one possibility is waiting to see what term becomes familiar and recognized in litigation.

Professor Coquillette noted that treatises exist in online databases that use Boolean search operators. Changing key terms will complicate the use of these word retrieval systems.

A judge member also noted that the Supreme Court uses the term, and the Court's usage would not be altered by changes to the national rules for the lower federal courts.

Professor Capra said that recent changes include New Jersey now using the term "special adjudicator," and New York using "referee."

Random Case Assignment. Judge Rosenberg reported that the Advisory Committee has received several proposals to require random district judge assignment in certain types of cases. In March 2024, the Judicial Conference issued guidance to all districts concerning civil actions that seek to bar or mandate statewide enforcement of a state law or nationwide enforcement of a federal law, whether by declaratory judgment or injunctive relief. In such cases, judges would be assigned by a district-wide random selection. Judge Rosenberg stated that the Advisory Committee is monitoring the implementation of the guidance, but that it is premature to make any rule proposals in the near future.

Judge Bates thanked Judge Rosenberg and the reporters for their report.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which last met on November 6-7, 2024, in New York, NY. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 320.

Information Items

Rule 53 and Broadcasting Criminal Proceedings. Judge Dever noted that Rule 53 provides that "[e]xcept as otherwise provided by a statute or these rules, the court must not permit … the broadcasting of judicial proceedings from the courtroom." The Rule 53 Subcommittee previously considered but did not act on a suggestion from some members of Congress suggesting that a clause be added excluding from the rule any trial involving Donald J. Trump. Subsequently, a consortium of media organizations proposed that Rule 53 be revised to permit the broadcasting of criminal proceedings, or to at least create an "extraordinary case" exception to the prohibition on broadcasting. A subcommittee was formed to consider that suggestion.

The Subcommittee met a number of times and gathered information about Judicial Conference Policy § 420(b), which permits the court to permit broadcasting of civil and bankruptcy non-trial proceedings in which no testimony will be taken. The Subcommittee also received an excellent FJC survey on state practices related to broadcasting and attempted to find empirical studies on the effect of broadcasting on criminal proceedings. Ultimately, the Subcommittee unanimously recommended no change to Rule 53, citing concerns about due process, fairness, privacy, and security. With one dissenting vote, the Advisory Committee decided not to propose amending Rule 53.

Professor King noted that, after the agenda book for the Advisory Committee's fall meeting was published, the Advisory Committee received an additional two submissions related to broadcasting. Professor Beale noted that one of those submissions was from the proponent of the original Rule 53 proposal. She noted that the Advisory Committee welcomed comments on the topic.

A judge member expressed interest in the FJC's research on remote public access to court proceedings. This judge member expressed skepticism about the assertion that the risks of broadcasting are somehow greater in federal court proceedings than in state court proceedings (where the risks seem to have been overcome). The member also wondered why the DOJ had abstained from voting on whether to remove the Rule 53 proposal from the Committee's study agenda.

Rule 17 Subpoena Authority. Judge Dever reported that the Advisory Committee was continuing to consider a proposal from the New York City Bar Association to amend Rule 17. The Rule 17 Subcommittee has learned of a wide range of practices under Rule 17 and associated caselaw. The Subcommittee will continue to meet and will present further information at the Advisory Committee's April meeting.

References to Minors by Pseudonyms and Full Redaction of Social Security Numbers. Judge Dever noted that Rule 49.1(a)(3) currently requires filings referring to a minor to include only that minor's initials unless the court orders otherwise. Rule 49.1(a) also provides that only the last four digits of a social security number may appear in public filings. The DOJ and two bar groups have proposed amending the rule to require that minors be referred to by a pseudonym rather than initials in order to provide greater protection of their privacy. Meanwhile, Senator Wyden has suggested amending the rule with respect to social security numbers. The relevant Subcommittee expects to present a proposal to the Advisory Committee at its April meeting.

Professor Beale noted that if Rule 49.1 is amended to require use of pseudonyms for minors, this would create disuniformity unless the other privacy rules are similarly amended. She noted that DOJ policy is to use pseudonyms, and federal defenders said they mostly use pseudonyms already as well. Professor Beale thought that the rules should reflect this practice. Given that the Criminal Rules Committee would consider this proposal at its Spring meeting, she expressed a hope that the other advisory committees would do so as well.

As to Senator Wyden's concern about the inclusion of the last four digits of social security numbers in court filings, Judge Dever stated that disclosure of the last four digits can impact a person's privacy interests. He recognized that different issues arise with respect to the Bankruptcy Rules; but the Criminal Rules Committee thought that, outside that context, removing the last four digits from public filings makes sense.

Professor Beale said that the Advisory Committee received feedback from federal defenders, the DOJ, and the Clerk of Court liaison, none of whom see a need for the last four digits in public filings. Where reference to a social security number is actually necessary (for example, in a fraud case), it can be filed under seal. Professor Beale acknowledged that references to social security numbers can be necessary in bankruptcy cases. But for the other rule sets, she suggested,

the time has come to re-examine the risks of disclosing the last four digits of the social security number.

Summing up, Judge Bates noted that the Criminal Rules Committee will be considering the privacy issues related to pseudonyms for minors and full redaction of social security numbers and encouraged the Appellate and Civil Rules Committees to consider the issues as well.

Professor Marcus noted that in civil proceedings permitting a party to proceed anonymously is controversial. He wondered whether the considerations are different for minors. Judge Bates clarified that the issue before the Criminal Rules Committee is not as to a party; it would be very rare for a minor to be a defendant in a federal prosecution.

Ambiguities and Gaps in Rule 40. Judge Dever reported that a Subcommittee was established to address possible ambiguities in Rule 40, which relates to arrests for violating conditions of release set in another district. Magistrate Judge Bolitho raised this issue, and the Magistrate Judges Advisory Group submitted a detailed letter expressing its concerns. Judge Harvey was appointed to chair the Subcommittee.

Rule 43 and Extending the Authority to Use Videoconferencing. Judge Dever recalled that, over the years, the Advisory Committee has considered many suggestions submitted by district judges concerning the use of videoconference technology in Rule 11 proceedings, sentencings, and hearings on revocation of probation or supervised release. By contrast, neither the National Association of Criminal Defense Lawyers nor the DOJ had submitted such suggestions.

During the discussion at the Advisory Committee's last meeting, the members generally did not support changing the rules for Rule 11 or sentencing proceedings, although one member noted the long distances that participants must travel in some districts.

A Subcommittee has been appointed to study the topic. The Subcommittee intends to explore the universe of proceedings that the rules do not already cover, since the rules already permit videoconferencing for some proceedings, like initial appearances, arraignments, and Rule 40 hearings.

A judge member supported considerably relaxing Rule 43. He thought that videoconferencing should be available for noncritical proceedings if the defendant consents but not for trials, guilty pleas, or sentencings. Judge Dever responded that Rule 43(b)(3) already permits hearings involving only a question of law to proceed without the defendant present. The Subcommittee will discuss other types of proceedings.

Contempt proceedings. Judge Dever reported that the Advisory Committee received a proposal to substantially change Criminal Rule 42 concerning contempt proceedings. The proposal also advocated revisions to various federal statutes. The Advisory Committee removed the proposal from its agenda.

Judge Bates thanked Judge Dever for the report.

OTHER COMMITTEE BUSINESS

The legislation tracking chart begins on page 378 of the agenda book. The Rules Law Clerk provided a legislative update, noting that the 118th legislative session ended shortly before the Standing Committee's meeting.

Action Item

Judiciary Strategic Planning. As at prior meetings, Judge Bates asked the Standing Committee to authorize him to work with Rules Committee Staff to respond to the Judicial Conference of the United States regarding strategic planning. Without objection, the Standing Committee authorized Judge Bates to work with Rules Committee Staff to submit a response regarding strategic planning on behalf of the Standing Committee.

CONCLUDING REMARKS

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on June 10, 2025, in Washington, DC.

TAB 2B

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Committee or Standing Committee) met on January 7, 2025. New member Judge Joan N. Ericksen was unable to participate.

Representing the advisory committees were Judge Allison H. Eid (10th Cir.), Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, Chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge James C. Dever III, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Jesse M. Furman, Chair and Professor Daniel Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Bridget M. Healy and Scott Myers, Rules Committee Staff Counsel; Kyle Brinker, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and Elizabeth J. Shapiro,

Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received updates on joint committee business that involve ongoing and coordinated efforts in response to suggestions on: (1) expanding access to electronic filing by self-represented litigants, (2) adopting nationwide rules governing admission to practice before the U.S. district courts, and (3) requiring complete redaction of Social Security numbers (SSNs).

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met on October 9, 2024. The Advisory Committee is considering several issues, including possible amendments to Rule 15 (Review or Enforcement of an Agency Order—How Obtained; Intervention) to address the "incurably premature" doctrine regarding review of agency action, Rule 4 (Appeal as of Right—When Taken) concerning reopening of the time to take a civil appeal, and Rule 8 (Stay or Injunction Pending Appeal) to address the purpose and length of administrative stays, and suggestions for a new rule governing intervention on appeal. The Advisory Committee removed from its agenda suggestions regarding standards of review, use of capital letters and diacritical marks in case captions, incorporation of widely adopted local rules into the national rules, and standardizing page equivalents for word limits. The Advisory Committee will hold a February 2025 hearing on its two proposals that are out for public comment; one proposal concerns Rule 29's amicus brief requirements and the other concerns the information required on Form 4 for seeking in forma pauperis status.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rule 2002 (Notices) and Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy) with a recommendation that they be published for public comment in August 2025. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 2002 (Notices)

The proposed amendment to Rule 2002(o) would simplify the caption of most notices given under Rule 2002 by requiring that they include only the court's name, the debtor's name, the case number, the chapter under which the case was filed, and a brief description of the document's character. Notably, most Rule 2002 notices would no longer be required to include the last four digits of the debtor's SSN or individual taxpayer identification number.

Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)

Question 4 in Part 1 of Official Form 101 would be amended to clarify that the question is attempting to elicit only the Employer Identification Number (EIN), if any, of the individual filing for bankruptcy and not the EIN of any other person. The modification will guide debtors to avoid the error of providing their employer's EIN. Because multiple debtors could have the same employer, deterring such debtors from erroneously providing their employer's EIN will avoid triggering an erroneous automated report that the debtor has engaged in repeat filings.

Information Items

The Advisory Committee on Bankruptcy Rules met on September 12, 2024. In addition to the recommendation discussed above, the Advisory Committee considered suggestions for an amendment to allow appointment of masters in bankruptcy cases and proceedings and for a new rule concerning random assignment of mega bankruptcy cases within a district, which the

Advisory Committee will revisit after the Committee on the Administration of the Bankruptcy System has concluded its consideration of potential related policy (*see* Report of the Committee on the Administration of the Bankruptcy System, at Agenda E-3). The Advisory Committee removed from its agenda a suggestion to add language concerning the possibility of unclaimed funds to the forms for orders of discharge in cases under chapters 7 and 13. After careful study of a suggestion to require complete redaction of SSNs (rather than redaction of all but the last four digits, as currently required by the national rules), and after considering bankruptcy stakeholders' expressed need for the last four digits of the SSN, the Advisory Committee decided to take no action on the suggestion at this time; however, the Advisory Committee will continue to monitor discussions of this suggestion in the other advisory committees.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 81 (Applicability of the Rules in General; Removed Actions) and Rule 41 (Dismissal of Actions) with a recommendation that they be published for public comment in August 2025. The Standing Committee unanimously approved the Advisory Committee's recommendation concerning Rule 81 (with a stylistic change) and offered feedback on the language of the proposed amendment to Rule 41. The Advisory Committee will bring the Rule 41 proposal back for approval at the Standing Committee's June 2025 meeting.

The proposed amendment to Rule 81(c) would provide that a jury demand must always be made after removal if no such demand was made before removal and a party desires a jury trial, and the Rule 41 proposal would clarify that Rule 41(a) is not limited to authorizing dismissal only of an entire action but also permits the dismissal of one or more claims in a multi-

claim case and that a stipulation of dismissal must be signed by only all parties who have appeared and remain in the action.

Information Items

The Advisory Committee on Civil Rules met on October 10, 2024. In addition to the recommendations discussed above, the Advisory Committee continued to discuss proposals to amend Rule 45 (Subpoena) regarding the manner of service of subpoenas and the tendering of witness fees at time of service. The Advisory Committee is also studying possible amendments concerning remote testimony; one possible amendment to Rule 45 would clarify the court's subpoena authority with respect to remote trial testimony, while a different possible amendment to Rule 43 (Taking Testimony) would relax the standards governing permission for remote trial testimony. The Advisory Committee heard updates from its subcommittee on Rule 7.1 (Disclosure Statement). The Advisory Committee also continues to study suggestions on Rule 55 (Default; Default Judgment), cross-border discovery, and the use of the term "master" in the Civil Rules, and has commenced a renewed study of the topic of third-party litigation funding. On the random assignment of cases, the Advisory Committee noted the Judicial Conference's March 2024 adoption of policy on this topic (JCUS-MAR 2024, p. 8) and will continue to study the districts' response to this policy.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on November 6-7, 2024. The Advisory Committee continued to discuss a proposal to expand the availability of pretrial subpoenas under Rule 17 (Subpoena) and heard the views of 12 invited speakers who provided comments on a possible draft amendment. In addition, the Advisory Committee established two new subcommittees to consider proposals for amendments to clarify Rule 40 (Arrest for Failing to

Appear in Another District or for Violating Conditions of Release Set in Another District) and for amendments to Rule 43 (Defendant's Presence) to extend the district courts' authority to use videoconferencing with the defendant's consent.

The Advisory Committee is actively considering proposals to amend Rule 49.1 (Privacy Protection for Filings Made with the Court) to protect minors' privacy by requiring the use of pseudonyms and to require complete redaction of SSNs (rather than redaction of all but the last four digits).

The Advisory Committee decided to remove from its agenda a proposal to amend Rule 53 (Courtroom Photographing and Broadcasting Prohibited) to allow broadcasting of criminal proceedings under some circumstances and a proposal to revise the procedures for contempt proceedings under Rule 42 (Criminal Contempt).

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met on November 8, 2024. The Advisory Committee discussed possible amendments relating to the admissibility of evidence generated by artificial intelligence. The discussion focused on two areas: the admissibility of machine-learning evidence offered without the accompanying testimony of an expert, and challenges to the admissibility of asserted "deepfakes" (that is, fake audio and/or visual recordings created through the use of artificial intelligence). To address the first topic, the Advisory Committee is developing a proposed new Rule 707 that would apply to machine-generated evidence standards akin to those in Rule 702 (Testimony by Expert Witnesses); the Advisory Committee will recommend to the Civil and Criminal Rules Committees that they consider any associated issues concerning disclosures relating to machine-learning evidence. The Committee is not currently intending to bring forward for

publication a proposal addressing the second topic (deepfakes) but will work on a possible amendment to Rule 901 (Authenticating or Identifying Evidence) that could be brought forward in the event that developments warrant rulemaking on the topic.

The Advisory Committee is considering a possible amendment to Rule 609 (Impeachment by Evidence of a Criminal Conviction) to tighten the standard for admission in criminal cases of evidence of a defendant's prior felony conviction. It has also begun to study a proposal to amend Rule 902 (Evidence That Is Self-Authenticating) to add federally recognized Indian tribes to Rule 902(1)'s list of governments the public documents of which are self-authenticating.

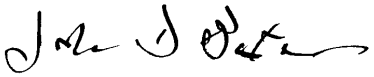
The Advisory Committee decided to remove from its agenda a proposal to amend Rule 702 (Testimony by Expert Witnesses) regarding peer review and a suggestion regarding a possible amendment or new rule to address allegations of prior false accusations of sexual misconduct. In addition, the Advisory Committee decided to table a suggestion for a proposed amendment to Rule 404 (Character Evidence, Other Crimes, Wrongs, or Acts) concerning evidence of other crimes, wrongs, or acts the relevance of which depends upon inferences about propensity. Finally, the Advisory Committee determined that the decisions in *Smith v. Arizona*, 602 U.S. 779 (2024), and *Diaz v. United States*, 602 U.S. 526 (2024), do not currently require any amendments to Rule 703 (Bases of an Expert's Opinion Testimony) or Rule 704 (Opinion on an Ultimate Issue), but it will monitor the lower court caselaw applying those decisions.

JUDICIARY STRATEGIC PLANNING

The Committee was asked by Chief Judge Michael A. Chagares (3d Cir.), the judiciary's planning coordinator, to identify any changes it believes should be considered in updating the *Strategic Plan for the Federal Judiciary* in 2025. Recommendations on behalf of the Committee

regarding the judicial workforce and preserving public trust in the judiciary were communicated to Chief Judge Chagares by letter dated January 15, 2025.

Respectfully submitted,



John D. Bates, Chair

Paul J. Barbadoro	Patricia Ann Millett
Elizabeth J. Cabraser	Lisa O. Monaco
Louis A. Chaiten	Andrew J. Pincus
Joan N. Ericksen	D. Brooks Smith
Stephen A. Higginson	Kosta Stojilkovic
Edward M. Mansfield	Jennifer G. Zipps
Troy A. McKenzie	

TAB 3

Minutes of the Fall Meeting of the

Advisory Committee on the Appellate Rules

October 9, 2024

Washington, DC

Judge Allison Eid, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, October 9, 2024, at approximately 9:00 a.m. EDT.

In addition to Judge Eid, the following members of the Advisory Committee on the Appellate Rules were present in person: George Hicks, Professor Bert Huang, Judge Carl J. Nichols, Judge Sidney Thomas, and Lisa Wright. Solicitor General Elizabeth Prelogar was represented by Mark Freeman, Director of Appellate Staff, Civil Division, Department of Justice. Judge Richard C. Wesley attended via Teams.

Also present in person were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Daniel Bress, Member, Advisory Committee on the Bankruptcy Rules and Liaison to the Advisory Committee on the Appellate Rules; Andrew Pincus, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; Christopher Wolpert, Clerk of Court Representative; H. Thomas Byron, Secretary to the Standing Committee, Rules Committee Staff (RCS); Bridget M. Healy, Counsel, RCS; Shelly Cox, Management Analyst, RCS; Kyle Brinker, Rules Law Clerk, RCS; Rakita Johnson, Administrative Assistant, RCS; Tim Reagan, Federal Judicial Center; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules.

Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure, attended via Teams.

I. Introduction and Preliminary Matters

Judge Eid opened the meeting and noted that she was excited and honored to be chairing the committee. She suggested that everyone keep in their thoughts those dealing with the impact of the hurricane. She asked those participating in the meeting to introduce themselves, and welcomed everyone, including members of the public.

Mr. Byron called attention to the rules tracking chart and noted that the amendments to Rules 35 and 40 are scheduled to go into effect this year, and that the amendments to Rules 6 and 39 have been sent to the Supreme Court. (Agenda book

page 22). These amendments have been sent to Congress for review and include the substantial revisions of Rules 35 and 40 that this Committee put a lot of work into.

Mr. Brinker referred to the pending legislation chart and noted that there is no recent Congressional action regarding the Federal Rules of Appellate Procedure. (Agenda book page 29).

Mr. Reagan described the FJC's report to the rules committees as explaining what the FJC is doing so that the committees know what it can do and what the committee can ask it to do. The report also contains information about educational activity by the FJC, because one often hears at meetings of the rules committee that education rather than a rule amendment is the proper response to a problem. (Agenda book page 35).

Judge Eid noted the draft minutes of the meeting of the Standing Committee. (Agenda book page 45). The proposed amendments to Rules 6 and 39 were approved, with very minor tweaks. There was also discussion of the pending amicus proposal, which will be taken up later in this meeting.

II. Approval of the Minutes

The reporter noted two typographical corrections to the minutes of the April 10, 2024, Advisory Committee meeting. (Agenda book page 97). "Team" should be Teams" on page 97 and "undated" should be "updated" on page 98. With these two corrections, the minutes were approved without dissent.

III. Discussion of Joint Committee Matters

Professor Struve provided an update regarding electronic filing and service for self-represented parties. (Agenda book page 117). She noted that there had been a very good discussion at the Bankruptcy Rules meeting; perhaps this group can help with some of the concerns.

The working group has two big ideas. The first is that since filings made by non-electronic filers are uploaded by the clerk's office, triggering a notice to electronic filers, there does not seem to be a need to require the non-electronic filer to make copies and mail them to other parties. The second involves making electronic filing more available to self-represented parties.

The first is reflected in a sketch of a possible amendment to Civil Rule 5. It could be adapted to other rule sets, including Appellate Rule 25. In accordance with a suggestion by Ed Hartnett, the sketch flips the order in current Civil Rule 5, making service pursuant to electronic filing primary, and then listing the other alternatives. It also adds a provision allowing service by email to the address that the court uses for Notices of Filing. Such service by email is conditioned on the sender designating

in advance the email address from which service will be made, enabling the receiver to know that the email is not spam and should not be filtered out.

The second is also reflected in a sketch of Civil Rule 5 that would flip the presumption that a self-represented litigant may not file electronically to a presumption that a self-represented litigant may file electronically. A court's ability to bar self-represented litigants from using the court's electronic filing system would be preserved, but a local rule or general court order doing so would have to either allow reasonable exceptions or allow the use of some other electronic method of filing. There are a wide range of views regarding this second proposal, which is less controversial in this committee, because the courts of appeals have been in the forefront of allowing CM/ECF access.

Members of the Bankruptcy Rules Committee support the idea of access and alleviating unnecessary burdens, but they have some resistance and are concerned about having sufficient safeguards. The full sketch may be too adventurous; perhaps simply flipping the presumption is the place to start.

One possible problem with the service aspect of the proposal is if there is more than one self-represented party in a case. How does a self-represented party know that there is another self-represented party who needs to be served outside of the court's electronic system? When we raised the issue earlier, the district court clerks thought that this was just not a real problem because it would be an issue in so few cases. But in bankruptcy, there may well be multiple self-represented creditors. Is there a technical fix to this problem? Is it a problem only in bankruptcy cases?

Judge Eid invited suggested solutions.

Mr. Wolpert stated that in the Tenth Circuit, a pro se litigant is required to file a consent to electronic service. That goes on the docket with the litigant's email address, so it is clear who has and who has not consented. He understands that things may be different in bankruptcy, but that the additional effort may be worth it compared to the benefit of not having to chase down service issues.

A judge member added that it hasn't been an issue allowing pro se litigants to file in the court of appeals but recognized that it may be different in bankruptcy.

Mr. Wolpert noted that he had some concerns about reasonable conditions, and added that the Tenth Circuit local rules make clear that electronic service is not for case initiating documents, such as those filed under Rules 5, 15, and 21. Professor Struve explained that the point of the "reasonable conditions" provision was to deal with districts that might say, "No, never," and prompt them to do something. Mr. Wolpert replied that this is a wonderful initiative and that the benefits will outweigh the potential for problems.

A judge member asked if anyone was proposing requiring everyone to file electronically, unless allowed not to file electronically. That would solve the notice issue. There is a risk of abuse, but that can be dealt with on an ad hoc basis with individual litigants. Professor Struve stated that she can imagine that world someday, but that we aren't there yet. For many people, their only access to the internet is via a smartphone. Trying to deal with documents on a phone is a recipe for things going disastrously wrong. Such a proposal could cause access problems.

A different judge member added that one kind of reasonable restriction is to limit access to the litigant's own case. That is especially important for prisoners, who may try to learn about cooperating witnesses. A mandate would not work for them. Barring case initiating documents is another reasonable restriction, but case initiation can be done via a form on a website, thereby creating legible filings.

Mr. Wolpert noted that electronic filing is not a problem for appellate courts and that it is nothing but positive. With regard to service by litigants using the email address used by the court, he added that he didn't see a need for a provision requiring the designation for a sending email address. It should be on lawyers to manage their spam filters, just as they have to deal with junk mail.

Professor Struve invited any other input, including any drafting particulars, via email.

Mr. Byron presented an update concerning privacy matters. (Agenda book page 131). The reporters' working group has been considering the suggestion by Senator Wyden that courts require the complete redaction of social security numbers, not simply redaction of all but the last four digits. That proposal was not immediately acted upon so that the working group could consider a more general review of privacy concerns across all four sets of rules.

The working group considered a variety of potential issues—including ambiguity in the existing exemptions, the scope of the existing waiver provision, the possible expansion of protected information subject to redaction, and the possible addition of other categories of information to be protected—but did not identify a real-world problem demonstrating a need for amendment. It therefore recommends not addressing these additional issues at this time.

Mr. Freeman asked what would be a demonstrated need in this area, a data breach? Mr. Byron responded that the general approach is to look for real world problems that a rule amendment can solve, but he acknowledged that a different approach might be appropriate here: taking a prophylactic step to protect personal information. Mr. Freeman suggested that dates of birth, for example, might be protected.

A liaison member agreed with Mr. Freeman. With the ability to scrape information and attack people for filing, it may be especially important to consider the exemption for court records. Mr. Freeman added, for example, that one court of appeals that requires personal phone numbers on oral argument forms does not make those numbers publicly available.

Professor Struve presented the report of a joint subcommittee on attorney admission. (Agenda book page 140). This joint subcommittee includes members of the Criminal, Civil, and Bankruptcy Rules Committees, and has been considering a suggestion to make it easier to become a member of a district court's bar. A major issue involves districts that require admission to the state bar where the district court is located—especially if that state requires lawyers admitted elsewhere to take the local bar exam. This is not an item for the Appellate Rules Committee, because Appellate Rule 46 makes an attorney eligible for admission to the bar of a court of appeals if the attorney is admitted in any state. Other committees have discussed this issue, including whether admission to the bar of a district court is within the scope of the Rules Enabling Act.

This committee might have experience with Appellate Rule 46, including problems, that would be relevant. A judge member noted that he has chaired the grievance committee in the Second Circuit and that it is very active, with a central staff, an attorney's committee for factfinding, hearings, and reports, and close cooperation with the state bars.

A different judge member noted in the Ninth Circuit they have a different process and are hampered by some state bars. District courts would not want such changes. Pro hac vice lawyers can be a problem, and referrals to bars outside the state are not very effective. Professor Struve noted that it is frequently said that it is a very different world in the district courts than in the courts of appeals.

Mr. Wolpert stated that Rule 46 works fine. When problems arise, it is important to remember that Rule 46 sets forth eligibility requirements but does not require admission. For example, someone was admitted to a tribal court, used that to become in-house in Wisconsin, and used that (in turn) to be admitted to the Eastern District of Wisconsin, but had never taken a bar exam. The Court of Appeals for the Tenth Circuit denied admission.

IV. Discussion of Matters Published for Public Comment

A. Amicus Briefs—Rule 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-B; 23-AP-I; 23-AP-K)

The Reporter presented the report of the amicus subcommittee. (Agenda book page 170). Proposed amendments to Rule 29 were published for public comment. (Agenda book page 173).

The proposed amendments address two major areas.

First, they address disclosures by amici. The committee has been working on this issue for years. It has received considerable feedback from the Standing Committee that has been incorporated into the proposal published for public comment. As of the meeting of the subcommittee, we had received two comments (in addition to ones received before the comment period opened and docketed as new suggestions). Since then, more have come in. We expect still more before the comment period ends on February 17, 2025. We also expect that there will be people who wish to testify at the hearing scheduled for January and February of 2025.

Second, the proposed amendments address an issue that arose later in the process, whether to change the requirements for filing an amicus brief. Current Rule 29(a)(2) permits a nongovernmental party to file an amicus brief during a court's initial consideration of a case either by making a motion or by obtaining the consent of the parties. Current Rule 29(b)(2) requires a motion at the rehearing stage.

The proposal published for public comment would eliminate the consent option from Rule 29(a)(2), requiring a motion during a court's initial consideration of the case. There was substantial concern about this proposal at the Standing Committee, particularly about the additional work for lawyers and courts on motions that are not currently required.

The Reporter suggested that the Advisory Committee might wish to focus its discussion on the second issue. It has discussed the first issue at length, and will revisit it in light of full public comment. But it has not discussed the second issue as extensively and may want to consider the concerns of the Standing Committee.

A judge member stated that he had no problem with the disclosure requirements. The consent option is an issue in the Ninth Circuit and other circuits. An amicus brief that is filed by consent can lead to the recusal of a judge. In one case, an amicus brief required the recusal of 10 judges. Striking a brief doesn't solve the problem, especially at the en banc stage. A judge who is recused is not eligible to be drawn for an en banc panel. If as many as 10 judges are recused from being eligible to be drawn, something is amiss.

And the consent option does affect cases from the beginning. Many judges in the Ninth Circuit are recusal hawks. The computer program checks for recusals and will block a case from being assigned to a judge before the case is assigned to a panel. No judge decides whether to strike the brief; the judge is stricken at the outset as a result of the consent of the parties. The Court of Appeals for the Ninth Circuit is considering a local rule that would eliminate the consent option. The attorney advisory group is supportive. Whatever happens with the national rule, there should be at least a Ninth Circuit carve out.

Mr. Wolpert favored eliminating the consent option. The Tenth Circuit also has recusal hawks. Having a single track for amicus briefs and requiring a motion would be good.

A different judge member from a different circuit agreed that requiring a motion at both the initial hearing and rehearing stage should be required.

A liaison member noted that he has had a brief bounced at the panel stage because a judge would otherwise be recused. Apparently, different circuits do things differently. Would the result of eliminating the consent requirement be that, in the Ninth Circuit, if any judge were recused, the brief would be bounced?

The first judge said no. Instead, eliminating the consent option would give a judge the option to decide whether to recuse or not and whether to strike the brief. The point is to have a judge decide rather than simply have the computer not assign the judge in the first place.

The liaison member suggested surveying the circuits for the Standing Committee. Judge Bates added that it is important to get some sense of every circuit; at least one had a quite different reaction at the Standing Committee.

The liaison member added that a motion is not a major undertaking, but that local rules generally require stating the position of other parties regarding a motion, so it will be necessary to ask for consent anyway.

Mr. Wolpert noted that if the position he favors—eliminating the consent option—does not carry the day, he can manage.

A circuit judge added that circuits should be allowed to opt out. Some states hire law firms in order to knock out certain judges. If a circuit assigns cases to panels as they come through the door, consent amicus briefs are okay. But if a circuit assigns cases to panels later, the result can be that a judge gets disqualified without any involvement in that decision.

The Reporter asked and received confirmation that the Advisory Committee did not want to discuss the disclosure amendments today, but instead would await full public comment.

B. Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

The Reporter stated that the IFP subcommittee did not meet to discuss the proposed amendments to Form 4 because no comments had been received before the agenda materials were prepared. (Agenda book page 228). Since then, one favorable comment has been received.

The Advisory Committee declined to discuss the proposed amendments at this time, awaiting the completion of the public comment period.

The Advisory Committee took a short break before resuming at approximately 10:45.

V. Discussion of Matters Before Subcommittees

A. Intervention on Appeal (22-AP-G; 23-AP-C)

Mr. Freeman presented the report of the intervention on appeal subcommittee. (Agenda book page 235). There is currently no Appellate Rule governing intervention, other than Rule 15 which sets a deadline but no criteria for intervention in agency cases. In the past, the Advisory Committee decided not to pursue creating a new rule governing intervention on appeal.

At the last meeting, we decided to step back and ask, "What is the problem?" Judge Bybee asked the FJC to research the actual circumstances in which intervention is sought. The vast majority of decisions on such motions are not reported, so the FJC can use its access to ECF filings and dispositions. We will hear about the FJC research in a moment. The Reporter did some research into reported cases, and Mr. Freeman gathered information from the Department of Justice.

That DOJ information is not complete or systematic. But the impression it provides is that the cases in which intervention on appeal is sought fall into distinct categories.

First, there are big national cases where an ideological plaintiff or a state files a case and later there is a change in the administration of the government (President or Governor) whose law or policy is challenged. These are high profile, but small in number.

Outside of these cases, there does not seem to be a functional problem,

There are agency direct review cases. Here, the person who lost before the agency seeks review, and the person who prevailed before the agency seeks to intervene to support the agency. The court of appeals is the first Article III court to consider the case, and the proposed intervenor participated in and shaped the record in the agency proceeding.

There are cases presenting constitutional challenges and the government entity whose action is being challenged seeks to intervene. These are typically granted. Similarly, sometimes the interest of a foreign sovereign or a tribe becomes clear for the first time on appeal.

There are environmental cases involving matters such as grazing rights. These tend not to be problematic because the interests are quite concrete. They tend to be resolved the way we would expect: if the person passed up an opportunity to intervene in the district court, the motion is denied. But if it just became clear now that the person's interests are at stake, the motion is granted.

Another set of cases involves persons who move to appeal in the court of appeals rather than appeal from the denial of intervention in the district court (with its deferential standard of review). These motions are typically denied.

The first category might become much larger. But creating a rule might invite more opportunistic behavior.

The report identifies some possible takeaways.

First, it might be that agency review cases are sufficiently different that they can be handled separately from appeals from district courts. The FJC research is relevant here.

Second, there are some recent cases in which some judges appear to view Civil Rule 24 as applying to intervention on appeal more of its own force, as opposed to the traditional statement that intervention on appeal is available only in exceptional cases for imperative reasons. If that view prevails in a circuit, clarification may be particularly important.

Third, the problem of intervention on appeal may be acute in cases involving universal remedies. One common response 15 years ago to a motion to intervene would be, "File your own lawsuit, and appeal." But if the remedy at issue applies to you already, your desire to intervene increases. We may want to see how this plays out. In the *Labrador* case, five justices expressed interest in prohibiting such remedies, but have not done so yet. There is some movement on that front.

Mr. Reagan from the FJC began by stating that the FJC provides objective independent research; it does not solve problems identified by an Advisory Committee

or tell an Advisory Committee what to do. The FJC has access to all cases, run of the mill cases, not just those few that result in decisions on Westlaw or memorable cases. So far, he has done a feasibility study to see what can be done, checking all docket sheets in a given period for the string "interven"; that string should appear on the docket of any case where there is a motion to intervene. He has selected random cases from that group. They fall into two major categories, agency appeals and appeals from district courts in civil cases. There does not appear to be a significant issue in criminal cases. Going forward, he can be more targeted on civil appeals in all circuits.

Circuits vary on who decides motions to intervene: 3 judge panels, 2 judge panels, single judges, and the clerk. Except in the Sixth Circuit, which issues short opinions, there are almost never reasons.

His plan is to use a filing cohort, appeals that were filed during a certain period. He noted that the Reporter had pointed out that we might be interested in motions to intervene late in a case. At some point, it might be worth looking at a termination cohort. But he does not want to start there, because some recently terminated appeals may involve appeals filed decades ago. He expects that it would be a one-to-two-year project; if the committee would like, he would be happy to do it.

Judge Bates asked Mr. Freeman if he was lumping together vacatur of agency rules with universal injunctions. Mr. Freeman responded that there is pressure on both, but that they might change differently, referring to the quip that DC circuit judges vacate 5 rules before breakfast. Nationwide injunctions are declining sharply; vacatur may continue. A lawyer member of the committee expressed interest in this area, noting that apart from the issue of universal injunctions, there are different approaches in the circuits. It would be nice to have a uniform rule.

Mr. Freeman stated that nationwide courts draw on Civil Rule 24 and that there is a body of caselaw that says that intervention on appeal should be rare. Adopting a rule can change behavior, not only based on the content of the rule, but the existence of a rule can appear to bless the idea of intervention on appeal and lead to more motions.

A liaison member asked if there was any sense of where the issue is most in play. Sometimes the issue arises at a very late stage, where the government changes position or does not want to seek further review.

Mr. Freeman noted that the Supreme Court has granted cert on this issue three times. There is no political valence; it happens both ways. Often there is a question of timeliness. There is also a question of who represents, and what it means to represent adequately. For example, the SG may decide not to seek en banc rehearing in a particular case, but a private party might care about *this* case.

A different liaison member observed that there is a real difference between cases that originate in the courts of appeals (where the DOJ is okay with intervention) and cases in the district court seeking universal vacatur (where the DOJ often opposes intervention). He agreed with Judge Bates that the APA is different. He is more concerned that once a district judge grants a universal remedy, people want to intervene. If the government accedes to a universal remedy, that can be a shortcut to repealing a rule and avoiding notice and comment.

There are a bunch of cases where the issue arises, and there is a serious problem with the lack of standards. The stakes of the case have changed, or the government's position has changed. There are reasons to have a rule that addresses it. Civil Rule 24 isn't focused on the key issue of what changed.

Judge Bates added that he sees the merits of a broad intervention rule. Maybe there are three or four different rules, dealing with agency cases, APA cases that were filed in the district court, universal injunctions, and the rest of the civil docket.

A liaison member noted that it is kaleidoscopic. But it is possible to find general principles. Civil Rule 24 has sort of worked to focus the inquiry. Keep Rule 15 the way it is; focus on other cases. I think it is possible to identify the process and considerations and provide a structure.

Mr. Freeman stated that he appreciated the comments. There are several different problems. Civil Rule 24 is ambiguous; it uses the term "interest," not "legal interest," but the Supreme Court in *Cameron* used the phrase "legal interest." The subcommittee does not want take a position on Civil Rule 24 or replicate its problems. If someone who seeks intervention is denied in the district court, the proposed intervenor can appeal. If intervention is granted, the intervenor is a party, is bound by the judgment, and engages in discovery.

But the DOJ thinks that is different on appeal. Someone who has not been a part of discovery in the district court and is not bound by the district court judgment now seeks to intervene. That feels different, including as a matter of fairness to litigants. What is an appeal? It is a proceeding to determine whether there was error in the judgment. Intervenors with new claims and theories are not showing that there was error in the district court's judgment.

Settlement presents different questions, questions that the Supreme Court has been unable to resolve.

Is there a useful rule that we could draft, putting aside agency cases? It could require timeliness, reasons, interest, why amicus status is insufficient, and state that allowing intervention on appeal is uncommon. The hard question is what interests are sufficient. Some are not controversial. But should the possibility of a future claim against the proposed intervenor be enough?

The Reporter asked if the consensus was that the FJC should continue its work but not focus on appeals from administrative agencies that go directly to the courts of appeals. Mr. Freeman said yes, but that some agencies, like the NLRB, are structured so that they bring enforcement proceedings in the courts of appeals.

Mr. Reagan stated that, methodologically, the FJC would continue to look at all case types. Concentration on case types of greatest interest can come later.

A judge member stated that we have not answered the earlier question of the liaison member. In hard cases, courts are probably asking the right questions in the absence of a rule. Is there some benefit here, some problem being fixed, other than that there is no rule. By comparison, in the costs on appeal area, the Supreme Court had identified a problem. Maybe the absence of a rule is enough, but there are possible negative effects. Can we set a standard that we all agree is correct? Can we get there? Will it dictate particular outcomes?

Mr. Freeman stated that he has the same questions. A draft could clarify that there are two aspects to the timeliness analysis, both timely in the appeal and timely in the case as a whole. There is also the harder question of what is a valid basis for intervening.

The Reporter said that on the harder question, there is the hope of limiting the range of debate. Even if the question of whether an interest is sufficient is a hard question in particular cases, a rule might avoid replicating the ambiguity of Rule 24 and make clear that only a legal interest counts. That would be especially useful if a court of appeals adopts the apparent view of some circuit judges that Rule 24 applies without the filter of "exceptional cases for imperative reasons."

There are two possible developments that the committee might decide to wait for. First, there are some circuit judges who seem to view Civil Rule 24 as more directly applicable and therefore view intervention on appeal more widely available than the traditional doctrine that calls for intervention on appeal to be rare. The committee might wait to see if that view ever carries the day in a circuit. Second the committee might wait to see what develops regarding universal or nonparty injunctions. Should we wait? Or should we keep going, knowing that the need will be greater or less depending on those developments?

A liaison member said that the timelines question is a real question. Plus a rule can put the right factors on the table and be more cabined. A lawyer member added that borrowing from Civil Rule 24 is not doing everything we need in this context, and that while a definitive new rule might be too difficult, a new rule might be able structure the analysis, make clear that most prior caselaw is still good law, and help frame things,

A judge member noted that this proposal puts pressure on the question of whether there is really a problem. If there had been a rule in place for 50 years, that would be great, but we don't. Maybe the absence of a rule is itself enough of a problem.

Judge Bates observed that it is about more than just timing. Some problems cannot be solved by a rule. We won't solve government transitions by rule.

Mr. Freeman stated that a rule may not be worth the candle. But it could require timeliness, make clear that intervention on appeal is rare, that intervention requires showing that amicus participation is not adequate, and clarify that an interest in precedent is not enough. There are then the harder questions about the nature of the interest. There is not a reason to give up yet.

A judge member stated that he did not favor tabling the matter. We should keep thinking about it and trying to size it correctly. The subcommittee should keep thinking, with the FJC's research, and we should talk about it again in six or twelve months.

A different judge member noted that intervention on appeal comes in so many different flavors that it is hard to craft a rule that applies to all cases. Sometimes someone will seek to intervene solely to be able to file a cert petition. Courts can reach a fair resolution in the absence of a rule. A rule could produce a lot more motions to intervene.

Mr. Reagan confirmed that the FJC was happy to continue to work on this project. It's busy, but busy doing things like this.

B. Rule 15 (24-AP-G)

Professor Huang presented the report of the Rule 15 subcommittee. ((Agenda book page 271). The subcommittee is considering a suggestion to fix a potential trap for the unwary in Rule 15. The "incurably premature" doctrine, which governs in the D.C. Circuit and maybe in others, holds that if a motion to reconsider an agency decision makes that decision unreviewable in the court of appeals, then a petition to review that agency decision is not just held in the court of appeals awaiting the agency's decision on the motion to reconsider. Instead, the petition for review is dismissed, and a new petition for review must be filed after the agency decides the motion to reconsider.

Rule 4, dealing with appeals from district court judgments, used to work in a similar way with regard to various post-judgment motions. But in 1993, Rule 4 was amended to provide that such a premature notice of appeal becomes effective when the post-judgment motion is decided. The suggestion is to do for Rule 15 what was done for Rule 4.

Mark Freeman and his team discovered that this suggestion was previously made by Judge Williams in 1995. Some of the material from the committee's prior consideration of that suggestion is in the agenda book at page 202. The suggestion advanced far enough to be published for public comment, and the latest version of the proposal before the committee is in the agenda book at page 272.

The committee dropped the proposal due to the strong opposition of the D.C. circuit judges who were active at the time. Based on a reading of the minutes from that prior consideration, it seems that the committee favored the proposal and was not terribly persuaded by the D.C. circuit judges. But it nevertheless dropped the proposal due to their opposition.

The subcommittee thinks that it could make some changes to improve the prior proposal and is open to studying the matter further. Technology and administrative changes might reduce the concerns that motivated the D.C. circuit judges in the past. Plus, while this is very much a D.C. Circuit issue, a broader range of circuits deal with agency challenges. Should we see what that D.C. Circuit thinks now? Its docketing statement asks if there has been a motion for reconsideration.

A judge member noted that this is not just a D.C. Circuit issue. Some 38% of the cases in the Ninth Circuit are agency cases. A different judge member noted that he is open to taking a look at this. A liaison member added that the D.C. Circuit is not as dominant in this area as it used to be. Mr. Freeman observed that he is not sure that the issue arises in immigration cases, with a judge member adding that in the immigration context a motion for reconsideration does not affect the finality of a removal order. Mr. Freeman added that the governing statutes vary on this issue from one agency to another. The doctrine puts the government in an uncomfortable position of winning by default rather than on the merits. It is particularly uncomfortable dealing with self-represented litigants who ask if their petition for review is still good; DOJ can't give them legal advice, but there is a trap for the unwary.

A judge member noted that the subcommittee report which suggests (Agenda book 273) that a premature petition could be "treated as filed" on the date the reconsideration motion is decided doesn't solve the problem. There is still an open appeal that is abated. Professor Huang responded that the time it is deemed filed may affect things other than the stats, such as the statute dealing with petitions filed in multiple circuits. The subcommittee has not studied that possible interaction.

Judge Eid said that she would follow up with chief judge of the D.C. Circuit. Judge Bates suggested other circuits would be interested as well. A judge member noted that the Ninth Circuit sees lots of FERC cases.

The committee took about a one-hour break for lunch and resumed at approximately 1:05.

VI. Discussion of Recent Suggestions

A. Reopening Time to Appeal (24-AP-M)

The Reporter presented a new suggestion from Chief Judge Sutton regarding Rule 4. (Agenda book page 292). Rule 4(a)(6) permits a district court to reopen the time to appeal in limited circumstances. In the *Winters* case [*Winters v. Taskila*, 88 F.4th 665 (6th Cir. 2023)], a habeas petitioner did not receive notice of the district court's decision denying relief until long after the time to appeal. The court of appeals held that the district court properly treated the notice of appeal as a motion to reopen the time to appeal and granted that motion. There was no need to file an additional notice of appeal because the original notice of appeal ripened once the motion to reopen the time to appeal was granted. In addition, the notice of appeal was construed as a request for a certificate of appealability.

Chief Judge Sutton noted that one could fairly wonder about allowing a single two-sentence document to be a notice of appeal, a motion for an extension of time, a motion to reopen, and a request for a certificate of appealability. He pointed out the lack of agreement in the courts of appeals on these issues, and suggested this committee take a look.

Later, the Court of Appeals for the Fourth Circuit insisted that an appellant must file a notice of appeal after a motion to reopen the time to appeal is granted—and cannot rely on an earlier notice of appeal that was treated as a motion to reopen. [*Parrish v. United States*, No. 20-1766, 2024 WL 1736340 (4th Cir. Apr. 23, 2024)]. Judge Gregory, joined by three other judges, dissented from rehearing en banc, and urged this Committee to provide guidance.

In light of these opinions, the Reporter suggested the creation of a subcommittee. Judge Eid appointed Mr. Hicks, Judge Nichols, Judge Wesley, and Mr. Wolpert.

B. Administrative Stays (24-AP-L)

The Reporter presented a suggestion by Will Havemann to amend Rule 8 to provide limits on administrative stays. (Agenda book 307). Several justices of the Supreme Court have noted problems with the use of administrative stays. A rule could make clear the purpose of administrative stays and perhaps limit their length, by analogy to the way Civil Rule 65 treats TROs. Mr. Freeman agreed that the matter deserves exploration, even if the rules may not be able to solve all the issues.

Judge Eid appointed a subcommittee consisting of Mr. Freeman, Professor Huang, and Mr. Pincus.

C. Various Suggestions from Sai (24-AP-H through K)

The Reporter presented a series of suggestions from Sai. (Agenda book page 237).

Sai suggests that filings avoid using all caps for the names of persons and that proper diacritics be used. Sai appears to be correct, but there is a question whether this is the sort of problem that is well addressed through rule making. Rule 32 does have some rather precise formatting requirements.

In response to a question, Mr. Wolpert stated that courts of appeal use the district court docket to set up the docket in the court of appeals. He worried about policing the kinds of requirements suggested. A judge member agreed that Sai's approach is better, but deferred to Mr. Wolpert, not wanting to give the clerk's office one more task in bouncing briefs.

The Reporter mentioned that there is a typography guide in the Seventh Circuit. A lawyer member did not think that this is much of an appellate problem.

Without opposition, the committee agreed to remove this item from its agenda.

Sai suggests that many local rules are universal or nearly so and could usefully be moved into the national rules. A judge member stated that there does not appear to be an identified problem and without that would not undertake such significant work. A lawyer member agreed that it would be a lot of work, and he wasn't sure what the payoff would be without a real problem. The judge member moved to remove the item from the agenda, and the Committee agreed without opposition.

Sai suggests that, where the various rules have similar provisions, they be moved to a set of Federal Common Rules. That way, instead of having to coordinate any changes to such provisions across the various rule sets, they could be done in one place. The individual rule sets could provide for differences from the Common Rules where appropriate. If starting from scratch, there is much to be said for such an approach. It is, for example, the way that New Jersey Court Rules work. A judge member agreed that this makes sense in an ideal world. But it would be a lot of work, a massive undertaking, and there is no particular problem. It's not worth the candle. The Committee, without opposition, approved a motion to remove the item from the agenda.

Sai suggests standardizing the page equivalents for words and lines in the various provisions of the Federal Rules. The ratio of words to page in some rules is 260, but in another is about 433 words per page. Sai also suggests eliminating the option of using monospace.

Professor Struve explained that reducing length limits for briefs was the most contentious issue this Committee has faced. The 260-word ratio was selected as the most accurate one; the 30 page limit (which results in the 433 word/page ratio) was chosen as a safe harbor.

The Reporter suggested that it could be simplified today, with the greater availability of word processing. Only briefs prepared without a word processor would need a page or line count option. Mr. Freeman asked how many non-word-processed briefs are filed. Mr. Wolpert responded that they are mostly by pro se prisoners. If someone uses a word processor, they can use the word limits.

The Reporter suggested that the word limits could be made primary, and the page limit available only for those submitting non-word-processed briefs. Professor Struve said that those who made the earlier changes thought that's what they were doing.

A judge member suggested that there was no real problem and not worth it. A different judge member suggested that maybe everyone should have to comply with the word limit; what would happen if a self-represented person simply stated a word count? Mr. Wolpert said that the clerk's office would generally trust that word count unless a judge cried foul. There is not a problem that needs fixing; he has never seen a line count and doesn't know what monospace is.

Mr. Freeman clarified that if the word to page ratio were fixed, that would allow for more pages by pro se litigants. A lawyer member wondered whether any pro se briefs were long enough for this to matter.

The Committee, without opposition, approved a motion to remove the item from the agenda.

D. Standard of Review (24-AP-E)

The Reporter presented a suggestion from Jonathan Cohen that Rule 28, which requires a statement of the standard of review, be amended to provide guidance about those standards. (Agenda book page 334). He doubted the Federal Rules of Appellate Procedure were an appropriate vehicle for such guidance, but perhaps brief mention of the major examples of standards of review could be helpful to litigants.

A judge member stated that he would not want a brief from someone who needs this and that there is no identified problem. A lawyer member agreed, adding that it could be distracting and invite lots of discussion. Mr. Freeman stated that the most useful clarification regarding standards of review could be whether it should be a freestanding part of the brief or part of the argument section. It seems that whichever one is picked, the brief gets bounced. This is a local rules matter.

The Committee, without opposition, approved a motion to remove the item from the agenda.

VII. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter directed the Committee's attention to a table of recent amendments to the Appellate Rules. (Agenda book page 339). This matter is placed on the agenda to provide an opportunity to discuss whether anybody has noticed things that have gone well or gone poorly with our amendments. No one raised any concerns.

VIII. Old Business

The Reporter suggested formal action on suggestions that had been previously considered by not formally acted upon. (Agenda book page 342). These include two suggestions that are being held awaiting action by the Criminal Rules Committee (24-AP-B and 24-AP-C), a comment regarding amicus briefs that was submitted prior to the publication of a proposal for public comment that has been treated as comment by the amicus subcommittee (24-AP-D), and a belated comment on Rule 39 (24-AP-F).

No member of the Committee voiced any concerns about these actions. Mr. Byron stated that no formal action was required on the first three. A judge member moved to remove the final item from the agenda. This motion was approved without opposition.

IX. New Business

No member of the Committee raised new business.

X. Adjournment

Judge Eid thanked everyone for their hard work. She announced that the next meeting will be held on April 2, 2025. The location has not been decided, but it will most likely be somewhere east of the Mississippi.

The Committee adjourned at approximately 1:50 p.m.

TAB 4

TAB 4A

MEMORANDUM

DATE: March 7, 2025

TO: Advisory Committees on Civil, Criminal, and Appellate Rules

FROM: Catherine T. Struve

RE: Project on service and electronic filing by self-represented litigants

As the Committees know, the project on service and electronic filing by self-represented litigants ("SRLs") has two basic goals. As to service, the goal is to eliminate the requirement of separate (paper) service (of documents after the case's initial filing) on a litigant who receives a Notice of Filing through the court's electronic-filing system or a court-based electronic-noticing program. As to filing, the idea is to make two changes compared with current practice: (1) to presumptively permit SRLs to file electronically (unless a court order or local rule bars them from doing so) and (2) to provide that a local rule or general court order that bars SRLs from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

This memo sets out sketches for how those goals might be implemented in the Civil, Criminal, and Appellate Rules. During the fall 2024 advisory committee discussions, the Bankruptcy Rules Committee decided that it was not ready to endorse either aspect of this program for adoption as part of the Bankruptcy Rules. By contrast, the Civil, Appellate, and Criminal Rules Committees – which met subsequently – indicated willingness to proceed with the proposed amendments. At its January 2025 meeting, the Standing Committee discussed whether it would be justifiable to proceed with proposed amendments to the Civil, Appellate, and Criminal Rules if the Bankruptcy Rules were not correspondingly amended. The Standing Committee did not express opposition to such an approach.

At its upcoming spring meeting, the Bankruptcy Rules Committee will assess whether the decision of the other three advisory committees might provide a reason to reconsider its skepticism about the proposed amendments. In a separate memo[1] I discuss two different packages of amendments to the Bankruptcy Rules – one that would parallel the proposed

1 The copy of this memo submitted for potential inclusion in the agenda books of the Appellate and Civil Rules Committees will enclose that memo.

amendments that will be considered by the Civil, Appellate, and Criminal Rules Committees, and an alternative that could be adopted if the Bankruptcy Rules Committee instead adheres to its decision not to implement the proposed filing and service changes at this time. Because of the uncertainty surrounding what the Bankruptcy Rules Committee will decide, this memo assumes that the Bankruptcy Rules Committee might decide to adhere to its prior decision, and offers suggestions for consideration by the Appellate Rules Committee in case that occurs.

This memo sketches possible amendments to the Civil, Criminal, and Appellate Rules that would achieve the twin goals of the project. As participants in this project are aware, the service and filing rules in those sets of rules are very similar but not identical. As discussed during the Standing Committee's January 2025 meeting, this project does not seek to eliminate existing variations among the sets of service and filing rules. In a number of instances those variations likely reflect salient differences among the contexts of the different rule sets. Rather, the sketches in this memo attempt to transpose into each rule set the key features of the SRL service and e-filing project.

As an update on relevant recent work by the Federal Judicial Center, I also wanted to mention that Tim Reagan has prepared a new report, "United States District Courts' Local Rules and Procedures on Electronic Filing by Self-Represented Litigants,"[2] which discusses relevant local rules and procedures in all of the 94 district courts. And he reports that the FJC's Education Division is planning an episode of its documentary program, "Court to Court," on self-represented litigants' use of CM/ECF. The focus of the episode will be showing how a district court can successfully allow self-represented litigants access to electronic filing. That development helpfully responds to suggestions made in the fall 2024 meetings concerning the benefits of court education on this topic.

Because this memo is lengthy, here is a table of contents:

2 The report is available at https://www.fjc.gov/content/391989/united-states-district-courts-local-rules-and-procedures-electronic-filing-self .

I. Changes made since the prior draft of Civil Rule 5

This section briefly notes substantive differences between the Civil Rule 5 draft set out in Part II.A and the Civil Rule 5 draft that was included in the fall 2024 agenda books. (I am not specifically noting style changes, but I thank the style consultants for their excellent guidance.)

The fall 2024 draft included – as an option for making service – sending a paper "by email to the address that the court uses to email Notices of Filing – so long as the sender has designated in advance the email address from which such service will be made." This option came in for some criticism during the fall advisory committee meetings. A judge member of the Bankruptcy Rules Committee stated that the provision was confusing. In the Appellate Rules Committee meeting, the Committee's Clerk of Court representative also expressed reservations about the provision's workability in practice. In addition, the style consultants proposed changes that indicated they, too, found the provision confusing as drafted. To streamline the proposal and avoid distracting from the needed innovations that the core proposals will accomplish, I propose that we delete this provision from the drafts.

In the fall agenda book, proposed Civil Rule 5(d)(3)(B)(ii) referred to a "general court order." The style consultants pointed out that "general court order" doesn't appear elsewhere in the rules. I've tentatively changed it to "a local rule – or any other local court provision that extends beyond a particular litigant or case –" (see Part II.A, lines 85-87). This phrasing is intended to capture the fact Rule 5(d)(3)(B)(ii) is talking about court orders or rules that are not specific to a given litigant or case.

In the prior draft of Civil Rule 5, as in the draft set out here, subdivision (b)(3)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served," but no such proviso is included in new subdivision (b)(2). I have added a paragraph to the Committee Note to Rule 5(b)(3)(E) to explain this difference.

II. Civil Rules: Amendments to Civil Rule 5 (plus a conforming amendment)

Part II.A sets out the sketch of Civil Rule 5, revised in light of guidance from the style consultants. Part II.B sets out the conforming amendment to Civil Rule 6.

A. Civil Rule 5

Here is the sketch of the Civil Rule 5 amendments:

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) <u>Service by a Notice of Filing Sent Through the Court's Electronic-Filing System.</u>

<u>A notice of filing sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But a court may provide by local rule that if a paper is filed under seal, it must be</u>

served by other means.

(3) Service by Other Means ~~in General~~. A paper ~~is~~ may also be served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address – in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) ~~sending it to a registered user by filing it with the court's electronic filing system or~~ sending it by ~~other~~ electronic means that the person has consented to in writing – in ~~either of~~ which event~~s~~ service is complete upon ~~filing or~~ sending, but is not effective if the ~~filer or~~ sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person has consented to in writing – in which event service is complete when the person making service delivers it to the agency designated to make delivery.

~~**(3) Using Court Facilities.** [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.]~~ **(4) Serving**

Papers That Are Not Filed. Rule 5(b)(3) governs service of a paper that is not filed.

(5) Definition of "Notice of Filing." The term "notice of filing" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

(A) Papers ~~after~~ After the Complaint. Any paper after the complaint that is required to be served must be filed no later than[3] a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) Certificate of Service. No certificate of service is required when a paper is served under Rule 5(b)(2)~~by filing it with the court's electronic-filing~~

3 The style consultants had suggested changing "no later than" to "within." However, it subsequently occurred to me that "within" would not work. Typically service occurs simultaneously with filing (because both occur at the same moment through the court's electronic-filing system). In such typical instances, I don't think that a simultaneous service would occur "within" any amount of time "*after*" service. Cf. the 2023 amendment to Civil Rule 15(a)(1).

~~system~~. When a paper that is required to be served is served by other means:

(i) if ~~the paper~~ it is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if ~~the paper~~ it is not filed, a certificate of service need not be filed, unless filing is required by court order or by local rule.

(2) ~~Nonelectronic Filing.~~ ~~A paper not filed electronically is filed by delivering it:~~

~~(A) to the clerk; or~~

~~(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.~~

~~(3)~~ Electronic Filing and Signing.

(A) By a Represented Person—Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) By ~~an Unrepresented~~ a Self-Represented[4] Person—When Allowed or

4 The current rules use "unrepresented" to refer to a litigant who does not have a lawyer. With the concurrence of the style consultants, I propose that we instead use "self-represented." "Self-represented" recognizes that the litigant is advocating on the litigant's own behalf. The Latin term "pro se" means "for oneself," which is closer to "self-represented" than "unrepresented." Courts and legal organizations increasingly use "self-represented" to describe pro se litigants. See, e.g., https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/self-represented-litigants. And the entry in Black's Law Dictionary for "pro se litigant" includes "self-represented" but not "unrepresented": "pro se litigant (1857) One who represents oneself in a court proceeding without the assistance of a lawyer <the third case on the court's docket

Required.

(i) **In General.** A self-represented person ~~not represented by an attorney: (i)~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system [to file papers[5] and receive notice of activity in the case],[6] unless a court order or ~~by~~ local rule prohibits the person from doing so.~~; and (ii)~~ A self-represented person may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) **Local Provisions Prohibiting Access.** If a local rule – or any other local court provision that extends beyond a particular litigant or

---

involving a pro se>. — Often shortened to pro se, n. — Also termed pro per; self-represented litigant; litigant in propria persona; litigant pro persona; litigant pro per; litigant in person; (rarely) pro se-er." Black's Law Dictionary (12th ed. 2024) (Bryan A. Garner, Ed. in Chief).

5 Previous drafts have used "document," but it came to my attention that the rules we are thinking of amending take two different approaches. Bankruptcy Rule 5005, Civil Rule 5, Criminal Rule 49, and (in the main) Appellate Rule 25 use the word "paper," while Bankruptcy Rules 8011 and 9036 use the word "document." On the theory that internal consistency within a rule may be more valuable on this point than consistency across rules, this memo and my companion memo on the Bankruptcy Rules use "paper" when sketching amendments to Bankruptcy Rule 5005, Civil Rule 5, Criminal Rule 49, and Appellate Rule 25, but use "document" when sketching amendments to Bankruptcy Rules 8011 and 9036. Of course, the style consultants will be key guides on this issue.

6 The previous draft of (B)(i) said "may file electronically." The style consultants pointed out that a reader might think there is a lack of parallelism between this phrase in (B)(i) and the reference in (B)(ii) to the requirement for providing alternatives to CM/ECF access – namely "another electronic method for filing documents and receiving electronic notice of activity in the case." Substantively, one could argue the two are in parallel, because one who is allowed to use the court's electronic-filing system will also receive electronic notices from the court's electronic-filing system. So one could say in (B)(i) simply "use the court's electronic-filing system" (lines 78-79) and it would be implicit that this would also encompass electronic noticing. But it could be useful to also include the bracketed language on lines 79-80, especially since spelling things out may assist SRLs.

case – prohibits self-represented persons from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing [papers] and for receiving electronic notice [of activity in the case].[7]

(iii) **Conditions and Restrictions[8] on Access.** A court may set reasonable conditions and restrictions on self-represented persons' access to the court's electronic-filing system.

(iv) **Restrictions on a Particular Person.** A court may deny a particular person access to the court's electronic-filing system and may revoke a person's previously granted access for not complying with the conditions authorized in (iii).

---

7 On lines 89-90, the style consultants suggest that the bracketed language could be deleted if the bracketed language in (i) is included.

8 The style consultants question whether "conditions and restrictions" is redundant. My initial reason for including both terms is that "conditions" on access occur when the court says that SRLs can only use the system on certain conditions (e.g., on condition that they first take a course), while "restrictions" on access occur when the court says that certain types of SRLs can't use the system (like SRLs who are incarcerated). Professor Kimble suggests, though, that "if you say that X can't use the system, then you're saying that a condition of using the system is that you're not X." He wonders whether there are "other instances in the rules of using 'conditions' without 'restrictions.'"

Two responses to this style suggestion occur to me – one semantic and one practical. The semantic response is that there are examples of existing rules that use a similar distinction. See, e.g., Bankruptcy Rule 4001 (distinguishing between prohibitions and conditions with respect to use, sale, or lease of property). More importantly, the practical response is that this provision is designed to speak not only to clerk's offices but also to self-represented litigants. Using both terms will help to head off arguments by a self-represented litigant that a particular condition or restriction is not authorized under the rules.

(C) Signing. A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(D) Same as a Written Paper. A paper filed electronically is a written paper for purposes of these rules.

(3) Nonelectronic Filing.[9] A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(4) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

Committee Note

Rule 5 is amended to address two topics concerning self-represented litigants. (Concurrent amendments are made to [add cites to Bankruptcy Rules],[10] Criminal Rule 49, and Appellate Rule 25.) Rule 5(b) is amended to address service of documents (subsequent to the complaint) filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 5(b)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice. Rule 5(d) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case. Also, the order of what had been Rules 5(d)(2) ("Nonelectronic Filing") and 5(d)(3) ("Electronic Filing and Signing") is reversed – with (d)(2) becoming (d)(3) and vice versa – to reflect the modern primacy of electronic filing.

9 This provision is currently Rule 5(d)(2) and is being relocated pursuant to the style consultants' guidance and to accord with the ordering in Criminal Rule 49 and with the modern primacy of electronic filing.

10 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

Subdivision (b). Rule 5(b) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision 5(b)(2). Existing Rule 5(b)(2) becomes new Rule 5(b)(3), which continues to address alternative means of service. New Rule 5(b)(4) addresses service of papers not filed with the court, and new Rule 5(b)(5) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (b)(2). Amended Rule 5(b)(2) eliminates the requirement of separate (paper) service (of documents after the complaint) on a litigant who is registered to receive a notice of filing from the court's electronic-filing system. Litigants who are registered to receive a notice of filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 5(b)(2)(E)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 5(b)(2) states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (b)(3). Subdivision (b)(3) carries forward the contents of current Rule 5(b)(2), with two changes.

The subdivision's introductory phrase ("A paper is served under this rule by") is amended to read "A paper may also be served under this rule by." This locution ensures that what will become Rule 5(b)(3) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the notice of filing).

Subdivision (b)(3)(E). The prior reference to "sending [a paper] to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 5(b)(2).

Although subdivision (b)(3)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served," no such proviso is included in new subdivision (b)(2). This is

because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.

Subdivision (b)(4). New Rule 5(b)(4) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 5(b)(2): If a paper is not filed with the court, then the court's electronic system will never generate a notice of filing, so the sender cannot use Rule 5(b)(2) for service and thus must use Rule 5(b)(3).

Subdivision (b)(5). New Rule 5(b)(5) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (d)(1)(B). Subdivision (d)(1)(B) previously provided that no certificate of service was required when a paper was served "by filing it with the court's electronic-filing system." This phrase is replaced by "under Rule 5(b)(2)" in order to conform to the change to subdivision (b)(2).

Subdivision (d)(2)(B). Under new Rule 5(d)(2)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 5(d)(3)(B). That is, under new Rule 5(d)(2)(B)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 5(d)(2)(B)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 5(d)(2)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 5(d)(2)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-

filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 5(d)(2)(B)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 5(d)(2)(B)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 5(d)(2)(B)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

B. Civil Rule 6

As you know, a conforming change to Civil Rule 6 would be necessary in order to update cross-references. That draft has not changed since the version shown in the fall 2024 agenda books:

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(~~2~~3)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Subdivision (d) is amended to conform to the renumbering of Civil Rule 5(b)(2) as Rule 5(b)(3).

III. Criminal Rules: Amendments to Criminal Rule 49 (plus a conforming amendment)

Criminal Rule 49 contains the filing and service provisions for the Criminal Rules. In

transposing the Civil Rule 5 draft into Criminal Rule 49, a few questions arise about the degree of parallelism that we seek to attain. On the whole, it seems wise not to attempt to bring the two rules into complete parallel. Existing differences between the rules were not eliminated during the prior joint projects concerning e-filing rules, and attempting to eliminate all such differences in the context of this project may create a distraction from the project's goals.

A. Criminal Rule 49

Rule 49. Serving and Filing Papers

(a) Service on a Party.

(1) What is Required. Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

(2) Serving a Party's Attorney. Unless the court orders otherwise, when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party.

(3) Service by ~~Electronic Means~~ a Notice of Filing Sent Through the Court's Electronic-Filing System. A notice of filing sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But a court may provide by local rule that if a paper is filed under seal, it must be served by other means.

~~**(A) Using the Court's Electronic-Filing System.** A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon~~

~~filing, but is not effective if the serving party learns that it did not reach the person to be served.~~

~~**(B) Using Other Electronic Means.** A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served.~~

(4) Service by ~~Nonelectronic~~ Other Means. A paper may also be served by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address – in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address; ~~or~~

(E) sending it by electronic means that the person has consented to in writing – in which event service is complete upon sending, but is not effective if the sender learns that it did not reach the person to be served; or

~~(E)~~ (F) delivering it by any other means that the person consented to in writing – in which event service is complete when the person making service

delivers it to the agency designated to make delivery.

[(5) Serving Papers That Are Not Filed. Rule 49(a)(4) governs service of a paper that is not filed.[11]]

(6) Definition of "Notice of Filing." The term "notice of filing" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

(b) Filing.

(1) When Required; Certificate of Service. Any paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served ~~by filing it with the court's electronic-~~

11 The Civil and Criminal Rules take different approaches as to papers that are served but not filed. The Civil Rules take the view that, for example, discovery responses are papers that are served, and so when Civil Rule 5(d)(1) directs that papers after the complaint that must be served must also be filed, it includes an additional sentence listing out items (disclosures, discovery requests, and discovery responses) that mustn't be filed as an initial matter.

Criminal Rule 49, by contrast, does not discuss in explicit terms service of, for example, disclosures under Criminal Rule 16 or production of witness statements under Criminal Rule 26.2. It may be that Criminal Rule 49, unlike Civil Rule 5, simply regards such papers as falling outside its ambit. Rule 49(a)(1)'s list of papers that must be served is: "any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper." By contrast, Civil Rule 5(a)(1)'s list of papers that must be served explicitly includes "discovery paper[s] required to be served on a party, unless the court orders otherwise," Civil Rule 5(a)(1)(C).

This difference might lead to a difference concerning what is shown here as proposed Rule 49(a)(5). Even in Civil Rule 5, it's not clear to me that we really need that provision; it simply makes explicit what is already implicit, namely, that if a document is not filed, then it won't be served on anyone via the court's electronic-filing system. Given the different treatment of the topic of served-but-not-filed documents in the Criminal Rules, I wonder if this provision might be less useful in the context of the Criminal Rules.

~~filing system~~ under Rule 49(a)(3). When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing.

(2) ~~Means of~~ Electronic Filing and Signing.

(A) By a Represented Person – Generally Required; Exceptions. A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.[12]

(B) By a Self-Represented Person – When Allowed or Required.

(i) In General. A self-represented person may use the court's electronic-filing system [to file papers and receive notice of activity in the case], unless a court order or local rule prohibits the person from doing so.[13]

(ii) Local Provisions Prohibiting Access. If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits self-represented persons from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing [papers] and for receiving electronic notice [of activity in the

12 This is currently in Rule 49(b)(3)(A). It is moved here to conform with the goal of the project to foreground e-filing as the primary filing method.

13 This provision carries forward a feature of current Rule 49(b)(3)(B) – namely, the absence of any reference to local provisions requiring a self-represented person to e-file.

case].

(iii) Conditions and Restrictions on Access. A court may set reasonable conditions and restrictions on self-represented persons' access to the court's electronic-filing system.

(iv) Restrictions on a Particular Person. A court may deny a particular person access to the court's electronic-filing system and may revoke a person's previously granted access for not complying with the conditions authorized in (iii).

(C) Means of Filing. ~~**Electronically.**~~ A paper is filed electronically by filing it with the court's electronic-filing system.

(D) Signature. A filing made through a person's electronic-filing account and authorized by that person, together with the person's name on a signature block, constitutes the person's signature.[14]

(E) Qualifies as Written Paper. A paper filed electronically is written or in writing under these rules.

~~**(B)**~~ **(3) Nonelectronic~~ally~~ Filing.** A paper not filed electronically is filed by delivering it:

(i) to the clerk; or

(ii) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

14 Professor Kimble asks how Rule 49(b)(2)(D) relates to Rule 49(b)(4). That thoughtful question seems to me to lie outside the scope of the SRL service and e-filing project. I of course defer to the Criminal Rules Committee as to whether or not it wishes to consider a change in this regard while it is considering the amendments to Rule 49 sketched in this memo.

~~**(3) Means Used by Represented and Unrepresented Parties.**~~

~~**(A) Represented Party.** A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.~~

~~**(B) Unrepresented Party.** A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.~~

(4) Signature. Every written motion and other paper must be signed by at least one attorney of record in the attorney's name--or by a person filing a paper if the person is not represented by an attorney. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or person's attention.

(5) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

(c) Service and Filing by Nonparties. A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

(d) Notice of a Court Order. When the court issues an order on any post-arraignment motion, the clerk must serve notice of the entry on each party as required by Rule

49(a). A party also may serve notice of the entry by the same means. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve--or authorize the court to relieve--a party's failure to appeal within the allowed time.

Committee Note

Rule 49 is amended to address two topics concerning self-represented litigants. (Concurrent amendments are made to [add cites to Bankruptcy Rules],[15] Civil Rule 5, and Appellate Rule 25.) Rule 49(a) is amended to address service of documents filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 49(b) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case.

Subdivision (a)(3). Rule 49(a)(3) is revised so that it focuses solely on the service of notice by means of the court's electronic-filing system. What had been Rule 49(a)(3)(B) (concerning "other electronic means" of service) is relocated, as revised, to a new Rule 49(a)(4)(E).

Amended Rule 49(a)(3) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of filing from the court's electronic-filing system. Litigants who are registered to receive a notice of filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 49(a)(3)(A)'s provision for service by "on a registered user by filing [the paper] with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 49(a)(3) states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for districts in which parties in the case cannot access other participants' sealed filings

15 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

via the court's electronic-filing system.

Subdivision (a)(4). Rule 49(a)(4) is retitled "Service by Other Means" to reflect the relocation into that subdivision – as new Rule 49(a)(4)(E) – what was previously Rule 49(a)(3)(B). The subdivision's introductory phrase ("A paper may be served by") is amended to read "A paper may also be served by." This locution ensures that Rule 49(a)(4) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the notice of filing).

Although new subdivision (a)(4)(E) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "learns that it did not reach the person to be served," no such proviso is included in new subdivision (a)(3). This is because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.

[Subdivision (a)(5). New Rule 49(a)(5) addresses service of papers not filed with the court. It makes explicit what is arguably implicit in new Rule 49(a)(3): If a paper is not filed with the court, then the court's electronic system will never generate a notice of filing, so the sender cannot use Rule 49(a)(3) for service and thus must use Rule 49(a)(4).]

Subdivision (a)(6). New Rule 49(a)(6) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (b)(1). Subdivision (b)(1) previously provided that no certificate of service was required when a paper was served "by filing it with the court's electronic-filing system." This phrase is replaced by "under Rule 49(a)(3)" in order to conform to the change to subdivision (a)(3).

Subdivision (b)(2). Amended Rule 49(b)(2) governs electronic filing and signing. New Rules 49(b)(2)(A) and (B) replace what had been Rule 49(b)(3). Under new Rule 49(b)(2)(B)(i), the presumption is the opposite of the presumption set by the prior Rule 49(b)(3)(B). That is, under new Rule 49(b)(2)(B)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 49(b)(2)(B)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 49(b)(2)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 49(b)(2)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 49(b)(2)(B)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 49(b)(2)(B)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 49(b)(2)(B)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

Subdivision (b)(3). What had been Rule 49(b)(2)(B) (concerning nonelectronic means of filing) is carried forward as new Rule 49(b)(3).

B. Criminal Rule 45

A conforming amendment would be necessary in order to update a cross-reference in Criminal Rule 45(c):

Rule 45. Computing and Extending Time

* * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within

a specified time after being served and service is made under Rule 49(a)(4)(C), (D), and ~~(E)~~ (F), 3 days are added after the period would otherwise expire under subdivision (a).

Committee Note

Subdivision (c) is amended to conform to the renumbering of Criminal Rule 49(a)(4)(E) as Rule 49(a)(4)(F).

IV. Appellate Rules: Amendments to Appellate Rule 25

This section first discusses (in Part IV.A) a suggestion for implementing the project's goals through amendments to Appellate Rule 25. It then turns (in Part IV.B) to a brief discussion of options that might be considered for dovetailing the Appellate Rules with whichever approach the Bankruptcy Rules Committee selects for the Bankruptcy Rules.

A. Implementation: Amendments to Appellate Rule 25

To implement the project's twin goals in Appellate Rule 25, the following amendments could be considered. You will note that I am not suggesting the inclusion of the new provision about service of documents not filed with the court.[16] That is because I could not think of documents that would meet that description in the context of a proceeding in the court of appeals.

Rule 25. Filing and Service

(a) Filing.

(1) Filing with the Clerk. A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) Filing: Method and Timeliness.

(A) Nonelectronic Filing.

(i) In General. For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not

16 Cf. proposed Civil Rule 5(b)(4).

timely unless the clerk receives the papers within the time fixed for filing.

(ii) A Brief or Appendix. A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

- mailed to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
- dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(iii) Inmate Filing. If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(A)(iii). A paper not filed electronically[17] by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

- it is accompanied by: a declaration in compliance with 28 U.S.C. § 1746--or a notarized statement--setting out the date of deposit and stating that first-class postage is being prepaid; or evidence (such as a postmark or date stamp) showing

17 Some participants have noted that it would be useful to consider updating the inmate filing rule to address timeliness of documents filed pursuant to an electronic filing program within the institution. This project does not encompass such a proposal, but if this project extends into another rulemaking cycle, it might be worthwhile to expand it to include inmate-filing provisions, including this one and the one in Appellate Rule 4(c)(1).

that the paper was so deposited and that postage was prepaid; or

• the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(A)(iii).

(B) Electronic Filing ~~and Signing. (i) By~~ by a Represented Person--Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

~~(ii)~~ **(C) Electronic Filing by ~~By an Unrepresented~~ a Self-Represented Person--When Allowed or Required.**

(i) In General. A self-represented person ~~not represented by an attorney: •~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system [to file papers and receive notice of activity in the case], unless a court order or ~~by~~ local rule prohibits the person from doing so.~~; and •~~ A self-represented person may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) Local Provisions Prohibiting Access. If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits self-represented persons from using the court's electronic-filing system, the provision must include reasonable

exceptions or must permit the use of another electronic method for filing [papers] and for receiving electronic notice [of activity in the case].

(iii) Conditions and Restrictions on Access. A court may set reasonable conditions and restrictions on self-represented persons' access to the court's electronic-filing system.

(iv) Restrictions on a Particular Person. A court may deny a particular person access to the court's electronic-filing system and may revoke a person's previously granted access for not complying with the conditions authorized in (iii).

~~(iii)~~ **(D) Signing.** A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

~~(iv)~~ **(E) Same as a Written Paper.** A paper filed electronically is a written paper for purposes of these rules.

(3) Filing a Motion with a Judge. *[Not shown in this draft, for brevity.]*

(4) Clerk's Refusal of Documents. *[Not shown in this draft, for brevity.]*

(5) Privacy Protection. *[Not shown in this draft, for brevity.]*

(b) Service of All Papers Required. Unless a rule requires service by the clerk or the paper will be served under Rule 25(c)(1), a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) Service by a Notice of Filing Sent Through the Court's Electronic-Filing System. A notice of filing sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But a court may provide by local rule that if a paper is filed under seal, it must be served by other means.

(2) Service by Other Means. A paper may also be served under this rule by:

~~Nonelectronic service may be any of the following:~~

(A) personal delivery, including delivery to a responsible person at the office of counsel;

(B) ~~by~~ mail; ~~or~~

(C) ~~by~~ third-party commercial carrier for delivery within 3 days; or

(D) ~~. (2) Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by~~ sending it by ~~other~~ electronic means that the person to be served consented to in writing.

(3) **Considerations in Choosing Other Means.** When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) **When Service Is Complete.** Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by a notice from the court's electronic-

filing system is complete as of the notice's date.[18] Service by other electronic means is complete on filing or sending, unless the party making service is notified that the paper was not received by the party served.

(5) Definition of "Notice of Filing." The term "notice of filing" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

18 This provision will take care of the issue of periods that are timed from service. Appellate Rule 26(c) provides: "(c) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a)." Under Rule 26(c), the "three-day rule" doesn't apply when a paper is served electronically. When electronic service of a paper filing occurs by means of the court's electronic-filing system, there may be a (generally brief) time lag between the submission of the paper filing to the court and the clerk's upload of the paper into the electronic-filing system. By providing that such service is complete as of the date of the notice of filing, amended Rule 25(c)(4) will ensure that the recipient's response time is not cut short.

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. *[Not shown in this draft, for brevity.]*

Committee Note

Rule 25 is amended to address two topics concerning self-represented litigants. (Concurrent amendments are made to [add cites to Bankruptcy Rules],[19] Civil Rule 5, and Criminal Rule 49.) Rule 25(a)(2) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case. Rule 25(c) is amended to address service of documents filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 25(c)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice.

Subdivision (a)(2)(C). Under new Rule 25(a)(2)(C)(i), the presumption is the opposite of the presumption set by the prior Rule 25(a)(2)(B)(ii). That is, under new Rule 25(a)(2)(C)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case. If a district wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 25(a)(2)(C)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 25(a)(2)(C)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

19 The cites to the Bankruptcy Rules will depend on the option selected by the Bankruptcy Rules Committee.

A court can comply with Rules 25(a)(2)(C)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, filings that commence a proceeding in the court of appeals – cannot be filed by means of the court's electronic-filing system. Rule 25(a)(2)(C)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 25(a)(2)(C)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 25(a)(2)(C)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

Former Rules 25(a)(2)(B)(iii) and (iv) are carried forward but renumbered as Rules 25(a)(2)(D) and (E).

Subdivision (b). Existing Rule 25(b) generally requires that a party, "at or before the time of filing a paper, [must] serve a copy on the other parties to the appeal or review." The existing rule exempts from this requirement instances when "a rule requires service by the clerk." The rule is amended to add a second exemption, for instances when "the paper will be served under Rule 25(c)(1)." This amendment is necessary because new Rule 25(c)(1) encompasses service by the notice of filing that results from the clerk's uploading into the system a paper filing by a self-represented litigant. In those circumstances, service will not occur "at or before the time of filing a paper," but it will occur when the court's electronic-filing system sends the notice to the litigants registered to receive it.

Subdivision (c). Rule 25(c) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in Rule 25(c)(1). Existing Rule 25(c)(1) becomes new Rule 25(c)(2), which continues to address alternative means of service. New Rule 25(c)(5) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (c)(1). Amended Rule 25(c)(1) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of filing from the court's electronic-filing system. Litigants who are registered to receive a notice of filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 25(c)(2)'s provision for service by "sending [a paper] to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 25(c)(1) states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for circuits (if any) in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (c)(2). Subdivision (c)(2) carries forward the contents of current Rule 25(c)(1), with two changes.

The subdivision's introductory phrase ("Nonelectronic service may be any of the following") is amended to read "A paper may also be served under this rule by." This locution reflects the inclusion of other electronic means (apart from service through the court's electronic-filing system) in new Rule 25(c)(2)(D) and also ensures that what will become Rule 25(c)(2) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the notice of filing).

The prior reference to "sending [a paper] to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 25(c)(1).

Subdivision (c)(4). Amended subdivision (c)(4) carries forward the prior rule's provisions that service by electronic means other than through the court's electronic-filing system is complete on sending unless the party making service is notified that the paper was not received by the party served, and that service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

As to service through the court's electronic-filing system, the amendments make two changes. First, the amended rule provides that such service "is complete as of the notice's date." Under new subdivision (c)(1), when a litigant files a paper other than through the court's electronic-filing system, service on a litigant who is registered to receive a notice of filing

through the court's electronic-filing system occurs by means of the notice of filing. But that service does not occur "on filing" when the filing is made other than through the court's electronic-filing system. There can be a short time lag between the date the litigant files the document with the court and the date that the clerk's office uploads it into the court's electronic-filing system. Thus, new subdivision (c)(1) and amended subdivision (c)(4) provide that service by a notice of filing sent to a person registered to receive it through the court's electronic-filing system is complete as of the date of the notice of filing.

Second, although subdivision (c)(4) carries forward – for service by other electronic means – the prior rule's provision that such service is not effective if the sender "is notified that the paper was not received by the party served," no such proviso is included as to service by a notice of filing sent to a person registered to receive it through the court's electronic-filing system. This is because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.

Subdivision (c)(5). New Rule 25(c)(5) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

B. Dovetailing the Appellate Rules with the Bankruptcy Rules

Because the Appellate Rules address bankruptcy appeals as well as other types of proceedings in the courts of appeals, it will be necessary to ensure that the Bankruptcy and Appellate Rules work seamlessly together. This topic is discussed at greater length in Part II.B of the separate memorandum to the Bankruptcy Rules Committee. In brief, if the Bankruptcy Rules Committee were to change its decision and were to propose adoption for the Bankruptcy Rules of the twin goals of the SRL project, then the proposed amended Bankruptcy and Appellate Rules would work smoothly together because the approach taken in the originating court would be the same as that taken in the court of appeals. If, instead, the Bankruptcy Rules Committee adheres to its fall 2024 decision not to propose adoption of the SRL project's changes in the Bankruptcy Rules, then it will be necessary to determine how to handle bankruptcy appeals.

The memorandum to the Bankruptcy Rules Committee suggests that the best solution might be to have the procedures in bankruptcy appeals track the new procedures that will generally apply in the district courts and the courts of appeals. If that approach is adopted, it would necessitate a change to Bankruptcy Rule 8011 but no particular change to the Appellate Rules.

If instead the decision were made that the procedures in the court of appeals should track those in the bankruptcy court, this would entail amending a couple of relevant rules. I am not sketching such amendments here, because I surmise that the committees will prefer to keep the practice in the courts of appeals uniform across types of appeal rather than exempting bankruptcy appeals from the new SRL service and e-filing approach in the courts of appeals. But one could tentatively say that the change, if it were deemed advisable, could be accomplished by amending Rule 8011 and also Appellate Rule 6 (Appeal in a Bankruptcy Case).

III. Conclusion

The project on SRL service and e-filing will entail implementing amendments to the Civil, Criminal, and Appellate Rules, and either implementing or conforming amendments to the Bankruptcy Rules.

With enclosure (for the copies of this memorandum submitted to the Civil and Appellate Rules Committees)
Without enclosure (for the copy of this memorandum submitted to the Criminal Rules Committee)

MEMORANDUM

DATE: March 7, 2025

TO: Advisory Committee on Bankruptcy Rules

FROM: Catherine T. Struve

RE: Project on service and electronic filing by self-represented litigants

As the Committee knows, the project on service and electronic filing by self-represented litigants ("SRLs") has two basic goals. As to service, the goal is to eliminate the requirement of separate (paper) service (of documents after the case's initial filing) on a litigant who receives a notice of filing through the court's electronic-filing system or a court-based electronic-noticing program. As to filing, the idea is to make two changes compared with current practice: (1) to presumptively permit SRLs to file electronically (unless a court order or local rule bars them from doing so) and (2) to provide that a local rule or general court order that bars SRLs from using the court's electronic-filing system must include reasonable exceptions or must permit the use of another electronic method for filing documents and receiving electronic notice of activity in the case.

During the fall 2024 advisory committee discussions, the Bankruptcy Rules Committee decided that it was not ready to endorse either aspect of this program for adoption as part of the Bankruptcy Rules. By contrast, the Civil, Appellate, and Criminal Rules Committees – which met subsequently – indicated willingness to proceed with the proposed amendments. At its January 2025 meeting, the Standing Committee discussed whether it would be justifiable to proceed with proposed amendments to the Civil, Appellate, and Criminal Rules if the Bankruptcy Rules were not correspondingly amended. The Standing Committee did not express opposition to such an approach.

However, it has been suggested that it may be worthwhile for the Bankruptcy Rules Committee to assess whether the decisions of the other three advisory committees might provide a reason to reconsider its skepticism about the proposed amendments. Given that the Bankruptcy Rules Committee did not know of the other committees' views at the time of its fall 2024 discussion, the spring 2025 meeting provides an opportunity revisit and re-weigh the costs and benefits of proceeding with the proposals. In the event that the Committee were to change its view and propose amending the Bankruptcy Rules in tandem with the other sets of rules, it would need to consider amendments to Bankruptcy Rules 5005, 8011, and 9036. In the event that

the Committee were to adhere to its fall 2024 view, it would need to consider how best to dovetail the (unchanged) approach of the Bankruptcy Rules with the (changed) approach of the Civil and Appellate Rules. Such dovetailing would entail an amendment to Rule 7005 and perhaps an amendment to Rule 8011.

To illustrate the choices, I sketch below two different packages of amendments to the Bankruptcy Rules. Part I sets out a package of amendments that would parallel the proposed amendments that will be considered by the Civil, Appellate, and Criminal Rules Committees.[1] Part I thus illustrates what the Bankruptcy Rules proposal might look like if the Bankruptcy Rules Committee were to change its position and decide to participate in the proposed filing and service changes. Part II discusses a package of amendments that would be necessary or advisable in the event that the Bankruptcy Rules Committee instead adheres to its decision not to implement the proposed filing and service changes at this time. As Part II illustrates, the linkages between the Bankruptcy Rules and the Civil and Appellate Rules mean that some amendments to the Bankruptcy Rules will be necessary either way.

Because this memo is lengthy, here is a table of contents:

1 I enclose my memorandum to those Committees, which sets out sketches of those proposed rules.

I. Option One: Changing the filing and service rules for SRLs in the bankruptcy courts

If the Bankruptcy Rules Committee were to change its decision and opt to participate in the proposed package of filing and service changes, this would entail amendments to Bankruptcy Rules 5005, 8011, and 9036 (but not Bankruptcy Rule 7005).[2] Sketches of those amendments follow.

A. Rule 5005

Bankruptcy Rule 5005 is a general provision that applies across different types of bankruptcy cases. To bring the Bankruptcy Rules into accord with the goals of the pro se e-filing and service project, the following amendments to Rule 5005 could be considered:

Rule 5005. Filing Papers and Sending Copies to the United States Trustee

(a) Filing Papers.

* * *

2 In the interest of completeness, I note that Rule 8001(c) also arguably implicates some of the issues addressed by this project. Rule 8001(c) provides: "**(c) Requirement to Send Documents Electronically.** Under these Part VIII rules, a document must be sent electronically, unless: (1) it is sent by or to an individual who is not represented by counsel; or (2) the court's local rules permit or require mailing or delivery by other means."

One might at first glance wonder why Rule 8001(c) exists. It requires that documents be sent electronically, and one might wonder whether this requirement needs explicit inclusion in the Rules. All attorneys are required to use the court's electronic-filing system, and the court sends notices via that system to all who are registered to receive such notices, so nearly all documents in a case will be sent electronically simply by the operation of that system. But perhaps bankruptcy appeals feature situations in which a litigant must send a document without filing it, in which event the directive to send the document electronically would still serve some independent purpose.

Rule 8001(c) also distinguishes between service on SRLs and service on others. Perhaps the idea is that attorneys will always be able to use email and receive email, while self-represented litigants might or might not be reliable users of email. Perhaps that justifies maintaining current Rule 8001(c) as drafted.

Thus, this footnote is included for completeness rather than to suggest that Rule 8001(c) should necessarily be considered for amendment.

(3) Electronic Filing and Signing.

(A) By a Represented Entity--Generally Required; Exceptions.

An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for cause or is allowed or required by local rule.

(B) By ~~an Unrepresented~~ a Self-Represented[3] Individual[4]--When Allowed or Required.

(i) In General. ~~An~~ A self-represented individual ~~not represented by an attorney: (i)~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system [to file papers[5] and receive

3 The current rules use "unrepresented" to refer to a litigant who does not have a lawyer. With the concurrence of the style consultants, I propose that we instead use "self-represented." "Self-represented" recognizes that the litigant is advocating on the litigant's own behalf. The Latin term "pro se" means "for oneself," which is closer to "self-represented" than "unrepresented." Courts and legal organizations increasingly use "self-represented" to describe pro se litigants. See, e.g., https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/self-represented-litigants. And the entry in Black's Law Dictionary for "pro se litigant" includes "self-represented" but not "unrepresented": "pro se litigant (1857) One who represents oneself in a court proceeding without the assistance of a lawyer <the third case on the court's docket involving a pro se>. — Often shortened to pro se, n. — Also termed pro per; self-represented litigant; litigant in propria persona; litigant pro persona; litigant pro per; litigant in person; (rarely) pro se-er." Black's Law Dictionary (12th ed. 2024) (Bryan A. Garner, Ed. in Chief).

4 The Bankruptcy Rules use the word "individual" in a number of places – presumably because the Bankruptcy Code uses "individual" – and I follow that convention in this memo. I note, however, that Civil Rule 5 uses "person."

5 Previous drafts have used "document," but it came to my attention that the rules we are thinking of amending take two different approaches. Bankruptcy Rule 5005, Civil Rule 5, Criminal Rule 49, and (in the main) Appellate Rule 25 use the word "paper," while Bankruptcy Rules 8011 and 9036 use the word "document." On the theory that internal consistency within a

notice of activity in the case][6] unless a court order or local rule~~; and~~ prohibits the person from doing so. A self-represented individual ~~(ii)~~ may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) Local Provisions Prohibiting Access. If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits self-represented [individuals] from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of

---

rule may be more valuable on this point than consistency across rules, this memo and my companion memo on the Civil, Criminal, and Appellate Rules use "paper" when sketching amendments to Bankruptcy Rule 5005, Civil Rule 5, Criminal Rule 49, and Appellate Rule 25, but use "document" when sketching amendments to Bankruptcy Rules 8011 and 9036. Of course, the style consultants will be key guides on this issue.

6 The previous draft of (B)(i) (in the sketch of Civil Rule 5) said "may file electronically." The style consultants pointed out that a reader might think there is a lack of parallelism between this phrase in (B)(i) and the reference in (B)(ii) to the requirement for providing alternatives to CM/ECF access – namely "another electronic method for filing documents and receiving electronic notice of activity in the case." Substantively, one could argue the two are in parallel, because one who is allowed to use the court's electronic-filing system will also receive electronic notices from the court's electronic-filing system. So in (B)(i) one could simply say "use the court's electronic-filing system" (line 13) and it would be implicit that this would also encompass electronic noticing. But it could be useful to also include the bracketed language on lines 13-14, especially since spelling things out may assist SRLs. Moreover, including the language will help clarify to a court that the default is to allow an SRL to receive electronic notice of all filings in the case (not merely the orders issued by the court).

another electronic method for filing [papers] and for receiving electronic notice [of activity in the case].[7]

(iii) Conditions and Restrictions[8] on Access. A court may set reasonable conditions and restrictions on self-represented [individuals'] access to the court's electronic-filing system.

(iv) Restrictions on a Particular [Individual]. A court may deny a particular [individual] access to the court's electronic-filing system and may revoke an

7 On lines 26-27, the style consultants suggest that the bracketed language could be deleted. However, it has been pointed out that there are substantive values served by retaining the language. As to the phrase "filing papers," retaining the word "papers" may help satisfy the concerns of some that the new rules are opening up the process to allow debtors to file inappropriate materials. As to the phrase "notice of activity in the case," including it may be useful at this time because currently some courts allow a self-represented debtor to receive notice electronically of items served from the clerk of court but will not allow the same unrepresented debtor to receive notice of items filed electronically by parties.

8 The style consultants question whether "conditions and restrictions" is redundant. My initial reason for including both terms is that "conditions" on access occur when the court says that SRLs can only use the system on certain conditions (e.g., on condition that they first take a course), while "restrictions" on access occur when the court says that certain types of SRLs can't use the system (like SRLs who are incarcerated). Professor Kimble suggests, though, that "if you say that X can't use the system, then you're saying that a condition of using the system is that you're not X." He wonders whether there are "other instances in the rules of using 'conditions' without 'restrictions.'"

Two responses to this style suggestion occur to me – one semantic and one practical. The semantic response is that there are examples of existing rules that use a similar distinction. See, e.g., Bankruptcy Rule 4001 (distinguishing between prohibitions and conditions with respect to use, sale, or lease of property). More importantly, the practical response is that this provision is designed to speak not only to clerk's offices but also to self-represented litigants. Using both terms will help to head off arguments by a self-represented litigant that a particular condition or restriction is not authorized under the rules.

[individual]'s previously granted access for not complying with the conditions authorized in (iii).

(C) Signing. A filing made through a person's electronic-filing account and authorized by that person, together with the person's name on a signature block, constitutes the person's signature.

(D) Same as a Written Paper. A paper filed electronically is a written paper for purposes of these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107.

(b) Sending Copies to the United States Trustee.

(1) Papers Sent Electronically. All papers required to be sent to the United States trustee may be sent by using the court's electronic-filing system in accordance with Rule 9036,[9] unless a court order or local rule provides otherwise.

(2) Papers Not Sent Electronically. If an entity other than the clerk sends a paper to the United States trustee without using the court's electronic-filing system, the entity must promptly file a statement identifying the paper and stating the manner by which and the date

9 I do not think any change is needed to Rule 5005(b)(1), because the phrase "using the court's electronic-filing system in accordance with Rule 9036" – when taken in conjunction the changes to Rule 9036 discussed below – will encompass situations where the self-represented litigant makes a paper filing that is then uploaded into the court's electronic-filing system by the clerk.

it was sent. The clerk need not send a copy of a paper to a United States trustee who requests in writing that it not be sent.

* * *

Committee Note

Rule 5005(a)(3)(B) is amended to address electronic filing by self-represented litigants. (Concurrent amendments are made to Rules 8011 and 9036 and to Civil Rule 5, Criminal Rule 49, and Appellate Rule 25.) The amendments expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case.

Under amended Rule 5005(a)(3)(B)(i), the presumption is the opposite of the presumption set by the prior rule. That is, under the amended rule, self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district court or BAP wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 5005(a)(3)(B)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 5005(a)(3)(B)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 5005(a)(3)(B)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 5005(a)(3)(B)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant

or case" to make clear that 5005(a)(3)(B)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 5005(a)(3)(B)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

B. Rule 8011

Bankruptcy Rule 8011's provisions on filing and service govern in appeals to the district court or Bankruptcy Appellate Panel (BAP). To bring the Bankruptcy Rules into accord with the goals of the SRL e-filing and service project, the following amendments to Rule 8011 could be considered. You will note that I am not suggesting the inclusion of the new provision about service of documents not filed with the court.[10] That is because I could not think of documents that would meet that description in the context of a bankruptcy appeal.

Rule 8011. Filing and Service; Signature

(a) Filing.

(1) With the Clerk. A document required or permitted to be filed in a district court or BAP must be filed with the clerk of that court.

(2) Method and Timeliness.

(A) Nonelectronic Filing.

* * *

(B) Electronic Filing~~.(i)~~[11] By a Represented Person--Generally Required; Exceptions. An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for cause or is allowed or required by local rule.

10 Cf. proposed Civil Rule 5(b)(4).

11 I suggest this re-numbering in order to avoid running out of levels of numbering and lettering.

~~(ii)~~ **(C) Electronic Filing By ~~an Unrepresented~~ a Self-Represented Individual--When Allowed or Required.**

(i) In General. ~~An~~ A self-represented individual ~~not represented by an attorney: •~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system [to file documents and receive notice of activity in the case] unless a court order or ~~by~~ local rule prohibits the individual from doing so.~~; and~~ A self-represented individual ~~•~~ may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) Local Provisions Prohibiting Access. If a local rule – or any other local court provision that extends beyond a particular litigant or case – prohibits self-represented [individuals] from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing [documents] and for receiving electronic notice [of activity in the case].

(iii) Conditions and Restrictions on Access. A court may set reasonable conditions and restrictions on self-represented [individuals'] access to the court's electronic-filing system.

(iv) Restrictions on a Particular [Individual]. A court may deny a particular [individual] access to the court's electronic-filing system

and may revoke an [individual]'s previously granted access for not complying with the conditions authorized in (iii).

~~(iii)~~ **(D) Electronically Filed Same as a Written Paper.** A document filed electronically is a written paper for purposes of these rules.

~~(C)~~ (E) **When Paper Copies Are Required.** No paper copies are required when a document is filed electronically. If a document is filed by mail or by delivery to the district court or BAP, no additional copies are required. But the district court or BAP may, by local rule or order in a particular case, require that a specific number of paper copies be filed or furnished.

(3) Clerk's Refusal of Documents. The court clerk must not refuse to accept for filing any document solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(b) Service of All Documents Required. Unless a rule requires service by the clerk or the document will be served under (c)(1), a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) Service by a Notice of Filing Sent Through the Court's Electronic-Filing System. A notice of filing sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But a court may provide by local rule that if a paper is filed under seal, it must be served by other means.

~~(1) Nonelectronic~~ **(2) Service by Other Means.** ~~Nonelectronic service~~ A paper may also be served under this rule by ~~any of the following~~:

(A) personal delivery;

(B) mail; ~~or~~

(C) third-party commercial carrier for delivery within 3 days~~.~~; or

~~(2) Service By Electronic Means. Electronic service may be made by:~~

~~(A) sending a document to a registered user by filing it with the court's electronic-filing system; or~~

~~(B) using other~~ (D) electronic means that the person served has consented to in writing.

(3) When Service Is Complete.

(A) Service under (c)(1) is complete as of the date of the notice of filing.

(B) Service by other electronic means is complete on sending, unless the person making service receives notice that the document was not received by the person served.

(C) Service by mail or by third-party commercial carrier is complete on mailing or delivery to the carrier. ~~Service by electronic means is complete on filing or sending, unless the person making service receives notice that the document was not received by the person served.~~

(4) Definition of "Notice of Filing." The term "notice of filing" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing

system to inform them of activity on the docket.

(d) Proof of Service.

(1) Requirements. A document presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgement of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) the mail or electronic address, the fax number, or the address of the place of delivery--as appropriate for the manner of service--for each person served.

(2) Delayed Proof of Service. A district or BAP clerk may accept a document for filing without an acknowledgement or proof of service, but must require the acknowledgment or proof of service to be filed promptly thereafter.

(3) For a Brief or Appendix. When a brief or appendix is filed, the proof of service must also state the date and manner by which it was filed.

(e) Signature Always Required.

(1) Electronic Filing. Every document filed electronically must include the electronic signature of the person filing it or, if the person is represented, the counsel's electronic signature. A filing made through a person's electronic-filing account and authorized by that person--together with that person's name on a signature

block--constitutes the person's signature.

(2) Paper Filing. Every document filed in paper form must be signed by the person filing it or, if the person is represented, by the person's counsel.

Committee Note

Rule 8011 is amended to address two topics concerning self-represented litigants. (Concurrent amendments are made to Rules 5005 and 9036 and to Civil Rule 5, Criminal Rule 49, and Appellate Rule 25.) Rule 8011(a) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case. Rule 8011(c) is amended to address service of documents filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Rule 8011(c)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice.

Subdivision (a)(2)(C). Under new Rule 8011(a)(2)(C)(i), the presumption is the opposite of the presumption set by the prior Rule 8011(a)(2)(B)(ii). That is, under new Rule 8011(a)(2)(C)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district court or BAP wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 8011(a)(2)(C)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 8011(a)(2)(C)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 8011(a)(2)(C)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-

incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 8011(a)(2)(C)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant or case" to make clear that Rule 8011(a)(2)(C)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 8011(a)(2)(C)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

Subdivision (b). Existing Rule 8011(b) generally requires that a party, "at or before the time of filing a document, [must] serve it on the other parties to the appeal." The existing rule exempts from this requirement instances when "a rule requires service by the clerk." The rule is amended to add a second exemption, for instances when "the document will be served under (c)(1)." This amendment is necessary because new Rule 8011(c)(1) encompasses service by the notice of filing that results from the clerk's uploading into the system a paper filing by a self-represented litigant. In those circumstances, service will not occur "at or before the time of filing a document," but it will occur when the court's electronic-filing system sends the notice to the litigants registered to receive it.

Subdivision (c). Rule 8011(c) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision (c)(1). Existing Rule 8011(c)(1) becomes new Rule 8011(c)(2), which continues to address alternative means of service. New Rule 8011(c)(4) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (c)(1). Amended Rule 8011(c)(1) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of filing from the court's electronic-filing system. Litigants who are registered to receive a notice of filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 8011(c)(2)(A)'s provision for service by "sending a document to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 8011(c)(1) states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is

designed to account for districts or BAPs in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (c)(2). Subdivision (c)(2) carries forward the contents of current Rules 8011(c)(1) and (2), with two changes.

The subdivision's introductory phrase ("Nonelectronic service may be by any of the following") is amended to read "A paper may also be served under this rule by." This locution ensures that what will become Rule 8011(c)(2) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the notice of filing).

Prior Rule 8011(c)(2)(A)'s reference to "sending a document to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 8011(c)(1).

Subdivision (c)(3). Rule 8011(c)(3) ("When Service is Complete") is amended to distinguish between service under new Rule 8011(c)(1) – that is, service by means of the notice of electronic filing, which is complete as of the notice's date – and service by "other electronic means," which continues to be complete on "sending, unless the person making service receives notice that the document was not received by the person served." Experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.

Subdivision (c)(4). New Rule 8011(c)(4) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

C. Rule 9036

Bankruptcy Rule 9036 governs the electronic transmission of notices and documents by the bankruptcy court or other parties. To bring the Bankruptcy Rules into accord with the goals of the pro se e-filing and service project, the following amendments to Rule 9036 could be considered:

Rule 9036. Electronic Notice and Service

(a) In General. This rule applies whenever these rules require or permit sending a notice or serving a document by mail or other means.

(b) Notices from and Service by the Court.

(1) To Registered Users. The clerk may send notice to or serve a registered user by filing the notice or document with the court's electronic-filing system.

(2) To All Recipients. For any recipient, the clerk may send notice or serve a document by electronic means that the recipient consented to in writing, including by designating an electronic address for receiving notices. But these exceptions apply:

(A) if the recipient has registered an electronic address with the Administrative Office of the United States Courts' bankruptcy-noticing program, the clerk must use that address;[12] and

(B) if an entity has been designated by the Director of the Administrative Office of the United States Courts as a high-volume paper-notice recipient, the clerk may send the

12 As shown in the text, under both the current Rule 9036 and this sketch of an amended Rule 9036, the clerk is directed to use the BNC address for all notices. At some point, the Committee may wish to address what happens when the address designated on the proof of claim differs from the BNC address. That issue appears to be beyond the scope of the SRL project, but of course I defer to the Committee as to whether it may wish to fold consideration of that question into the project in the event that it selects the Option One discussed in this memo (which as sketched here would entail amendments to Rule 9036).

notice to or serve the document electronically at an address designated by the Director, unless the entity has designated an address under § 342(e) or (f).

(c) Notices from and Service by an Entity. ~~An entity may send notice or serve a document in the same manner that the clerk does under (b), excluding (b)(2)(A) and (B).~~

(1) Notice of Filing Sent Through the Court's Electronic-Filing System. A notice of filing sent to a person registered to receive it through the court's electronic-filing system constitutes notice or service on that person as of the date of the notice of filing. But a court may provide by local rule that if a paper is filed under seal, neither service nor notice occurs under this Rule 9036(c)(1).[13]

(2) Electronic Means Consented To. An entity may also send notice or serve a document by electronic means that the recipient consented to in writing, including by designating an electronic address for receiving notices.

(3) Definition of "Notice of Filing." The term "notice of filing" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case

13 This formulation ("neither service nor notice occurs") differs from the language currently proposed for the other rules. See, e.g., proposed Rule 8011(c)(1) ("But a court may provide by local rule that if a paper is filed under seal, it must be served by other means."). The difference arises because it seems awkward to say "it must be served or noticed by other means." The style consultants may have guidance to share on this point.

participants through the court's electronic-filing system to inform them of activity on the docket.

(d) When Notice or Service Is Complete; Keeping an Address Current.

(1) Notice of Filing Sent Through the Court's Electronic-Filing System. Notice – or service – by a notice of filing sent to a person registered to receive it through the court's electronic-filing system is complete as of the date of the notice of filing.

(2) Other Electronic Means. Electronic notice or service by other electronic means is complete upon ~~filing or~~ sending but is not effective if the filer or sender receives notice that it did not reach the person to be notified or served.

(3) Keeping an Address Current. The recipient must keep its electronic address current with the clerk.

(e) Inapplicability. This rule does not apply to any document required to be served in accordance with Rule 7004.

Committee Note

Rule 9036 is amended to address service by self-represented litigants. (Concurrent amendments are made to Rules 5005 and 8011 and to Civil Rule 5, Criminal Rule 49, and Appellate Rule 25.) Rule 9036(c) is amended to address service of documents filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Conforming amendments are made to Rule 9036(d).

Subdivision (c). Rule 9036(c) previously stated simply that "[a]n entity may send notice or serve a document in the same manner that the clerk does under (b), excluding (b)(2)(A) and (B)." That provision could be read to exclude instances when a self-represented litigant files a

document in paper form and the clerk's office scans the document and uploads it into the court's electronic-filing system. Thus read, the previous rules required separate (paper) service in such instances, even on litigants who were registered to receive a notice of filing from the court's electronic-filing system. New Rule 9036(c) restates the substance of the service options previously incorporated by reference to Rule 9036(b), but does so in a way that changes the rule concerning service by a litigant who makes a filing other than through the court's electronic-filing system.

New Rule 9036(c)(1) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of filing from the court's electronic-filing system. Litigants who are registered to receive a notice of filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Prior Rule 9036(c)'s provision for notice or service "in the same manner that the clerk does under" Rule 9036(b)(1) had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file a document with the court by a means other than through the court's electronic-filing system.) The last sentence of amended Rule 9036(c)(1) states that a court may provide by local rule that if a paper is filed under seal, notice or service must occur by other means. This sentence is designed to account for districts or BAPs in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

What is now Rule 9036(c)(2) carries forward the prior option to effect notice or service by consented-to electronic means.

New Rule 9036(c)(3) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

Subdivision (d). New subdivision (d)(2) carries forward the rule's prior treatment of the timing of notice or service by electronic means other than the court's electronic-filing system. New subdivision (d)(1) addresses the timing of notice or service through the court's electronic-filing system.

Previously, Rule 9036(d) provided simply that "Electronic notice or service is complete upon filing or sending but is not effective if the filer or sender receives notice that it did not reach the person to be notified or served." The adoption of new Rule 9036(c)(1) requires a change to Rule 9036(d): Under new subdivision (c)(1), when a litigant files a paper other than through the court's electronic-filing system, service on a litigant who is registered to receive a

notice of filing through the court's electronic-filing system occurs by means of the notice of filing. But that service does not occur "upon filing" when the filing is made other than through the court's electronic-filing system. There can be a short time lag between the date the litigant files the document with the court and the date that the clerk's office uploads it into the court's electronic-filing system. Thus, new subdivision (d)(1) provides that notice – or service – by a notice of filing sent to a person registered to receive it through the court's electronic-filing system is complete as of the date of the notice of filing.

Although new subdivision (d)(2) carries forward – for notice or service by other electronic means – the prior rule's provision that such notice or service is not effective if the sender "receives notice that it did not reach the person to be notified or served," no such proviso is included in new subdivision (d)(1). This is because experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.

II. Option Two: Maintaining the current filing and service rules for SRLs in the bankruptcy courts

If the Bankruptcy Rules Committee were to adhere to its decision not to participate in the proposed package of filing and service changes, this would require an amendment to Bankruptcy Rule 7005 and might also make an amendment to Bankruptcy Rule 8011 advisable. But no amendments would be needed to Bankruptcy Rule 5005 or 9036.

Part II.A sketches a possible amendment to Rule 7005. Part II.B.1 considers how to treat bankruptcy appeals. Part II.B.2 discusses possible amendments to Rule 8011 that would treat bankruptcy appeals the same as other matters in the district court, while Part II.B.3 suggests that, if instead the decision is made to treat bankruptcy appeals the same as proceedings in the bankruptcy court, this could be accomplished by means of amendments to Rule 8011 and Appellate Rule 6.

A. Rule 7005

Rule 7005 currently incorporates by reference the provisions of Civil Rule 5. To avoid incorporating into the Bankruptcy Rules the new features of proposed amended Civil Rule 5, something like the following amendment to Bankruptcy Rule 7005 should be considered:

Rule 7005. Serving and Filing Pleadings and Other Papers

Fed. R. Civ. P. 5 applies in an adversary proceeding<u>, except that:</u>

<u>(1) Rule 5005(a)(3)(B) – not Fed. R. Civ. P. 5(d)(3)(B) – governs</u>

electronic filing by a self-represented individual; and

(2) The reference in Fed. R. Civ. P. 5(d)(1)(B) to service "under Rule 5(b)(2)" – and the reference in Fed. R. Civ. P. 5(b)(2) to "A notice of filing sent to a person registered to receive it through the court's electronic-filing system" – mean service by sending a paper to a registered user by filing it with the court's electronic-filing system.

Committee Note

For adversary proceedings in bankruptcy, Rule 7005 incorporates by reference Civil Rule 5, including the latter's provisions on filing and service. Changes to Civil Rule 5 necessitate some adjustment to this incorporation by reference.

The concurrent amendments to Civil Rule 5 address two topics concerning self-represented litigants. Civil Rule 5(b) is amended to address service of documents (subsequent to the complaint) filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, Civil Rule 5(b) is amended so that it no longer requires separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. Civil Rule 5(d) is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case.

These changes to Civil Rule 5 are not yet appropriate for adoption as mandates for the bankruptcy courts. It currently appears to be rare for bankruptcy courts to permit self-represented litigants to use the court's electronic-filing system; thus, a rule requiring the bankruptcy courts to permit such access or to provide alternative modes of electronic access could cause greater disruption in bankruptcy courts than in the district courts or courts of appeals.

Moreover, a given bankruptcy case may include multiple self-represented litigants. Under the amendments to Civil Rule 5, any self-represented litigant who is neither enrolled in the court's electronic-filing system nor enrolled in a court-provided electronic-noticing program would continue to be served by means other than electronic notice from the court. But in a case that includes two or more such litigants, those self-represented litigants might be misled by amended Civil Rule 5 into omitting to make traditional service on the other self-represented litigants. Admittedly, this risk appears not to have materialized in disruptive ways in the district courts that have already eliminated the requirement of paper service on litigants who receive notices from the court's electronic-filing system. It may be the case that self-represented litigants learn their particular service obligations on other self-represented litigants from an order entered

in the case or by calling the clerk's office, and therefore duly serve any self-represented litigants in the case who need such service. But the lack of known problems in these district courts might also stem from the rarity – in the district courts – of cases featuring more than one self-represented litigant who is neither registered with the court's electronic-filing system nor registered to receive electronic notices from the court. Because such cases are less rare in the bankruptcy courts, problems might be more likely to result in those courts.

To avoid this risk, the Bankruptcy Rules will continue to require that all self-represented litigants make traditional service on all other litigants. While this will continue to require redundant paper service (by self-represented litigants who are not using the court's electronic-filing system) on the many participants in a bankruptcy proceeding who neither need nor want such paper copies, it will avoid the risk that a self-represented litigant would fail to make the required traditional service on another self-represented litigant who needs it.

Accordingly, Rule 7005 is amended to provide that Rule 5005(a)(3)(B) – not Fed. R. Civ. P. 5(d)(3)(B) – governs electronic filing by a self-represented individual. The amendments to Rule 7005 also provide that Civil Rule 5(d)(1)(B) reference to service "under Rule 5(b)(2)" and Civil Rule 5(b)(2)'s reference to "[a] notice of filing sent to a person registered to receive it through the court's electronic-filing system" mean service by sending a paper to a registered user by filing it with the court's electronic-filing system.

B. Rule 8011

Assuming that the Bankruptcy Rules maintain their current approach to self-represented litigants' service and electronic filing, it is necessary to consider which approach – the current one or the one that will be newly adopted for the Civil and Appellate Rules – will govern in bankruptcy appeals.

Part II.B.1 discusses policy arguments for and against the various possible approaches, and suggests that the best approach may be to treat bankruptcy appeals the same way as other matters that are heard in the district courts and courts of appeals. This approach is illustrated in the sketch set out in Part II.B.2. An alternative would be to treat bankruptcy appeals the same way on appeal as they are treated in the bankruptcy courts. This approach is discussed in Part II.B.3.

1. Policy choices

Before setting out the sketches, it is useful to consider the policy arguments for and against each one. At the outset, it seems useful to note that whatever choice is made on filing and service for SRLs in bankruptcy appeals, the application of those choices will be to a relatively small number of cases and litigants. For example, in the year ending September 30, 2023:

- In the federal district courts, of 339,731 civil cases filed, 1,346 were bankruptcy appeals and another 140 were matters withdrawn from the bankruptcy courts.

- In the five Bankruptcy Appellate Panels as group, 320 appeals were commenced.

- In the federal courts of appeals in the year ending September 30, 2023, of 39,987 total appeals filed, 657 were bankruptcy appeals.

So bankruptcy appeals are quite rare compared to original proceedings in either the bankruptcy courts or the district courts. (In addition, one might speculate that self-represented litigants may be less likely to litigate actively in bankruptcy appeals than in proceedings in the bankruptcy courts. This might be true, for example, to the extent that appeals in bankruptcy cases are more likely to be taken in high-stakes and complex matters. But this is, of course, pure speculation; I haven't found figures concerning the number of SRLs involved in bankruptcy appeals.)

In sum, the group of litigants *in bankruptcy appeals* who would be affected by any rule change is small. And so one might argue that the stakes of the choices discussed in this part are relatively low, and that one might place a premium on choosing the options that best promote clarity and administrability.

a. SRL e-filing access in bankruptcy appeals

I can see some arguments in favor of having the practice on appeal[14] track the ordinary practice of the relevant appellate court, at least as to electronic-filing access. That is to say, a court that ordinarily allows SRLs to use its electronic-filing system presumably would experience no difficulties in allowing SRLs to do so in bankruptcy appeals as well. And an SRL would be unlikely to be confused by such an approach; it seems easy to understand that one level of court might permit such access even though another level of court bars it. In fact, such a phenomenon currently exists today, given the relatively greater openness to such access shown by the local practices of the courts of appeals (compared with the district courts) and of the district courts (compared with the bankruptcy courts).

We should also take account of the fact that in some circuits bankruptcy appeals may go to a BAP instead of to a district court. Thus, we should consider how any proposed amendment would affect BAPs.[15] Three of the BAPs have posted provisions indicating that they currently

14 I envision that the filing of the notice of appeal would occur in accordance with the practice in the lower court – here, the bankruptcy court. So by practice on appeal, I mean events after the filing of the notice of appeal.

15 There may well be close connections between the court of appeals for a circuit and the BAP for that circuit. See, e.g., Eighth Circuit BAP Rule 8024A(a)(1) ("The Clerk of the United

take approaches to SRL e-filing that would be compatible with proposed Civil Rule 5:

- First Circuit BAP. See General Order No. 2 Rule 1(c): "Use of the ECF System is voluntary for all litigants proceeding without representation by an attorney …." See also id. Rule 2(c) (offering additional filing methods for SRLs).

- Ninth Circuit BAP. See Administrative Order Regarding Electronic Filing in BAP Cases Rule 2(d): "Any litigant who is not a licensed attorney authorized to practice before the BAP may file a motion requesting leave to register for CM/ECF."

- Tenth Circuit BAP Rule 8001-1(b): "Individuals not represented by an attorney … may, but are not required to, file using the ECF system."

The Eighth Circuit BAP's approach is compatible with the proposed Civil Rule 5 approach in that it's receptive to SRL e-filing, but in fact this BAP's rule goes beyond the current proposal by making e-filing mandatory for non-incarcerated SRLs. See Eighth Circuit BAP Rule 8011A: "All documents, other than those filed by an inmate, shall be filed electronically…."[16] The apparently mandatory aspect of this BAP's program is incompatible with proposed Civil Rule 5, but note that it's also in violation of current Bankruptcy Rule 8011(a)(2)(B)(ii), which provides that SRLs "may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions."

The Sixth Circuit BAP may already be taking an approach that's consistent with the proposed rule, but that's not clear from this BAP's published materials, so further checking might be advisable. Sixth Circuit BAP Rule 8011-1 states: "…. The 'Sixth Circuit Guide to Electronic Filing' is adopted to govern the filing of documents in cases filed with the BAP." Arguably, this evinces an intent to track whatever the Sixth Circuit does concerning e-filing. And the Sixth Circuit now permits pro se litigants to file by email. But it does so in a local rule, not in the Sixth Circuit Guide to Electronic Filing. So without checking further with the BAP, it is not possible to be sure what the BAP's current practice is. And it's not clear whether the Sixth Circuit offers an electronic noticing program as such; it does allow people in general to sign up for email notices from PACER concerning a case, but that's different from an e-noticing program. So the proposed amendments might effect more of a change to practice in the Sixth Circuit Court of Appeals and BAP than in some other circuits.

I am less able to think of arguments in favor of having the e-filing practice on appeal

---

States Court of Appeals for the Eighth Circuit shall serve as the Clerk of the United States Bankruptcy Appellate Panel for the Eighth Circuit.").

16 By contrast, the Eighth Circuit makes it optional for pro se filers in the court of appeals: "Use of the CM/ECF system for filing is mandatory for attorney filers. It is voluntary for non-attorney filers." https://media.ca8.uscourts.gov/files/faq.pdf .

track that of the bankruptcy court below, though I welcome any suggestions.

b. Service by SRLs in bankruptcy appeals

As to service, the question is whether it makes sense to change the approach to service by non-electronically-filing SRLs on CM/ECF participants in bankruptcy appeals to the district courts and BAPs. It seems to me that adopting the new service approach for such appeals could be okay if the circumstances of bankruptcy appeals differ sufficiently from those of litigation in the bankruptcy court itself. The main impediment to changing the service approach in the bankruptcy court is the concern that there may be multiple SRLs in the same proceeding, and that if multiple SRLs are in fact not participating in CM/ECF or a court sponsored electronic noticing system, then they might erroneously fail to serve each other by traditional means. A factual question to which I don't know the answer is whether the same difficulty is likely to arise on appeal. If it is likely to arise on appeal, then that would weigh in favor of having bankruptcy appeals track the bankruptcy-court practice with respect to service.

On the other hand, if the multiple-SRL problem is not as likely to arise on appeal, then perhaps the appellate practice could diverge from the bankruptcy-court practice on service without causing problems. It's not obvious that changing the service requirement that applies to self-represented paper filers in the district courts and courts of appeals would cause confusion for SRLs while they litigate in the bankruptcy courts. For one thing, a SRL typically will have litigated in the bankruptcy court – and become accustomed to the service requirements that apply there – before they litigate on appeal. And in many appeals (e.g., final-judgment appeals that result in affirmance), there may be no further proceedings in the bankruptcy court after the appellate proceeding concludes. Given that there are so few bankruptcy appeals generally, it seems as though the likelihood of confusion from a different service rule on appeal may be low.

As with filing, so too with service, another consideration is whether changing the practice applicable to appeals would disrupt the BAPs' current practices. Here, it does appear that – like many district courts – the BAPs probably follow the national rules' current approach on the service question. Four of the five BAPs either have a provision making clear that they follow Bankruptcy Rule 8011(c)'s approach to service or seem likely to do so:

- First Circuit BAP: "In accordance with Fed. R. Bankr. P. 8011(c), documents filed by any means other than through the ECF System must also be served by one of the following methods on the other parties to the appeal: personal delivery; mail; third-party commercial carrier; or email, if the entity served consented in writing to email service…."

- Sixth Circuit BAP, Ninth Circuit BAP, and Tenth Circuit BAP (possibly): A quick search didn't disclose any local provision on point, so I assume that the court applies Rule 8011(c).

The Eighth Circuit BAP has an ambiguous local provision that might be read to indicate that even paper filers needn't provide separate service on litigants who will receive the electronic notice via CM/ECF. Eighth Circuit BAP Rule 8014A(c) states: " Service shall be made by CM/ECF upon filing of the brief. However, one paper copy of the brief shall be served on any party who is not a CM/ECF participant."

c. Overall policy considerations

In sum, I can see arguments for having service practice in bankruptcy appeals continue to track the service practice in the bankruptcy courts, though those arguments are strongest as to the level of the intermediate appeal to district courts and BAPs, and somewhat weaker at the level of the court of appeals (because the courts of appeals – unlike the BAPs – would be moving to the new service practice anyway if the proposed rule changes are adopted).

There is also the issue of overall simplicity of design. It may be useful for the practice on bankruptcy appeals to track the ordinary practice in the relevant appellate court. It also may be useful for the treatment of e-filing and service by SRLs to be treated in tandem – that is, to apply the updated service approach whenever the updated e-filing approach applies and vice versa. Taken together, these considerations may weigh in favor of treating bankruptcy appeals the same way as other matters that are heard in the district courts and courts of appeals. The next section illustrates that approach.

2. Treating bankruptcy appeals the same as other matters in the district court: Amendment to Rule 8011 (and conforming amendment to Rule 8004(a)(3))

If the committees decide that the service and filing approaches that ordinarily apply in the district courts and courts of appeals should also apply on bankruptcy appeals, then it will be necessary to bring Rule 8011 into parallel with the goals of the SRL service and e-filing project.[17] This could be accomplished by means of the amendments sketched in Part I.B above, with one adjustment.

The adjustment concerns notices of appeal. Because notices of appeal are filed in the court from which the appeal is taken, the practice concerning notices of appeal from the bankruptcy court should track the practice that applies to other filings in the bankruptcy court. One can argue that the proposed sketch shown in Part I.B would accomplish that, because Rule 8011 as currently drafted seems designed only to govern filings in the district court or BAP, and

17 By contrast, if the committees were to decide that the new service and filing approaches should apply to bankruptcy appeals only in the courts of appeals – and not in the district courts or BAPs – then no changes to Rule 8011 would be necessary. That is because Appellate Rule 25(a)(5), not Bankruptcy Rule 8011, governs filing and service in the courts of appeals.

not filings in the bankruptcy court.[18] But once Rule 8011's treatment of filing and service diverges from the approach that applies in the bankruptcy court, it will become more important to ensure clarity concerning which rule applies to the filing of a notice of appeal (or other document, such as a motion for a stay) in the bankruptcy court.

A straightforward way to accomplish this would be to insert a new Rule 8011(a) that would read: "**(a) Scope.** This rule governs signature, service, and filing of documents required or permitted to be filed in a district court or BAP." Then Rule 8011's existing subdivisions would be re-lettered – that is, (a) would become (b), and so on. To adjust to the re-lettering, one would also need to make a conforming amendment to Rule 8004.[19] Admittedly, there are always transition costs associated with re-numbering an entire rule, because references to the prior version of the rule will no longer track the current numbering. But in the case of Rule 8011, those transition costs may be relatively manageable. As of February 27, 2025, a Westlaw search for court decisions citing Rule 8011 after November 30, 2014 (that is, the last day before the comprehensive 2014 revisions took effect) pulls up only 14 cases. Concededly, the renumbering could also require changes in local rules; but if Rule 8011 were to be amended to adopt the new approach to SRL service and e-filing, local rule amendments would be necessary anyway.

In sum, to implement the policy choice of updating bankruptcy appellate practice in the district courts and BAPs to track the proposed new approach to SRL service and e-filing, one could add the new subdivision 8011(a) concerning scope, re-letter the remaining subdivisions of Rule 8011, implement the proposed amendments to Rule 8011 sketched in Part I.B of this memo, and make a conforming amendment to the cross-reference in Rule 8004(a)(3):

Rule 8011. Filing and Service; Signature

(a) Scope. This rule governs signature, service, and filing of documents required or permitted to be filed in a district court or BAP.

(b) Filing.

18 One might initially be tempted to argue that Rule 8001(a) also suggests as much, because it provides in part that "[t]hese Part VIII rules govern the procedure in a United States district court and in a bankruptcy appellate panel on appeal from a bankruptcy court's judgment, order, or decree," and it does not say anything about the Part VIII rules governing procedure in the bankruptcy court. But that argument plainly doesn't work: It proves too much. The Part VIII rules explicitly govern some activities in the bankruptcy court, such as the filing of the notice of appeal. See Rule 8003(a)(1).

19 Specifically, one would revise Rule 8004(a)(3) to refer to "Rule 8011(e)" instead of "Rule 8011(d)."

(1) With the Clerk. A document required or permitted to be filed in a district court or BAP must be filed with the clerk of that court.

(2) Method and Timeliness.

(A) Nonelectronic Filing.

* * *

(B) Electronic Filing.~~(i)~~[20] By a Represented Person--Generally Required; Exceptions. An entity represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for cause or is allowed or required by local rule.

~~(ii)~~ **(C) Electronic Filing By ~~an Unrepresented~~ a Self-Represented Individual--When Allowed or Required.**

(i) In General. ~~An~~ A self-represented individual ~~not represented by an attorney: •~~ may ~~file electronically only if allowed by~~ use the court's electronic-filing system [to file documents and receive notice of activity in the case] unless a court order or ~~by~~ local rule prohibits the individual from doing so.~~; and~~ A self-represented individual ~~•~~ may be required to file electronically only by ~~court~~ order in a case~~,~~ or by a local rule that includes reasonable exceptions.

(ii) Local Provisions Prohibiting Access. If a local rule – or any other

20 I suggest this re-numbering in order to avoid running out of levels of numbering and lettering.

local court provision that extends beyond a particular litigant or case – prohibits self-represented [individuals] from using the court's electronic-filing system, the provision must include reasonable exceptions or must permit the use of another electronic method for filing [documents] and for receiving electronic notice [of activity in the case].

(iii) Conditions and Restrictions on Access. A court may set reasonable conditions and restrictions on self-represented [individuals'] access to the court's electronic-filing system.

(iv) Restrictions on a Particular [Individual]. A court may deny a particular [individual] access to the court's electronic-filing system and may revoke an [individual]'s previously granted access for not complying with the conditions authorized in (iii).

~~(iii)~~ **(D) Electronically Filed Same as a Written Paper.** A document filed electronically is a written paper for purposes of these rules.

~~(C)~~ (E) **When Paper Copies Are Required.** No paper copies are required when a document is filed electronically. If a document is filed by mail or by delivery to the district court or BAP, no additional copies are required. But the district court or BAP may, by local rule or order in a particular case, require that a specific number of paper copies be filed or furnished.

(3) Clerk's Refusal of Documents. The court clerk must not refuse to accept for filing any document solely because it is not presented in proper form as required by

these rules or by any local rule or practice.

~~(b)~~ (c) **Service of All Documents Required.** Unless a rule requires service by the clerk or the document will be served under (d)(1), a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal. Service on a party represented by counsel must be made on the party's counsel.

~~(c)~~ (d) **Manner of Service.**

(1) **Service by a Notice of Filing Sent Through the Court's Electronic-Filing System.** A notice of filing sent to a person registered to receive it through the court's electronic-filing system constitutes service on that person as of the notice's date. But a court may provide by local rule that if a paper is filed under seal, it must be served by other means.

~~(1) Nonelectronic~~ (2) **Service by Other Means.** ~~Nonelectronic service~~ A paper may also be served under this rule by ~~any of the following~~:

(A) personal delivery;

(B) mail; ~~or~~

(C) third-party commercial carrier for delivery within 3 days~~.~~; or

~~(2) Service By Electronic Means. Electronic service may be made by:~~

~~(A) sending a document to a registered user by filing it with the court's electronic-filing system; or~~

~~(B) using other~~ (D) electronic means that the person served has consented to in writing.

(3) When Service Is Complete.

(A) Service under (d)(1) is complete as of the date of the notice of filing.

(B) Service by other electronic means is complete on sending, unless the person making service receives notice that the document was not received by the person served.

(C) Service by mail or by third-party commercial carrier is complete on mailing or delivery to the carrier. ~~Service by electronic means is complete on filing or sending, unless the person making service receives notice that the document was not received by the person served.~~

(4) Definition of "Notice of Filing." The term "notice of filing" in this rule includes a notice of docket activity, a notice of electronic filing, and any other similar electronic notice provided to case participants through the court's electronic-filing system to inform them of activity on the docket.

~~(d)~~ (e) Proof of Service.

(1) Requirements. A document presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgement of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) the mail or electronic address, the fax number, or the address of the place of delivery--as appropriate for the manner of service--for

each person served.

(2) Delayed Proof of Service. A district or BAP clerk may accept a document for filing without an acknowledgement or proof of service, but must require the acknowledgment or proof of service to be filed promptly thereafter.

(3) For a Brief or Appendix. When a brief or appendix is filed, the proof of service must also state the date and manner by which it was filed.

~~(e)~~ (f) **Signature Always Required.**

(1) Electronic Filing. Every document filed electronically must include the electronic signature of the person filing it or, if the person is represented, the counsel's electronic signature. A filing made through a person's electronic-filing account and authorized by that person--together with that person's name on a signature block--constitutes the person's signature.

(2) Paper Filing. Every document filed in paper form must be signed by the person filing it or, if the person is represented, by the person's counsel.

Committee Note

Rule 8011 is amended to address two topics concerning self-represented litigants. (Concurrent amendments are made to Rule 7005, Civil Rule 5, Criminal Rule 49, and Appellate Rule 25.) A new Rule 8011(a) addresses the scope of Rule 8011. Rule 8011(a) becomes Rule 8011(b) and is amended to expand the availability of electronic modes by which self-represented litigants can file documents with the court and receive notice of filings that others make in the case. Rule 8011(c) becomes Rule 8011(d) and is amended to address service of documents filed by a self-represented litigant in paper form. Because all such paper filings are uploaded by court staff into the court's electronic-filing system, there is no need to require separate paper service by the filer on case participants who receive an electronic notice of the filing from the court's electronic-filing system. New Rule 8011(d)'s treatment of service is also reorganized to reflect the primacy of service by means of the electronic notice.

Subdivision (a). As noted above, concurrent amendments are changing the practice for

filings by self-represented litigants under the Civil, Criminal and Appellate Rules as well as Rule 8011. However, for the reasons explained in the Committee Note to Rule 7005, no similar amendments are being made elsewhere in the Bankruptcy Rules. Accordingly, this package of amendments will not change the practice for filings by self-represented litigants in the bankruptcy courts. Notices of appeal are filed in the court from which the appeal is taken, and so the practice concerning notices of appeal from the bankruptcy court should track the practice that applies to other filings in the bankruptcy court. Rule 8011 is designed only to govern filings in the district court or BAP, and not filings in the bankruptcy court. But now that Rule 8011's treatment of filing and service will diverge from the approach that applies in the bankruptcy court, it becomes more important to ensure clarity concerning which rule applies to the filing of a notice of appeal (or other document, such as a motion for a stay) in the bankruptcy court. Accordingly, new subdivision (a) provides that Rule 8011 governs signature, service, and filing of documents required or permitted to be filed in a district court or BAP.

Subdivision (b)(2)(C). Under new Rule 8011(b)(2)(C)(i), the presumption is the opposite of the presumption set by the prior Rule 8011(a)(2)(B)(ii). That is, under new Rule 8011(b)(2)(C)(i), self-represented litigants are presumptively authorized to use the court's electronic-filing system to file documents in their case subsequent to the case's commencement. If a district court or BAP wishes to restrict self-represented litigants' access to the court's electronic-filing system, it must adopt an order or local rule to impose that restriction.

Under Rule 8011(b)(2)(C)(ii), a local rule or general court order that bars persons not represented by an attorney from using the court's electronic-filing system must include reasonable exceptions, unless that court permits the use of another electronic method for filing documents and receiving electronic notice of activity in the case. But Rule 8011(a)(2)(C)(iii) makes clear that the court may set reasonable conditions on access to the court's electronic-filing system.

A court can comply with Rules 8011(b)(2)(C)(ii) and (iii) by doing either of the following: (1) Allowing reasonable access for self-represented litigants to the court's electronic-filing system, or (2) providing self-represented litigants with an alternative electronic means for filing (such as by email or by upload through an electronic document submission system) and an alternative electronic means for receiving notice of court filings and orders (such as an electronic noticing program).

For a court that adopts the option of allowing reasonable access to the court's electronic-filing system, the concept of "reasonable access" encompasses the idea of reasonable conditions and restrictions. Thus, for example, access to electronic filing could be restricted to non-incarcerated litigants and could be restricted to those persons who satisfactorily complete required training and/or certifications and comply with reasonable conditions on access. Also, a court could adopt a local provision stating that certain types of filings – for example, notices of appeal – cannot be filed by means of the court's electronic-filing system. Rule 8011(b)(2)(C)(ii) refers to "a local rule – or any other local court provision that extends beyond a particular litigant

or case" to make clear that Rule 8011(b)(2)(C)(ii) does not restrict a court from entering an order barring a specific self-represented litigant from accessing the court's electronic-filing system.

Rule 8011(b)(2)(C)(iv) provides that the court may deny a specific self-represented litigant access to the court's electronic-filing system, and that the court may revoke a self-represented litigant's access to the court's electronic-filing system.

Subdivision (c). Existing Rule 8011(b) generally requires that a party, "at or before the time of filing a document, [must] serve it on the other parties to the appeal." The existing rule exempts from this requirement instances when "a rule requires service by the clerk." The rule is amended to add a second exemption, for instances when "the document will be served under (d)(1)." This amendment is necessary because new Rule 8011(d)(1) encompasses service by the notice of filing that results from the clerk's uploading into the system a paper filing by a self-represented litigant. In those circumstances, service will not occur "at or before the time of filing a document," but it will occur when the court's electronic-filing system sends the notice to the litigants registered to receive it.

Subdivision (d). Rule 8011(d) is restructured so that the primary means of service – that is, service by means of the court's electronic-filing system – is addressed first, in subdivision (d)(1). Existing Rule 8011(c)(1) becomes new Rule 8011(d)(2), which continues to address alternative means of service. New Rule 8011(d)(4) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket.

Subdivision (d)(1). Amended Rule 8011(d)(1) eliminates the requirement of separate (paper) service on a litigant who is registered to receive a notice of filing from the court's electronic-filing system. Litigants who are registered to receive a notice of filing include those litigants who are participating in the court's electronic-filing system with respect to the case in question and also include those litigants who receive the notice because they have registered for a court-based electronic-noticing program. (Current Rule 8011(c)(2)(A)'s provision for service by "sending a document to a registered user by filing it with the court's electronic-filing system" had already eliminated the requirement of paper service on registered users of the court's electronic-filing system by other registered users of the system; the amendment extends this exemption from paper service to those who file by a means other than through the court's electronic-filing system.)

The last sentence of amended Rule 8011(d)(1) states that a court may provide by local rule that if a paper is filed under seal, it must be served by other means. This sentence is designed to account for districts or BAPs in which parties in the case cannot access other participants' sealed filings via the court's electronic-filing system.

Subdivision (d)(2). Subdivision (d)(2) carries forward the contents of current Rules 8011(c)(1) and (2), with two changes.

The subdivision's introductory phrase ("Nonelectronic service may be by any of the following") is amended to read "A paper may also be served under this rule by." This locution ensures that what will become Rule 8011(d)(2) remains an option for serving any litigant, even one who receives notices of filing. This option might be useful to a litigant who will be filing non-electronically but who wishes to effect service on their opponent before the time when the court will have uploaded the filing into the court's system (thus generating the notice of filing).

Prior Rule 8011(c)(2)(A)'s reference to "sending a document to a registered user by filing it with the court's electronic-filing system" is deleted, because this is now covered by new Rule 8011(d)(1).

Subdivision (d)(3). Rule 8011(c)(3) ("When Service is Complete") becomes Rule 8011(d)(3) and is amended to distinguish between service under new Rule 8011(d)(1) – that is, service by means of the notice of electronic filing, which is complete as of the notice's date – and service by "other electronic means," which continues to be complete on "sending, unless the person making service receives notice that the document was not received by the person served." Experience has demonstrated the general reliability of notice and service through the court's electronic-filing system on those registered to receive notices of electronic filing from that system.

Subdivision (d)(4). New Rule 8011(d)(4) defines the term "notice of filing" as any electronic notice provided to case participants through the court's electronic-filing system to inform them of a filing or other activity on the docket. There are two equivalent terms currently in use: Notice of Electronic Filing and Notice of Docket Activity. "Notice of filing" is intended to encompass both of those terms, as well as any equivalent terms that may come into use in future. The word "electronic" is deleted as superfluous now that electronic filing is the default method.

* * *

Rule 8004. Leave to Appeal from an Interlocutory Order or Decree Under 28 U.S.C. § 158(a)(3)

(a) Notice of Appeal and Accompanying Motion for Leave to Appeal. To appeal under 28 U.S.C. § 158(a)(3) from a bankruptcy court's interlocutory order or decree, a party must file with the bankruptcy clerk a notice of appeal under Rule 8003(a). The notice must:

(1) be filed within the time allowed by Rule 8002;

(2) be accompanied by a motion for leave to appeal prepared in accordance with (b); and

(3) unless served electronically using the court's electronic-filing system, include proof of service in accordance with Rule 8011~~(d)~~ (e).

* * *

Committee Note

Rule 8004(a)(3) is amended to conform to the renumbering of Bankruptcy Rule 8011(d) as Rule 8011(e).

3. Treating bankruptcy appeals the same as proceedings in the bankruptcy court: Possible Appellate Rules amendment

Alternatively, the committees might decide not to amend Bankruptcy Rule 8011, and to preserve the current approach to filing and service for purposes of appeals to a district court or BAP. Note, though, that absent additional amendments, the service and filing approaches that apply on appeal to the court of appeals might be thought to track the (new) procedures that would apply in the district courts and courts of appeals generally.

This is because, under the current rules, Appellate Rule 25(a)(5), not Bankruptcy Rule 8011, governs filing and service in the courts of appeals. Appellate Rule 1(a)(1) provides: "These rules govern procedure in the United States courts of appeals." Bankruptcy Rule 8001(a) provides that the Part VIII Rules "govern certain procedures on appeal to a United States court of appeals under 28 U.S.C. § 158(d)." The 2014 Committee Note to Rule 8001(a) lists (as Part VIII Rules that "relate to appeals to courts of appeals") Rules 8004(e), 8006, 8007, 8008, 8009, 8010, 8025, and 8028) – but not Rule 8011.

Nor would it be persuasive to suggest that Bankruptcy Rule 1001 somehow applies Rules 5005 or 9036 to bankruptcy matters in the courts of appeals. It's true that Rule 1001(a) states that "[t]hese rules, together with the Official Bankruptcy Forms, govern the procedure in cases under the Bankruptcy Code, Title 11 of the United States Code." But Rules 5005 and 9036 are drafted in ways that show they are not designed to address proceedings in the court of appeals. For example, each refers to the "clerk," which is defined by Rule 9001(b)(2) to mean "a bankruptcy clerk if one has been appointed; otherwise, it means the district-court clerk."

Thus, the current rules allocate to Appellate Rule 25(a)(5) the role of governing filing and service for proceedings in the courts of appeals, including bankruptcy appeals. So if the rulemakers wish to exempt bankruptcy appeals from proposed updated treatment of SRL service

and e-filing in the courts of appeals, some amendments to the Appellate and Bankruptcy Rules would seem necessary to accomplish that. I am not sketching such amendments here, because I surmise that the committees will prefer to keep the practice in the courts of appeals uniform across types of appeal rather than exempting bankruptcy appeals from the new SRL service and e-filing approach in the courts of appeals. But one could tentatively say that the change could be accomplished by amending Rule 8011 and also Appellate Rule 6 (Appeal in a Bankruptcy Case).

III. Conclusion

The project on SRL service and e-filing, if it goes forward in any form, will require amendments to the Bankruptcy Rules. This memo sketched the basic choices that will arise depending on whether or not bankruptcy-court practice will diverge from the new SRL service and e-filing practices that will apply in the district courts and courts of appeals.

Encl.

TAB 4B

MEMORANDUM

To: Advisory Committee Chairs

From: Reporters' Privacy Rules Working Group
H. Thomas Byron III, Rules Committee Chief Counsel

Re: Potential issues related to the privacy rules

Date: August 21, 2024

The Rules Committees have received several suggestions that address particular issues related to the privacy rules (Appellate Rule 25, Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1): (1) a suggestion to reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings (22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B); (2) suggestions to streamline the caption on many bankruptcy notices by limiting or eliminating detailed information about a debtor, including the debtor's SSN, from subsequent notices after the meeting of creditors notice (23-BK-D, 23-BK-J); and (3) a suggestion to amend Criminal Rule 49.1(a)(3) and corresponding provisions of the other privacy rules, which currently require including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses (suggestions 24-CR-A, 24-AP-B, 24-BK-D, 24-CV-C). The appropriate Advisory Committees will continue to consider those pending suggestions. This memo addresses whether those deliberations should expand to encompass other privacy-related issues, and recommends against such an expansion.

I. Background and Overview

At the spring 2024 meetings, the Advisory Committees discussed a suggestion from Senator Wyden (22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B) that would require complete redaction of social-security numbers. The agenda books included a sketch of a draft rule amendment but did not recommend that the amendment be considered at that time. (Our March 19, 2024, memorandum is attached for reference.) Based on the recommendation of the reporters' working group, the committees decided to defer consideration of a draft rule amendment until after discussion of pending suggestions and possibly other potential issues concerning the privacy rules.

In addition to the pending suggestions that are under consideration by the Bankruptcy and Criminal Rules Committees, we have identified several potential

issues common to all three rule sets (Bankruptcy, Civil, and Criminal).[1] This memorandum explains the tentative conclusion of the working group that those issues, outlined below, do not warrant further study by the advisory committees. We seek input from each committee about that recommendation and about whether any other issues related to the privacy rules deserve consideration at this time.

Each of the issues described below represents an area where some clarifying changes could be made to the privacy rules or where they could be expanded to cover additional information. But our consensus view is that there is no demonstrated need for the Rules Committees to take up any of these issues. Put simply, there is no real-world problem that we need to solve right now. That initial question—whether there is an actual problem in the application of the rules that could be solved by an amendment—has long driven the focus of the rules committees, and it properly reflects the limited time and other resources available to the committees, as well as the presumption that rule amendments should be limited to avoid disruption of settled practices.

That view could change if we receive a specific suggestion for a rule amendment that identifies a practical problem in the privacy rules or if case law or other information reflects real uncertainty or divergence in how the rules are being interpreted or applied. In that event, we will ask the committees to consider how to address the particular concern. Similarly, if another Judicial Conference committee, such as CACM or IT, were to identify a privacy-related concern that could be addressed by a rule amendment, the rules committees could consider the issues raised in that context.

In the meantime, the Bankruptcy and Criminal Rules Committees will continue to consider the pending proposals for amendments to the privacy rules. The suggestion for an amendment requiring complete redaction of social-security numbers can be considered along with any proposed amendments that result from that ongoing work on pending suggestions.

The following summaries describe the issues considered by the working group:

II. Potential Privacy-Rule Issues

A. Ambiguity and overlap in the exemptions

The exemptions from the redaction requirements, set forth in subdivision (b) of each of the privacy rules, include language that appears ambiguous or possibly

[1] Appellate Rule 25(a)(5) generally provides that that the appropriate privacy rule in the Bankruptcy, Civil, or Criminal Rules will govern in particular categories of cases in the appellate courts. Unless otherwise noted, privacy rule citations in this memo are to the common provisions of the Bankruptcy, Civil, and Criminal Rules.

overbroad, although we are not aware of any particular problems or concerns related to the application of these provisions. Here are two examples:

Subdivision (b)(3) refers to the "official record from a state-court proceeding"; rules committee records indicate that this exemption was originally intended to refer to the records of state cases removed to federal court. But that focus is not apparent in the text of the rules. And state-court records can be included in filings in other types of cases as well.

Subdivision (b)(4), which exempts "the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed," was initially aimed at pre-2007 federal court records, although the rule text appears to apply much more broadly to the record of any court or tribunal. It appears to overlap, and perhaps make redundant, some more specific exemptions for: (1) the record of administrative or agency proceedings, in subdivision (b)(2); (2) the official record of a state-court proceeding, in subdivision (b)(3); and (3) state-court records in a pro se action brought under 28 U.S.C. § 2254, in subdivision (b)(6) of Civil Rule 5.2 and Criminal Rule 49.1.

B. Scope of the waiver

The waiver provision in subdivision (h) of Civil Rule 5.2 and Criminal Rule 49.1, and subdivision (g) of Bankruptcy Rule 9037, can be read narrowly to provide only that an individual does not violate the rule by failing to comply with the redaction requirements with respect to the person's own personally identifiable information (PII). That is, inclusion of a person's own unredacted PII waives the redaction requirement for that party with respect to that specific PII in that particular filing only. However, the records of the rules committees' original consideration of the privacy rules support a broader reading of the waiver provision: Under that view, once a person waives the protection of subdivision (a)'s redaction requirements in a filing as to the person's own information, other filers no longer need to redact the disclosed PII in subsequent filings in the case (or perhaps even in other cases).

The broader view is not apparent from the rule text or committee note. But the ambiguity inherent in the term "waives," as well as the rules committees' public records on the subject, leaves open the possibility that the waiver provision could be read by some litigants to permit inclusion of unredacted PII in a broad range of court filings. Here too, however, we have not received any indication of a problem in practice related to the waiver provision.

C. Expansion of protected information subject to redaction

Since their adoption in 2007, the privacy rules have required redaction of "an individual's social-security number, taxpayer-identification number, or birth date," as well as "the name of an individual known to be a minor" and "a financial-account

number." Civil Rule 5.2(a). Other categories or identifiers might equally warrant protection in court filings as PII. For example, an individual's passport or driver's license number could potentially cause harm if disclosed, and there seems little or no reason why an unsealed filing would need to disclose those kinds of details. Similarly, online login information such as account identifiers and passwords could cause harm if disclosed.

Other information, such as an individual's birthplace, could—in conjunction with other data—facilitate identity theft or similar malicious activity. Telephone numbers and physical or email addresses could pose different considerations, as they are generally required for attorneys and pro se filers to ensure that courts and parties can reach litigants. But there might be little reason to allow routine disclosure of third parties' information.

At this point, we have not received any indication that disclosure of these categories of information in court filings is widespread or has led to specific problems. And the absence of such a suggestion seems sufficient reason not to devote resources to these questions now.

D. Protection of other sensitive information

Beyond redaction of specific PII, there might also be additional categories of information that warrant protection from public disclosure. For example, medical records and related information about an individual's health conditions are protected from disclosure in certain circumstances, although the privacy rules do not address that type of information. And geolocation information (such as from cellphone records, smartwatches, GPS devices, or Bluetooth trackers) can also include sensitive personal information that might be considered private in some circumstances. The privacy rules specifically mention filings made under seal in subdivision (d), and these categories of information raise the question whether the rules should protect specific categories of privacy-related information that might need to be known to parties in litigation but should not be subject to wider public disclosure.

A 2023 submission from Lawyers for Civil Justice (23-CV-W) questions whether the rules as a whole do enough to ensure the protection of sensitive personal information from disclosure. The Civil Rules Committee has not yet discussed that suggestion, and its consideration of the issues could provide additional relevant guidance to the other Advisory Committees. At this time, however, there is no indication that the privacy rules need to be amended to address these broader concerns.

MEMORANDUM

To: Advisory Committee Chairs

From: Reporters' Privacy Rules Working Group
H. Thomas Byron III, Chief Counsel, Rules Committee Staff
Zachary Hawari, Rules Law Clerk

Re: Update on Review of Privacy Rules

Date: March 19, 2024

I. Background and Overview

In 2022, Senator Ron Wyden suggested that the Rules Committees reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings (suggestions 22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B). The redaction requirements—including the requirement that filers redact all but the last 4 digits of SSNs—are generally consistent across the privacy rules (Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2(a), and Criminal Rule 49.1(a)). See E-Government Act of 2002, Pub. L. No. 107-347, § 205(c)(3)(A)(ii), 116 Stat. 2914 ("Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.").

The partial SSN redaction requirement in the privacy rules was adopted and retained in large part due to concerns that participants in bankruptcy cases needed the last 4 digits of a debtor's SSN. In light of that history, the Advisory Committees concluded in 2022 that the Bankruptcy Rules Committee should first determine the extent to which that need remains paramount before the Appellate, Civil, and Criminal Rules Committees consider whether any different approach would be warranted in non-bankruptcy cases. The Bankruptcy Rules Committee has tentatively determined that it would not be feasible to require complete redaction of SSNs in all bankruptcy filings, but that committee is considering a range of options that could include eliminating SSNs from some filings. Those issues remain under review and are unlikely to result in a recommendation to publish any proposed amendments to the Bankruptcy Rules before 2025.

The reporters and Rules Committee Staff have been discussing Senator Wyden's suggestion and related issues concerning the privacy rules. We have tentatively concluded that any amendments to the Civil and Criminal Rules concerning the redaction of SSNs should not be considered in isolation but should be part of a more considered review of the privacy rules. The following sections outline possible areas of inquiry that the Rules Committees might consider.

II. Sketch of Rules Amendments Requiring Complete Redaction of SSNs

The Rules Committees could consider amendments that would require complete SSN redaction by amending Civil Rule 5.2(a) and Criminal Rule 49.1(a) along these lines:

> (a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing must [fully] redact the social-security number or taxpayer-identification number and may include only:
>
> (1) ~~the last four digits of the social-security number and taxpayer-identification number;~~
>
> ~~(2)~~ the year of the individual's birth;
>
> (~~3~~2) the minor's initials; and
>
> (4~~3~~) the last four digits of the financial-account number.

The Bankruptcy Rules Committee is considering this suggestion, among other possible approaches to amending the rules governing SSNs in bankruptcy filings.[1]

Several considerations warrant a broader review of the privacy rules before moving forward to consider this or a similar proposal in isolation. First, the Federal Judicial Center is conducting a study of unredacted privacy information—including SSNs—in court filings. That study could help inform the Rules Committees' understanding of whether the privacy rules warrant further review and possible amendment. Second, the Rules Committees have received additional suggestions concerning possible amendments to the privacy rules. While the proposal outlined above could move forward while the committees consider other suggestions, the Rules Committees generally seek to avoid multiple proposed amendments to any individual rule, preferring instead to present a single set of consolidated changes after comprehensive consideration. This approach helps educate courts, litigants, and the public about rules changes, avoiding confusion and the risk of amendment fatigue.

Because the committees will be considering other privacy rule suggestions, as well as the conclusions of the ongoing FJC study, it seems prudent to consider any proposed amendment requiring full redaction of social-security numbers along with any other proposed amendments to the privacy rules that the committees conclude may be warranted after careful review of the issues.

[1] There would likely be no need for an amendment of Appellate Rule 25(a)(5), which specifies that the other privacy rules apply to appellate filings in particular categories of cases.

III. Other Privacy Rule Issues

A. The Bankruptcy Rules Committee is considering suggestions to streamline the caption on many notices by limiting or eliminating detailed information about a debtor, including the debtor's SSN, from subsequent notices after the meeting of creditors notice (23-BK-D, 23-BK-J). That committee is considering the suggestions in conjunction with its ongoing consideration of the continuing need and utility of including the last 4 digits of an individual's SSN in bankruptcy filings.

B. The Department of Justice has recently submitted a suggestion to amend Criminal Rule 49.1(a)(3), which currently requires including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses (suggestion 24-CR-A). Because similar requirements appear in the Bankruptcy and Civil Rules, and are incorporated in the Appellate Rules, the suggestion has been forwarded to those advisory committees as well (suggestions 24-AP-B, 24-BK-D, 24-CV-C).

C. Nearly 20 years have passed since the Rules Committees initially considered the privacy rules, and this could present a timely opportunity to review the rules and consider whether any amendments might be warranted in light of the passage of time, or whether practice under the rules has identified other areas of concern. For example, the committees could consider whether any other personal information, not included in the redaction requirements, might warrant protection today.

Some issues could concern provisions that are common to the privacy rules. For example, the exemptions from the redaction requirements in subdivision (b) of each of the privacy rules include language that could be ambiguous or overlapping; additional inquiry could identify whether any of these provisions pose a practical problem to litigants or courts. And the waiver provision in subdivision (h) might warrant clarification. Those inquiries should proceed on a coordinated basis, either by continuing the work of the reporters' working group, by designating one advisory committee to take the lead, or by asking the Standing Committee Chair to appoint a joint subcommittee.

Moreover, an Advisory Committee might seek to consider issues solely related to filings in appellate, bankruptcy, civil, or criminal proceedings. For example, the Bankruptcy Rules Committee is already considering such questions. And the Criminal Rules Committee might review several provisions in Criminal Rule 49.1 that address unique concerns, such as arrest or search warrants and charging documents (Rule 49.1(b)(8)-(9)).

* * * *

The Rules Committee Staff will continue to work with the relevant Advisory Committee Chairs and reporters to identify any areas of common concern and to

assist in any necessary coordination. We anticipate that the reporters' advisory group will continue its discussions over the next several months. Each Advisory Committee can also consider whether it wishes to appoint a subcommittee to consider these issues or instead to await further information.

TAB 4C

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Privacy rule (22-AP-E; 24-AP-B; 24-AP-C)

Date: March 10, 2025

The Rules Committees have been considering several suggestions to amend the privacy rules across the various rule sets. In particular, Senator Wyden has suggested that complete redaction of social security numbers should be required (22-AP-E), and the Department of Justice has suggested that pseudonyms rather than initials be used for minors. (24-AP-B). The American Association for Justice, commenting on the DOJ proposal, adds that the pseudonyms should be gender neutral. (24-AP-C). For further background, see the August 21, 2024, memo from the Reporters' Privacy Rules Working Group and Thomas Byron that accompanies this memo.

Over the years, considerable effort has been made to keep the various rule sets uniform to the extent possible. Accordingly, there has been hesitancy to revise the privacy rules for any one set that did not work for another rule set.

But it has become clear that the Bankruptcy Rules Committee, for reasons that are unique to bankruptcy, is not prepared to require complete redaction of social security numbers. Evidently, social security numbers remain crucial to creditors trying to identify the precise debtor from among those with identical names.

The Criminal Rules Committee is furthest ahead with a proposed change to Criminal Rule 49.1, but it is no longer planning to seek publication this summer.

The easiest thing for the Appellate Committee to do is nothing. That's because Appellate Rule 25(a)(5) applies to appeals the privacy rules that applied to that case in the court below. It provides:

> **Privacy Protection**. An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The provisions on remote electronic access in Federal Rule of Civil Procedure 5.2(c)(1) and (2)

apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

Under Appellate Rule 25(a)(5), the privacy rules simply flow through to appeal. So Appellate can simply wait for the other committees to act and let their changes apply in the courts of appeals.

But whatever need there is in the bankruptcy courts for social security numbers to identify debtors, that task should be accomplished before any appeal to a court of appeals. Plus, members of the Appellate Committee have expressed concern about some of the exceptions in the existing privacy rules. For example, even if it would be too cumbersome to expect redaction of court records filed in the district court, it is hard to see why an unredacted social security number should be reproduced in a brief or appendix in the court of appeals.

For this reason, the Committee might consider adding a sentence to Rule 25(a)(5).

(C) Redacting a Social-Security Number. Unless the court orders filing under seal, a party or nonparty must fully redact a social-security number from any filing it makes. But this requirement does not apply to a clerk forwarding or making the record available under Rule 6(b)(2)(C), Rule 6(c)(2), or Rule 11 or to an agency filing the record under Rule 17.

A Committee Note could say:

Whatever the justification for permitting unredacted or partially redacted social security numbers in other settings, there is no need for them in the publicly available papers filed by litigants in a court of appeals. If it is necessary for the court to know the number, a court order can permit filing under seal.

This prohibition does not apply to a clerk who forwards or makes the record under Rule 6(b)(2)(C), Rule 6(c)(2), or Rule 11. Nor does it apply to an agency filing the record under Rule 17. The record can be sent as it is. The prohibition does apply, however, to any litigant who reproduces portions of the record in an appendix under Rule 30.

The style consultants recommend, if this sentence is added, that the first two sentences in the rule be lettered (A) and (B) and be given the headings "In General" and "In a Petition Involving the Railroad Retirement Act."

When it appeared that Criminal and Civil were going to go forward with publication this summer, I thought it possible that the Appellate Rules Committee might be sufficiently comfortable with this addition to likewise ask the Standing Committee to publish it this summer for public comment along with any proposed changes to the Criminal and Civil Rules governing privacy. But now that it appears that those are not ready for publication this summer, I doubt that it makes sense for Appellate to move forward on its own this summer

Instead, if the Committee is interested in an idea along these lines, I suggest that a subcommittee be appointed.

TAB 5

TAB 5A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Amicus Subcommittee

Re: FRAP 29

Date: March 7, 2025

Proposed amendments to FRAP 29, dealing with amicus briefs, were published in August for public comment. The subcommittee has reviewed voluminous comments as well as the testimony given at a public hearing. It has reached agreement on several changes prompted by the comments and testimony. But it is divided regarding one possible change. And on a different possible change, it reached consensus on its preferred resolution, but it wants further assurance that its preferred solution meets the concerns previously raised by members of the advisory committee. In Parts I and II, this memo focuses first on these two matters, and the subcommittee expects that discussion at the advisory committee meeting will similarly focus on them. Then, in Parts III, IV, and V, it turns to matters on which the subcommittee reached consensus.

I

Disclosure of Financial Ties Between a Party and an Amicus

As published for public comment, FRAP 29(b)(4) requires an amicus 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."

We received many comments about this proposal, much of it critical. Critics argue that it threatens free association and First Amendment rights. Others endorse the proposal, viewing it as a step in the right direction but not going far enough.

The subcommittee is not persuaded that there is a threat to free association and the First Amendment. The proposal does not call for an amicus to disclose all its donors, or even all its major donors. Instead, it is focused on parties to the case. And even there, it does not call for disclosure of all parties to the case who support the amicus financially, but only those who provide 25% or more of the revenue of that amicus.

And, even more fundamentally, the disclosure requirement is limited to those who file amicus briefs with the courts of appeals. Parties have a right to be heard in court, but amici do not. Plus, there are a host of requirements for amicus briefs that would be unthinkable as more general limitations on speech, ranging from the

requirement of consent of the parties or leave of court to word limitations and detailed content requirements.

No commentator or witness convincingly explained why it is inappropriate for a court to know whether an amicus is financially reliant on a party to the case. As Professor Allison Orr Larsen put it, disclosure "can only aid courts to assess a brief's reliability. As any new researcher is taught and any cross-examiner knows well, a source's motivation is intrinsically tied to its credibility." (0374, 393).[1]

One commenter suggested a 50% level, arguing that "at any level less than that, other contributors have a greater voice than the party." (0339, 357). But a party need not contribute most of the revenue for an amicus to feel indebted or beholden to that party. No one would suggest that it would be improper to impeach a witness for bias because that witness received one-quarter but not one-half of her income from that party.

The current rule requires disclosure of whether a party authored the amicus brief in whole or in part. FRAP 29(a)(4)(E)(i). But the arguments of an amicus may be shaped by its receipt of contributions from a party without the party writing the brief, just as a witness's testimony may be shaped by her income from a party without that party writing her testimony.

Accordingly, a majority of the subcommittee recommends final approval of (b)(4) as published.

A minority of the subcommittee, on the other hand, is not persuaded that a proposal facing such broad opposition should be adopted without a greater showing. The necessary showing includes both that there is a sufficient problem today to warrant a rule change, and that the proposal meaningfully addresses that problem. We don't know how often amicus briefs are filed by amici who receive substantial revenue from parties (and are unlikely to learn absent a disclosure requirement). Moreover, the proposal may not make a significant difference in practice, as those determined to evade a new disclosure rule can find ways to evade.

In accordance with this division in the subcommittee, the proposed drafts accompanying this report place (b)(4) in brackets.

[1] The first number in the citations is to the number assigned to the comment. The second number is the page reference in the document at Tab 5D.

II

Motion Requirement

As published for public comment, FRAP 29(a)(3) requires all nongovernmental amici to move for leave to file, eliminating the ability to file at the initial hearing stage based on party consent.

There appears to be no support in the bar for this proposal. Commenters fear that it will increase costs, thereby deterring some amicus briefs, and that, by breaking the norm of consent, the result will be contested motions for leave to file. Some amici may shift their focus even more from courts of appeals to the Supreme Court, where amicus brief may be filed without even the consent of the parties. If any change is to be made, many suggest, it should be in the opposite direction: following the Supreme Court's lead and freely permitting the filing of amicus briefs.

The major reason for the proposed change to a motion requirement is to deal with recusal issues. The current power in FRAP 29(a)(2) to strike a brief is insufficient to deal with situations where a clerk declines to assign a case to a judge based on an amicus brief filed on consent.

Alan Morrison suggests that, just as the Justices of the Supreme Court have decided that an amicus brief does not result in recusal, circuit judges could do the same. "If the Justices do not care, why should judges of the courts of appeals?" (0151, 246). But the subcommittee does not believe that the FRAP could declare that no amicus brief can cause a recusal in the courts of appeals. See 28 U.S.C. § 455.

Nevertheless, the subcommittee is hard pressed to respond to the argument that the recusal problem should be dealt with by changing internal processes, rather than by changing the rules. The California Academy of Appellate Lawyers suggest a way to solve the problem. (0027, 83). Here is the relevant passage:

> If a circuit court wants to give individual judges an opportunity to consider whether they should be disqualified by the filing of an amicus brief or, more likely, whether the amicus brief should be stricken, then the 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. (We assume that the motion for leave to file the amicus brief would be distributed to the assigned merits panel and not a motions panel; otherwise, it could not serve its function of permitting the merits panel to evaluate the amicus filing.)

> From a circuit court's workload perspective, there is little or no difference between reviewing (1) an amicus brief filed on consent and (2) a motion for leave to file an amicus brief, together with the proposed brief. And there is little or no difference, from the court's workload perspective, between voting to deny a motion for leave and requesting an order striking a filed amicus brief. Similarly, from the public's perspective, there is no difference between filing a motion for leave to file an amicus brief that attaches the proposed amicus brief and simply filing the amicus brief. Either way, the amicus brief is docketed in the court because the rules require a movant to submit a copy of the amicus brief with the motion. FRAP 29(a)(3). In short, we respectfully suggest that the Judicial Conference should address the "recusal issues" that prompted the proposed revision to Rule 29(a)(2) by routing amicus briefs filed on consent to the merits panel, where judges can evaluate them and strike them. A motion is unnecessary. If any change were needed, a circuit court could clarify that any single judge assigned to a merits panel has the power to strike an amicus brief that has been filed in the assigned case.

The subcommittee believes that this is a better approach and thinks that it would allow the courts of appeals to freely allow the filing of amicus briefs. For that reason, it has drafted a provision along these lines.

This revised approach would revamp FRAP 29(a)(2) so that neither a motion nor party consent would be required. And it would revise the part of FRAP 29(a)(2) that deals with striking an amicus brief, placing it in a new paragraph (a)(3):

> **Disqualification**. A court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification. The court may assign matters without regard to that possibility. If a judge to whom a matter is assigned determines that an amicus brief would result in that judge's disqualification, the judge may either recuse or may strike the brief.

The subcommittee believes that this approach could also address the problem at the rehearing stage, so long as petitions for rehearing are handled the same way: distributed without regard to whether an amicus brief might cause a recusal and leaving it to the judge to decide whether to recuse or strike the brief. Accordingly, a new sentence would be added to FRAP 29(f):

> For purposes of Rule 29(a)(3), matters include petitions for rehearing.

Nothing in this approach requires a court of appeals to follow this process. If a court of appeals prefers to have its clerk implement recusals before assigning matters to judges, it may continue to do so. By phrasing this approach as what a court "may" do, it effectively creates an optional path for those courts of appeals who choose to implement it.

Although the subcommittee believes that this approach addresses the concerns previously raised by some committee members about the recusal issue, it wants to be sure that those committee members agree.

It is also possible that some might think that this is a significant enough change from what was published that it should be republished for additional public comment. But the public comment is clear that the bar would have no objection to freely allowing the filing of amicus briefs. The concern about amicus briefs resulting in recusal came from inside the committee. Plus, the circulate-then-recuse-or-strike process is optional with the court of appeals. For these reasons, it seems unlikely that additional public comment is called for.[2]

Because members of the committee might find flaws with this approach or think republication would be required to implement it, the subcommittee is also presenting a draft that makes no change to the existing rule regarding the consent option. It leaves the consent option in place at the initial consideration stage, FRAP 29(a)(2), and leaves the motion requirement in place at the rehearing stage. FRAP 29(b)(2), re-lettered as FRAP 29(f)(2).

III

Standard for Filing an Amicus Brief

The current rule does not state a standard for filing an amicus brief. The closest it comes is the requirement that a motion for leave to file an amicus brief state, "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." FRAP 29(a)(3)(B).

The proposed rule, drawing on Supreme Court Rule 37, sets forth the purpose of an amicus brief: "An amicus curiae brief that brings to the court's attention

[2] One commentor, Steven Finell, argues that the existing rule, which permits striking a brief to avoid recusal, should be eliminated. As he sees it, "Refusing to file or striking the amicus brief does not eliminate the conflict of interests between the judge and the amicus, nor does it eliminate the appearance of impropriety that the conflicted judge's participation in deciding the appeal would cause." (0409,427). The subcommittee is not persuaded. None of the options for "who decides"—the clerk's office, the motions panel, the merits panel, or the judge alone—is ideal. There is value in flexibility among the courts of appeals in addressing those tradeoffs.

relevant matter not already mentioned by the parties may help the court. An amicus brief that does not serve this purpose—or that is redundant with another amicus brief—is disfavored." FRAP 29(a)(2).

This proposal has also attracted considerable opposition. Much of that opposition stems from the combination of this provision with a motion requirement, leading to fears that courts would deny motions to file amicus briefs based on a conclusion that the brief is insufficiently helpful, redundant, or addresses matters that have been "mentioned"—if not fully or adequately developed—in a party's brief. The disfavoring of redundancy with other amicus briefs was particularly worrisome; the time to file is short, one amicus may not know about others, and there might be a race to the courthouse so that one's brief was not thought redundant of a previously filed amicus brief.

Much, but not all, of this concern evaporates if the consent option remains in place (and even more so if consent is not required). The subcommittee recommends that the provision about redundancy with other briefs be moved to the Committee Note because it is in the nature of advice to be followed to increase the value of the brief to the court when possible. In addition, the subcommittee takes the point that "mentioned" can be too broad. Most matters that an amicus might properly discuss could be understood as "mentioned" by a party.

Accordingly, the subcommittee recommends that this provision follow the Supreme Court rule more closely. Supreme Court Rule 37.1 states, in part:

> An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored.

The accompanying drafts of FRAP 29(a)(2) provide, in part:

> An amicus curiae brief that brings to the court's attention relevant matter not already brought to its attention by the parties may help the court. An amicus brief that does not serve this purpose burdens the court, and its filing is disfavored.

IV

Earmarked Contributions

Current rule 29(a)(4)(E)(iii) requires the disclosure of earmarked contributions to a brief, no matter how small the amount, by any person other than the amicus itself, members of the amicus, or counsel for the amicus.

As published for public comment, FRAP 29(b)(2) continues to impose this disclosure requirement on a party or its counsel, but is phrased without exception, thereby making clear that the member exception does not apply to parties and counsel to parties.

As published for public comment, FRAP 29(e) continues to impose this disclosure obligation on nonparties, but makes two complementary changes. First, it creates a de minimis exception, permitting earmarked contributions of $100 or less. Second, in order to prevent evasion by the simple expedient of becoming a member in order to make undisclosed earmarked contributions for an amicus brief, it provides that the member exemption does not apply unless the person has been a member of the amicus for the prior 12 months.

In both FRAP 29(b)(2) and (e), the proposed amendment makes clear that earmarked contributions for all stages of brief production—preparing, drafting, submitting—are included.

Much of the criticism of the proposed disclosure requirements is at a high enough level of generality that it would seem to encompass this provision as well, although much of that criticism does not demonstrate awareness that the existing rule already requires disclosure of earmarked contributions of any amount by a nonparty who does not fall within the exception.

If someone who is not a member of an amicus is making earmarked contributions for an amicus brief, there is a danger that the amicus is simply a paid mouthpiece for the contributor. Under the current rule, such a contributor who seeks to anonymously utilize a paid mouthpiece can become a member of the amicus at the same time he makes the contribution. Under the proposed rule, such a contributor could either allow disclosure or contribute to the general funds of the amicus. If a contributor has not previously been a member of the organization and is not willing to contribute to its general funds—but is interested only in providing earmarked funding for a particular brief—the danger that the contributor is seeking a paid mouthpiece increases.

Nothing in the proposed rule impairs an organization's ability to use a particular amicus brief as a way to attract new members or contributors; those members or contributors simply have to support the organization itself (not just this particular brief) if they want to remain anonymous.

One witness did raise a more nuanced concern about the proposal as published: There might be longtime members of an organization who, perhaps inadvertently, let their memberships lapse. To deal with this issue, the subcommittee recommends that proposed FRAP 29(e) require disclosure of earmarked contributions unless the person first became a member more than 12 months ago. So revised, the provision would read:

Disclosing a Relationship Between an Amicus and a Nonparty. An amicus brief must name any person—other than the amicus, its counsel, or a member of the amicus who first became a member more than 12 months ago—who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief. 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.

V

Other Issues

Some commenters are concerned that the somewhat more detailed non-financial disclosures required by the proposal will make it untenable to submit a collective brief on behalf of dozens or hundreds of amici because it will take up too much room in the brief. *See* FRAP 29(a)(4)(D) (requiring "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").

The subcommittee believes that counsel can manage this. *See* Memorandum from Scott S. Harris, Clerk of the Supreme Court, to Those Intending to File an Amicus Curiae Brief in the Supreme Court of the United States 3(c). ("If there are an unusually large number of amici joining the brief, it is permissible to include a listing of the amici in an appendix to the brief, but any description of the amici and of their interests in the case must be included in the body of the brief . . . .").

Some commenters suggested clarifying terms that are in the existing rule. (0307, 331) ("contribute"); (0332, 353) ("member"). The subcommittee is not aware of any difficulties that have arisen applying these terms and therefore recommends leaving them as they are.

Native American organizations suggest adding tribes to the list of government entities that can file briefs without a motion. (0403, 400). This might be mooted if the requirement of a motion or consent is broadly eliminated. And, in any event, the issue of the treatment of tribes arises under a number of rules, including a possible new rule governing intervention on appeal, and the subcommittee recommends treating this issue in a unified rather than piecemeal way.

TAB 5A

TAB 5A1

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability**. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) **Purpose; When Permitted.** An amicus curiae brief that brings to the court's attention relevant matter not already brought to its attention by the parties may help the court. An amicus brief that does not serve this purpose burdens the court, and its filing is disfavored. 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 a judge's disqualification.

(3) **Motion for Leave to File.** A ~~The~~ motion for leave to file must be accompanied by the proposed brief and state:

(A) the movant's interest; ~~and~~

(B) the reason ~~why an amicus~~ the brief is helpful ~~desirable~~ and why it serves the purpose set forth in Rule 29(a)(2). ~~the matters asserted are relevant to the disposition of the case.~~

(4) **Contents and Form**. An amicus brief must comply with Rule 32. ~~In addition to the requirements of Rule 32,~~ The cover must ~~identify~~ name the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~An amicus~~ The brief need not comply with Rule 28, but it must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) a table of contents, with page references;

(C) a table of authorities — cases (alphabetically arranged), statutes, and other authorities, ~~— with references to~~ together with the pages ~~of the brief~~ where they are cited;

(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 brief and the perspective of the amicus will help the court;

(E) if an amicus has existed for less than 12 months, the date the amicus was created;

~~(E)~~(F) unless the amicus is the United States, its officer or agency, or a state, the disclosures required by Rules 29(b), (c), and (e); ~~curiae is one listed in the~~

~~first sentence of Rule 29(a)(2), 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;~~

~~(F)~~(G) an argument, which may be preceded by a summary ~~and which~~ but need not include a statement of the applicable standard of review; and

~~(G)~~(H) a certificate of compliance under Rule 32(g)(1), ~~if length is computed using a word or line limit~~.

(5) **Length**. Except ~~by~~ with the court's permission, an amicus brief must not exceed 6,500 words ~~may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief~~.

(6) **Time for Filing**. An amicus curiae must file its brief, ~~accompanied by a motion to filing when necessary,~~ no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. The ~~A~~ court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) **Reply Brief**. An amicus curiae may file a reply brief only with the court's permission. ~~Except by the court's permission, an amicus curiae may not file a reply brief.~~

(8) **Oral Argument**. An amicus curiae may participate in oral argument only with the court's permission.

(b) Disclosing a Relationship Between an Amicus and a Party. An amicus brief must disclose whether:

(1) a party or its counsel authored the brief in whole or in part;

(2) a party or its counsel contributed or pledged to contribute money intended to pay for preparing, drafting, or submitting the brief;

(3) a party, its counsel, or any combination of parties, their counsel, or both has a majority ownership interest in or majority control of a legal entity submitting the brief; and

[(4) 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.]

(c) Naming the Party or Counsel. Any disclosure required by Rule 29(b) must name the party or counsel.

(d) Disclosure by the Party or Counsel. If the party or counsel knows that an amicus has failed to make the disclosure required by Rule 29(b) or (c), the party or counsel must do so.

(e) Disclosing a Relationship Between an Amicus and a Nonparty. An amicus brief must name any person—other than the amicus, its counsel, or a member of the amicus who first became a member more than 12 months earlier—who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief. 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.

~~(b)~~**(f) During Consideration of Whether to Grant Rehearing.**

(1) **Applicability**. ~~This Rule 29(b)~~ Rules 29(a)-(e) governs amicus ~~filings~~ briefs filed during

a court's consideration of whether to grant panel rehearing or rehearing en banc, except as provided in Rules 29(f)(2) and (3), and unless a local rule or order in a case provides otherwise.

(2) **When Permitted.** 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 by leave of court.

(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.

(4) ~~Contents, Form, and~~ **Length**. ~~Rule 29(a)(4) applies to the amicus brief.~~ An amicus ~~The~~ brief must not exceed 2,600 words.

(5) **Time for Filing**. An amicus curiae supporting ~~the~~ a petition for rehearing or supporting neither party must file its brief, accompanied

by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for ~~the~~ a response.

Committee Note

The amendments to Rule 29 make changes to the procedure for filing amicus briefs, including to the disclosure requirements.

The amendments seek primarily to provide the courts and the public with more information about an amicus curiae. Throughout its consideration of possible amendments, the Advisory Committee has carefully considered the relevant First Amendment interests.

Some 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. At times, however, courts do consider the identity and perspective of an amicus to be relevant. For that reason, the Committee thinks that some disclosures about an amicus are important to promote the integrity of court processes and rules.

Careful attention to the various interests and the need to avoid unjustified burdens is reflected throughout these amendments. For example, the amendment treats disclosures

about the relationship between a party and an amicus differently than disclosures about the relationship between a nonparty and an amicus. While the public interest in knowing about an amicus—in order to evaluate its arguments and a court's consideration of those arguments—is relevant in both situations, there 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. Moreover, the burden on an amicus of disclosing a relationship with a party is much lower than having to disclose a relationship with nonparties. Disclosing a relationship with a party requires an amicus to check its records (and perhaps make a disclosure) regarding only the limited number of persons who are parties to the case. Disclosing a relationship with a nonparty would, by contrast, require an amicus to check its records (and perhaps make a disclosure) regarding the much larger universe of all persons who are not parties to the case.

To take another example, the amendment treats contributions by a nonparty that are earmarked for a particular brief differently than general contributions by a nonparty to an amicus. People may make contributions to organizations for a host of reasons, including reasons that have nothing to do with filing amicus briefs. Requiring the disclosure of non-earmarked contributions provides less useful information for those who seek to evaluate a brief and imposes far greater burdens on contributors.

Subdivision (a). The amendment to Rule 29(a)(2) adds a statement of the purpose of an amicus brief: to bring to the court's attention relevant matter not already brought to its attention by the parties that may help the court. By contrast, if an amicus curiae brief adds nothing to the parties' briefs, it is a burden rather than a help. Where feasible, avoiding redundancy among amicus briefs can also be helpful.

The amendment to Rule 29(a)(4)(D) expands the required statement regarding the identity of an amicus and its interest in the case and requires "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." The amendment calls for this broader disclosure to help the court and the public evaluate the likely reliability and helpfulness of an amicus, particularly those with anodyne or potentially misleading names. It also requires that the amicus explain how the brief and the perspective of the amicus will further the goal of helping the court. Rule 29(a)(4)(E) is new. It requires an amicus that has existed for less than 12 months to state the date of its creation, helping identify amici that may have been created for the purpose of this litigation. Subsequent provisions are re-lettered.

Existing disclosure requirements about the relationship between the amicus and both parties and nonparties are removed from subdivision (a) and placed in separate subdivisions, one dealing with parties (subdivision (b)) and one dealing with nonparties (subdivision (e)).

Rule 29(a)(5) is amended to directly impose a word limit on amicus briefs, replacing the provision that establishes length limits for amicus briefs as a fraction of the length limits for parties. This results in removing the option to rely on a page count rather than a word count. This change enables Rule 29(a)(4)(H) (formerly 29(a)(4)(G)) to be simplified and require a certification of compliance under Rule 32(g)(1) in all amicus briefs.

Subdivision (b). Subdivision (b) dealing with disclosure of the relationship between the amicus and a party is new, but it draws on existing Rule 29(a)(4)(E). Because of the important interest in knowing whether a party has significant influence or control of an amicus, these disclosures are more far reaching than those involving nonparties, which are addressed in (e).

Rule 29(b)(1) carries forward the existing requirement that authorship of an amicus brief by a party or its counsel must be disclosed.

Rule 29(b)(2) carries forward the existing requirement that money contributed by a party or party's counsel that was intended to fund the preparation or submission of the brief must be disclosed. But in an effort to counteract the possibility of an amicus interpreting the existing rule narrowly, the amendment explicitly refers to "preparing, drafting, or submitting the brief," thereby making clear that it applies to every stage of the process.

Subdivision (b)(3) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel either has a majority ownership interest in or majority control of an amicus. If a party has such control over an amicus, it is in a position to control the content of an amicus brief. If undisclosed, the court and the public may be misled about the independence of an amicus from a party, and a party may be able to effectively exceed the limitations otherwise imposed on parties.

[Subdivision (b)(4) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel has either contributed or pledged to contribute 25% or more of the revenue of an amicus. The 25% figure is chosen because the Committee believes that someone who provides that high a percentage of the revenue of an amicus is likely to have substantial power to influence that amicus. Knowing that an amicus has that level of dependency on a party is useful in evaluating the arguments of that amicus. Because the concern is about contributions or pledges made sufficiently near in time to the filing of the brief to influence the brief, contributions or pledges made within 12 months before the filing of the brief must be disclosed. To minimize the burden of disclosure on the amicus, the 25% calculation is based on the total revenue of the amicus for its prior fiscal year. This means that such a calculation of the disclosure threshold needs to be done only once a year rather than each time an amicus brief is filed. And by using the prior fiscal year, an amicus can rely on its ordinary accounting process. The term "total revenue" is used because that is the term used by a tax-exempt organization on its IRS Form 990. A non-tax-exempt entity is likely to prepare an income statement which includes its total revenue. Individual amici can rely on their total income from the prior fiscal year reported on IRS Form 1040.]

Subdivision (c). Subdivision (c) requires that any disclosure required by paragraph (b) name the party or counsel. This builds upon the requirement in current Rule 29(a)(4)(D)(iii) that certain persons who make earmarked contributions be identified.

Subdivision (d). Subdivision (d) is new. It operates as a backstop to the disclosure requirements of (b) and (c): If the amicus fails to make a required disclosure, and the party or counsel knows it, the party or counsel must make the disclosure.

Subdivision (e). Subdivision (e) focuses on the relationship between the amicus and a nonparty. It makes several changes to the existing Rule 29(a)(4)(E)(iii), which currently requires the disclosure of any contribution earmarked for a brief, no matter how small, by anyone other than the amicus itself, its members, or its counsel. Earmarked contributions run the risk that the amicus is being used as a paid mouthpiece by the contributor. Knowing about earmarked contributions helps courts and the public evaluate the arguments and information in the amicus brief by providing information about possible reasons for the filing other than those explained by the amicus itself.

The Committee considered requiring the disclosure of nonparties who make any significant contributions to an amicus, whether earmarked or not. But it decided against doing so because of the burdens it could impose on amici and their contributors, even when the reason for the contribution had nothing to do with the brief. Instead, it retained the focus of the existing rule on earmarked contributions.

The Committee considered eliminating the member exception because that exception allows for easy evasion: simply become a member at the time of making an earmarked contribution. But it decided against doing so because members speak through an amicus and an amicus generally speaks for its members. In addition, eliminating the member exception threatened to place an unfair burden on amici who do not budget in advance for amicus briefs (and therefore have to "pass the hat" when the need to file an amicus brief arises) compared to other amici who may file amicus briefs more frequently (and therefore can budget in advance and fund them from general revenue). Without a member exception, the latter (generally larger) amici would not have to disclose, but the former (generally smaller) amici would have to disclose.

Instead, the amendment retains the member exception, but limits it to those who first became members of the amicus more than 12 months earlier. In effect, the amendment is an anti-evasion rule that treats new members of an amicus as non-members.

This then raises the question of what to do with a newly-formed amicus organization. Rather than eliminate the member exception for such organizations, the amendment protects members from disclosure. But Rule 29(a)(4)(E) requires an amicus that has existed for less than 12 months to disclose the date of its creation. This requirement works in conjunction with the expanded disclosure requirement of Rule 29(a)(4)(D) to reveal an amicus that may have been created for purposes of particular litigation or is less established and broadly-based than its name might suggest. Unless adequately explained, a court and the public might choose to discount the views of such an amicus.

The amendment also provides a $100 threshold for the disclosure requirement. Under the existing rule, a non-member of an amicus who contributes any amount, no matter how small, that is earmarked for a particular brief must be disclosed. This can hamper crowdfunding of amicus briefs while providing little useful information to the courts or the public. Contributions of $100 or less are unlikely to run the risk that an amicus is being used as a mouthpiece for others.

Subdivision (f). Subdivision (f) retains most of the content of existing subdivision (b) and governs amicus briefs at the rehearing stage. It is revised to largely incorporate by reference the provision applicable to amicus briefs at the initial consideration of the case. Rule 29(f)(1) makes Rule 29(a) through (e) applicable, except as provided in the rest of Rule 29(f) or if a local rule or order in a particular case provides otherwise. As a result, duplicative provisions are eliminated.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 32. Form of Briefs, Appendices, and Other Papers[2]

* * * * *

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(a)(5), 29(f)(4) ~~29(b)(4)~~, or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), or 40(d)(3)(A)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation.

[1] New material is underlined in red; matter to be omitted is lined through.

[2] The changes indicated are to the revised version of Rule 32, not yet in effect.

The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

Rule 32(g) is amended to conform to amendments to Rule 29.

Appendix

Length Limits Stated in the

Federal Rules of Appellate Procedure

* * *					
Amicus briefs	29(a)(5)	• Amicus brief during initial consideration on merits	~~One-half the length set by the Appellate Rules for a party's principal brief~~ 6,500 2,600	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable Not applicable	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable Not applicable
	~~29(b)(4)~~ 29(f)(4)	• Amicus brief during consideration of whether to grant rehearing			
* * *					

TAB 5A2

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability**. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) **Purpose.** ~~**When Permitted.**~~ An amicus curiae brief that brings to the court's attention relevant matter not already brought to its attention by the parties may help the court. An amicus brief that does not serve this purpose burdens the court and its filing is disfavored. ~~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 by leave of court or if the brief states that all parties have consented to its filing, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.~~

(3) **Disqualification**. A court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification. The court may assign matters without regard to that possibility. If a judge to whom a matter is assigned determines that an amicus brief would result in that judge's disqualification, the judge may either recuse or may strike the brief.

~~**Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:~~

~~(A) the movant's interest; and~~

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

(4) **Contents and Form**. An amicus brief must comply with Rule 32. ~~In addition to the requirements of Rule 32,~~ The cover must ~~identify~~ name the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~An amicus~~ The brief need not comply with Rule 28, but it must

include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) a table of contents, with page references;

(C) a table of authorities — cases (alphabetically arranged), statutes, and other authorities, ~~— with references to~~ together with the pages ~~of the brief~~ where they are cited;

(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 brief and the perspective of the amicus will help the court;

(E) if an amicus has existed for less than 12 months, the date the amicus was created;

~~(E)~~(F) unless the amicus is the United States,

its officer or agency, or a state, the disclosures required by Rules 29(b), (c), and (e); ~~curiae is one listed in the first sentence of Rule 29(a)(2), 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;~~

~~(F)~~(G) an argument, which may be preceded by a summary ~~and which~~ but need not

include a statement of the applicable standard of review; and

~~(G)~~(H) a certificate of compliance under Rule 32(g)(1~~), if length is computed using a word or line limit~~.

(5) **Length**. Except ~~by~~ with the court's permission, an amicus brief must not exceed 6,500 words ~~may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief~~.

(6) **Time for Filing**. An amicus curiae must file its brie~~f, accompanied by a motion to filing when necessary,~~ no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. The ~~A~~ court may grant leave for later filing, specifying the time

within which an opposing party may answer.

(7) **Reply Brief**. An amicus curiae may file a reply brief only with the court's permission.

~~Except by the court's permission, an amicus curiae may not file a reply brief.~~

(8) **Oral Argument**. An amicus curiae may participate in oral argument only with the court's permission.

(b) Disclosing a Relationship Between an Amicus and a Party. An amicus brief must disclose whether:

(1) a party or its counsel authored the brief in whole or in part;

(2) a party or its counsel contributed or pledged to contribute money intended to pay for preparing, drafting, or submitting the brief;

(3) a party, its counsel, or any combination of parties, their counsel, or both has a majority ownership interest in or majority control of a legal entity submitting the brief; and

[(4) 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.]

(c) Naming the Party or Counsel. Any disclosure required by Rule 29(b) must name the party or counsel.

(d) Disclosure by the Party or Counsel. If the party or counsel knows that an amicus has failed to make the disclosure required by Rule 29(b) or (c), the party or counsel must do so.

(e) Disclosing a Relationship Between an Amicus and a Nonparty. An amicus brief must name any person—other than the amicus, its counsel, or a member of the amicus who first became a member more than 12 months earlier—who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief. 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.

~~(b)~~(f) **During Consideration of Whether to Grant Rehearing.**

(1) **Applicability**. ~~This Rule 29(b)~~ Rules 29(a)-(e) governs amicus ~~filings~~ briefs filed during a court's consideration of whether to grant panel rehearing or rehearing en banc, except as provided in Rules 29(f)(2) and (3), and unless a local rule or order in a case provides otherwise. For purposes of Rule 29(a)(3), matters include petitions for rehearing.

~~(2) **When Permitted.** 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 by leave of court.~~

~~(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.~~

~~(4)~~(2) ~~Contents, Form, and~~ **Length**. ~~Rule 29(a)(4) applies to the amicus brief.~~ An amicus ~~The~~ brief must not exceed 2,600 words.

~~(5)~~(3) **Time for Filing**. An amicus curiae supporting ~~the~~ a petition for rehearing or supporting neither party must file its brief~~, accompanied~~

~~by a motion for filing when necessary,~~ no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than the date set by the court for ~~the~~ a response.

Committee Note

The amendments to Rule 29 make changes to the procedure for filing amicus briefs, including to the disclosure requirements.

The amendments seek primarily to provide the courts and the public with more information about an amicus curiae. Throughout its consideration of possible amendments, the Advisory Committee has carefully considered the relevant First Amendment interests.

Some 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. At times, however, courts do consider the identity and perspective of an amicus to be relevant. For that reason, the Committee thinks that some disclosures about an amicus are important to promote the integrity of court processes and rules.

Careful attention to the various interests and the need to avoid unjustified burdens is reflected throughout these amendments. For example, the amendment treats disclosures

about the relationship between a party and an amicus differently than disclosures about the relationship between a nonparty and an amicus. While the public interest in knowing about an amicus—in order to evaluate its arguments and a court's consideration of those arguments—is relevant in both situations, there 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. Moreover, the burden on an amicus of disclosing a relationship with a party is much lower than having to disclose a relationship with nonparties. Disclosing a relationship with a party requires an amicus to check its records (and perhaps make a disclosure) regarding only the limited number of persons who are parties to the case. Disclosing a relationship with a nonparty would, by contrast, require an amicus to check its records (and perhaps make a disclosure) regarding the much larger universe of all persons who are not parties to the case.

To take another example, the amendment treats contributions by a nonparty that are earmarked for a particular brief differently than general contributions by a nonparty to an amicus. People may make contributions to organizations for a host of reasons, including reasons that have nothing to do with filing amicus briefs. Requiring the disclosure of non-earmarked contributions provides less useful information for those who seek to evaluate a brief and imposes far greater burdens on contributors.

Subdivision (a). The amendment to Rule 29(a)(2) adds a statement of the purpose of an amicus brief: to bring to the court's attention relevant matter not already brought to its attention by the parties that may help the court. By contrast, if an amicus curiae brief adds nothing to the parties' briefs,

it is a burden rather than a help. Where feasible, avoiding redundancy among amicus briefs can also be helpful.

The amendment also eliminates the need for an amicus to secure either the consent of the parties or the court's permission to file an amicus brief. Most parties already follow a norm of granting consent to anyone who asks.

One concern that has arisen with amicus briefs filed via consent is that they can result in a clerk's office not assigning a case to a judge—without any judge deciding whether recusal is necessary based on the amicus brief or, if it would be, whether striking the brief, as authorized by existing subdivision (a)(2), is the better option. To make clear that there is flexibility to avoid this situation, the amendment moves the provision regarding striking a brief to subdivision (a)(3) and adds a provision that the court may assign matters without regard to the possibility of disqualification caused by an amicus brief. If a judge to whom a matter is assigned determines that an amicus brief would result in that judge's disqualification, the judge may either recuse or strike the brief.

The amendment to Rule 29(a)(4)(D) expands the required statement regarding the identity of an amicus and its interest in the case and requires "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." The amendment calls for this broader disclosure to help the court and the public evaluate the likely reliability and helpfulness of an amicus, particularly those with anodyne or potentially misleading names. It also requires that the amicus explain how the brief and the perspective of the amicus will further the goal of helping the court. Rule 29(a)(4)(E) is new. It requires an amicus that has existed for less than 12 months to state the date of its creation, helping identify amici that may have been created for the purpose of this litigation. Subsequent provisions are re-lettered.

Existing disclosure requirements about the relationship between the amicus and both parties and nonparties are removed from subdivision (a) and placed in separate subdivisions, one dealing with parties (subdivision (b)) and one dealing with nonparties (subdivision (e)).

Rule 29(a)(5) is amended to directly impose a word limit on amicus briefs, replacing the provision that establishes length limits for amicus briefs as a fraction of the length limits for parties. This results in removing the option to rely on a page count rather than a word count. This change enables Rule 29(a)(4)(H) (formerly 29(a)(4)(G)) to be simplified and require a certification of compliance under Rule 32(g)(1) in all amicus briefs.

Subdivision (b). Subdivision (b) dealing with disclosure of the relationship between the amicus and a party is new, but it draws on existing Rule 29(a)(4)(E). Because of the important interest in knowing whether a party has significant influence or control of an amicus, these disclosures are more far reaching than those involving nonparties, which are addressed in (e).

Rule 29(b)(1) carries forward the existing requirement that authorship of an amicus brief by a party or its counsel must be disclosed.

Rule 29(b)(2) carries forward the existing requirement that money contributed by a party or party's counsel that was intended to fund the preparation or submission of the brief must be disclosed. But in an effort to counteract the possibility of an amicus interpreting the existing rule narrowly, the amendment explicitly refers to "preparing, drafting, or submitting the brief," thereby making clear that it applies to every stage of the process.

Subdivision (b)(3) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel either has a majority ownership interest in or majority control of an amicus. If a party has such control

over an amicus, it is in a position to control the content of an amicus brief. If undisclosed, the court and the public may be misled about the independence of an amicus from a party, and a party may be able to effectively exceed the limitations otherwise imposed on parties.

[Subdivision (b)(4) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel has either contributed or pledged to contribute 25% or more of the revenue of an amicus. The 25% figure is chosen because the Committee believes that someone who provides that high a percentage of the revenue of an amicus is likely to have substantial power to influence that amicus. Knowing that an amicus has that level of dependency on a party is useful in evaluating the arguments of that amicus. Because the concern is about contributions or pledges made sufficiently near in time to the filing of the brief to influence the brief, contributions or pledges made within 12 months before the filing of the brief must be disclosed. To minimize the burden of disclosure on the amicus, the 25% calculation is based on the total revenue of the amicus for its prior fiscal year. This means that such a calculation of the disclosure threshold needs to be done only once a year rather than each time an amicus brief is filed. And by using the prior fiscal year, an amicus can rely on its ordinary accounting process. The term "total revenue" is used because that is the term used by a tax-exempt organization on its IRS Form 990. A non-tax-exempt entity is likely to prepare an income statement which includes its total revenue. Individual amici can rely on their total income from the prior fiscal year reported on IRS Form 1040.]

Subdivision (c). Subdivision (c) requires that any disclosure required by paragraph (b) name the party or counsel. This builds upon the requirement in current Rule 29(a)(4)(D)(iii) that certain persons who make earmarked contributions be identified.

Subdivision (d). Subdivision (d) is new. It operates as a backstop to the disclosure requirements of (b) and (c): If the amicus fails to make a required disclosure, and the party or counsel knows it, the party or counsel must make the disclosure.

Subdivision (e). Subdivision (e) focuses on the relationship between the amicus and a nonparty. It makes several changes to the existing Rule 29(a)(4)(E)(iii), which currently requires the disclosure of any contribution earmarked for a brief, no matter how small, by anyone other than the amicus itself, its members, or its counsel. Earmarked contributions run the risk that the amicus is being used as a paid mouthpiece by the contributor. Knowing about earmarked contributions helps courts and the public evaluate the arguments and information in the amicus brief by providing information about possible reasons for the filing other than those explained by the amicus itself.

The Committee considered requiring the disclosure of nonparties who make any significant contributions to an amicus, whether earmarked or not. But it decided against doing so because of the burdens it could impose on amici and their contributors, even when the reason for the contribution had nothing to do with the brief. Instead, it retained the focus of the existing rule on earmarked contributions.

The Committee considered eliminating the member exception because that exception allows for easy evasion: simply become a member at the time of making an earmarked contribution. But it decided against doing so because members speak through an amicus and an amicus generally speaks for its members. In addition, eliminating the member exception threatened to place an unfair burden on amici who do not budget in advance for amicus briefs

(and therefore have to "pass the hat" when the need to file an amicus brief arises) compared to other amici who may file amicus briefs more frequently (and therefore can budget in advance and fund them from general revenue). Without a member exception, the latter (generally larger) amici would not have to disclose, but the former (generally smaller) amici would have to disclose.

Instead, the amendment retains the member exception, but limits it to those who first became members of the amicus more than 12 months earlier. In effect, the amendment is an anti-evasion rule that treats new members of an amicus as non-members.

This then raises the question of what to do with a newly-formed amicus organization. Rather than eliminate the member exception for such organizations, the amendment protects members from disclosure. But Rule 29(a)(4)(E) requires an amicus that has existed for less than 12 months to disclose the date of its creation. This requirement works in conjunction with the expanded disclosure requirement of Rule 29(a)(4)(D) to reveal an amicus that may have been created for purposes of particular litigation or is less established and broadly-based than its name might suggest. Unless adequately explained, a court and the public might choose to discount the views of such an amicus.

The amendment also provides a $100 threshold for the disclosure requirement. Under the existing rule, a non-member of an amicus who contributes any amount, no matter how small, that is earmarked for a particular brief must be disclosed. This can hamper crowdfunding of amicus briefs while providing little useful information to the courts or the public. Contributions of $100 or less are unlikely to run the risk that an amicus is being used as a mouthpiece for others.

Subdivision (f). Subdivision (f) retains most of the content of existing subdivision (b) and governs amicus briefs at the rehearing stage. It is revised to largely incorporate by reference the provision applicable to amicus briefs at the initial consideration of the case. Rule 29(f)(1) makes Rule 29(a) through (e) applicable, except as provided in the rest of Rule 29(f) or if a local rule or order in a particular case provides otherwise. As a result, duplicative provisions are eliminated. To make clear that the approach described in subdivision (a)(3) is available at the rehearing stage, it provides that matters include petitions for rehearing.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 32. Form of Briefs, Appendices, and Other Papers[2]

* * * * *

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(a)(5), 29(f)(2) ~~29(b)(4)~~, or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), or 40(d)(3)(A)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation.

[1] New material is underlined in red; matter to be omitted is lined through.

[2] The changes indicated are to the revised version of Rule 32, not yet in effect.

The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

Rule 32(g) is amended to conform to amendments to Rule 29.

Appendix

Length Limits Stated in the

Federal Rules of Appellate Procedure

* * *					
Amicus briefs	29(a)(5)	• Amicus brief during initial consideration on merits	~~One-half the length set by the Appellate Rules for a party's principal brief~~ 6,500 2,600	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable Not applicable	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable Not applicable
	~~29(b)(4)~~ 29(f)(2)	• Amicus brief during consideration of whether to grant rehearing			
* * *					

TAB 5B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability**. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) **Purpose; When Permitted.** 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 does not serve this purpose—or that is redundant with another amicus brief—is disfavored. The United States ~~or~~, its officer or agency, or a state may file an amicus brief

[1] New material is underlined in red; matter to be omitted is lined through.

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 a judge's disqualification.

(3) **Motion for Leave to File.** A ~~The~~ motion for leave to file must be accompanied by the proposed brief and state:

(A) the movant's interest; ~~and~~

(B) the reason ~~why an amicus~~ the brief is helpful ~~desirable~~ and why it serves the purpose set forth in Rule 29(a)(2); and ~~the matters asserted are relevant to the disposition of the case.~~

(C) the information required by Rules 29(a)(4)(A), (b), (c), and (e).

(4) **Contents and Form**. An amicus brief must comply with Rule 32. ~~In addition to the requirements of Rule 32,~~ The cover must ~~identify~~ name the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~An amicus~~ The brief need not comply with Rule 28, but it must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) a table of contents, with page references;

(C) a table of authorities — cases (alphabetically arranged), statutes, and other authorities, ~~— with~~

~~references to~~ together with the pages ~~of the brief~~ where they are cited;

(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 brief and the perspective of the amicus will help the court;

(E) if an amicus has existed for less than 12 months, the date the amicus was created;

~~(E)~~(F) unless the amicus is the United States, its officer or agency, or a state, the disclosures required by Rules 29(b), (c), and (e); ~~curiae is one listed in the~~

~~first sentence of Rule 29(a)(2), 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;~~

~~(F)~~(G) an argument, which may be preceded by a summary ~~and which~~ but need not

include a statement of the applicable standard of review; and

~~(G)~~(H) a certificate of compliance under Rule 32(g)(1)~~, if length is computed using a word or line limit~~.

(5) **Length**. Except ~~by~~ with the court's permission, an amicus brief must not exceed 6,500 words ~~may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief~~.

(6) **Time for Filing**. An amicus curiae must file its brief~~, accompanied by a motion to filing when necessary,~~ no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support

either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. The ~~A~~ court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) **Reply Brief**. An amicus curiae may file a reply brief only with the court's permission. ~~Except by the court's permission, an amicus curiae may not file a reply brief.~~

(8) **Oral Argument**. An amicus curiae may participate in oral argument only with the court's permission.

(b) Disclosing a Relationship Between an Amicus and a Party. An amicus brief must disclose whether:

(1) a party or its counsel authored the brief in whole or in part;

(2) a party or its counsel contributed or pledged to contribute money intended to pay for preparing, drafting, or submitting the brief;

(3) a party, its counsel, or any combination of parties, their counsel, or both has a majority ownership interest in or majority control of a legal entity submitting the brief; and

(4) 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.

(c) Naming the Party or Counsel. Any disclosure required by Rule 29(b) must name the party or counsel.

(d) Disclosure by the Party or Counsel. If the party or counsel knows that an amicus has failed to make the disclosure required by Rule 29(b) or (c), the party or counsel must do so.

(e) Disclosing a Relationship Between an Amicus and a Nonparty. An amicus brief must name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief, unless the person has been a member of the amicus for the prior 12 months. 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.

~~(b)~~**(f) During Consideration of Whether to Grant Rehearing.**

(1) **Applicability**. ~~This Rule 29(b)~~ Rules 29(a)-(e) governs amicus ~~filings~~ briefs filed during

a court's consideration of whether to grant panel rehearing or rehearing en banc, except as provided in Rules 29(f)(2) and (3), and unless a local rule or order in a case provides otherwise.

~~(2) **When Permitted.** 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 by leave of court.~~

~~(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.~~

~~(4)~~(2) ~~Contents, Form, and~~ **Length**. ~~Rule 29(a)(4) applies to the amicus brief.~~ An amicus ~~The~~ brief must not exceed 2,600 words.

~~(5)~~(3) **Time for Filing**. An amicus curiae supporting ~~the~~ a petition for rehearing or supporting neither party must file its brief~~, accompanied~~

~~by a motion for filing when necessary,~~ no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than the date set by the court for ~~the~~ a response.

Committee Note

The amendments to Rule 29 make changes to the procedure for filing amicus briefs, including to the disclosure requirements.

The amendments seek primarily to provide the courts and the public with more information about an amicus curiae. Throughout its consideration of possible amendments, the Advisory Committee has carefully considered the relevant First Amendment interests.

Some 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. At times, however, courts do consider the identity and perspective of an amicus to be relevant. For that reason, the Committee thinks that some disclosures about an amicus are important to promote the integrity of court processes and rules.

Careful attention to the various interests and the need to avoid unjustified burdens is reflected throughout these amendments. For example, the amendment treats disclosures

about the relationship between a party and an amicus differently than disclosures about the relationship between a nonparty and an amicus. While the public interest in knowing about an amicus—in order to evaluate its arguments and a court's consideration of those arguments—is relevant in both situations, there 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. Moreover, the burden on an amicus of disclosing a relationship with a party is much lower than having to disclose a relationship with nonparties. Disclosing a relationship with a party requires an amicus to check its records (and perhaps make a disclosure) regarding only the limited number of persons who are parties to the case. Disclosing a relationship with a nonparty would, by contrast, require an amicus to check its records (and perhaps make a disclosure) regarding the much larger universe of all persons who are not parties to the case.

To take another example, the amendment treats contributions by a nonparty that are earmarked for a particular brief differently than general contributions by a nonparty to an amicus. People may make contributions to organizations for a host of reasons, including reasons that have nothing to do with filing amicus briefs. Requiring the disclosure of non-earmarked contributions provides less useful information for those who seek to evaluate a brief and imposes far greater burdens on contributors.

Subdivision (a). The amendment to Rule 29(a)(2) adds a statement of the purpose of an amicus brief: to bring to the court's attention relevant matter not already mentioned by the parties that may help the court. By contrast, if an amicus curiae brief is redundant with the parties' briefs or

other amicus curiae briefs, it is a burden rather than a help. The amendment also eliminates the ability of a nongovernmental amicus to file a brief based solely on the consent of the parties. Most parties follow a norm of granting consent to anyone who asks. As a result, the consent requirement fails to serve as a useful filter. Some parties might not respond to a request to consent, leaving a potential amicus needing to wait until the last minute to know whether to file a motion. Under the amendment, all nongovernmental parties must file a motion, eliminating uncertainty and providing a filter on the filing of unhelpful briefs. Rule 29(a)(3) is amended to require the motion to state why the brief is helpful and serves the purpose of an amicus brief; the motion must also include the disclosures required by Rules 29(a)(4)(A), (b), (c). and (e).

The amendment to Rule 29(a)(4)(D) expands the required statement regarding the identity of an amicus and its interest in the case and requires "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." The amendment calls for this broader disclosure to help the court and the public evaluate the likely reliability and helpfulness of an amicus, particularly those with anodyne or potentially misleading names. It also requires that the amicus explain how the brief and the perspective of the amicus will further the goal of helping the court. Rule 29(a)(4)(E) is new. It requires an amicus that has existed for less than 12 months to state the date of its creation, helping identify amici that may have been created for the purpose of this litigation. Subsequent provisions are re-lettered.

Existing disclosure requirements about the relationship between the amicus and both parties and nonparties are removed from subdivision (a) and placed in

separate subdivisions, one dealing with parties (subdivision (b)) and one dealing with nonparties (subdivision (e)).

Rule 29(a)(5) is amended to directly impose a word limit on amicus briefs, replacing the provision that establishes length limits for amicus briefs as a fraction of the length limits for parties. This results in removing the option to rely on a page count rather than a word count. This change enables Rule 29(a)(4)(H) (formerly 29(a)(4)(G)) to be simplified and require a certification of compliance under Rule 32(g)(1) in all amicus briefs.

Subdivision (b). Subdivision (b) dealing with disclosure of the relationship between the amicus and a party is new, but it draws on existing Rule 29(a)(4)(E). Because of the important interest in knowing whether a party has significant influence or control of an amicus, these disclosures are more far reaching than those involving nonparties, which are addressed in (e).

Rule 29(b)(1) carries forward the existing requirement that authorship of an amicus brief by a party or its counsel must be disclosed.

Rule 29(b)(2) carries forward the existing requirement that money contributed by a party or party's counsel that was intended to fund the preparation or submission of the brief must be disclosed. But in an effort to counteract the possibility of an amicus interpreting the existing rule narrowly, the amendment explicitly refers to "preparing, drafting, or submitting the brief," thereby making clear that it applies to every stage of the process.

Subdivision (b)(3) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel either has a majority ownership interest in or majority control of an amicus. If a party has such control

over an amicus, it is in a position to control the content of an amicus brief. If undisclosed, the court and the public may be misled about the independence of an amicus from a party, and a party may be able to effectively exceed the limitations otherwise imposed on parties.

Subdivision (b)(4) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel has either contributed or pledged to contribute 25% or more of the revenue of an amicus. The 25% figure is chosen because the Committee believes that someone who provides that high a percentage of the revenue of an amicus is likely to have substantial power to influence that amicus. Because the concern is about contributions or pledges made sufficiently near in time to the filing of the brief to influence the brief, contributions or pledges made within 12 months before the filing of the brief must be disclosed. To minimize the burden of disclosure on the amicus, the 25% calculation is based on the total revenue of the amicus for its prior fiscal year. This means that such a calculation of the disclosure threshold needs to be done only once a year rather than each time an amicus brief is filed. And by using the prior fiscal year, an amicus can rely on its ordinary accounting process. The term "total revenue" is used because that is the term used by a tax-exempt organization on its IRS Form 990. A non-tax-exempt entity is likely to prepare an income statement which includes its total revenue. Individual amici can rely on their total income from the prior fiscal year reported on IRS Form 1040.

Subdivision (c). Subdivision (c) requires that any disclosure required by paragraph (b) name the party or counsel. This builds upon the requirement in current Rule 29(a)(4)(D)(iii) that certain persons who make earmarked contributions be identified.

Subdivision (d). Subdivision (d) is new. It operates as a backstop to the disclosure requirements of (b) and (c): If the amicus fails to make a required disclosure, and the party or counsel knows it, the party or counsel must make the disclosure.

Subdivision (e). Subdivision (e) focuses on the relationship between the amicus and a nonparty. It makes several changes to the existing Rule 29(a)(4)(E)(iii), which currently requires the disclosure of any contribution earmarked for a brief, no matter how small, by anyone other than the amicus itself, its members, or its counsel. Earmarked contributions run the risk that the amicus is being used as a paid mouthpiece by the contributor. Knowing about earmarked contributions helps courts and the public evaluate the arguments and information in the amicus brief by providing information about possible reasons for the filing other than those explained by the amicus itself.

The Committee considered requiring the disclosure of nonparties who make any significant contributions to an amicus, whether earmarked or not. But it decided against doing so because of the burdens it could impose on amici and their contributors, even when the reason for the contribution had nothing to do with the brief. Instead, it retained the focus of the existing rule on earmarked contributions.

The Committee considered eliminating the member exception because that exception allows for easy evasion: simply become a member at the time of making an earmarked contribution. But it decided against doing so because members speak through an amicus and an amicus generally speaks for its members. In addition, eliminating the member exception threatened to place an unfair burden on amici who do not budget in advance for amicus briefs

(and therefore have to "pass the hat" when the need to file an amicus brief arises) compared to other amici who may file amicus briefs more frequently (and therefore can budget in advance and fund them from general revenue). Without a member exception, the latter (generally larger) amici would not have to disclose, but the former (generally smaller) amici would have to disclose.

Instead, the amendment retains the member exception, but limits it to those who have been members of the amicus for the prior 12 months. In effect, the amendment is an anti-evasion rule that treats new members of an amicus as non-members.

This then raises the question of what to do with a newly-formed amicus organization. Rather than eliminate the member exception for such organizations, the amendment protects members from disclosure. But Rule 29(a)(4)(E) requires an amicus that has existed for less than 12 months to disclose the date of its creation. This requirement works in conjunction with the expanded disclosure requirement of Rule 29(a)(4)(D) to reveal an amicus that may have been created for purposes of particular litigation or is less established and broadly-based than its name might suggest. Unless adequately explained, a court and the public might choose to discount the views of such an amicus.

The amendment also provides a $100 threshold for the disclosure requirement. Under the existing rule, a non-member of an amicus who contributes any amount, no matter how small, that is earmarked for a particular brief must be disclosed. This can hamper crowdfunding of amicus briefs while providing little useful information to the courts or the public. Contributions of $100 or less are unlikely to run the risk that an amicus is being used as a mouthpiece for others.

Subdivision (f). Subdivision (f) retains most of the content of existing subdivision (b) and governs amicus briefs at the rehearing stage. It is revised to largely incorporate by reference the provision applicable to amicus briefs at the initial consideration of the case. Rule 29(f)(1) makes Rule 29(a) through (e) applicable, except as provided in the rest of Rule 29(f) or if a local rule or order in a particular case provides otherwise. As a result, duplicative provisions are eliminated.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 32. Form of Briefs, Appendices, and Other Papers[2]

* * * * *

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(a)(5), 29(f)(2) ~~29(b)(4)~~, or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), or 40(d)(3)(A)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation.

[1] New material is underlined in red; matter to be omitted is lined through.

[2] The changes indicated are to the revised version of Rule 32, not yet in effect.

The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

Rule 32(g) is amended to conform to amendments to Rule 29.

Appendix

Length Limits Stated in the

Federal Rules of Appellate Procedure

		* * *			
Amicus briefs	29(a)(5)	• Amicus brief during initial consideration on merits	~~One-half the length set by the Appellate Rules for a party's principal brief~~ 6,500 2,600	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable Not applicable	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable Not applicable
	~~29(b)(4)~~ 29(f)(2)	• Amicus brief during consideration of whether to grant rehearing			
		* * *			

TAB 5C

#	Comment Number	Submitter	Comment	Attachment Files
1	USC-RULES-AP-2024-0001-0003	Straw, Andrew	Amicus briefs are an expression of the First Amendment right to petition courts on matters of public interest. It costs virtually nothing to allow amicus briefs to be filed and they should always be allowed regardless of the consent of any party. The Court is under no obligation to do what an amicus wants, but it should always allow such statements in the public record. As a civil rights advocate for people with disabilities, it is exceptionally important to allow these briefs in civil rights cases, but the rule of allowing them without exception should apply to all cases.	
2	USC-RULES-AP-2024-0001-0004	Washington Legal Foundation	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0004/attachment_1.pdf
3	USC-RULES-AP-2024-0001-0005	Anonymous	Thank you for the opportunity to comment anonymously. I agree with the changes to Rule 29. Amicus briefs have become a conduit for hyper-fixated interest groups, lobbying organizations, and partisan political entities to unduly influence the legal and factual proceedings of federal courts. Naturally, all amicus-filers will post lengthy comments in response to this Proposed Rule — indeed, this is what they love to do most! — lobbing complaints about “limiting access.” They will then go on to speak about how judges have the freedom to ignore any filed amicus briefs they choose. Most importantly, they will bemoan the reduction of their ability to prod their way into cases they have no direct connection to. Good. All judges know that receiving amicus briefs is like getting junk mail in that you might be fooled into reading a brief in the same way you might be fooled to reading junk mail that uses a font that resembles someone’s natural handwriting. However, at the end of the day, judges know that what’s in amicus briefs is much like what’s in junk mail: something written by an entity that wants to influence you to do something you’d otherwise not do, most often by emotional trickery and undergraduate-psychology-class marketing tactics. I urge that the proposed amendments for Rule 29 are adopted. Thank you for your consideration.	
4	USC-RULES-AP-2024-0001-0006	Senator Sheldon Whitehouse & Congressman Hank Johnson	Please see the attached letter from Senator Sheldon Whitehouse and Congressman Hank Johnson.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0006/attachment_1.pdf
5	USC-RULES-AP-2024-0001-0007	Hernandez, Simon	The Proposed Form 4 to apply for in forma pauperis in an appellate court will considerably ease those who are in need. As stated in the proposed amendment, the current Form 4 is overly complicated, intrusive, and includes unneeded information. If a court believes that someone is lying about their status, they can inquire. But why put up one more barrier for someone who already is struggling to navigate the complicated appellate process. For example, the current form includes the employment history of a filer for the last two years. This is not likely relevant to the process of establishing if they are qualified for in forma pauperis, the simplified form which includes only income and expenses will do the job. The Proposed Form 4 is an example of how a government form can be better and should.	
6	USC-RULES-AP-2024-0001-0008	Senators Mitch McConnell, John Cornyn, and John Thune	See Attached	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0008/attachment_1.pdf
7	USC-RULES-AP-2024-0001-0009	Morrison, Alan	See Attached	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0009/attachment_1.pdf
8	USC-RULES-AP-2024-0001-0010	Anonymous	The FRAP should be more flexible for incarcerated inmates	
9	USC-RULES-AP-2024-0001-0011	Ravnitzky, Michael	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0011/attachment_1.pdf
10	USC-RULES-AP-2024-0001-0012	Atlantic Legal Foundation	Atlantic Legal Foundation	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0012/attachment_1.pdf

#	Comment Number	Submitter	Comment	Attachment Files
11	USC-RULES-AP-2024-0001-0013	Diamond, Maria	Committee on Rules of Practice and Procedure Administrative Office of the United States Courts One Columbus Circle, NE Washington, DC 20544 Dear Committee Members: I submit this comment regarding the proposed amendments to FRCP 29. I am a civil litigator in Washington state who has practiced in both state and federal court systems for 41 years. My comment is based on my experience as an attorney who has litigated multiple cases through the appeals process and also submitted amicus briefs to the Washington State Supreme Court. Amicus briefs play an important role in educating judges on issues of wide-ranging importance. They provide an opportunity for experts, such as academics, non-profits, and think tanks, to educate the court on those issues. They assist judges by presenting ideas, arguments, theories, insights, factual background, and data not found in the parties' briefs. My primary concern regarding the proposed rule change is elimination of the party consent option, requiring leave of court for the filing of all amicus briefs. I believe this is a move in the wrong direction. In contrast to the proposal, the United States Supreme Court has changed its rules in the opposite direction, freely allowing the filing of amicus briefs without leave of court or consent of the parties. The proposed change will place additional burdens on the court that outweigh the purported concern over recusal issues. Furthermore, I am concerned about the proposed content restrictions. While I understand the desire to reduce redundancy, I seriously question how the proposed amendment will prevent redundancy without coordination between amici and the parties. The proposal may also significantly increase the rate of amicus denials, thereby chilling amicus curiae filings. This unintended consequence will deprive the courts of valuable assistance to aid their decision-making on issues of public importance. I applaud the committee's efforts to improve the appellate litigation process and thank you for your consideration of this comment. Sincerely, Maria S. Diamond Diamond Massong, PLLC	

#	Comment Number	Submitter	Comment	Attachment Files
12	USC-RULES-AP-2024-0001-0014	Anonymous	Honorable John D. Bates Chair, Committee on Rules of Practice and Procedure Administrative Office of the United States Courts One Columbus Circle NE Washington, D.C. 20544 Dear Judge Gates, Thank you for all the work the Advisory Committee has done regarding this issue and many others. I truly esteem the impartiality of the Courts in making decisions like this, based on the common interest and the Constitution rather than any partisan agenda. I am writing to express my strong support for the proposed amendments to Federal Rule of Appellate Procedure 29 to enhance disclosure requirements for amicus curiae briefs — in fact, I would encourage the Committee to go further to strengthen the disclosure requirements. As a college student, and one who is deeply interested in politics and the law, I believe that I bring an important lay perspective on this issue: an issue that affects not just the courts but also the public. This amendment is important. Arguments brought up in amicus curiae briefs can affect judges and judicial decisions — and these judicial decisions can have a very real impact on the public at large. And, while I can not speak specifically on the governmental interest for amicus' disclosure, I can confidently state that it is in the American public interest for all of us to know who exactly is trying to influence our judicial system through amicus curiae briefs. Specifically, Rule 29(a)(4)(D), which requires a concise description of the amicus curiae and their pertinence in the case, is particularly valuable. It imposes almost no additional cost on the amicus while providing the public – along with the courts – important, accessible information. This would make it significantly quicker and simpler to observe court proceedings: the public would be given valuable insight into the major political voices on a subject. However, even beyond this change, the others described in the amendment can benefit the public interest. As Senator Whitehouse and Representative Johnson mention in their comment on the issue, the tactics of corporations and dark money groups trying to affect the judicial decision-making process have sharply intensified — and this amendment can try and shed light on these machinations. America does not belong to corporations or interest groups but rather to the American people. We – college students, young people, and average American citizens – have every right to have this disclosure, donor or otherwise, from these organizations. Meanwhile, this disclosure would not affect the First Amendment Rights of the amicus groups, as described in the Advisory Committee's report. I am quite shocked by, yet resigned to, the partisan politicization surrounding these disclosure enhancements. The government and the courts are designed to serve, and be responsive to, the American people. Amicus curiae briefs play a powerful role in American governance, and, therefore, it is in the interests of everyone – Democrat, Republican, or Independent – to have all of the information. Thank you for considering my comments on this amendment, and I strongly encourage the Judicial Conference to approve these changes. Most respectfully,	
13	USC-RULES-AP-2024-0001-0015	SIFMA	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0015/attachment_1.pdf
14	USC-RULES-AP-2024-0001-0016	National Taxpayers Union Foundation and People United For Privacy Foundation	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0016/attachment_1.pdf
15	USC-RULES-AP-2024-0001-0017	Andrade , Mia	I agree with the proposed amendments to the Federal Rules of Appellate Procedure. These changes are essential for improving the clarity, efficiency, and fairness of the appellate process. By updating the rules, we can ensure that the legal system remains responsive to contemporary issues, reducing unnecessary delays and ambiguities. This helps maintain the integrity of the judicial process and reinforces public confidence in the legal system, which is crucial for ensuring justice and fairness for all parties involved.	
16	USC-RULES-AP-2024-0001-0018	U.S. Chamber of Commerce	See attached file.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0018/attachment_1.pdf
17	USC-RULES-AP-2024-0001-0019	National Federation of Independent Business, Inc.	National Federation of Independent Business (NFIB) comment letter of December 30, 2024, to Committee on Rules of Practice and Procedure of the Judicial Conference of the United States concerning proposed amendments for Federal Rule of Appellate Procedure 29, relating to amicus briefs, is attached.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0019/attachment_1.pdf
18	USC-RULES-AP-2024-0001-0020	Herman, Stephen	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0020/attachment_1.pdf
19	USC-RULES-AP-2024-0001-0021	American Property Casualty Insurance Association	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0021/attachment_1.pdf

#	Comment Number	Submitter	Comment	Attachment Files
20	USC-RULES-AP-2024-0001-0023	American Council of Life Insurers	ACLI Comments to the Proposed Amendments to Federal Rule of Appellate Procedure 29	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0023/attachment_1.pdf
21	USC-RULES-AP-2024-0001-0024	DRI Center for Law and Public Policy	Please find attached a comment on proposed changes to FRAP 23 from Lisa M. Baird in her capacity as chair of the DRI Center for Law and Public Policy's Amicus Committee.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0024/attachment_1.pdf
22	USC-RULES-AP-2024-0001-0025	Anonymous	I strongly urge the passing of this rule to support fairness and justice in the judicial process.	
23	USC-RULES-AP-2024-0001-0026	Young America's Foundation	Comment in Opposition to Proposed Changes to Federal Rule of Appellate Procedure 29	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0026/attachment_1.pdf
24	USC-RULES-AP-2024-0001-0027	California Academy of Appellate Lawyers	Please see attached.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0027/attachment_1.pdf
25	USC-RULES-AP-2024-0001-0028	Philanthropy Roundtable	Philanthropy Roundtable	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0028/attachment_1.pdf
26	USC-RULES-AP-2024-0001-0029	Avital Fried, Myriam Gilles, Andrew Hammond, Alexander A. Reinert, Judith Resnik, Tanina Rostain, Anna Selbrede, Lauren	This comment, attached, is submitted by Avital Fried, Myriam Gilles, Andrew Hammond, Alexander A. Reinert, Judith Resnik, Tanina Rostain, Anna Selbrede, Lauren Sudeall, and Julia Udell.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0029/attachment_1.pdf
27	USC-RULES-AP-2024-0001-0030	Lucas, Seth	Comment Letter from Zack Smith and Seth Lucas on Proposed FRAP 29 Amendments	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0030/attachment_1.pdf
28	USC-RULES-AP-2024-0001-0031	Court Accountability	Please see attached.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0031/attachment_1.pdf
29	USC-RULES-AP-2024-0001-0032	Federation of Defense & Corporate Counsel	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0032/attachment_1.pdf
30	USC-RULES-AP-2024-0001-0033	Smoger, Gerson	See Attached	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0033/attachment_1.pdf
31	USC-RULES-AP-2024-0001-0034	American Association for Justice	Comment with attachments from the American Association for Justice.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0034/attachment_1.pdf https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0034/attachment_2.pdf
32	USC-RULES-AP-2024-0001-0035	Industry Coalition	See attached file.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0035/attachment_1.pdf
33	USC-RULES-AP-2024-0001-0036	Travinski, Brian	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	

#	Comment Number	Submitter	Comment	Attachment Files
34	USC-RULES-AP-2024-0001-0037	Allen, Timothy	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
35	USC-RULES-AP-2024-0001-0038	Tavares , C	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
36	USC-RULES-AP-2024-0001-0039	Porter, Ann	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
37	USC-RULES-AP-2024-0001-0040	Nelson, James	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
38	USC-RULES-AP-2024-0001-0041	McLaughlin, Kirk L	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	

#	Comment Number	Submitter	Comment	Attachment Files
39	USC-RULES-AP-2024-0001-0042	Stiver , Phil	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
40	USC-RULES-AP-2024-0001-0043	Wendell, Jerome	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
41	USC-RULES-AP-2024-0001-0044	Easterlin, Eric	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
42	USC-RULES-AP-2024-0001-0045	Goebel, Michael	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
43	USC-RULES-AP-2024-0001-0046	FLETCHER, CRAIG	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
44	USC-RULES-AP-2024-0001-0047	Kloppenburg, Judy	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
45	USC-RULES-AP-2024-0001-0048	Trump, Jim	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
46	USC-RULES-AP-2024-0001-0049	White, Erich	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	

#	Comment Number	Submitter	Comment	Attachment Files
47	USC-RULES-AP-2024-0001-0050	Inkman, Michael	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal€™s claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
48	USC-RULES-AP-2024-0001-0051	Sakach, Matthew	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
49	USC-RULES-AP-2024-0001-0052	Ritter, Ann	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
50	USC-RULES-AP-2024-0001-0053	Martinez , James	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal€™s claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	

#	Comment Number	Submitter	Comment	Attachment Files
51	USC-RULES-AP-2024-0001-0054	Easley, Terry	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
52	USC-RULES-AP-2024-0001-0055	Caskey , Colin	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
53	USC-RULES-AP-2024-0001-0056	Samalot, Diana	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal€™s claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
54	USC-RULES-AP-2024-0001-0057	Horan, Pat	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	

#	Comment Number	Submitter	Comment	Attachment Files
55	USC-RULES-AP-2024-0001-0058	Taylor, Linda	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal€™s claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
56	USC-RULES-AP-2024-0001-0059	Flinchbaugh, Norma Jean	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal€™s claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
57	USC-RULES-AP-2024-0001-0060	Christie, Edwin	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
58	USC-RULES-AP-2024-0001-0061	Swing, Jill	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	

#	Comment Number	Submitter	Comment	Attachment Files
59	USC-RULES-AP-2024-0001-0062	Salter, Janice	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
60	USC-RULES-AP-2024-0001-0063	harkness, william	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
61	USC-RULES-AP-2024-0001-0064	Bagby, John	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal€™s claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
62	USC-RULES-AP-2024-0001-0065	Aloi, Sharon	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
63	USC-RULES-AP-2024-0001-0066	Bauer, Cookie	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
64	USC-RULES-AP-2024-0001-0067	Benshoof, Mary	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
65	USC-RULES-AP-2024-0001-0068	Braniff, Thomas	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
66	USC-RULES-AP-2024-0001-0069	Brenner, Joseph	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
67	USC-RULES-AP-2024-0001-0070	Brown, MG	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
68	USC-RULES-AP-2024-0001-0071	Brubaker , Terri	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
69	USC-RULES-AP-2024-0001-0072	Bump, Jeff	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
70	USC-RULES-AP-2024-0001-0073	Burger, Tracy	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
71	USC-RULES-AP-2024-0001-0074	Butcher , Riley	WE THE PEOPLE STRONGLY OPPOSED the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create UNNECESSARY DELAYS in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks ALREADY have EFFECTIVE METHODS for FILTERING out UNHELPFUL amicus briefs, so there is NO NEED for this additional BUREAUCRATIC TYRANNY!!! WE THE PEOPLE DEMAND THAT THE COMMITTEE to EXTERMINATE this HARMFUL proposal and WITHDRAW IT NOW!!!	

#	Comment Number	Submitter	Comment	Attachment Files
72	USC-RULES-AP-2024-0001-0075	Buttery, Joanne	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
73	USC-RULES-AP-2024-0001-0076	Byrne, Patrick	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
74	USC-RULES-AP-2024-0001-0077	Cutuli , Silvio	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
75	USC-RULES-AP-2024-0001-0078	Dolleman, Douglas	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
76	USC-RULES-AP-2024-0001-0079	DUNCAN, GAIL	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private	

#	Comment Number	Submitter	Comment	Attachment Files
77	USC-RULES-AP-2024-0001-0080	Durbin, MD, Michael D.	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
78	USC-RULES-AP-2024-0001-0081	Elkins, Dan	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
79	USC-RULES-AP-2024-0001-0082	Ferguson, Shirley	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
80	USC-RULES-AP-2024-0001-0083	Fleet, Ruby	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
81	USC-RULES-AP-2024-0001-0084	Foy, Stephanie	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
82	USC-RULES-AP-2024-0001-0085	Funk, Linda	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal€™s claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
83	USC-RULES-AP-2024-0001-0086	Campbell, William R	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
84	USC-RULES-AP-2024-0001-0087	Dibari, Robert	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
85	USC-RULES-AP-2024-0001-0088	Feicht, Jeffrey	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
86	USC-RULES-AP-2024-0001-0089	Foster, Price	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
87	USC-RULES-AP-2024-0001-0090	Frick, Susan	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
88	USC-RULES-AP-2024-0001-0091	Gallimore , Alexander	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
89	USC-RULES-AP-2024-0001-0092	Garbutt, Patrick	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
90	USC-RULES-AP-2024-0001-0093	Gheen, Nathan	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
91	USC-RULES-AP-2024-0001-0094	Giusti, Primo	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
92	USC-RULES-AP-2024-0001-0095	Glowaski, James	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
93	USC-RULES-AP-2024-0001-0096	Gore, Robert	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
94	USC-RULES-AP-2024-0001-0097	Grigsby, Leland	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
95	USC-RULES-AP-2024-0001-0098	Grimes, George	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
96	USC-RULES-AP-2024-0001-0099	Hamilton , Matt	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
97	USC-RULES-AP-2024-0001-0100	Hanes, Pat	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
98	USC-RULES-AP-2024-0001-0101	Harris, Lawrence	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
99	USC-RULES-AP-2024-0001-0102	Hendrickson, Earlene	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal€™s claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	

#	Comment Number	Submitter	Comment	Attachment Files
100	USC-RULES-AP-2024-0001-0103	Hogue Sr., Robert	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
101	USC-RULES-AP-2024-0001-0104	HOWE, DOUGLAS	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
102	USC-RULES-AP-2024-0001-0105	Jacobs, Kenneth	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
103	USC-RULES-AP-2024-0001-0106	James, Lynn	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
104	USC-RULES-AP-2024-0001-0107	Jeffrey , Sandra	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal€™s claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	

#	Comment Number	Submitter	Comment	Attachment Files
105	USC-RULES-AP-2024-0001-0108	Johnson, Dean	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
106	USC-RULES-AP-2024-0001-0109	Johnson, Roscoe	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
107	USC-RULES-AP-2024-0001-0110	KAHL, WILLIAM	I am writing to voice my opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will limit the role that amici play in our judicial process, would slow down the process and discourage the submission of briefs, and would threaten First Amendment rights by requiring amici to disclose financial details about their donors. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
108	USC-RULES-AP-2024-0001-0111	Kairys, Judy	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
109	USC-RULES-AP-2024-0001-0112	Keels, Suzie	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	

#	Comment Number	Submitter	Comment	Attachment Files
110	USC-RULES-AP-2024-0001-0113	Keuck Sr, Donald	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal€™s claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
111	USC-RULES-AP-2024-0001-0114	Kiel, Donna	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
112	USC-RULES-AP-2024-0001-0115	Klaras, Patricia	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
113	USC-RULES-AP-2024-0001-0116	Kramer, Richard	We need more, not less, access to the courts! I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
114	USC-RULES-AP-2024-0001-0117	Krause, Joni	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
115	USC-RULES-AP-2024-0001-0118	Krusec, Ann	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
116	USC-RULES-AP-2024-0001-0119	Lapin, James	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
117	USC-RULES-AP-2024-0001-0120	Lininger, Don	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	

#	Comment Number	Submitter	Comment	Attachment Files
118	USC-RULES-AP-2024-0001-0121	luft, karen	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
119	USC-RULES-AP-2024-0001-0122	Maddox, Kirk	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
120	USC-RULES-AP-2024-0001-0123	Marcus, Bruce	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
121	USC-RULES-AP-2024-0001-0124	Marketon, Jill	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
122	USC-RULES-AP-2024-0001-0125	Masciale, Debbie	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
123	USC-RULES-AP-2024-0001-0126	Mattox, Karen	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
124	USC-RULES-AP-2024-0001-0127	maynard, Nancy	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
125	USC-RULES-AP-2024-0001-0128	McCormick, Francis	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
126	USC-RULES-AP-2024-0001-0129	McMillan, Peri	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	

#	Comment Number	Submitter	Comment	Attachment Files
127	USC-RULES-AP-2024-0001-0130	McWilliams, Linda	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
128	USC-RULES-AP-2024-0001-0131	Meinhardt, Steve	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
129	USC-RULES-AP-2024-0001-0132	Meyer, Karen	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
130	USC-RULES-AP-2024-0001-0133	Mohr, Robert	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	

#	Comment Number	Submitter	Comment	Attachment Files
131	USC-RULES-AP-2024-0001-0134	Montgomery, Norman	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
132	USC-RULES-AP-2024-0001-0135	Morgan, Linda	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
133	USC-RULES-AP-2024-0001-0136	Moutvic, Thomas	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
134	USC-RULES-AP-2024-0001-0137	Moynahan, Eileen	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
135	USC-RULES-AP-2024-0001-0138	Muraview, Fred	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	

#	Comment Number	Submitter	Comment	Attachment Files
136	USC-RULES-AP-2024-0001-0139	Murphy, Joseph	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
137	USC-RULES-AP-2024-0001-0140	National Association of Home Builders	Please see the attached letter from the National Association of Home Builders	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0140/attachment_1.pdf
138	USC-RULES-AP-2024-0001-0141	Nieuwsma, David	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
139	USC-RULES-AP-2024-0001-0142	O'Bryant, Ronda	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
140	USC-RULES-AP-2024-0001-0143	odenwelder, miles	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
141	USC-RULES-AP-2024-0001-0144	Osucha, Thomas	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
142	USC-RULES-AP-2024-0001-0145	Bitner , Kathryn	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
143	USC-RULES-AP-2024-0001-0146	Breese, Mark	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
144	USC-RULES-AP-2024-0001-0147	Breite, Dave	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
145	USC-RULES-AP-2024-0001-0148	Grannis, Scott	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	

#	Comment Number	Submitter	Comment	Attachment Files
146	USC-RULES-AP-2024-0001-0149	Miller, Jonathan	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
147	USC-RULES-AP-2024-0001-0150	Miner, Steve	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
148	USC-RULES-AP-2024-0001-0151	Morrison, Alan	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0151/attachment_1.pdf
149	USC-RULES-AP-2024-0001-0152	Mott-Smith, Linda	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
150	USC-RULES-AP-2024-0001-0153	Ostaszewski, John	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
151	USC-RULES-AP-2024-0001-0154	Palmer, Brian R	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
152	USC-RULES-AP-2024-0001-0155	Phinney, Craig	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
153	USC-RULES-AP-2024-0001-0156	Prewitt, James	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
154	USC-RULES-AP-2024-0001-0157	Pyle , Shirley	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	

#	Comment Number	Submitter	Comment	Attachment Files
155	USC-RULES-AP-2024-0001-0158	Rajagopalan , Gopal	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
156	USC-RULES-AP-2024-0001-0159	Randolph, Betsy	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
157	USC-RULES-AP-2024-0001-0160	Rapp, Sandra	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
158	USC-RULES-AP-2024-0001-0161	Rardin, Delene	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
159	USC-RULES-AP-2024-0001-0162	REDA, LOU	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
160	USC-RULES-AP-2024-0001-0163	Riley, Luann	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
161	USC-RULES-AP-2024-0001-0164	Robinson, Jamie	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
162	USC-RULES-AP-2024-0001-0165	Rosinski, Katrin	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	

#	Comment Number	Submitter	Comment	Attachment Files
163	USC-RULES-AP-2024-0001-0166	Rouse, Marty	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
164	USC-RULES-AP-2024-0001-0167	Roushar, Carrie	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
165	USC-RULES-AP-2024-0001-0168	Rybak, Eliece	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
166	USC-RULES-AP-2024-0001-0169	Rzeszutek, Candice	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	

#	Comment Number	Submitter	Comment	Attachment Files
167	USC-RULES-AP-2024-0001-0170	saltsman, audrey	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
168	USC-RULES-AP-2024-0001-0171	Sanders, Donald	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
169	USC-RULES-AP-2024-0001-0172	Schmiedl, Sally	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
170	USC-RULES-AP-2024-0001-0173	SCHUMM, MICHAEL	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
171	USC-RULES-AP-2024-0001-0174	SIMON, JAMES	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	

#	Comment Number	Submitter	Comment	Attachment Files
172	USC-RULES-AP-2024-0001-0175	Sorensen, manuel	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
173	USC-RULES-AP-2024-0001-0176	St-Onge, Michael	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
174	USC-RULES-AP-2024-0001-0177	Stickney, Karen	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
175	USC-RULES-AP-2024-0001-0178	Stivaletti, Michael	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	

#	Comment Number	Submitter	Comment	Attachment Files
176	USC-RULES-AP-2024-0001-0179	Stivaletti, Michael	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
177	USC-RULES-AP-2024-0001-0180	Sylvester, Yolanda	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
178	USC-RULES-AP-2024-0001-0181	Szabo, Jeffrey	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
179	USC-RULES-AP-2024-0001-0182	Szabo, Les	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
180	USC-RULES-AP-2024-0001-0183	Tavares, Jeanne	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
181	USC-RULES-AP-2024-0001-0184	Taylor, Kathy	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
182	USC-RULES-AP-2024-0001-0185	Thallmayer, Jeanne Marie	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
183	USC-RULES-AP-2024-0001-0186	Trahan, Boyce	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
184	USC-RULES-AP-2024-0001-0187	Tregoning, Michael	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	

#	Comment Number	Submitter	Comment	Attachment Files
185	USC-RULES-AP-2024-0001-0188	Trepanier, Helen	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
186	USC-RULES-AP-2024-0001-0189	Ward, Sharon	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
187	USC-RULES-AP-2024-0001-0190	Weigold , Mark	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
188	USC-RULES-AP-2024-0001-0191	Werre, Tim	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
189	USC-RULES-AP-2024-0001-0192	Wessel, Robert	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	

#	Comment Number	Submitter	Comment	Attachment Files
190	USC-RULES-AP-2024-0001-0193	Wheelock, Tina	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
191	USC-RULES-AP-2024-0001-0194	Whittaker, Greg	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
192	USC-RULES-AP-2024-0001-0195	Williams , Carmela	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
193	USC-RULES-AP-2024-0001-0196	Willmering, Jerome	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
194	USC-RULES-AP-2024-0001-0197	Wolk, Robert	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
195	USC-RULES-AP-2024-0001-0198	Yamamoto, Lillian	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
196	USC-RULES-AP-2024-0001-0199	Steiner, Gregory	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
197	USC-RULES-AP-2024-0001-0200	Coleman, Bob	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
198	USC-RULES-AP-2024-0001-0201	Waldrip, Michelle	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	

#	Comment Number	Submitter	Comment	Attachment Files
199	USC-RULES-AP-2024-0001-0202	Donald, Matt	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
200	USC-RULES-AP-2024-0001-0203	Fernando, Mike	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
201	USC-RULES-AP-2024-0001-0204	Andres, Bonita	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
202	USC-RULES-AP-2024-0001-0205	Norby, Rita	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
203	USC-RULES-AP-2024-0001-0206	Whitmire, Charlotte	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
204	USC-RULES-AP-2024-0001-0207	Southeastern Legal Foundation	Southeastern Legal Foundation's comment on the proposed amendments to the Federal Rules of Appellate Procedure is attached.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0207/attachment_1.pdf

#	Comment Number	Submitter	Comment	Attachment Files
205	USC-RULES-AP-2024-0001-0208	Wolfe, Jennifer	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
206	USC-RULES-AP-2024-0001-0209	Farabaugh, Cecelia	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
207	USC-RULES-AP-2024-0001-0210	Fanning, James	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
208	USC-RULES-AP-2024-0001-0211	Norby, Rita	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
209	USC-RULES-AP-2024-0001-0212	The Buckeye Institute	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0212/attachment_1.pdf
210	USC-RULES-AP-2024-0001-0213	Alliance Defending Freedom	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0213/attachment_1.pdf

#	Comment Number	Submitter	Comment	Attachment Files
211	USC-RULES-AP-2024-0001-0214	American Civil Liberties Union	Please see the attached file for the American Civil Liberties Union.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0214/attachment_1.pdf
212	USC-RULES-AP-2024-0001-0215	Roderick & Solange MacArthur Justice Center	Submitting on behalf of the Roderick & Solange MacArthur Justice Center	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0215/attachment_1.pdf
213	USC-RULES-AP-2024-0001-0216	Federal Public Defender, District of Nevada	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0216/attachment_1.pdf
214	USC-RULES-AP-2024-0001-0217	Tolley, George	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0217/attachment_1.pdf
215	USC-RULES-AP-2024-0001-0218	Americans for Prosperity Foundation	Please see attached. Thank you.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0218/attachment_1.pdf
216	USC-RULES-AP-2024-0001-0219	Lawyers' Committee for Civil Rights Under Law	Please see the attached comment letter on behalf of the Lawyers' Committee for Civil Rights Under Law.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0219/attachment_1.pdf
217	USC-RULES-AP-2024-0001-0220	Committee on Appellate Courts of the California Lawyers Association's Litigation Section	Please see attached comment.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0220/attachment_1.pdf
218	USC-RULES-AP-2024-0001-0221	The Leukemia & Lymphoma Society	Please see the attached comments on behalf of The Leukemia & Lymphoma Society opposing the proposed change to require a motion for leave to file amicus curiae briefs. Thank you for your consideration.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0221/attachment_1.pdf
219	USC-RULES-AP-2024-0001-0222	NAACP Legal Defense Fund, HRC, LatinoJustice, NCLR, National Partnership for Women and Families, NELP, NWLC	Please see the attached file for the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), Human Rights Campaign ("HRC"), LatinoJustice PRLDEF ("LatinoJustice"), National Center for Lesbian Rights ("NCLR"), National Partnership for Women and Families (the "National Partnership"), National Employment Law Project ("NELP"), and National Women's Law Center ("NWLC") on the proposed changes to Federal Rules of Appellate Procedure Rule 29.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0222/attachment_1.pdf
220	USC-RULES-AP-2024-0001-0223	Storms, Don	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	

#	Comment Number	Submitter	Comment	Attachment Files
221	USC-RULES-AP-2024-0001-0224	Lee, Brian	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
222	USC-RULES-AP-2024-0001-0225	Americans United for Separation of Church and State	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0225/attachment_1.pdf
223	USC-RULES-AP-2024-0001-0226	Addison, Lance	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
224	USC-RULES-AP-2024-0001-0227	Brubaker , Terri	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	

#	Comment Number	Submitter	Comment	Attachment Files
225	USC-RULES-AP-2024-0001-0228	Zaczyk, Patrick	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
226	USC-RULES-AP-2024-0001-0229	Wolfe, Jennifer	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
227	USC-RULES-AP-2024-0001-0230	Tregoning, Michael	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private	
228	USC-RULES-AP-2024-0001-0231	Barnes, Tony	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	

#	Comment Number	Submitter	Comment	Attachment Files
229	USC-RULES-AP-2024-0001-0232	Baxter, Debra	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
230	USC-RULES-AP-2024-0001-0233	Thompson, Bruce	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
231	USC-RULES-AP-2024-0001-0234	Thompson , Charlene	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
232	USC-RULES-AP-2024-0001-0235	THOMAS, DAVID	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	

#	Comment Number	Submitter	Comment	Attachment Files
233	USC-RULES-AP-2024-0001-0236	Taylor, Marlys	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
234	USC-RULES-AP-2024-0001-0237	Tanner, Richard	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
235	USC-RULES-AP-2024-0001-0238	Swenson, Eloise	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
236	USC-RULES-AP-2024-0001-0239	Stuart, Roger	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	

#	Comment Number	Submitter	Comment	Attachment Files
237	USC-RULES-AP-2024-0001-0240	Stiver , Phil	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
238	USC-RULES-AP-2024-0001-0241	Steiner, Gregory	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
239	USC-RULES-AP-2024-0001-0242	Sims, Patti A	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
240	USC-RULES-AP-2024-0001-0243	Simonson, Sheila	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
241	USC-RULES-AP-2024-0001-0244	Simon, James	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	

#	Comment Number	Submitter	Comment	Attachment Files
242	USC-RULES-AP-2024-0001-0245	Schech, Willo	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
243	USC-RULES-AP-2024-0001-0246	Rybak, Eliece	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
244	USC-RULES-AP-2024-0001-0247	Russell, Kathleen	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
245	USC-RULES-AP-2024-0001-0248	Rudnick, Teri	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
246	USC-RULES-AP-2024-0001-0249	Rudnick, Teri	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
247	USC-RULES-AP-2024-0001-0250	Rubin, Larry	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
248	USC-RULES-AP-2024-0001-0251	Robinson, David	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
249	USC-RULES-AP-2024-0001-0252	Readey, Judy	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
250	USC-RULES-AP-2024-0001-0253	Randolph, Betsy	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
251	USC-RULES-AP-2024-0001-0254	Pongracz, Dorothy	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
252	USC-RULES-AP-2024-0001-0255	Pacific Legal Foundation	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0255/attachment_1.pdf

#	Comment Number	Submitter	Comment	Attachment Files
253	USC-RULES-AP-2024-0001-0256	Otta, Jack	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
254	USC-RULES-AP-2024-0001-0257	Ott, Algene	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
255	USC-RULES-AP-2024-0001-0258	Osucha, Thomas	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
256	USC-RULES-AP-2024-0001-0259	O'Hara, Franque	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	

#	Comment Number	Submitter	Comment	Attachment Files
257	USC-RULES-AP-2024-0001-0260	O'Bryant, Ronda	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
258	USC-RULES-AP-2024-0001-0261	O'Bryant, Ronda	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
259	USC-RULES-AP-2024-0001-0262	Niehaus, Sally	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
260	USC-RULES-AP-2024-0001-0263	Newton, Joan	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
261	USC-RULES-AP-2024-0001-0264	New York Intellectual Property Law Association (NYIPLA)	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0264/attachment_1.pdf
262	USC-RULES-AP-2024-0001-0265	Murphy, Norman	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	

#	Comment Number	Submitter	Comment	Attachment Files
263	USC-RULES-AP-2024-0001-0266	Morgan, Andrea	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
264	USC-RULES-AP-2024-0001-0267	Moniz, Sandra	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
265	USC-RULES-AP-2024-0001-0268	Messenger, David	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
266	USC-RULES-AP-2024-0001-0269	McMillan, Peri	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
267	USC-RULES-AP-2024-0001-0270	McGetrick, Harriett	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	

#	Comment Number	Submitter	Comment	Attachment Files
268	USC-RULES-AP-2024-0001-0271	Mace, Brenda	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
269	USC-RULES-AP-2024-0001-0272	Ludwig, Lorena	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
270	USC-RULES-AP-2024-0001-0273	Limbaugh, Velita	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
271	USC-RULES-AP-2024-0001-0274	Lerwick, Lewis	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	

#	Comment Number	Submitter	Comment	Attachment Files
272	USC-RULES-AP-2024-0001-0275	Lerwick, Alan	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
273	USC-RULES-AP-2024-0001-0276	Kuhlenschmidt, James	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
274	USC-RULES-AP-2024-0001-0277	Kuhlenschmidt, Diane	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
275	USC-RULES-AP-2024-0001-0278	Krusec, Ann	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	

#	Comment Number	Submitter	Comment	Attachment Files
276	USC-RULES-AP-2024-0001-0279	Kordelski, Bruce	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
277	USC-RULES-AP-2024-0001-0280	Koller, William	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
278	USC-RULES-AP-2024-0001-0281	Klaras, Patricia	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
279	USC-RULES-AP-2024-0001-0282	Klaras, Patricia	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	

#	Comment Number	Submitter	Comment	Attachment Files
280	USC-RULES-AP-2024-0001-0283	Kerwin, Craig	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
281	USC-RULES-AP-2024-0001-0284	Kern, Richard	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
282	USC-RULES-AP-2024-0001-0285	Johnson, Dean	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
283	USC-RULES-AP-2024-0001-0286	Jacobson, Wayne	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
284	USC-RULES-AP-2024-0001-0287	Inkman, Michael	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
285	USC-RULES-AP-2024-0001-0288	Golding, Robert	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
286	USC-RULES-AP-2024-0001-0289	Barnes, John	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
287	USC-RULES-AP-2024-0001-0290	Inzer, Carlene	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
288	USC-RULES-AP-2024-0001-0291	Freese, Ray	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
289	USC-RULES-AP-2024-0001-0292	Horan, Pat	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
290	USC-RULES-AP-2024-0001-0293	Flynn, Daniel	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspect	
291	USC-RULES-AP-2024-0001-0294	Chase, Paul	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	

#	Comment Number	Submitter	Comment	Attachment Files
292	USC-RULES-AP-2024-0001-0295	Effland, Philip	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
293	USC-RULES-AP-2024-0001-0296	Bogle, John	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
294	USC-RULES-AP-2024-0001-0297	Hutchins, Cindy	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	

#	Comment Number	Submitter	Comment	Attachment Files
295	USC-RULES-AP-2024-0001-0298	Bains, David	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
296	USC-RULES-AP-2024-0001-0299	Blanchard, Charles	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
297	USC-RULES-AP-2024-0001-0300	Gift , Richard	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
298	USC-RULES-AP-2024-0001-0301	Byrne, Patrick	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
299	USC-RULES-AP-2024-0001-0302	Deutsch, Nathan	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	

#	Comment Number	Submitter	Comment	Attachment Files
300	USC-RULES-AP-2024-0001-0303	Delgado, Erick	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
301	USC-RULES-AP-2024-0001-0304	Grigsby, Leland	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
302	USC-RULES-AP-2024-0001-0305	Beynun, Kathleen	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
303	USC-RULES-AP-2024-0001-0306	National Association of Manufacturers	National Association of Manufacturers' Comments on Proposed Amendments to Federal Rule of Appellate Procedure 29	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0306/attachment_1.pdf
304	USC-RULES-AP-2024-0001-0307	National Association of Criminal Defense Lawyers	Comments of NACDL attached	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0307/attachment_1.pdf

#	Comment Number	Submitter	Comment	Attachment Files
305	USC-RULES-AP-2024-0001-0308	harkness, william	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
306	USC-RULES-AP-2024-0001-0309	Ameredes , Bill	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
307	USC-RULES-AP-2024-0001-0310	American Academy of Appellate Lawyers	See attached letter.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0310/attachment_1.pdf
308	USC-RULES-AP-2024-0001-0311	American Economic Liberties Project	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0311/attachment_1.pdf
309	USC-RULES-AP-2024-0001-0312	Athayde, Olav	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	

#	Comment Number	Submitter	Comment	Attachment Files
310	USC-RULES-AP-2024-0001-0313	Babich, Frank	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
311	USC-RULES-AP-2024-0001-0314	Bailey, Doris	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
312	USC-RULES-AP-2024-0001-0315	Barclay, Beth	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
313	USC-RULES-AP-2024-0001-0316	Bargy, Terry	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	

#	Comment Number	Submitter	Comment	Attachment Files
314	USC-RULES-AP-2024-0001-0317	Beppu, Debbie	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
315	USC-RULES-AP-2024-0001-0318	Berry, Thomas	Please see the attached document for my comment.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0318/attachment_1.pdf
316	USC-RULES-AP-2024-0001-0319	Biehl, Tim	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
317	USC-RULES-AP-2024-0001-0320	Bird, Leonard	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
318	USC-RULES-AP-2024-0001-0321	Blankenship, John	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
319	USC-RULES-AP-2024-0001-0322	Brady Center to Prevent Gun Violence	Please see the attached comment.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0322/attachment_1.pdf

#	Comment Number	Submitter	Comment	Attachment Files
320	USC-RULES-AP-2024-0001-0323	Brant, Diana	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
321	USC-RULES-AP-2024-0001-0324	Brookhart, Beverly	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
322	USC-RULES-AP-2024-0001-0325	Brossette, McKinley	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
323	USC-RULES-AP-2024-0001-0326	Buatti, Peter	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
324	USC-RULES-AP-2024-0001-0327	Budke, Chris	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
325	USC-RULES-AP-2024-0001-0328	Bunnell, Paul	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
326	USC-RULES-AP-2024-0001-0329	Burchett, Chris	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
327	USC-RULES-AP-2024-0001-0330	Burwell, Ed	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
328	USC-RULES-AP-2024-0001-0331	Campbell, William R	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
329	USC-RULES-AP-2024-0001-0332	Cararo, Ronald	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
330	USC-RULES-AP-2024-0001-0333	carini, michael	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
331	USC-RULES-AP-2024-0001-0334	Casey, Margie	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	

#	Comment Number	Submitter	Comment	Attachment Files
332	USC-RULES-AP-2024-0001-0335	Christman, Gary	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
333	USC-RULES-AP-2024-0001-0336	Cochran, Paul	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
334	USC-RULES-AP-2024-0001-0337	Cole, Ronald	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
335	USC-RULES-AP-2024-0001-0338	Collins, Chad	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	

#	Comment Number	Submitter	Comment	Attachment Files
336	USC-RULES-AP-2024-0001-0339	Complex Insurance Claims Litigation Association	See attached file for Comments from the Complex Insurance Claims Litigation Association.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0339/attachment_1.pdf
337	USC-RULES-AP-2024-0001-0340	COSAL	See attached.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0340/attachment_1.pdf
338	USC-RULES-AP-2024-0001-0341	Cox, Nancy	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
339	USC-RULES-AP-2024-0001-0342	Curl, Marjorie	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
340	USC-RULES-AP-2024-0001-0343	David Gaffney Jr, David	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
341	USC-RULES-AP-2024-0001-0344	Davidson, Elizabeth	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
342	USC-RULES-AP-2024-0001-0345	de Alvarez, Elizabeth	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	

#	Comment Number	Submitter	Comment	Attachment Files
343	USC-RULES-AP-2024-0001-0346	Dolleman, Douglas	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
344	USC-RULES-AP-2024-0001-0347	Dooley , Dee	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
345	USC-RULES-AP-2024-0001-0348	doyle, april	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
346	USC-RULES-AP-2024-0001-0349	Eastman, Carol	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
347	USC-RULES-AP-2024-0001-0350	Electronic Frontier Foundation	Please see the attached PDF with comments on FRAP 29 from the Electronic Frontier Foundation (EFF).	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0350/attachment_1.pdf

#	Comment Number	Submitter	Comment	Attachment Files
348	USC-RULES-AP-2024-0001-0351	Endlich, M.	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
349	USC-RULES-AP-2024-0001-0352	Fink, Susan	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
350	USC-RULES-AP-2024-0001-0353	Free Speech Coalition and Free Speech Defense and Education Fund	Please see attached the comments of Free Speech Coalition and Free Speech Defense and Education Fund, et al.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0353/attachment_1.pdf
351	USC-RULES-AP-2024-0001-0354	funk, Linda	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
352	USC-RULES-AP-2024-0001-0355	Galer, Stephen	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
353	USC-RULES-AP-2024-0001-0356	Gallimore , Alexander	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	

#	Comment Number	Submitter	Comment	Attachment Files
354	USC-RULES-AP-2024-0001-0357	Glowaski, James	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
355	USC-RULES-AP-2024-0001-0358	GOMEZ, VIRGINIA	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
356	USC-RULES-AP-2024-0001-0359	Groomer, W. P.	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
357	USC-RULES-AP-2024-0001-0360	Hall, Judy	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
358	USC-RULES-AP-2024-0001-0361	Henry, Charles	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
359	USC-RULES-AP-2024-0001-0362	Hettrick, Amy	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
360	USC-RULES-AP-2024-0001-0363	Higgins, Nancy	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
361	USC-RULES-AP-2024-0001-0364	HOWE, DOUGLAS	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
362	USC-RULES-AP-2024-0001-0365	Hurd, Deborah	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
363	USC-RULES-AP-2024-0001-0366	Independent Community Bankers of America	See attached file.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0366/attachment_1.docx
364	USC-RULES-AP-2024-0001-0367	Ingersoll, Carol	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
365	USC-RULES-AP-2024-0001-0368	Institute for Justice	See attached document commenting on proposed amendments to Rule 29.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0368/attachment_1.pdf
366	USC-RULES-AP-2024-0001-0369	International Attestations, LLC	This comment generated by the Honorable Melissa A. Kotulski of International Attestations, LLC (Registered Trademark) (IA) is developed at the prompting of the periodic and regular review of the rules through a rulemaking process that is generated by the U.S. Courts as presented by the Judicial Conference Advisory Committee (the Committee). For the 2025 Comment Period, the Committee presented its proposed rule-changes for the U.S. bodies of law pertaining to Appellate, Bankruptcy, and Evidence (Collectively, The Rules. Separately Appellate Rules, Bankruptcy Rules, and Evidence Rules). The Rules of Procedure for Evidence, Bankruptcy, and Appeals all touched upon amicus brief standards as well as in forma pauperis (IFP) considerations. Assuming they are in fact from this year's rules are from the three sub-committees, and not also presenting from Criminal and Civil Rulemaking bodies as well, the comments included here present a two-fold concern for the process in general as well as the text-based analysis of the revisions centered on (1) amicus length limits; & (2) IFP Form 4 revisions. IA proposes that the Judiciary Conference further consider preparations for the coming global events (North America's World Cup 2026, the Sesquicentennial for the U.S.A. & Los Angeles Olympics 2028) by enriching pathways for inclusion of American borne personages, whether individual, corporate, agency or other.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0369/attachment_1.pdf
367	USC-RULES-AP-2024-0001-0370	Investment Company Institute	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0370/attachment_1.pdf

#	Comment Number	Submitter	Comment	Attachment Files
368	USC-RULES-AP-2024-0001-0371	Jackson, David	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
369	USC-RULES-AP-2024-0001-0372	Jacobs, Kenneth	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
370	USC-RULES-AP-2024-0001-0373	Koenig, Steven	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before considering the briefs. Judges and clerks currently have ways to filter out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to withdraw this proposal.	
371	USC-RULES-AP-2024-0001-0374	Larsen, Allison	Please see attached.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0374/attachment_1.pdf
372	USC-RULES-AP-2024-0001-0375	Laurent, Vicki	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
373	USC-RULES-AP-2024-0001-0376	M Mauer, Irene	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
374	USC-RULES-AP-2024-0001-0377	MacRae, Mary H MacRae	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
375	USC-RULES-AP-2024-0001-0378	Macy, Bill	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
376	USC-RULES-AP-2024-0001-0379	meehan, joseph	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
377	USC-RULES-AP-2024-0001-0380	Megill, Joan	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
378	USC-RULES-AP-2024-0001-0381	Morgan , Linda	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
379	USC-RULES-AP-2024-0001-0382	Muraview, Fred	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
380	USC-RULES-AP-2024-0001-0383	Sylvester, Yolanda	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
381	USC-RULES-AP-2024-0001-0384	Schechter, Duke	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	

#	Comment Number	Submitter	Comment	Attachment Files
382	USC-RULES-AP-2024-0001-0385	Nemecek, David	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
383	USC-RULES-AP-2024-0001-0386	Oldahm, Elaine	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
384	USC-RULES-AP-2024-0001-0387	Swanson, Justin	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
385	USC-RULES-AP-2024-0001-0388	Parkhill, Gary	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
386	USC-RULES-AP-2024-0001-0389	Watson, Pam	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	

#	Comment Number	Submitter	Comment	Attachment Files
387	USC-RULES-AP-2024-0001-0390	Windus, Donald	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
388	USC-RULES-AP-2024-0001-0391	Stapelman, Sunny	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
389	USC-RULES-AP-2024-0001-0392	Trainor, Les	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
390	USC-RULES-AP-2024-0001-0393	Salinovich, Judy	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	

#	Comment Number	Submitter	Comment	Attachment Files
391	USC-RULES-AP-2024-0001-0394	Salinovich, Judy	I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings. Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions. Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process. This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly. I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.	
392	USC-RULES-AP-2024-0001-0395	Shafer, Joanna	I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts. This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.	
393	USC-RULES-AP-2024-0001-0396	Theurer, Nancy	I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs. Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating. Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations. This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.	
394	USC-RULES-AP-2024-0001-0397	Weingand, Kurt	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	
395	USC-RULES-AP-2024-0001-0398	Ponds, Billy	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step. I urge the Committee to reconsider this harmful proposal and withdraw it.	

#	Comment Number	Submitter	Comment	Attachment Files
396	USC-RULES-AP-2024-0001-0399	Vandegrift, Pamela	I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations. Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns. Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy. This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.	
397	USC-RULES-AP-2024-0001-0400	REDA, LOU	I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights. The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system. This proposal is a step in the wrong direction, and I urge the Committee to withdraw it	
398	USC-RULES-AP-2024-0001-0401	Senator Sheldon Whitehouse and Congressman Hank Johnson	Please see the attached additional Senator Sheldon Whitehouse and Congressman Hank Johnson.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0401/attachment_1.pdf
399	USC-RULES-AP-2024-0001-0402	Court Accountability		https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0402/attachment_1.pdf
400	USC-RULES-AP-2024-0001-0403	Native American Rights Fund	Please see the attached the Native American Rights Fund, the National Congress of American Indians, and the Northern Plains Indian Law Center.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0403/attachment_1.pdf
401	USC-RULES-AP-2024-0001-0404	Rando, Robert	I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. Limiting the input of amici by word count and/or permission to file not only infringes on the public's, or interested stakeholders', ability to exercise their First Amendment rights and to apprise the Courts of issues or unintended consequences of potential rulings, which the parties by virtue of their respective roles and/or word count limitations may not or cannot argue, it deprives the Courts of the perspective that escapes the myopic focus inherent in the appeals process. I strongly urge withdrawal of this proposal to protect the constitutional rights of those who in their capacity as "friends of the Court" enhance the potential for the Courts to reach well-informed and just decisions not only for the parties to the appeal but for the affected and interested members of society as well.	
402	USC-RULES-AP-2024-0001-0405	Retail Litigation Center	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0405/attachment_1.pdf
403	USC-RULES-AP-2024-0001-0406	Jennings, Rachel	Please see attached letter.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0406/attachment_1.pdf
404	USC-RULES-AP-2024-0001-0407	Hans, Gautam	Please see attached comment.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0407/attachment_1.pdf

#	Comment Number	Submitter	Comment	Attachment Files
405	USC-RULES-AP-2024-0001-0408	American Legislative Exchange Council	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0408/attachment_1.pdf
406	USC-RULES-AP-2024-0001-0409	Finell, Steven	See attached file(s)	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0409/attachment_1.pdf
407	USC-RULES-AP-2024-0001-0410	National Association of Manufacturers	See the attached document.	https://downloads.regulations.gov/USC-RULES-AP-2024-0001-0410/attachment_1.pdf

TAB 5D

WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

August 19, 2024

Submitted via regulations.gov

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

Re: Proposed Amendments to Federal Rule of Appellate Procedure 29

Judge Bates:

Washington Legal Foundation submits this comment on proposed amendments to Federal Rule of Appellate Procedure 29. WLF appreciates the chance to weigh in on the proposal to amend the submission and disclosure requirements for amicus curiae briefs. The proposal would require nongovernmental amici to obtain leave of court to file amicus briefs and require intrusive disclosures from amici. As explained below, the Committee should not move forward with the proposal.

I. WLF Has An Interest In Ensuring That The Process For Filing Amicus Curiae Briefs Is Fair And Efficient.

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. WLF often appears as amicus curiae in all thirteen courts of appeals—filing twelve such briefs over the past year. *See*, *e.g., CVS Pharmacy, Inc. v. Forest Lab'ys Inc.*, 101 F.4th 223 (2d Cir. 2024). WLF also participates in the rulemaking process by submitting comments on proposed amendments to federal rules. *See*, *e.g.*, WLF Comment, *In re Federal Rule of Evidence 702 Amendment* (Dec. 14, 2021); WLF Comment, *In re Proposed Amendments to Federal Rule of Civil Procedure 23* (Feb. 15, 2017). WLF therefore has a strong interest in the proposal.

II. Requiring Leave Of Court To File An Amicus Brief Is Unnecessary, Inefficient, And Limits Access To The Courts.

The proposal to require every nongovernmental amicus to obtain leave of court to file a brief is an unnecessary step that would decrease judicial efficiency and subvert stakeholders' access to the appellate system. The proposal also misunderstands amicus briefs and will not accomplish its goals.

A. Rule 29 allows for the efficient screening of amicus briefs.

The proposal seeks to "eliminat[e] uncertainty and provid[e] a filter on the filing of unhelpful briefs." Standing Comm. on Rules of Practice & Proc., Agenda Book, 204 (June 4, 2024), https://perma.cc/DNX3-XAMQ. It tries to accomplish this goal by requiring all nongovernmental amici to seek leave of court to file an amicus brief while "stat[ing] why the brief is helpful and serves the purpose of an amicus brief." *Id.*

But there 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. A law clerk may spend 10 seconds reading the table of contents of one amicus brief before throwing it in the trash while the judge may spend hours examining the arguments in another amicus brief. Thus, requiring potential amici to file a motion would just increase the workload on chambers. Rather than just reviewing the brief, judges would have to review the motion and then, if leave is granted, the brief.

There are several ways judges quickly decide whether an amicus brief is helpful. First, is the identity of the amicus. For example, Justices Ginsburg, Scalia, and Thomas gave American Civil Liberties Union briefs closer attention. *See* Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Pol. 33, 49-50 (2004). This tracks studies showing that judges pay more attention to briefs by amici with a reputation for high-quality work. *See* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901, 1937 (2016). In other words, judges often use an amicus's reputation based on prior briefs to help decide whether future briefs will be helpful.

Second, judges quickly scan the table of contents to determine whether the brief will be helpful. The same is true of the summary of argument and interest of amicus curiae sections of the brief. Third, the attorneys filing an

amicus brief also convey whether the brief is likely to be helpful. A brief filed by Lisa Blatt or Paul Clement is worth reading. On the other hand, it may not be worthwhile to read an amicus brief by a serial pro se litigant.

The proposal decreases the efficiency of appellate courts' considering amicus briefs. Modern appellate practice includes filing a plethora of motions and responses. In some circuits, judges handle most of these motions. In other circuits, the clerk has the power to decide most motions. And in the Ninth Circuit, a special master is empowered to rule on some motions. 9th Cir. R. 27-7. Requiring amici to move for leave to file briefs in every case would increase the burden on the judiciary without any benefit.

That is why the Supreme Court eliminated the need to seek consent or move for leave to file an amicus brief. *See* Supreme Court, *Memorandum to Those Intending to File an Amicus Curiae Brief in the Supreme Court of the United States,* 1 (Jan. 2023), https://perma.cc/6XTY-ZZF5 (there is "no need for an amicus to file a motion for leave to file" a timely amicus brief). The Court recognized that the time justices and the Clerk's Office were spending on deciding the motions squandered judicial resources. The same is true for the courts of appeals, which have far more crowded dockets. Thus, the proposal is unnecessary to help judges decide whether an amicus brief is helpful and decreases judicial efficiency.

B. The proposal will increase, not eliminate, uncertainty for amici.

The Committee adds that "some parties might not respond to a request to consent, leaving a potential amicus needing to wait until the last minute to know whether to file a motion." Agenda Book, *supra*, at 203-04. First, this is not a problem that arises often. WLF files many briefs annually in the courts of appeals and rarely must file motions; parties usually consent.

About once a year, parties do not respond to WLF's consent request. While this is frustrating, requiring every potential amicus to seek leave to file is not the solution. WLF's process is to prepare a motion if consent has not been received from all parties two days before the due date. Often, the motion is not filed because parties eventually consent. Other times, parties who failed to respond to a request for consent never bother to file in opposition to WLF's motion. This is a minor inconvenience. But preparing a motion a few times a year that need not be filed is much more efficient for amici and the courts than requiring a motion in every case.

If the Committee truly wants to eliminate the problem of parties not responding to amici, it could require parties to respond to consent requests within a specified time. For example, consent could be presumed unless a party opposes the request within two business days. As uncertainty is not a problem and there are also better, targeted options if the Committee wants to eliminate uncertainty, the proposal is unnecessary.

Rather than decrease uncertainty, the Committee's proposal would increase uncertainty. Judges would have to decide whether a proposed amicus brief met Rule 29's "helpfulness" standard. But deciding whether a brief is helpful would cause uncertainty for amici. The terms "helpful" and "serves the purpose of an amicus brief" are so ambiguous that different judges would interpret those phrases differently. Amici would always be unsure if their brief would be considered, which would discourage amicus filings.

Preparing and filing amicus briefs is not cheap. Many amici are willing to spend scarce resources on amicus briefs because they are confident that parties will consent to the filing and courts will accept the submission. But groups may not be willing to pay for an amicus brief if they must gamble on its acceptance. This will decrease the number of diverse perspectives and arguments submitted by amici. The proposal will have a particularly chilling effect on individuals and smaller groups who want to file amicus briefs.

Besides disproportionately affecting individuals and smaller groups, the proposal will also widen the gap between governments (which need not seek leave to file an amicus brief) and private parties (who must seek leave). True, the rules have special provisions regarding the government. But those rules usually apply equally to all parties. *See, e.g.*, Fed. R. App. P. 4(a)(1)(B). The courts should not "place a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else." *Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (per curiam) (Gorsuch, J., dissenting from the denial of certiorari). The Supreme Court recognized this fact when eliminating the requirement for private parties to seek consent before filing an amicus brief. There is no reason for the Committee to go in the opposite direction for the courts of appeals.

C. Amicus briefs play an important role in the judicial process.

The proposal undersells the critical role that amicus briefs play in our common law system. Federal courts do not issue advisory opinions. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 378 (2024) (citing 13 Papers of George

Washington: Presidential Series 392 (C. Patrick ed. 2007)). Rather, courts announce legal standards and rules as part of resolving cases and controversies between parties. This limit on the judiciary's power is key to separation of powers. But it also means that amicus participation is important.

Amici make arguments that the parties are often unwilling or unable to make. For example, the parties may want the answer to a legal question and so they will not argue that the court lacks subject-matter jurisdiction. Amici, however, can explain why federal courts lack jurisdiction over a case. This helps the court get the decision right. *See Lefebure v. D'Aquilla*, 15 F.4th 670, 675 (5th Cir. 2021) (Ho, J., in chambers) ("courts should welcome amicus briefs for one simple reason: '[I]t is for the honour of a court of justice to avoid error in their judgments" (quoting *Protector v. Geering*, 145 Eng. Rep. 394 (K.B. 1686) (alteration in original))).

Parties to an appeal worry about the outcome of a specific case. Amici, however, have interests beyond that case. They can therefore explain to the court the far-reaching implications of a holding. For example, imagine a plaintiff slips and falls on ice on the defendant's driveway. The parties are only interested in winning the case. An amicus group representing shopping malls may file an amicus brief explaining why the hills and ridges doctrine is important for their business and urging the court to limit the ruling to residential properties or to craft a rule that recognizes the importance of the doctrine. This would help the panel understand the issues. *Cf. Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 764 (7th Cir. 2020) (Scudder, J., in chambers) (explaining how judges may find amicus briefs helpful). The proposal ignores these benefits associated with amicus briefs.

D. The explanation for departing from Supreme Court practice is illogical.

Finally, the proposal departs from the Supreme Court's recent rule change on amicus briefs. Amici may now file briefs without the consent of the parties or leave of court. The Committee explains this departure by stating that the Supreme Court receives far more amicus briefs and, unlike the courts of appeals, amicus briefs cannot cause recusal problems for Supreme Court Justices. Agenda Book, *supra*, at 150-51. Both rationales are illogical.

First, as explained above, the motion requirement would burden judges and staff. But even if that were not true, there is no reason that fewer amicus briefs in the courts of appeals warrants more scrutiny of those briefs. If anything, the opposite is true. It appears as though the Committee was just

searching for any difference between the Supreme Court and the courts of appeals to support its desired outcome of limiting amicus briefs.

Second, the proposal will not help prevent disqualification. The rules allow a court to reject any "amicus brief that would result in a judge's disqualification." Fed. R. App. P. 29(a)(2). Requiring all amici to file a motion will thus not help avoid disqualifications. So neither explanation for departing from the Supreme Court's recent simplification of amicus practice makes sense.

III. The Proposed Disclosure Requirements Are Unnecessary And Raise First Amendment Concerns.

A. Forcing amici to disclose their donors is unnecessary.

The proposal would require amici to disclose "whether a party, its counsel, or any combination of parties or their counsel 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 the prior fiscal year." Agenda Book, *supra*, at 206. Requiring this disclosure is unnecessary because the current rules, which track the Supreme Court's rule, already ensure that parties do not fund amicus briefs.

Rule 29 requires amici to 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," or "a 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)(i-iii). This stops parties from using amicus briefs to circumvent word limits. *See* Fed. R. App. P. 29 note.

Concerns about party involvement in amicus briefs are thus adequately addressed by the current rule. If a party is paying for an amicus brief, that must be disclosed to the court. Still, the Committee "believes that someone who provides [over 25%] of the revenue of an amicus is likely to have substantial power to influence that amicus." Agenda Book, *supra*, at 206. This argument fails for several reasons.

First, the Committee does not explain why it chose 25% as the cutoff. Because the number is so arbitrary, the Committee must explain its rationale. Although donating a large percentage of an amicus's annual budget may influence the issues that the amicus is interested in, the current rule prevents

that donation from being used to file an amicus brief supporting the donor absent disclosure. That strikes the correct balance.

Second, the most helpful amici often have a strong interest in one industry or issue. For example, the local farm bureau is probably best positioned to file an amicus brief in a right-to-farm case. These industry groups may receive funding from parties because they are members of industry groups. But that should not require disclosure. This is particularly true if multiple industry participants are parties. Thus, there is no need for increased disclosure.

The Committee also believes that some amicus efforts led the Supreme Court to overturn some precedent. But that is no reason to tighten amicus rules at the court of appeals level. Again, the Supreme Court has loosened the requirements for filing amicus briefs there. The Committee fails to explain why amicus influence at the Supreme Court should cause more amicus disclosures in the courts of appeals. Thus, there is no need to force amici to make more disclosures in the courts of appeals.

B. The disclosure requirements may violate the First Amendment.

The proposal requires disclosure of "any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $100 to pay for preparing, drafting, or submitting the brief." Agenda Book, *supra*, at 200. Currently, there is no requirement to disclose if an amicus's member(s) paid for a brief. Under the proposal, this exception applies only if a "person [] has been a member of the amicus for the prior 12 months." *Id.*

The Committee claims "the amendment is an anti-evasion rule that treats new members of an amicus as non-members." Agenda Book, *supra*, at 208. The proposal, the Committee says, would deter people from becoming members of an amicus to circumvent the disclosure requirements. But this explanation ignores the associational rights of amici and their new members.

The First Amendment protects the rights of organizations from disclosing their membership absent a "subordinating interest which is compelling" and narrowly tailored to that interest. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960). There is a "vital relationship between freedom to associate and privacy in one's associations." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021).

Requiring amici to disclose new members who give more than $100 to prepare an amicus brief is constitutionally suspect. The proposal would deter association with amici by telling potential members that their identities must be disclosed if they help pay for a brief. This "deterrent effect on the exercise of First Amendment rights" requires establishing a compelling interest that is narrowly tailored to advance that interest. *Ams. For Prosperity*, 594 U.S. at 607.

The proposal is not narrowly tailored and does not advance a compelling governmental interest. First, the length of time before a member can be exempt from the disclosure requirement could be shorter. But the proposal instead freezes the associational rights of amici and their members for twelve months. Second, ensuring that the public knows which non-parties are helping pay for amicus briefs is not a compelling governmental interest. The value of an amicus brief is tied to the persuasiveness of its legal analysis, not the identity of its funders. As there is no compelling reason to tighten disclosure requirements, the constitutionality of the proposal is doubtful.

* * *

The proposal is unnecessary, unduly burdensome, and raises constitutional concerns. Courts are not being overrun with useless amicus briefs that judges have trouble filtering out. But requiring all amici to seek leave to file briefs will decrease judicial efficiency and the number of helpful amicus briefs filed. The heightened disclosure requirements are similarly unnecessary and infringe on the associational rights of amici and their members. Thus, WLF urges the Committee to scrap the proposal.

Respectfully submitted,

Dennis Azvolinsky
LAW CLERK

Cory L. Andrews
GENERAL COUNSEL & VICE
PRESIDENT OF LITIGATION

John M. Masslon II
SENIOR LITIGATION COUNSEL

Congress of the United States
Washington, DC 20510

September 12, 2024

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
One Columbus Circle NE
Washington, D.C. 20544

Dear Judge Bates:

Thank you for the Advisory Committee's long and thorough deliberations on necessary amendments to Federal Rule of Appellate Procedure 29. Without taking a position on other provisions of the proposed amendment, we strongly encourage the Committee to adopt the provisions improving disclosures related to amici curiae. If adopted, the new rule would yield a long-overdue, if incomplete, improvement over existing amicus disclosure requirements. To further bolster the Committee's proposal, we offer several additional recommendations for consideration.

It is important to understand the context that makes these improvements to the rule necessary. In brief summation, a campaign to influence our federal courts began some time ago, signaled by then-attorney Lewis Powell's memorandum to the United States Chamber of Commerce urging the Chamber to join other groups in "exploiting judicial action."[1] According to Powell, "especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change," making the courts "a vast area of opportunity for the Chamber . . . if . . . business is willing to provide the funds."[2] Industries familiar with the tactic of regulatory capture, sometimes called agency capture, had a ready template from which to proceed in this campaign.

The campaign had multiple vectors: one, to put amenably-minded judges and justices on the bench; two, to forge helpful legal doctrines in amenable think tanks and universities; three, to fund litigating and amicus groups to provide helpful court advocacy regarding those doctrines.

The legal groups operate in various ways. Sometimes they represent a party, often a party they have sought out or recruited; contra the ordinary process of injured parties choosing their lawyers. Although this practice, standing alone, is not always problematic, these groups have taken it to a new level. One nominal plaintiff even ended up on the payroll of the litigating group.[3] Sometimes they swap out plaintiffs and swap in new ones for strategic reasons or to protect their claims to standing.[4] Often, multiple legal groups file amicus briefs aligned with the litigating group, hence the importance of this rule. Sometimes they swap positions: in *Friedrichs*

[1] Memorandum from Lewis F. Powell, Jr. to Eugene B. Snydor, Jr. at 26 (Aug. 23, 1971), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo.
[2] *Id.* at 26-27.
[3] Mitchell Armentrout, *Mark Janus quits state job for conservative think tank gig after landmark ruling*, CHICAGO SUN-TIMES (July 20, 2018), https://chicago.suntimes.com/2018/7/20/18409126/mark-janus-quits-state-job-for-conservative-think-tank-gig-after-landmark-ruling.
[4] *See* Mary Bottari, *Behind* Janus*: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2018), https://inthesetimes.com/features/janus_supreme_court_unions_investigation.html.

v. California Teachers Association, 136 S. Ct. 1083 (2016) (per curiam), petitioner's counsel became an amicus when the same question returned to the Supreme Court in *Janus v. AFSCME*, 585 U.S. 878 (2018);[5] a petitioner's litigating group in *Janus* had been an amicus in *Friedrichs*.[6] Often, they file in orchestrated and harmonized flotillas: the usual number in the chorus is around ten or twelve;[7] in matters of particular impact and importance to the influence campaign, we've seen as many as fifty-five, even at the certiorari stage.[8] In one such case, the petitioner was the 501(c)(3) twin of the 501(c)(4) right-wing political battleship Americans for Prosperity, which sits at the center of the political network that funded numerous of the amicus filers, but none of that was disclosed.[9]

Some advocacy groups seem to have no business or function other than to interpose themselves between corporate interests and courts, screening from the judicial proceedings the corporate identities behind them (some perform that function in administrative proceedings too); some are well-established trade groups recruited to the cause (perhaps for compensation—trade associations like the U.S. Chamber of Commerce refuse to deny or disclose this); some are practically pop-ups, appearing for particular cases, as the Committee has noted with its less-than-twelve-months-of-existence provisions. In sum, a robust and coordinated system operates to flood appellate court proceedings with covertly funded amicus encouragement, while denying courts, the parties, and the public essential knowledge to evaluate the true interests behind the briefing and any resulting conflicts.

Major corporations as parties have been caught funding amici that filed briefs in their case arguing positions helpful to their cause.[10] Major funders of multiple amicus briefs in the same case have been caught "orchestrat[ing] . . . amicus efforts" in addition to helping fund "the actual, underlying legal actions."[11] Entities that are mere "fictitious names" for other entities have filed briefs that failed to disclose the actual corporate entity behind the fictitious name, and failed to disclose that entity's other fictitious names and related corporate entities.[12] We have filed amicus briefs describing for the Supreme Court undisclosed funding links we could find

---

[5] *Id.*
[6] *Id.*; Amicus Curiae Brief of the National Right to Work Legal Defense Foundation, Inc., In Support of Petitioners, 578 U.S. 1 (2016) (No. 14-915).
[7] *See* Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, YALE L.J.F. 141, 149-150 (2021).
[8] *Id.* at 147-148 (2021).
[9] *Id.* at 147-149.
[10] *See, e.g.*, Shawn Musgrave, *The Gaping Hole in Supreme Court Rules for Tracking Links Between Litigants and Influence Groups*, THE INTERCEPT (Apr. 18, 2024), https://theintercept.com/2024/04/18/supreme-court-amicus-briefs-secret-conservative-funders/; Naomi Nix & Joe Light, *Oracle Reveals Funding of Dark Money Group Fighting Big Tech*, BLOOMBERG (Feb. 25, 2020), https://www.bloomberg.com/news/articles/2020-02-25/oracle-reveals-it-s-funding-dark-money-group-fighting-big-tech.
[11] Lisa Graves, *Snapshot of Secret Funding of Amicus Briefs Tied to Leonard Leo-Federalist Society Leader, Promoter of Amy Barrett*, TRUE NORTH RESEARCH (Oct. 9, 2020), https://truenorthresearch.org/2020/10/snapshot-of-secret-funding-of-amicus-briefs-tied-to-leonard-leo-federalist-society-leader-promoter-amy-coney-barrett/.
[12] Hansi Lo Wang, *This conservative group helped push a disputed election theory*, NPR (Aug. 12, 2022), https://www.npr.org/2022/08/12/1111606448/supreme-court-independent-state-legislature-theory-honest-elections-project.

among multiple amici appearing in the case, but since so much of the funding of these groups is secret, the linkages we found are necessarily an incomplete picture.[13]

In light of all the above, the chief recommendation we propose is that a subsection be added related to connections among amici. The Committee is justifiably attentive to the difference in burden between disclosing links between amici and parties versus disclosing links between amici and the world at large. Some disclosures by amici are easily managed, however. For example, the Committee should require amici to disclose at least major donors funding multiple amici. To ensure consistency, the Committee could adopt the same disclosure thresholds as it has with respect to amicus-party connections.

While "[t]he burdens of disclosure are far greater with regard to nonparties,"[14] the relevant universe of "flotilla amici" and their major donors amounts to an extremely small list of individuals or entities in most cases, known to each other through coordination and common funding. Amicus organizations should have little difficulty tracking individuals or entities whose contributions amount to at least 25% of the organization's prior year revenue—a number organizations need calculate only once per year. As the Committee notes, "top officials at an amicus are likely to be aware of such a high-level contributor without having to do any research at all."[15] Thus, this is a very simple requirement, and it can be made the responsibility of the lawyers filing the briefs to aver that they have done the necessary due diligence and made the necessary disclosures, subject to discipline by the court where they have failed or misled a court.

Because the nominal plaintiff or petitioner may be a "plaintiff of convenience" but not the real party in interest, requiring disclosure only of links to the nominal party will often be a vain effort. Too often, cases are "faux litigation"—the litigating group found the client, judge-shopped the court, and participated in an orchestrated campaign of judicial lobbying by an amicus flotilla. It is the flotilla of coordinated amicus filings and the common funders and orchestrators of the flotilla that need disclosing. Flotillas of coordinated amicus briefs add little beyond a false appearance of numerosity and a great many extra pages, so there is little added value to the court from all the filings. Redundancy is disfavored, and so should subterfuge be.

---

[13] *See, e.g.,* Brief of Senators Sheldon Whitehouse and Richard Blumenthal as Amici Curiae in Support of Respondents at 16-17, Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 585 U.S. 878 (2018) (No. 16-1466); Brief of Amicus Curiae Senator Sheldon Whitehouse in Support of Respondent at n.18, Kisor v. Wilkie, 588 U.S. 558 (2019) (No. 18-15); Brief of Senators Sheldon Whitehouse et al. as Amici Curiae in Support of Respondents at 8-9, N.Y. State Pistol & Rifle Ass'n v. City of New York, New York, 139 S. Ct. 939 (2019) (No. 18-280); Brief of Amici Curiae U.S. Senators Sheldon Whitehouse et al. in Support of Court-Appointed Amicus Curiae at 19, Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197 (2020) (No.19-7); Brief of Senators Sheldon Whitehouse et al. in Support of Respondents at 18-19, Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021) (No. 20-107); Brief of U.S. Senators as Amici Curiae in Support of Respondent at n.29, Ams. for Prosperity Found. v. Bonta, 594 U.S. 595 (2021) (No. 19-251); Brief of U.S. Senators Sheldon Whitehouse et al. as Amici Curiae in Support of Respondents at 14-15, 18-19, West Virginia v. EPA, 597 U.S. 697 (2022) (No. 20-1530); Brief of Amici Curiae U.S. Senator Sheldon Whitehouse and Representative Herny "Hank" Johnson, Jr. in Support of Respondents at 23-28, 30-33, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271); Brief of Amici Curiae U.S. Senators Sheldon Whitehouse et al. in Support of Respondents at 15-17, Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2023) (No. 22-451).

[14] Memorandum from Hon. Jay Bybee to Hon. John D. Bates at 16 (Aug. 15, 2024).

[15] *Id.* at 17.

It would require minimal effort for amici to provide the court and the public with important information about the true interests behind the briefs. For instance, the Committee could require amici to disclose known links between them and other amici. An obvious part of this disclosure would be for amici that are part of a network of related corporate entities, as "fictitious names" of other entities or otherwise, to disclose the other entities in the network, including coordination of multiple amici by a third party, as was the case in *Friedrichs* and *King v. Burwell*, 576 U.S. 473 (2015).[16]

Disclosure of links among amici is a burden easily managed, as no one knows better than the amici operating in coordinated flotillas how and why and how much they were coordinated. Unjustified burden is virtually nil. It is really just a matter of disclosing what the lawyers already know or can readily determine. The connected entities in the flotillas have a pretty good idea who they all are, and the number of amici on one side in these cases is usually around a dozen, so the burden of research and disclosure is not great. The importance of courts standing above and apart from the campaign of influence is paramount to public confidence in courts' integrity; it creates a perilous situation when the public cannot tell where the influence campaign ends and the judiciary begins. Disclosure draws a good line. It is in the interest of judicial integrity that entities presenting themselves in judicial proceedings present themselves unmasked, for who they really are. Lawyers who facilitate masking operations degrade the institution of the judiciary, and it is not unreasonable to put them under a duty of candor about proper disclosure.

A related recommendation therefore is that, if the Committee requires disclosure of links among amici, it also require the lawyer presenting an amicus brief make a declaration in the brief that he or she has conducted a duly diligent effort to understand the connections among his or her client and other amicus filers, and has given the court a candid, thorough, plain and honest description of the amicus filer's various funding and additional links with other amici. The requirement that a counsel knowing of a disclosure failure by any amicus must report it is a very good step, but an added requirement of due diligence as to the links with the amicus client would be advisable. In this context, the Committee may want to consider additional language accounting for creative funding structures intended to evade disclosure, such as promises of post-filing payments. This is an area where a lot of hiding is done, and closing off technical loopholes with broad language and broad lawyer candor responsibility would be advisable.

[16] Graves, *supra* note 11.

In Congress, those who lobby the institution must make quite robust disclosures about their activities and payments.[17] It is time to clean up this avenue of anonymous lobbying of the judiciary. We are grateful at the steps you have taken and urge your favorable consideration of the above suggestions.

Sincerely,

SHELDON WHITEHOUSE
Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

HENRY C. "HANK" JOHNSON, JR.
Ranking Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

[17] 2 U.S.C. § 1604.

MITCH McCONNELL
KENTUCKY

United States Senate
REPUBLICAN LEADER

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

September 10, 2024

Dear Judge Bates:

We write to express our strong opposition to the proposed amendments to *amicus* disclosure that the Judicial Conference has been inexplicably considering. These amendments would do nothing to strengthen confidence in the judiciary. They are based on complaints from partisan Democrats who operate under a bad-faith misunderstanding of the judicial process. It's obvious that they seek to use these disclosures to chill core protected speech and associations while bringing the judiciary into disrepute for partisan purposes. We are, frankly, shocked that these discussions have proceeded as far as they have given their obviously partisan genesis and their certain deleterious effects.

I. The First Amendment Protects the Associational and Speech Rights of Those Seeking to Weigh in on Litigation.

We are firm believers in the rights protected by the First Amendment. Defending the right to free speech has been an animating principle behind our combined more than eighty years in the U.S. Senate.[1] We have therefore been alarmed by the growing hostility to these rights. If the rights of speech and association should find their protection anywhere, it's in the courts—including in the Judicial Conference.

You shouldn't need us to explain the protections the First Amendment provides to speech and association, but this proposal compels us to do so.

[1] *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93 (2003); Letter from Senator John Thune, et al., to the Hon. Jessica Rosenworcel (June 6, 2024), https://www.thune.senate.gov/public/_cache/files/f6d3f136-5e2e-42d6-a979-6a943dd06162/16768AD893634C882D27CE35E1D5FAE5.06.06.24-letter-to-chairwoman-rosenworcel-re.-ai-and-political-ads.pdf; Glenn Thrush, *W.H. can't assuage Cornyn*, Politico (Aug. 19, 2009), https://www.politico.com/blogs/on-congress/2009/08/wh-cant-assuage-cornyn-020739.

S-230 THE CAPITOL WASHINGTON, DC 20510–7012
202–224–3135

Under the First Amendment, "Congress shall make no law … abridging the freedom of speech."[2] This freedom of speech includes "a corresponding right to associate with others."[3] The Supreme Court recently explained that "[p]rotected association furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'"[4] As such the Court has long protected those who associate for speech purposes from compelled disclosure of those associations, subjecting any such disclosures to "exacting scrutiny."[5]

The seminal case on this score was *NAACP v. Alabama*, 357 U.S. 449 (1958). There Alabama sought to force the NAACP, a New York non-profit corporation, to disclose the identities of its agents and members to the Alabama Attorney General.[6] The Court held that they couldn't. Noting that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," Justice Harlan concluded, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[7]

The Court rightly observed that this is a rather elementary conclusion, observing, "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved."[8] This is so because—especially as applied to the NAACP in Jim Crow Alabama—"revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[9]

Of course, in the context of election-campaign disclosure requirements, the Supreme Court has held that "exacting scrutiny" is satisfied in the context of express advocacy related directly to an election campaign. The Court, in *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam), identified three purposes justifying disclosure even at the expense of free association: (1) providing the electorate with information as to where money both comes from and is spent in order to make informed voting choices; (2) deterring actual corruption and its appearance by exposing large expenditures; and (3) providing the information needed to detect violations of the campaign-

---

[2] U.S. Const. Amend. 1.
[3] *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).
[4] *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 606 (2021) (quoting *Roberts*, 468 U.S. at 622).
[5] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).
[6] *NAACP v. Alabama*, 357 U.S. 449, 451 (1958).
[7] *NAACP*, 357 U.S. at 460.
[8] *Id.* at 462.
[9] *Id.*

finance laws.[10] And even in the context of political speech courts have differentiated between advocating for issues and advocating for the election or defeat of a candidate.[11]

Obviously courts are not Congress, litigation is not an election, and an appellate docket is not a free-for-all. The justifications for campaign-finance disclosure identified in *Buckley* do not apply here.

First, voters may, indeed, have an interest in knowing who is funding electioneering efforts. Dirty tricks abound in electoral politics. Is this ad in a Republican primary secretly being funded by the Democratic Majority Leader?[12] Disclosure rules perhaps help voters navigate the hurly-burly of politics. We seriously doubt that you think such Nixonian wet works are at play on the federal appellate docket, because they aren't.

Second, campaign disclosure ostensibly deters corruption by blowing the whistle on *the recipient* of the expenditures—i.e. the candidate. Who's the corruptee in this case: the trade associations and think tanks standing as *amici*? That seems improbable. And even if it were true, who cares? The public purpose of campaign disclosures is to ferret out corruption *by elected officials*. Where's the public interest in seeing if, hypothetically, the Sierra Club has been bought off by the green-energy industry? And even if such a public interest did exist, why is it the job of the judicial bureaucracy to play-act as Woodward and Bernstein?

Lastly, there is no FEC of the appellate bar policing a byzantine maze of criminal and civil penalties that requires data to do its job like there is in electoral politics.

In sum, under our Constitution there is a strong presumption against disclosed affiliations. In the rare case that the government has prevailed against that presumption—campaign-finance disclosure for candidate advocacy—the benefits identified by the Supreme Court don't apply in the case of *amicus* briefs. That the Advisory Committee saw fit to analogize the two reflects the judgment of a body that apparently understands neither campaigns nor judging.[13] To the contrary, *amicus* briefs are clearly more analogous to issue advocacy, where disclosure rules are unconstitutional. Regardless, any supposed benefit that could come from election-type transparency being grafted on to *amicus* briefs will be quickly overtaken by harassment of disfavored speakers. Such harassment is not merely hypothetical, as we explain below. Indeed, we cannot help but note the incongruence of this proposal with the Conference's recent, important advocacy to adopt laws that shield from disclosure its judges' personal information, as well as its

---

[10] *Buckley*, 424 U.S. at 66–68.

[11] *See Bonta*, 594 U.S. at 608.

[12] *See* Joe Schoffstall, *Schumer-linked PACs spend millions to meddle in GOP primaries*, Fox News (Mar. 24, 2024), https://www.foxnews.com/politics/schumer-linked-pacs-spend-millionsmeddle-gop-primaries.

[13] Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to Federal Rules (Aug. 2024) ("Proposed Amendments") at *20 ("Disclosure requirements in connection with amicus briefs 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.").

continued, related advocacy for increased security funding to respond to the very real threat environment faced by judges and litigants alike.[14]

Courts rightly maintain various restrictions on who can express themselves in a judicial context through procedural rules, admissions, and inherent judicial powers. The goal of those rules is not political but procedural. They exist to maintain reasonable dockets so as to promote the effectiveness of the adversary process in driving judicial decision-making. The current provisions of Rule 29, for example, prevent litigants from abusing the *amicus* process in order to evade page limits. It's about maintaining a level playing field *for the litigants*. Not so this proposal, which seeks to chill free speech and cast aspersions on federal judges.

We have little doubt that the judges of the Judicial Conference and the Justices of the Supreme Court will immediately see the violence this proposal does to the First Amendment should it reach them. But it's also clear that at each of these subsequent stages in the rulemaking process, judges will be under tremendous pressure to approve the proposed rule lest they seem "political." We would advise them that the inevitable braying of liberal political and academic voices will have it precisely backwards: following the Constitution is not political; rubber-stamping a partisan agenda item is.

If this rule is somehow enacted, we encourage affected parties to challenge it immediately in court. 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. And you won't be able to say that you weren't warned.

II. The Elected Officials Promoting These Reforms Seek to Intimidate and Undermine the Judiciary.

The elected officials, who spurred this rulemaking and have sponsored similar legislation in Congress, don't care about maintaining the integrity of the judiciary. The Advisory Committee does not shrink from the fact that it sprang into action upon seeing the unfriendly AMICUS Act.[15]

The fact is that the political actors pushing *amicus* disclosure are doing so to intimidate and undermine the judiciary, which is a perceived impediment to their preferred policies. This rule would give credence to their outlandish claims and be weaponized by elected officials as they seek to bully judicial officers and undermine their authority. Indeed, Senate Democrats have gone to great lengths to bully and harass members of the judiciary as well as private individuals engaged in political advocacy.[16] The Democratic theory is that the federal judiciary—and the Supreme

---

[14] *See Congress Passes the Daniel Anderl Judicial Security and Privacy Act*, Judiciary News, United States Courts (December 16, 2022), https://www.uscourts.gov/news/2022/12/16/congress-passes-daniel-anderl-judicial-security-and-privacy-act (noting that "the bill was strongly endorsed by the Judicial Conference of the United States"); *see also* Dan Mangan, *1,000 federal judges seek to remove personal info from internet as threats skyrocket*, CNBC (Mar. 17, 2023), https://www.cnbc.com/2023/03/17/federal-judges-remove-personal-information-from-internet.html.

[15] Proposed Amendments at *11.

[16] *See, e.g.,* Press Release, Senators Unveil New Captured Courts Report Exposing the Judicial Crisis Network's Central Role in a Scheme to Capture and Control the Supreme Court, Senator Sheldon Whitehouse, https://www.whitehouse.senate.gov/news/release/senators-unveil-new-captured-courts-report-exposing-the-judicial-

Court in particular—has been the target of a longstanding "scheme" by private interests to take it over for their personal benefit. In short, the Supreme Court doesn't issue originalist rulings because it's majority originalist; it does so because "right-wing special interests" have "captured" it. Of course, what good is having six Justices in your pocket if you can't make sure they know how you want them to rule? That's where the *amicus* briefs come in: these "special interests" organize "flotillas" of briefs to signal to the corrupt Justices how they should rule.[17] Like chalk marks on a mailbox or a misplaced rock, these *amicus* briefs supposedly inform the right-wing sleeper agents at the Supreme Court what to do. Or so these theorists would have us believe.

The reality is that this is not how litigation works. You know it's not how litigation works.[18] Judges read the briefs, they listen to arguments, they do their research, and they rule by applying the law to the facts using their best judgment. Different judges can reach different conclusions based on the same law and facts because people aren't widgets and the law isn't a computer algorithm. Judicial philosophy informs judgment across multiple levels and it affects results. Sometimes we like these results and sometimes we don't. Win or lose, we know that judges are operating in good faith by their best lights, not at the secret instruction of the petrochemical industry, on one hand, or George Soros, on the other. By even countenancing this preposterous proposal, you are giving credence to claims you know to be false about how judges do their jobs.

The goal here is not to help the courts but to undermine the courts. Don't take our word for it: Democrats are up front about what they're doing. In a recent anti-Second Amendment *amicus* brief prominent Senate Democrats said: "The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.'"[19] The current Senate Majority Leader went to the steps of the Supreme Court and ominously intoned, "I want to tell you, Gorsuch; I want to tell you, Kavanaugh: You have released the whirlwind and you will pay the price. You won't know what hit you if you go forward with these awful decisions."[20] In a highly unusual written response, Chief Justice Roberts said, "Justices know that criticism comes with the territory, but threatening statements of this sort

---

crisis-networks-central-role-in-a-scheme-to-capture-and-control-the-supreme-court/. *See also* Sheldon Whitehouse & Jennifer Mueller, The Scheme (2022) *and* The Scheme 33: The Undoing of the Modern Regulatory State, Senator Sheldon Whitehouse, https://www.whitehouse.senate.gov/news/speeches/the-scheme-33-the-undoing-of-the-modern-regulatory-state/.

[17] Scheme Speech 9: Amicus Flotillas, Senator Sheldon Whitehouse, https://www.whitehouse.senate.gov/news/speeches/scheme-speech-9-amicus-flotillas/.

[18] The Advisory Committee says otherwise: "But the identity of an amicus does matter, at least in some cases, to some judges." Proposed Amendments at *20. If Judge Bybee and his colleagues believe this, they should name names.

[19] Br. of Senator Sheldon Whitehouse et al., *N.Y. State Rifle & Pistol Association., Inc., v. New York*, No. 18-280 (2020), https://www.whitehouse.senate.gov/wp-content/uploads/imo/media/doc/New%20York%20Rifle%20&%20Pistol%20Association%20v.%20New%20York%20(Whitehouse%20amicus%20FINAL).pdf.

[20] Editorial, *Sen. Chuck Schumer's threatening rhetoric to Supreme Court justices crosses a line*, USA Today (Mar. 5, 2020), https://www.usatoday.com/story/opinion/todaysdebate/2020/03/05/chuck-schumer-threatening-rhetoric-gorsuch-kavanaugh-crosses-line-editorials-debates/4964578002/.

from the highest levels of government are not only inappropriate, they are dangerous."[21] And what happened after Justice Kavanaugh indeed went forward with a decision that liberals didn't like? A man who said he was upset about a leaked Supreme Court decision allegedly traveled to Justice Kavanaugh's Maryland home intending to assassinate Justice Kavanaugh.[22] The man was arrested near Justice Kavanaugh's residence with a pistol, ammunition, a crow bar, a hammer, zip ties, and duct tape.[23]

These efforts to attack and undermine the courts are not restricted to elected Democrats. There's a whole media cottage industry dedicated to attacking Judge Matt Kacsmaryk in the Northern District of Texas for ruling in ways that liberals don't like.[24] Fifth Circuit Judge Jim Ho has been getting his turn in the barrel, too.[25] There was even a concerted effort to paint as corrupt Judges Don Willett of the Fifth Circuit[26] and Cam Barker of the Eastern District of Texas[27] (are you noticing a pattern?) due to non-material, attenuated holdings sleuthed from their financial

---

[21] Pete Williams, *In rare rebuke, Chief Justice Roberts slams Schumer for 'threatening' comments*, NBC News (March 4, 2020), https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-schumer-threatening-comments-n1150036.

[22] Mara Cramer, *Armed Man Traveled to Justice Kavanaugh's Home to Kill Him, Officials Say*, N.Y. Times, (June 8, 2022), https://www.nytimes.com/2022/06/08/us/brett-kavanaugh-threat-arrest.html.

[23] *California Man Facing Federal Charges in Maryland for Attempted Murder of a United States Judge*, United States Attorney's Office, District of Maryland, (June 8, 2022) https://www.justice.gov/usao-md/pr/california-man-facing-federal-charges-maryland-attempted-murder-united-states-judge.

[24] *See, e.g.*, Ruth Marcus, *Thanks to the Supreme Court, a federal judge in Texas is making foreign policy decisions*, Wash. Post (Aug. 25, 2021), https://www.washingtonpost.com/opinions/2021/08/25/supreme-court-matthew-kacsmaryk-remain-in-mexico-policy/; Melissa Quinn, *Meet the federal judge set to rule in a case that could disrupt access to the abortion pill*, CBS News (Mar. 2, 2023), https://www.cbsnews.com/news/matthew-kacsmaryk-medication-abortion-mifepristone-abortion-pill-judge-texas/; Nate Raymond, *Texas judge in abortion pill lawsuit often rules for conservatives*, Reuters (Apr. 10, 2023), https://www.reuters.com/world/us/texas-judge-abortion-pill-lawsuit-often-rules-conservatives-2023-04-08/; Charlie Savage & Pam Belluck, *Judge's Ruling Against Abortion Pill Is Filled With Activists' Language*, N.Y. Times (Apr. 11, 2023), https://www.nytimes.com/2023/04/11/us/abortion-pill-ruling.html; *Hear what judge who suspended abortion pill said in undisclosed radio interviews*, CNN, https://www.cnn.com/videos/politics/2023/04/20/federal-judge-kacsmaryk-fails-to-disclose-interviews-nomination-kfile-lead-vpx.cnn; Casey Tolan & Isabelle Chapman, *Details about multimillion-dollar stock holding concealed in abortion pill judge's financial disclosures*, CNN (Apr. 21, 2023), https://www.cnn.com/2023/04/21/politics/judge-kacsmaryk-financial-holdings-abortion-pill/index.html; Matt Ford, *A Right-Wing Judge Aims to Undo Free Speech, One Drag Show at a Time*, The New Republic (Sept. 26, 2023), https://newrepublic.com/article/175748/right-wing-judge-aims-undo-free-speech-one-drag-show-time.

[25] Ian Millhiser, *The edgelord of the federal judiciary*, Vox (Aug. 26, 2023), https://www.vox.com/scotus/23841718/edgelord-federal-judiciary-james-ho-fifth-circuit-abortion-guns; James Larock, *The Worst Trump Judge In America Is James Ho*, Balls and Strikes (June 15, 2023), https://ballsandstrikes.org/legal-culture/the-worst-trump-judge-in-america-is-james-ho/; Ansev Demirhan & Evan Vorpahl, *Judge James Ho's Connections to the Anti-Abortion Movement*, Ms. (Oct. 5, 2023), https://msmagazine.com/2023/10/05/judge-james-ho-abortion/; Amanda Yen, *Wife of Judge on Mifepristone Case Was Paid by Anti-Abortion Group*, The Daily Beast (Mar. 25, 2024), https://www.thedailybeast.com/wife-of-james-ho-judge-on-mifepristone-case-was-paid-by-anti-abortion-group; Joe Patrice, *Judge James Jo Delivers Tour De Force In Disingenuous Bulls*t*, Above the Law (Apr. 18, 2024), https://abovethelaw.com/2024/04/judge-ho-conservative-forum-shopping/.

[26] *Watchdog: Conflicted 5th Circuit Judge Must Recuse in U.S. Chamber Lawsuit Against CFPB Credit Card Rule*, Accountable.Us (Apr. 9, 2024), https://accountable.us/watchdog-conflicted-5th-circuit-judge-must-recuse-in-u-s-chamber-lawsuit-against-cfpb-credit-card-rule/.

[27] David Dayen, *Judge Hearing Noncompete Cases Holds Stock in Companies That Use Noncompetes* (May 9, 2024), https://prospect.org/justice/2024-05-09-judge-barker-noncompete-cases-stocks-conflict/

disclosures. Unlike when the media decried it as a threat to democracy when the previous president attacked judges he perceived as opponents, the media now happily pass the ammunition because it's "conservative" judges being attacked.

This proposal will only provide more grist for the mill of attacking judges who stand up to powerful cultural forces.

III. The Other Goal and Certain Result of These Reforms Will Be the Harassment of Private Parties in a Concerted Effort to Chill Speech and Association.

Recent years have seen an explosion of harassment against people whose political activities are disclosed.

Prominent Democrats attack their opponents' donors, like when the late Senator Harry Reid attacked the Koch Brothers[28] or when President Obama said one of Mitt Romney's donors was "betting against America" and had a "less-than-reputable" record.[29] A center-right legislative reform organization's donors were famously harassed into stopping their donations.[30] Chick-Fil-A was even forced to stop donating to the Salvation Army and the Fellowship of Christian Athletes following a proverbial "fifteen minutes of hate."[31] And the harassment endured by supporters of California's Proposition 8 is too extensive to list beyond the high-profile dismissals[32] and "cancellations"[33] it spawned.

Even liberals understand the danger proposed by disclosure. When one anti-court activist group accidentally sent its donor list to a center-right media outlet, its president complained, "I have only two foundations that give me money, and if their names become public, they're never going to talk to me again...."[34] Indeed.

One would have to be naïve to think that once these donors are "outed" for funding *amicus* briefs in cases protecting minority constitutional rights, the machinery of punishment from the dominant culture will not spring into action against them. The contemporary push for disclosure shares the same illiberal impulses that it had in 1950s Alabama.

---

[28] Dana Milbank, *Harry Reid has a Koch problem*, Washington Post (Apr. 30, 2014), https://www.washingtonpost.com/opinions/dana-milbank-harry-reid-has-a-koch-problem/2014/04/30/49c5e406-d0af-11e3-9e25-188ebe1fa93bstory.html.

[29] Kimberly A. Strassel, *The President Has a List*, Wall St. J. (Apr. 26, 2012), https://www.wsj.com/articles/SB10001424052702304723304577368280604524916.

[30] Editorial, *Shutting Down ALEC*, Wall St. J. (Apr. 18, 2012), https://www.wsj.com/articles/SB10001424052702304432704577347763603932288.

[31] Justin Kirkland, *Chick-fil-A Will No Longer Act as a Shield for Hateful People*, Esquire (Nov. 19, 2019), https://www.esquire.com/food-drink/food/a29836910/chick-fil-a-donation-lgbtq-announcement-backlash/.

[32] Jon Swaine, *Mozilla CEO Brendan Eich resigns in wake of backlash to Prop 8*, The Guardian (Apr. 3, 2014), https://www.theguardian.com/technology/2014/apr/03/mozilla-ceo-brendan-eich-resigns-prop-8.

[33] Hunter Baker, *The Vilification of Orson Scott Card*, hunterbaker.wordpress.com (Nov. 2, 2013), https://hunterbaker.wordpress.com/2013/11/02/the-villification-of-orson-scott-card/.

[34] Gabe Kaminsky, *Supreme Court 'transparency' charity director panics over IRS donor leak: 'I just f***ed up'*, Washington Examiner (May 17, 2023), https://www.washingtonexaminer.com/news/2201699/supreme-court-transparency-charity-director-panics-over-irs-donor-leak-i-just-fed-up/.

****

It's unfortunate that the Judicial Conference's committees have decided to spend five years dancing a jig to a nakedly partisan tune. While we understand the impulse in a non-political body like the Judicial Conference to humor bad-faith political actors by indulging their complaints, doing so only incentivizes further partisan harassment. Worse still, when you go beyond indulgence to acquiescence you open up your committee to consistent, open lobbying and nuisance. If an elected official has nowhere near the votes to pass his judicial-reform legislation—but he can get it from the judiciary if he complains—his colleagues and allies would be remiss not to start complaining, too. When you reward a child's whining with treats, you can expect a lot more whining. It's human nature and basic politics.

Perhaps the Judicial Conference will need to adopt rules requiring disclosure requirements for the inevitable flotillas of public-and-private-sector harassers, cajolers, and lobbyists who will be seeking future "reforms" from its committees now that they know they can get their way.

Scrap this ill-begotten, quasi-legislative proposal and focus on issues that actually matter to the courts of appeals.

Sincerely,

Mitch McConnell, U.S. Senator

John Cornyn, U.S. Senator

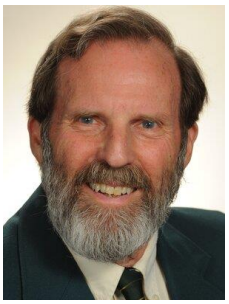
John Thune, U.S. Senator

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

More Guidance Needed On Appellate Amicus Recusals

By **Alan Morrison** (September 18, 2024, 4:05 PM EDT)


Alan Morrison

On Aug. 15, the Judicial Conference's Committee on Rules and Practice published proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure, which deals with the briefs of an amicus curiae. Written comments are due by Feb. 17, 2025.

These extensive amendments have three objectives: to help appellate courts evaluate the objectivity of an amicus; to reduce the number of amicus briefs that do not provide useful information to the court; and to increase the ability of the court to deny amicus participation when that might require one or more judges to recuse in a case.

To accomplish this latter goal, one of the proposed amendments eliminates the right for an amicus to file a brief based on the consent of all parties. This article urges the committee to obtain guidance on the appropriate standards for recusal when the disqualification may be triggered by the participation of an amicus or its counsel.

The concern that amicus filings might cause a disqualification was first reflected in Rule 29 in a 2018 amendment to Subdivision (b)(2), which now authorizes a court of appeals to use local rules or orders to "prohibit the filing or [to] strike an amicus brief that would result in a judge's disqualification."

The discussion at the committee leading to that amendment focused on the effect of a recusal when a case was to be reheard en banc. The concern was that either the amicus itself or a lawyer for an amicus would be brought into a case for the express purpose of taking away a judge who the amicus or the party it was supporting thought would be adverse to that side.

However, the rule, as finalized, was not limited to en banc cases.

The recently proposed amendment doubles down on the disqualification concern by eliminating the right to file an amicus brief based on the consent of all parties, although the U.S. and the states continue to be allowed to file amicus briefs as of right. As the proposed committee note states, "[m]ost parties follow a norm of granting consent to anyone who asks. As a result, the consent requirement fails to serve as a useful filter," which most likely refers to filters to forestall recusals.

Subdivision (b)(2) of the proposed amendment also appears to enable a panel in a particular case to prohibit the filing or to strike an amicus brief that has already been filed, whereas the prior provision was available only to "a court of appeals" by local rule or court order.

Before discussing whether the requirement of a motion to file an amicus brief is a sound one, there is an underlying question that the proponents of the recusal concern have not answered: What is the standard applicable to a recusal by a court of appeals judge based on the participation by an amicus and/or its attorney?

Congress has enacted a statute, Title 28 of the U.S. Code, Section 455, that deals specifically with disqualifications by federal judges, including Supreme Court justices. Subsection (a) is the general provision requiring disqualification "in any proceeding in which [the judge's] impartiality might reasonably be questioned." It is certainly broad enough to include recusals triggered by an amicus brief.

Subsection (b) sets forth five specific sets of grounds for disqualification, several of which apply because of the judge's relation to "a party," which would not include an amicus. However, some of them might apply if an amicus or its attorney had a prohibited relation to the judge. For example, the filing of an amicus brief might cause the judge to step aside under (5), if the spouse of the judge were counsel of record for the amicus, or under (4) if the judge had a financial interest in an amicus company, and the potential effect of the case on that other industry was not apparent until the amicus brief was filed.

On the other hand, it is far from obvious that the disqualification rules should be identical if, for example, the judge used to work for a large firm and that firm was counsel for a nonprofit amicus rather than a business suing a regulator. Section 455 does not mention amici, and I am not aware of any cases in which there was a contested motion under that section based on the relation between the judge and an amicus.

Significantly, as of Jan. 1, 2023, the U.S. Supreme Court no longer requires a motion or consent of the parties for anyone to file an amicus brief. If filings of amicus briefs in that court are unlimited, where the stakes are much higher, and many more amicus briefs are filed, it at least suggests that the justices are not concerned that amicus briefs may trigger Section 455.

Of course, when a justice is recused, there is no substitute available to take their place, but that is also true of en banc hearings — other than in the U.S. Court of Appeals for the Ninth Circuit where the en bancs are composed of 11 out of the authorized complement of 29 judges. The rules committee is right that there is a cost, if an appellate judge is unnecessarily recused because another judge must sit instead, and the regular rotation is disturbed.

But which recusals at the circuit court level are justified, meaning what are the standards that a conscientious judge should apply when an amicus filing raises a disqualification issue? Unfortunately, Section 455 does not provide an answer, and there is nothing else out there to help judges decide whether to step aside.

Here's a suggestion: The Appellate Rules Committee should ask the Committee on Codes of Judicial Conduct of the Judicial Conference of the United States to issue general guidance for circuit judges on whether they should recuse in a range of typical amicus cases, perhaps using Section 455(b) as a starting point. Not only would that help judges decide their proper course, but it would help lawyers avoid having an amicus brief rejected because it might cause a judge to be disqualified.

This last benefit is important for another reason: The decision on whether to seek to file an amicus brief, whether or not a motion is required, must be made before the brief is written and often before counsel is selected. But in the federal courts of appeals, the names of the judges who will hear the case are

almost never public before that decision must be made.

Because the most common ground for a judge's recusal is their financial holdings, which are public information for federal judges and their spouses, if the standards for amicus recusal are known, lawyers can make educated guesses if they want to avoid disqualifying particular judges if they happen to be on the panel.

I have serious doubts as to the need to police the filing of amicus briefs for possible recusals at all. But if there is a problem, there at least should be some guidance from the Judicial Conference on when appeals court judges must not sit in a case because of the presence of an amicus or its counsel.

Alan B. Morrison is associate dean for public interest and public service law at George Washington University Law School.

Comments on Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Evidence

Amendments to Fed. R. Appellate Procedure 29 Regarding Amicus Curiae Briefs

I am writing to express my strong support for the proposed enhanced disclosure requirements for amicus curiae briefs in Federal Rule of Appellate Procedure 29.

Support for Enhanced Disclosure Requirements

I strongly support the proposed changes to enhance disclosure requirements for amicus curiae briefs under Federal Rule of Appellate Procedure 29. Transparency is fundamental to maintaining trust in the judicial process. Sen. Whitehouse and Rep. Johnson (in their comments dated September 12, 2024) have articulated the importance of revealing connections among amici and major donors, arguing that this transparency will prevent undue influence and enhance the integrity of the judicial system. They provide historical context, referencing the efforts to influence courts through coordinated campaigns, and emphasize the necessity of shedding light on these practices.

Disclosure is vital because it ensures that all parties, the courts, and the public are aware of the true interests behind amicus briefs. Secretly funded amicus briefs can undermine the integrity of the judicial process by allowing hidden influences to shape legal outcomes without accountability. Historically, there have been instances where undisclosed funding and coordination among amici have led to biased representations and decisions that favor powerful interests over justice.

Assertions that increased disclosure will lead to harassment are largely a strawman argument. The idea that transparency will result in widespread harassment is disingenuous and distracts from the true purpose of disclosure, which is to hinder corruption, puppeteering, and undue influence by big money in our legal system. Our country has long recognized the value of financial disclosure across various sectors. Campaign contributions and expenditures are disclosed to prevent election corruption; public servants disclose their financial interests to ensure ethical conduct; judges disclose their financial holdings to avoid

conflicts of interest. These practices safeguard our democracy and legal system by ensuring that decisions are made based on merit, not hidden agendas.

In line with these established norms, the proposed disclosure requirements for amicus briefs will enhance transparency and accountability. Requiring amici to disclose their financial backers ensures that the court and the public can evaluate the impartiality of the arguments presented. Additionally, requiring amici to disclose connections among themselves and major donors will further strengthen these safeguards, preventing coordinated efforts to unduly influence court decisions.

While Sen. McConnell, Cornyn, and Thune have raised strong objections regarding potential First Amendment infringements and harassment in their comments dated September 10, 2024, as did the Washington Legal Foundation's August 19, 2024 comments, these concerns are exaggerated and fail to recognize the well-documented extensive and covert activities of wealthy interests that have striven to shape legal outcomes from behind the scenes. Of course, it's important to acknowledge the legitimate First Amendment interests at stake. However, the proposed disclosure requirements are carefully crafted to balance these interests with the need for transparency, and without imposing undue burdens or risks on amici.

Connections Among Amici:

I support the disclosure of connections among amici, particularly focusing on major donors funding multiple amici. I also support the disclosure of connections between amici and nonparties. This will provide a clearer picture of the financial interests behind coordinated amicus campaigns. The $100 threshold helps reduce the burden on smaller organizations, or organizations receiving smaller donations.

Relationships With Major Donors:

I support the required disclosure of major donors who contribute a significant portion of an amicus's funding is essential for transparency. This aligns with existing practices in campaign finance and public servant disclosures.

Preventing Identity Laundering:

Preventing intermediary groups from hiding the true donors is crucial for maintaining transparency. This recommendation aims to ensure that the financial interests behind

amicus briefs are fully transparent. While this could add complexity to the reporting process, clear guidelines and support for amici in conducting due diligence can help mitigate the burden.

Support for Retention of the Consent Requirement for Filing Amicus Briefs

I also support the decision to retain the consent requirement for filing amicus briefs. The current requirement for obtaining consent ensures that only those briefs with substantial contributions are filed, thereby maintaining the efficiency and effectiveness of the judicial process. This mechanism allows parties to the case to filter out briefs that do not add meaningful insights or perspectives, helping to prevent the submission of frivolous or redundant briefs. This quality control mechanism is crucial for preserving the integrity of the amicus process.

From a policy perspective, maintaining the consent requirement also supports the principle of party autonomy. Parties should have the right to "own" their own cases. Allowing parties to the case to have a say in which amicus briefs are accepted helps ensure that the amicus process is aligned with the interests and needs of the actual litigants. This is particularly important in complex cases where the parties have a deep understanding of the issues at hand and can better assess which submissions would be most valuable.

Conclusion

In conclusion, the proposed changes to the amicus curiae rules represent a significant step towards enhancing transparency, efficiency, and fairness in the judicial process. Amicus briefs play a vital role in our appellate system, and these proposed changes will help ensure that they continue to serve their purpose effectively.

Changes to Appellate Form 4

I support the proposed changes to Appellate Form 4 related to in forma pauperis (IFP) applications. The revisions to this form are a positive step towards simplifying and streamlining the process for waiving fees and costs in appellate cases.

The updated form reduces the burden on applicants by focusing on the most relevant financial information, making it easier for individuals with limited financial means to access the appellate system. By ensuring that the form is clear and straightforward, the proposed changes will help applicants complete their submissions accurately and efficiently.

I appreciate the effort to make this important aspect of the legal process more accessible and user-friendly. The changes to Appellate Form 4 are a significant improvement and will contribute to ensuring fairness and equity in our judicial system.

Amendment to Fed. R. Evidence 801

The proposed change involves striking out the words "and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition," thereby broadening the admissibility of prior inconsistent statements made by a testifying witness.

The amendment has the potential to significantly impact the reliability and fairness of trial outcomes by allowing a wider array of prior inconsistent statements to be considered. While the Committee argues that the dangers of hearsay are mitigated because the declarant is available for cross-examination, I believe that an additional safeguard is warranted to prevent potential misuse.

It is essential that prior inconsistent statements be considered in their entirety and in the context in which they were made. This approach would help prevent statements from being taken out of context and used to unfairly prejudice the witness. It may be beneficial for the Committee to further consider the risks associated with taking statements out of context, as this could potentially undermine the fairness of the process. As a result, I recommend the following addition to the proposed rule:

"(1) The declarant testifies and is subject to cross-examination about a prior statement, and the statement: (A) is inconsistent with the declarant's testimony; is considered in its entirety, and is considered in the context in which it was made; (…)"

The proposed amendment to Evidence Rule 801(d)(1)(A) aims to streamline the use of prior inconsistent statements and eliminate confusing jury instructions. However, to ensure the amendment enhances the fairness and reliability of the judicial process, it is crucial to incorporate safeguards that require considering prior inconsistent statements in their entirety and context. Doing so will help prevent potential misuse and protect the rights of witnesses.

===

Thank you for considering my comments on the proposed rule changes.

Michael Ravnitzky
Silver Spring, Maryland

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

December 2, 2024

Via Federal eRulemaking Portal at: https://www.regulations.gov

Judicial Conference of the United States
Committee on Rules of Practice and Procedure
Attn: Honorable John D. Bates, Chair
Advisory Committee on Appellate Rules
Attn: Honorable Jay S. Bybee, Chair
Washington, DC 20544

Re: Proposed Amendments to Federal Rules and Forms:
SIFMA Comment on Proposed Amendments to
FRAP 29 (Amicus Curiae Briefs)

Dear Judges Bates and Bybee:

The Securities Industry and Financial Markets Association (***"SIFMA"***)[1] appreciates the opportunity to comment on the Judicial Conference Committee on Rules of Practice and Procedure's proposed amendments to Federal Rule of Appellate Procedure 29 (the ***"Proposal"***).[2]

SIFMA and its predecessor organizations have been filing amicus briefs in various state and federal court cases for the past fifty years. Today SIFMA files approximately twenty amicus briefs per year. We file amicus briefs in court cases that raise significant issues that impact our industry and markets. Our briefs educate courts about established industry and market practices and highlight important policy concerns that transcend the particular case.

We have two primary concerns with the Proposal. The first is the elimination of the option to file an amicus brief on consent of the parties. Under current Rule 29, an amicus may file a brief by leave of court or on consent of all parties. The Proposal would eliminate the option to file an amicus brief on consent of all parties. SIFMA strongly opposes eliminating the

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed-income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit http://www.sifma.org.

[2] *See* https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment.

option to file on consent.

Our second concern is the new purpose requirement. It requires that the brief "bring[] to the court's attention relevant matters not already mentioned by the parties" in order to "help the court." Amicus briefs that do not serve this purpose or that are "redundant with another amicus brief" are "disfavored." Amicus filers must address the purpose requirement in both the motion and the body of the brief. The motion must explain why the brief is "helpful." SIFMA opposes the new purpose requirement, as drafted.

SIFMA offers the following policy and practical arguments in support of our opposition to these two discrete elements of the Proposal:

RULE 29 SHOULD CONTINUE TO ALLOW CONSENT OF THE PARTIES TO FILE AN AMICUS BRIEF.

1. The premise of the Proposal – that there is a current unmet need to filter-out the filing of "unhelpful" amicus briefs – is flawed.

The Proposal identifies as the problem "[t]he unconstrained filing of amicus briefs in the courts of appeals."[3] Thus, the Proposal seeks to impose "[l]imitations on filing amicus briefs"[4] and a "filter on amicus briefs."[5] Such a filter, the Proposal argues, would prevent "the filing of *unhelpful* briefs."[6] (Emphasis added). The Proposal asserts that because "the consent requirement fails to serve as a useful filter,"[7] it should be eliminated.

The Proposal, however, offers no evidence that "unhelpful" amicus briefs are now being, or have historically been, filed in significant numbers in the courts of appeal.[8] Even if one accepts the premise that some amicus brief filings may be deemed "unhelpful," the Proposal offers no assessment or estimation of the scope or magnitude of "unhelpful" briefs versus helpful

---

[3] *Id.* at p. 26.

[4] Preliminary Draft of Proposed Amendments to Federal Rules (Aug. 2024), https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2024.pdf (***"Preliminary Draft"***), at p. 20.

[5] *Id.* at p. 25.

[6] *Id.* at p. 40.

[7] *Id.*

[8] Notably, at the Supreme Court level, amicus briefs are cited in roughly half of cases, suggesting a general level of helpfulness to the Court. National Law Journal (Nov. 2020), *Amicus Curiae at the Supreme Court*, https://www.arnoldporter.com/-/media/files/perspectives/publications/2020/11/amicuscuriae-at-the-supreme-court.pdf. An amicus brief can "perform a valuable subsidiary role by introducing subtle variations of the basic argument, or emotive and even questionable arguments that might result in a successful verdict, but are too risky to be embraced by the principal litigant." Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 711 (1963). Amicus briefs can produce "additional social, scientific, legal, or political information" to assist the judges. Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 Law & Soc'y Rev. 807, 808 (2004). There is a common misconception that amicus briefs "are not very important; that they are at best only icing on the cake. In reality, they are often the cake itself." Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U. L. Rev. 603 (1984).

briefs. Finally, the Proposal does not articulate any burden imposed or harm caused by "unhelpful" briefs, much less the scope or magnitude of such alleged burden or harm.

Given that courts of appeal are free to read, use and/or address – or *not* – amicus briefs at their discretion, it is hard to imagine any appreciable burden or harm to the courts of appeal from the filing of presumably some small number of amicus briefs that are later deemed to be "unhelpful." The Proposal thus fails to make the case that the filing of "unhelpful" amicus briefs is a legitimate problem in need of a solution, or that the solution should include eliminating the consent requirement.

2. The benefit of filtering-out "unhelpful" amicus briefs is far outweighed by the burdens imposed by pre-vetting <u>all</u> amicus briefs through motions for leave.

Admittedly, given the choice, there would probably be some marginal benefit to having all amicus briefs filed be "helpful" versus having some small number be "unhelpful." But if the cost of receiving that marginal benefit means that every last amicus brief must be pre-vetted through a motion for leave, then the trade is not worth it. The courts of appeal would be burdened by having to review many hundreds, perhaps thousands, of additional motions for leave annually. Prospective amicus filers, by the Proposal's own admission,[9] would also be burdened by having to make a motion for leave in every case.[10]

3. The standard for accepting amicus briefs should not be more stringent in the courts of appeal than in the Supreme Court.

The Proposal acknowledges that the Supreme Court recently changed its own rules to freely allow the filing of amicus briefs.[11] The federal appellate courts' rules should be aligned with the Supreme Court's rules. Federal appellate courts should have the benefit of all available legal, policy, and practical arguments, and amicus perspective, to best inform their decision-making. Moreover, neither the Supreme Court Justices, nor amicus participants, should have to wait until a case elevates to the Supreme Court to hear or voice, respectively, an amicus participant's perspective because a lower court determined that such perspective would not be "helpful."

4. The differences in amicus practice in the Supreme Court versus the courts of appeals do not justify a more stringent rule in the courts of appeal.

The Proposal distinguishes Supreme Court amicus practice from that in the courts of appeals on two grounds: (i) Supreme Court amicus briefs must be in the form of printed booklets; and (ii) under the Supreme Court's Code of Conduct, an amicus brief filing does *not*

[9] Preliminary Draft at p. 26.

[10] In addition, in cases that elevate to the Supreme Court, the Court would be deprived of having certain amicus briefs in the appellate record (because a court of appeals deemed them to be "unhelpful"), which amicus briefs would be otherwise freely allowed in the Supreme Court.

[11] Preliminary Draft at p. 25 (citing Supreme Court Rule 37.2 (effective Jan. 1, 2023)).

require a Justice's disqualification. The Proposal suggests that these two grounds justify a more stringent rule to filter-out amicus filings in the courts of appeal.

On ground one, the Proposal states that the printed booklet requirement "operates as a modest filter on [Supreme Court] amicus briefs."[12] We do not accept this statement as true, nor do we believe that there is any basis for making it. SIFMA has filed hundreds of amicus briefs over several decades, many in the Supreme Court, and we are not aware of any individual or entity, ever, who was deterred from filing a Supreme Court amicus brief because of the printer requirement. If an individual or entity is inclined to file an amicus brief in the Supreme Court, the printer requirement would likely never be the decisive factor against doing so. The Supreme Court's printed booklet requirement was not intended to, and does not in fact, operate as a filter that limits the filing of Supreme Court amicus briefs.

On ground two, the Proposal suggests that "unconstrained filing of amicus briefs in the courts of appeals" would produce recusal issues that do not exist in the Supreme Court.[13] But under current Rule 29, the court is already free to strike an amicus brief that would result in a judge's disqualification. Thus, the rules already provide a mechanism for addressing recusal issues. There is no indication that this mechanism has not worked properly over the many years, or that it now requires the intervention of a judge prior to the filing of an amicus brief.

Thus, neither booklet printing requirements nor recusal issues justify a more stringent amicus filing rule in the courts of appeal than in the Supreme Court.

THE PROPOSAL'S NEW PURPOSE TEST IS UNCLEAR ON WHAT IS "HELPFUL" AND WHAT IS "REDUNDANT."

1. The scope of what is deemed "helpful" should be clarified, broadened and permissive.

The Proposal defines "helpful" as "[a]n amicus curiae brief that brings to the court's attention relevant matter not already mentioned by the parties."[14] The term "relevant matter not already mentioned" could be read and applied quite narrowly so as to significantly reduce the number of amicus briefs that are deemed "helpful" and thus allowed to be filed. We recommend that the Proposal clarify that the term should not be read or applied in that manner, but instead with a presumption of permissiveness.

The Proposal asserts that "[l]imitations on filing amicus briefs … do not prevent anyone from speaking out … about how a court should decide a case."[15] This is so, the argument goes, because such persons are free to voice their views "in books, articles, podcasts, blogs,

[12] *Id.*

[13] *Id.* at p. 26.

[14] *Id.* at p. 28.

[15] *Id.* at p. 20.

advertisements, social media, etc."[16] This argument completely misses the point. The court is *not* reading the articles, blogs, social media, etc., but it will likely read the amicus brief if it is allowed to be filed. Otherwise, the Proposal would in fact operate to prevent voices from being heard in a meaningful way (i.e., before the judges deciding the case).

Accordingly, we recommend that the scope of what is deemed "helpful" should be broad and permissive, erring in favor of finding some modicum of helpfulness and thus permitting the filing of the amicus brief. For example, when an association like SIFMA which represents an entire industry files an amicus brief, that brief should be deemed *per se* helpful. It is *per se* helpful to hear and understand the consolidated views of an entire industry on the particular issues in a case. The Proposal itself acknowledges that "the identity of an amicus does matter, at least in some cases, to some judges."[17] With respect to industry trade associations like SIFMA, we recommend that identity be deemed dispositive on the determination of the helpfulness of the amicus brief to the court.

2. The scope of what constitutes "redundant" should be clarified and sharply narrowed.

The Proposal also states that an amicus brief that is "redundant with another amicus brief" is "disfavored."[18] The term "redundant" is unreasonably vague and needs to be clarified. For example, what level of redundancy is disfavored? Is a brief that is 1% redundant and 99% non-redundant with another brief acceptable? What about a brief that is 99% redundant and 1% non-redundant? Where do you draw the line?

The Proposal's redundancy standard also seems impractical from a compliance perspective. Would an industry trade association like SIFMA need to contact all of the other financial services trades, find out which ones are filing an amicus brief in the same case, identify any redundant arguments, and then negotiate away the redundancy? Which trade group would have the final say on who takes what arguments? How could trades even have such conversations without compromising their common interest privilege with their members?

Moreover, even so-called "redundant" amicus briefs may be helpful to the court. What about a scenario in which several different industries, or distinct lines of business within the same or similar industries, file amicus briefs whose substance and content is generally redundant? Is not there still value in the court hearing and understanding that the views of these different constituencies are largely consistent? It seems that it would be inherently helpful to the court to know that these multiple different amici decided the issue was important enough to spend the time, effort and expense to submit a brief, and it would helpfully inform the court about the weight of support for or against a particular legal and/or policy position. Similar to our earlier point, the discretely different identities of these amicus filers should be deemed dispositive on the determination of the non-redundancy of their amicus briefs.

---

[16] *Id.*

[17] *Id.*

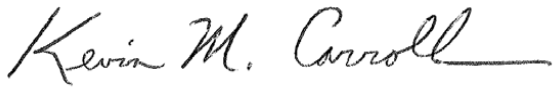
[18] *Id.* at p. 28.

Finally, what about briefs that are deemed to be "redundant"? Which brief(s) are the redundant ones? Is the standard essentially a race to the courthouse where the first to file is accepted, but subsequent briefs deemed "redundant" are rejected? That does not seem fair or appropriate.

* * *

We are happy to further engage with you on these important issues. If you have questions or would like to further discuss, please contact the undersigned at 202-962-7300.

Sincerely,



Kevin M. Carroll
Deputy General Counsel,
Office of General Counsel
SIFMA

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

---

[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.

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

NFIB

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,

---

[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.

---

[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

Fishman Haygood LLP
201 St. Charles Avenue, 46th Floor
New Orleans, LA 70170
fishmanhaygood.com

Stephen J. Herman
Direct: 504.556.5541
Cell: 504.232.5154
E-Mail: sherman@fishmanhaygood.com

January 9, 2025

***via* regulations.gov**

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

Re: Proposed Amendments to Federal Rule of Appellate Procedure 29

To the Honorable Judge Bates and Members of the Committee:

I serve as the Chair of both the American Association for Justice *Amicus Curiae* Committee and the Louisiana Association for Justice *Amicus Curiae* Committee. I also, among other things:

- am a Past President of the Louisiana Association for Justice (formerly the Louisiana Trial Lawyers Association), the National Civil Justice Institute (formerly the Pound Civil Justice Institute), and the Civil Justice Foundation, as well as the Immediate Past President of the New Orleans Bar Association;
- am a member of the American Law Institute (ALI) and a fellow of the International Academy of Trial Lawyers (IATL); and,
- teach the Complex Litigation: Advanced Civil Procedure course at Tulane Law School, and an Advanced Torts Seminar on Class Actions at Loyola Law School.

I hope that the following observations may be helpful to the Committee in its consideration of any potential changes to Federal Rule of Appellate Procedure 29.

Disclosure

While the currently-proposed amendments do not appear problematic, I think it's important, as the Committee considers these issues, (and potentially alternative proposals), to recognize the distinction in the way that *amicus* briefs are frequently prepared and submitted by traditional "plaintiff" versus traditional "defense" interests.

As a practical matter, an individual plaintiff, (or potential plaintiff, or future plaintiff, or would-be plaintiff),[1] will generally lack the knowledge and resources to prepare, or retain a law firm to prepare, an *amicus* brief. Therefore, the responsibility for such advocacy is typically assumed by plaintiff lawyers, and/or organizations of plaintiff lawyers, as opposed to the potentially affected persons or businesses themselves.

The prototypical corporate or insurance defendant, on the other hand, (albeit sometimes alerted and assisted by attorneys), will generally have the knowledge, the motivation, and the resources, either separately or in allegiance with other "defense" interests, to pay for the preparation and submission of an *amicus* brief in their own name.

To the extent the disclosure, therefore, might focus on the involvement or participation of counsel, as opposed to the involvement or participation of the party, there will frequently be instances where the plaintiff's counsel of record is also a member of, or contributor to, an association comprised largely of plaintiff lawyers, even where that counsel has no direct involvement in the preparation of the organization's *amicus* brief, and whose monetary contributions to the organization are immaterial and insignificant relative to either the total revenue or the total expenditures of the organization.

An insurance company or other corporation that perceived it might be affected by the outcome of an appeal, by contrast, would have a relatively easy time finding and retaining a qualified law firm with no involvement or participation as counsel of record in the subject case.

The current proposal, while not specifically addressed to this particular asymmetry, effectively accounts for the potential concern. As noted by the Committee: "The amendment treats contributions by a nonparty that are earmarked for a particular brief differently than general contributions by a nonparty to an *amicus*. People may make contributions to organizations for a host of reasons, including reasons that have nothing to do with filing *amicus* briefs. Requiring the disclosure of non-earmarked contributions provides less useful information for those who seek to evaluate a brief and imposes far greater burdens on contributors."

The primary purpose of the Rule, in this regard, is to ensure that the Court understands who the *amicus* is – *i.e.* what they do and what they stand for – and to ensure that the party-in-interest is not filing a second brief. Appropriately, therefore, (at least with respect to the disclosure of counsel), the current proposal would only require an earmarked contribution, or a contribution of greater than 25%. If the Rule were otherwise, attorney organizations might face an undue and largely unnecessary burden, and/or some type of prejudice. And without trial lawyers, the ordinary consumers and employees whom they represent will lose some of their most effective (often only) advocates – and Courts will lose the benefit of their experience and perspectives – on important issues of public health and safety, employment protections, taxpayer rights, and environmental concerns.

[1] Unlike many traditional corporate "defense" interests, employees, or consumers, or other individuals and small companies not involved in active litigation will be largely unaware of a pending appeal that might have some direct or indirect effect on their potential future rights.

Motion For Leave Requirement

While perhaps unusual that I would agree with the Washington Legal Foundation, it seems likely, based on my experience, that "the proposal to require every nongovernmental *amicus* to obtain leave of court to file a brief is an unnecessary step that would decrease judicial efficiency and subvert stakeholders' access to the appellate system."[2]

If anything, the Courts of Appeal should likely adopt the current Supreme Court Rule, which allows *amici* to submit briefs – as long as they are timely and otherwise comply with the Rules – without either formal leave or consent.

A formal motion for leave would not seem to either reduce the Courts' workloads nor assist in "filtering" briefs that are unhelpful, as the proposed *amicus* brief would still have to be reviewed by the Court to determine whether leave should be granted.

In the situation where a party actively ***opposes*** the filing of an *amicus,* it may be necessary for the Court to consider the issue in some formal way.[3] At the end of the day, however, the purpose of the *amicus* is not to assist the parties-in-interest; but to assist ***the Court.*** The parties' position therefore arguably shouldn't matter. And, in the event that the party disputes the information or arguments advanced by an *amicus,* the deadlines set forth in Rule 29(a)(6) ensure that the party will have an opportunity to respond.

Nevertheless, in the event, and to the extent, that formal leave is required, the proposed amended statement of purpose gives one pause.

Purpose

As the Chair of the LAJ and AAJ *Amicus* Committees, and a frequent author of *amicus* briefs myself, I am always mindful of – and preaching to others about the importance of – ensuring that the brief brings to the Court's attention relevant matter not already being addressed by the parties.

[2] Washington Legal Foundation Comments (Aug. 19, 2024) at p.2.

[3] While perhaps not directly implicated by the proposed amendments to the disclosure provisions, there was an incident in the *Deepwater Horizon Litigation* which the Committee might find relevant or helpful in some way: The U.S. Chamber of Commerce submitted *amicus* briefs to the U.S. Fifth Circuit and the Supreme Court in support of BP purporting to speak for "more than three million U.S. businesses and organizations of every size, in every industry, and from every region of the country" – while refusing to disclose to either Court that at least hundreds if not thousands or tens of thousands of affiliates of the Chamber and business members of those Local Chamber affiliates had submitted claims for business economic losses, with interests directly adverse to BP. A number of Local Chamber affiliates were compelled to file their own *amicus* to correct the record in response. *See, e.g., Amicus* Brief submitted by the Mobile Area Chamber of Commerce, et al, in opposition to the BP Petition and the U.S. Chamber *Amicus* Brief in the U.S. Supreme Court, No.14-123 (Oct. 2014).

At the same time, however, I am not sure that, as a practical matter, this proposed language will aid the Court, and I am concernd that **(i)** the denial – or even the prospect of denial – may discourage the filing of briefs that might be helpful or important to the Court's consideration, particularly, if **(ii)** the language may be applied overbroadly. Finally, (and while fully understanding the independent and apolitical role of the Federal Courts within our three-branches system), in an age where the legitimacy of the judiciary is increasingly being challenged, it would seem desirable for the Courts to encourage participation, particularly by potentially less sophisticated groups, who may lack resources, while advancing the interests of those who may already feel economically disadvantaged or disenfranchised.

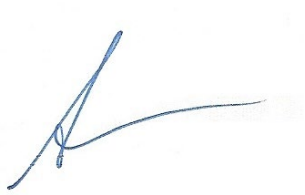
From a practical standpoint, it is difficult to see how the Court will know whether the proposed *amicus* brief is "redundant" without reading it. And, while there is typically an admitted 7-day period under the Rule for a prospective *amicus* to review the relevant party's brief, that is not much time – particularly if the *amicus* is not coordinating with the party-in-interest or their attorneys.[4]

From a more substantive standpoint, and while fully acknowledging the Court's interest in eliminating unnecessary redundancy, a largely "redundant" brief might nevertheless be helpful in clarifying a particular point or issue, or by alerting the Court to a consensus among diverse thinkers or groups who are typically opposed to one another.

Finally, organizations have limited resources. The prospect that their time, money, and effort might not even be accepted by the Court may tip the scales, and thereby deprive the Court, the parties, and others who might be affected by the decision of an *amicus* brief that might have otherwise made an important contribution to the opinion in that case.

I appreciate the Committee's time and consideration.

Respectfully submitted,



STEPHEN J. HERMAN

[4] Particularly where the proposed *amicus* brief does not support either party, the *amicus* brief will be due before the appellee or respondent's brief and will not necessarily know whether they might be addressing matters that would already be addressed by the appellee. *See* Rule 29(a)(6).

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
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.

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

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

Comment in Opposition to Proposed Changes to Federal Rule of Appellate Procedure 29

Young America's Foundation regularly files amicus briefs in federal court to aid courts' decisions on matters that pertain to the Foundation's efforts to protect free speech on college campuses and to promote the ideas of free enterprise, strong national defense, individual liberty, and traditional values.

The Foundation opposes the proposed changes to Rule 29 because they hinder potential amici (and donors) from expressing their ideas in the judicial system and give the government oversight tools beyond its rightful authority and that do not further the administration of fair and impartial justice. The Foundation would be negatively affected by the proposed changes to Rule 29. Further, The Foundation strongly believes the proposed changes are wrong-headed and likely unconstitutional in some cases. Specifically:

- *29(a)(2) "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 does not serve this purpose—or that is redundant with another amicus brief—is disfavored."*

  This is overly strict. Amici often write to elaborate on arguments that were mentioned but not developed by a party because of length restrictions. Amici should continue to be permitted to expound upon arguments mentioned but not fully explored by the parties.

- *29(a)(2) "Any other amicus curiae may file a brief only with by leave of court."*

  This is unfair. Government amici should not have more rights than citizen amici. Citizens are the sovereigns in our nation and have even more of a right to be heard than does the government. At the very least, the consent option should remain.

- *29(a)(4)(D) "a concise statement description of the identity, history, experience, and interests"*

  This is ridiculously overbearing. Amici who meet the requirements of the rule and formatting and care enough about judicial accuracy to bother to write for a court's aid should not have to prove their worth before they are "accepted" as amici. Why should citizen amici have to prove their worth when government parties do not? Why this favoritism of government speech? Further, our American system protects anonymity and privacy, and these requirements overstep any gatekeeping role of the courts.

- *29(a)(4)(E) "if an amicus has existed for less than 12 months, the date the amicus was created"*

  This is irrelevant. Should the court also ask the age of the brief's drafter?

- *29(b) "An amicus brief must name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief, unless the person has been a member of the amicus for the prior 12 months. 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."*

  This violates Supreme Court law. The Court in *AFP v Bonta* upheld privacy protections for donors and for the nonprofits which hold donor information. Further, this would adversely effect the administration of justice because donors would no longer donate to these efforts. Amicus briefs take a lot of resources, and most lawyers do not have the time to draft these briefs for free. Lawyers have to make a living, and even nonprofit lawyers, who are less likely to be paid per hour or per brief, need donors willing to support amicus efforts as part of their employment in a cause-related organization. Thus, these changes would restrict speech.

  Additionally, these new requirements would not further a governmental interest in determining the relationship between the parties and amici, and nothing in the Constitution permits the government to demand this private and sensitive information. That young organizations are not required to provide this information further shows the government has no compelling interest here at all.

Respectfully submitted:

Jan 27, 2025

Madison Leigh Hahn
Associate General Counsel

January 27, 2025

Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, DC 20544

Re: Comments on Proposed Revisions to Rule 29(a)(2)

The California Academy of Appellate Lawyers (calappellate.org), one of the nation's first bar organizations devoted to appellate practice, respectfully opposes the proposed revisions to Rule 29(a)(2) of the Federal Rules of Appellate Procedure. As explained below, the revisions would impose additional burdens and costs on amici curiae and counsel without producing any benefits.

I. The costs of the revisions to Rule 29(a)(2) outweigh any benefits.

Under the current version of Rule 29 of the Federal Rules of Appellate Procedure ("FRAP"), a non-governmental amicus curiae has the option to file an amicus brief at the merits stage with the consent of all the parties. FRAP 29(a)(2). The proposed revision to Rule 29(a)(2) would eliminate that consent-based option and would instead require all non-governmental amici curiae to file a motion for leave to file an amicus brief.

If adopted, the proposed revision will increase costs for amicus parties, who must pay their counsel to prepare the motion. Alternatively, for lawyers who are representing amici curiae pro bono, preparing the motion imposes additional burdens on them, thus creating an additional impediment to pro bono representation. Responding to a motion for leave also would impose additional costs. The Academy does not believe that the benefits of the proposed revision to Rule 29(a)(2) outweigh these costs.

In its request for comments, the Judicial Conference Committee on Rules of Practice and Procedure included an excerpt of a report of the Advisory Committee on Appellate Rules, which acknowledged that filing a motion imposes a burden on

litigants, then goes on to say that it "is hardly a severe burden" for one who seeks to participate in the court system.[1] But the burden imposed by the motion depends on how substantive the motion must be. If the motion should explain in detail why the amicus brief "is helpful," so that the motion itself is a "filter on the filing of unhelpful briefs,"[2] then the motion will be burdensome. On the other hand, if the motion's only practical purpose is to disclose the identity of the parties and lawyers and any financial relationships with other interested parties, then the motion would be less burdensome, but also unnecessary, because the parties can present this information in a certification accompanying the amicus brief. As explained below, a motion is unnecessary if the point of the motion is to avoid recusal issues.

A. A motion is unnecessary to avoid recusal issues.

The Advisory Committee explained that the purpose of the proposed revision to Rule 29(a)(2) is to avoid potential "recusal issues" that could arise upon the filing of an amicus brief without permission of the court before a merits panel is assigned to the case. This is unnecessary. The rules already provide that the court "may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification." FRAP 29(a)(2). Courts already have the power to ensure that amicus filings do not disqualify judges.

The Advisory Committee's underlying concern appears to be that the circuit courts are not exercising optimal control over amicus filings, particularly with respect to the chance that a filing would result in automatic disqualification of a judge. The Advisory Committee explains in its report: "The clerk's office does a comprehensive conflict check, and if an amicus brief is filed during the briefing period with the consent of the parties, it could cause the recusal of a judge at the panel stage without the judge even knowing."[3] If a court maintains this internal operating procedure, the clerk may decline to assign an appeal to a judge based on the judge's standing "recusal list," such that an amicus filing could cause the non-assignment of the judge based on the recusal list alone, as opposed to the judge's

---

[1] Committee on Rules of Practice and Procedure of the 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* at 26 (Aug. 15, 2024), *available at* www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2024.pdf [hereafter, "**Preliminary Draft**"].

[2] Preliminary Draft, supra note 1, at 40, lines 239-243.

[3] Preliminary Draft, supra note 1, at 26.

independent decision. To the extent that this procedure exists and is known to litigants, it may encourage strategic filing of amicus briefs with the hope that the clerk will not assign a particular judge to a merits panel.

We agree that strategic filing of amicus briefs in an attempt to avoid certain judges would be a problem, although in our experience this does not occur very often. Reputable lawyers do not want to spend their time writing amicus briefs for dubious disqualification purposes. Moreover, attempting to disqualify a judge or judges by filing an amicus brief is unlikely to be an effective tactic because the amicus party does not know the identity of the panel members at the time of filing a merits-stage amicus brief. In any event, managing potential recusal issues should be an internal operating matter for the circuit courts, not a matter to be addressed by amending Rule 29(a)(2).

If a circuit court wants to give individual judges an opportunity to consider whether they should be disqualified by the filing of an amicus brief or, more likely, whether the amicus brief should be stricken, then the 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. (We assume that the motion for leave to file the amicus brief would be distributed to the assigned merits panel and not a motions panel; otherwise, it could not serve its function of permitting the merits panel to evaluate the amicus filing.)

From a circuit court's workload perspective, there is little or no difference between reviewing (1) an amicus brief filed on consent and (2) a motion for leave to file an amicus brief, together with the proposed brief. And there is little or no difference, from the court's workload perspective, between voting to deny a motion for leave and requesting an order striking a filed amicus brief. Similarly, from the public's perspective, there is no difference between filing a motion for leave to file an amicus brief that attaches the proposed amicus brief and simply filing the amicus brief. Either way, the amicus brief is docketed in the court because the rules require a movant to submit a copy of the amicus brief with the motion. FRAP 29(a)(3). In short, we respectfully suggest that the Judicial Conference should address the "recusal issues" that prompted the proposed revision to Rule 29(a)(2) by routing amicus briefs filed on consent to the merits panel, where judges can evaluate them

and strike them. A motion is unnecessary. If any change were needed, a circuit court could clarify that any single judge assigned to a merits panel has the power to strike an amicus brief that has been filed in the assigned case.

We share one additional concern. Recusal is an individual issue. But adjudicating a motion is an action by the court, i.e., a three-judge panel or a circuit judge or clerk exercising delegated authority on behalf of the court. FRAP 27(b), (c). The proposed revision to Rule 29(a)(2) does not address whether a court would delegate authority to a clerk to decide the motion (perhaps after each judge has advised the clerk whether he or she would be disqualified if the motion were granted) or would instead ask each judge assigned to a merits panel to vote on the motion. If the merits panel judges vote on the motion, two judges could vote to grant a motion that causes the disqualification of the third panel judge. While this may seem unlikely, if the Judicial Conference revises Rule 29(a)(2), it should consider clarifying that the court "shall" prohibit the filing or "shall" strike an amicus brief if the brief would result in any panel member's disqualification. A rule requiring the court clerk to strike an amicus brief if any member of the panel states that the amicus brief would result in his or her disqualification would be preferable to a rule that grants discretion to a merits panel to decide whether to strike such a brief.

B. A motion will not provide a useful filter on the filing of unhelpful amicus briefs.

While the Advisory Committee report explains that the purpose of the proposed amendment to Rule 29(a)(2) is to address recusal issues, the draft Committee Note does not mention recusal or disqualification.[4] Instead, the Committee Note reasons: "Most parties follow a norm of granting consent to anyone who asks" and, as a result, "the consent requirement fails to serve as a useful filter."[5] The Committee Note predicts that a motion will provide a "filter on the filing of unhelpful briefs."[6] In our view, this prediction is inaccurate.

The norm of consenting to the filing of amicus briefs would be unlikely to play out differently if the amicus party had to file a motion for leave to file an amicus brief. The parties who previously would have consented could simply file no

[4] *See* Preliminary Draft, supra note 1, at 39-40.

[5] Preliminary Draft, supra note 1, at 40, lines 234-236.

[6] Preliminary Draft, supra note 1, at 40, lines 241-242.

opposition or a statement of non-opposition. Thus, the adversarial process is unlikely to sharpen the "helpfulness" question. Perhaps even more importantly, litigating by motion whether a brief is "helpful" is not a productive use of time for the court or the parties. In practice, we believe that courts determine whether an amicus brief is helpful by reviewing the brief (including by assigning law clerks to review it), not by reading a motion about the helpfulness of the brief.

To the extent that the Committee Note invites and encourages the parties to file oppositions to motions for leave to file an amicus brief, the invitation could have unintended consequences. While the court may simply ignore unhelpful amicus briefs, which do not require any independent adjudication, courts cannot ignore an opposed motion, which does. Prompted to act as a "filter," litigating parties may use the required motion as an opportunity to present additional arguments to the court or reinforce the existing ones. Reviewing and adjudicating such oppositions to a motion for leave would multiply the burdens on the court, without any discernible benefit for the parties or the public.

For all these reasons, the California Academy of Appellate Lawyers respectfully requests that the Committee reconsider its proposed revision to Rule 29(a)(2) and maintain the option to file an amicus brief based on consent of all the parties. Thank you for your consideration of these comments.

Respectfully submitted,

Joseph P. Mascovich
Academy President

Brian A. Sutherland
Chair, Rules Commentary &
Legislative Suggestions Committee

Philanthropy Roundtable

January 28, 2025

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

Re: Proposed Amendments to Federal Rules of Appellate Procedure 29 (Amicus Curiae Briefs)

Dear Judges Bates, Bybee, and Members of the Committee:

I write to express our concerns regarding the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. These changes, particularly the expanded amicus disclosure requirements, threaten to undermine the constitutional freedoms that safeguard the vitality of our civil society. We urge the Committee to reconsider these amendments in light of their potential to chill First Amendment-protected activities and erode the longstanding tradition of private giving and association in the United States.

Philanthropy Roundtable supports the right of Americans to give and associate freely, and privately. This freedom enables individuals to support poverty-relief initiatives, cultural and educational institutions, faith-based organizations, and countless other causes without fear of reprisal. The proposed disclosure requirements jeopardize this freedom by creating new opportunities for harassment and intimidation.

Amicus briefs have long served as a vital mechanism for individuals and organizations to share diverse perspectives and expertise with the judiciary. They are utilized across the ideological spectrum, from progressives and conservatives to industries and activists, to contribute to the fair and informed administration of justice. The proposed amendments, however, risk diminishing the utility and accessibility of this important tool by imposing burdensome disclosure requirements that conflict with fundamental First Amendment protections.

The Supreme Court has consistently recognized the dangers posed by compelled disclosure to First Amendment rights. In *NAACP v. Alabama* (1958), the Court held that requiring the NAACP to disclose its membership lists violated the First Amendment, as it exposed members to potential economic reprisals, harassment, and violence. More recently, in *Americans for Prosperity Foundation v. Bonta* (2021), the Court reaffirmed the principle that disclosure requirements must satisfy "exacting scrutiny," demonstrating a "substantial relation" to a compelling governmental interest while avoiding unnecessary infringement on associational freedoms.

The proposed amendments to Rule 29 fail to meet this high standard. Requiring amici to disclose detailed information about their funding sources, history, and experience imposes significant burdens on organizations and individuals who wish to participate in the judicial process. The provision mandating disclosure of contributors who gave as little as $100 in the past 12 months is particularly concerning. Such requirements are not narrowly tailored and risk deterring participation by individuals and

1120 20th Street NW, Suite 400 North
Washington, D.C. 20036
main@PhilanthropyRoundtable.org
202.822.8333

organizations who fear retaliation or public scrutiny for their support of causes that may be unpopular or controversial.

The ability to associate and give privately has been a cornerstone of American civil society throughout history. From the abolitionist movement to women's suffrage and the civil rights movement, anonymity has often been essential for protecting individuals from persecution and enabling them to support causes aligned with their values. In today's polarized climate, the risk of retaliation—whether social, economic, or political—has only intensified. Compelled disclosure threatens to chill participation in civic and charitable activities, undermining the diversity and vibrancy of our nonprofit sector.

The Committee has not demonstrated a compelling need for these new disclosure requirements. Existing rules already require amici to disclose any direct financial or control relationships with parties to a case. The proposed amendments' expansion of these requirements lacks clear evidence that such additional disclosures are necessary to protect the integrity of the judicial process. Instead, these changes risk deterring amici participation, depriving courts of valuable perspectives and insights that contribute to better-informed decisions.

The vitality of our civil society depends on preserving the freedoms that allow individuals and organizations to engage in advocacy, association, and giving without undue government interference. The proposed amendments to Rule 29's amicus disclosure requirements threaten to erode these freedoms, chilling participation and undermining the essential role of amicus briefs in our judicial system.

We respectfully urge the Committee to withdraw the proposed amendments to ensure they do not infringe on First Amendment rights. Philanthropy Roundtable remains committed to protecting the freedoms that sustain our nation's vibrant civil society, and we stand ready to assist the Committee in identifying alternative approaches that uphold these values.

Thank you for considering our comments.

Sincerely,

Jack Salmon
Director of Policy Research
Philanthropy Roundtable

1120 20th Street NW, Suite 400 North
Washington, D.C. 20036

main@PhilanthropyRoundtable.org
202.822.8333

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.

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.

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.

---

[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

January 27, 2025

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 Federation of Defense and Corporate Counsel (FDCC), I am submitting these comments on the proposed amendments to Federal Rule of Appellate Procedure 29. We focus our comments primarily on the proposed elimination of the option of filing an amicus brief with the consent of the parties, as currently provided in Rule 29(a)(2), and the consequent requirement in proposed Rule 29(a)(3) that a motion for leave to file be submitted with every proposed amicus brief.

The FDCC is a national professional trade association of approximately 1,500 vetted and premier defense and corporate counsel and industry executives dedicated to leading the profession by advancing the principles of integrity, professionalism, fair civil justice, intellectual capital, and fostering the trust and value of fellowship. We seek to advance and sustain an equitable civil justice system now, and for future generations, through a community and network of trusted, leading and innovative industry legal professionals.

The FDCC submits amicus briefs on issues that have a significant impact on the defense bar, the practice of law (such as the attorney-client privilege) and/or the civil justice system as a whole. We select very carefully which cases we participate in as an amicus curiae, to ensure that our participation would serve the interests of our organization as a whole. This process includes review by our Amicus and Public Policy Committee, followed by review and approval by our Board of Directors. We file approximately six amicus briefs per year. When we prepare amicus briefs, one or more of our members do so without compensation, and other members review and comment on drafts also without compensation. We prepare an amicus brief only when we firmly conclude not only that the brief will be of substantial value to the court but that the effort is worthy of dozens of hours of volunteered time of our attorney members.

610 Freedom Business Center | Suite 110 | King of Prussia, PA 19406 | 610-992-0001 (o)
www.thefederation.org

We always seek, and often receive, consent of the parties to the filing of our brief. If the FDCC were to prepare and submit a proposed amicus brief only to have the court deny leave for filing of the brief, this would be a substantial waste of time and resources.

If the proposed rule is adopted, we fear it will discourage the preparation and filing of amicus briefs by organizations like ours, who rely on volunteer attorneys to prepare and submit amicus briefs in carefully selected cases.

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. This would not impose a significant burden on the courts of appeals given that the volume of amicus briefs in the federal courts of appeals is substantially lower than in the Supreme Court, the new proposed disclosure rules are expected to weed out amicus briefs filed for inappropriate purposes, and judges and law clerks can readily determine whether an amicus brief is unhelpful before reviewing it in detail.

To the extent the Committee has expressed a concern about judicial recusal, Rule 29(a)(2) provides for the amicus brief to be stricken if it would cause a recusal. The issue of potential recusal should be addressed by a rule amendment similar to the Code of Conduct adopted by the Supreme Court Justices in November 2023,which provides that "Neither the filing of a brief *amicus curiae* nor the participation of counsel for *amicus curiae* requires a Justice's disqualification."

Thank you for the opportunity to share our comments with the Committee. We would be pleased to provide additional information and to respond to any questions the Committee may have. In the interim, we respectfully urge the Committee not to adopt the proposed amendment and, rather, to propose an amendment that would bring Rule 29 in conformance with Supreme Court Rule 37, as amended January 1, 2023.

Respectfully yours,

Heidi Goebel
President

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

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]

---

[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]

---

[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

---

[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

---

[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)

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 & 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

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)

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE 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 ten percent 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)

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 & 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

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

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-

---

[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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

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.

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

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

JOIN NOW ›

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

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)

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

January 31, 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:

The undersigned organizations write to express their opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. Collectively, our associations are concerned that the proposed amendments will infringe on core First Amendment rights and impose unnecessary burdens on amicus curiae and the federal courts of appeals.

First, the proposed disclosure amendments threaten the First Amendment rights of amicus organizations and their members and/or supporters. As the Supreme Court has recently explained, compelled disclosure of information about an association's members inevitably exerts a "deterrent effect on the exercise of First Amendment rights" and must satisfy at least "exacting scrutiny." *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 606 (2021); *see also id.* at 619 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 623 (Alito, J., concurring in part and concurring in the judgment). The proposed amendments do not meet that demanding standard because they mandate broad disclosures untethered to the purposes of Rule 29. *See* Fed. R. App. P. 29 advisory committee notes ("The [current] disclosure requirement … serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs" and "may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing[.]"). They are also unnecessary, as the disclosure requirements in the current version of Rule 29 already protect the integrity of amicus participation—without intruding on the privacy of relationships between amicus organizations and their members or deterring amicus organizations from submitting their views on important issues.

Second, the proposals to require amicus organizations to file a motion for leave in every case, and to establish new criteria for judges to apply in ruling on those motions, are equally problematic. Amicus briefs are often helpful to the court, and to the extent they are not, the judges who decide the merits of the case are free to ignore them. That is why the Supreme Court has repeatedly loosened its rules on amicus filings and today requires neither a motion nor consent. The opposite approach taken here will burden federal courts with unnecessary motions and undermine the efficient disposition of cases. Moreover, by specifying when an amicus brief is "disfavored," the proposal places a thumb on the scale against granting leave to file amicus briefs, which is likely to result in the acceptance of fewer amicus briefs and may discourage amicus participation altogether. The proposed motions requirement is also unnecessary to resolving the Advisory Committee's concerns about judicial recusal. Under the existing version of Rule 29, judges are permitted to strike an amicus brief regardless of whether it is accompanied by a motion

for leave to file. *See* Fed. R. App. P. 29(a)(2). Establishing a motions requirement is a solution in search of a problem that does not exist.

For these reasons, the undersigned organizations respectfully request that the Committee reject the proposed amendments.

Sincerely,

National Organizations

Ted Waugh
Acting General Counsel and Corporate Secretary
American Chemistry Council

Jillian Froment
Executive Vice President & General Counsel
American Council of Life Insurers

Andrew J. Topps
General Counsel
American Forest & Paper Association

Claire Howard
Senior Vice President, General Counsel and Corporate Secretary
American Property Casualty Insurance Association

H. Sherman Joyce
President
American Tort Reform Association

Richard Pianka
General Counsel
American Trucking Associations

Ann Petros
Vice President, Policy Engagement & Credit Union Operations
America's Credit Unions

Ben Brubeck
Vice President, Regulatory, Labor and State Affairs
Associated Builders and Contractors

Leah Pilconis
General Counsel
Associated General Contractors of America

Lawrence Ebner
Executive Vice President & General Counsel
Atlantic Legal Foundation

Marisa Coppel
Head of Legal
Blockchain Association

Liz Dougherty
General Counsel and Corporate Secretary
Business Roundtable

Jason Altmire
Chief Executive Officer
Career Education Colleges and Universities

David Pommerehn
General Counsel
Consumer Bankers Association

Lisa M. Baird
Amicus Committee Chair
DRI Center for Law and Public Policy

Jenna Burke
EVP, General Counsel, Government Relations & Public Policy
Independent Community Bankers of America

Sarah Davies
General Counsel and VP of Government Relations
International Franchise Association

Jennifer W. Han
Chief Legal Officer & Head of Global Regulatory Affairs
Managed Funds Association

Doug Kantor
General Counsel
National Association of Convenience Stores

Erica Klenicki
Deputy General Counsel, Litigation
National Association of Manufacturers

Karen R. Harned
Director of Litigation and Legal Policy
National Association of Wholesaler-Distributors

Tawny Bridgeford
General Counsel & Senior Vice President, Regulatory Affairs
National Mining Association

Christine Banning
Chief Executive Officer & President
National Parking Association

Stephanie Martz
Chief Administrative Officer and General Counsel
National Retail Federation

Christopher Marchese
Director, NetChoice Litigation Center
NetChoice

Elizabeth Milito
Vice President & Executive Director
NFIB Small Business Legal Center

Charlie Souhrada
Vice President of Regulatory & Technical Affairs
North American Association of Food Equipment Manufacturers (NAFEM)

James C. Stansel
EVP and General Counsel
PhRMA

Christine McCarthy
Director, Government Affairs
Portland Cement Association

Deborah White
President
Retail Litigation Center

Stephanie Harris
General Counsel
The Food Industry Association (FMI)

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

Alabama

Nancy Hewston
Vice President of Communications and Advocacy
Mobile Chamber

Ali Rauch
President & Chief Executive Officer
Opelika Chamber of Commerce

Alaska

Kari Nore
Director of External Affairs
Alaska Chamber of Commerce

Arizona

Joe Galli
Senior Advisor Public Policy
Greater Flagstaff Chamber of Commerce

Mike Huckins
Senior Vice President of Public Affairs
Greater Phoenix Chamber

Raoul Sada
President & Chief Executive Officer
Northwest Valley Chamber of Commerce

Michael Guymo
President & Chief Executive Officer
Tucson Metro Chamber

California

Ben Golombek
Executive Vice President
California Chamber of Commerce

Bret Schanzenbach
Chief Executive Officer
Carlsbad Chamber of Commerce

Zeb Welborn
President & Chief Executive Officer
Chino Valley Chamber of Commerce

Brandon Marley
President & Chief Executive Officer
Greater Coachella Valley Chamber of Commerce

Elissa Diaz
Senior Public Policy Manager
Los Angeles Area Chamber of Commerce

Patrick Ellis
President & Chief Executive Officer
Murrieta/Wildomar Chamber of Commerce

Patrick Klein
General Manager
Palm Desert Area Chamber of Commerce

Justine Murray
Policy Director
San Diego Regional Chamber of Commerce

Dustin Hoiseth
Director of Public Policy
Santa Barbara South Coast Chamber of Commerce

Florida

Frank Walker
Executive Vice President of Government & Political Affairs
Florida Chamber of Commerce

Hawaii

Kiran Polk
Executive Director & Chief Executive Officer
Kapolei Chamber of Commerce

Idaho

Alex LaBeau
President
Idaho Association of Commerce & Industry

Matt Hunter
President & Chief Executive Officer
Pocatello-Chubbuck Chamber of Commerce

Kyle Tarbet
President & Chief Executive Officer
Twin Falls Area Chamber of Commerce

Illinois

Beth Goncher
President & Chief Executive Officer
Chamber630

Lou Sandoval
President & Chief Executive Officer
Illinois Chamber of Commerce

Neil Malone
Government Affairs Manager
Naperville Area Chamber of Commerce

Mike Murphy
President & Chief Executive Officer
The Greater Springfield Chamber of Commerce

Teresa Dason
President
Winnetka-Northfield-Glencoe Chamber of Commerce

Indiana

Brad Klopfenstein
President
Greater Lawrence Chamber of Commerce

Sharon Montoya
Executive Director
Kendallville Area Chamber of Commerce

Iowa

Stacy Doughan
President & Chief Executive Officer
Clear Lake Area Chamber of Commerce

JD Davis
Vice President of Public Policy
Iowa Association of Business & Industry

Chelsea Petersen
Executive Director
Waverly Chamber of Commerce

Kentucky

P. Anthony Allen
Vice President of Public Policy
Commerce Lexington

Ashli Watts
President & Chief Executive Officer
Kentucky Chamber of Commerce

Tami Wilson
Vice President of Public Affairs
Northern Kentucky Chamber of Commerce

Massachusetts

Roy Nascimento
President & Chief Executive Officer
North Central Massachusetts Chamber of Commerce

Michigan

Caitlyn Stark
President
Cadillac Area Chamber of Commerce

Adam Majestic
Manager of Government Relations
Detroit Regional Chamber

Jean Derenzy
Executive Director
Elk Rapids Area Chamber of Commerce

Ryan Boeskool
Executive Director
Greater Niles Chamber

Steve Japinga
Senior Vice President
Lansing Regional Chamber of Commerce

Wendy Block
Senior Vice President of Business Advocacy
Michigan Chamber of Commerce

Minnesota

Shari Sprague
Executive Director
Albert Lea-Freeborn County Chamber of Commerce

Karen Peterson
Executive Director
Blooming Prairie Area Chamber of Commerce

Pat MulQueeny
President
Eden Prairie Chamber of Commerce

Andy Wilke
Executive Vice President
Greater Mankato Growth

Tim Zunker
President
Shakopee Area Chamber of Commerce

Montana

Todd O'Hair
President
Montana Chamber of Commerce

Nebraska

Derek Rusher
President & Chief Executive Officer
Kearney Area Chamber of Commerce

Bruce Bohrer
Executive Vice President & General Counsel
Lincoln Chamber of Commerce

Bryan Slone
President
Nebraska Chamber of Commerce & Industry

Brad Earley
Executive Director
Washington County Chamber of Commerce

Nevada

Ann Silver
Chief Executive Officer
Reno + Sparks Chamber of Commerce

North Dakota

Andrea Pfennig
Vice President of Government Affairs
Greater North Dakota Chamber of Commerce

Ohio

Mason Hutton
Executive Director
Huber Heights Chamber of Commerce

Rick Carfagna
Senior Vice President of Government Affairs
Ohio Chamber of Commerce

Kim Barlag
President & Chief Executive Officer
Pickerington Area Chamber of Commerce

Matt Appenzeller
President & Chief Executive Officer
Southern Ohio Chamber Alliance

Brian Dicken
Vice President of Advocacy & Strategic Initiatives
Toledo Regional Chamber of Commerce

Nico Morgione
Director of Government Affairs
Youngstown/Warren Regional Chamber of Commerce

Oregon

Jay Jones
President & Chief Executive Officer
North Clackamas County Chamber of Commerce

Paloma Sparks
Executive Vice President & General Counsel
Oregon Business & Industry

Debra Fromdahl
President & Chief Executive Officer
Roseburg Area Chamber of Commerce

Pennsylvania

Lynda Pozzuto
President
Alle Kiski Strong Chamber of Commerce

Nicole Deary
President & Chief Executive Officer
Carlisle Area Chamber of Commerce

Chris Berleth
President & Chief Executive Officer
Columbia Montour Chamber of Commerce

Ryan Unger
President & Chief Executive Officer
Harrisburg Regional Chamber

Neal Lesher
Director of Government Affairs
Pennsylvania Chamber of Business and Industry

Robert Carl
President & Chief Executive Officer
Schuylkill Chamber of Commerce

Jason Fink
President & Chief Executive Officer
Williamsport/Lycoming Chamber of Commerce

Rhode Island

Erin Donovan-Boyle
President & Chief Executive Officer
Greater Newport Chamber of Commerce

South Carolina

Mike Brenan
President
South Carolina Chamber of Commerce

South Dakota

Jeff Griffin
President & Chief Executive Officer
Greater Sioux Falls Chamber of Commerce

Texas

Kelly Hall
President & Chief Executive Officer
Longview Chamber of Commerce

Utah

Mary Catherine Perry
Vice President of Public Policy
Salt Lake Chamber of Commerce

Jay Francis
President & Chief Executive Officer
South Valley Chamber

Alyn Toalepai
President
Utah Pacific Islander Chamber of Commerce

Virginia

John Easter
Senior Vice President of Government and Community Affairs
ChamberRVA

Barry Butler
Director of Government Relations
Lynchburg Regional Business Alliance

Richard Wren
Executive Director
New Kent Chamber of Commerce

Washington

Stephanie Rees
President & CEO
Burlington Chamber of Commerce

Alex Kim
Vice President of Public Policy
Finseca

Jake Mayson
Director of Public Policy
Greater Spokane Inc.

Jen Dean
CEO
Mercer Island Chamber of Commerce

Marie Dymkoski
Executive Director
Pullman Chamber of Commerce

Wisconsin

David Vander Bloomen
President & CEO
De Pere Area Chamber of Commerce

Elizabeth Mueller
Executive Director
Grafton Area Chamber of Commerce

Dale Kooyenga
President & CEO
Metropolitan Milwaukee Association of Commerce

Scott Manley
Executive Vice President of Government Relations
Wisconsin Manufacturers & Commerce

Wyoming

Dale Steenbergen
CEO
Greater Cheyenne Chamber of Commerce

Dale Steenbergen
CEO
Wyoming Chamber of Commerce

Legal Advocacy & Compliance
Thomas Ward
Vice President
tward@nahb.org

January 31, 2025

Submitted via regulations.gov

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

Dear Judge Bates:

On behalf of the more than 140,000 members of the National Association of Home Builders of the United States ("NAHB"), I am pleased to submit these comments in response to the Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure and the Federal Rules of Evidence. NAHB files numerous amicus briefs in the federal courts in cases that impact the housing industry and is specifically concerned with the proposed changes to Rule 29.

NAHB is a Washington, D.C.-based trade association that represents more than 140,000 members who are involved in all segments of the residential construction industry including home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing, land development, and other aspects of residential and light commercial construction. NAHB is affiliated with more than 700 state and local home builder associations around the country. NAHB's members construct about 80 percent of new housing units, making housing a large engine of economic growth in the United States.

Additional Language Concerning When Amicus Brief Are Permitted

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) proposes to add the following language to Rule 29(a):

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

NAHB generally supports the proposition that briefs which bring new relevant matter to the court's attention may be helpful. However, the Standing Committee would serve amici by explaining when briefs are or are not helpful. For example, briefs that restate a party's legal argument are redundant and do not help the court. However, briefs that address an element(s) of a party's legal argument in more depth or with different precedent may give the court a distinctive view of the argument. Moreover, briefs that illustrate how the court's decision could impact other non-parties or industries should be considered helpful.

NAHB does not support adding the phrase "*or that is redundant with another amicus brief*" to Rule 29(a). First, it assumes an amicus has foreknowledge of others that plan to file briefs in a case. NAHB files many amicus briefs, but often without knowledge of others planning to do the same. Therefore, it is practically impossible for an amicus to know if their arguments are "*redundant with another amicus brief*." Moreover, it is unclear what the Standing Committee means by "*redundant*." If two briefs have one argument that is similar, and each has one argument that is completely different—are those briefs "*redundant?*"

Furthermore, who is going to police the redundancy constraint? The amici may not be able to because they do not know others that are filing, or one amicus may not be willing to remove an argument that is vital to its brief. The other option is that the courts will determine whether a brief or part of a brief is redundant. How are judges to decide which brief is the redundant brief? They could choose by date filed. However, that leads to amici "racing to the courthouse," and does not promote justice and encourages speed over quality. Moreover, that option adds more work to the judiciary.

Thus, the redundancy constraint adds practical problems for amici and may add more work for judges. Therefore, NAHB does not support its addition to Rule 29(a).

Consent of the Parties

The Standing Committee proposes to remove the allowance for amici to file briefs with the consent of the parties, thereby requiring amici to file motions with every amicus brief. NAHB does not support this change.

Allowing briefs by consent reflects and promotes professionalism of the bar. In NAHB's experience, the parties generally consent to the filing of amicus briefs. Furthermore, it enables the parties to communicate with the amicus and explain why they will (or will not) consent to a particular amicus brief. It also allows the parties' attorneys to inform amicus of others that are interested in the same topic, thereby minimizing the number of briefs. Ultimately, allowing briefs by consent has worked well and it illustrates a recognition that there are different points of view, and that the judiciary will fairly determine the correct answer in a matter.

Requiring a motion with every amicus brief adds work and costs to the parties, the amicus, and the judiciary. First, amicus will now have to spend in-house time or incur more outside counsel costs to draft and file the motion. Second, the parties will now be forced to respond to these motions, when before they simply could have consented. Finally, the courts will now have to address all motions to file amicus briefs.

Finally, as the Standing Committee is aware, the U.S. Supreme Court has amended its rules in a manner that reduces the obstacles to filing amicus brief. The Committee should follow the Court's lead.

Therefore, NAHB suggests that the Standing Committee retain the allowance for amicus briefs based on consent of the parties.

* * *

NAHB is happy to discuss these important issues with you or the Standing Committee. If you have questions or would like to have further discussions, please contact me at 202-266-8230.

Sincerely,

Thomas J. Ward
Vice President, Legal Advocacy & Compliance
National Association of Home Builders

February 4, 2025

SUPPLEMENTAL SUBMISSION OF

ALAN B. MORRISON

PROPOSED AMENDMENT TO FRAP 29

One of the stated purposes behind the elimination of the current option in Rule 29 to file amicus briefs with the consent of all the parties is to prevent judges from having to recuse based on the identity of the proposed amicus. My prior submission suggested that the Committee should first establish guidelines for recusal based on amici for judges of the courts of appeals.

In that connection, I recently focused on Supreme Court Rule 29.6, which requires the inclusion of a corporate disclosure statement by a nongovernmental corporation in every filing, "except a joint appendix or an *amicus curiae* brief." In other words, industry trade associations- and many others - do not have to file disclosure statements showing who controls or supports them when they file amicus briefs, presumably because the Justices do not make recusal judgments based on who owns or controls an amicus. If the Justices do not care, why should judges of the courts of appeals?

SOUTHEASTERN LEGAL FOUNDATION

560 W. Crossville Rd., Ste. 104
Roswell, Georgia 30075
www.SLFLiberty.org

February 10, 2025

Submitted Electronically to
Regulations.gov
Hon. John D. Bates
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure
Docket ID No. USC-RULES-AP-2024
Aug. 13, 2024

Dear Judge Bates:

Southeastern Legal Foundation (SLF) submits this comment on the Proposed Amendments to the Federal Rules of Appellate Procedure, dated August 13, 2024. SLF is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic®. Since 1976, SLF has been going to court for the American people when the government overreaches and violates their constitutional rights. It engages in regular representation before the federal courts of appeal, and it frequently files amicus curiae briefs with the courts.

I. The proposed changes to Rule 29(a)(2) are vague, overbroad, and unnecessary.

Federal courts of appeal are tasked with deciding matters of vast importance, often which have lasting effects on our nation's jurisprudence and the American people writ large. Amicus briefs play an important role in aiding courts as they consider the precedent that underlies a case, the legal and constitutional framework at play, and the impact their decisions will have. The proposed changes to Rule 29(a)(2) would hinder, not help, federal courts in deciding such matters.

First, the proposal would eliminate the longstanding requirement that nongovernment amici must receive consent from both parties before filing a brief. But rather than eliminate the requirement altogether and welcome briefs from all amici, as the United States Supreme Court recently did, the Committee admits that it is moving "in the opposite direction."[1]

The language of the proposed change will only make the job of federal courts harder, not easier. First, a party must submit a motion for leave to file a brief explaining why and how its brief is "helpful" and "brings to the court's attention relevant matter not already mentioned by the parties."[2] The proposal fails to explain what it means to be a "helpful" brief on a "relevant matter"

[1] Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure, and the Federal Rules of Evidence, at 25 (Aug. 2024) (Preliminary Draft).
[2] Preliminary Draft at 28-30.

that has not already been "mentioned" by the parties. And this language appears contradictory. For example, if parties were appealing a challenge under the First Amendment Establishment Clause, amici would presumably need to file a brief that is on the same topic or closely related to it to be deemed "relevant." Yet a brief cannot touch on anything "already mentioned by the parties." Does this mean amici could never use the phrases "Establishment Clause" or "First Amendment" in their own brief? What if a party mentioned a Supreme Court case in a footnote to illustrate a marginal point—could amici expand on that case in their own brief, or must they refrain from citing that case altogether?

The answers to these questions are not clear, and they will send judges and clerks scrambling to assess each and every proposed brief on a case-by-case basis, spending far more time sifting through motions and comparing amicus briefs to party briefs than they do now. And as they always do, such vague and overbroad terms pave the way for discrimination. In justifying the proposed changes to this section and to Rule 29(b)(4), the Committee explains that courts must be able to determine the "credibility of the arguments and perspectives offered by amici" and compares judges evaluating amicus briefs with voters evaluating their candidates. While courts, like voters, are meant to be persuaded, this language suggests that courts should be making judgments about the very speech being offered in amicus briefs based on who is speaking and what they are saying. The lack of clear guidance for what constitutes a "redundant" brief thus opens the door to subjective review and creates inevitable risk of viewpoint- and speaker-based discrimination. Still worse, potential amici will not know if the courts will find their arguments credible until after they have spent the time and effort to preparing the proposed brief.

This proposed change will also have a significant chilling effect on amici, who will be deterred from using time and resources to write a thought-provoking brief to aid the courts if there is a likelihood that the brief will be denied on entry. Under this Committee's high bar, that likelihood seems substantial.

While judges must recuse themselves when faced with a conflict, amicus briefs do not create such a conflict because amici are not parties to a lawsuit. If the Committee's proposals were to go into effect, amici would be required to provide a detailed snapshot of their interests, perspectives, history, and experience via motion before a judge could even read their briefs. Surely such a detailed review risks infecting the judicial process with bias just as much as reviewing a brief itself would. And if judges were truly concerned about such conflicts, Rule 29(a)(2) already permits courts to strike briefs that would force a judge's recusal. Judges can simply task their clerks with taking the first pass at amicus briefs—reviewing the already-required statement of interest for any conflicts—before placing them on a judge's desk. With these proposed changes, however, judges will be all the more likely to review and respond to these detailed motions, jeopardizing their impartiality rather than safeguarding it.

II. The proposed changes requiring additional disclosures under Rule 29(b)(4) will likewise hinder rather than help the judicial process.

The proposed additional compelled disclosures under Rule 29(b)(4) will only drain judicial resources and increase the risk of bias in the judicial process. The concerns that underly the

proposed changes—namely, that amicus briefs serve as an extension of party briefs—are already addressed under the current Rule 29(a)(4)(E), which requires amici to disclose whether a party's counsel authored the amicus brief or contributed money to the brief, or whether a third party contributed money to the brief. The Committee fails to explain why an additional disclosure of whether someone other than amici has contributed "25% or more of the revenue of an amicus" is necessary, nor does it explain why or how that percentage indicates stronger influence upon a court proceeding than a lesser contribution.[3]

Amici are motivated by issues. SLF, for instance, litigates in four key areas of constitutional law: restoring constitutional balance, reclaiming civil liberties, protecting free speech, and securing property rights. When other parties bring cases that affect SLF's mission and could impact precedent within its zone of interests, it files amicus briefs to draw courts' attention to perspectives they may not have considered yet. The same is true for hundreds of legal nonprofit organizations across the country whose missions are centered around improving the legal landscape without charging their clients a dime. But requiring nonprofit organizations to take additional measures to submit amicus briefs—particularly at the risk of exposing donors—will chill their speech. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615-18 (2021) ("When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The *risk* of a chilling effect on association is enough[.]") (emphasis added).

Courts should be persuaded by strong legal arguments only. The ultimate role of amici is to encourage courts to consider the impact a decision could have on the issues that matter to amici. It should not matter who is doing the filing, yet it appears that the very goal—or, at least, the guaranteed result—of the proposed changes would be to give judges more discretion to cherry pick amicus briefs based on speaker and content. The Committee should resist this temptation.

Conclusion

If judges do not wish to read an amicus brief, they may simply disregard it. The proposed changes to Rule 29 will instead require them to intentionally sift through amicus briefs via motions practice. Judges must determine whether to grant an amicus brief based on vague and overbroad terms that lack any sort of guidance. This practice, coupled with the additional disclosure requirements, paves the way for judges to make distinctions based on speaker and subject when assessing amicus briefs. For these reasons, the proposed changes should not be permitted.

Yours in Freedom,

SLF
SOUTHEASTERN LEGAL FOUNDATION

Southeastern Legal Foundation

[3] *See* Preliminary Draft at 35, 42.

THE BUCKEYE INSTITUTE

February 13, 2025

Submitted via Regulations.gov

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

Re: Request for Comments on Proposed Amendments to Rule 29

Dear Judge Bates,

The Buckeye Institute submits this response to the Committee's request for comments on proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. The Buckeye Institute thanks the Committee for its work on this Rule to facilitate effective communication by amici to the appellate courts.

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. To fulfill its mission, The Buckeye Institute regularly files amicus briefs in the federal courts of appeals, filing 16 amicus briefs in 2024, along with 32 amicus briefs with the Supreme Court. The Buckeye Institute advocates for the right to speak and associate through amicus briefs without forcing the disclosure of amici's financial supporters.

Under current Rule 29, membership organizations are not required to disclose the identities of their members, even if a member has contributed funds earmarked for a brief. Fed. R. App. P. 29(a)(4)(E)(iii). The Committee's proposed changes would require disclosure of a member's identity if the member (1) joined a membership organization that is older than 12 months, (2) joined the organization within the 12 months leading up to the filing of the brief, and (3) contributed or pledged to contribute more than $100 for preparing, drafting, or submitting the brief. Proposed Fed. R. App. P. 29(e). Because the proposed disclosure risks stifling amicus participation and poses serious First Amendment concerns, The Buckeye Institute urges the Committee to reject these proposed changes.

I. Amicus participation is important to the democratic process.

The democratic process involves all three branches of government. The judicial branch is unique in that it is the final arbiter of many disputes. The court's decision in many of those disputes will impact non-parties to the case before the court and will shape—and sometimes create—policies

that affect all of society. Accordingly, the courts should have as much relevant information and legal thought as possible.

It is commonly believed that amicus curiae participation in the legal process originated in Roman law. *See*, *e.g.*, Paul M. Collins, *The Use of Amicus Briefs*, 14 Annual Rev. of L. & Social Science 219, 220 (2018). English courts later adopted this practice. *Id.* In the 1820s, the first amicus curiae participated in a U.S. Supreme Court case. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 Rev. Litig. 669, 711 n.31 (2008) (citing *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823)). Since then, amicus participation has grown exponentially. *See*, *e.g.*, Adam Feldman, ***Amicus Citations in OT 2022 and 2023***, Empirical SCOTUS (July 22, 2024).

"[A]micus participation serves an expressive function in a democratic system." Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 Fla. St. U. L. Rev. 315, 337–38 (2008)3. "Through these briefs, amici can present courts with new or alternative legal positions, social scientific and factual information, and perspectives regarding the policy implications of their decisions." Collins, *supra*, at 220. Amicus participation can help level the playing field by offering a relatively low-cost option for groups and individuals to unite and influence governmental policy. Garcia, *supra*, at 332. By promoting nongovernmental groups' access to the courts, the courts have access to more information, more legal analysis, and more points of view. *See id.* Some have raised concerns—without evidence—about an "imbalance of resources that may skew amicus participation toward the wealthy," *see id.* But that is speculative given that many non-profit organizations with broad financial support and representing a broad group of individuals, not necessarily wealthy members or donors, actively submit amicus briefs. And even if one could show that amici largely support the interests of wealthy people or entities, such a concern is "no different than in any other area of litigation." *Id.* Such concerns should motivate efforts to empower, not discourage, more groups with diverse views to file amicus briefs.

The Committee has expressed concern about excessive influence by members who donate funds for a specific brief. That concern is misplaced. When a membership organization files an amicus brief, it speaks on behalf of the organization and all members. If the organization were to become a mouthpiece for one member who earmarked funds for a brief in a way inconsistent with the organization's or the members' interests, it would betray its own mission and its other members. These internal dynamics prevent the established organizations that are the subject of the proposed changes from becoming mouthpieces for just one person or a small group of members with financial power. Further, the proposed rule presumes that amici organizations are—at least sometimes—acting in bad faith. Such a concern should be dispelled by the requirement that amici include a statement of interest that identifies the organization's purpose and its interest in the particular case. If this representation is false or inconsistent with the organization's purpose, members will then have the remedy of challenging the organization's actions or terminating their membership.

Amicus briefs are also "a formidable tool in the effectuation of social change through litigation." Simard, *supra*, at 677–78. This too is part of democracy. Groups from all sides of the political and social spectrum have used amicus briefs to inform and advise courts. "The Department of Justice

was one of the first entities to effectively invoke the amicus device in pursuit of public policy change and, in the early part of the twentieth century, state attorneys general and minority groups recognized the opportunity to use the tool to shape public policy." *Id.* at 678.

The NAACP, for example, "began its campaign against legal segregation by filing amicus briefs in a 1950s case involving the Westminster School District in Orange County, California. Garcia, *supra*, at 341. "Thurgood Marshall and Robert L. Carter, among other NAACP and ACLU lawyers, filed an amicus brief on behalf of the [segregated Mexican-American] children," outlining some of the initial data that would be used in *Brown v. Board of Education*. *Id.* That was not a politically correct position at the time and forcing disclosure of one-time donors supporting a specific brief certainly could have chilled such donations. Today, the ACLU and the United States Chamber of Commerce—organizations often on opposing sides of issues—are two of the most prolific filers of amicus briefs at all court levels. *See* Adam Feldman, ***Amicus Deep Dive 2024***, Legalytics (Jan. 2, 2025). Just as with the NAACP, the ACLU and the Chamber (and other amici) sometimes assert controversial or unpopular positions. The court should not discourage one-time donors from funding a brief that asserts a certain unpopular, but legally viable viewpoint.

Amicus briefs from organizations convey the organization's views to the court, its members, and society at large. As a long-standing and essential advocacy tool, participation by amici in the legal process should be encouraged rather than discouraged.

II. The First Amendment protects Amicus participation in the legal process and the proposed rule unlawfully infringes on the First Amendment.

The First Amendment prohibits the government from "abridging the freedom of speech" and interfering with "the right of the people . . . to petition the government for a redress of grievances." U.S. Const. amend. 1. Throughout history, litigation has served as a means of expression and a form of petition for redress of grievances. Garcia, *supra*, at 333. "Amicus briefs, like all briefs, are a form of speech." *Id.* at 334. When an organization has a vested interest in the outcome of litigation but cannot join the lawsuit—or when joining the lawsuit is not the most effective or efficient use of resources—filing an amicus brief becomes synonymous with activity that has historically been considered part of the Petition Clause. *See id.* at 337.

Whether one views amicus briefs as only a form of speech or additionally as a form of petition for redress of grievances, one thing is clear—the "Court has 'long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.'" *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). "Protected association [through amicus briefs] furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority,'" *see id.* (quoting *Roberts*, 468 U.S. at 622). And forced disclosure of a member's identity is akin to restricting one's "'right to associate' with their preferred publisher 'for the purpose of speaking.'" *See TikTok Inc. v. Garland*, No. 24-656, 2025 WL 222571, at *10 (U.S. Jan. 17, 2025) (Sotomayor, J., concurring in part and

concurring in the judgment) (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 68 (2006)).

The proposed rule infringes on both aspects of the First Amendment. Such infringement must pass the exacting scrutiny analysis. To satisfy exacting scrutiny, there must be a "'substantial relation between the disclosure requirement and a sufficiently important governmental interest,' and [ ] the disclosure requirement [must] be narrowly tailored to the interest it promotes." *Americans for Prosperity Found.*, 594 U.S. at 611 (quoting *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010)). While preventing an amicus from becoming a mouthpiece for a party may be an important governmental interest, that interest is satisfied by the party-relation disclosure portion of the rules. That claimed interest has little bearing on non-party members' interest in funding amicus briefs. Additionally, the courts lack a sufficiently important governmental interest in knowing which members funded an organization's amicus brief.

Restrictions on exercising a protected right through association by requiring disclosure can result in at least two distinct harms. First, such restrictions can chill participation in the judicial process. *See*, *e.g.*, *Americans for Prosperity Found.*, 594 U.S. at 616–618. Organizations and their members may feel intimidated into forgoing participation in or providing funding for amicus briefs. Although they may have no nefarious motives, members might fear that disclosing their identities could lead to "economic reprisal" and "other manifestations of public hostility." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *Talley v. California*, 362 U.S. 60, 65 (1960) ("identification and fear of reprisal *might* deter perfectly peaceful discussions of public matters of importance" (emphasis added)). "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Americans for Prosperity Found.*, 594 U.S. at 609 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Second, rules that chill individuals' association can hinder the effectiveness of the organization's amicus briefs by identifying culturally or politically unpopular individual members. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 462. As the Committee recognized, courts consider the identity of the amicus organization and the disclosed members when considering the validity of the arguments presented. When answering whether she was influenced by the identity, prestige, or experience of the amicus curiae, Justice Ginsburg noted that "her clerks often divide the amicus briefs into three piles: those that should be skipped entirely, those that should be skimmed, and those that should be read in full." Simard, *supra*, at 688. Similarly, in a study of 60 circuit court judges, with at least one from each circuit, a majority (55.3%) indicated that the amicus' identity, prestige, or experience are moderately or significantly influential. *Id.*[1] Although this reality encourages organizations to file well-reasoned and well-written briefs to develop a positive reputation with the courts, it is not necessarily a positive reality. Our justice system fundamentally lies on the concept that "justice is blind," meaning that justice is impartial: It dispenses justice the same to the rich and poor—and everyone in between—alike. *See*, *e.g.*, *Figures*

[1] 26.8% indicated that these factors had at least some influence. *Id.* at n.83.

of Justice*, Information Sheet*, Office of the Curator, Supreme Court of the United States[2] (the blindfold on the statue at the Supreme Court depicting justice "is generally accepted as a symbol of impartiality"). Hence, requiring amici to disclose certain individual members is peaking from underneath the blindfold, abandoning impartiality, or at least giving the appearance of partiality. It facilitates bias against any disfavored persons, whether because of wealth or political viewpoint, Facebook postings, tweets, or other characteristics and risks having amici relegated to the "should be skipped entirely" pile. Amicus briefs should be judged on the content of the brief, not who donated money to the organization—either as a general financial contribution or a directed donation.

Moreover, the size of the donation or the identity of the member/donor designating a sum for an amicus brief gives very little information to the court. Consider a billionaire who donates $1,000,000 to an organization *with no strings attached*, and the organization submits an amicus brief that it knows will please its billionaire donor and encourage another million-dollar donation. That amicus need not disclose the billionaire's identity. But if a middle-class person feels strongly about an issue and joins an entity that represents his/her views and donates $150 for the purpose of funding a specific brief, the amicus must disclose that person's identity. Assuming the identity of the $150 donor is disclosed under the new rule, the Court has learned very little about the real power behind the amicus organization. But the minor donor may well be dissuaded from donating because of the new disclosure rule. Indeed, under the new rule, the million-dollar donor could fund the creation of a new non-profit entity to file an amicus brief with the explicit purpose of funding a specific brief. And under new Rule 29(e), the new entity would only need to disclose the date of creation, but not the identity of the billionaire donor. *See* Proposed Fed. R. App. P. 29(e) ("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."). Thus, the proposed rule actually facilitates greater amicus influence by wealthy individuals and discourages participation by publicity-shy minor donors—the exact opposite of the Committee's stated intent.[3]

The Committee must consider the importance that amici play in the judicial system and the First Amendment harm that may result from restrictions on amici participation. The proposed rule is unwise and fails the exacting scrutiny test.

III. The Committee should propose rules governing amici participation at the district court level.

Although the Committee's work addresses only appellate rules, The Buckeye Institute encourages the Committee to propose rules regarding participation at the district court level to facilitate amicus participation there. Increased amici participation at the district court level would help judicial economy by allowing the trial court and the parties to address amici's arguments with the benefit of full briefing and evidence rather than waiting for the appellate court to hear the arguments for the first time. Yet the Federal Rules of Civil Procedure lack specific rules regarding

[2] **Figures of Justice**, SupremeCourt.gov.

[3] The Buckeye Institute does not advocate the disclosure of such donors. Such a requirement would only further chill the exercise of First Amendment rights.

amicus participation. Amici must hope that the district court grants a motion for leave to file an amicus brief—after investing time and resources into preparing the brief—and must guess the proper procedure for filing. The Committee's time would be well spent addressing these deficiencies and promoting amicus participation at that level, too.

Respectfully,
David C. Tryon
Director of Litigation
The Buckeye Institute

February 13, 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: Comment Regarding Proposed Changes to Federal Rule of Appellate Procedure 29

Dear Judge Bates,

Alliance Defending Freedom (ADF) submits this letter in response to the Judicial Conference Committee on Rules of Practice and Procedure's (Standing Committee) request for comments on proposed amendments to Federal Rule of Appellate Procedure 29 (FRAP 29), which governs the filing of amicus briefs in the U.S. Courts of Appeals. This comment highlights significant issues arising from the proposed amendments that may not be immediately apparent to the Standing Committee.

Purpose of An Amicus Brief

The Non-Redundancy Rule (FRAP 29(a)(2)). The Committee Note on Subdivision (a) describes amicus briefs that are "redundant with . . . other amicus curiae briefs" as "a burden." But it overlooks the greater burden that will be placed on amicus parties should the proposed amendments be adopted because amicus parties often do not know who else will submit an amicus brief or what topics other amici will address. Additionally, the proposed amendment lacks clear criteria for judges to determine when to deny leave to file due to redundancy, including how to decide which brief is permitted. This vague standard could lead to a first-come, first-served race to file. Perhaps more concerning, denying leave to file after the fact—rendering the amici's time and effort pointless—may significantly discourage amicus parties from submitting briefs at all. This chilling effect could substantially reduce the number of valuable briefs available to the Courts of Appeals.

While amici should and often do strive to avoid redundancy, minor and unintentional overlaps should not be grounds for rejecting a brief wholesale. In many cases, amicus parties have no way of fully avoiding redundancy. The proposed rule, therefore, sets an unrealistic—and perhaps even impossible—bar for amici to meet. And it may unintentionally create more problems than it solves.

Consent of the Parties (FRAP 29(a)(2)). The Advisory Committee advised that it is "particularly interested" in comments on the proposal to eliminate the option to file an amicus brief on consent at the panel stage. And for good reason, because the proposed rule is contrary to longstanding practice and the Supreme Court's recent allowance of amicus brief filings without motion or consent.

In short, the proposed rule change is a solution in search of a problem.

First, the Advisory Committee assumes that "[t]he requirement of consent is not a meaningful constraint on amicus briefs because *the norm among counsel is to uniformly consent without seeing the amicus brief*." (emphasis added). Describing the consent requirement as "not [] meaningful" undermines the spirit of collegiality among lawyers. And, actually, parties in the Courts of Appeals frequently withhold consent to file amicus briefs. There is no well-established norm of granting consent to all comers. In practice, few amicus authors draft a brief *before* seeking the parties' consent to file. Drafting an amicus brief is a labor-intensive, resource-draining effort that many lawyers undertake pro bono. Authors invest thousands of dollars in billable time completing a draft. They are unlikely to start drafting if a party denies consent. Without consent, uncertainty abounds about whether the amici can even file the brief. This uncertainty will be compounded if the consent-based amicus brief filing option is removed at the panel stage, leaving the decision to file briefs solely at the discretion of a single judge or motions panel.

Second, the proposed change assumes that potential amicus parties face uncertainty by having to "wait until the last minute to know whether to file a motion" when a party does not respond to a consent request. Putting aside the fact that amici curiae are free to file a motion if they become impatient with a party's response time, a motion calls into question whether an amicus brief *will even be filed*. That doesn't eliminate uncertainty. Fewer amicus authors may be willing to go through the time and effort of drafting a brief that a court may reject for unknowable reasons, thereby decreasing the number of amicus submissions that may significantly help courts.

Third, the Courts of Appeals' rulings have ramifications for millions of people, not just the parties. Since the Supreme Court traditionally grants review in only 70–80 cases—recently, 50–60 cases—each term, the vast majority of cases become final at the Courts of Appeals level. Due to the sheer number of cases, more law is established there than at the Supreme Court. What's more, amicus curiae usually reserve their briefs for cases that substantially impact the public at large—*i.e.*, most appeals do not have amici participation. Amicus parties who wish to file helpful briefs should not face added burdens or be rejected because a conflicted-out judge would rather sit on the panel than yield to a non-conflicted judge.

Fourth, the Advisory Committee raised concerns regarding recusal issues. The consent requirement, however, has been in place for decades without issue, and for

good reason. When an appeal goes up, the Clerk's Office checks the recusal list and excludes any judge with a conflict—usually without that judge's knowledge. Thereafter, the case is assigned to a panel of three judges with no conflicts. This process works, especially since appeals are randomly assigned to a panel of three judges who are also randomly selected. It's inherent to the system that some judges don't hear specific appeals (*i.e.*, any judge not randomly assigned to the panel). Given the randomness involved, a rare exclusion based on an amicus submission doesn't carry statistical significance.

Judges, of course, do not have a right to hear a particular appeal. Unless amicus briefs would wipe out the entire pool of judges—which, to ADF's knowledge, has never happened nor is ever likely to happen—the recusal concern seems overstated. Indeed, if all judges were somehow conflicted, they could strike any briefs that would disqualify them. FRAP 29(a)(2); *see Federal Trade Commission v. Quincy Bioscience Holding Company, Inc.*, 753 Fed.Appx.87 (2nd Cir. 2019) (unpublished) (stating that the current rule "permits a panel to strike an amicus brief after it has already been filed, thus allowing a panel to reject the brief at any point at which a panel member discovers a potential conflict").

The Advisory Committee expressed particular concern about recusal issues "at the rehearing en banc stage, making it especially important to retain the requirement of court permissions at that stage." ADF agrees. That's why Rule 29(b), *as currently written*, provides that, other than the government, "[a]ny other amicus curiae may file a brief only by leave of court" at the en-banc stage. FRAP 29(b)(2).

The Advisory Committee's purported solution is not only in search of a problem—it *is* a problem. The option that best "promotes public confidence in the integrity and impartiality of the judiciary" is *not* for a conflicted-out judge to decide whether to recuse or exclude an amicus brief that could be of substantial help to the court, especially when amicus briefs are most often filed in high-profile matters of significant legal importance. The best option is to retain the consent requirement.

Disclosure Requirements

The proposed amendments to FRAP 29 introduce several disclosure requirements designed to divulge relationships between an amicus and a party. This comment outlines the potential unintended negative effects of these new rules.

Disclosing a Relationship Between an Amicus and a Party (FRAP 29(b)(4)). Proposed new FRAP Rule 29(b)(4) requires an amicus party to disclose if a party contributed 25% or more of the amicus curiae's revenue during the prior fiscal year. One unintended consequence of this requirement is that it could discourage small organizations receiving such funds from filing amicus briefs on issues they strongly believe in—briefs that could be extremely helpful to a court—for fear the court would

view them as biased or their brief tainted. It is not uncommon for small organizations and their donors to align on key issues, and these organizations may want to raise their voices through amicus briefs. Small, donor-funded organizations may be forced to forgo essential funding from donors to avoid filing an amicus brief perceived as biased based on the identity of the donor.

An additional unintended consequence of this proposed requirement is that it will complicate the process of amicus parties joining briefs near the filing deadline. Attorneys drafting or coordinating amici briefs will need extra time to ensure compliance, including obtaining confirmation or certification from joining parties (there are often several to dozens) that neither a party nor its counsel contributed 25% or more to their revenue in the prior fiscal year. Amici curiae already on the brief may be reluctant to allow other organizations to join for fear of compromising their credibility with the court. The proposed change is unhelpful in that situation for another reason—one amicus party out of many who may have a connection to a party is not an indicator of undue influence on the joint brief.

Disclosing a Relationship Between an Amicus and a Nonparty (FRAP 29(e)). This proposed rule requires an amicus that has existed for less than 12 months to identify "the date the amicus was created." The addition of this language is purportedly intended to "unmask organizations . . . created for the purpose of artificially creating the appearance of widespread support for a position." Report of the Advisory Comm. on Appellate Rules, at 24 (May 13, 2024).

While the rule may appear noble at first glance, it actually casts a nefarious inference upon amici organizations less than a year old—that their voices are less credible or somehow compromised. Even when individuals come together to present a collective perspective through an amicus brief, their input can be immensely valuable to the court. Take, for example, a group of mothers who form an organization to oppose harmful policies affecting their children and offer an amicus brief to highlight these issues. This rule implies that courts should view their brief—and the accounts of harm based on personal experience—with suspicion.

This amendment also requires an amicus brief to "name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief, unless the person has been a member of the amicus for the prior 12 months." An unintended consequence of this rule is that it could discourage donors who wish to remain anonymous from supporting amicus briefs that would help courts, even if the contribution was completely charitable and was only to cover the costs of filing and attorney admission. ADF recommends removing this provision or raising the threshold to $1,000.

Disclosure by the Party or Counsel (FRAP 29(d)). This proposed amendment requires parties and their counsel to disclose if either "knows that an amicus has

failed to make the disclosure required by Rule 29(b) or (c)." ADF recommends that the Rule explicitly define "knows" as actual knowledge at the time of filing without a duty to investigate. Without this clarification, the proposed rule could create additional burdens, particularly for counsel, who may feel required to ask about the recipients of their clients' donations, which would otherwise be confidential.

CONCLUSION

Amici are friends of the court. The sole reason for amicus briefs is to assist the courts by bringing to the courts' attention important issues that might not otherwise be presented. For that reason, amici should be encouraged, not discouraged, from filing amicus briefs. Although reasonable rules governing amicus briefs should be in place, rules that discourage amici or that place unnecessary obstacles in their way should be avoided.

Although the proposed amendments to FRAP 29 might have been intended to address perceived issues of redundancy, judicial efficiency, and financial disclosures, as noted above, many of the proposed amendments will actually make it more difficult for amici to file amicus briefs, thereby depriving courts of amici's important insights.

Sincerely,

/s/ *Andrew J. Spangenberg*
Andrew J. Spangenberg
Director of Allied Legal Affairs
Alliance Defending Freedom

February 13, 2024

Hon. 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
RulesCommittee_Secretary@ao.uscourts.gov

RE: ACLU Comments on Proposed Amendments to Federal Rule of Appellate Procedure 29 (USC-RULES-AP-2024-0001)

Dear Judge Bates:

The American Civil Liberties Union (ACLU) respectfully submits this comment recommending that the Committee reject certain of the proposed amendments to Federal Rule of Appellate Procedure 29. The ACLU is a nationwide, non-profit, non-partisan organization dedicated to defending the civil liberties and rights guaranteed by the Constitution. Together with its state affiliates, the ACLU has appeared in thousands of cases in federal courts as *amicus curiae*.

First, the ACLU urges the Committee not to make the proposed changes to member and donor disclosure requirements for *amicus curiae,* because those changes would burden First Amendment associational rights. Any concerns the committee has regarding conflicts of interest would at most justify imposing the same disclosure requirements on *amici* as are imposed on the parties to a lawsuit—but the proposed changes go much further.

Second, the ACLU asks the Committee not to adopt the standard that *amicus* briefs be limited to matters "not already mentioned" by the parties, because doing so will be unduly restrictive and will prevent the filing of *amicus* briefs that would assist courts of appeals in resolving the complex legal issues that come before them. The ACLU includes in this comment examples of past *amicus* briefs filed by our organization that were cited by federal courts but would likely have been precluded had the proposed amendment been in place.

And third, the ACLU recommends that the Committee not impose a motion requirement on the filing of all *amicus* briefs, because of the considerable cost such a requirement imposes for little benefit.

The ACLU hopes the Committee will take into consideration the critical role that *amicus curiae* briefs play in assisting federal appellate (and district) courts in fulfilling their mandate to administer justice fairly and efficiently. Many legal issues that the federal courts are called on to resolve have consequences that reach beyond the concerns of the parties to a case, and those parties may not be

best positioned to identify or explain them. In particular, *amicus* briefs can help ensure that the narrow interests of the parties before a court do not result in decisions that have unintended or negative consequences for other individuals or the public writ large. The value of an *amicus* brief lies in the persuasiveness of its legal arguments, which are made publicly, and which opposing parties or other *amici* can respond to. Federal courts have always been free to disregard *amicus* briefs that do not assist their decision-making and to discount or ignore arguments that they do not find persuasive. Courts are never required to consider every—or even any—argument raised by an *amicus* brief.

Many litigants are also resource-constrained and cannot afford or find legal counsel with the requisite expertise to brief a complex legal issue. Such constraints can especially arise in the criminal context, where many defendants lack access to competent counsel, and where even the most capable counsel are often forced to address a panoply of issues at once. In all such cases, *amicus* briefs serve an important function in presenting legal arguments and context for the court's consideration.

ACLU
AMERICAN CIVIL LIBERTIES UNION

In summary, the ACLU strongly recommends that the Committee reconsider its proposed member and donor disclosure requirements and other rules that would burden or restrict *amicus* participation. Given that federal district courts largely lack formal rules governing *amicus* briefs and often look to federal appellate rules, the proposed changes to Rule 29 could upend federal litigation practice and leave trial and appellate courts without the benefit of *amicus* briefs that would be helpful to them.

I. The increased disclosure requirements on *amici* burden First Amendment associational rights and are not justified by legitimate interests in judicial fairness and impartiality.

The Committee's proposed disclosure requirements for *amicus* briefs trigger First Amendment scrutiny because they burden the constitutional right of association.[1] Any compelled disclosure of an association's members or donors triggers "exacting" scrutiny, requiring "a substantial relation between the disclosure requirement and a sufficiently important governmental interest."[2] In this case, the Committee's interest in preserving judicial fairness and impartiality and avoiding conflicts of interest are adequately addressed by the current Rule's disclosure requirements, which require information sufficient to determine

[1] *See Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 606 (2021); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *see also In re Primus*, 436 US 412, 428 (1978) (noting that for groups like the ACLU, litigation is a form of political expression and political association entitled to First Amendment protection).

[2] *Bonta*, 594 U.S at 607 (plurality op.).

whether a party has improperly contributed to an *amicus* brief by authoring it in whole or in part or contributing money to fund it. Any additional member or donor disclosure requirements will have the effect of deterring valid and helpful *amicus* participation in the federal courts,[3] and any such requirements are not necessary to advance the stated interests in support of the proposed amendments.

The ACLU, while largely agreeing with the comment made by the U.S. Chamber of Commerce on the First Amendment implications of the proposed disclosure rules,[4] writes to emphasize two important points regarding how to assess *amicus* disclosure requirements.

First, the Committee incorrectly suggests that the First Amendment is more tolerant of restrictions on *amicus* participation because such restrictions do not "prevent anyone from speaking out—in books, articles, podcasts, blogs, advertisements, social media, etc.—about how a court should decide a case."[5] Regulating *amicus* participation via *amicus* briefs triggers full First Amendment scrutiny because it burdens access to a unique medium of speech that is also a unique avenue to petition the courts.[6] The proposed alternative channels of advocacy are in no way equivalent to the formal submission of legal arguments for a court's direct consideration, subject to the rules and ethics of the legal profession and court practice. Even if they are actually seen by judges, arguments made outside the context of a brief filed with a court need not adhere to such rules, and accordingly may not have similar persuasive weight or credibility. An *amicus* brief also gives all parties (and the public) following a particular litigation notice of the legal arguments being made to a court, and the opportunity to respond—a fundamental requirement of due process. Encouraging groups who might otherwise file *amicus* briefs to instead seek to influence the courts via alternative media would require parties to attempt to track down the universe of such arguments and respond to them, without being aware of which arguments have even come to the court's notice. Indeed, this very concern underlies existing

---

[3] *See Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (subjecting a campaign finance disclosure law to First Amendment scrutiny because of its "deterrent effect" on the exercise of First Amendment rights).

[4] *See* Chamber of Com. of the U.S., Comment Letter on Proposed Changes to Rule 29 (Dec. 19, 2024), https://perma.cc/QGB4-P65H.

[5] Advisory Committee on Appellate Rules, May 2024 Report to the Standing Committee (revised Aug. 15, 2024), at 20, https://perma.cc/LE9Y-74SY.

[6] *See*, *e.g.*, *Packingham v. North Carolina*, 582 U.S. 98, 109 (2017) (reversing the North Carolina Supreme Court, which had determined that a law restricting access to social media posed no First Amendment problem because other websites provided an alternative medium for speech).

prohibitions on ex parte submissions to courts.[7] *Amicus* briefs become part of the record of a case, which is important for historical reasons, allowing other judges and the public to know which arguments a court had before it at the time it rendered its decision.

Second, the Committee should not rely on analogies to campaign finance laws and to the very different government interests asserted in support of such laws to assess whether the burdens on First Amendment rights are justified here. Campaign finance laws can be justified when they prevent corruption of public officials or the appearance of corruption that could occur via expenditures that directly benefit political candidates.[8] The same interests do not justify disclosure requirements on *amicus* briefs filed in court because such briefs do not create the risk of corruption of any judicial officer or other public official. Indeed, the filing of *amicus* briefs is intended to present legal arguments to assist a court in deciding an issue before it. As such, *amicus* briefs do not pose remotely the same kinds of risk that they will be used to subvert democratic processes as campaign contributions. Instead, in the vast majority of cases, *amicus* participation ensures the proper functioning of the courts and assists them in reaching correct and informed legal decisions. The attempt to burden *amicus* parties from making persuasive arguments to influence a court goes to the heart of what the First Amendment protects against.

And to the extent campaign finance laws mandating donor disclosure are justified to enforce campaign finance law and to enable an informed electorate, neither of those interests apply in the same manner to *amicus* briefs. The legitimate judicial interests in mandating disclosures by *amici* are to identify any improper coordination between an *amicus* and a party, and to identify any conflicts of interest mandating recusal by judges or the rejection of an *amicus* brief. The current iteration of Rule 29 satisfies the former interest, *see* Fed. R. App. P. 29(a)(4)(E), and any modifications to the Rule should continue to be narrowly tailored to identifying such impermissible coordination. And to the extent the Committee is concerned about conflicts of interest with *amici*, that would at most justify requiring *amici* to disclose the same information about corporate structure that is required of parties under the Federal Rules of Appellate procedure—something the current rules already do, *see* Fed. R. App. P. 29(a)(4)(A). Finally, the audience for an *amicus* brief is first and foremost the court, which evaluates the persuasiveness of the legal arguments presented by counsel who are bound by court and ethics rules. This context is far different from one in which an electorate may need more information to evaluate the truthfulness and credibility of speakers on a host of election issues.

---

[7] *See*, *e.g.*, Model Code of Judicial Conduct 2.9(A).

[8] *See Citizens United v. FEC*, 558 U.S. 310 (2010).

II. The requirement that *amicus* briefs be limited to matters not already mentioned by the parties is unduly restrictive.

"The traditional function of an *amicus curiae* is to assist in cases of general public interest by supplementing the efforts of private counsel and by drawing the court's attention to law that might otherwise escape consideration."[9] *Amici curiae* play a key role in the adversarial legal system, which relies on the "fundamental assumption . . . that strong (but fair) advocacy on behalf of opposing views promotes sound decision making."[10] A welcoming approach to *amicus* involvement reflects the reality that in a common law system, the outcomes of adversarial suits have implications far beyond the parties before the court.[11] If courts are to adjudicate responsibly, they must be more informed, not less, about the legal doctrines and policy considerations relevant to a particular case.

In proposing an update to Rule 29(a)(2) that would favor *amicus* briefs that address matters "not already mentioned by the parties" while disfavoring others, the proposed amendments subvert many of the fundamental purposes of *amicus curiae* involvement. The proposal would preclude multiple categories of helpful *amicus* briefs, including briefs in support of a party that elaborate on legal issues already raised and briefs in support of neither party that offer alternative approaches to those issues. Further, in light of *United States v. Sineneng-Smith*'s[12] limitation on courts' deciding issues or claims introduced only by *amici,* the proposal places potential *amici* in an untenable position: requiring them to write briefs that do not touch on matters mentioned by the parties, while also following the restriction against raising new legal issues not preserved by the parties. The proposal also introduces significant logistical concerns for potential *amici*, giving prospective *amicus* brief drafters an unrealistically narrow window to draft their arguments and, ironically, requiring greater coordination between potential *amici* and parties that nonetheless may be impossible due to confidentiality or other concerns.

---

[9] *Shoemaker v. City of Howell*, 795 F.3d 553, 562 (6th Cir. 2015) (citing 3–28 Moore's Manual—Federal Practice and Procedure § 28.84 (2014)).

[10] *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.) (rejecting the argument that to comply with Rule 29, briefs of *amicus curiae* must meet some threshold of impartiality).

[11] *See* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 696–97 (1963).

[12] 590 U.S. 371 (2020).

A. The proposal would preclude categories of *amicus* briefs that are helpful to the courts' disposition of difficult cases.

Disfavoring briefs that address issues already raised by the parties would limit subsets of *amicus* briefs that are uniquely helpful to the disposition of difficult cases. *Amicus* briefs frequently address issues that are raised by the parties, but elaborate or expand on them in a way that is valuable to the courts' adjudication. Federal appellate courts often cite *amicus* briefs that address issues or matters raised by the parties, but incorporate expanded legal analysis, factual or analytical context, or relevant policy considerations distinct from those raised in the parties' briefing.[13]

The ACLU, for example, is a frequent filer of *amicus* briefs, including those that have been cited or relied on by federal courts but would likely have been precluded by the proposed rule.[14] The ACLU and other groups often file *amicus* briefs that expound or elaborate on arguments already made and briefed by the parties.[15] *Amicus* briefs may raise distinct empirical or social scientific information relevant to the disposition of a claim addressed by the parties.[16] They

---

[13] *See Neonatology Associates, P.A*, 293 F.3d at 132 ("Even when a party is very well represented, an amicus may provide important assistance to the court. Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group." (quotation marks omitted)).

[14] *See*, *e.g.*, *Nat'l Veterans Legal Servs. Program v. United States*, 968 F.3d 1340, 1357 (Fed. Cir. 2020) (citing ACLU *amicus* brief discussing First Amendment right of access to judicial proceedings); *United States v. Yang,* 958 F.3d 851 (9th Cir. 2020) (citing ACLU *amicus* brief for information about Automated License Plate Reader technology); *see also Van Buren v. United States*, 593 U.S. 374, 395 (2021); *Counterman v. Colorado*, 600 U.S. 66, 88 (2023) (Sotomayor, J., concurring).

[15] *See, e.g.*, *Book People, Inc. v. Wong*, 91 F.4th 318, 333 (5th Cir. 2024) (citing an *amicus* brief that elaborated on the plaintiff's basis for standing) ("The ACLU of Texas and Constitutional Law Scholars, as *amicus curiae*, make the good point that enjoining the Commissioner from enforcing READER would free Plaintiffs from the injurious dilemma that READER creates: either submit unconstitutionally compelled ratings to the Agency at great expense or refuse to comply and lose customers and revenue.").

[16] *See, e.g.*, *U.S. v. Weaver*, 9 F.4th 129, 185 n.4 (2d Cir. 2021) (Chin, J., dissenting) (citing an *amicus* brief which provided social scientific research on the racial disparity of police stop-and-frisk practices in a case concerning whether the

may offer more detailed perspectives on a particular element of a claim raised by the parties.[17] They may reiterate the claims made by a party, but introduce distinct policy arguments for courts to consider.[18]

Further, an *amicus* brief "may be *particularly helpful* when the party supported is unrepresented or inadequately represented."[19] Despite the right to counsel in criminal proceedings, there is widespread recognition that there remains a crisis of access to competent representation, especially among indigent people facing criminal prosecution, who compose the vast majority of litigants in the criminal legal system.[20] Without a formalized right to counsel in civil litigation, there is a parallel crisis of access to competent representation, with a litigant in roughly three-quarters of the roughly 20 million civil cases filed in state courts each year lacking access to counsel altogether.[21] In the federal court

---

stop-and-frisk of a Black man—arguably based on racial pretext—comported with the Fourth Amendment).

[17] *See, e.g.*, *Smallwood v. Williams*, 59 F.4th 306, 317 (7th Cir. 2023) (citing *amici* elaborating on why a plaintiff's claims could proceed despite the exhaustion of remedies requirement under the Prison Litigation Reform Act).

[18] *See, e.g.*, *Cook Cnty., Illinois v. Wolf*, 962 F.3d 208, 227, 230 (7th Cir. 2020) (citing multiple *amicus* briefs that elaborated on the implications of a challenged federal rule change) ("Cook County urges that the Rule is arbitrary and capricious in a number of ways: (1) DHS failed meaningfully to evaluate and address significant potential harms from the Rule, including its substantial chilling effect on immigrants not covered by the Rule; (2) DHS failed to give a logical rationale for the duration-based standard; and (3) DHS added factors to the totality-of-the-circumstances analysis that are 'unsupported, irrational and at odds with the Final Rule's purported purpose.' Numerous *amici* underscored these points and explained how the Rule will lead to arbitrary results, cause both direct and indirect economic harms, burden states and localities that have to manage fallout from the Rule, and disproportionately harm the disabled and children."); *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1121 (9th Cir. 2024) ("As Amici American Civil Liberties Union and American Civil Liberties Union of Northern California (together, the ACLU) note in their amicus brief, the CAADCA's broad requirement that companies identify the risk of children being exposed to potentially harmful content necessarily compels companies to 'assess the potential for [online] material to instigate grief, sorrow, pain, hurt, distress, or affliction in a minor.'").

[19] *Neonatology Associates, P.A*, 293 F.3d at 132 (emphasis in original).

[20] John Gross, *Reframing the Indigent Defense Crisis*, Harv. L. Rev. Blog, https://perma.cc/W998-XLJN (Mar. 18, 2023); David Carroll, *Gideon's Despair*, The Marshall Project (Jan 2, 2015), https://perma.cc/AH84-F6YN.

[21] Nora Freeman Engstrom & David Freeman Engstrom, *The Making of the A2J Crisis*, 75 Stan. L. Rev. Online 146 (2024).

system, *amici* can serve an important role in supplementing the efforts of courts' *pro se* support services. And even with competent representation in criminal cases, a defendant may be constrained in properly briefing a key legal issue because of the need to address a panoply of issues. In light of this persistent reality, the input of *amicus* in difficult cases is not only helpful to truth-seeking and the administration of justice: it is indispensable to safeguard against the ongoing distortion of the common law that results when entire categories of litigants lack competent counsel who can fulfill their role as zealous representatives in the adversarial system.

B. The proposal is untenable in light of the rule regarding the proper role of *amici curiae* that the Supreme Court laid out in *Sineneng-Smith*.

As the Supreme Court has explained, to ensure the proper functioning of the adversarial system, courts must adhere to the party presentation principle, relying primarily on parties themselves to "frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."[22] While courts may bend the party presentation principle to ensure that, in particular, *pro se* litigants are not prejudiced by formalistic labeling and pleading requirements,[23] only "extraordinary circumstances" can justify a federal court departing entirely from issues mentioned by the parties.[24] In *Sineneng-Smith*, the Supreme Court held that precisely such a departure, where the Ninth Circuit relied on *amicus* input to address a legal issue unmentioned by the parties, violated the party presentation principle.[25]

Of course, the party presentation principle elucidated in *Sineneng-Smith* generally precludes courts from deciding legal *issues or claims* addressed only by *amici*, but does not limit courts from considering new *arguments* from *amici* on issues or claims preserved by the parties.[26] Indeed, that is the "classic role" of an *amicus curiae*.[27] But the Committee's proposal that prospective *amici* limit

---

[22] *Sineneng-Smith*, 590 U.S. at 375.

[23] *Id.*

[24] *See id.* at 372, 374–75.

[25] *Id.*

[26] *E.g. Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1208 (5th Cir. 1991); *White v. Illinois*, 502 U.S. 346, 352 (1992) ("We consider as a preliminary matter an *argument* not considered below but urged by the United States as amicus curiae in support of respondent." (emphasis added)).

[27] *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus., State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) (order) ("[T]he classic role of amicus curiae [is] assisting

themselves only to "matters" not mentioned by the parties, lest their briefs be disfavored on a Rule 29 motion, places prospective *amici* between a rock and a hard place. On the one hand, the rule change would require prospective *amici* to limit their arguments to issues and matters unmentioned by the parties. On the other, federal courts may not consider wholly novel issues raised only by *amici* that go beyond the pleadings and framing put forth by the parties. In light of this dilemma, it is unclear whether and how the proposal would work in practice, but it seems likely to drastically curtail the involvement of *amici* in ways that the Committee does not intend.

C. The proposal introduces significant logistical concerns among potential *amicus* brief drafters.

Prospective *amici curiae* must adhere to a logistically challenging timeline when formulating their briefs. The proposed rule change would compound these logistical challenges, potentially precluding *amicus* briefs altogether.

Under Rule 29(a)(6), the standard timing for *amicus* brief submissions is no later than seven days after the principal brief of the party being supported, or no later than seven days after the appellant or petitioner's principal brief if the proposed *amicus* brief is in support of neither party.

The proposal to disfavor *amicus* briefs addressing issues already mentioned by the parties would require *amicus* brief drafters, within an untenably narrow window of time, to review all parties' briefing and adjust their own drafts accordingly to edit out references to issues already addressed. For many drafters, this logistical hurdle will be insurmountable. Workarounds, such as closer collaboration between *amicus* drafters and the parties, may be impossible because of attorney-client privilege and ethical confidentiality concerns that sometimes preclude litigants from communicating arguments and work product to prospective *amici*.

Similarly, the proposal to disfavor *amicus* briefs that are "redundant with another amicus brief" presupposes that prospective *amici* know in advance the entire universe of individuals and organizations who might potentially seek to participate as *amicus*, can contact them to learn the scope and details of their planned briefing, and then have time and ability to excise or rewrite portions of a draft brief that may be regarded as "redundant" with another. Because there is no requirement (nor should there be) that prospective *amici* file with a court ahead of the deadline in the Rules, there is simply no way to know in advance what other *amici* may be planning to file. And in conjunction with the problems detailed above with rushing to rewrite a brief during the seven days between the deadlines for the party's brief and the *amicus* briefs in support of it, exhaustive coordination

---

in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration.").

with all potential *amici* is even more unworkable. It is no answer that prospective *amici* may join forces and collaborate on a brief to avoid redundancy. Although that may often be a good practice when prospective *amici* are aware of each other and are fully aligned in their view of a case, in many cases potential *amici* may agree on some predicate questions but have different views on others. Thus, even *amici* who are aware of each other and are able to share details in advance about their planned briefs may need to separately make some redundant arguments in order to explain the relevancy of points on which they diverge.

III. The elimination of consent filing and requirement for motion filing for all *amicus* briefs introduces a considerable cost for little benefit and runs counter to the trend in Supreme Court practice.

Imposing heightened restrictions and costs on the involvement of *amici curiae* through requiring a motion for leave to file in every case provides questionable benefit.

Prospective *amici curiae* are not alone in bearing the heightened logistical costs that would flow from this proposal. Even framed as a measure that promotes judicial economy and efficiency, the proposal does not achieve its stated aim, because it would require courts to expend further time and energy adjudicating motions for leave to file. Even under the status quo, "it is frequently hard to tell whether an amicus brief adds anything useful to the briefs of the parties without thoroughly studying those briefs and other pertinent materials, and it is often not feasible to do this in connection with the motion for leave to file."[28] As then-Judge Alito pointed out in a Third Circuit opinion, "the time required for skeptical scrutiny of proposed amicus briefs [in conjunction with a motion for leave to file] 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."[29]

In a shift that serves judicial economy and practicality, the Supreme Court, through a rule change that took effect on January 1, 2023, no longer requires consent or motions for leave to file *amicus* briefs.[30] Commentators have noted that the consent or motion requirement served little practical purpose because it imposed an unnecessary logistical burden given that virtually all *amicus* briefs submitted before the Court are, "as a practical matter," docketed.[31] Given that the

[28] *Neonatology Associates, P.A.*, 293 F.3d at 132–33.

[29] *Id.* at 133.

[30] Memorandum to Those Intending to File an *Amicus Curiae* Brief in the Supreme Court of the United States, Sup. Ct. of the U.S. 1, https://perma.cc/NC2H-2QUM (Jan. 2023).

[31] Amy Howe, *Court Drops Consent Requirement for Filing of Amicus Briefs, Makes Other Tweaks to Rules*, SCOTUSblog, https://perma.cc/9JXE-24A4 (Dec. 6, 2022).

time to review and incorporate or disregard the content of *amicus* briefs may be far less resource intensive than the time to adjudicate a motion for leave to file for each potential *amicus* brief, this practice makes good sense. The Committee's proposal runs directly counter to this trend in Supreme Court practice. Of course, freely allowing *amicus* filings without motion on the consent of the parties does not obligate courts to give any particular weight or consideration to the arguments advanced in each *amicus* brief, but it does save busy motion panels from needlessly reading and parsing proposed *amicus* briefs that will be reviewed anew by later merits panels.

IV. Because District Courts often follow the standards set by Federal Rule of Appellate Procedure 29, an adoption of these proposals would lead to a sea change in District Court practice as well.

In recent years, federal trial courts have also witnessed an increasing number of briefs of *amicus curiae* proposed and filed before them.[32] However, federal district courts often lack formal rules governing the filing of *amicus* briefs,[33] instead looking to the relevant rules and standards put forth by the federal appellate courts of their jurisdiction.[34] If adopted, the proposed change to Rule 29 would lead to a sea change in District Court practice across the board—imposing unworkable dilemmas for litigants and costs for the judiciary at the trial level.

* * * * *

Thank you for your consideration of the ACLU's comments as you evaluate these major proposed changes to the rules of federal appellate practice.

---

[32] *See* Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?* 41 Am. U. L. Rev. 1243, 1256 (1992).

[33] *See United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991).

[34] *See* Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 Fla. St. U. L. Rev. 315, 323 (2008); *see also, e.g.*, *United States v. Bd. of Cnty. Commissioners of the Cnty. of Otero*, 184 F. Supp. 3d 1097, 1115 & n.7 (D.N.M. 2015) ("Although no Federal Rule of Civil Procedure governs amicus participation in a district court case, district courts commonly look for guidance to Federal Rule of Appellate Procedure 29, which governs amicus curiae briefs in the United States Circuit Courts of Appeal.") (citing cases); *In re Dow Corning Corp.*, 255 B.R. 445, 464–65 (E.D. Mich. 2000) (citing Rule 29).

Sincerely,

Cecillia Wang
Esha Bhandari
Brett Max Kaufman
Nathan Freed Wessler
Tyler Takemoto
American Civil Liberties Union Foundation
125 Broad Street, Floor 18
New York, NY 10004
(212) 549-2500

Roderick & Solange MacArthur Justice Center

Roderick and Solange MacArthur Justice Center
501 H Street NE, Suite 275
Washington, DC 20002

macarthurjusticecenter.org

Devi M. Rao
Director, Supreme Court & Appellate Program
devi.rao@macarthurjustice.org
O 202 869 3490

February 13, 2025

Honorable John D. Bates, Chair of Committee on Rules of Practice and Procedure
Honorable Jay S. Bybee, Chair of Advisory Committee on Appellate Rules
Judicial Conference of the United States
Committee on Rules of Practice and Procedure
Washington, DC 20544

Re: Public Comments on Proposed Amendments to FRAP 29

Dear Judges Bates and Bybee:

The Roderick & Solange MacArthur Justice Center is grateful for the opportunity to provide comments on the proposed amendments to Federal Rule of Appellate Procedure 29. The Commission's proposed amendments concern an area in which our organization has specific expertise: filing amicus briefs in appellate courts. We wish to share our views on why portions of these amendments would burden the courts, parties, and amicus curiae.

The Roderick & Solange MacArthur Justice Center

The Roderick & Solange MacArthur Justice Center (MJC) is a not-for-profit public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. MJC has offices in Illinois, in Mississippi, in Louisiana, in Missouri, and in Washington, D.C. MJC attorneys routinely litigate or file amicus briefs in federal courts of appeals around the country in cases involving the criminal legal system and the treatment of incarcerated people.

Comments on Proposed Amendment to Rule 29(a)(3)

At the outset, we agree with the Committee's articulation of the court's interest in amicus briefs: "to help a court make the correct decision in a case before it."[1] MJC takes no position on the Proposed Amendments that relate to disclosure, and stands ready to comply with those changes. However, we view the proposals to require motions to submit amicus briefs in all cases—and to curtail the substance of amicus briefs—as inconsistent with this worthy objective. We believe these changes are actually likely to burden courts and impede fully-informed judicial decisionmaking.

Our central concern is with the proposed amendment to Rule 29(a)(3), which would, in every case, require a motion to file an amicus brief that addresses "the reason the brief is helpful"

[1] Draft of Proposed Amendments to Federal Rules, August 2024, at 20 (hereinafter "Proposal").

and why it "brings to the court's attention relevant matter not already mentioned by the parties."[2] This change would eliminate the option for non-governmental parties to file an amicus brief with the consent of the parties and thus would require courts to adjudicate whether *every* proposed amicus brief before the court is "helpful" or, in contrast, treads on ground "already mentioned" by a party.[3] MJC opposes the Committee's proposed changes to Rule 29(a)(3) as drafted because these changes would unnecessarily burden the judiciary, parties, and amicus curiae, and needlessly diverge from the Supreme Court's updated practice.

1. Amicus briefs can be useful to courts, even if they address issues "already mentioned" by a party.

Amicus participation allows courts to hear from interested outsiders and receive additional "social scientific, legal, or political information" to best ensure the court reaches a just outcome.[4] And ensuring the court has robust advocacy before it is fundamental to our adversarial system: "strong (but fair) advocacy on behalf of opposing views promotes sound decision making."[5] A member of the Seventh Circuit has outlined a series of contributions amici may make in their briefs, including:

- Offering a different analytical approach to the legal issues before the court;
- Highlighting factual, historical, or legal nuance glossed over by the parties;
- Explaining the broader regulatory or commercial context in which a question comes to the court;
- Providing practical perspectives on the consequences of potential outcomes;
- Relaying views on legal questions by employing the tools of social science;
- Supplying empirical data informing one or another question implicated by an appeal;
- Conveying instruction on highly technical, scientific, or specialized subjects beyond the ken of most generalist federal judges; and
- Identifying how other jurisdictions—cities, states, or even foreign countries—have approached one or another aspect of a legal question or regulatory challenge.[6]

Notably, these approaches can be valuable to the court regardless of whether they are already "mentioned" in the parties' briefs. That is because while parties may include any number of issues in their briefs in a cursory manner, amicus curiae are often better equipped to provide depth and color to a particular issue, thus aiding the court. As such, an amicus can "perform

[2] *Id.* at 28-29.
[3] *Id.*
[4] Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 810 (2004).
[5] *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 131 (3d Cir. 2002).
[6] *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020).

a valuable subsidiary role by introducing subtle variations of the basic argument."[7] Indeed, an amicus brief may "be additive" and "offer something different, new, and important," even if the subject matter was already mentioned by a party.[8] Such briefs perform an important function, providing the court with particular knowledge and expertise it would not have otherwise.

As then-Judge Alito stated while serving on the Third Circuit, "[t]he criterion of desirability" set out in Rule 29 is "open-ended, but a broad reading is prudent."[9] Indeed, at the Supreme Court—where Justices do not screen briefs at the front end—reference to amicus briefs in the Court's opinions indicate that they remain helpful and an important part of appellate decisionmaking.[10]

2. Motion practice aimed at policing Rule 29(a)(2)'s purpose requirement will not address the Committee's concerns regarding the need to "filter" out unhelpful briefs.

In suggesting why the proposed change may be beneficial, the Committee expressed a desire to insert a "filter" to ameliorate any burden unhelpful briefs pose to courts.[11] Rule 29(a)(3)'s motion requirement will have the opposite effect: it will increase litigation regarding the "purpose" of an amicus brief.

To start, the proposed amendment to Rule 29(a)(3)(B) does not clarify what makes a brief "helpful," or, in contrast, "redundant" and therefore "disfavored" under Rule 29(a)(2), thus creating opportunity for dispute—to be hashed out in motions and opposition filings—between an amicus and one or more parties. Moreover, parties' argumentation in their briefs may be chilled, as they may fear that "mention[ing]" a "relevant matter" in passing now bars the introduction of an amicus brief on that issue.[12] This fear may run them headlong into issues of waiver.[13] Or, at a minimum, parties and potential amici would be required to

[7] Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 711 (1963).
[8] *Prairie Rivers Network*, 976 F.3d at 763.
[9] *Neonatology Assocs., P.A.*, 293 F.3d at 132.
[10] *See* Karen O'Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 JUST. SYS. J. 35, 43 (1983) (finding that, in cases where an amicus brief was filed, at least one amicus brief was cited in 18% of the Court's opinions); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 757 (2000) ("There is no question but that the total number of references to amici is substantial, and that the frequency of such references has been increasing over time.").
[11] Proposal at 25.
[12] *Id.* at 28.
[13] *See* Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris. § 3974.1 & nn. 30-31 (5th ed. 2023) (collecting cases where raised arguments were deemed waived for failure to provide meaningful argument or sufficient supporting authority).

coordinate more comprehensively before briefs are filed, which is both burdensome and at odds with the notion that an amicus is a "friend of the court"—not a friend of a party.

And, of course, either a motions judge or a merits panel would be required in every case to *adjudicate* the motion—and accordingly, whether a brief is "helpful" and "brings to the court's attention relevant matter not already mentioned by the parties."[14] As then-Judge Alito put it: this "seems to be an unpromising strategy for lightening a court's work load."[15] That is because "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."[16] This is particularly true "because poor quality briefs are usually easy to spot," meaning that "unhelpful amicus briefs surely do not claim more than a very small part of a court's time."[17]

Aside from increasing burdens on the federal courts, the motion-for-leave-to-file process is a blunt instrument that risks depriving the courts of useful information. As then-Judge Alito noted, "[t]he decision whether to grant leave to file must be made at a relatively early stage of the appeal" when "[i]t is often difficult . . . to tell with any accuracy if a proposed amicus filing will be helpful."[18] And this "motion may be assigned to a judge or panel of judges who will not decide the merits of the appeal," requiring them to gaze into a crystal ball 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."[19] If the judge or panel faced with an amicus motion makes an incorrect judgement on this front and "a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance."[20]

Importantly, curtailing the courts' access to amicus expertise may undermine public confidence in judicial decisionmaking. Proscribing certain briefs robs the court of meaningful expertise that "will help the court toward the right answer[]."[21] This is concerning because judicial decisions—particularly at the appellate level—belong not just to the parties but "to the legal community as a whole."[22] What is more, as then-Judge Alito pointed out, increasing judicial scrutiny to the screening of amicus briefs "may also create at least the perception of viewpoint discrimination."[23]

---

[14] Proposal at 28-29.
[15] *Neonatology Assocs., P.A.*, 293 F.3d 133.
[16] *Id.* at 133.
[17] *Id.*
[18] *Id.* at 132.
[19] *Id.* at 133.
[20] *Id.*
[21] *Massachusetts Food Ass'n v. Massachusetts Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999).
[22] *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994).
[23] *Neonatology Assocs., P.A.*, 293 F.3d at 133.

The proposed rule change is also unfair to groups—and particularly non-profit organizations—that wish to assist the court as amicus. Notably, the motion for leave must also be "accompanied by the proposed brief."[24] Amicus counsel would accordingly have to invest substantial time into writing an amicus brief with little certainty that the brief will be accepted. Such a rule will deter amicus counsel—and especially nonprofit legal organizations like MJC—from filing meritorious briefs because these organizations lack the resources to invest in a brief that may never reach a merits panel. Well-funded interest groups will accordingly be more likely to file amicus briefs, while "arguments of groups with lesser resources will be lost."[25] Such a rule will keep diverse voices from contributing to appeals involving legal issues important to them.[26]

3. The new rule diverges from Supreme Court amicus practice without sufficient justification.

The Committee noted that it initially considered "follow[ing] the Supreme Court's lead" and eliminating the motion requirement altogether to "freely allow[] the filing of amicus briefs.[27] Specifically, the Supreme Court eliminated the consent requirement altogether in January 2023—parties need not provide consent to individual briefs, and amicus need not file a motion for leave to file the brief.[28] As the Clerk's commentary stated, "compliance with the [motion for leave] rule imposes unnecessary burdens upon litigants and the Court."[29] The same is true of amicus briefing in federal circuit courts, and MJC would urge the Committee to follow the Supreme Court's lead on this question.

In going "in the opposite direction" and proposing amendments to Rule 29(a)(3) "to require leave of court for all amicus briefs," the Committee relied on two ways in which amicus practice may differ between the two courts.[30] However, MJC respectfully suggests that the

---

[24] Proposal at 29.
[25] Ruben Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 331 (2008); *see also* Kearney & Merrill, *supra* note 10, at n.146.
[26] Amicus briefs have long allowed "discrete and insular minorities" to voice their interests before the court. Krislov, *supra* note 3, at 709. For example, the first minority group to participate as amicus curiae was the Chinese Charitable and Benevolent Association of New York, challenging anti-Chinese immigration laws. *Id.* at 707. For its part, the NAACP has contributed amicus briefs "almost from its inception," including in *Guinn v. United States*, a Grandfather Clause case where the NAACP "justified its participation on grounds that '"the vital importance of these questions to every citizen of the United States, whether white or colored, seems amply to warrant the submission of this brief."' *Id.* The NAACP often used amicus briefs to "test the water for broader victories" like *Brown v. Board of Education*. Garcia, 35 FLA. ST. U. L. REV. at 341.
[27] Proposal at 25.
[28] SUP. CT. R. 37.2.
[29] Proposed Revisions to the Rules of the Supreme Court of the United States (March 2022), https://www.supremecourt.gov/filingandrules/2021_Proposed_Rules_Changes-March_2022-redline_strikeout_version.pdf, at 8.
[30] Proposal at 25.

Committee's reasoning for eliminating the consent option in Rule 29(a)(3) does not justify the proposed amendment.

First, the Committee's Proposal states that the printed booklet requirement at the high court "operates as a modest filter on [Supreme Court] amicus briefs."[31] But there is no evidence that the printed booklet requirement deters amicus curiae who would otherwise want to present their interests before the nation's highest court. Additionally, once accepted, the majority of courts of appeals require amicus briefs to be printed, so any proposed amicus must expect that they will, too, have to file paper copies, so there is no deterrent effect.[32]

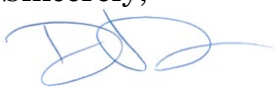
Second, the Proposal states that "unconstrained filing of amicus briefs in the courts of appeals would pose recusal issues."[33] However, the current text of Rule 29(a)(2) already allows judges to strike briefs that would result in a judge's recusal, so there is no need for front-end screening.[34] This provides a sufficient check without unduly burdening amici.

* * *

In short, MJC respectfully urges the Committee to rethink the proposal to require motions to file amicus briefs in every case, and to consider following the Supreme Court's lead and eliminating the motion requirement altogether. If the Committee wishes to provide more information to parties regarding what purposes amicus briefs should serve, MJC does not oppose a fleshed-out purpose requirement, to mirror Supreme Court Rule 37.1. However, for such a requirement to be litigated through motion practice in each case would waste—not save—courts' resources.

We appreciate the opportunity to provide the Committee with our views on these important proposals. We are thankful for the Committee's continued work to enhance the integrity and efficacy of court processes and rules.

Sincerely,



Devi M. Rao
Attorney

[31] *Id.*
[32] By the undersigned's count, all circuits but four (the Sixth, Ninth, Tenth, and D.C. Circuits) require accepted amicus briefs to file paper copies.
[33] Proposal at 26.
[34] FED. R. APP. PROC. 29(a)(2).

Rene L. Valladares
Federal Public Defender
District of Nevada

Lori C. Teicher
First Assistant

Amy B. Cleary
Appellate Chief

FEDERAL PUBLIC DEFENDER
District of Nevada

411 E. Bonneville Ave.
Suite #250
Las Vegas, NV 89101
Tel: 702-388-6577

Uploaded Public Comment to Regulations.gov

February 13, 2025

Hon. Allison H. Eid, Chair
Prof. Edward Hartnett, Reporter
Advisory Committee on Appellate Rules

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

Dear Judge Eid and Professor Hartnett,

We are the Federal Public Defender and the First Assistant Federal Public Defender for the District of Nevada. Thank you for your invitation to comment on the proposed revisions to Federal Rule of Appellate Procedure Rule 29 concerning amicus filings. We respectfully urge you to decline the proposal and retain the existing rule in its current form.

Background

Current Rule 29(a)(2) allows non-governmental parties to file amicus briefs during the initial consideration of a case at the merits stage with either consent of the parties or with leave of the court. At the rehearing stage, current Rule 29(b) requires non-governmental parties to file amicus briefs with leave of the court. These requirements are more stringent than the Supreme Court's recently amended amicus rule, which allows the filing of amicus briefs at any stage of the proceedings without the need to obtain consent or leave from the court. *See* Sup. Ct. R. 37.2 (eff. Jan. 1, 2023).

The Advisory Committee has thus far elected not to adopt the Supreme Court's revised amicus rule. Instead, it has proposed amending Rule 29(a)(2) "in the opposite direction" by "requir[ing] leave of court for all amicus briefs, not just those at the rehearing stage." Preliminary Draft, p. 25. This request for leave must also "be accompanied by the proposed brief." *Id.* The proposed amendment further provides than any amicus brief addressing a relevant matter "already mentioned" by the parties "is disfavored." *Id.* at p. 28.

We respectfully oppose these proposals. Each will adversely impact our clients and the development of constitutional and criminal law in serious ways. In our view, these proposals are unsound and should be declined.

Analysis

I. The proposed amendment will create substantial hardships for our clients and adversely affect the development of constitutional and criminal law.

The individuals we represent are all indigent persons charged with federal criminal offenses arising under the United States Code and the Code of Federal Regulations. The stakes upon conviction are dire. If convicted, possible outcomes include probation and supervision with restrictive conditions, hefty fines and restitution, lengthy incarceration terms, indefinite civil institutionalization, and death sentences. Convicted clients can also face deportation, permanent disenfranchisement, exclusion from federal financial and medical assistance programs, and housing, employment, and licensing restrictions.

"It is estimated that there are at least 10,000, and possibly as many as 300,000, federal regulations that can be enforced criminally."[1] Given the breadth of the criminal charges lodged against our clients, they can give rise to novel, complex constitutional or statutory claims that, once decided, will impact not only individual clients but also similarly situated individuals throughout the country whether presently or in the future.

As a result, amicus briefs play a critical role in the development of criminal law and the preservation of constitutional rights for everyone, not just an individual criminal defendant. The goal of these briefs is to assist the decisional process by

[1] NACDL, *Federal Criminal Code Reform* (Oct. 27, 2021), https://www.nacdl.org/Content/FederalCriminalCodeReform (last visited Feb. 7, 2025).

providing courts historical, institutional, and specialized knowledge on important issues and identifying possible unintended outcomes from a particular decision.

Established nonprofit agencies such as NACDL, ACLU, NAACP, the Cato Institute, the National Immigration Law Center, and other Federal Defender Offices are typical of the entities who provide amicus support in our criminal cases. These entities possess significant expertise on federal criminal law and constitutional issues. For instance, Federal Public and Community Defender Organizations represent the vast majority of all federal criminal defendants charged in the Ninth Circuit, and therefore have a unique, practice- and experience-informed institutional perspective on federal criminal cases. But these potential amici already have limited availability to draft briefs in our cases. These potential amici must always weigh the demand for their expertise against their own limited resources in prioritizing their support. Put simply, the need and demand for amicus support on criminal and constitutional matters far exceeds the available bandwidth for filing them.

Given the strained resources of these specialists, it is often difficult to have qualified amici weigh in on the criminal law and constitutional issues that arise at the circuit level. Qualified and reputable amici with the necessary expertise, time, and resources to author and file amicus briefs are readily available when a criminal case is before the United States Supreme Court. But the same is not true at the federal circuit level. Even so, amicus briefs are as critical in the federal circuit courts as they are in the Supreme Court, if not more so. Historically, the Supreme Court accepted around 1% of requests for review—about 80 of the 7,000 to 8,000 petitions it received each year.[2] Of the cases it accepts, only a handful are criminal cases. For October Term 2022, the Court accepted just eight federal criminal cases.[3] For October Term 2021, the Court accepted just seven.[4] As it is statistically unlikely the Supreme Court will accept a criminal case for review, the federal circuit courts bear the lion's share of criminal appellate review and the task of developing criminal and constitutional law. Expertise offered through amicus briefs should thus be readily available to the federal circuit courts—it is these courts that are the

[2] https://www.supremecourt.gov/about/faq_general.aspx. That number decreased to around 60 cases in recent Terms.

[3] Harvard Law Review, Supreme Court Statistics, 2022 Term, Table III, p. 503, https://harvardlawreview.org/supreme-court-statistics/ (last visited Feb. 7, 2025).

[4] *Id.* at 2021 Term, Table III, p. 514.

likely final arbiters of the overwhelming majority of the issues that criminal cases present.

The proposed amendment, however, will unquestionably quell the availability of the already constrained amici resources in federal criminal cases at the circuit level. Under current Rule 29, the government typically consents to the filing of amicus briefs in federal criminal cases. This consent allows amicus curiae to know, at the outset, that a brief it agrees to dedicate its limited resources to will, in fact, be accepted by the circuit court. The proposed rule will inexorably alter the amicus curiae decisional process for committing its expertise and resources. If there is no method by which amicus curiae can be assured the circuit court will accept its brief before its devoting scarce resources to research, write, and file it, amicus curiae will be far less inclined to offer its expertise at the circuit level. Stripping circuit courts from this valuable resource will consequently harm our clients' individual interests and the interests of the country at large by stifling the sound development of criminal and constitutional law.

The Advisory Committee suggests that some parties might not respond to a request for consent in a timely fashion and that consent may not serve as a useful filter. Preliminary Draft, p. 40. This has not been our collective experience when seeking governmental consent. In federal criminal appeals, the government timely responds to consent requests for amici filings and inquires about the purpose of amicus curiae briefs before granting consent if the purpose was not made clear by defense counsel or amici.

Finally, the proposal conflicts with the Sixth Amendment's guarantee of fairness in our adversary criminal process. *United States v. Cronic*, 466 U.S. 648, 656 (1984). The proposal requires only criminal defendants to obtain judicial leave for amicus support while placing no such restriction on the government. This lopsided process unnecessarily creates inequalities in an area where fairness between adversaries is constitutionally guaranteed.

For these reasons, the proposed rule presents an arduous stumbling block with potentially devastating consequences. Without amicus briefs, our circuit courts will have less information available to decide important criminal and constitutional matters that impact our clients' interests and the interests of the public at large. Curtailing amicus input will thus stifle the sound development of our criminal justice system. Current Rule 29 avoids this inauspicious outcome. The proposal requiring leave of the court for an amicus brief to be accepted should be rejected.

Most of the concerns expressed by the Advisory Committee appear to relate to civil impact litigation, whereas criminal defendants must defend against charges that the federal government brings. Thus, if the Advisory Committee intends to require leave of court for most cases, we respectfully suggest the Committee consider exceptions for amicus briefs supporting a defendant in a criminal case or a habeas petitioner in a proceeding under 28 U.S.C. §§ 2241, 2254, or 2255 and amicus briefs addressing a civil statute or regulation that has criminal law implications. Barring that, we respectfully suggest, at a minimum, the Committee consider amending Rule 29(a)(2)—which authorizes the United States, its officer or agency, or a state to file an amicus brief as a matter of course—to include a Federal Public or Community Defender organization (or a grouping of such organizations) as entities that may likewise file an amicus brief as a matter of course.

II. The proposed amendment disfavors any amicus brief that mentions a matter addressed in the parties' briefs regardless of the degree to which that matter was analyzed or the proposed outcome.

Current Rule 29 contains no textual limitation on the matters that an amicus brief may address. And it is not clear that a limitation is necessary. It is widely understood and accepted that no brief should duplicate matters raised in a party's brief. Moreover, duplicative briefs would provide no meaningful assistance to the circuit courts' decisional process and waste the resources of all involved—the courts, the parties, and the amici—becoming the antithesis of a "friend of the court" brief.

The proposed rule, however, provides that an amicus brief bringing to the court's attention a relevant matter "already mentioned" by the parties "or that is redundant with another amicus brief" is disfavored. While disfavoring "redundant" briefs would not change the accepted purpose of amicus briefs, disfavoring briefs addressing a relevant matter "mentioned" in a party's brief would.

The choice of the word "mentioned" is a cut too deep. It is common for amicus curiae to discuss a relevant issue that a party mentioned. Indeed, amicus curiae participate in cases because of their interest and expertise in an issue mentioned by a party. Amicus briefs should not rehash a party-presented issue. But many amicus briefs should continue to provide their expertise on relevant matters by delving deeper into the history, significance, and constitutional implications of the mentioned matter and, when warranted, proposing a different approach or result than that proposed by the party on a mentioned relevant issue. Simply mentioning the issue that a party presents in their brief would prevent an amicus from providing such potentially useful insight to the court.

The proposed rule's use of the term "mentioned" would thus curtail an important reason amicus briefs exist in the first instance—to provide courts with a broader or different understanding of a relevant issue mentioned by a party. Rule 29 should thus not be amended to disfavor amicus briefs that mention a relevant matter already addressed by a party.

We respectfully suggest the Advisory Committee consider alternative language such as: "An amicus brief that is mostly redundant with a party's brief or with another amicus brief is disfavored."

Conclusion

Rule 29 should not be amended to require judicial leave to file amicus briefs with a copy of the proposed brief. This requirement will inhibit the filing of amicus briefs by nonprofit entities with expertise in criminal law.

Rule 29 should also not be amended to disfavor amicus briefs that address a relevant matter simply mentioned by a party. Doing so would diminish the ability of amicus curiae to provide courts with a different perspective than the one advocated by a party on a relevant matter.

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

Sincerely,

Rene L. Valladares
Federal Public Defender

Lori C. Teicher
First Assistant Federal Public Defender

Amy B. Cleary
Appellate Chief

DUGAN
BABIJ
TOLLEY
& KOHLER LLC
Finding Answers.
Demanding Justice.

ATTORNEYS AT LAW

Henry E. Dugan, Jr.
Retired
Bruce J. Babij*†‡+▲
bbabij@medicalneg.com
George S. Tolley, III*†‡§
gtolley@medicalneg.com
Alison D. Kohler*
akohler@medicalneg.com

* Admitted in MD
‡ Admitted in DC
§ Admitted in NC
† Admitted in WV
+ Admitted in PA
▲ Admitted in OH

February 14, 2025

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: **FRAP 29 – Brief of an Amicus Curiae**

Members of the Committee on Rules of Practice and Procedure:

Thank you for allowing this opportunity to provide comments concerning the proposed amendments to FRAP 29 concerning amicus briefs.

I graduated from New York University School of Law in 1991. My office is located in Maryland. I have been a plaintiff-side practitioner for more than three decades.

While my practice focuses on litigation and trial work, I have consulted on numerous amicus briefs submitted to the U.S. Court of Appeals for the Fourth Circuit and the Supreme Court of Maryland, and I authored or co-authored 17 amicus briefs over the past 25 years. Most of those briefs were prepared for the Maryland Association for Justice (formerly the Maryland Trial Lawyers Association), a statewide specialty bar association with about 1,200 plaintiff-side practitioner members from every jurisdiction in our State.

My comments specifically concern the proposed removal of the party consent option and the proposed addition of content restrictions intended to reduce redundancy. I respectfully oppose both proposed amendments.

First, I respectfully suggest that elimination of the party consent option likely will add to the burdens on the appellate courts, without providing a substantial benefit. As amended, FRAP 29 would require an appellate court to read and consider the merits of a motion for leave to file as to ***every*** proposed amicus brief. Under current FRAP 29, appellate courts need not undertake such a review when all parties consent to an amicus brief, thereby saving time.

Currently, the work of determining the appropriateness of an amicus brief is "outsourced" to the parties, in at least some cases, thus relieving the appellate courts of the burden of screening proposed briefs.

Under the proposed amendments, it is reasonable to expect that very few, if any, motions for leave to file an amicus brief would concede redundancy. On the contrary, prospective amici

can be expected to contend that even slight differences in perspective can provide important insight with respect to nuanced issues of law and fact.

Because redundancy typically will not be conceded, the courts would be constrained to read and scrutinize every proposed amicus brief and make a finding as to redundancy – and then scrutinize most, if not all, of the same briefs as to the substantive issues on appeal.

Second, I respectfully suggest that the new content restrictions would impose unfair burdens on amici, who ***cannot know*** in advance of filing their amicus brief whether an appellate court might deem the brief "redundant" of one or more briefs filed by other amici.

Ironically, by eliminating the consent option altogether, the proposed amendments do not encourage communication among prospective amici and the parties prior to preparation and filing of an amicus brief. Without such communication, a prospective amicus is unlikely to know what issues will, or will not, be covered by other briefs.

Of course, an amicus brief can take many hours of attorney time to research and write, with associated costs. In most cases, the decision to begin researching and writing a brief – and incurring costs for the same – will be made long before a prospective amicus could possibly know that another amicus was planning to submit a "redundant" brief.

Because of the proposed new content restrictions raise a real concern that a proposed amicus brief could be rejected for "redundancy" – a standard that is impossible to predict with reasonable certainty – the proposed amendments to FRAP 29 produce a "chilling effect" on the speech of every prospective amicus, especially those with limited resources. Indeed, amici with relatively unlimited resources may experience the same chilling effect to a lesser extent, thereby creating an inherent bias that, over time, could result in the appellate courts hearing more often from well-funded amici.

Finally, the standard of "redundancy" in the proposed amendments to FRAP 29 is too subjective. No two briefs will be identical, and even slight differences of perspective can be important. The proposed new content restrictions likely will result in different Circuits – or even different panels within the same Circuit – applying the ambiguous standard in measurably different ways, which would appear arbitrary to the parties and the public.

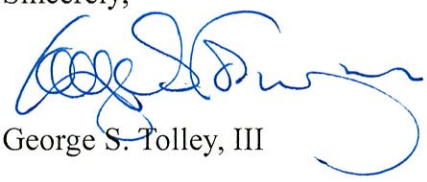
I acknowledge that appellate courts will view a truly redundant amicus brief as lacking much, if any, persuasive value. As a practical matter, however, the difference between a court ***disregarding*** a redundant brief, or ***rejecting*** the same brief as redundant prior to filing, may be measured by the effect that one or the other action might have on the general public's view of the court itself.

An appellate court that rejects proposed briefs from amici supporting one side or the other – justly or unjustly, fairly or unfairly – could be ill-equipped to defend itself against charges of impermissible bias for or against one side or the other.

At the present time in our Nation's history, I would respectfully suggest that it would be difficult to overstate the need for fairness and impartiality in our judicial system.

Thank you again for the opportunity to present these comments, and for your anticipated courtesy and indulgence.

Sincerely,



George S. Tolley, III

February 14, 2025

Submitted Via Regulations.gov

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

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

Dear Judge Bates:

I write on behalf of Americans for Prosperity Foundation ("AFPF"), a 501(c)(3) nonpartisan nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, AFPF regularly appears as *amicus curiae* before federal and state courts, including U.S. Courts of Appeals, on a wide range of matters,[1] including in partnership with an ideologically diverse collection of groups.[2] AFPF was also the named petitioner in *Americans for Prosperity Foundation v. Bonta*,[3] a Supreme Court decision directly bearing on the constitutionality of the proposed amicus disclosure requirements.[4]

AFPF believes that cases of public significance raising important legal questions benefit from broad amicus participation from a diverse array of voices and perspectives that can aid and help inform judicial decision making. Judges should have discretion to consult and make use of amicus briefs as they see fit and are well equipped to evaluate the credibility and persuasiveness of the legal arguments made in those briefs and determine what, if any, weight those arguments should receive. Judges are equally free to simply ignore amicus briefs that they do not find useful.

AFPF appreciates the opportunity to comment on the proposed amendments to Federal Rule of Appellate Procedure 29. Rule 29, in its current form, already requires disclosures that adequately protect the integrity of the amicus process without hampering judicial efficiency or infringing First Amendment rights. And by allowing the filing of amicus briefs on consent in most cases, Rule 29 allows judges to efficiently screen amicus briefs and separate the wheat from the chaff without burdening courts with the necessity of ruling on motions for leave to file. AFPF respectfully urges the Committee to reconsider and withdraw its proposed changes to Rule 29 to require nongovernmental amici to file a motion and obtain leave of court in all cases to file an

[1] *See generally* AFPF, *Amicus* Briefs, https://americansforprosperityfoundation.org/amicus-briefs/.
[2] *See*, *e.g.*, *Villarreal v. City of Laredo*, 94 F.4th 374, 412 (5th Cir. 2024) (en banc) (Ho, J., dissenting) (mentioning AFPF as part of "diverse amicus coalition of nationally recognized public interest groups").
[3] 594 U.S. 595 (2021).
[4] *See* Report of the Advisory Committee on Appellate Rules at 13 (revised Aug. 15, 2024) (appended to Preliminary Draft of Proposed Amendments) ("August Report") ("The Advisory Committee was aware in the spring of 2021 of the pendency of *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021). When the Committee met again in the fall of 2021 after that case was decided, it considered an analysis of that decision[.]").

amicus brief and require unnecessary and intrusive disclosures compromising the First Amendment associational rights of contributors to an amicus filer.

If anything, the Judicial Conference should bring Rule 29 in line with Supreme Court Rule 37 and allow filing of amicus briefs in all cases without consent of all parties.

I. Amicus Briefs Serve A Valuable Purpose and Should Be Freely Allowed.

Courts and the public benefit from broad and diverse amicus participation. After all, "[o]ur adversarial system of justice is based on the same fundamental premise as our First Amendment—a firm belief in the robust and fearless exchange of ideas as the best mechanism for uncovering the truth."[5] And "courts should welcome amicus briefs for one simple reason: '[I]t is for the honour of a court of justice to avoid error in their judgments.'"[6] "An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court."[7] Indeed, the "classic role of *amicus curiae*" is "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration[.]"[8]

"Courts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed."[9] "[E]ven a friend of the court interested in a particular outcome can contribute in clear and distinct ways," including:

> [o]ffering a different analytical approach to the legal issues before the court; [h]ighlighting factual, historical, or legal nuance glossed over by the parties; [e]xplaining the broader regulatory or commercial context in which a question comes to the court; [p]roviding practical perspectives on the consequences of potential outcomes; [r]elaying views on legal questions by employing the tools of social science; [s]upplying empirical data informing one or another question implicated by an appeal; [c]onveying instruction on highly technical, scientific, or specialized subjects beyond the ken of most generalist federal judges; [and] [i]dentifying how other jurisdictions—cities, states, or even foreign countries—have approached one or another aspect of a legal question or regulatory challenge.[10]

For judges who value amicus participation, well-written briefs that are "additive" and "strive to offer something different, new, and important"[11] may be a useful resource—regardless of whether a judge agrees with or is persuaded by an amicus brief's arguments. Broad amicus participation may be particularly valuable in cases raising complex doctrinal questions with implications

---

[5] *Lefebure v. D'Aquilla*, 15 F.4th 670, 674 (5th Cir. 2021) (Ho, J., in chambers).
[6] *Id.* at 675 (quoting *The Protector v. Geering*, 145 Eng. Rep. 394 (K.B. 1686)); *see also Am. Coll. of Obstetricians & Gynecologists, Pa. Section v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983) (Higginbotham, J., dissenting) (noting that "[m]ore than three centuries ago it was stressed that the general attitude of the court was to welcome *amicus* briefs" and suggesting "avoidance of unnecessary errors should be as relevant for the courts of today" (cleaned up)).
[7] FRAP 29, Notes of Advisory Committee on 1998 amendments.
[8] *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus. State of Mont*., 694 F.2d 203, 204 (9th Cir. 1982) (per curiam).
[9] *Sierra Club v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004); *see FTC v. AT&T Mobility Ltd. Liab. Co.,* 883 F.3d 848, 852 n.3 (9th Cir. 2018) (en banc) ("[W]e received eight amicus briefs from a broad array of interested parties[.] . . . The briefs were helpful to our understanding of the implications of this case from various points of view. We thank amici for their participation."); *A.C. v. McKee*, 23 F.4th 37, 42 n.2 (1st Cir. 2022) (similar).
[10] *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (Scudder, J., in Chambers) (listing examples).
[11] *Id.*

radiating far beyond the parties' dispute and those with far reaching practical implications. After all, counsel for the parties focus on winning specific cases, whereas amici are often more concerned with the broader implications of a case.

To be sure, not all amicus briefs add unique value. It is inevitable that some will be repetitive. And some judges may find amicus briefs more useful than others. But courts still benefit from a policy of liberally allowing the filing of amicus briefs. There are no downsides to such a policy. The party presentation principle already ensures amici cannot hijack a case and add entirely new arguments.[12] And judges are free to ignore and toss aside poorly written or otherwise unhelpful briefs. As then-Judge Alito has observed:

> 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. On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.[13]

That resonates here. At a recent meeting of the Judicial Conference's Standing Committee, Judge Millett of the D.C. Circuit put it thus: "'Even if [a brief] is not helpful at all, a lot of times, you just let it in, because it's a way for people to express their views to the court, which I think is a very important part of the openness of our process[.]'"[14] And in some cases, even amicus briefs that merely repeat the parties' arguments may add value. For example, in *AFPF* ideologically diverse groups from across the spectrum filed amicus briefs in support of AFPF—a fact noted by the majority.[15]

In sum, our adversarial system only benefits from a policy of liberally allowing the filing of amicus briefs.

II. The Proposed Motion Requirement Would Needlessly Burden Courts.

AFPF agrees with the multiple commenters who have expressed support for continuing to allow the filing of amicus briefs with the consent of the parties.[16] For the reasons expressed by those commenters, and as further discussed below, the proposed changes to Rule 29(a) to require leave of court are unnecessary, counterproductive, and should be withdrawn.

---

[12] The party presentation principle already ensures amici cannot hijack a case and add entirely new arguments. *See generally United States v. Sineneng-Smith*, 590 U.S. 371 (2020).

[13] *Neonatology Assocs.,* 293 F.3d at 133 (Alito, J., in chambers).

[14] Jeff Overley, *Judiciary Panel Clears 1st MDL Rule, Eyes 'Mouthpiece' Amici*, Law360 (June 4, 2024), https://www.law360.com/pulse/articles/1844246/judiciary-panel-clears-1st-mdl-rule-eyes-mouthpiece-amici. Judge Kayatta of the First Circuit echoed this sentiment: "'I share the concerns of Judge Millett. . . . I don't see why we're having a requirement that people seek leave for something that's essentially going to be automatically granted all the time anyhow.'" *Id.*

[15] *See AFPF*, 594 U.S. at 617 ("The gravity of the privacy concerns in this context is further underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors[.]").

[16] *See, e.g.,* Washington Legal Foundation Comment at 2–6, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0004; U.S. Chamber of Commerce Comment at 7–12, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0018; NFIB Comment at 2, 4, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0019; Atlantic Legal Foundation Comment, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0012; SIFMA Comment, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0015; Comment of Maria S. Diamond, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0013.

In AFPF's experience, with very rare exceptions, parties almost always consent to the timely filing of amicus briefs, including when motions for leave to file are required, such as in support of petitions for rehearing en banc. As the Advisory Committee found, "the norm among counsel is to uniformly consent without seeing the amicus brief."[17] This is both a matter of professional courtesy and, in many cases, a two-way street: amici for appellants and appellees are treated equally in a given case and freely granted consent.[18] Concordantly, "[t]he normal practice of the Department of Justice is to freely grant its consent to the filing of amicus briefs, even where it might reasonably be contended that the amicus brief does not make a positive contribution to the proper resolution of an appeal."[19]

This makes sense, "if only to avoid burdening the Court with the need to rule on the motion."[20] Motions practice on amicus briefs needlessly burdens courts and litigants alike,[21] particularly smaller organizations.[22] For judges who do not find amicus briefs useful, it is less time consuming to simply ignore them than take the time to review and rule on a motion for leave to file.[23] Indeed, a quick skim of the table of contents should often be sufficient to indicate whether an amicus brief is repetitive or duplicative of the parties' briefs or, alternatively, adds unique value in one way or another. On top of this, as then-Judge Alito put it: "A restrictive policy with respect to granting leave to file [amicus briefs] may also create at least the perception of viewpoint discrimination. . . . A restrictive policy may also convey an unfortunate message about the openness of the court."[24]

Moreover, while a court has near-plenary authority to control its own courtroom, the proposed motions requirement is in tension with bedrock First Amendment law, which prohibits burdening speech based on viewpoint or speaker by placing a burden on private filers that does not apply to government filers.[25] "In the realm of private speech or expression, government

---

[17] August Report at 26.

[18] In AFPF's experience, counsel for the parties are also prompt in responding to requests for consent to file.

[19] U.S. Dep't of Justice, Justice Manual § 2-2.125 (2018). Of course, "[a] Department attorney, when asked for consent to file an amicus brief, may condition consent on compliance with the timeliness and length requirements of Fed. R. App. P. 29, or on compliance with any local court rule or an existing order of the court in the pending matter relating to briefing schedules, page lengths, or similar matters." *Id.*

[20] Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 762 (2000).

[21] *See also* Memorandum from Amicus Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure, Re: FRAP 29, at 170 (Sept. 6, 2024) ("Members of the Standing Committee are concerned that requiring motions, rather than relying on the consent of the parties, will produce unnecessary work for both litigants and courts."), https://www.uscourts.gov/sites/default/files/2024-10_appellate_agenda_book_final.pdf.

[22] *See* NFIB Comment at 4.

[23] *Neonatology Assocs., P.A. v. Commissioner*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J., in chambers) ("[A] restrictive practice regarding motions for leave to file seems to be an unpromising strategy for lightening a court's work load. . . . [T]he 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. In addition, because private amicus briefs are not submitted in the vast majority of court of appeals cases, and because poor quality briefs are usually easy to spot, unhelpful amicus briefs surely do not claim more than a very small part of a court's time.").

[24] *Neonatology Assocs.*, 293 F.3d at 133; *see also Boumediene v. Bush*, 476 F.3d 934, 936 (D.C. Cir. 2006) (Rogers, J., dissenting) ("[D]enying the unopposed motion for leave to file" an amicus brief "may itself create an appearance of partiality.")

[25] *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828–29 (1995) ("When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

regulation may not favor one speaker over another."[26] It is true that the existing rule exempts government filers from seeking consent, thus removing a burden placed on other filers; but as discussed above, the difference in burden has been minimized by prevailing practice and DOJ policy. Here, by contrast, the burden that would be applied only to private filers cannot be diminished. It also creates the constitutionally suspect arrangement in which one government entity, the court, acts as gatekeeper to potentially exclude non-governmental speakers while always allowing government speech. The potential for placing a thumb on the scale in favor of the government's position is patent and, at a minimum, the potential perception of bias in favor of government speakers cannot be avoided. Finally, the proposed motion requirement is out of step with the U.S. Supreme Court's liberal amicus rules, which, as recently amended, do not require a motion for leave or even consent.[27] There simply is no justification for the proposal to eliminate nongovernmental amicus filings on consent—a misguided solution to a nonexistent problem.

III. The Proposed Disclosure Requirements Are Unnecessary.

Nor do the proposed amendments to Rule 29's disclosure requirements serve any meaningful purpose. The Advisory Committee claimed that these additional amicus disclosures are necessary, in part, because "parties are given a limited opportunity to persuade a court and should not be able to evade those limits by using a proxy" and "a court should not be misled into thinking that an amicus is more independent of a party than it is."[28] But Rule 29 currently accounts for these concerns, adequately guarding the integrity of the amicus process. As it stands now, nongovernmental amicus briefs must already include "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[.]"[29] "Significantly, the current rule requires disclosure of earmarked contributions not only by parties to the case, but by nonparties as well—with the exception of such contribution by the amicus itself, its members, or its counsel."[30] Among other things, these disclosure requirements "serve[] to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs" and "also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief."[31] In other words, FRAP 29 *already* requires amicus filers to disclose whether they are effectively an arm of a party. This allows courts to discern whether the amicus is truly independent.[32]

---

[26] *Id*. at 828 (citing *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).
[27] *See* Sup. Ct. R. 37.2, 37.3, 37.4; *see also* Revisions to Rules of the Supreme Court of the United States Adopted December 5, 2022, at 9 ("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."), https://www.supremecourt.gov/filingandrules/SummaryOfRuleChanges2023.pdf.
[28] August Report at 21.
[29] FRAP 29(a)(4)(E). "Subsection (ii) gets at whether a party is really behind an amicus brief. Subsection (iii) gets at whether a non-party is really behind an amicus brief. It is important to note that the existing rule already reaches funding by non-parties." Minutes of the Fall 2021 Meeting of the Advisory Committee on the Appellate Rules, at 5 (October 7, 2021), https://www.uscourts.gov/sites/default/files/final_-_minutes_appellate_rules_committee_fall_2021_1.pdf.
[30] August Report at 11.
[31] FRAP 29, Notes of Advisory Committee on 2010 amendments.
[32] It also bears noting that amicus briefs in support of neither party are often filed.

On top of this, and importantly, Rule 29 also already requires that "if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1" must also be filed.[33] In turn, Rule 26.1(a) requires that "[a]ny nongovernmental corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation."[34] "The purpose of this rule is to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify the judges from hearing the appeal."[35] "A Rule 26.1 disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case."[36] "The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of 'a financial interest in the subject matter in controversy.'"[37] These existing disclosures thereby ensure that judges do not have a financial conflict of interest and that judges have all the information necessary to evaluate whether they should recuse.[38] And Rule 29, in turn, *already* provides that "a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification."[39] If a Rule 26.1 disclosure statement is sufficient for the actual parties in the litigation, it is also hard to see why that would not be so for a non-party amicus curiae.[40] Indeed, it makes zero sense for an organization to have *less* disclosure obligations as a party than as a nonparty amicus.

IV. The Proposed Disclosure Requirements Raise First Amendment Concerns.

Numerous comments have also highlighted substantial First Amendment problems with the proposed amendments to Rule 29 to require additional disclosures.[41] For good reason.[42]

---

[33] FRAP 29(a)(4)(A).
[34] FRAP 26.1(a).
[35] FRAP 26.1, Notes of Advisory Committee on 1989 addition of Rule.
[36] FRAP 26.1, Notes of Advisory Committee on 1998 addition of Rule.
[37] FRAP 26.1, Notes of Advisory Committee on 2002 addition of Rule (quoting Code of Judicial Conduct, Canon 3C(1)(c) (1972)).
[38] *See generally* 28 U.S.C. § 455; Canon 3C, Code Of Conduct For United States Judges. For 501(c) nonprofit organizations financial conflicts are a nonissue, as no one owns a nonprofit.
[39] FRAP 29(a)(2).
[40] *Cf.* Comment from Alan B. Morrison, Associate Dean for Public Interest and Public Service Law at George Washington University Law School, at 3 ("I have serious doubts as to the need to police the filing of amicus briefs for possible recusals at all. But if there is a problem, there at least should be some guidance from the Judicial Conference on when appeals court judges must not sit in a case because of the presence of an amicus or its counsel."), https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0009. *See generally Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (amicus "is not a party").
[41] *See, e.g.,* National Taxpayers Union Foundation and People United for Privacy Foundation Comment, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0016; Washington Legal Foundation Comment at 6–8, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0004; U.S. Chamber of Commerce Comment at 2–7, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0018; Comment from U.S. Senators Mitch McConnell, John Cornyn, and John Thune, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0008.
[42] The Committee has long recognized that expansion of Rule 29's disclosure requirements implicate the First Amendment. *See* Advisory Committee on Appellate Rules Fall Agenda Book at 156 (Oct. 7, 2021) ("Fall 2021 Agenda") ("Constitutional Concerns Associated with Disclosure"), https://www.uscourts.gov/sites/default/files/2021-10-07_appellate_rules_agenda_book_0.pdf. That alone should counsel hesitation. *Cf.* Minutes of the Fall 2021 Meeting of the Advisory Committee on the Appellate Rules, at 8 (October 7, 2021) ("An academic member stated that the need for a constitutional memo should make the Committee hesitate. Even if an amendment would not violate

The First Amendment unequivocally protects "the freedom of speech[.]"[43] It also guarantees freedom of association to engage in that speech.[44] "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as th[e Supreme] Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[45] "[P]rivacy in group association" is "indispensable to preservation of freedom of association[.]"[46] "Protected association furthers a wide variety of political, social, economic, educational, religious, and cultural ends, and is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."[47] The Supreme "Court has recognized the vital relationship between freedom to associate and privacy in one's associations."[48]

"It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association[.]"[49] The threats to supporters of organizations across the ideological spectrum that advocate for controversial positions are not speculative or one-sided: "The deterrent effect" of compelled disclosure "feared by these organizations is real and pervasive[.]"[50] Public disclosure of the identities of supporters of such organizations puts them at risk to similar mistreatment and has a chilling effect. Indeed, as the Advisory Committee recognized, "[s]ome might even decline to join an association for fear that the organization might file an amicus brief that requires disclosure."[51]

---

the Constitution, constitutional interests counsel against getting within shouting distance of a constitutional violation. . . . If Citizen for Goodness and Wellness file an amicus brief, the danger caused by not knowing who they are is lower than the danger of chilling speech by requiring disclosure."), https://www.uscourts.gov/sites/default/files/final_-_minutes_appellate_rules_committee_fall_2021_1.pdf.

[43] U.S. Const. amend. I.

[44] *See Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). As a matter of first principles, the Constitution's guarantee of freedom of association, including anonymous association, may indeed flow from the First Amendment's Assembly Clause—a valuable point made well by amici in *AFPF*. *See, e.g.,* Becket Fund Am. Br., *AFPF v. Bonta*, Nos. 19-251 & 19-255 (filed Mar. 1, 2021).

[45] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958).

[46] *Id.* at 462.

[47] *AFPF*, 594 U.S. at 606.

[48] *NAACP*, 357 U.S. at 462.

[49] *Id.*

[50] *AFPF*, 594 U.S. at 617. As the Supreme Court observed in *AFPF,* for example:

> The petitioners . . . introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence. Such risks are heightened in the 21st century and seem to grow with each passing year, as anyone with access to a computer can compile a wealth of information about anyone else, including such sensitive details as a person's home address or the school attended by his children. The gravity of the privacy concerns in this context is further underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno.

Id. Regrettably, the Judiciary has also been exposed to intimidation tactics for unpopular rulings, including "doxxing." *See* 2024 Year End Report on the Federal Judiciary, 6–7 (Dec. 31, 2024), https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf.

[51] August Report at 13.

Accordingly, "[r]egardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny."[52] "[E]xacting 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."[53] To meet this test, the government must "demonstrate its need . . . in light of any less intrusive alternatives" and is not "free to enforce any disclosure regime that furthers its interests."[54] "Such scrutiny, . . . [the Supreme Court] ha[s] held, is appropriate given the deterrent effect on the exercise of First Amendment rights that arises as an inevitable result of the government's conduct in requiring disclosure."[55] "This is not a loose form of judicial review[.]"[56] Thus, as the AMICUS Act Subcommittee has observed, "[a]ny proposed amendments to FRAP 29 would have to be based on careful identification of the governmental interest being served and be narrowly tailored to serve that interest."[57] That standard has not been met here.[58] And as in *AFPF*, the proposed amendments to Rule 29 "create[] an unnecessary risk of chilling in violation of the First Amendment[.]"[59]

The proposed disclosure requirements fail exacting scrutiny because they are not narrowly tailored. "People may make contributions to organizations for a host of reasons, including reasons that have nothing to do with filing amicus briefs."[60] "Most" organizations "engage in a wide variety of activities other than submitting amicus briefs."[61] And people who contribute to organizations—particularly those with a broad, multifaceted mission—may only agree and wish to be associated with only *some* of the positions an organization takes, including those set forth in amicus briefs. For that matter, for organizations that engage in a broad array of activities, donors may contribute for reasons entirely unrelated to the organization's amicus advocacy and may be unaware that the organization even files amicus briefs.[62] Nonprofit organizations may only devote a small percentage of the revenue they receive to amicus advocacy. For many organizations that file amicus briefs, donors have no involvement in, let alone control over, what cases the organization engages in, let alone involvement in, or control over, the organization's position and arguments. The concern that "someone who provides . . . [25% or more] of the revenue of an amicus is likely to have substantial power to influence that amicus"[63] simply does not hold water for most organizations. For organizations with large memberships, this holds particularly true where "*any*

---

[52] *AFPF*, 594 U.S. at 608.

[53] *Id.* at 611; *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.").

[54] *Id.* at 613.

[55] *Id.* at 607.

[56] *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014).

[57] Fall 2021 Agenda at 164.

[58] In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Supreme Court identified three general justifications for election-campaign disclosure requirements, *see id.* at 66–68. *None* of those justifications obtains here; to hold otherwise, one would need to not only conclude that appellate litigation no different from a political campaign but also that life-tenured Senate-confirmed Article III judges are just politicians in robes. That is an affront to the integrity and dignity of the federal judiciary untethered to reality. And if accepted, this dangerous false notion would undermine public confidence in and undermine the legitimacy of the federal courts.

[59] *AFPF*, 594 U.S. at 616–17 (cleaned up).

[60] Preliminary Draft of Proposed Amendments at 39 (Committee Note).

[61] August Report at 23.

[62] As the Advisory Committee recognized, organizations "that regularly file amicus briefs" often "budget for them from general revenue[.]" *Id.* at 24.

[63] Preliminary Draft of Proposed Amendments at 42 (Committee Note, Subdivision (b)).

combination of parties or counsel has either contributed or pledged to contribute 25% or more of the revenue of an amicus."[64] On the flip side, the proposed rule is likely to dissuade smaller groups from filing amicus even when they have valuable information to provide to the court for fear of having to disclose, and potentially upsetting, a relationship with a significant financial partner. The 12-month lookback period also makes no sense for a simple practical reason: the time window for filing amicus briefs in U.S. Courts of Appeals is informed by the deadlines for the parties' briefs, and there is not a one-year lag time between when a district court issues its decision and when amicus briefs are filed. Thus, individuals supporting an organization would necessarily have not known their contribution might even partially fund an amicus brief in a given case when they made the contribution.

The proposed disclosure requirements independently fail exacting scrutiny because they do not serve a sufficiently important government interest. The Advisory Committee found that the disclosure requirements are justified, in part, because "members of the public can use the disclosures to monitor the courts, thereby serving both the important governmental interest in appropriate accountability and public confidence in the courts."[65] But mere public curiosity is not a substantial governmental interest.[66] Further, this informational curiosity is just as likely to misinform as inform the public. Most members of the public will not be culling public databases for the financial relationships of amici; they will rely on third parties to access these records. But the history of disclosure rules in other contexts has demonstrated that these third-party actors are more than willing to use disclosure not to inform but to deliberately blur the lines of normal procedure, to create selective outrage, to instill a sense of guilt by association, and in the most extreme cases deter future activity via harassment.

The Advisory Committee's Report also suggests without elaboration that additional disclosures are required because "the identity of an amicus does matter, at least in some cases, to some judges."[67] But respectfully, "[c]ourts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed."[68] As the Advisory Committee found, "amicus 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."[69] And life-tenured Article III judges are not politicians in robes but neutral umpires whose job is to independently call balls and strikes. Even if the amicus's identity and unique perspective mattered, Rule 29 already requires that an amicus brief contain "a concise statement of the identity of the amicus curiae" and "its interest in the case[.]"[70] And even if an amicus's identity is relevant to some, there simply is no evidence or reason to think that the identity of an organization's donors or members—who, again, may not even be aware of, let alone agree with or share the views expressed in, an amicus brief—are at all relevant. Indeed, in

[64] *Id.* (emphasis added).
[65] August Report at 20.
[66] *See also Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72–73 (2d Cir. 1996).
[67] August Report at 20. No specific examples are provided.
[68] *Sierra Club v. EPA*, 358 F.3d at 518. *Cf.* Minutes of the Fall 2021 Meeting of the Advisory Committee on the Appellate Rules, at 7 (October 7, 2021) (Judge Member: "Where an amicus has a track record, judges know how much weight to give its brief. The concern that there will be a large number of amicus briefs giving the illusion of broad support is remote at the court of appeals."), https://www.uscourts.gov/sites/default/files/final_-_minutes_appellate_rules_committee_fall_2021_1.pdf.
[69] August Report at 12. Indeed, AFPF makes the amicus briefs freely and publicly available on its website. *See* AFPF, *Amicus* Briefs, https://americansforprosperityfoundation.org/amicus-briefs/.
[70] FRAP 29(a)(4)(D).

circumstances where contributors do not support the views expressed in an amicus brief, forced disclosure of their identities would again be a form of misinformation, falsely suggesting that these contributors agree with the amicus brief.

V. The Advisory Committee Correctly Decided Against Unconstitutionally Requiring Disclosure of Non-Earmarked Contributions To An Amicus By Nonparties.

The proposed changes to Rule 29's disclosure requirements are unnecessary, infringe First Amendment rights, and should be withdrawn. But with respect to even more onerous and unnecessary disclosures "[w]ith regard to the relationship between a nonparty and an amicus," AFPF believes the Advisory Committee correctly "decided against" including in proposed Rule 29(e) "the addition of parallel disclosure requirements of" proposed Rule 29(b)(4), which applies to certain non-earmarked contributions to an amicus by parties.[71] The Advisory Committee found "the information obtained would be less useful in evaluating the arguments made in an amicus brief" than that required under proposed Rule 29(b)(4) and "the burdens of such disclosure would be much greater."[72] It further found: "With such a broad disclosure requirement, not limited to cases in which the contributor is a party, people might decline to make significant contributions to avoid disclosure."[73] The Advisory Committee previously recognized that "required disclosures here would be significant for many organizations, particularly non-business and true advocacy organizations. There is also reason to doubt its efficacy[.]"[74] "First Amendment concerns in this area," the Committee explained then, "have informed its separate treatment of parties and nonparties because the government interests in disclosure—as well as the burdens of disclosure—are different."[75] It also noted that "limiting disclosure of [non-party] contributions to those that are earmarked for that [specific amicus] brief is an important aspect of narrow tailoring."[76] In all events, the Advisory Committee's decision to exclude non-earmarked contributions to an amicus by nonparties from its disclosure requirements should stand. Any such requirement would fail exacting scrutiny and thus violate the First Amendment.

For the foregoing reasons, AFPF respectfully urges the Committee to reconsider and withdraw the proposed amendments to Rule 29 and retain the existing rule in its present form. If you have questions about this comment, please contact me at mpepson@afphq.org. Thank you for your attention to this matter.

---

[71] August Report at 23. AFPF believes this understates matters.

[72] *Id.*; *see* Preliminary Draft of Proposed Amendments to Federal Rules at 43 (Committee Note, Subdivision (e) (noting "burdens" "requiring the disclosure of nonparties who make any significant contributions to an amicus, whether earmarked or not" "could impose on amici and their contributors, even when the reason for the contribution had nothing to do with the brief").

[73] August Report at 23.

[74] Report of the Advisory Committee on Appellate Rules at 6 (Dec. 6, 2022), https://www.uscourts.gov/sites/default/files/advisory_committee_on_appellate_rules_december_2022_0.pdf.

[75] *Id.*

[76] *Id.* at 4.

Sincerely,

/s/ Michael Pepson

Michael Pepson
Americans for Prosperity Foundation
4201 Wilson Blvd., Ste. 1000
Arlington, VA 22203
(571) 329-4529
mpepson@afphq.org

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

1500 K Street, NW
Suite 900
Washington, DC 20005

Tel: 202.662.8600
Fax: 202.783.0857
www.lawyerscommittee.org

February 14, 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, D.C. 20544

Re: Proposed Amendments to Federal Rule of Appellate Procedure 29

Dear Judge Bates:

The Lawyers' Committee for Civil Rights Under Law appreciates this opportunity to comment on the proposed amendments to Federal Rule of Appellate Procedures 29 ("FRAP 29"). The Lawyers' Committee, like many other civil society organizations, often submits amicus briefs, whether on our own behalf or for coalition partners and community-based organizations. We have filed hundreds of amicus briefs highlighting the overlooked impacts that cases may have on Black people, other people of color, and other vulnerable populations. We write to address two main concerns with the proposed amendments (the "Proposal"). First, the Proposal's elimination of the option to file with the consent of parties and filter on redundant briefs unnecessarily burden the freedom of expression of amici. Second, the Proposal in its current form is unworkable.

I. The Proposal Unnecessarily Burdens Amici's Freedom of Expression

Amici, such as the Lawyers' Committee, rely on the current amicus framework to weigh in on matters that are important to them. The Proposal threatens their ability to do so by requiring them to obtain leave of court and avoid redundancy. Indeed, the express purpose of the Proposal is to create a more demanding "filter" on amicus participation and thus limit the ability of amici to voice their unique views. But there is no need to do so. Courts have recognized these perspectives can be of great benefit to their resolution of cases before them, even if some portion of the arguments of amici is repetitive or redundant.[1] For example, by giving a voice to an otherwise unheard perspective, amici can highlight "factual, historical, or legal nuance glossed over by the parties," give "practical perspectives on the consequences of potential outcomes," expand on "the broader regulatory or commercial context," and more.[2]

There is no evidence that these benefits are outweighed by any associated administrative burden on courts. The current consent of the parties framework has existed substantially unchanged since 1998, and courts have not been overwhelmed by "unhelpful" amicus

[1] . *See Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 764 (7th Cir. 2020).
[2] *Id.*

participation. In 2002, four years after the 1998 amendments were adopted, only 413 cases in the federal courts of appeals attracted any amicus attention.[3] In the majority of these cases, only one amicus brief was filed.[4] Based on this data, even if judges read every amicus brief before them (which they are under no obligation to do), that would still be only ten or eleven briefs a year.[5] This is not a significant burden. Nor has this burden substantially increased since 2002. In 2021, only about 50 of the thousand or so cases decided in the Sixth Circuit attracted any amicus participation.[6] Further, in 20-40% of those cases judges cited one or more of the amicus briefs in their opinions.[7] And in 10% of those cases, the Sixth Circuit's opinion relied significantly on one or more of the amicus briefs.[8] Thus, the evidence shows that rather than being overwhelmed by unhelpful briefs, courts are largely being aided by helpful briefs in the small minority of cases where they are filed.

Finally, even if courts were faced with burdensome amounts of unhelpful amicus briefs, the Proposal would increase not decrease these burdens. Under the current framework, a judge is free to consult an amicus brief submitted with the consent of the parties to the extent they find it helpful, or they can ignore it completely. If the Proposal is adopted, however, judges will be forced to consider motions for leave to file from all amici under new and vague standards. And even if amici meet these standards and their motions are granted, that is still no guarantee their brief will be helpful. Thus, judges are still left with briefs that may or may not be useful, except now they have the additional burden of ruling on a flurry of needless motions.

II. The Proposal in its Current Form is Unworkable

Finally, the Proposal's effort to prohibit "redundant" briefs is not workable. For starters, it is unclear how amici can ensure they are not replicating the arguments of others without some form of significant coordination, and it is unclear how any such coordination would work. Second, even if amici could divine the arguments of their co-amici, it is entirely unclear how much repetition is too much. Too broad a definition of "redundant" would deprive the court of helpful briefs simply because they discuss a subpart of an issue or doctrine already raised in other briefs. Too narrow a definition would force a judge to examine the nuances of each amici's argument just to determine whether their brief can be filed at all. Finally, the Proposal risks incentivizing a race to the courthouse where amici are forced to sacrifice careful analysis and argument for speed as they rush to file first so their constituents' position can be heard before it is too closely replicated. Such a dynamic would result in less helpful rather than more helpful amicus participation.

---

[3] John Harrington, Note, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RES. L. REV. 667, 678 (2005).
[4] *Id*.
[5] *Id*.
[6] Colter Paulson, *Amicus Briefs, OSHA, and the Sixth Circuit*, Sixth Circuit Appellate Blog (Dec. 2, 2021), https://www.sixthcircuitappellateblog.com/news-and-analysis/8994/.
[7] *Id*.
[8] *Id*.

For the foregoing reasons we urge you to reject the Proposal and allow amici to continue to file briefs with the consent of the parties and without undergoing the type of redundancy analysis contemplated by the Proposal.

Respectfully Submitted,

Thomas Silverstein

Thomas Silverstein
Director, Fair Housing & Community Development Project

Dariely Rodriguez
Acting Co-Chief Counsel

Edward Caspar
Acting Co-Chief Counsel

To: Honorable John D. Bates, Chair
Committee on Rules of Practice and Procedure

From: California Lawyers Association, Litigation Section,
Committee on Appellate Courts

Date: February 14, 2025

Re: Comment on Proposed Revisions to Federal Rule of Appellate Procedure 29

The Committee on Appellate Courts ("CAC") of the California Lawyers Association's Litigation Section respectfully submits these comments on the proposed amendments to Federal Rule of Appellate Procedure 29. Established in 2018, the California Lawyers Association is a nonprofit, voluntary organization with approximately 44,000 members. It is dedicated to the professional advancement of attorneys practicing in the state of California. The Committee on Appellate Courts consists of over twenty experienced appellate practitioners and court attorneys, drawn from a wide range of practice areas.

The proposed amendments would eliminate the option to file an amicus brief by consent and would impose additional disclosure requirements. As explained below, the CAC has concerns about the elimination of the consent option. The CAC supports the new disclosures between a party and amicus curiae, as well as the new disclosures between a nonparty and amicus curiae.

A. Proposed elimination of consent option at the panel stage

Current Rule 29 requires court permission to file amicus briefs at the rehearing stage, but not at the panel stage. The Advisory Committee has raised concerns about recusal issues at the panel stage, but it is not clear to the CAC that there are any issues at this stage. Amicus briefs are generally filed before principal briefing is completed, Fed. R. App. P. 29(a)(6), and thus

conflicts checks may be performed for amici in the same manner they are performed for the parties—before assignment to a merits panel.

One of the Advisory Committee's stated reasons for the proposed amendments is that requiring a motion would permit the judges themselves to be "involved in deciding whether to deny leave to file the brief or to recuse."[1] Under the current rule, "[t]he clerk's office does a comprehensive conflict check, and if an amicus brief is filed during the briefing period with the consent of the parties, it could cause the recusal of a judge at the panel stage without the judge even knowing."[2]

The CAC is concerned that this rationale might lead the public to believe the judiciary is more concerned with remaining on a case than with receiving valuable input from amici. If filing by consent was unavailable, and motions were denied because of a conflict with a judge, amici would be denied the opportunity to share their perspectives with the court, and the court would be denied the opportunity to hear them. The CAC believes that the better approach is to respect the parties' consent to the propriety of an amicus brief and assign a panel based on existing procedures.

Also, it is not clear that judges' involvement in the decision about the filing of amicus briefs would address the conflict issues. If, for example, a judge has a conflict with an organization that seeks leave to file an amicus brief and the panel rejects the brief so that the judge may remain on the panel, the judge will know that the organization sought to file a brief in support of one party. This could potentially influence the judge's decision in the case, even though the amicus brief was not filed.

Another concern about requiring motions for leave to file amicus briefs is that some potential amici might not be willing to hire counsel to prepare a brief if they do not know whether the court will grant leave to file it. This may result in fewer amicus briefs to assist the court, with a greater adverse impact on amici with limited financial resources.

---

[1] Comm. on Rules of Prac. & Proc., Jud. Conf. of the U.S., *Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure, and the Federal Rules of Evidence* 26 (Aug. 2024), https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2024.pdf.

[2] *Id.*

Thus, the CAC cautions against eliminating the filing of non-governmental amicus curiae briefs by consent at the principal briefing stage. If the proposed amendments are adopted, the CAC suggests that there be guidance on how the amendments will be applied. For example, courts should advise of the reason for the denial of the motion—whether it is for a conflict or otherwise.

B. Proposed amicus disclosures

The Advisory Committee has proposed disclosure requirements between a party and an amicus curiae that pertain to ownership and financial contributions. It has also proposed disclosure requirements between a nonparty and an amicus curiae that pertain to financial contributions.

The CAC supports the amendments regarding the relationship between a party and an amicus curiae as they promote transparency and fairness. If a party has a majority interest or is a major donor of an amicus curiae and this information is not disclosed, both the court and the public may be misled about the independence of the amicus curiae from the party. It is important that an amicus curiae offer its own insights about the merits of a case, rather than simply serve as a mouthpiece for a party. Parties already have the opportunity to submit a brief (or two); they should not be afforded an additional opportunity to advocate by influencing the contents of an amicus brief, which is the risk when a party has a significant financial interest in an amicus curiae. At a minimum, the court and the public should be aware of such a relationship so that they can determine how much weight to afford to the amicus brief.

Similarly, the CAC supports the amendments regarding the relationship between a nonparty and an amicus curiae. Under the existing rule, the mandated disclosure of contributions of any dollar amount is not always helpful to the court, as it is unlikely that relatively small contributions to an amicus will cause the amicus to be unduly influenced by the donor. The amendment, which requires that only contributions over $100 be disclosed, is more narrowly tailored and will provide the court with more useful information.

CONTACTS:

Committee on Appellate Courts
Jocelyn Sperling
Chairperson, Committee on Appellate Courts,
Litigation Section
California Lawyers Association
(415) 649-6700
jocelyn.sperling@calg.com

California Lawyers Association
Saul Bercovitch
Chief Governmental Affairs Officer
(916) 516-1704
saul.bercovitch@calawyers.org

LEUKEMIA & LYMPHOMA SOCIETY®

February 14, 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

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

Dear Judge Bates,

The Leukemia & Lymphoma Society (LLS) appreciates the opportunity to provide comment on the proposal to amend the submission and disclosure requirements for amicus curiae briefs.

LLS Interest and History of Filing *Amicus Curiae* Briefs

LLS is the world's largest voluntary health agency dedicated to fighting blood cancer and ensuring that the more than 1.3 million blood cancer patients and survivors in the United States have access to the care they need. LLS's mission is to cure leukemia, lymphoma, Hodgkin's disease, and myeloma, and to improve the quality of life of patients and their families. LLS advances that mission by advocating that blood cancer patients have sustainable access to quality, affordable, coordinated health care, regardless of the source of their coverage. In partnership with dozens of nonprofit organizations, LLS often appears as *amicus curiae* in courts of appeals – filing 10 such briefs over the past year. Our briefs have provided valuable information to the courts regarding significant policy and public health implications.

Requiring Leave to File

LLS opposes the proposal to require every nongovernmental amicus to affirmatively obtain leave of the court to file an amicus brief. We believe this unnecessary requirement will reduce important stakeholders' access to the appellate system.

Under the current Rule 29, except in rare and unusual circumstances, litigating parties' counsel routinely consent to the timely filing of amicus briefs. Judges and their clerks are then free to decide whether they find each brief helpful and what weight it should carry. Requiring a motion for leave would undermine this process by deterring the preparation and submission of worthwhile amicus briefs, in addition to unnecessarily burdening appellate judges.

Under the Committee's proposal, judges and clerks must spend limited time and resources deciding motions for leave based on an unclear standard of whether said brief is helpful or unhelpful. However, it is glaringly unclear what Courts should consider under this standard. Additionally, a party against

whom one or more amicus briefs would otherwise be filed may oppose the motions for leave, setting up even more uncertainty.

This uncertainty is likely to deter nonprofit organizations with limited resources from drafting briefs that would contain relevant and helpful information. This is likely to decrease the number of perspectives and arguments submitted by amici and have a chilling effect on smaller, resource-constrained groups. Indeed, instead of the approach proposed by the Committee, we believe the Supreme Court's approach – to allow the filing of timely amicus briefs without the need to obtain either the court's or the parties' consent – would be both preferable and in the interest of judicial efficiency.

Conclusion

LLS thanks the Committee again for this opportunity to provide comment. If you have any questions or would like to discuss our comments further, please contact Kinika Young, Director of Legal Advocacy at The Leukemia & Lymphoma Society at Kinika.Young@lls.org.

Sincerely,

Bethany Lilly
Executive Director, Public Policy

February 14, 2025

Honorable Judge D. Bates
Chair 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,

The NAACP Legal Defense and Educational Fund, Inc. ("LDF"), Human Rights Campaign ("HRC"), LatinoJustice PRLDEF ("LatinoJustice"), National Center for Lesbian Rights ("NCLR"), National Partnership for Women and Families (the "National Partnership"), National Employment Law Project ("NELP"), and National Women's Law Center ("NWLC") 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. Our organizations are non-profit organizations that routinely file amicus briefs on behalf of civil rights clients in federal appellate courts nationwide.[1] We write today to comment on two specific aspects

[1] The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Since its founding in 1940, LDF has strived to secure equal justice under the law for all Americans and to break down barriers that prevent Black people from realizing their basic civil and human rights. Since its enactment, LDF has routinely filed amicus briefs in federal appellate courts across the country.

The Human Rights Campaign ("HRC") is a national LGBTQ+ advocacy organization that envisions a world where every LGBTQ+ individual has the freedom to live their truth without fear and with equality under the law. HRC has a long history of leading and joining federal amicus briefs.

LatinoJustice PRLDEF, a 52-year-old civil rights organization serving Latino and other historically underserved communities, has considerable expertise submitting amicus briefs. LatinoJustice has authored or contributed to amicus briefs submitted in the First, Second, Third, Fourth, Fifth, and Ninth Circuits, on a wide range of issues, including education, employment, the criminal legal system, and voting rights. LatinoJustice joins the Legal Defense Fund and others in respectfully asking the court to consider the recommendations offered here.

The National Center for Lesbian Rights ("NCLR") is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ+) people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ+ people and their families in cases across the country involving constitutional and civil rights. NCLR has filed amicus briefs in numerous cases involving protecting the legal rights of LGBTQ+ individuals.

The National Employment Law Project ("NELP") is a non-profit legal organization with over 55 years of experience advocating for the employment and labor rights of lower-paid workers. NELP partners with community organizations, unions, and public agencies, to ensure that all workers can assert their power in the workplace and thrive in good jobs. NELP has litigated directly or participated as amicus curiae in nearly all federal circuits, the US Supreme Court, and in state courts on priority issues for workers.

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

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 and the other organizations put careful effort into writing amicus briefs that illuminate underexamined or underdeveloped issues in an appeal. But in doing so, we are always mindful that American courts "follow the principle of party presentation." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020); *see also Polansky v. Exec. Health Res. Inc*, 17 F.4th 376, 382 n.5 (3d Cir. 2021) ("[W]e generally avoid considering arguments raised solely in amicus briefs where[, as here,] the parties are competently represented by counsel.") (cleaned up); *De Oliveira v. Garland*, 112 F.4th 12, 30 (1st Cir. 2024) ("[t]he customary praxis in this circuit is to

---

The National Partnership for Women & Families ("The National Partnership") is a nonprofit, nonpartisan advocacy group that has over 50 years of experience in combating barriers to equity and opportunity for women. The National Partnership works for a just and equitable society in which all women and families can live with dignity, respect, and security; every person has the opportunity to achieve their potential; and no person is held back by discrimination or bias. The National Partnership has a long history of using litigation and supporting via amicus briefs and testimony.

The National Women's Law Center ("NWLC") fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. NWLC uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us—especially women of color, LGBTQIA+ people, and low-income women and families. For over forty years, NWLC has routinely filed amicus curiae briefs in cases involving gender-justice issues in state and federal courts across the United States, and we believe them to be a critical vehicle for communicating with the courts around the development of the law.

eschew arguments raised only by amici and not by the parties"); *Rodriguez-Hernandez v. Garland*, 89 F.4th 742, 752 (9th Cir. 2023), cert. denied, No. 24-5302, 2024 WL 4427484 (U.S. Oct. 7, 2024) ("An amicus curiae generally cannot raise new arguments on appeal, and arguments not raised by a party in an opening brief are waived[.]"); *World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 753 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal.") (cleaned up). 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)(2). 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 by 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 our organizations 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 our organizations expend 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.

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

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.

Our organizations 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 Committee 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
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street NW, Ste. 600
Washington, DC 20005
(202) 682-1300
mcain@naacpldf.org

Sarah Warbelow
HUMAN RIGHTS CAMPAIGN
1640 Rhode Island Avenue NW
Washington, DC 20036

Francisca D. Fajana
LATINOJUSTICE PRLDEF
475 Riverside Drive, Ste. 1901

New York, NY 10115

Danielle (Danny) King
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Ste. 370
San Francisco, CA 94102

Catherine Ruckelshaus
NATIONAL EMPLOYMENT LAW PROJECT
PO Box 1779
New York, NY 10008

Aimee Peoples
NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES
1725 Eye Street NW, Ste. 950
Washington, DC 20006

Elizabeth E. Theran
NATIONAL WOMEN'S LAW CENTER
1350 I Street NW, Ste. 700
Washington, DC 20005

AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE

1310 L Street NW Suite 200, Washington, DC 20005
(202) 466-3234 | au.org

February 14, 2025

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

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

Dear Judge Bates,

On behalf of Americans United for Separation of Church and State, I submit this comment in opposition to the proposed rule change to Federal Rule of Appellate Procedure 29.

Americans United is a national, nonpartisan organization that brings together people of all faiths and the nonreligious who share a deep commitment to religious freedom as a shield to protect but never a sword to harm others. We regularly file amicus briefs in cases across the country that implicate religious freedom. Our briefs provide unique perspectives from faith leaders, religious minority groups, and other communities that stand to be impacted by courts' decisions. Drawing on over seventy-five years of expertise, our briefs also provide historical and legal analysis that assist courts in analyzing the First Amendment's Religion Clauses. Multiple courts have favorably cited our briefs over the years, demonstrating the critical value that Americans United and our partners add.[1]

Amicus briefs help courts by bringing up important issues and arguments, and by highlighting the diverse groups and interests that will be impacted by a particular decision. The proposed changes to Federal Rule of Appellate Procedure 29 would hamper groups like Americans United, making it harder for us to raise key issues with the courts. More generally, these changes would discourage prospective amici and undermine judicial efficiency in two key ways. **First**, these changes would make it difficult—if not impossible—to submit briefs on behalf of broad coalitions. **Second**, the changes would limit the ability of third parties to raise their concerns through the amicus process, increasing burdens on courts and possibly driving concerned parties to pursue the more onerous process of intervention.

[1] *See, e.g.*, *Cross Culture Christian Center v. Newsom*, 445 F. Supp. 3d 758, 767 (E.D. Cal. 2020); *Legacy Church, Inc. v. Kunkel*, 472 F. Supp. 3d 926, 980 (D.N.M. 2020).

1. The Proposed Changes Could Prohibit Briefs by Broad Coalitions.

Under the existing rule, amicus briefs provide an opportunity for multiple organizations or communities—across sectors, faiths, and political divides—to express consensus on particular legal issues. To this end, Americans United has submitted or joined briefs with 200+ organizations or signatories.[2] This helps courts understand the wide range of interests that stand to be impacted by a decision.

Under the proposed rule change, an amicus brief must include a "concise description of the identity, history, experience, and interests" of amici, as well as "an explanation of how the brief and the perspective of the ami[ci] will help the court."[3] In addition, amici must include additional disclosures under proposed Rule 29(a)(4)(F). Because the proposed rule does not change existing length limits, amicus briefs cannot exceed 6,500 words without permission from the court.[4] While a couple of circuits currently exempt the concise statement of interest from the word count, most do not.[5]

If the Rule 29(a)(4) statement and other disclosures are included in the word count, coalitions of amici—which may comprise dozens or hundreds of organizations—**will be unable to submit a collective brief**. By the time each party provides a "concise statement" of interest alone, there would be little to no room remaining for the parties to advance their actual arguments. This could prompt multiple parties to file individual, duplicative briefs—which the court would then be

---

[2] *See, e.g.*, Brief of Over 200 Reproductive Health, Rights, and Justice Organizations as *Amici Curiae* in Support of Applicants, *U.S. Food & Drug Admin. v. All. for Hippocratic Med.*, Nos. 22A901-02 (Apr. 14, 2024), *available at* https://www.au.org/wp-content/uploads/2023/04/Amicus-of-Over-200-Reproductive-Health-Rights-and-Justice-Orgs.pdf.; Brief of 240 Students, Faculty, and Staff at Religiously Affiliated Universities as Amici Curiae in Support of Respondents, *Zubik v. Burwell*, Nos. 14-1418, 14-1453, 14-15-5, 15-35, 15-105, 15-119, 15-191 (Feb. 17, 2016), *available at* https://www.au.org/wp-content/uploads/2022/09/Amicus-Brief-of-Students-Faculty-and-Staff-at-Religiously-Affiliated-Universities.pdf.

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

[4] Proposed Rule 29(a)(5).

[5] The Federal Rules of Appellate Procedure do not exempt the Rule 29(a)(4) statement of interest from the word limit, and the Supreme Court has expressly required inclusion of the statement in the total word count. *See* Scott S. Harris, *Memorandum to Those Intending to File an* Amicus Curiae *Brief in the Supreme Court of the United States*, Oct. 2019, https://www.supremecourt.gov/casehand/Amicus Guide2019.pdf. While two circuits exempt the Rule 29(a)(4) statement from the total word limit, most circuits exclude only the elements listed in Federal Rule of Appellate Procedure 32(f). *Compare* 3rd Cir. L.R. 29.1(b) (excluding Rule 29(c)(4) statement from word count), *and* 5th Cir. L.R. 32.2 (same), *with* 1st Cir. L.R. 32.4 (no carve out); 2d Cir. L.R. 32.1 (same); 4th Cir. L.R. 32(b) (same); 6th Cir. L.R. 32(b) (same); 7th Cir. L.R. 29, 32 (same); 8th Cir. L.R. 32A (same); 9th Cir. L.R. 32-1(c) (same); 10th Cir. L.R. 32 (same); 11th Cir. L.R. 32-4 (same); D.C. Cir. L.R. 32(e)(3) (same); *and* Fed. Cir. L.R. 32 (same).

required to evaluate on an individual basis under the newly-proposed requirement that all non-governmental amici must seek the court's leave to file a brief.[6] This result would be wasteful and impractical, and would deprive third parties of the ability to demonstrate unified support or opposition on a particular matter.

2. The Proposed Changes Would Increase Burdens on District and Appellate Courts Alike.

Amicus briefs currently provide a low-stakes way for third parties to represent their interest in the outcome of a particular case, in contrast with the more onerous process of intervention under Federal Rule of Civil Procedure 24. Unlike Rule 24, courts must allow intervention if the proposed intervenor has "an interest related to the property or transaction that is the subject of the action" and the existing parties do not adequately represent their interest, and courts may allow intervention if the proposed intervenor has a claim or defense that shares with the main action a common question of fact or law.

By requiring non-governmental amici to seek the court's leave to file—and by specifying that each brief must "bring[] to the court's attention relevant matter not already mentioned by the parties"—the proposed rule change functionally elevates an amicus filing into something more akin to a motion for intervention. In essence, the new rule requires prospective amici to explain why the current parties (and any amici who previously filed) did not adequately represent their interests, asking them to identify a specific argument or set of facts that no other party has raised. This increases the burden on courts, which would need to read and evaluate each brief according to the newly-imposed standard. Moreover, amici—unlike intervenors—do not become full parties to the litigation. Having fewer rights, it makes sense that amici should have correspondingly lower burdens.

Tightening the standard for amicus participation could also have a trickle-down effect on the lower courts. Impacted organizations and communities, uncertain if they will be able to articulate their views at the appellate level, may feel compelled to seek intervention in earlier stages of litigation. This would create additional work and backlog at the district-court level, adding unnecessary motions practice and unnecessarily increasing the complexity of underlying cases.

* * * *

In short, the proposed changes to Federal Rule of Appellate Procedure 29 would increase burdens on parties and judges alike, to the overall detriment of the courts and the amicus process. Americans United strongly urges the Committee to reject the proposed changes to Rule 29(a)(2), 29(a)(3), and 29(a)(4)(D).

[6] *See* Proposed Rule 29(a)(2)-(3).

Sincerely,

/s/ Alexandra Zaretsky

Alexandra Zaretsky
Litigation Counsel
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005

Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
February 14, 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

Re: Proposed Amendment to Federal Rule of Appellate Procedure 29

Judge Bates:

This letter addresses concerns regarding the proposed changes to Federal Rule of Appellate Procedure 29, which would introduce additional disclosure requirements for non-government filers of amicus briefs. The intent behind these efforts is understood to manage the growing volume of amicus filings; however, the necessity of this rule and its potential unintended consequences need to be considered.

Firstly, the current rule has been effective, and there appears to be no significant issues necessitating these new disclosure requirements. The proposed change might be perceived as politically motivated rather than aimed at improving judicial administration.

Secondly, implementing new disclosure obligations could discourage participation in amicus advocacy, raising concerns related to freedom of association as recognized in cases such as *NAACP v. Button*. While transparency in judicial proceedings is crucial, requiring amici to disclose certain funding sources may deter organizations and individuals from engaging in the legal process, potentially affecting the quality of legal debate.

Lastly, addressing the issue of redundant briefs through the proposed approach might have counterproductive effects. Incentivizing parties to file quickly rather than ensuring well-reasoned contributions could reduce the quality of amicus participation. The Supreme Court has tackled the challenge of increasing amicus filings by allowing any entity to file without the need for consent, thereby reducing administrative burdens rather than increasing them.

For these reasons, it is advisable for the Committee to reconsider the adoption of the proposed amendment. The current rule is effectively serving the courts and the public, and the suggested changes may not provide the intended benefits.

Sincerely,

Daniel J. Dew
Legal Policy Director
Pacific Legal Foundation

February 14, 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, D.C. 20544

RE: Request for Comments on Proposed Amendments to Federal Rule of Appellate Procedure 29, Docket ID No. USC-Rules-AP-2024-0001 (August 13, 2024)

Dear Judge Bates:

The New York Intellectual Property Law Association (NYIPLA) is a one-hundred-two-year-old professional association whose interests and practices lie in patent, trademark, copyright, and other intellectual property (IP) law. Traditionally, the NYIPLA has been one of the largest regional IP bar associations in the United States. The NYIPLA's members include a diverse array of professionals, including in-house counsel and patent agents for businesses that own, enforce, and challenge various IP rights, as well as attorneys and patent agents in private practice who represent entities in adjudicative proceedings before the U.S. Patent and Trademark Office (USPTO), the federal courts, and various arbitral fora. Many of the NYIPLA's members also actively participate in IP litigation across all IP specialties. The entities served by the NYIPLA's members include inventors, entrepreneurs, venture capitalists, businesses, universities, research institutions, and industry and trade associations.

Relevant to the current proposed rule changes to Federal Rule of Appellate Procedure (FRAP) 29, NYIPLA, via the volunteer efforts of its members, has filed no fewer than 86 amicus briefs over the course of the last 28 years, related to matters that have meaningful impact on the practice and scope of IP Law. These briefs, which have been filed at the Supreme Court, the Federal Circuit and other Circuit Courts, are prepared without compensation and do not advocate for either party, but rather seek to provide a service as a "friend of the court," allowing a different perspective than that of the litigants. NYIPLA carefully considers the cases in which we participate as an amicus curiae, first through review by our Amicus Brief Committee and then by review and approval by our Board of Directors.[1] This selective process ensures that amicus briefs are prepared only when we conclude that the brief will be of substantial value to the court, will reflect the interests of our diverse membership as a whole, and merits the volunteered time and effort of our attorney members of all levels of experience. It is through the filing of these amicus briefs that NYIPLA sees itself - in whatever small way - as helping to shape the future of IP law.

[1] For instance, NYIPLA has filed amicus briefs in recent years to such varied issues as to obviousness-type double patenting (*Cellect, LLC v. Vidal*, Supreme Court Docket No. 23-1231); derogatory words used as trademarks (*Lee v. Tam,* Supreme Court Docket No. 15-1293) and patent subject matter eligibility (*Alice Pty, Ltd. v. CLS Bank Int'l*, Supreme Court Docket No. 13-298 and *Mayo Collaboratives Services v. Prometheus Labs, Inc.*, Supreme Court Docket No. 10-1150), among others.

The currently proposed amendments to FRAP 29 raise concerns to NYIPLA. Some of the changes are detrimental to a standard of drawing from a wide array of amici; other proposed changes appear to be unnecessary. NYIPLA comments on the proposals are as follows:

Elimination of the party consent option for filing briefs. The proposed amendments require leave of court for all proposed amicus briefs. Consent of the parties, the overwhelming route toward gaining permission to filing briefs, and one which plays a valuable gatekeeping function, is no longer an option. In creating uncertainty as to whether a brief will be accepted, this proposed change would be disappointing and potentially chilling to the future participation of amicus curiae. This chilling effect will be more particularly felt by organizations like NYIPLA that rely entirely on the volunteer efforts of members in preparing amicus briefs.

In contrast, Supreme Court Rule 37, most recently amended in 2023, allows for filing of amicus briefs without the court's permission or consent of the parties. This rule should be adopted for all courts to encourage the filing of amicus briefs. Amicus briefs allow for the free flow of ideas to the various courts from members of the IP community who are not litigants in the particular case, yet will be affected in the long run by the appeals court's ruling. Amici frequently raise issues about which IP professionals and the public in general feel most strongly. Moreover, disfavoring duplicative arguments among amici is potentially counterproductive. Courts should *want* to know whether several amici feel the same way on a particular issue. The multiplication of many voices on the matter can serve as a guidepost to the importance of the matter to the IP community and the public at large.

Avoiding redundancy. If adopted, the proposed amendment is also designed to reduce "redundancy," requiring that amicus briefs bring to the court's attention relevant matters *not already mentioned by the parties*. The proposed rule further disfavors briefs that discuss matters *already mentioned by other amici*. As highlighted above, this change discounts the level of importance the matter may have to multiple amici, and also the level of acceptance by amici of arguments made by the parties. Both considerations are potentially significant. Moreover, when an amicus agrees with the position of a party, it can suggest that the matter may be more far-reaching than just the litigants. Of course, the filing of reinforcing amicus briefs does not imply that the position asserted in these briefs is correct, but rather that the position may have added significance.

A bright-line word limit of 6500 words would now be the standard. Absent permission granted by the court, amici will no longer be able to file a brief with up to 50 percent of the number of words allowed in a party brief. The 6500-word limitation is precisely the same amount as that allowed in any current "typical" amicus brief. Yet, by allowing the parties to file merits briefs of more than 13000 words, the court has recognized that a matter is important enough to be more robustly argued. Limiting the amicus brief to 6500 words will prevent a more in-depth discussion by an amicus of a matter which the court has itself deemed important enough to require such discussion.

NYIPLA acknowledges the undertaking of the Committee in proposing these rule changes, and is appreciative of the chance to provide our comments on the Committee's draft. We thank you for your consideration.

Respectfully Submitted,

Patrice P. Jean, President
New York Intellectual Property Law Association

NATIONAL ASSOCIATION OF Manufacturers

February 14, 2025

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

Re: Proposed Amendments to Federal Rule of Appellate Procedure 29

Dear Judge Bates,

The National Association of Manufacturers ("NAM") appreciates the opportunity to provide comments to the Committee on Rules of Practice and Procedure (the "Committee") in response to its proposed amendments to Federal Rule of Appellate Procedure 29, the rule governing submission of amicus briefs to federal courts of appeal.[1]

The NAM is the largest manufacturing association in the United States, representing 14,000 manufacturers of all sizes, in every industrial sector and in all 50 states. Manufacturing employs nearly 13 million people across the country, contributing $2.93 trillion annually to the U.S. economy.[2] The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM frequently files amicus briefs to explain the ramifications of a particular ruling on the manufacturing industry, providing the broader regulatory or commercial context of a dispute as well as industry expertise to assist courts in resolving cases. *See*, *e.g.*, *Richter v. Syngenta Crop Protection LLC* (7th Cir.) (supporting the trial court's application of Federal Rule of Evidence 702); *Liberty Global, Inc. v. USA* (10th Cir.) (discussing the proper application of the economic substance doctrine). Amicus briefs, like the ones the NAM files, "bring[] relevant matter to the attention of . . . [courts] that has not already been brought to [their] attention by the parties" and are "of considerable help to" courts. Fed. R. App. P. 29, Committee Notes on Rules—1998 Amendment, Subdivision (b).

The proposed amendments threaten to stymie amicus filings by requiring: (1) amicus curiae to file a motion for leave of court to file all amicus briefs; (2) that an amicus brief not be "redundant" with other amicus briefs; (3) the disclosure of whether a party or its counsel has contributed 25% or more to the revenue of amicus curiae for its prior fiscal year; and (4) the disclosure of any person who pledged to or contributed more than $100 to the preparing, drafting or submission of an amicus brief unless the person was a member of amicus curiae in the 12 months prior to the contribution. For purposes of this comment, we refer to the first two proposed changes as the "motion and redundancy requirements" and the latter two proposed changes as the "relationship disclosure requirements." The NAM urges the Committee not to

[1] Preliminary Draft of Proposed Amendments to Federal Rules ("Preliminary Draft"), available at https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment.

[2] National Association of Manufacturers, Facts About Manufacturing, available at https://nam.org/manufacturing-in-the-united-states/facts-about-manufacturing-expanded/.

finalize these proposed changes to avoid chilling useful amicus filings and abridging the exercise of core First Amendment rights.

1. **The Motion and Redundancy Requirements Could Chill Useful Amicus Filings Without Much Added Benefit**

The NAM, like other amicus curiae, benefits from the current practice where both parties to a case generally consent to the filing of amicus briefs—obviating the need to move for leave to file—and the NAM files those briefs *without* establishing that its briefs are not redundant with other briefs that will be filed. The proposed amendments' motion for leave and redundancy requirements threaten to chill useful amicus filings by increasing the labor and financial costs required to file amicus briefs. The vagueness of the redundancy requirement could also chill useful amicus filings.

The NAM is a non-profit business organization that promotes the interests of manufacturers, including through its amicus program. Its program engages outside counsel to file amicus briefs covering the incredibly vast legal, regulatory and compliance issues affecting the manufacturing sector. In 2024, for example, we filed 57 amicus briefs across 26 different federal and state courts addressing federal statutes like the Employee Retirement Income Security Act, the Toxic Substances Control Act, the False Claims Act, the Inflation Reduction Act and the National Labor Relations Act as well as tort and product liability law, the First Amendment, class actions and more. The motion and redundancy requirements would add to the NAM's costs for filing amicus briefs, straining its limited resources. Take first the need to determine whether an anticipated amicus brief is redundant. This unworkable requirement necessitates amicus curiae taking, at a minimum, the following steps to attempt to satisfy it:

1. Discern the universe of groups interested in weighing in on a case (without knowing whether we reached every possible party).
2. Find contact information for those groups.
3. Communicate with those groups to inquire about whether they intend to file an amicus brief and, if so, on what topic.
4. Analyze the topics other amicus curiae intend to address.

After satisfying the referenced steps, the NAM may have to engage counsel to assist with drafting and filing the brief who would likely charge more because of the additional work required (e.g., filing a motion for leave and rerunning checks to certify that the amicus brief is not redundant with other amicus briefs that will be filed)—all of this without the certainty of knowing whether an amicus brief will be accepted or considered "redundant" by the relevant appellate court. The risk of incurring costs to file briefs that are ultimately rejected by an appellate court alone could serve to discourage amicus participation.

Indeed, the redundancy standard is ambiguous at best and could further discourage the NAM's participation. The proposed amendments fail to define the term and instead leaves to courts of appeals' discretion how it is interpreted. Is the term intended to preclude the filing of amicus briefs that contain any overlap even if the overlap is slight (e.g. one sentence or a paragraph)? Does the term only preclude significant overlap? The lack of clarity around the standard leaves the NAM and other amicus curiae to guess whether their amicus briefs will be accepted, again a deterrent to filing amicus briefs in first place.

The benefit of the proposed redundancy and motion requirements are minimal. As an initial matter, the Preliminary Draft does not identify a flood of amicus briefs as being the reason for

the proposed rule. Rather, "[t]he amendments seek primarily to provide the courts and the public with more information about an amicus curiae." Preliminary Draft at 38. The redundancy and motion requirements do nothing more to accomplish that goal than an amicus brief does itself. In fact, amicus curiae are already required to disclose their interest in the case. These statements are not perfunctory. They generally describe the reasons an amicus curiae believes its brief can be of use to a court. *See* Fed. R. App. P. 29(a)(4)(D) (requiring amicus briefs to include "a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file"). The Committee has not indicated that it has surveyed courts to discern whether courts perceive redundant amicus briefs to be a problem. The redundancy and motion requirements therefore appear to be a solution in search of a problem. They will only serve to create a rush to file amicus briefs to avoid the disqualifying "redundant" designation. Rushed amicus briefs, in turn, may suffer in quality.

2. <u>The Relationship Disclosure Requirements Likely Violate First Amendment Associational Rights</u>

The relationship disclosure requirements stand on shaky constitutional footing. Rule 29 is one of the Federal Rules of Appellate Procedure which Congress authorized the Supreme Court to promulgate so long as the rules do "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). One such substantive right is the First Amendment right of freedom of association. *Williams v. Rhodes*, 393 U.S. 23, 38 (1968) (Douglas, J. concurring) ("The right to engage in association for advancement of beliefs and ideas is one activity . . . that has First Amendment protection." (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)). As the U.S. Supreme Court has explained, "[c]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *NAACP*, 357 U.S. at 462). Indeed, the Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam). Just as disclosure requirements can chill individuals from giving money to nonprofit organizations, so too can they chill nonprofits from soliciting contributions from donors who do not wish to be identified publicly. *See NAACP*, 357 U.S. at 459-60. Thus, the relationship disclosure requirements burden First Amendment rights because they mandate disclosure of anyone new to membership within the past 12 months who has contributed more than $100 towards the filing of a brief or any party or party's counsel who contributes 25% or more towards an organization's revenue.

The Committee's interest in the appearance of judicial integrity and accountability, *see* Preliminary Draft at 13, 20, is not closely drawn to the relationship disclosure requirements and therefore fails to justify them. *See McCutcheon v. FEC*, 572 U.S. 185, 197 (2014) ("'significant interference' with protected rights of political association may be sustained if" the asserted important government interest "employs means closely drawn to avoid unnecessary abridgment of associational freedoms." (quoting *Buckley*, 424 U.S. at 25)). The Committee appears to rely on *Buckley* and its progeny to establish otherwise. *See* Preliminary Draft at 20 (describing the relationship disclosure requirements as "analogous to campaign finance disclosures that help voters to evaluate those who seek to persuade them."). To the extent it does, that reliance is misplaced.

Buckley—the U.S. Supreme Court's seminal campaign finance disclosure decision—addressed the scope of regulating campaign related speech by requiring disclosure of campaign contributions. In holding that the Federal Election Campaign Act of 1971's disclosure

requirements did not violate First Amendment rights, the U.S. Supreme Court identified three categories of significant government interests—pertinent to the free functioning of government—that outweighed the interests protected by the First Amendment: (1) providing the electorate with information; (2) deterring corruption and avoiding the appearance of corruption; and (3) gathering data to detect violations of contribution limits. *Buckley*, 424 U.S. at 66-67. As relevant here, the Court explained that it was necessary to provide the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" because the source of contributions (1) "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches"; and (2) "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id*. at 67. In other words, the government's interest in the election process was "in deterring the 'buying' of elections and the undue influence of large contributors on officeholders," *id.* at 70, which certainty bare on the free functioning of government. Unlike campaign contributions in *Buckley*, the relationship disclosure requirements proposed by the Committee neither bare on nor impact the free functioning of government.

True, protecting the appearance of judicial integrity is a government interest "of the highest order[,]" *Williams-Yulee v. Florida Bar Ass'n*, 575 U.S. 433, 446 (2015), but the Committee has failed to proffer any evidence demonstrating that financial contributions to organizations that file amicus briefs impact the public's view of judicial integrity or fairness. The absence of documented harm to public perception undermines the Committee's claim that the proposed relationship disclosure requirements serve to "improve the integrity and fairness of the federal judicial process." *See* Preliminary Draft at 13, 20; *cf. United States v. Nat'l Treasury Emples. Union*, 513 U.S. 454, 472 (1995) (noting the lack of "evidence" supporting that "the vast rank and file" of employees "misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities" undermines government interest in banning the compensation).

Notably, the Committee has not provided a concrete example of how the public knowing who contributes monetarily to an organization or amicus brief—at the incredibly low $100 threshold—would positively impact the public's confidence in the judiciary. Nor could it. A person's contributions to an organization or its filing of an amicus brief reveal only that that person is supportive of an organization's mission, or the position(s) advocated for by an organization. The contributions say nothing about how a court will resolve a case before it.

The Committee's claim that the proposed relationship disclosure requirements serve to help "courts evaluate the submissions of those who seek to persuade them[,]" Preliminary Draft at 20, also fails to justify the proposal for two reasons. First, the relationship disclosure requirements do not educate judges like voters are educated by campaign disclosure laws as the Committee suggests. *Id*. As noted, the U.S. Supreme Court has described campaign disclosure laws as necessary for voters to know more about a political candidate so that voters can form judgments about how a candidate might act upon assuming office. By contrast, courts need not know who contributes to an organization or amicus brief to make the correct decision in a case. After all, "[i]t is emphatically the providence and duty of the judicial department to say what the law is." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 369 (2024) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). Amicus curiae generally only attempt to help the court understand the ramifications of a particular course of action or provide further background on an issue.

Moreover, current Rule 29 is sufficient to assist courts with evaluating submissions. As noted, that rule requires amicus curiae to include in their briefs a statement of their identity, interest in the case, whether a party or its counsel contributed to the brief and whether "a 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)(D), 29(a)(4)(E)(i)-(iii). This information is sufficient to inform courts of who is responsible for the content of amicus briefs which are filed on the public docket and the perspective of the filer. *See* Preliminary Draft at 38 (identifying courts consideration of "the identity and perspective of an amicus to be relevant" as a reason for "some disclosures about an amicus . . . to promote the integrity of court processes and rules"). And courts can evaluate amicus curiae's positions in a brief by reading the arguments and legal authority cited therein for support. Simply put, the relationship disclosure requirements do not establish that "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" as the Committee suggests, *see* Preliminary Draft at 39, considering: (1) an organization must serve the interests of all, not just one, of its members; and (2) that Rule 29 already requires, as noted, amicus curiae to indicate whether "a party's counsel authored the brief in whole or part."

* * *

For the reasons stated above, the NAM requests that the Committee not proceed forward with the referenced proposed changes to Rule 29.

Sincerely,

Michael A. Tilghman II

Michael A. Tilghman II
Senior Litigation Counsel

National Association of Criminal Defense Lawyers
12th Floor, 1660 L Street, NW
Washington, DC 20036

February 15, 2025
Submitted online

H. Thomas Byron III, Esq., Secretary
Advisory Committee on Appellate Rules
Committee on Rules of Practice & Procedure
Judicial Conference of the United States

AMENDMENTS TO APPELLATE RULES PROPOSED FOR COMMENT, Aug. 2024

To the Committee and Staff:

The National Association of Criminal Defense Lawyers (NACDL) is pleased to submit our comments on the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure and to Appeals Form 4. Overall, the theme of our comments is that the proposals appear to overlook the particular characteristics of federal criminal and related appeals, and would impose unwarranted burdens on many amici and on the judiciary itself in the great majority of appeals where the concerns that animate the proposals do not arise.

Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. Our association has more than 10,000 direct members. With NACDL's 90 state and local affiliates spanning nearly every state, we represent a combined membership of some 40,000 private attorneys, public defenders, and interested academics.

APPELLATE RULE 29 – BRIEFS OF AMICUS CURIAE

NACDL has an active amicus curiae program, which we administer through a large volunteer committee of our members, with minimal staff support and virtually no budget. Our amicus program supports our organization's public policy goals as a non-profit professional association devoted to the integrity and reform of the criminal justice system, to the competent and otherwise ethical representation of persons charged with or convicted of crime, and to the rights of the accused as guaranteed by law. After careful evaluation and strategic planning, the organization's Board of Directors judged a multi-faceted strategy best suited to advancing our mission of advocating criminal law reform to achieve a fair, rational, and humane criminal legal system. The filing of amicus briefs is a core component of that strategy. We have reason to believe, based on feedback from numerous judges and from members who are former appellate law clerks, that our briefs are generally held in high regard by the judiciary and found to be useful in the just disposition of cases and in the setting of appropriate precedent.

NACDL's amicus committee has seven national co-chairs, who supervise the overall work of the committee and personally oversee our filings at the Supreme Court of the United States. In addition, the committee has 31 vice-chairs, two or three of whom are assigned by geography to each of the various circuits. The vice-chairs identify cases of particular interest and importance, and then recruit and supervise volunteer authors (most but not all of whom are members of

NACDL) for filings in our name in those cases. The committee operates under strict written "protocols" that ensure that only cases presenting issues of importance to our mission are supported; a member of NACDL has no entitlement to (or even preference in) having their "own" case supported. According to the AO there were 9649 federal criminal appeals in Fiscal Year 2023 (the most recent year reported). We are probably the most prolific amicus filer in criminal and related appeals nationwide, yet in 2024 NACDL filed amicus briefs in just 23 selected federal appellate cases nationwide – not more than one to four per Circuit (along with 16 at the Supreme Court and 20 in state supreme courts). As stated on NACDL's website, we seek to file briefs in "cases that present issues of importance to criminal defendants, criminal defense lawyers, and/or the criminal justice system as a whole, and to do so in a manner that is consistent with NACDL policy and [that] complements NACDL's public policy advocacy initiatives."

The concerns that appear to animate the current proposal do not apply outside the context of high-stakes civil litigation in which they arose. In the criminal, civil rights, habeas and related cases in which NACDL participates, we rarely see special-purpose "amici" with ties to the parties. In our cases there is almost never a concern with monied interests trying to influence the outcome of specific cases or the setting of precedent through paid or puppet amicus participation. Never do we experience a flood of duplicative or self-serving amicus briefs filed in connection with a criminal appeal. Yet the committee's proposal will adversely affect all amici, including NACDL. Against this background, we are acutely concerned with how any amendment to Rule 29, including those which are now proposed, would adversely affect NACDL's and similarly structured organizations' ability to advance their respective missions.

A. <u>The proposed elimination of filing on consent, with a requirement to seek leave</u>

Allowing courts to reject tendered amicus briefs, particularly without explanation, creates an enormous disincentive for small, volunteer-reliant, and/or financially strapped organizations such as NACDL to prepare them at all. That could reshape resource allocation and strategy for many organizations. Anything that injects uncertainty into our ability to pursue that strategy would force us to reevaluate our strategic plan and our First Amendment-protected allocation of resources.

Advancing the orderly development of decisional law on issues affecting their constituents and priorities is a core element of advocacy for countless organizations, including NACDL. It's a pillar of reform efforts for many. The committee report makes no mention of this. Instead, the committee mentions only self-serving and secondary motives, stating that "Amicus briefs may serve the amicus as a method of fundraising, as a method of showing its members that it is working on their behalf, as communication to the broader public, or as a method of advertising for the lawyers involved." (Report, at 20 of 109.) If those are the principal motives of any groups that regularly file amicus briefs, it is certainly not true for NACDL. None of NACDL's roughly $10 million annual budget (a fact made public by our annual IRS Form 990 filing as a recognized § 501(c)(6) tax-exempt organization) is allocated to the support of our active amicus program; it is near 100% volunteer effort. One staff member – who has multiple other responsibilities in connection with NACDL's criminal justice reform efforts – supports the committee's operations, but does not render assistance to our volunteer authors. We can count on the fingers of one hand the number of times a paid staffer has authored a NACDL amicus brief, thinking back a couple of decades. Moreover, our three dozen chairs and vice-chairs volunteer their time to screen potential cases and then to recruit authors and edit or approve the final product for filing. When a member –

or non-member supporter – volunteers to write an amicus brief, they are donating their services (and any related clerical or paralegal support), either individually or on behalf of a law firm, and, in fact, they cover the printing and filing costs as well. It is very unlikely that we could continue to persuade our volunteers to contribute these hundreds of hours (worth hundreds of thousands of dollars *in toto*) of donated time if there were a significant chance that the brief thus produced would not even be accepted for filing and consideration by the Court. NACDL would be forced to turn its criminal law reform efforts away from advancing the orderly development of precedent, contrary to its own best (First Amendment-protected) judgment as to how to advance its mission. This impediment to our advocacy should be avoided unless deemed essential to achieving a countervailing public interest, such as defeating a substantial burden on the judicial process.

Under the present rule, we receive consent nearly 100% of time from both the government and the defendant's counsel, predicated on our history and reputation for quality and integrity in our briefing and on longstanding collegial, cordial relations with Main Justice and U.S. Attorney's Office appellate prosecutors. The proposed Advisory Committee Note says only that the consent requirement "fails to serve as a useful filter" (*l.* 236), but there is no suggestion that the circuits are inundated with consented-to amicus briefs, much less with unhelpful ones, to the point that any filter is needed. Much less is there any basis for thinking that the volume of amicus briefs in the circuits is such that the burden of deciding a mandatory motion accompanying each – which subsumes analyzing the details of that brief against other amicus briefs and the party brief – would be lower. At least as applied to criminal and related appeals, there is no reason to change the present rule in this respect.

The committee suggests that the consent option may leave a potential amicus "needing to wait until the last minute to know whether to file a motion." (prop. Adv.Comm.Note, *ll*. 238–39.) But the proposed amended rule creates a much worse situation, as it leaves all amici (other than the government, the adversary in nearly all the cases we participate in) in limbo on whether to write the brief at all, all the way through filing and beyond. A completed brief must be attached to the motion as an exhibit. Prop. Rule 29(a)(3). Of course, we do not claim a right to have any given brief accepted, but time and resources are finite for every professional as for every organization. Uncertainty about whether our views will be received at all would strongly discourage NACDL from choosing to devote its efforts to preparing amicus briefs at all, even when it is our own First Amendment-protected decision to do so in aid of our non-profit mission in service of the pursuit of justice. (This is a different First Amendment argument from the one advanced by the ACLU and the Chamber of Commerce in their comments, with which NACDL also agrees.)

We urge the committee not to adopt a mandatory-motion rule, or at least to make it inapplicable to criminal, civil rights, and habeas appeals, where there is not even arguably any problem of abuse of amicus participation to be solved.

B. <u>The proposed substantive standard</u>

The committee suggests amending paragraph (a)(2) of the FRAP 29 to say that the filing of an amicus brief "is disfavored" unless it "brings to the court's attention relevant matter that is not already mentioned by the parties" and is not "redundant with another amicus brief." For two reasons, NACDL opposes injecting these standards into the Rule, whether or not the proposed motion requirement (discussed under Point A of this letter) is implemented.

First, the suggested criteria fail to capture the many ways that amicus briefs can be helpful and appropriate, as are the briefs that NACDL routinely files. Whether the "relevant matter" is factual in nature or takes the form of legal argument, it is hard to imagine a proper amicus brief that does not advance arguments (if not issues) that the parties do not at least "mention" in the principal briefs. What amici such as NACDL can and do provide, in many cases, is a more thoroughly researched, broader and deeper, or more nuanced presentation of the issues in the case. This is particularly true in criminal appeals, where defendants – typically the appellant – are often represented by a trial lawyer who is not an appellate specialist. (Many Circuits by local rule require trial counsel to continue on appeal unless excused.) In contrast, the government is usually represented by a trained appellate lawyer or at least by an attorney supervised by appellate specialists. And even when the defendant's appellate counsel is highly skilled, they have an obligation to cover much more territory, both factual and legal, even considering the greater allowable word-count for the merits brief. The amicus, by contrast, can limit its recitation of the case-specific facts, permitting greater depth or breadth of presentation on points on which the party can only touch. Yet such briefs would apparently be viewed as "disfavored" under the proposed rule, to the detriment of both the amicus organization's ability to fulfill its mission and of the court's final product.

Relatedly, amici such as NACDL can assist the court by flagging the potential value of a broader (or narrower) *ratio decidendi* for the court's decision, and of the ramifications of a given holding, while the party's counsel is ethically bound to argue only what is best for the particular client. Moreover, the filing of an amicus brief inherently raises the profile of a case, thus providing expert assistance to the court in selecting cases for oral argument and/or for precedential treatment. The proposed amended language for Rule 29(a)(2) does not communicate to potential amici that such briefs are welcome and useful, nor does it encourage courts considering motions for leave to file to grant permission to the full range of helpful amicus briefs. See *Neonatology Associates, P.A. v. Comm'r*, 293 F.3d 128 (3d Cir. 2002) (per Alito, J., overruling objections to filing of amicus brief and explaining why courts should give a broad reading to Rule 29(a)).

As to the second proposed limitation (redundancy), in our experience an amicus like NACDL is unlikely to know what points other amici (if any) plan to argue, or even whether any other amici intend to file. There is no mechanism by which prospective amici would necessarily learn of one another, unless each has communicated with the party and party counsel has connected them. And even then, it is unlikely that multiple amici would have sufficiently complete draft briefs to exchange in time to evaluate and modify each for potential redundancy, even if they could agree to attempt a coordinated effort. It would be difficult at best, then, for NACDL to be in a position to allege in a motion under (a)(3)(B) that its arguments are not "redundant" of those presented by another amicus. Moreover, how would NACDL ascertain that it was *our* brief that was "redundant" and not that of the other amicus? Would a busy judge be more likely to accept the brief filed by the better-known lawyer, firm, or amicus, rather than the better brief?

The wording of the proposal is also unclear whether each amicus submission must eschew redundancy entirely or merely limit it. If the latter, the degree of acceptable similarity is left in doubt. A smaller organization working on an issue in the rural heartland may have a subtly different perspective from that of a larger organization working on the same issue in an urban center. Would their briefs be "redundant" of each other, and/or a party's brief, because they address the same issue? In our view, this proposed amendment could be implemented, if at all, only with the benefit of hindsight. Our experience suggests that it would not work at all in the real world of appellate practice.

In addition, the mere fact of receiving multiple amicus briefs making similar points but from diverse sources may further validate those points in the minds of the judges, dispelling any suspicion of special pleading, bias, or idiosyncratic viewpoints. In this way, some redundancy can actually advance the proper purposes of amicus briefing.

Indeed, a given amicus brief may contain a nugget of insight that will resonate importantly with one judge on the merits panel, even if not with others, in a way that contributes significantly to a better outcome. If a motions panel rejects the brief, that insight will never reach the judge who would have found it helpful. If the merits panel decides whether to accept a brief, would two panel members' votes to reject it require the judge who finds it helpful to eschew reliance on its insight? Far better for all concerned for each member of a panel to simply toss aside any amicus briefs that judge finds unhelpful – making the same individualized decisions judges and their law clerks easily make now.

Equally problematic with respect to the proposed substantive amendment of Rule 29(a)(2) is how it would be enforced in a real case, assuming for purposes of discussion that the motion requirement is also enacted (which we oppose in the preceding portion of this comment). In our experience, the merits panel is not assigned to a given appeal until after the appellee's brief is filed. Will all motions for leave to file amicus briefs be held under advisement until all the briefs are in, and then evaluated by the merits panel for compliance with Rule 29(a)(2)? If so, there is no saving in judicial resources, as the briefs will all have to be closely scrutinized, and all the arguments researched and weighed, to fairly apply either the "not already mentioned" or the "[not] redundant with another amicus brief" criterion. If, on the other hand, a given Circuit uses a pre-merits motions panel (whether of one, two or even three judges) the waste of judicial resources to implement and enforce the amended rule would be exponentially increased, far outweighing any benefit from the weeding out of unhelpful amicus submissions, and the merits panel potentially deprived in the end of useful information for the just disposition of the case.

Whether or not the motion requirement is enacted, the new language in (a)(2) would still be pertinent to the statement in the amicus brief itself, required by new Rule 29(a)(4)(D), as to how the brief will be "helpful." The proposed language, given its narrow scope, would discourage scrupulous lawyers, including those volunteering with NACDL, from preparing and submitting many of the kinds of amicus briefs that experience has shown to be useful to courts in developing the law and reaching just outcomes in individual cases. In short, the proposed amendment to Rule 29(a)(2) would not improve the appellate process and should not be forwarded by the Advisory Committee to the Standing Committee and the Judicial Conference.

C. <u>The proposed amended disclosure requirements</u>

Of the proposed expanded disclosure requirements (prop. rev. FRAP 29(b)-(e)), only proposed paragraph (e) would apply to NACDL. We do not permit defendants' counsel to ghost-author our amicus briefs or to pay the filing costs for those submissions (much less to compensate our volunteer brief-writers), nor does any individual or group contribute as much as 25% of NACDL's total revenues. As previously noted, NACDL does not "pass the hat" to fund our amicus briefs (prop. Adv.Comm.Note, *l.* 363), nor do we pay anyone to write for us. Our volunteer authors contribute not only their professional services but also the out-of-pocket costs for the production and filing of the briefs they write under NACDL's auspices. As for proposed Rule 29(e), it unlikely but possible that someone other than the volunteer author herself or a long-

standing member of NACDL might contribute more than $100 toward a given amicus filing; if so, NACDL would have no objection to that disclosure.

We do suggest, however, that the Rule or Note make clear whether the required disclosures include the value of in-kind contributions (be they in the form of professional services, clerical and paralegal services, or printing), or only the amount of cash contributions.

APPELLATE FORM 4 – APPLICATION TO PROCEED *IN FORMA PAUPERIS*

As with the proposed changes to the amicus rule, the proposed amendment to Form 4 overlooks the different circumstances of criminal appeals. The Form should be further amended to add the information that a person for whom counsel has been appointed under the Criminal Justice Act is automatically entitled by law to appeal *in forma pauperis*, so such appellants are not required or expected to complete Form 4. *See* 18 U.S.C. § 3006A(d)(7) ("If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28."). A small number of criminal appeals do involve appellants eligible for *in forma pauperis* status but without CJA counsel. These include *pro se* cases, instances where a family member or friend has retained private counsel for an indigent defendant, and cases taken *pro bono*. Those appellants will still have to use the form to obtain IFP status and a waiver of filing fees. So it would not be correct simply to say the form does not apply to criminal cases. Conversely, there are civil appeals where counsel may have been appointed under the CJA, including *habeas corpus*, *coram nobis* and § 2255 cases. The Form is not to be used in those cases. None of this is taken into account, much less made clear, by the present version of Form 4 or the current proposal to amend it.

For these reasons, NACDL suggests that the Committee further amend Form 4 by adding – perhaps between the heading ("Affidavit Accompanying Motion ...") and the Affidavit box itself – the words, "**No affidavit is required, and this Form does not apply, if counsel has been appointed for you under the Criminal Justice Act**."

* * *

NACDL thanks the Committee for its valuable work and for this opportunity to contribute our thoughts. We look forward to continuing our longstanding relationship with the advisory committees as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

By: Peter Goldberger
Ardmore, PA
Chair, Committee on Rules of Procedure

Lisa A. Mathewson
Philadelphia, PA
Vice-Chair, Amicus Curiae Committee

In Memoriam:
William J. Genego
Santa Monica, CA
Late Co-Chair

Cheryl D. Stein
Washington, DC

Alexander Bunin
Houston, TX

Please respond to:
Peter Goldberger, Esq.
P.O. Box 645
Ardmore, PA 19003
E: peter.goldberger@verizon.net

American Academy
of Appellate Lawyers

February 17, 2025

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, N.E.
Washington, D.C. 20544

Re: USC-RULES-AP-2024-0001—Request for Comments on Proposed Amendments to Federal Rule of Appellate 29

Dear Judge Bates:

On behalf of the American Academy of Appellate Lawyers, I am submitting these comments on the proposed amendments to Federal Rule of Appellate Procedure 29. The Academy appreciates the Advisory Committee's work on this and other issues that are critical to the resolution of appellate disputes.

This letter responds to the August 15, 2024 request for comments on those proposed revisions. In that request, the Advisory Committee on Appellate Rules said 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" found in proposed revisions to Appellate Rule 29(a)(2).

These comments focus on Rule 29(a)(2)'s proposed revisions that would (1) eliminate the consent option for nongovernmental amici and (2) provide that amicus briefs not meeting newly engrafted requirements will be "disfavored." The proposed revisions not only impose unnecessary burdens on litigants and courts, but they are also impractical and

1300 Piccard Drive, Suite LL14, Rockville, MD 20850 • (240) 401-6498 • Fax: (301) 299-2027 • Email: info@appellateacademy.org • Web: www.appellateacademy.org

unworkable. The Academy urges the committee to reject these proposed revisions and instead to revise Federal Rule of Appellate Procedure 29 to align with Supreme Court Rule 37.

The Academy takes no position on Appellate Rule 29's proposed revisions beyond subsection (a)(2), including the proposed revised disclosure requirements.

By way of background, the American Academy of Appellate Lawyers (appellateacademy.org) is an invitation-only, non-profit, nonpartisan national professional association of more than 300 lawyers skilled and experienced in appellate practice and related post-trial activity in state and federal courts. The Academy's Fellows are dedicated to the enhancement of the standards of appellate practice and seek to improve the administration of appellate justice. Founded in 1990, the group has at times sought to further these goals either by comments to this committee or by filing amicus curiae briefs. *See, e.g.*, *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. 17, 19 n.8 (2017) (citing AAAL amicus brief); *Am. Axle & Mfg. v. NEAPCO Holdings*, 966 F.3d 1347, 1365 (Fed. Cir. 2020) (O'Malley, J., dissenting) (citing letter from AAAL forwarded to court by Advisory Committee on Appellate Rules).[1]

These comments are the product of a task force of approximately a dozen Fellows who collectively have many decades of experience practicing in appellate courts across the country. The comments have been approved by the Academy's Board and are submitted on behalf of the Academy.

Proposed revisions to Rule 29(a)(2) to eliminate the consent option

The Academy opposes the proposed revision to Appellate Rule 29(a)(2) that would eliminate the option to file an amicus brief with the parties'

[1] *See also* Brief of the American Academy of Appellate Lawyers, Amicus Curiae, Supporting Petitioners, *Williams v. Pennsylvania*, 579 U.S. 1 (2016); Brief of the American Academy of Appellate Lawyers, Amicus Curiae, Supporting Petitioners, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); Brief of the American Academy of Appellate Lawyers, Amicus Curiae, Supporting the Petition for a Writ of Certiorari, *Mountain Enters., Inc. v. Fitch*, 541 U.S. 989 (2004).

1300 Piccard Drive, Suite 210 • Rockville, MD 20850 • (240) 404-6568 • Fax (301) 990-9771 • Email: info@appellateacademy.org • Web: www.appellateacademy.org

consent and would instead make leave motions mandatory for every nongovernmental amicus. Consent should be sufficient. Even better, the rule should be revised—in alignment with revised Supreme Court Rule 37 that went into effect January 1, 2023—to freely allow amicus briefs to be filed without the parties' consent or the Court's permission.

The proposal to limit the filing of amicus briefs by nongovernmental parties only upon leave of court is fraught with procedural and even substantive difficulties.

Timing concerns—For the parties, the proposal to replace the consent option with a mandatory-motion requirement unnecessarily creates a procedural nightmare.

The proposed revised Appellate Rule 29(a)(2) assumes that a leave motion is not a big burden to place on potential amici. That's true. But it misses the big picture. The proposed mandatory motion will build in uncertainty about whether a brief will be accepted for filing. Will clients want to invest significant resources and time into researching and drafting an amicus brief that may be rejected for a reason that cannot even be anticipated? Or, as is often the case, for amicus briefs that are prepared pro bono, will amicus counsel want to invest their time in authoring amicus briefs only to have them rejected for a reason that is unknowable?

Either way, the consent-elimination proposed revision discourages the investment of time and resources to producing thoughtful amicus briefs that may provide the circuit courts with assistance. By contrast, the ability to file with consent (or in the Supreme Court, without even having to obtain consent) acts as a filter for amicus filings, eliminates any such uncertainty, and encourages, rather than deters, submission of valuable amicus briefs.

What's more, if all nongovernmental amicus briefs can be filed only upon leave of court, the opposing party may not know when it prepares its appellee's brief or the appellant's reply brief whether to address an intervening amicus brief that may not be accepted by the court. Because the current Appellate Rules require any amicus brief to be filed "no later

1300 Piccard Drive, Suite 210 • Rockville, MD 20850 • (240) 404-6458 • Fax (301) 990-9271 • Email: info@appellateacademy.org • Web: www.appellateacademy.org

than 7 days after the principal brief of the party being supported is filed," Fed. R. App. P. 29(a)(6), usually the appellee's brief will be due 23 days after the amicus supporting the appellant files, and the appellant's reply brief will be due 14 days after an amicus supporting the appellee is filed.

Unless a court rules on a leave motion immediately (a burden that the Academy does not advocate be placed on already-busy appellate courts), the non-supported party will be forced to choose between two undesirable options: (1) address the amicus in its next submission—a risky allocation of the limited word count to respond to an amicus brief that might not be accepted; or (2) wait until the court rules on the leave motion and then seek its own leave to respond to the amicus.

Efficiency concerns—If Appellate Rule 29(a)(2)'s proposed revisions are intended to provide a buffer between potential amici that might cause recusal and arguments made by disqualification-causing amici, the proposed mandatory-motion requirement actually has a perverse effect.

Under the proposed revisions to Appellate Rule 29(a)(3), the leave motion must explain why the brief meets the newly added "purpose set forth in Rule 29(a)(2)." To satisfy that requirement, a leave motion will necessarily touch on the merits of the proposed amicus brief. The same is true if a party opposes the leave motion; a response in opposition is likely to delve into the merits of the proposed amicus. A leave motion would also reveal the name of the party or counsel supporting one side.

Thus, even if leave to file is denied, a judge ruling on the leave motion would have been exposed to the proposed amicus's arguments and the identity of the proposed amicus or its counsel. As a result, replacing the consent option with a mandatory-motion requirement will not shield circuit court judges from that information.

There's another efficiency concern. If adopted, the mandatory-motion requirement would increase opposition to leave motions, which are now relatively infrequent. Consent will no longer be the norm, and so clients will find ways, serious or not, to oppose an amicus submitted in support of an opponent. By replacing the consent option with the mandatory-motion

1300 Piccard Drive, Suite 210 • Rockville, MD 20850 • (240) 404-6568 • Fax (301) 990-9771 • Email: info@appellateacademy.org • Web: www.appellateacademy.org

requirement, the proposed revisions not merely invite, but encourage such opposition. And while courts are well equipped to assess the value of an amicus brief on its own, having to assess the back-and-forth squabbles over whether or not to permit an amicus would be a waste of judicial resources. Making a leave motion mandatory, thus, secures little tangible benefit.

Disqualification or recusal problem—There is no current way for an amicus who wants to avoid having a brief rejected to identify potential disqualification or recusal issues. If the recusal policies of judges were public, a different non-profit or a different law firm could be chosen to make the same points—but only if the problem could be identified in advance.

Still, it is unclear how serious the recusal problem is at any time before en banc consideration. A multi-member court can always factor in disqualification issues in the initial-assignment process. In the rare instance in which a post-assignment recusal issue arises, cases could be decided by a quorum of two judges. Even then, circuit courts often solve a post-assignment issue by swapping out a recusing panel member for another who has no disqualification or recusal issue.

But if denial of leave to file is meant to avoid recusal problems, then the proposed mandatory-motion requirement might double the opportunities for denial: once by the motions panel and again by the merits panel. On that score, could a brief be accepted at the motion stage and then be stricken by the merits panel? Denying leave to file simply because one member of a circuit court would be disqualified—whether or not that judge will be assigned to the merits panel—places an impossible burden on amicus counsel. So, too, it requires every motions panel to apply recusal standards for every judge who might be assigned to a merits panel.

Worse, it harms the administration of justice by depriving judges who have no basis for a recusal the opportunity to read amicus briefs that may prove genuinely helpful—those that bring new and useful perspectives or those that provide advocacy that one or the other party should have, but did not, include in its brief that should be before the court.

1300 Piccard Drive, Suite 210 • Rockville, MD 20850 • (240) 404-6568 • Fax (301) 990-9771 • Email: info@appellateacademy.org • Web: www.appellateacademy.org

Proposed revisions to Rule 29(a)(2) to disfavor amicus briefs that are redundant with party briefs or other amicus filings

The Academy also opposes the proposed revision to Appellate Rule 29(a)(2) that would appear to direct courts to reject amicus briefs that do not meet the "Purpose" proposed to be added to the rule's "When Permitted" provision—that amicus briefs will be permitted when they "bring to the court's attention relevant matter not already mentioned by the parties"—and that briefs not serving this purpose or are "redundant with another amicus brief" would be "disfavored."

The Academy agrees that the goal of discouraging unhelpful amicus briefs is commendable. To that end, the text of proposed revised Rule 29(a)(4)(D) elsewhere sensibly provides that amicus briefs should explain how the brief and the perspective of the amicus will "help the court." Similarly, some local circuit court rules already advise that amicus briefs should avoid repeating the facts in, or legal arguments made by, the principal briefs and, instead, should focus on points either not made or not adequately discussed in those briefs.

It is one thing to provide guidance about the proper scope of an amicus brief. But it is quite another thing to convert guidance into a requirement. And that is what the proposed revisions to Appellate Rule 29(a)(2)'s "When Permitted" provision do. On top of that, the proposed revisions layer in another requirement—that amicus briefs avoid redundancy with other amici. In so doing, the proposed revisions create practical problems. And, given the narrow seven-day window for filing a circuit-court level amicus, those problems are especially acute.

Consider the requirement that amicus briefs bring the court's attention to relevant matter not already mentioned by the parties. In practice, when amicus briefs are being researched and drafted, few amici have access to the principal brief of the party whose position they are supporting until that brief is filed. That is especially true for the U.S. Department of Justice, which never shares drafts with counsel for other parties on its side, let alone amici. Overhauling an amicus brief within Appellate Rule

1300 Piccard Drive, Suite 210 • Rockville, MD 20850 • (240) 404-6858 • Fax (301) 990-9771 • Email: info@appellateacademy.org • Web: www.appellateacademy.org

29(a)(6)'s seven-day amicus filing window to eliminate redundancy with party briefs is, at best, impractical.

In the same way, the proposed revision to avoid redundancy with other amicus briefs places an additional burden on nongovernmental amicus filers that's unworkable. As with the principal briefs, few amici are aware of what yet-to-be-filed amicus briefs being drafted by others might say. To be sure, some potential amici are able to coordinate and even combine resources for a unified effort. But many others are unaware of other efforts and unable to coordinate. And, as a practical matter, most circuit-court level amicus briefs are filed near the end of Appellate Rule 29(a)(6)'s narrow seven-day window.

If there's overlap with another amicus brief, which amicus brief will be disfavored? The proposed revisions may unintentionally create a race for potential amici to be the first to file within the seven-day window. But a race to be the first to file only diminishes the time to review the principal party's as-filed brief and revise the amicus brief to eliminate any unhelpful duplication not needed for context.

⁂

The Academy appreciates that amicus briefs are sometimes redundant of the parties' briefs. The proposed revisions to Appellate Rule 29(a)(2) may secure some benefits at the margin in keeping down that redundancy. But because they create more problems than they solve, they're not worth the candle. After all, amicus briefs that are unhelpful "almost always self-identify (unintentionally) fast enough to avoid being burdensome." *Perez v. City of San Antonio*, No. 24-0714, 2024 WL 4644361, at *2 (Tex. Nov. 1, 2024) (Young, J., respecting the denial of amicus curiae's motion to participate in oral argument). It is easy enough for a judge or a court to disregard a brief that is not helpful. And in practice, appellate judges and justices tend to give amicus filings only whatever weight and time they deserve.

Ultimately, the dynamic created by the removal of consent results in significant uncertainty about whether a court might ever accept a

1300 Piccard Drive, Suite 210 • Rockville, MD 20850 • (240) 404-6568 • Fax (301) 990-9771 • Email: info@appellateacademy.org • Web: www.appellateacademy.org

proposed amicus brief. Uncertainty in turn discourages potential amici from allocating resources to preparing amicus briefs that may provide a valuable perspective or other assistance to the court's decision-making process. That includes potential amici who have no affiliation with or affinity for either side and no one urging them to file, such as academics who are experts in the field or lawyers who study courts' dockets regularly. These least-partial friends of the court may be dissuaded from submitting an amicus if they must worry about fighting either side who might file an opposition to a leave motion. Because amicus briefs give affected or interested nonparties a limited way to lend their expertise or to be heard short of intervention, the Academy asks the committee to consider rejecting the proposed revisions to Appellate Rule 29(a)(2) that would discourage amicus briefs.

In sum, the Academy believes that Appellate Rule 29(a)(2) should retain the consent option, or, better still, the rule should be amended to align with Supreme Court Rule 37, as amended January 1, 2023, that allows the filing of amicus briefs without requiring a motion for leave or the parties' consent. And the Academy urges the committee to reject the proposed revisions that would appear to direct courts to reject amicus briefs that are redundant with party briefs or other amicus filings.

Thank you for your consideration.

Sincerely,

Deanne E. Maynard
President
American Academy of
Appellate Lawyers

1300 Piccard Drive, Suite 210 • Rockville, MD 20850 • (240) 404-6568 • Fax (301) 990-9771 • Email: info@appellateacademy.org • Web: www.appellateacademy.org

AMERICAN ECONOMIC LIBERTIES PROJECT

February 17, 2025

Submitted via Regulations.gov

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 Members of the Committee on Rules of Practice and Procedure:

The American Economic Liberties Project ("AELP") submits this comment to support the efforts of the Committee on Rules of Practice and Procedures ("Committee") to reform amicus practice in a manner that enhances public confidence in the judicial system, and to recommend certain revisions to the proposed amendments to Federal Rule of Appellate Procedure 29. As part of AELP's mission to advocate for policies and litigation outcomes that address the harms of concentrated economic power,[1] AELP routinely files amicus briefs and monitors federal litigation involving sophisticated, well-resourced corporate actors – in other words, precisely the type of parties equipped to leverage amicus filings in a manner that has concerned Congress, the public, and this Committee.

In particular, the Committee should 1) preserve the party-consent mechanism for filing amicus briefs, 2) develop a simple form to fulfill any motion for leave requirement, 3) strike the proposed anti-redundancy provision, 4) lower the disclosure threshold for general contributions to a modified version of those in the proposed AMICUS Act[2]: 10% with an alternative minimum of $100,000, 5) require disclosure of date of amici creation since the underlying case was filed, 6) lengthen the contribution disclosure time frame to 4 years, and 7) require amici to disclose whether their law firms currently or frequently represent a party to the litigation.

[1] AELP is a non-profit, non-partisan organization that works to promote fair competition, combat monopolistic practices, and advance economic liberty. AELP leverages a variety of policy tools to address America's crisis of concentrated economic power, which has made supply chains more brittle, depressed business dynamism, suppressed wages, hiked prices, harmed patients, undermined local sovereignty, and threatened democratic governance. *See* "About Us," https://www.economicliberties.us/about/#; "Problem," https://www.economicliberties.us/problem/#. AELP is funded by contributions and grants from foundations and individuals, and does not accept any funding from corporations.

[2] S. 1411 - AMICUS Act, 116th Cong., https://www.congress.gov/bill/116th-congress/senate-bill/1411/text

I. Consent and Motion for Leave of Court Revisions

a. Preserve Party Consent to Amicus Filings for Convenience and Informative Value

Preserving the role of parties as the initial gatekeepers to amicus participation is consistent with the adversarial structure of our judicial system. That parties typically consent to a high percentage of amicus filings does not vitiate this role, because the instances where consent is withheld then offer a stronger, clearer signal to judges about which amici filings should be viewed with skepticism[3]– and which motions for leave may justify denial. We agree with other commenters, such as the American Association for Justice (AAJ),[4] that courts should not unduly discourage the filing of amicus briefs. Accordingly, we encourage the Committee to preserve the party consent mechanism rather than impose mandatory motion practice that would be burdensome for parties and courts alike.

b. Adopt a Simple Form to Balance Recusal Concerns with Administrative Burdens

In the alternative, to the extent the Committee determines that concerns such as recusal warrant the imposition of an additional screening mechanism, we respectfully recommend that instead of mandating motions with lengthy written justifications for filing,[5] the Committee should consider developing a simple form with check boxes and short blanks. Notably, the Committee's current suite of proposals includes a revision to a form used in a different context.[6] Although unrelated to amicus practice, this initiative illustrates the value of a streamlined form for certain frequent and routine tasks. Adopting a short form would lessen time and resource expenditure by parties, minimize barriers to participation by less sophisticated amici, and reduce the burden on clerks and judges deciding whether to accept amicus filings. The availability of a short form option need not preclude amici from providing a more fulsome written brief, as circumstances may dictate.

c. Strike the Proposed Anti-Redundancy Provision Which Risks Promoting Untoward Coordination Between Parties and Amici

In the spirit of both minimizing burdens and stemming dynamics that undermine faith in the judicial system, we also recommend striking the proposed "[p]urpose" language in Rule 29(a)(2) that

---

[3] For example, Epic Games recently conditioned consent to amicus briefs supporting Google in its appeal from a jury trial loss on heightened disclosure of financial information in the spirit of the Committee's current proposal. *See* Brief of Amicus Curiae Prof. Paul. M. Collins, Jr. in Support of Pl.-Appellee ("Collins Amicus") 20-21, *Epic Games, Inc. v. Google LLC*, Nos. 24-6256, 24-6274, ECF No. 145.1 (9th Cir. Jan. 7, 2025),https://storage.courtlistener.com/recap/gov.uscourts.ca9.e2d27689-fc63-4b46-aa8e-dcf086bf9b65/gov.uscourts.ca9.e2d27689-fc63-4b46-aa8e-dcf086bf9b65.145.0.pdf (Epic made its consent contingent on "each amicus disclos[ing] any money he or she has received in the past 12 months from a party or amicus or their affiliates.") Sixteen out of eighteen amici refused this request, prompting Epic to deny consent such that those amici then had to file motions with the court. *Id*. at 21 (citations omitted).

[4] Comment from American Association for Justice ("AAJ Comment"), USC-RULES-AP-2024-0001-0034, 2, Jan. 30, 2025, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0034 (citation omitted).

[5] Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure, and the Federal Rules of Evidence ("Proposed Amendments"), USC-RULES-AP-2024-0001-0001, 29-30, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Aug. 2024, https://www.regulations.gov/document/USC-RULES-AP-2024-0001-0001.

[6] *Id*. at 49 (Form 4: Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis). We take no position on that or any proposal other than the Fed. R. App. P. 29 revisions addressed herein.

"disfavor[s]" the filing of an amicus brief "that is redundant with another amicus brief."[7] Not only is it unclear how this proposal would be implemented and what criteria might be used to evaluate redundancy, this proposal appears to present the risk of cementing the influence of the very "Amicus Machine"[8] the disclosure revisions seek to expose to judicial–and public–scrutiny. How would an amicus who is truly independent be able to coordinate the excision of redundant arguments with other impending filers who are unknown to them? Who could impartially referee which filer would have to restructure their brief or perhaps forego filing altogether to avoid disfavored redundancy? Such thorny questions strongly indicate that the proposal raises more problems than it solves. Moreover, as an organization that frequently supports bipartisan policies, AELP agrees with AAJ that certain redundancies can be informative, especially when the overlap occurs between "strange bedfellows."[9] In any event, the court is the final arbiter of what arguments are persuasive or novel, and which are not. Accordingly, we recommend striking the redundancy language, and support the alternative amendments to (a)(2) and (a)(3) proposed by AAJ.[10]

II. Disclosure Revisions

We applaud the Committee's efforts to expand disclosure requirements to ensure, among other things, that courts are not "misled into thinking that an amicus is more independent of a party than it is."[11] In light of a decline in the public's confidence in the judiciary in recent years,[12] these efforts are both important and timely. As the Committee aptly reasons, "in 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."[13] We note that certain nonparties could also exploit inadequate disclosure rules by choosing to forego motions to intervene–which, if granted, would subject them to exposure of financial interests and testing of claimed harms–in favor of amicus filings that allow them to claim harm while shielded from such adversarial inquiries.[14] In addition, we agree with Court Accountability that the existing rule warrants amendment because the current wording would fail to require an amicus filer to disclose the financial support of a party that "fund[s] essentially the

---

[7] Proposed Amendments at 28.

[8] Allison Orr Larsen & Neal Devins, "The Amicus Machine," 102 Va. L. Rev. 1901 (2016), https://scholarship.law.wm.edu/facpubs/1826/

[9] AAJ Comment at 5.

[10] *Id*. at 6.

[11] Proposed Amendments at 21.

[12] Benedict Vigers and Lydia Saad, "Americans Pass Judgment on Their Courts," Gallup (Dec. 17, 2024), https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx ("Since 2020, confidence in the courts across the other OECD countries has been stable, while the U.S. has seen a sharp decline -- 24 percentage points -- in the past four years." Confidence "dropped to a record-low 35% in 2024.").

[13] Proposed Amendments at 21.

[14] At the district court level, motions to intervene are governed by Fed. R. Civ. P. 24. The Advisory Committee on Appellate Rules is currently considering adopting an equivalent rule at the appellate level. *See* Committee on Rules of Practice and Procedure, 197 (Jan. 7, 2025) (attaching Report of the Advisory Committee on Appellate Rules from Dec. 16, 2024), https://www.uscourts.gov/sites/default/files/2024-12/2025-01_standing_committee_agenda_book_final_12-19.pdf; Jordan Thomas, "In the (Court)Room Where It Happens: The Case for a More Expansive Standard for Intervention in the Federal Court of Appeals," 43 YALE LAW & POLICY REV. 1 (Fall 2024), https://yalelawandpolicy.org/courtroom-where-it-happens-case-more-expansive-standard-intervention-federal-courts-appeals#_ftnref15

[filer's] entire amicus operation" so long as no brief-specific earmark is made.[15] We also agree with the Committee that because "a would-be amicus does not have a right to be heard in court,"[16] First Amendment objections to disclosure requirements do not hold water; amicus practice is allowed for the benefit of the judicial system, not for speech purposes, and amici have other avenues for voicing their views.[17]

Although we support the Committee's goals, we also respectfully submit that the proposed amendments, while helpful, do not go far enough in certain respects. In the worst light, the proposed amendments codify loopholes that undermine the Committee's efforts to resolve a serious problem. Accordingly, we propose the following revisions:[18]

a. Lower the Disclosure Threshold to 10%, with an alternative minimum of $100,000

The proposed amendments require amici to disclose whether a party, its counsel, or any combination thereof has, in the previous 12 months, contributed or pledged to contribute 25% or more of its total revenue from its last fiscal year.[19] We support the intentions behind this requirement. Yet for some amici, even a single digit percentage equates to millions of dollars–

[15] Comment from Court Accountability, Comment ID USC-RULES-AP-2024-0001-0031, 2 (Jan. 29, 2025), https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0031. We also agree with Court Accountability's discussion regarding the "Benefits of the Proposed Amendments." *Id*. at 2-3.

[16] Proposed Amendments at 20.

[17] Accepting the proposition that amici have such a strong First Amendment right to participate in a judicial proceeding that they can do so while keeping their true interest secret would raise other difficult questions about how far their First Amendment rights extend. What limiting principle would preclude a First Amendment right to file amicus briefs at every stage of litigation, including discovery disputes? What would prevent amici from demanding to participate in oral arguments at hearings? At some point– especially as courts take on quasi-policymaking roles– would courts have to open public comment dockets, like executive branch agencies? Moreover, it would be odd for the Judicial Conference to expand First Amendment *speech* rights after so recently curtailing the right of the press and the public to *hear* judicial proceedings by rescinding the availability of public audio lines. *See*, *e.g.*, Jenna Greene, "Bad timing: Federal courts are poised to backtrack on remote access," Reuters, May 18, 2023, https://www.reuters.com/legal/government/bad-timing-federal-courts-are-poised-backtrack-remote-access-2023-05-17/; Leslie Kendrick, "Are Speech Rights for Speakers?" 103 VA. L. REV. 1767, 1778 (2017) (characterizing free speech as a right of listeners to access information without interference by the government). Ultimately, we agree with the Committee that the First Amendment does not override the ability of courts to establish common sense requirements that ensure the integrity of their decision-making with respect to amicus briefs.

[18] In addition, we agree with Sen. Sheldon Whitehouse and Rep. Hank Johnson's proposal to require more disclosure of financial ties between amici. *See* Comment from Senator Sheldon Whitehouse & Congressman Hank Johnson, Comment ID USC-RULES-AP-2024-0001-0006, 3, Sept. 12, 2024, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0006. We also agree with AAJ's clarifying edits to the proposed (a)(4)(D) disclosure requirements, as well as its proposal to raise the threshold for nonparties to $1000 to avoid imposing undue burdens on small organizations reliant on crowdfunding. AAJ Comment at 8-9.

[19] Proposed Amendments, at 22, 35.

more than enough to fully fund the annual salaries of multiple lawyers.[20] And the Committee's proposed threshold percentage is more than double that set by Federal Rule of Appellate Procedure 26.1, which alerts judges about the potential need for recusal by requiring a nongovernmental corporation that is a party or seeks to intervene to disclose any publicly held corporation that owns 10% or more of its stock.[21] Accordingly, we recommend lowering the general contribution disclosure threshold to 10%– a more informative level that is still less burdensome than proposed Congressional reforms.[22] We also recommend setting an alternative minimum disclosure for contributions of $100,000 – a threshold proposed in the AMICUS Act,[23] which also happens to align with the nationwide average annual salary for a single nonprofit lawyer.[24]

b. Require Disclosure of Creation Date for Amicus Formed Since Underlying Case Began

The proposed amendments require an amicus that has existed for less than 12 months to state the date it was created.[25] But amici may be created in anticipation of not only the appellate phase.[26] Amici could be formed to influence a particular case at any time during the underlying litigation, with an eye towards filing amicus briefs at the district court level before also filing amicus briefs at the appellate level.[27] Accordingly, we recommend requiring disclosure of dates of creation for all amici formed since the underlying case was filed. This would add little burden for amici, as they would typically need to retain records of dates of formation for tax and state registration purposes.

---

[20] "United States Chamber of Commerce (USCC)," Cause IQ, https://www.causeiq.com/organizations/united-states-chamber-of-commerce,530045720/ (accessed Feb. 17, 2025) (noting total revenues of over $196 million in 2023).

[21] The applicable Committee Notes for explain: "A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock." Fed. R. App. P. 26.1 Committee Notes, https://www.law.cornell.edu/rules/frap/rule_26.1

[22] S. 1411 - AMICUS Act, 116th Cong., https://www.congress.gov/bill/116th-congress/senate-bill/1411/text (AMICUS Act proposed threshold of 3% of gross annual revenue).

[23] *Id*.

[24] *See, e.g.*, "Nonprofit Lawyer Salary," ZipRecruiter, https://www.ziprecruiter.com/Salaries/Nonprofit-Lawyer-Salary (accessed Feb. 17, 2025).

[25] Proposed Amendments at 20, 31, 36.

[26] Moreover, even amici created for purposes of filing briefs at the appellate stage would need to take into account that the ability to ensure that donors receive favorable tax treatment depends on Internal Revenue Service processing times. *See, e.g.*, "How Long Does It Take to Get 501(c)(3) Status?" Harbor Compliance, https://www.harborcompliance.com/how-long-does-it-take-to-get-501c3-status (accessed Feb. 17, 2025) ("If you file Form 1023, the average IRS processing time is 6 months. Processing times of 9 or 12 months are not unheard of.").

[27] Amici created for purposes of litigation could also be formed early on with the aim of generating research or white papers that may be relied upon by a party, in addition to eventually filing amicus briefs.

c. Lengthen the Disclosure Lookback Period

The proposed amendments restrict the financial disclosure requirements to the previous 12 months. Yet cases may have been filed years ago. Sophisticated parties that are frequently subject to litigation have opportunities to coordinate with amici they fund well before appeal, from early in the merits phase.

Given that some amici make arguments that are tantamount to expert reports–without adversarial *Daubert*[28] testing–and some judges cite facts from amicus briefs,[29] the Committee may wish to consider referring to rules relating to expert disclosures as another yardstick for amicus disclosure reform. For example, Fed. R. Civ. P. 26(a)(2)(B)(v) requires the report of a testifying expert to disclose information such as "the witness's qualifications, including a list of all publications authored in the previous 10 years," and "a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition." Although arising in a different context, these longer lookback periods indicate the value the legal system places on disclosure periods that are long enough to detect representative patterns of conduct.

d. Require Amici to Disclose Whether Their Law Firms Frequently Represent a Party

Law firms that frequently represent a party often shepherd amicus filings from non-party advocacy organizations or experts. Even where the amicus is, for example, a law professor or economist who has never taken money directly from a party, the party-linked law firm may exert considerable influence over the content of the brief. Thus, representations styled as "pro bono" work for an "independent" third party may, in practice, function more like *de facto* discounts to entice repeat business from a longstanding client. This is not a hypothetical concern: In a recent Ninth Circuit case, counsel for amici had collectively represented a party "in over 200 distinct cases in federal district court alone"– not counting litigation in other courts, or corporate or compliance matters.[30] One law firm that filed an amicus brief on behalf of a law professor had represented a party to the case in 99 federal district court cases.[31] Accordingly, we recommend requiring disclosure of whether the law firm filing an amicus brief currently represents a party in other matters, and the number of matters where the law firm has represented a party within the past 5 years (or other reasonable threshold). Law firms routinely have to run conflicts of interest to comply with professional rules of conduct, so will already have much of this information on hand.

In conclusion, we applaud the Committee's efforts, and encourage the Committee to make the foregoing revisions to appropriately balance concerns of administrative burden, potential judicial recusal, and the public's confidence in the integrity of the judicial system.

---

[28] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (factors for screening expert testimony).
[29] Allison Orr Larsen, "The Trouble with Amicus Facts," 100 VA. L. Rev. 1757, 1762-63 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409071 ("My research shows that 1 in every 5 citations to amicus briefs by the Justices in the last 5 years was used to support a factual claim--something I define as a theoretically falsifiable observation about the world… [T]he Justices are using these briefs as more than a research tool. The briefs themselves are the factual authorities, and the amici are the experts.")
[30] Collins amicus at 30-31.
[31] *Id*. at 31.

Respectfully submitted,

American Economic Liberties Project

February 17, 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 this comment in my personal capacity.

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. I wish to 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 one of our attorneys works *exclusively* on that case. 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 that went into effect in 2023, 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, I would find it 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. In sum, this rule would not just reduce the number of *amicus*

briefs by causing some to be rejected for filing. It would also reduce the number by causing many briefs to not even be written in the first place.

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 frequent 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

February 14, 2025

Via Federal eRulemaking Portal at: https://www.regulations.gov

Judicial Conference of the United States
Committee on Rules of Practice and Procedure
Attn: Honorable John D. Bates, Chair
Advisory Committee on Appellate Rules
Attn: Honorable Jay S. Bybee, Chair
Washington, DC 20544

Re: Proposed Amendments to Federal Rules and Forms:
Brady Center to Prevent Gun Violence Comment on Proposed Amendments to FRAP 29

Dear Judges Bates and Bybee:

The Brady Center to Prevent Gun Violence is a nonpartisan, not-for-profit organization dedicated to ending gun violence in the United States. Since 2022, our Legal Department has filed an average of 36 amicus briefs per year across all levels of federal courts, providing those courts with our perspective and expertise as the most long-standing survivor-led gun violence prevention organization in the United States. During that time, multiple courts have cited our amicus briefs in their decisions, including, most recently, the U.S. Court of Appeals for the D.C. Circuit,[1] demonstrating the valuable role amicus briefs can play in judicial decision-making.

As frequent practitioners in this area, we write to express concerns with some aspects of the proposed changes to Federal Rule of Appellate Procedure 29 (having served as the U.S. Department of Justice representative on the Advisory Committee on Appellate Rules for about 25 years, I continue to take a special interest in the Committee's work). Specifically, we wish to raise issues with the following:

(1) the elimination of amicus brief filings on consent of the parties[2];

(2) the requirement that motions for leave to file an amicus brief state "the reason the brief is helpful and why it serves the purpose set forth in Rule 29(a)(2)," with a brief that "may help the court" being defined as one that "brings to the court's attention relevant matter not already mentioned by the parties" and is not "redundant with another amicus brief"[3]; and

[1] *Hanson v. Smith*, 120 F.4th 223, 248, 249 (D.C. Cir. 2024).
[2] Proposed Rule 29(a)(2).
[3] Proposed Rule 29(a)(3)(B).

(3) the disclosure requirements regarding relationships between an amicus and a non-party, specifically with respect to contributing "members."[4]

Proposed FRAP 29(a)(2): Removing the ability to file on consent of the parties.

We have three concerns with this proposed change, one substantive and two pragmatic.

First, allowing amicus briefs to be filed on consent of the parties ensures that, in most cases, the full spectrum of voices that wish to be heard on an issue are represented; parties have an incentive to consent to amicus briefs expressing opposing viewpoints in order to ensure that amicus briefs in support of their position may also be filed. Were the federal circuit courts to do away with this possibility and make leave to file an amicus brief entirely discretionary with the courts, that could have the very detrimental effect of creating a public perception that only certain viewpoints are permitted to file amicus briefs, and that not all relevant viewpoints are being considered by the courts in litigation. This could create an unfortunate public perception of bias by judges assigned to a panel in appellate cases in favor of or against certain views. It could be quite damaging to the federal judiciary if the public perceives that certain entities have been allowed to file amicus briefs solely due to judicial discretion, while others have been denied their voice.[5]

Second, requiring judicial permission for every proposed amicus brief filing would certainly burden the courts and their clerks' offices with numerous motions for leave to file, which were not previously required.

Third, there is a serious practical problem for the circuit courts that the new proposal would cause. As noted above, if consent amicus filings are no longer allowed, then the burdens on the circuit courts will be particularly onerous because these numerous new motions would have to be acted on by the judges in a very short time. This speedy action would be necessary because appellate litigants need to know as they prepare their appellee and reply briefs whether or not particular proposed amicus briefs are going to be accepted by the court for filing. An appellant has only 14 days in which to file a reply brief after the appellee's brief has been filed and a supporting amicus brief has been filed.[6] As the appellant attorneys are drafting their reply briefs, they need to know if amicus briefs supporting the appellee are being accepted by the court, so that they know whether or not to respond to such briefs. And an appellee brief must be filed within 23 days after the appellant's brief and any supporting amicus briefs have been filed. Again, attorneys for appellees must know, as they are preparing their briefs, whether or not the filing of amicus briefs supporting the appellant have been accepted for filing, and thus whether the appellee attorneys must respond to points in those amicus briefs. This timing also means that these motions must be ruled upon by motions panels early in the briefing process, and the judges on these panels

[4] Proposed Rule 29(e).

[5] Then-Judge Samuel A. Alito recognized this potential problem in *Neonatology Associates, P.A. v. Commissioner*, writing: "A restrictive policy with respect to granting leave to file may also create at least the perception of viewpoint discrimination. Unless a court follows a policy of either granting or denying motions for leave to file in virtually all cases, instances of seemingly disparate treatment are predictable. A restrictive policy may also convey an unfortunate message about the openness of the court." 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.).

[6] As you know, an amicus brief in support of appellees is due seven days after the appellee brief. FRAP 29(a)(6).

will not have read the parties' briefs before deciding if particular amicus briefs should be allowed or not.

Proposed FRAP 29(a)(3)(B): Requiring that amicus motions for leave to file affirm that their briefs discuss matter "not already mentioned by the parties," and that the briefs be "not redundant with another amicus brief."

We have identified three issues with this proposed change.

First, as you know, pursuant to FRAP 29(a)(6), amicus briefs are due seven days after the filing of the brief that they support. As a result, amici typically do not see the party brief until seven days before the amicus filing deadline. Forming a group that will file a joint amicus brief and drafting that amicus brief generally must begin well in advance of that date. This makes it almost impossible to ensure that there is little-or-no overlap between a party brief and an amicus brief.

Second, the requirement that an amicus brief discuss only matters "not already mentioned by the parties" undermines one of the critical roles that amici can play: bringing to the court's attention the impact of an issue and its importance for a broad constituency well beyond the parties to a particular case. As Justice Alito has observed, "[e]ven when a party is very well represented, an amicus may provide important assistance to the court. Some amicus briefs . . . explain the impact a potential holding might have on an industry or other group." *Neonatology Assocs.*, 293 F.3d at 132 (citation and quotation omitted).

Third, as you know, all amici briefs in support of a particular party are due on the same day. But, amici often represent diverse groups and interests and there is no way as a practical matter to ensure that they are all aware of one another in advance of filing, much less are all in communication with each other. It would therefore be completely infeasible to ensure that each of the amicus briefs represents a unique perspective. It also raises timing questions: if several amici file briefs on the same day that contain overlapping content, which ones will receive permission by the court to file? The one that by happenstance filed first? It is far simpler for the court to simply allow all of the briefs to be filed on consent and then to decide which of those briefs are to be considered because they uniquely provide facts, arguments, or different points of view about the issues and background of a case.[7] Further, the Rule as currently proposed does not explain what may be considered "redundant." Would two briefs with overlapping arguments, but where the overlapping arguments are supported by different information, be considered "redundant"? If two briefs have a single overlapping argument, would that be enough to make them both disfavored? We suggest that this term be clarified in commentary to the new amendment in order to allow amici to best position their briefs for acceptance.

[7] "The decision whether to grant leave to file must be made at a relatively early stage of the appeal. It is often difficult at that point to tell with any accuracy if a proposed amicus filing will be helpful. . . . 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. On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance." *Neonatology Assocs.*, 293 F.3d at 132-33.

Proposed Rule 29(e): Disclosure requirements regarding the relationship between amici and non-parties.

Brady generally supports the increased disclosure requirements proposed by the rule changes. However, the Rule uses the term "member" without defining it in the text itself or in commentary by the Appellate Rules Advisory Committee. In some cases, such as ones involving amici briefs by labor unions or professional associations (for instance, the American Bar Association), membership may be easy to determine. But in other situations, it could be very difficult to determine what a "member" is. For example, there are organizations that do not have formal members, but request and receive numerous donations from individuals who likely do not consider themselves members of the organization (for example, family and friends may make donations at special occasions, but likely do not consider themselves as becoming members of an organization simply because they made a donation in honor of another person). It is thus not at all clear to us what a "member" is in the context of not-for-profit organizations, which are frequently the authors of amicus briefs in the federal courts of appeals. We suggest that the meaning of this term intended by the rules change be clarified in the commentary.

We appreciate the opportunity to discuss these proposed changes, and would be pleased to answer any questions you might have or to appear in person before the relevant committees.

Sincerely,

Douglas N. Letter
Chief Legal Officer
Brady Center to Prevent Gun Violence

crowell moring

Laura A. Foggan
(202) 624-2774
LFoggan@crowell.com

February 17, 2025

Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
One Columbus Circle Northeast
Washington, District of Columbia 20544

Submitted electronically via Regulations.gov

Dear Committee Members:

Re: Comments on Proposed Amendments to FRAP 29

I write on behalf of the Complex Insurance Claims Litigation Association ("CICLA"), a trade association of major property and casualty insurance companies. Through amicus participation, CICLA has been assisting courts across the country in understanding and resolving issues of significance to the insurance industry for 35 years. Courts consistently recognize the value of CICLA's amicus contributions to their decision-making. For example, in a decision issued last term, The U.S. Supreme Court quoted from and twice cited the amicus brief submitted by CICLA and co-amici on an important question involving standing under federal bankruptcy law. *See Truck Ins. Exch. v. Kaiser Gypsum Co*., 602 U.S. 268, 281, 282 (2024). Other courts have similarly recognized the value of CICLA's amicus submissions, particularly in identifying the broader implications of an issue, beyond the parties' interests.[1]

[1] *E.g.*, *CX Reinsurance Co. v. Johnson*, 282 A.3d 126, 145 (Md. 2022) (agreeing with the "Amicus Curiae Complex Insurance Claims Litigation Association" on implications of recognizing known and unknown tort claimants as policy beneficiaries); *Federated Mut. Ins. Co. v. Abston Petroleum, Inc*., 967 So. 2d 705, 711 (Ala. 2007) (citing with approval CICLA's arguments about application of a pollution exclusion clause); *ACMAT Corp. v. Greater N.Y. Mut. Ins. Co*., 282 Conn. 576, 593 n.14 (2007) (finding arguments CICLA presented as amicus curiae persuasive in a case of first impression on recovery of attorneys' fees); *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St. 3d 482, 485 n.1, 861 N.E.2d 121, 125 n.1 (2006) ("The court acknowledges with appreciation the briefs provided by amici curiae . . . the Complex Insurance Claims Litigation Association.").

As a regular amicus participant in the federal circuits,[2] CICLA writes to express its deep concerns that the Proposed Amendments to FRAP 29 would impose unwarranted barriers to amicus practice and deprive the courts of important information that is critical to strong judicial decision-making:

- First, by eliminating the option to file an amicus brief on consent of the parties, the Proposed Amendments would discourage amicus participation and impose an unnecessary burden on the courts.

- Second, combined with the motion for leave requirement, the Proposed Amendments unduly restrict the scope of amicus participation by "disfavoring" an amicus brief that addresses an issue "mentioned" by one of the parties.

- Third, the proposed new disclosure requirements, which would mandate disclosure of a party that contributes more than 25% to an amicus's budget, are arbitrary and not narrowly tailored to their stated purpose.

Together, the Proposed Amendments would inhibit amicus practice, to the detriment of sound judicial decision-making by silencing important contributions from subject-matter experts and others who identify critical issues and context the parties overlook or ignore.

Elimination of Consent Option

Unlike the rule adopted by the U.S. Supreme Court, which freely allows the filing of amicus briefs, the Proposed Amendments to FRAP 29 would require that a non-governmental amicus brief be submitted only by leave of court. Rule 29 permits amici to file a brief if all parties have consented. In CICLA's experience, the consent option is particularly useful in major cases, and when there are opposing amici submissions. The existing rule thus permits the court to fully benefit from competing perspectives on the broader implications of an issue and economizes judicial resources by avoiding the need for motions. When a motion explaining the value of amicus participation is required, CICLA has routinely been granted leave to participate and oppositions are rarely filed.

In contrast, by eliminating the consent option, the Proposed Amendments are designed to reduce amicus participation, while adding an unnecessary layer of judicial decision-making.

[2] Examples of CICLA's recent amicus participations include cases before the U.S. Courts of Appeals for the Second Circuit (*Am. Prec. Indus., Inc. v. Federal Ins. Co.,* No. 24-842 (2d Cir.) (pending)), the Sixth Circuit (*Westfield Nat'l Ins. Co. v. Quest Pharms., Inc*., 57 F. 4th 558 (6th Cir. 2023)), the Ninth Circuit (*AIU Ins. Co. v. McKesson Corp*., No. 22-16158 (9th Cir. Jan. 26, 2024)), and the Tenth Circuit (*Chisholm's-Village Plaza, LLC v. Travelers*, No. 23-2133 (10th Cir.) (pending)).

Requiring leave in every instance will invite parties to file oppositions rather than focus their resources on the merits of the issues. The federal circuits still must review proposed amicus briefing to rule on the motion for leave, but if the Proposed Amendments are approved, they now must also – in every instance involving a nongovernmental amicus –issue a separate ruling on whether the proposed participation satisfies the new Rule 29 gateway. And by raising the bar for participation, the Proposed Amendments will force potential amici to give greater weight to the risk that their finite resources will be wasted, if leave is not granted. Amici may choose to forgo participation to avoid that risk – even though the information they would have provided could have improved the court's analysis.

Furthermore, eliminating the consent requirement does not serve the purposes advanced in the Advisory Committee Report. The Report justifies the proposed rule's departure from the Supreme Court's rule based on (1) the Supreme Court's requirement that briefs be submitted in the form of printed booklets, which operates as a "modest filter on amicus briefs," and (2) the potential that an amicus brief could trigger a circuit court judge's recusal. It also states that current court conflict check procedures may result in a judge's recusal without their knowledge. By eliminating the consent option, the Advisory Committee states, the proposed rule would ensure that a judge decides whether to deny leave to file the brief or to recuse.

The Proposed Changes thus seem intended to limit amicus submissions based on the entity's financial resources (characterizing the booklet form required at the Supreme Court as a "modest filter") without offering a justification for such a "filter" or accounting for the benefits of strong amicus participation. Moreover, if the Committee is truly concerned that judges must be informed that an amicus submission could trigger their disqualification, a rule tailored to the court system's conflicts procedure would be a more closely tailored response.

In sum, requiring amici to file, and courts to rule on, a motion for leave in all cases wastes judicial resources, increases the cost to amici, and raises the bar for amicus participation, depriving courts of unique perspectives on important legal questions where an amicus curiae's expertise and experience could aid the court's decision-making. CICLA strongly urges the Committee to reject a rule requiring motions for leave in every instance.

<u>The New Purpose Requirement</u>

The Proposed Amendments also add a new "purpose" limitation – providing that an amicus submission is "disfavored" unless it "brings to the court's attention relevant matter not already *mentioned* by the parties." (Emphasis added.) Thus, combined with the motion-for-leave requirement, the Proposed Amendments require the circuit courts to parse the party briefs and the proposed amicus brief to ensure that there is no overlap of issues. Each circuit must decide how much overlap, if any, is permitted. For example, a party might make a broad assertion without addressing the rationale underlying it. Is the amicus prohibited from addressing the same question if it provides more detail or a different analysis?

The new "purpose" requirement, along with the elimination of a consent option, work together to make amicus participation more difficult and expensive, while adding to the burden on judicial resources and limiting the information available for sound judicial decision-making. CICLA urges the Committee to reject the idea that less information is better. Federal judges are adept at rejecting arguments they find unpersuasive or unhelpful.

New Disclosure Requirements

Finally, CICLA urges the Committee also to reject the proposed new disclosure provisions regarding the relationship between a party and an amicus. The current rules already require disclosure of a party that authors the brief — the core concern to ensure fairness in briefing to the court. To the extent there is concern about control of the amicus, disclosure could be required at 50%, since at any level less than that, other contributors have a greater voice than the party. The new provisions are burdensome and unnecessary: they misapprehend the purposes of a trade association or public interest group's amicus participation, which is not to act as a party advocate, but for the development of the law based on sound principles and predictable outcomes affecting their industry more broadly. But at bottom, the change is unnecessary. Courts can, and do, assess the usefulness of an amicus submission based on the persuasiveness and value of the arguments, not on an arbitrary financial threshold. Moreover, as other groups have pointed out, the expanded disclosure requirements raise significant constitutional issues.

CICLA respectfully submits that the premise of the Proposed Amendments to FRAP 29 – that there is a need for rule changes to curtail amicus practice before the federal courts – is misplaced. To the contrary, an amicus may be uniquely able to help a court frame the issues and offer solutions in a way that doesn't necessarily align with a party's interest in a particular case. For example, as an advocate for the development of sound and predictable rules in the insurance arena, CICLA has expertise and experience on complex questions that may help the court identify key impacts of its ruling. The Proposed Amendments would constrain the judicial process by reducing the courts' access to a valuable resource, while also burdening their dockets. CICLA submits that the Committee should decline to adopt these amendments to Rule 29.

Thank you for your consideration of these concerns.

Very truly yours,

/s/
Laura Foggan
Counsel for the Complex Insurance Claims Litigation Association

COSAL
COMMITTEE TO SUPPORT THE ANTITRUST LAWS

February 17, 2025

Submitted Electronically

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE
Suite 7-240
Washington, DC 20544

Re: Comments Regarding the Proposed Amendments to Rule 29 of the Federal Rules of Appellate Procedure by the Committee to Support the Antitrust Laws (USC-RULES-AP-2024-0001)

Dear Judge Bates:

The Committee to Support the Antitrust Laws (COSAL) submits these comments to express its general support for the proposed amendments to Federal Rule of Appellate Procedure 29. However, COSAL also highlights three potential areas of concern: (1) that the proposed provision eliminating the option to file an amicus brief with the consent of all parties will result in unfairness and inefficiency; (2) that the standard for permissible amicus briefs—those that address issues not "mentioned" in the parties' briefs and are not redundant of another—is both too stringent and unworkable; and (3) that the threshold for disclosure of party contributions to amici is too low. COSAL suggests revisions that may address these concerns.

1. COSAL Has an Interest in Ensuring That the Process for Filing Amicus Curiae Briefs Remains Fair and Transparent.

COSAL is a nonprofit organization that was established in 1986 to promote and support the enactment, preservation, and enforcement of a strong body of antitrust laws in the United States. COSAL's members are law firms throughout the country that represent individuals and businesses that have been harmed by violations of the antitrust laws. COSAL closely monitors and comments on congressional and administrative activity with respect to antitrust policy and plays a leadership role in building support for the antitrust laws. In addition, COSAL regularly files amicus briefs where the issue presented will affect enforcement of antitrust laws. This past year alone, COSAL filed five amicus briefs on topics related to statutes of limitations, pleading standards, and antitrust immunity related to the Noerr-Pennington doctrine.

2. Eliminating the Option to File an Amicus Brief on Consent of the Parties Creates Unfairness and Judicial Inefficiency.

COSAL opposes the proposed change to Rule 29(a)(2) that would permit an amicus curiae to "file a brief only with leave of court." The Committee on Rules of Practice and Procedure ("Standing Committee") proposes requiring leave of court because the current "consent requirement fails to serve as

a useful filter" and the failure of a party to timely respond to a consent request prevents a potential amicus from knowing whether it will need to file a motion until the last minute. Neither of these justifications, however, necessitate the amendment limiting amicus briefs to those approved by courts after motion practice. As discussed below, it is not at all clear that requiring amici to seek and obtain leave to file their briefs will serve as a significant filter to the number of motions for leave that are filed (except by under-resourced amici). Thus, the proposed rule merely substitutes one burden courts face (reviewing amicus briefs to consider on the merits) with another potentially greater burden (timely review of motions for leave to file together with the proposed amicus briefs). At the same time, the proposed rule would likely result in delays of courts' decisions regarding the motions, creating uncertainty among the parties as to which amici arguments they must respond to in their briefs, and which may be disregarded.

First, COSAL is concerned that this change increases actual burdens on appellate courts while the goal of the amendment is the opposite. Under the current rule, a court must read amicus briefs only once and decide whether to consider or rely on an amicus brief, at its discretion. A court can simply disregard briefs it deems unhelpful or redundant. By contrast, under the proposed rule, because all amici must seek leave of court, courts will now have to review and act upon every motion for leave to file—*adding* to courts' workload. Instead of reviewing each amicus brief only once to determine its helpfulness, courts will have to review the motion for leave, memorandum in support, and the amicus brief initially to determine whether to grant leave to file and then review the amicus brief again later in deciding the merits of the issue to which the brief is addressed.

Additionally, the proposed requirement that all amici must seek leave of court likely will delay rulings on such motions because *all* amici—rather than, under the current rule, the smaller number of amici that must seek leave only when they cannot obtain the parties' consent—will be required to seek leave to file briefs. Depending upon the number of briefs filed, the court may not have sufficient time to rule on the motions prior to the due date of the appellant's brief or reply brief, as applicable.[1] Further, because proposed amended Rule 29(a)(1) permits amicus curiae briefs only when they are not redundant with each other, this may require courts to delay their decisions on whether to grant leave to file until all amicus briefs have been submitted. Delays in resolving these motions may leave parties uncertain as to which amicus briefs to address in responsive briefs. As a result, the parties will have to either forgo addressing any amicus briefs in subsequent filings or be forced to address them all rather than be left guessing as to which may become part of the record.

Finally, the requirement that all amici seek leave of court may work substantial unfairness on under-resourced amici. The Advisory Committee appears to believe that the new requirement will, in and of itself, create a "filter" on amicus filings by disincentivizing amicus briefs. Realistically, however, the barrier the new rule erects is likely to disincentivize only those amici with fewer resources, rather than those with weak or redundant arguments. That is because amici must prepare their motions and supporting memoranda as well as their proposed briefs all without knowing whether their motions will be granted. Under-resourced potential amici would be forced to decide whether to allocate their limited resources or staff to preparing an amicus brief—no small endeavor—that they may not ultimately be permitted to file, or to other projects that will yield more certain results. Well-funded potential amici that do not face similar resource constraints are not confronted with that trade-off and thus are unlikely to be

[1] An amicus brief is due within seven days of the filing of the principal brief of the party being supported. *See* Fed. R. App. P. 29(a)(6). This leaves fourteen days for the court to rule on the motions for leave to file an amicus brief and an appellant to incorporate responses to amici filing briefs in support of the appellee into the reply brief. *See* Fed. R. App. P. 31(a)(1).

disincentivized from filing motions for leave. The result may be that the only amici curiae that are "filtered" out of the courts' processes are those with limited resources, without regard for the meritoriousness of their positions. The Advisory Committee should avoid such an imbalance, particularly where the other concern animating the proposed amendment appears to be questionable.[2]
Based on these concerns, COSAL recommends eliminating the requirement that parties seek leave of court and that the rule instead continue to allow amici to file briefs with the consent of the parties.

3. The Proposed Standard Is Both Too Stringent and Unworkable.

Rule 29(a)(1)'s proposed new standard for permissible amicus briefs is both ambiguously drafted and far too stringent in practice. First, the proposed amendment limits permissible amicus curiae briefs to only those addressing "relevant matter not mentioned by the parties." Problematically, this would eliminate useful categories of amicus briefs. Parties to an appeal must comply with word limits and may not be able to elaborate on every point that they mention. An amicus curiae brief can provide additional clarity on these points, yet the proposed rule's prohibition on matter "mentioned by the parties" could prevent such an amicus brief. Moreover, that language could threaten amicus briefs that seek to correct or address matters at issue in the appeal in more detail. If the Committee's concern is the filing of duplicative "me too" briefs, COSAL submits that it is more appropriate for the appellate courts to determine which of those briefs are helpful.

Second, the proposed amendment limits permissible amicus curiae briefs to those that are not redundant with one another. But it provides no guidelines for what is considered redundant and how courts are to decide which among redundant briefs will be granted leave.[3] The resolution of potential "tiebreakers" could create the perception of judicial bias, unlike the current rule. Importantly, from a practical standpoint, this standard would not limit the number of amicus briefs filed since, unless there were substantial coordination among amici, amici would not know whether their briefs are redundant of others filed (and if so, the degree of redundancy) because most amicus briefs would be filed on the day of the deadline. If anything, the court would then be burdened with the extra work of sorting through the amicus briefs to make dubious "redundancy" determinations.

---

[2] The Advisory Committee also identifies as a significant concern that "unconstrained filing of amicus briefs in the courts of appeals would produce recusal issues." Preliminary Draft of Proposed Amendments to Federal Rules at 25-26 (Aug. 2024). But the current rule—permitting amicus curiae briefs upon consent of the parties—has been in place for decades, and the Advisory Committee has not identified any actual recusal issues that have arisen during all that time whether at the panel or *en banc* stage. Indeed, the proposal to limit filings to only those granted leave by the court "is the opposite of the approach that the Advisory Committee reported it was initially considering." That the initial proposal took a more permissive approach suggests that concerns about recusal are speculative at most. And, as the Advisory Committee points out, the current rule permits an appellate court to strike an amicus filing, even one filed with the parties' consent, if it would result in the disqualification of a judge. Given the courts' current ability to strike a consent filing if it would otherwise disqualify a judge, this stated concern seems illusory.

[3] For instance, consider a simple yet likely scenario in which Brief 1 covers Matter A and Brief 2 covers Matters A and B. Does the standard require courts to admit the broader Brief 2? If not, and the court admits the narrower Brief 1, is Brief 2 redundant because there is some overlap with Brief 1? This seems to turn on how much overlap is sufficient to render a broader brief redundant with a narrower one. If two proposed briefs trod the same ground, the standard provides no guidance regarding how to determine which of the redundant briefs should be granted leave to file, and which to deny. Should it be the brief that addresses the issues more concisely – or more broadly (whatever those terms mean in this context)? The first brief filed? The best written brief? The brief with the most signatories? The most well-known amicus? The inherently subjective nature of such determinations demonstrates the unworkability of the proposal.

4. Increased Disclosure Rules Promote the Integrity and Fairness of the Judicial Process.

COSAL supports the Standing Committee's proposed changes to Rule 29(b), (c), (d), and (e) calling for greater disclosure. The Standing Committee identified a government interest in "improv[ing] the integrity and fairness of the federal judicial process." In particular, the Standing Committee narrowed its interest to ensuring that an amicus brief help the court reach the correct decision in the case before it, which requires that the court "be able to evaluate the information and arguments presented in [the amicus] brief." As advocates for individuals and businesses that have been harmed by violations of the antitrust laws, COSAL members appreciate the necessity of ensuring that the courts, parties, and the public have sufficient information to weigh the credibility of an amicus brief.

COSAL believes that the Standing Committee has narrowly tailored the revisions to Rule 29 to meet this stated goal. It has explained the substantial relationship between the increased disclosure rules and this interest: "By providing more information about amici, these amendments would place judges, parties, and the public in a better position to assess the independence and credibility of the arguments and perspectives offered by amici." The Standing Committee proposed stricter disclosure rules for relationships between parties and an amicus because fairness in the adversary system dictates that a party should not be able to use amici to extend page or word limits.

Former Assistant Attorney General Jonathan Kanter underscored the need to disclose the relationship between an amicus and a party in his recent remarks regarding the troubling trend of economists failing to disclose financial interests. In his remarks, he relayed an instance where "a Court of Appeals cited an economic study written by a professor paid by the defendants in support of the defendants' litigation position," but the court was unaware of the financial relationship and cited the paper in establishing a precedential rule. This underscores the judiciary's keen interest in understanding the funding sources of submissions before the court. This type of disclosure is not dissimilar to the solicitation of testimony regarding payments for expert witnesses at trial where fact finders use financial incentives to weigh the credibility of expert witnesses. Information regarding funding sources may be used to assess the credibility and independence of amicus curiae briefs.

Moreover, in evaluating whether to respond to an amicus brief, parties often consider the relationship between amici and the opposing party and an amicus's potential ulterior motive. It is not always possible, however, to discover this information. The proposed disclosure requirements will make it easier for courts (and the parties) to assess the more flagrant biases and enhance public confidence in the judiciary. Moreover, it is more efficient to require an amicus with knowledge and access to its own funding sources to produce that evidence rather than depending on parties to expose hidden conflicts of interest in a short amount of time. While COSAL recognizes that a line must be drawn somewhere to avoid overburdening amici, COSAL believes that the 25% threshold for disclosure is too high and could undermine the proposed disclosure rules. COSAL believes that the Standing Committee should adopt the corporate disclosure rule's threshold of 10% for contribution by a party, which has been in effect for over 25 years. *See* Fed. R. App. P. 26.1. The purpose of that rule is to "assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify the judges from hearing the appeal." Advisory Comm. note. That is, where a corporation owns 10% or more of a party's stock, the interests of the party to the litigation and its 10% owner are sufficiently aligned to potentially disqualify a judge with an interest in the non-party owner. Such alignment of interests is likewise present when a party to an appeal has contributed 10% of the annual revenue of amici. That alignment should be disclosed. This 10% threshold allows for greater disclosure, consistent with a

longstanding rule, while still avoiding the burden of having to report minute or remote financial contributions.

Sincerely,

Joseph C. Bourne
Lockridge Grindal Nauen PLLP
Chair, COSAL Federal Rules Committee

Sincerely,

Meegan Hollywood
Shinder Cantor Lerner LLP
Vice-Chair, COSAL Federal Rules Committee

February 17, 2025

Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Via: https://www.regulations.gov/docket/USC-RULES-AP-2024-0001/document

Re: Proposed Amendments to Federal Rule of Appellate Procedure 29 (Amicus Briefs)[1]
Docket ID: USC-RULES-AP-2024-0001

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

The Electronic Frontier Foundation (EFF) appreciates the opportunity to submit these comments on the proposed changes to Federal Rule of Appellate Procedure 29 regarding amicus briefs, as drafted by the Advisory Committee on Appellate Rules.

EFF is a San Francisco-based, member-supported, nonprofit civil liberties organization that has worked for 35 years to protect free speech, privacy, security, and innovation in the digital world. With over 30,000 members, and harnessing the talents of lawyers, activists, and technologists, EFF represents the interests of technology users in court cases and policy debates regarding the application of law to the internet and other technologies.[2]

I. Rule 29(a)(2) on "Purpose" is Overbroad

A. "Already Mentioned by the Parties"

Rule 29(a)(2) should not be amended to state that an amicus brief that addresses issues ("relevant matter") that are "already mentioned" by the parties is disfavored. This language is unduly broad[3] and may have foreclosed amicus briefs that EFF has filed over

[1] 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* (Aug. 2024), https://www.uscourts.gov/file/78921/download.
[2] *See* https://www.eff.org/.
[3] The Third Circuit, for example, has a local rule with more reasonable language, suggesting that some overlap between party briefs and amicus briefs is understandable and appropriate: "Before completing the preparation of an amicus brief, counsel for an amicus curiae must attempt to ascertain the arguments that will be made in the brief of

the years. We often file amicus briefs that expand upon issues only briefly addressed by the parties, either because of lack of space given other issues that party counsel must also address on appeal, or a lack of deep expertise by party counsel on a specific issue that EFF specializes in. We see this often in criminal appeals when we file in support of the defendant. We also file briefs that address issues mentioned by the parties but additionally explain how the relevant technology works or how the outcome of the case will impact certain other constituencies.

Here are a few examples of amicus briefs that may have been disfavored under this "already mentioned" standard, but nevertheless provided help to the courts:

- In *United States v. Cano*, we filed an amicus brief[4] that addressed the core issue of the case—whether the border search exception to the Fourth Amendment's warrant requirement applies to cell phones. We provided a detailed explanation of the privacy interests in digital devices, and a thorough Fourth Amendment analysis regarding why a warrant should be required to search digital devices at the border. The Ninth Circuit extensively engaged with our brief to vacate the defendant's conviction. *United States v. Cano*, 934 F.3d 1002, 1012 (9th Cir. 2019).

- In *United States v. Hasbajrami*, we filed an amicus brief[5] that expanded upon the central Fourth Amendment question in the case—whether warrantless access to Americans' international communications collected "incidentally" pursuant to Section 702 is unconstitutional. The Second Circuit extensively engaged with our brief in remanding the case back to the district court. *United States v. Hasbajrami*, 945 F.3d 641, 665 (2d Cir. 2019).

- In *United States v. Bosyk*, we filed an amicus brief[6] that addressed the central Fourth Amendment question on appeal—whether probable cause existed to issue a warrant—but provided in-depth technical details about how Uniform Resource Locators (URLs) work, which included explaining how the mere fact that a person clicked on a link does not establish probable cause, particularly because a URL's appearance may not identify the origin of the outbound link or the content of the materials on the linked resource (e.g., webpage). The Fourth Circuit's

---

any party whose position the amicus is supporting, with a view to avoiding any *unnecessary* repetition or restatement of those arguments in the amicus brief." Third Circuit Local Appellate Rule 29.1 (emphasis added), https://www.ca3.uscourts.gov/sites/ca3/files/2011_LAR_Final.pdf.

[4] https://www.eff.org/document/eff-amicus-brief-us-v-cano

[5] https://www.eff.org/document/hasbajrami-eff-aclu-amicus-brief

[6] https://www.eff.org/document/amicus-brief-40

opinion and the dissent cited our brief. *United States v. Bosyk*, 933 F.3d 319, 325, 355 n.1 (4th Cir. 2019) (Wynn, J., dissenting).

- In *B.L. v. Mahanoy Area School District*, we filed an amicus brief[7] that addressed the core First Amendment issue of the case—whether a high school student should be punished for her off-campus social media speech. We made a legal argument that *Tinker*'s "substantial disruption" test should not apply to off-campus speech, which the Third Circuit ultimately embraced. *B.L. v. Mahanoy Area School District*, 964 F.3d 170, 184 n.8, 186 (3d Cir. 2020), *affirmed by Mahanoy Area School District v. B. L.*, 594 U.S. 180 (2021). We also provided an explanation of how young people use social media for good and valid reasons, which the court cited in discussing the various ways young people use social media. *Id.* at 179.

- In *NetChoice, LLC v. Attorney General of Florida*, a First Amendment case about social media content moderation, we filed an amicus brief[8] that elaborated on points only briefly made by the parties about the prevalence of specialized social media services reflecting a wide variety of subject matter focuses and political viewpoints. Several of the examples we provided were used by the 11th Circuit in its opinion. *NetChoice, LLC v. Attorney General of Florida*, 34 F.4th 1196, 1213-14 (11th Cir. 2022), *vacated and remanded by Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).

- In *Center for Investigative Reporting v. DOJ*, a FOIA case, we filed an amicus brief[9] that provided technical expertise describing the growth of government databases and how many Americans' personal information is increasingly being collected and stored in government databases. The argument was directly relevant to the legal issue: whether FOIA permits agencies to disclose aggregate data based on those databases. Our brief pointed out that such disclosure is essential to ensure transparency and government oversight while protecting personal privacy. The Ninth Circuit agreed and cited our brief. *Center for Investigative Reporting v. DOJ*, 14 F.4th 916, 937 (9th Cir. 2021).

- In *UMG Recordings, Inc. v. Shelter Capital Partners*, the issue on appeal was the scope of the "safe harbor" provisions of the DMCA, 17 U.S.C. §512(c). UMG had sued Veoh, a now-defunct competitor of YouTube, in an effort to hold Veoh liable for users uploading UMG music videos. UMG argued that the statute's protection from liability for "infringement of copyright by reason of the storage at

[7] https://www.eff.org/document/eff-amicus-brief-bl-v-mahonoy-area-school-district-3d-cir
[8] https://www.eff.org/document/eff-amicus-brief-netchoice-v-florida
[9] https://www.eff.org/document/cir-v-doj-eff-amicus-brief

the direction of a user" only applies when a user uploads content, and not later when others access that content. Our amicus brief[10] explained the internet's history of online service providers and web hosting services to show that UMG's interpretation of the statute was too narrow, and that Veoh was entitled to safe harbor protection. The Ninth Circuit approvingly cited our brief in ruling in Veoh's favor. *UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F.3d 1006, 1018 (9th Cir. 2013).

B. "Redundant With Another Amicus Brief"

Rule 29(a)(2) should not be amended to state that an amicus brief that is "redundant with another amicus brief is disfavored." Some circuits already have local rules that encourage amici to coordinate and avoid overlap,[11] and EFF always endeavors to do this. However, it is unrealistic to expect that there should be no overlap among amicus briefs, given that any amicus cannot precisely know or control what every other amicus will write.

Additionally, the proposed rules appear to present an internal conflict. This rule would force the parties to create an amicus strategy to avoid redundancy among amicus briefs, yet the new disclosure rules appear to reflect a policy against greater coordination between the parties and amici. *See infra* Part III.

II. Rule 29(a)(2) Should Not be Amended to Remove the Consent Provision

Rule 29(a)(2) should not eliminate the consent provision at the panel stage. The rule should continue to permit amicus briefs with party consent or pursuant to a motion and leave of court for the initial panel consideration of a case.

Eliminating the consent provision will dramatically increase motion practice for circuit courts, putting administrative burdens on the courts as well as amicus brief filers. As the Advisory Committee recently acknowledged, "There was substantial concern about this proposal at the Standing Committee meeting in June of 2024, particularly about the additional work for lawyers and courts on motions that are not currently required."[12]

---

[10] https://www.eff.org/document/eff-and-public-interest-group-amicus-support-veoh
[11] *See, e.g.*, *Ninth Circuit Advisory Committee Note to Rule 29-1* ("The filing of multiple amici curiae briefs raising the same points in support of one party is disfavored. Prospective amici are encouraged to file a joint brief."), https://cdn.ca9.uscourts.gov/datastore/uploads/rules/frap.pdf.
[12] *Report of the Advisory Committee on Appellate Rules* at 3 (Dec. 16, 2024), available within Committee on Rules of Practice and Procedure, *Agenda Book* at 195 (Jan. 7,

Additionally, eliminating the consent provision does not appear necessary. The Advisory Committee cites the risk of recusal as the primary reason for eliminating the consent provision at the panel stage, favoring the striking of amicus briefs through the motion process over the recusal of a conflicted judge.[13] However, current Rule 29(a)(2) states that a circuit "may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification," even if originally filed based on party consent. That is, the consent provision does not prevent a later striking of an amicus brief to avoid a recusal.

Moreover, the Advisory Committee explains that the filing of an amicus brief with consent of the parties "could cause the recusal of a judge at the panel stage *without the judge even knowing*."[14] This appears to be in reference to the Second, Ninth, and Tenth Circuits' concerns about how their computer systems work:

> "The filing of an amicus brief on consent can lead the clerk's office, operating under a computer program that checks for recusals, to block a case from being assigned to a judge before the case is assigned to a panel. That means that a judge is stricken from a case at the outset, as a result of the consent of the parties. By requiring a motion, a judge would decide whether to recuse or to strike the brief—as opposed to the computer simply not assigning the judge to the case in the first place."[15]

If certain circuits have a computer system that recuses judges automatically, without a judge knowing or before a panel is created, it would be more prudent for these circuits to reprogram their computer systems to prevent this from happening—instead of increasing the burden to file amicus briefs.

Eliminating the consent provision ultimately is not in the interests of justice. Having to write and file a separate motion may disincentivize certain parties from filing amicus briefs, especially people or organizations with limited resources. The Advisory Committee should not be more concerned about allowing a single judge to remain on a panel than having the panel—regardless of which judges comprise the panel—hear the full panoply of arguments that may help the panel reach the right decision. And as the Advisory Committee acknowledged, requiring a motion and leave of court for all amicus

---

2025), https://www.uscourts.gov/sites/default/files/2024-12/2025-01_standing_committee_agenda_book_final_12-19.pdf.

[13] *Preliminary Draft* at 25-26.

[14] *Preliminary Draft* at 26 (emphasis added).

[15] *Report of the Advisory Committee on Appellate Rules* at 3 (Dec. 16, 2024), contained in Committee on Rules of Practice and Procedure, *Agenda Book* at 195 (Jan. 7, 2025), https://www.uscourts.gov/sites/default/files/2024-12/2025-01_standing_committee_agenda_book_final_12-19.pdf.

briefs is counter to Supreme Court Rule 37.2, which no longer even requires party consent for the filing of amicus briefs.[16] The circuits should, at minimum, maintain the current language in Rule 29(a)(2) to facilitate the participation by diverse organizations at all stages of the appellate process—where appeals often do not just deal with discrete disputes between parties, but instead deal with matters of constitutional and statutory interpretation that will impact the rights of Americans for years to come.

Finally, while it is true that, should the consent provision be eliminated, circuits could reinstate it via their local rules, having Rule 29(a)(2) amended in this way sends a negative message that the Judicial Conference disfavors amicus briefs. The Judicial Conference should not alter a system that has generally been working well.

III. Rules 29(a)(4)(D), (E), and (F) [incorporating Rules 29(b), (c) and (e)] on Disclosures Should be Approached With Caution

We understand that it can be difficult for courts to ascertain who an amicus entity really represents, and that "the identity of an amicus does matter, at least in some cases, to some judges."[17] As such, we are comfortable with the new language in Rules 29(a)(4)(D) and (E), expanding the Statement of Interest and requiring the disclosure of a creation date if the amicus organization has been in existence for less than 12 months; although we suggest that they and the other disclosure requirements be exempted from the word count. *See infra* Part IV.

However, we have some additional thoughts on Rule 29(a)(4)(F), which incorporates Rules 29(b), (c) and (e). The Advisory Committee is correct that mandated disclosures of members or finances of amicus organizations burden First Amendment rights, including the freedom of association.[18] However, we believe that the Advisory Committee's focus on campaign finance law, rulings about which have generally favored more disclosure, is misplaced. Amicus briefs do not pose the same risk of corruption of the courts as do financial contributions to elected officials, where a lack of transparency in that context may provide elected officials cover to enter quid pro quo relationships with donors.

A. Relationship Between Amicus and a Party

Rules 29(b)(4) and (c) would require an amicus to disclose when a **party** or the party's counsel "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

[16] *Preliminary Draft* at 25.
[17] *Preliminary Draft* at 20.
[18] *Preliminary Draft* at 14.

for its prior fiscal year." This is not limited to money designated for a specific amicus brief, but instead broadly applies to general operating revenue of the amicus organization.

While EFF's mission is focused on protecting the rights of technology users, sometimes our interests align with those of corporations to the extent a case ultimately implicates the rights of users; for example, in cases related to copyright (fair use), Section 230 (47 U.S.C. § 230), or government requests for user data. As such, we sometimes file amicus briefs in support of the company defendant in these cases. We are cautiously comfortable with the 25% threshold because no single corporation contributes more than a quarter of our annual revenue—in fact, our corporate donations are far below that threshold.[19] But we would not want this threshold to be any lower. While the 25% threshold should not affect EFF, we are concerned that it may be detrimental to amicus participation by other public interest organizations with valuable insights to provide to the courts. We frequently write amicus briefs that are joined by other organizations that are smaller and less well-resourced than EFF and thus can have their funding percentages misleadingly skewed by a large donation, even if they also exercise donor independence like we do.[20]

Additionally, we would not want the standard to change from an easily applicable numerical one to a more amorphous one. The Advisory Committee was right to reject this alternative standard: "requiring disclosure if a party has made sufficient contributions to the amicus that a reasonable person would, under the circumstances, attribute to the party a significant influence over the amicus curiae with respect to the filing or content of the brief."[21]

B. Relationship Between Amicus and a Nonparty

Rule 29(e) would require an amicus to disclose the name of "**any person**—other than amicus or its counsel—who contributed or pledged to contribute **more than $100** intended to pay for preparing, drafting, or submitting the brief, unless the person has been a member of the amicus for the prior 12 months." EFF does not solicit donations for amicus briefs. As long as this rule only applies to money given or promised *for a specific amicus brief*, this provision will not apply to EFF.

We oppose a general nonparty donor disclosure requirement for each filed amicus brief. We agree with the Advisory Committee that "people contribute to organizations that submit amicus briefs for reasons that have nothing to do with the submission of

[19] For fiscal year 2023, EFF only received $256,700 of donations from multiple corporations, which is a fraction of our over $19 million budget. *See EFF 2023 Annual Report*, https://annualreport.eff.org/#financials.
[20] EFF has a strict policy of independence from our donors. *See* EFF, *Donor Policy*, https://www.eff.org/pages/membership-faq#donorpolicy.
[21] *Preliminary Draft* at 22-23.

amicus briefs."[22] And such a requirement would be less useful to the court and would be a greater administrative and associational privacy/First Amendment burden for EFF and its donors and members.[23] It is important, as the Advisory Committee stated, that "[n]ew members are free to join the amicus, and their general contributions are not subject to disclosure."[24]

If EFF ever were to receive a donation for a *specific amicus brief*, we support the disclosure exemption when the donor has been a member for the prior 12 months—because many of our donors and members have supported EFF for years or decades.

IV. Rule 29(a)(5)'s Word Count Should Exclude New Statement of Interest and Disclosure Requirements

Based on our experience, we have found that 7,000 words is an ideal length for amicus briefs. But we appreciate the written clarification in Rule 29(a)(5) that 6,500 words is the default rule. As the Advisory Committee acknowledged, it is important that the circuits remain free to revert to 7,000 words as they see fit under their local rules, per Rule 32(e).[25]

Additionally, given this reduced amicus brief word count and the expanded requirements for the Statement of Interest in Rule 29(a)(4)(D), as well as additional required disclosures per Rule 29(a)(4)(E) and (F) [which incorporates the disclosures under Rule 29(b), (c) and (e)], we propose that **Rule 32(f)** be amended to *exempt* these new requirements from the amicus brief word count, to allow ample space for an amicus to provide substantive arguments that will help the court.

Respectfully submitted,

/s/ Sophia Cope

Sophia Cope
Senior Staff Attorney
Electronic Frontier Foundation
sophia@eff.org

[22] *Preliminary Draft* at 23.
[23] *Preliminary Draft* at 21, 23.
[24] *Preliminary Draft* at 24.
[25] *Preliminary Draft* at 26.

Free Speech
COALITION, INC.

370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615
Phone: (703) 356-6912 Fax: (703) 356-5085
E-mail: freespeech@mindspring.com
www.freespeechcoalition.org

February 17, 2025

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

Re: Opposition to Proposed Amendments to FRAP Rule 29
Regarding submission of *Amicus Curiae* briefs

Dear Judge Bates:

These comments are submitted on behalf of Free Speech Coalition, Inc. ("FSC") and the Free Speech Defense and Education Fund, Inc. ("FSDEF"), as well as other nonprofit organizations listed in the appendix. FSC and FSDEF alone have filed 62 *amicus* briefs since 1994, and combined with the other commenters, these nonprofits have filed literally hundreds of *amicus* briefs in the U.S. Supreme Court, federal courts of appeals, federal district courts, and state courts. Formed 32 years ago, FSC is an association of nonprofit organizations and for-profit corporations concerned with the preservation of the rights of nonprofit advocacy organizations. Formed 30 years ago, FSDEF is a public charity exempt under IRC § 501(c)(4). We appreciate the opportunity to comment on the Proposed Amendments to Federal Rule of Appellate Procedure 29 (Aug. 15, 2024).

SUMMARY

The Committee is considering a proposed amendment to Federal Rules of Appellate Procedure ("FRAP") Rule 29, which would make it more difficult for interested parties to file *amicus* briefs, by requiring a motion for leave and leave of court before filing any *amicus* brief, and by requiring that "[a]n amicus brief must name any person — other than the amicus or its counsel — who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief, unless the person has been a member of the amicus for the prior 12 months." Federal judges and the federal rules are not above the Constitution, and the proposed rules would violate *amici*'s First Amendment rights of speech, association, and petition. The interests posited by the Committee cannot and do not override the First Amendment's constitutional protections. The entire proposal should be rejected. If it is implemented, it will be challenged, and, according to applicable Supreme Court tests, we believe it will be struck down.

COMMENTS

I. THE PROPOSED RULES INDICATE A HOSTILITY TO HIGHLY VALUABLE *AMICUS* BRIEFS NOT SHARED BY THE U.S. SUPREME COURT.

The Committee's recommendations for amendments appear to be predicated on the low view of *amicus* briefs generally held by their principal sponsor Senator Sheldon Whitehouse (D-RI).[1] But the U.S. Supreme Court values them. As one study noted, "of all [U.S. Supreme Court] opinions published between 1986 and 1995, approximately fifteen percent cited at least one amicus brief by name, and thirty-seven percent referred to at least one amicus brief."[2] A recent law review article states:

> Justice Breyer has said that these briefs "play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our decisions." Justice Alito concurs, observing that "[e]ven when a party is very well represented, an amicus may provide important assistance to the court … [by] collect[ing] background or factual references that merit judicial notice." And former Supreme Court law clerks have remarked that it is the "non-legal" information provided by amici that is the most useful. As one clerk publicly explained: "As a rule, the farthest thing from a party argument is what is most helpful. For example, hard facts or social science data…. Often you wish you knew more facts than you get from a party brief."[3]

No court has more *amicus* briefs in each case than the Supreme Court, yet the High Court has not evidenced the hostility to *amicus* briefs shown by the Whitehouse proposed rule. Demonstrating how out-of-step these rules are, in 2020, the U.S. Supreme Court made it easier to file *amicus* briefs — both eliminating the requirement to obtain consent or leave of Court before filing merits *amicus* briefs, and requiring only notice be given before filing *amicus* briefs on petition.[4]

---

[1] *See* https://www.whitehouse.senate.gov/news/release/whitehouse-welcomes-judicial-conferences-proposed-amicus-brief-disclosure-rules/.

[2] K. Lynch, "Best friends? Supreme Court law clerks on effective amicus curiae briefs," JOURNAL OF LAW AND POLITICS, 20(1), 33, 35 (2004).

[3] A. Larsen, The Trouble with Amicus Facts, 100 VA. L. REV. 1757 (Dec. 2014) (endnotes omitted).

[4] Supreme Court Rule 37.

Also, the proposed rule rejects the view of *amicus* briefs by those Courts of Appeals which have also found them valuable. One author noted that they are "cited by Sixth Circuit judges in between 20 to 40% of the cases that attract amicus filings. The circuit substantively relies on an *amicus* filing in about 10% of the cases that attract an amicus" in the Sixth Circuit.[5] The rule proposed would impede the filing of such briefs.

Without examining motives, three illegitimate reasons for the proposed rule can be identified.

First, although federal courts are authorized only to resolve "cases" and "controversies," much federal court litigation does much more than resolve the dispute between the parties. Particularly in recent years, nationwide injunctions have been issued which purport to usurp the authority of the political branches. When numerous *amicus* briefs are filed in courts of appeals, it is more likely that potential usurpation of authority is exposed and briefed. Rather than impair the filing of such briefs, the courts should facilitate the filing of briefs by non-parties whose interests will be affected, if not determined by a decision in a case to which they were not a party. Should the courts return to the days when the decision issued affected only the parties, some rationale for the proposed rule could be identified, but that is highly unlikely to ever happen.

Second, some federal judges may dislike *amicus* briefs because they require them to do more work — assuming all judges read the *amicus* briefs. Page and word limits already make it difficult for parties to do more than what is minimally required of them, without bringing to the court's attention the broader ramifications of a decision. As they say in England, judges appreciate "a short day," but that is no reason to artificially reduce the number of *amicus* briefs filed.

Lastly, federal judges may dislike *amicus* briefs because *amici* are often more aggressive in making arguments. Parties must be careful not to offend judges, and thus pull their punches in party briefs. *Amici* are often driven by broader concerns, and will be more likely to challenge erroneous precedent without self-censoring as parties may do. Although parties generally feel constrained to argue based on established lines of judicial authority, *amicus* briefs are more willing to challenge those prior lines of cases as being contrary to the approach of the Framers. Such plain talk to a court about error should be encouraged, not discouraged.

---

[5] C. Paulson, "Amicus Briefs, OSHA, and the Sixth Circuit," SixthCircuitAppellateBlog.com (Dec. 2, 2021).

II. THE "DISCLOSURE" REQUIREMENT OF PROPOSED RULE 29(e) WORKS SEVERE BURDENS ON THE RIGHTS OF ASSOCIATION, SPEECH, AND PETITION.

A. The "Disclosure" Requirement Works Severe Burdens on the Right of Association.

The requirement to disclose any donor of more than $100 to fund a particular *amicus* brief would have a severe chilling effect on associational rights, particularly in our modern, exceptionally polarized environment. Federal judges have the protection of U.S. Marshals, but ordinary Americans who would like their views heard by the courts before ruling on matters that affect the nation do not, chilling their free expression for fear of being listed to be targeted by political opponents.

The U.S. Supreme Court recently struck down a California rule requiring all charitable organizations to disclose their donors to the state. The Court applied "exacting scrutiny," and found that, despite the state's "substantial governmental interest[] in protecting the public from fraud," a blanket disclosure requirement was not narrowly tailored to that interest, and the rule was facially unconstitutional. *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021) (hereinafter "*AFPF*").

At least in *AFPF*, California identified the problem it sought to address — preventing fraud in charitable solicitations — where the Committee here has not identified a real problem. The AFPF Court noted that "[t]he Attorney General receives complaints each month that identify a range of misconduct, from 'misuse, misappropriation, and diversion of charitable assets,' to 'false and misleading charitable solicitations,' to other 'improper activities by charities soliciting charitable donations.' … Such offenses cause serious social harms." *Id.* at 612. Here, while positing the possibility, the Committee has not demonstrated that any *amicus* briefs have caused social harm.

The *AFPF* Court noted the dangers inherent in coerced disclosure, particularly for groups on the "wrong side" of majority opinion on controversial subjects. The Court cited its seminal case on compelled disclosure, *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958). The Court noted that "NAACP members were threatened with economic reprisals and violence" if their membership was disclosed. *AFPF* at 606. The Court "explained that [e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association … and … noted the vital relationship between freedom to associate and privacy in one's associations." *Id.* The Court emphasized that "First Amendment freedoms need breathing space to survive." *Id.* at 609 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

The danger of disclosure is not unique to the NAACP. Indeed, the year after *AFPF*, the dangers of disclosure made national headlines, and the safety of the Justices themselves was

the story. After the Supreme Court's draft *Dobbs v. Jackson Women's Health Organization* decision, 597 U.S. 15 (2022) (which overturned *Roe v. Wade*) was leaked by USAID-funded *Politico* on May 2, 2022, pro-abortion groups released the home addresses of the justices in the majority, prompting a wave of picketing outside the homes of the justices.[6] One protestor was arrested for attempting to murder Justice Brett Kavanaugh, after being picked up outside the Justice's home with a gun, a knife, and pepper spray.[7]

Recent history also demonstrates the use of associational ties to discriminate on the basis of political viewpoint by the government. Under the Biden Administration, Secretary of Defense Lloyd Austin sought to review social media pages of potential military recruits to screen their political views.[8] Austin then sought an independent review to scrutinize the possibility of "extremism" and "radicalization" within the ranks.[9] Failing to find much evidence thereof after searching for a year and a half, the report instead turned its focus to eradicating political "polarization," arguing that "the risk to the military from widespread **polarization and division** in the ranks may be a greater risk than the radicalization of a few service members." *Id.* (emphasis added). How the military is to suppress political "polarization and division" without suppressing dissident speech is difficult to imagine. Indeed, a number of Republicans expressed concern that Austin's politicized screening and review would cause "conservative members of the military, in particular supporters of former President Donald Trump, [to] feel targeted for their private political views." *Id.*

As a result of this politicization, the concerns of Americans in our "cancel culture" are widespread, and those concerns are certainly shared by the donor class, as discussed in a recent *USA Today* op-ed.

> Millions of Americans today are afraid to express their opinions on matters of public importance. A summer poll by the Cato Institute found that 62% of Americans were afraid to reveal their opinions; nearly one third (32%) of employed Americans feared that they would lose their job or miss out on career opportunities if their views became known. Out of fear of harassment or social banishment, **many donors to certain causes prefer to make their gifts**

---

[6] H. Keene, "Activists vow to continue protesting at justices' houses, despite alleged attempt to kill Kavanaugh at home," *Fox News* (June 8, 2022).

[7] D. Wallace, D. Spunt, and B. Mears, "Armed suspect arrested near Justice Kavanaugh home identified," *Fox News* (June 8, 2022).

[8] S. Losey, "Pentagon Eyes Plan to Intensify Social Media Screening in Military Background Investigations," *Military Times* (Mar. 3, 2021).

[9] J. McIntyre, "Quiet release of DOD extremism report sparks conservative backlash," *Washington Examiner* (Jan. 5, 2024).

> **anonymously**. Unfortunately, some politicians today want to require charities to turn over their donor lists to the state…. Politicians may be seeking donor information … to create informal enemy lists….[10]

Indeed, many ordinary Americans decline even to put a sign in their yard for a political candidate, for fear of the backlash. According to one survey, "40% of voters are … concerned about offending or angering neighbors and loved ones and vandalism [and] 36% didn't want to be harassed by other neighbors."[11] The chilling effect that the proposed rule would have is real.

The U.S. Supreme Court has repeatedly emphasized that the right to anonymity is a critical component of the First Amendment. This certainly applies in the context of speech, as the Court noted in 1960 that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California*, 362 U.S. 60, 64 (1960). "[P]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all," the Court noted. "Even the Federalist Papers … were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." *Id.* at 64-65. The tradition of anonymous advocacy "is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed 'Publius.' Publius' opponents, the Anti-Federalists, also tended to publish under pseudonyms." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 n.6 (1995).

The Court has long made explicit that the First Amendment's protection of anonymity protects not just speech, but association also. In *Shelton v. Tucker*, 364 U.S. 479 (1960), the Court considered an Arkansas statute compelling public school teachers to disclose the identity of any association to which they belonged. Although the Court agreed that the state had an important interest in and right to "investigate the competence and fitness of those whom it hires to teach in its schools," it ruled that even a "legitimate and substantial" governmental interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 485, 488.

This is why, in *NAACP v. Alabama*, Justice Harlan wrote, "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association…." *Id.* at 460.

---

[10] J. Braceras, "Freedom of association is under attack. Will the Supreme Court protect it?," *USA Today* (Jan. 25, 2021) (emphasis added).

[11] E. Dean, "Some Voters Cautious About Displaying Political Signs in Yard," *FloridaDaily.com* (Nov. 1, 2024).

Justice Harlan explained that an "unconstitutional intimidation of the free exercise of the right to advocate" can manifest itself with "a congressional committee investigating lobbying and of an Act regulating lobbying…. The governmental action challenged may appear to be totally unrelated to protected liberties [such as] [s]tatutes imposing taxes." *Id.* at 461. He drew upon a powerful and painful historical lesson when he found "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs [to be] of the same order" as a "'requirement that adherents of particular religious faiths or political parties wear identifying arm-bands.'" *Id.* at 462. With this illustration, Justice Harlan reminded us that principles of anonymity are not second-order concerns that can be disregarded or suppressed, but instead are standards indispensable to both the protection of individual liberty and the preservation of our republic.

B. The "Disclosure" Requirement Works Severe Burdens on the Freedoms of Speech and Press.

The Committee argued that "[d]isclosure is especially valuable for any *amicus* who uses a dubious or misleading name." This strongly suggests the danger of viewpoint discrimination by judges, who ought to consider the persuasiveness and the legal arguments made in briefs, not their personal subjective feelings about the motivation of the *amici*.

Judges are free to accord as much or as little weight as they desire to any brief. But the requirement to obtain leave as a threshold matter, combined with the Committee's expressed concern over "dubious or misleading name(s)" of *amici* smacks of recycling the politicized targeting of "disinformation and misinformation" by government over the last few years. Although the Supreme Court eventually found that the plaintiffs did not have standing, the words of the district court judge in *Missouri v. Biden,* 680 F. Supp. 3d 630 (W.D. La. 2023), still ring true, as he found that the government's suppression of speech on the grounds that it constituted "disinformation" and "misinformation" was "arguably … the most massive attack against free speech in United States' history." *Id.* at 641. Appellate courts should not repeat the mistake of allowing the government to suppress any speech.

As Justice Stevens put it in *McIntyre*, "[t]he interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is … protected by the First Amendment." *McIntyre* at 342.

The *McIntyre* rule protects the constitutional right of the individual against forced disclosure even if the purpose of the disclosure requirement is to make the market participant accountable to someone other than a government official, including the general public. Just as these venerable precedents protect the speaker's anonymity, they should be applied here to protect the anonymity of those persons who fund the speaker.

C. The "Leave of Court" Requirement Restricts Access to the "Courthouse Door" and Works Hardship on the Right to Petition for Redress of Grievances.

The Supreme Court has long recognized the foundational importance of access to the courts in our American republican form of government. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Balt. & O. R. Co.*, 207 U.S. 142, 148 (1907). Although this right is primarily directed toward litigants themselves, the importance of the voices of *amici* should not be underestimated. Harvard law professor Martha Minow has noted that "an amicus brief can offer the court a picture of the larger context of the issues presented–and that context can include impact on legal doctrines and judicial administration, historical trends, or social and economic effects of the decision."[12]

The U.S. Supreme Court has recognized that the right to petition the government for redress of grievances includes the right of access to the courts, ruling in 1972, "[t]he right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The Court added, "[w]e conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not … use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view…." *Id.* at 510-11.

Among the constitutional bases for the right of access to courts the Supreme Court has identified are "the Article IV Privileges and Immunities Clause, … the First Amendment Petition Clause, … the Fifth Amendment Due Process Clause, … and the Fourteenth Amendment Equal Protection … and Due Process Clauses." *Christopher v. Harbury*, 536 U.S. 403, 415, n.12 (2002) (collecting cases). Circuit after circuit has likewise repeated the importance of the right of access to the courts. The Third Circuit has stated:

> The right to petition the courts, no less than the right to petition the legislative or administrative bodies, is protected by the first amendment…. The freedom to associate for the purpose of exercising the right of petition is protected conduct as well…. As the Court explained in *NAACP v. Alabama ex rel. Patterson*, … "[e]ffective advocacy of both public and private points of view, particularly controversial cases, is undeniably enhanced by group association." In the context of this case, these Supreme Court authorities teach no more than the principle that "groups can unite to assert their legal rights." Nor may the state "burden" or "abridge" those first amendment rights.

---

[12] A. Gutman, "Amicus briefs can help a party. They can also hurt," *Harvard Law Bulletin* (Spring 2006).

> [*Brookins v. O'Bannon*, 699 F.2d 648, 652-53 (3d Cir. 1983) (some internal quotations omitted) (emphasis added).]

The Fifth Circuit has also recognized the "First Amendment right to petition the courts for relief." *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 862 (5th Cir. 2000).

The Sixth Circuit concurs: "It is settled law that the first amendment right to petition the government for redress of grievances includes the right of effective access to the courts … and extends to the states via the due process clause of the fourteenth amendment." *Holt v. Jefferson County*, 1988 U.S. App. LEXIS 13619, at *9 (6th Cir. 1988) (citation omitted).

The Ninth Circuit has stated:

> Restricting access to the courts is, however, a serious matter. [T]he right of access to the courts is a fundamental right protected by the Constitution. The First Amendment right of the people … to petition the Government for a redress of grievances, which secures the right to access the courts, has been termed one of the most precious of the liberties safeguarded by the Bill of Rights. [*Ringgold-Lockhart v. County of L.A.*, 761 F.3d 1057, 1061 (9th Cir. 2014) (internal quotations and citations omitted).]

In their comments to this Committee, Senator Sheldon Whitehouse (D-RI) and Congressman Hank Johnson (D-GA) equate *amicus* briefs to lobbying of Congress, and urge that the disclosure contemplated in the proposed Rule will somehow limit the influence of powerful corporate interests. Although Whitehouse and Johnson's comments claim to be made in the name of "transparency" and "competitiveness," in reality, the effect of the Rule would operate to clear the field of any competition to powerful corporate interests. Large corporate interests are not limited to *amicus* briefs to advance their positions in the courts. They are financially well-equipped to bring test cases as plaintiffs or to intervene as parties defendant, with plenty of resources to litigate cases as parties.

Meanwhile, small *amici* such as FSC and FSDEF and the other commenters here, dependent almost entirely on funds from like-minded citizens who rely on these organizations to represent their concerns through *amicus* briefs, will be far more likely than powerful corporate interests to find those resources drying up as ordinary Americans choose to avoid the myriad of difficulties that come with the loss of anonymity in their donations. Their ability to assist in pointing the courts' attention to the broader effect of their decisions beyond just the parties will be significantly damaged.

The Proposal shows no understanding whatsoever of the problem or the issues involved, stating: "A putative *amicus* who refrains from filing an *amicus* brief to avoid disclosure is not silenced in any way…." Proposed Rule at 22. The Committee appears undisturbed by the fact that the "leave of court" requirement will likely close the courthouse

door to some *amici*. The Committee notes that Supreme Court brief formatting requirements give the Supreme Court more ability than the current Rule 29 to place a "modest filter on amicus briefs." Proposed Rule at 25. Elsewhere, the Committee appears to be concerned with limiting the "unconstrained filing of amicus briefs." *Id.* at 26. The Supreme Court should not be accused of adopting the formatting requirements to filter out *amicus* briefs.

III. THE PROPOSED RULE IS ARBITRARY.

The proposed rule proposes a requirement much more draconian than the disclosure regime struck down in *AFPF*, which required disclosure only of donors to charities who contributed more than $5,000 in a year, and it is far more likely to have a chilling effect. In *AFPF*, the information was required to be disclosed only to the government, not to the general public. The Court noted the district court's factual findings that confidential information of thousands of donors to charities was "inadvertently" released to the public (*id.* at 604), and noted that "disclosure requirements can chill association [e]ven if there [is] no disclosure to the general public." *Id.* at 616 (internal quotation omitted). Here, the Committee's entire purpose in requiring disclosure is to make the information public. The chilling effect is not accidental here, but purposeful.

In addition, the proposed Rule 29 is underinclusive. Notably, no such disclosures are required of parties to litigation by Rule 26.1. Corporate parties must disclose corporate ownership, but are not required to disclose donors. If the very parties before the court "lobbying" for relief are not obligated to disclose donors, then discriminating against *amici* as the Proposed Rule would do is insupportable.

Adopting the proposed rule would tell Americans that courts are influenced in making decisions by evaluating the organizations filing them — a message that would lead to an enormous loss of public confidence.

CONCLUSION

The Committee should reject the proposed rule changes.

Sincerely yours,
/s/
William J. Olson
Legal Counsel

WJO:gw
Attachment

APPENDIX: NONPROFIT ORGANIZATIONS JOINING COMMENTS

America's Future
American Studies Center
Citizens United
Citizens United Foundation
Conservative Legal Defense and Education Fund
DownsizeDC.org
Downsize DC Foundation
Free Speech Coalition
Free Speech Defense and Education Fund
Grass Roots North Carolina
Gun Owners of America
Gun Owners Foundation
Judicial Action Group
Leadership Institute
LONANG Institute
One Nation Under God Foundation
Patriotic Veterans
Public Advocate of the United States
Restoring Liberty Action Committee
Rights Watch International
Tennessee Firearms Association
Tennessee Firearms Foundation
The Senior Citizens League
U.S. Constitutional Rights Legal Defense Fund
Virginia Citizens Defense Foundation
Virginia Citizens Defense League

February 17, 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 [USC-RULES-AP-2024-0001]

Dear Judge Bates:

The Independent Community Bankers of America ("ICBA") and the undersigned state banking associations, representing thousands of community banks and the communities they serve, collectively oppose the Committee's proposed amendments to Federal Rule of Appellate Procedure 29 (the "Proposal"). Certain aspects of the Proposal threaten the First Amendment rights of amici associations and will unnecessarily burden amici and the federal courts of appeals. As such, we are concerned the Proposal will harm the ability of community banks and their advocacy groups to effectively participate in appellate litigation and have their voices heard on critical legal issues.

We fully support the Committee's goal of "improving the integrity and fairness of the federal judicial process." However, the Proposal's enhanced disclosure requirements do not promote this goal. Instead, the Proposed requirements could have a chilling effect on associations' participation in federal appellate cases by putting amici in the difficult position of either disclosing sensitive membership information or refraining from filing amicus briefs to protect their privacy interests. Additionally, the proposed changes introduce practical challenges and additional expense that will likely deter, or effectively block, putative amici from filing (or even preparing) amicus briefs.

As the Supreme Court has recently explained, compelled disclosure of information about an association's members inevitably exerts a "deterrent effect on the exercise of First Amendment rights" and must satisfy at least "exacting scrutiny." *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 606 (2021); *see also id.* at 619 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 623 (Alito, J., concurring in part and concurring in the judgment). The proposed amendments do not meet this demanding standard and are also unnecessary given the current disclosure requirements adequately protect First Amendment associational rights.

The proposed requirements that amici organizations obtain the court's permission to file in every case are also problematic. Preparing motions for leave to file requires amici to incur added legal expense and requires additional administrative review for courts that are already managing heavily loaded dockets. Seeking leave from the court to file amicus briefs will unnecessarily delay litigation, particularly in instances where the parties do not object to amici participation.

We also oppose the proposed language to Rule 29(a) which states that amicus briefs that are "redundant with another amicus brief" will be "disfavored." This criterion wrongly assumes amici

have knowledge of other non-parties that plan to file briefs and that amici have reviewed nonpublic drafts of other non-party briefs. This vague "redundancy" criterion also leaves many practical questions unanswered. For example, must amici incur the legal costs of preparing full amicus briefs that the court may later reject based on ill-defined "redundancy" criterion? Short of preparing full briefs prior to securing leave to file, what amount of information would be required to include in motions to meet the proposed "redundancy standard?" Will amici only satisfy the redundancy standard by filing first in line ahead of others so as not to introduce "redundant" arguments?

Because the Committee's Proposal offers no guidance to help amici or the judiciary navigate these questions, the proposed amendments will impair the ability of amici, particularly those representing small groups, to file amicus briefs in appellate proceedings. For these reasons, the undersigned organizations respectfully request that the Committee reject the proposed amendments.

Sincerely,

Independent Community Bankers of America

California Community Banking Network

Independent Community Bankers of Colorado

Florida Bankers Association

Community Bankers Association of Georgia

Community Bankers Association of Kansas

Bluegrass Community Bankers Association

Louisiana Bankers Association

Community Bankers of Michigan

BankIn Minnesota

Missouri Independent Bankers Association

Independent Bankers Association of New York State

Independent Community Banks of North Dakota

Community Bankers Association of Ohio

Pennsylvania Association of Community Bankers

Independent Banks of South Carolina

Tennessee Bankers Association

Independent Bankers Association of Texas

Vermont Bankers Association

Virginia Association of Community Banks

Wisconsin Bankers Association

INSTITUTE FOR JUSTICE

February 17, 2025

Submitted via regulations.gov

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
One Columbus Circle NE
Washington, DC 20544

Re: Proposed Amendments to Federal Rule of Appellate Procedure 29

Dear Judge Bates:

I write on behalf of the Institute for Justice to submit our views on one aspect of the proposed amendments to Rule 29: the proposal to eliminate the option to file an amicus brief on consent. We do not support any of the proposed amendments to Rule 29. Having reviewed the comments already submitted, however, we're focusing this letter on administrability concerns that have not been the main emphasis of other submissions and that, we believe, counsel against the proposed amendment.

1. According to the advisory committee's report, "the filing of a motion is hardly a severe burden on someone who seeks to participate in the court system." Several comments have pointed out errors in that premise. *See, e.g.*, National Federation of Independent Business, Inc. comment at 3-4 (Dec. 30, 2024). Beyond that, the committee's report also overlooks the grave administrability problems the amendment would invite. Under Rule 29, amicus briefs are filed shortly after the principal brief of the side the amicus supports—long before a merits panel is assigned. *See generally* Jon O. Newman & Marin K. Levy, *Written and Unwritten: The Rules, Internal Procedures, and Customs of the United States Courts of Appeals* at 27-29 (2024) (detailing circuit practices, under which many circuits assign cases to panels only after briefing is complete). Motions to file amicus briefs, in turn, often are not decided by the judges who will ultimately be tasked with familiarizing themselves with and deciding the merits of the appeal. Rather, they are resolved by a motions panel, by an individual duty judge, or even by the clerk's office. *See, e.g.*, 5th Cir. I.O.P. 27.1.14 (providing that the clerk may decide in the first instance motions "[t]o file an amicus curiae brief under Fed. R. App. P. 29"); 10th Cir. R. 27.5(A)(6) (authorizing the clerk to act on unopposed motions "to appear as amicus curiae"); *see generally* Newman & Levy, *supra*, at 57 (noting that "there is . . . variation when it comes to who may rule on a motion for leave to file an amicus brief" and that "in practice the clerk [of the Fifth Circuit] normally defers motions to file amicus briefs to the court"). Given this patchwork of protocols, scaling up the number of amicus motions nationwide would threaten a high degree of arbitrariness. Even if the decisionmaker in a particular circuit is a judge, that judge will not necessarily be on the eventual merits panel; in most circuits, in fact, the merits panel will not yet have been assigned when the amicus motion is granted or denied. Thus, the duty judge (or the motions panel or the clerk) will be tasked with determining whether the amicus brief

ARLINGTON AUSTIN CHICAGO MIAMI PHOENIX SEATTLE
901 N. Glebe Road, Suite 900 Arlington, VA 22203 P: (703) 682-9320 F: (703) 682-9321
www.ij.org

may be useful to his or her future merits-panel colleagues without having any deep familiarity with the issues, record, nuances, or broader implications of the underlying appeal. At the time the motion is submitted, the appeal will not even be fully briefed.

At scale, this state of affairs will promise serious unpredictability. At the best of times, the standard for granting or denying amicus motions is ill-defined; what's helpful to one judge can seem useless to another. *See, e.g.*, *DeVillier v. Texas*, 63 F.4th 416, 430 (5th Cir. 2023) (Oldham, J., dissenting from denial of rehearing en banc) (criticizing the merits panel for denying "without explanation" the Institute for Justice's motion for leave to file an amicus brief in support of rehearing), *judgment vacated and remanded*, 601 U.S. 285 (2024). Under the current Rule 29, the real-world consequences of that arbitrariness are fairly modest; as the committee report notes, the present-day "norm among counsel is to uniformly consent" to amicus briefs. Under the proposed amendment, however, hundreds of amicus motions—most of them unopposed—will be submitted for decision to duty judges or clerks who will be ill-equipped to determine whether the proposed brief will be helpful to the merits panel and who will have no real standard guiding their exercise of discretion.

From our perspective, this approach would be deeply flawed. Realistically, many judges will probably default to granting amicus motions near-automatically; after all, exercising considered judgment would require studying not just the proposed amicus brief, but all party briefs on file and any other amicus briefs previously submitted. *See* Proposed Amendment to Rule 29(a)(2). Many motions-panel judges also will likely believe (rightly) that an amicus brief's value is best left to the judgment of the future merits panel, whose members will have a far greater familiarity with the case and a far better sense of what will and won't aid their decisional process. *See* Roderick & Solange MacArthur Justice Center comment at 4 (Feb. 13, 2025); U.S. Chamber of Commerce comment at 10-12 (Dec. 19, 2024). To give just one empirical data point, the Fourth Circuit appears to have entertained amicus motions in eleven cases over the past twelve months[*]; of those, motions were denied in only two—in one, all outstanding motions were denied as moot following expedited briefing and decision (the *Griffin* case, below), and in the other (*Mosby*), the denied amicus motion was filed late and by a lawyer who seems not to have been a member of the court's bar. At the same time, it's fair to expect that a minority of judges will categorically disfavor amicus briefs and tend to deny amicus motions whenever they happen to be on motions duty. *Cf. Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (Posner, J., in chambers) ("[W]hether to allow the filing of an amicus curiae brief is a matter of 'judicial grace.'"). And virtually none of these

[*] *Griffin v. Riggs*, No. 25-1018(L); *RNC v. N.C. State Bd. of Elections*, No. 24-2044(L); *Real Time Med. Sys., Inc. v. PointClickCare Techs., Inc.*, No. 24-1773; *Bryant v. Moore*, No. 24-1576(L); *Oliver v. Navy Fed. Credit Union*, No. 24-188; *United States v. Mosby*, No. 24-4304; *Bestwall LLC v. Off. Comm. of Asbestos Claimants*, No. 24-1493; *United States v. Moore*, No. 24-4201; *Barnett v. INOVA Health Care Servs.*, No. 24-1271; *Bryant v. Stirling*, No. 23-4; *Sommerville v. Union Carbide Corp.*, No. 24-1491. In the Fourth Circuit, motions to file amicus briefs are noted on the docket as a motion to "file amicus curiae brief without consent of all parties." Running a search for that phrase on Bloomberg Law yielded the above list of cases for the past twelve-month period. Note, too, that we've counted consolidated appeals as a single case.

idiosyncratic orders—whether grants or denials—will be accompanied by any publicly stated application of a principled legal standard that can guide judges or potential amici in future cases.

Simply, there is no uniform or even widely accepted way of dealing with amicus motions, either in substance or in procedure. In large part for that reason, resolving the many administrability problems following from the proposed amendment would require fundamentally restructuring the existing schedules and procedures for handling amicus briefs. In the main, those modifications would need to be addressed on a circuit-by-circuit basis, and they could well generate destabilizing knock-on effects of their own.

2. As against all this, the upsides of the proposed amendment are unclear. According to the committee report, the key benefit is that eliminating amicus briefs by consent will ensure that "a judge is involved in deciding whether to deny leave to file the brief or to recuse." Factually, however, that appears to be incorrect; as noted above, several circuits delegate to the clerk the authority to act on amicus motions. It's also unclear from the committee report why the recusal angle moves the needle even in those circuits where one or more judges may act on amicus motions. Even if a judge happens to be involved in reviewing those motions, there's no guarantee that he or she will be assigned to the later merits panel that hears the case. So, to us, it's unclear how the proposed amendment solves any recusal difficulties that might arise for the three judges ultimately assigned to a merits panel. Nor is there any evidence (that we're aware of) casting doubt on the adequacy of the circuits' current procedures for striking amicus briefs in the rare instances when disqualification concerns arise. Fed. R. App. P. 29(a)(2); *see also* Order, *TikTok Inc. v. Garland*, No. 24-1113 (July 9, 2024) (striking amicus brief under D.C. Circuit Rule 29(b)).

Sincerely,

Samuel B. Gedge

The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE
Washington, DC // Brussels // London // www.ici.org

February 17, 2025

By Electronic Transmission

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

Dear Judge Bates:

The Investment Company Institute[1] is writing to object to the proposed amendments to Federal Rule of Appellate Procedure 29 (Brief of an Amicus Curiae)[2] that would: (i) make "redundant" briefs "disfavored;" (ii) eliminate the ability to file amicus briefs by consent of the litigants and instead require court permission; and (iii) require disclosure about the parties' contributions to total revenues of amici curiae in certain instances. Collectively, these changes would create new and unjustified obstacles for amici curiae to file briefs. Further, the proposal would compel speech in briefs, potentially chilling First Amendment speech and associational rights. Ultimately, these changes could lead to fewer amicus briefs and less informed judicial decisions.

ICI and Our Approach to Summitting Amicus Briefs

Founded in 1940, ICI is the leading association representing regulated funds globally, including mutual funds, ETFs, closed-end funds, and unit investment trusts in the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has a long history of seeking to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI does this in part through advocacy directed at ensuring a sound

[1] The Investment Company Institute (ICI) is the leading association representing the asset management industry in service of individual investors. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $38.2 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 120 million investors. Members manage an additional $9.6 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London.

[2] *Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure, and the Federal Rules of Evidence*, Prepared by the Committee on Rules of Practice and Procedure Judicial Conference of the United States, August 2024 ("Preliminary Draft"), available at https://www.uscourts.gov/file/78921/download.

legal and regulatory framework, which includes extensive economic research, legal analysis, and reporting of trends and activities in the fund industry.[3]

Our advocacy and education efforts sometimes include submitting amicus briefs in litigation affecting funds, advisers, and investors. Factors that we consider in deciding whether to file a brief include the following:

- Whether a case has a point of law at issue of significant importance to a substantial portion of the asset management industry;
- Whether the industry has a common position on that point of law;
- Whether the matter is ripe for ICI involvement; and
- Whether ICI's participation would be unique and meaningful to the court (e.g., where ICI could provide data, practical or legal analysis, or industry information that would inform the court in a way sufficiently different from the parties or other amici).

Some of our briefs address litigation directly affecting funds and investors. For example, the Securities and Exchange Commission (SEC) adopted Rule 30e-3 under the Investment Company Act in 2018, which permitted regulated funds (e.g., mutual funds and ETFs) to meet their shareholder report delivery obligations by posting them online and mailing paper copies to shareholders upon request, rather than defaulting to mailing paper copies. ICI supported the rule's adoption, but representatives of the paper industry challenged it in court (*Twin Rivers Paper Company, LLC, et al., v. United States Securities and Exchange Commission*). Our amicus brief explained why the rule benefitted funds and shareholders and included data and information about: estimated cost savings; shareholder report page counts; ICI survey data on investor behavior with respect to shareholder reports (e.g., how likely they were to read printed materials); and approaches taken by other government agencies in delivering information.

Other ICI briefs address litigation indirectly—but significantly—affecting funds and investors. For example, the SEC issued orders meant to modernize and improve access to equity market trading data in 2020 and 2021. Those orders (i) required that the new plan (the CT Plan) governing the dissemination of equity transaction data be administered by an entity that does not sell its own data products that compete with securities information processor data, and (ii) directed changes to the governance of the CT Plan's operating committee, to include representatives of individual and institutional investors. The orders recognized that the governance structure for equity market data needed to address the exchanges' inherent conflicts of interest and to provide more representation to the market participants who provide and consume the data. ICI supported the orders, but NASDAQ and other stock exchanges challenged the CT Plan order (*The Nasdaq Stock Market LLC, et al., v. Securities and Exchange Commission*). Our amicus brief filed in support of the SEC's defense of the order emphasized that regulated funds have a significant interest in equity market data as contributors to, and consumers of, market data and explained why the orders meaningfully address conflicts of interest in the current governance system that harm the entire investment community.

[3] *See, e.g.*, the 2024 Investment Company Fact Book.

Cost also factors into our decisions to file briefs. We typically engage outside counsel to assist with these briefs and pay for these legal services from general ICI revenues, which focuses our resources on matters of high importance to our collective membership. It is not our practice to have parties to litigation, or their counsel, underwrite the costs in preparing and filing our briefs. In a case where we file an amicus brief in litigation involving an ICI member as a party, that member/party pays us nothing "extra," although its regular payment of membership dues would indirectly finance a small part of the brief's overall cost.

In sum, we are judicious in deciding when to file amicus briefs and do so only when we believe those briefs would benefit courts.

Our Objections to the Proposed Amendments to Rule 29

Because we believe our activity here is responsible and beneficial to courts, we are concerned that three of the proposed amendments could limit our ability to file briefs, leaving courts less informed about litigated matters and our industry generally.

First, the proposed amendments to Rule 29(a)(2) and (a)(3)(B) would "disfavor" an amicus brief that either does not "bring…to the court's attention relevant matter not already mentioned by the parties" or is "redundant with another amicus brief." As discussed above, we typically submit briefs only where they would be unique and meaningful to the court. At the same time, often there is at least *some* overlap in the substance of our briefs and those of other parties and amici. And if briefs are assessed and compared in a highly generalized way (e.g., "both briefs represent views of asset managers, and therefore we will allow only one"), then amicus briefs could be excluded even where they differ in important and nuanced ways with respect to their information, emphasis, and perspective. An overly broad reading and application of this "redundancy" requirement could lead to "races" among amici to file, excessive and costly coordination among amici, and potential amici eschewing the process altogether, depriving courts of information essential to their decision-making process.

Second, a proposed amendment to Rule 29(a)(2) would eliminate the ability of litigants to consent to amicus filings and require amici to obtain court permission to file briefs. The intent is to provide "a filter on the filing of unhelpful briefs."[4] But this change would unnecessarily burden amici and courts by requiring motions in cases where briefs are informative (and litigants would have consented). The current approach provides a useful and efficient screening mechanism (parties can withhold consent if they have substantive concerns, leaving it to courts to decide whether to permit the brief) that respects the interests of all entities.

Finally, proposed Rule 29(b)(4) would require an amicus brief to disclose whether a party, its counsel, or any combination thereof, has contributed or pledged to contribute 25% or more of the total revenue of the amicus for its prior fiscal year. Here, the rationale is "that—at some level—

[4] Preliminary Draft at 40.

contributions by a party to an amicus create… a sufficient risk of party influence that disclosure [is] warranted."[5]

We support reasonable measures to protect the integrity of amicus briefs, including (i) providing disclosure about amici and their history, experience, and interests, as the proposed amendments contemplate, and (ii) the current requirement that an amicus brief disclose whether a party or a party's counsel authored the brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief.

But we object to more intrusive disclosure measures, such as providing member-specific financial disclosure in amicus briefs (particularly as it relates to total revenue). It is at least conceivable that a provision like proposed Rule 29(b)(4) could require financial disclosure in an ICI amicus brief if the percentage threshold were set low enough and a large enough number of members were parties to the same litigation. If this compelled speech requirement were triggered, ICI would be forced to choose between (a) protecting the legitimate privacy and associational interests of ICI and its members and (b) advocating on behalf of investors, the markets, and ICI members.[6] And were ICI to file a brief with the required financial disclosure, some courts may discount unfairly the brief's value, under the erroneous belief that it represents only the narrow interests of the litigants. Such a requirement would be Constitutionally questionable, bad policy, and harmful to the judicial process.

No matter the intent, we believe that adopting these changes in their totality would disfavor and discourage the filing of amicus briefs, including, potentially, from ICI. We see no compelling policy reason for this shift and believe that it would increase burdens for all affected parties and deprive courts of useful information, to the detriment of all.

* * * *

If you have any questions, or if we can be of assistance in any way, please contact us at paul.cellupica@ici.org or matt.thornton@ici.org.

Sincerely,

/s/ Paul G. Cellupica
General Counsel

/s/ Matthew Thornton
Associate General Counsel

[5] *Id*. at 21.

[6] As discussed above, we file amicus briefs consistent with our mission that are broadly representative of our members' views, even where a party to the litigation is an ICI member.

WILLIAM & MARY LAW SCHOOL

Allison Orr Larsen
Alfred Wilson & Mary I.W. Lee
Professor of Law and Director,
Institute of the Bill of Rights Law

P.O. Box 8795
Williamsburg, VA 23187-8795

February 17, 2025

Submitted by 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

Dear Judge Bates:

I serve as the Alfred Wilson & Mary I.W. Lee Professor of Law at William & Mary Law School. I am submitting these comments in my personal capacity to provide additional context on the need to improve amicus funding disclosure as part of the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. My submission is limited to the disclosure part of the proposed amendments. These comments draw on my scholarship, including *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757 (2014), and *The Amicus Machine*, 102 Va. L. Rev. 1901 (2016), which analyze the increasing influence of amicus briefs and their impact on Supreme Court jurisprudence. I have been thinking and writing about amicus practice and appellate fact-finding for over ten years; I have even testified on the subject to the Senate Judiciary Committee and the President's Commission on the Supreme Court of the United States. The goal of my amicus scholarship – which pre-dates any political attention to this issue – is to help judges confront the challenges presented by the tremendous rise in amicus participation in modern times and the increased use of these briefs by courts as sources of factual expertise.

Although my amicus scholarship focuses on the Supreme Court, the "amicus machine" phenomenon it describes is increasingly applicable to the federal courts of appeals. As my article on the amicus machine details, a "successful venture at the Supreme Court"—and not infrequently in high-stakes circuit court litigation—"requires a sophisticated 'amicus strategy.'"[1] Specifically, amicus briefs have increasingly become key tools that parties and other interests use to shape judicial reasoning and outcomes.

The "amicus machine" involves several layers. First, a party generally finds an "amicus wrangler," "someone who has the job of recruiting the 'right' amici."[2] The wrangler functions "much like a trial lawyer by selecting a roster of expert witnesses for trial," looking to ensure that the set of coordinated briefs sufficiently cover issues bearing on the case outcome (and offer the desired "legislative facts" supporting a party's position) and that the authors of the briefs are among the members of the appellate bar with

[1] *The Amicus Machine*, 102 Va. L. Rev. at 1904.
[2] *Id.* at 1919.

reputations that carry weight with the court. Once the amici are wrangled, it falls to the "amicus whisperer" to keep them in line.[3] The "amicus whisperer" choreographs the drafting, editing, and submission process, potentially even suggesting edits to amicus briefs to make sure that particular topics are covered in ways calculated to appeal to the court.[4] My article cites to a brief filed in 2016 identifying the cost of "soliciting and coordinating amici support" at over $531,000;[5] presumably the cost of such efforts has only grown, and likely significantly, over the past decade. Courts deserve greater visibility into the financial operations of the amicus machine, and by expanding the funding arrangements required to be disclosed, the Rule 29 amendments will help in this regard.

To be clear, my research identifies that the amicus machine has salutary effects: "In an era of infinite information and virtually limitless briefs, coordination efforts by Supreme Court experts are a controlling force on a potentially unruly system."[6] Specifically, Supreme Court specialists participate in a reputation market with each other and with the Justices, and that dynamic disincentivizes them from writing briefs and recruiting amici that make untested claims supported with dubious authorities. This potential upside, however, diminishes as the amicus machine grows and those with reputation interests at stake are not necessarily at the wheel.

Indeed, amicus practice has been through a tremendous growth spurt. Ninety-eight percent of Supreme Court cases now have amicus filings; over 800 briefs are filed each term and the marquee cases attract briefs in the triple digits. This is an 800% increase from the 1950s and a 95% increase from 1995.[7] With dozens of amicus briefs filed in every case, it is a highly optimistic to assume judges and their clerks can sort the reputable players from the ones who operate with more of an agenda and less restraint. There is also a risk that courts and the public may misperceive amicus briefs as neutral or objective sources when, in reality, they are integral components of sophisticated legal campaigns. The amendments to Rule 29 that would impose more specific identification obligations on amici and broaden funding disclosure requirements would help ameliorate this risk.

The amicus machine and its risks have become even more important with the increasing significance of "amicus facts," which are factual claims, from outside the record, propounded by amici and not subject to a robust adversarial fact-finding process. My research into amicus facts uncovered a number of situations "where the reliability of the information presented is shaky at best."[8] Furthermore, facts introduced in the amicus process can have problems beyond just being wrong. For instance, amici will sometimes cite to studies they funded themselves, hide key context or fail to disclose supporting evidence, or use unreliable methods.[9] I am not alone in discovering Supreme Court decisions in which incorrect factual assertions from

[3] *Id.* at 1925.
[4] *Id.* at 1926. *See also* Fed. R. App. P. 29, Committee Notes on Rules—2010 Amendment ("[M]ere coordination—in the sense of sharing drafts of briefs—need not be disclosed.").
[5] *Id.* at 1922 (citing Brief of Respondent at 10, *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 890 (2016) (No. 15-375), 2016 WL 1165966, at *10.).
[6] *Id.* at 1908.
[7] *Id.* at 1902. My strong suspicion is that this number has only increased since I did my initial research.
[8] *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757, 1764 (2014).
[9] *Id.*

amici have made their way into opinions, sometimes in ways that seem to materially affect case outcomes.[10] While it is true that the parties can point out these errors at least theoretically in their reply briefs; the practical reality is that this check from the adversarial system is rare. In my research relatively few of the amicus-provided facts that made it into Supreme Court opinions were contested by the parties, and I speculate this is because of a strategic bind that the litigators face in drawing the court's attention to one brief in a sea of many.

Although the pro-transparency amendments to Rule 29 will not directly prevent the introduction of incorrect or misleading facts in amicus briefs, the changes they make will help courts and the public better discern the interests of amici in relation to parties and provide courts with helpful context. Among other beneficial changes, the amendments would require an amicus to include additional information about its "history," including whether the amicus was established within the previous year, and "an explanation of how the brief and the perspective of the amicus will help the court."[11] The amendments would also compel amicus briefs to include disclosures of 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."[12] This can only aid courts to assess a brief's reliability. As any new researcher is taught and any cross-examiner knows well, a source's motivation is intrinsically tied to its credibility. (Are you being paid for your testimony? Is this product review being compensated by the seller?) My hope is that greater transparency requirements for amici will push courts to exert greater scrutiny on amicus facts based on more extensive information about amici identities and their influence by parties or other interests.

Thank you for the opportunity to provide comments on the proposed amendments to Rule 29, and I hope they prove helpful as the Committee considers the proposed amendments.

Respectfully submitted,

Allison Orr Larsen
Alfred Wilson & Mary I.W. Lee Professor of Law
Director, Institute of Bill of Rights Law
William & Mary Law School

[10] *See, e.g.*, Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard to Find*, ProPublica (Oct. 17, 2017), https://www.propublica.org/article/supreme-court-errors-are-not-hard-to-find.
[11] Proposed Fed. R. App. P. 29(a)(4).
[12] *Id.* 29(b)(4).

Congress of the United States

Washington, DC 20510

February 17, 2025

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
One Columbus Circle NE
Washington, D.C. 20544

Dear Judge Bates:

We write to supplement our initial comment on the Advisory Committee's proposed amendments to Federal Rule of Appellate Procedure 29. Following our submission, several commenters urged the Advisory Committee to abandon its proposal to improve amicus curiae disclosures. Those comments are misguided, and we urge the Advisory Committee to stay the course.

First, some opponents of the proposed amendments claim requiring greater amicus disclosure is unnecessary because the strength of an amicus's arguments is the only factor that will influence a court. But the judiciary has long recognized the importance of knowing—in one judge's words—"the real power behind the throne" when considering arguments made in amicus briefs.[1] Such disclosures provide information crucial not only to determining whether an amicus filing presents a conflict of interest, but also to understanding how much weight to give the presence of multiple amici in a given case.

Even the Chamber of Commerce, which opposes the amendments, acknowledges that "assessing the sheer number of amicus briefs filed in a particular case can be useful" to courts, as it was in *Americans for Prosperity Foundation v. Bonta*.[2] Citing the large number of amicus filings in that case, the Supreme Court explained that the merits of the petitioner's arguments were "further underscored by the filings of hundreds of organizations as amici curiae" from across "the ideological spectrum."[3] That statement shows that courts can find the number of amici in a case persuasive, and that when amici show up in flotillas to echo the same arguments, it can place a thumb on the scale in favor of the party they support. This signaling effect can be even more important in close cases or when litigants try to legitimize a novel legal theory.[4]

But when the same interest is behind multiple amicus briefs, it can distort the decision-making process by creating the impression that a particular argument enjoys more support than it actually does. Without transparency, wealthy donors and corporate interests can covertly fund dozens of seemingly distinct amici—as well as the "scholarship" and "studies" those amici cite in their

---

[1] Nate Raymond, *U.S. judiciary panel expresses support for amicus brief financial disclosures*, REUTERS (Jan. 4, 2022), https://www.reuters.com/legal/litigation/us-judiciary-panel-expresses-support-amicus-brief-financial-disclosures-2022-01-04/.
[2] Letter from U.S. Chamber of Commerce Litigation Center to Hon. John D. Bates at 9 (Dec. 19, 2024).
[3] *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 617 (2021).
[4] Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/. *See, e.g.*, Allison Orr Larsen, *Becoming a Doctrine*, 76 FLA. L. REV. 1, 37-39, 42-43 (2024) (discussing the "concerted amicus campaign" to "mainstream" the major questions and independent state legislature doctrines).

briefs—to create the illusion of credibility and broad support where none exists.[5] As detailed in our initial submission, this sort of covertly funded amicus encouragement has been a feature of several high-profile cases, including *AFPF v. Bonta*. In that case, at least sixty-nine amici that the majority found so persuasive were funded by the same eleven groups, and at least forty-five received funding from the political network spearheaded by the party those amici supported.[6] Good judging does not require ignoring how well-funded actors can try to manipulate the legal process, and the Advisory Committee should not accept narratives that suggest otherwise.

Second, some commenters claim that the proposed amendments may be vulnerable to a First Amendment challenge because no compelling government interest supports improving amicus transparency. Not so. Safeguarding "public perception of judicial integrity is 'a state interest of the highest order'" because the judiciary "depends in large measure on the public's willingness to respect and follow its decisions."[7] Requiring minimally burdensome disclosures about the true interests behind an amicus brief advances this interest by bolstering the "fairness and integrity" of the judicial process.[8] Those who lobby Congress must make significant disclosures about their identity and funding because trust in government requires the public know who is spending money to influence their elected officials.[9] The same principles apply to the judicial process, where greater transparency can prevent well-funded donors from secretly spending their way to victory in federal court.

Finally, we have always engaged the Judicial Conference in a respectful manner befitting communication with a co-equal branch of government and recognizing that protecting the integrity of the judicial process is not a partisan matter. Regrettably, instead of engaging with the Advisory Committee's proposal in good faith, some other congressional commenters have resorted to intimidation and insults. They "warn[]" the Advisory Committee that it has gone too far by entertaining the Supreme Court's request that it consider this issue and suggest that doing so "bring[s] the judiciary into disrepute for partisan purposes."[10] They attack the intelligence of the Judicial Conference members who contributed to the proposed amendment, saying the proposal "reflects the judgment of a body that apparently understands neither campaigns nor judging."[11] And in response to the Committee's note that "the identity of an amicus does matter, at least in some cases, to some judges," they threateningly demand that "Judge Bybee and his

---

[5] *See, e.g.*, Will Van Sant, *The NRA's Shadowy Supreme Court Lobbying Campaign*, POLITICO (Aug. 5, 2022), https://www.politico.com/interactives/2022/nra-supreme-court-gun-lobbying/ (finding that "at least 24 NRA-friendly briefs in [*New York State Rifle & Pistol Association v. Bruen*] . . . [cited] legal scholars whose work the gun group has long supported financially").

[6] Sen. Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 Yale L.J.F. 141, 147-149 (2021).

[7] *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 445-446 (2015) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

[8] *Williams-Yulee*, 575 U.S. at 445.

[9] *See* 2 U.S.C. 1601(3) ("the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.").

[10] Letter from Sens. Mitch McConnell, John Cornyn, and John Thune to Hon. John D. Bates at 1, 4 (Sept. 10, 2024); Letter from Scott S. Harris to Hon. David G. Campbell & Hon. John D. Bates (Sept. 18, 2020).

[11] Letter from Sens. Mitch McConnell, John Cornyn, & John Thune, *supra* note 10, at 3.

colleagues . . . name names."[12] We condemn these remarks and hope that the Advisory Committee will not be intimidated by overheated rhetoric and name-calling.

* * *

In sum, and as detailed in our initial comment, connections of amici to the nominal party in interest will reveal little to the court, the other parties and the public where the true protagonist is the litigating group that selected its plaintiff of convenience for the proceedings, and the proceedings are really driven by the litigating group and its coordinated flotilla of commonly-funded amici. (In one case, the nominal petitioner was put on the payroll of the litigating group; that occurred only after the litigating group cycled through several plaintiffs until one was found to confer standing.)[13] Because the lawyers involved set up the flotilla for the donors who fund the operation, to ask them to disclose what they already know will not be unduly burdensome. So we urge you to consider that the real issue here is the intrusion into litigation by coordinated and commonly-funded front groups, and look beyond links only to the nominal plaintiff/petitioner they have chosen.

Thank you again for the Advisory Committee's extensive consideration of this issue and the opportunity to comment on this matter.

Sincerely,

SHELDON WHITEHOUSE
Ranking Member, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

HENRY C. "HANK" JOHNSON, JR.
Ranking Member, House Judiciary Subcommittee on Courts, Intellectual Property, Artificial Intelligence, and the Internet

[12] *Id.* at n.18; Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to Federal Rules (Aug. 2024) at 20.
[13] Mitchell Armentrout, *Mark Janus quits state job for conservative think tank gig after landmark ruling*, CHICAGO SUN-TIMES (July 20, 2018), https://chicago.suntimes.com/2018/7/20/18409126/mark-janus-quits-state-job-for-conservative-think-tank-gig-after-landmark-ruling; Noam Scheiber & Kenneth P. Vogel, *Behind a Key Anti-Labor Case, a Web of Conservative Donors*, N.Y. TIMES (Feb. 25, 2018), https://www.nytimes.com/2018/02/25/business/economy/labor-court-conservatives.html.

February 17, 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

Dear Judge Bates:

We, the undersigned organizations and individuals, write to express our strong support for enhancing the amicus brief disclosure requirements in Rule 29 of the Federal Rules of Appellate Procedure. We thank the Committee for carefully considering the important concerns implicated by the funding of amici and their briefs and commend it for proposing amendments that would better allow courts and the public to assess the interests behind amicus briefs filed in federal courts of appeal.

Amici frequently provide valuable insights and diverse perspectives to courts. They can offer specific scientific and other expertise that make the decision-making process more effective. At the same time, however, courts and the public should be able to evaluate the interests of the amici in the matter and the relationship between an amicus and a party. The Advisory Committee correctly discounted the argument 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." Instead, the court and the public can fully evaluate the persuasiveness of the brief only when adequate information is available about both the amicus and the influence of the parties on the amicus.

The need for enhanced transparency in amicus filings is even more acute in the case of so-called "amicus facts." In the 2019-2020 term, for instance, the Supreme Court justices cited amicus briefs that provided information about, among other things, "the number of 'individuals killed by border agents,'" "studies on the reasons drivers have their licenses suspended," "the financial strain to businesses from excluding DACA recipients from the lawful labor force," "guidance on how effective consumer surveys are designed," "data on the health and other benefits of effective contraception," and "insights into religious practices of different faiths."[1] Again, judicial fairness, integrity, and reasoned decision-making require that courts and the public have sufficient background on the persons proferring these facts to assess their credibility and biases.[2]

[1] Anthony J. Franze & R. Reeves Anderson, Amicus Curiae at the Supreme Court: Last Term and the Decade in Review, National Law Journal (Nov. 18, 2020).
[2] *Cf.* Allison Orr Larsen, *The Trouble with Amicus Facts,* 100 Va. L. Rev. 1757, 1762 (2014) ("It is a mistake to conclude that the Justices can easily tell which of these amici are real factual experts and which of them are not. Most of the names on the covers of the briefs sound neutral and mask the advocacy that may be motivating them.")

The Committee's proposal makes several improvements to the Rule 29 amicus disclosures. First, it would require an amicus to provide "a concise description" of its "identity, history, experience, and interests" and its date of creation if it was established within the last year. This provision would discourage entities from establishing front organizations mainly to serve as amici and give courts more information to evaluate the credibility and motives of amici.

Second, it would require an amicus to disclose whether a party or its counsel, or any combination thereof, has contributed or pledged to contribute 25 percent or more of its total revenue in the prior fiscal year. Currently, only funds earmarked by a party or counsel for the preparation of a specific amicus brief are required to be disclosed, a standard that fails to capture a range of material financial connections bearing on relationships between parties and amici.

Third, the proposal would address a key loophole that allows non-party funders to avoid disclosure by making payments through an amicus's "membership" structure. This reform recognizes that membership should not shield financial influence from disclosure.

Overall, the proposed amendments to Rule 29 are a crucial step toward greater transparency and fairness in appellate litigation. We respectfully urge the Committee to adopt these reforms to enhance the integrity of judicial proceedings.

Thank you for your work on these important issues and for considering our views.

Sincerely,

Court Accountability
Alliance for Justice
American Governance Institute
Citizens for Responsibility and Ethics in Washington (CREW)
Civic Engagement Beyond Voting
Clean Elections Texas
Common Cause
Demand Justice
End Citizens United
Enough of Gun Violence: Non-Violence is Life
Equal Rights Advocates
Equality California
Fix the Court
Free Speech for People
Jim Hightower, former Texas Agriculture Commissioner
Kim Lane Scheppele, Laurance S. Rockefeller Professor of Sociology and International Affairs and the University Center for Human Values, Princeton University (in personal capacity)

Lorelie S. Masters
Newtown Action Alliance
North Carolina Democratic Party
People Power United
Philip Allen Lacovara, former President of the District of Columbia Bar
Reform for Illinois
Revolving Door Project
Systemic Justice Project at Harvard Law School
Towards Justice
Transformative Justice Coalition
UltraViolet
VoteAmerica
1Hood

February 17, 2025

Submitted via Regulations.gov

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

Re: Proposed Amendments to Federal Rules of Appellate Procedure

Dear Judge Bates:

The Native American Rights Fund, the National Congress of American Indians, and the Northern Plains Indian Law Center write to provide comment on the proposed revisions to the Federal Rules of Appellate Procedure. We offer no opinion on the proposed amendments to Rule 29 suggested by the Advisory Committee on Appellate Rules. Instead, we write to request that federally recognized Indian tribes be added to the list of entities exempt from the leave of court requirement for Amici Curiae in Rule 29. This change is of particular importance considering the proposed changes to Rule 29 which would require leave of court to file an Amicus Brief and add greater disclosure requirements.

Rule 29 recognizes the United States' and the individual States' unique interests in participating as amici curiae out of respect for their inherent sovereignty and their exercise of governmental authority, and distinguishes them from what the Advisory Committee on Appellate Rules calls "non-governmental amicus briefs."[1] But Rule 29 omits one group of domestic sovereigns from its ambit: Indian tribes. Adding Indian tribes to the list of government entities that Rule 29 exempts from its leave-of-court requirement is reasonable and necessary because cases defining the contours of tribal governmental authority and rights frequently do not include tribes as parties, leaving amicus briefing as the only avenue for those

[1] Prelim. Draft of Proposed Amendments to Federal Rules at 25, https://www.uscourts.gov/file/78921/download (hereinafter "Preliminary Draft").

tribes' participation. These cases often implicate foundational constitutional law principles as well, and tribes should be fully heard as part of the Circuit Courts' consideration of those issues.

In 2023, the U.S. Supreme Court added Indian tribes to the list of governmental entities in Supreme Court Rule 37, which governs amici curiae participation. The Federal Rules of Appellate Procedure should be revised to align with Indian tribes' recognition at the Supreme Court level and regular participation in cases at the Circuit Court level.

I. Indian Tribes are Imbued with Inherent Sovereignty.

Indian tribes are "distinct, independent, political communities, retaining their original natural rights." *Worcester v. Georgia*, 31 U.S (6 Pet.) 515, 519 (1832) (Marshall, C.J.).[2] Tribes possess inherent governmental authority, including the

[2] *See also Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (explaining tribes "remain 'separate sovereigns pre-existing the Constitution'") (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (describing "tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction");*United States v. Kagama*, 118 U.S. 375, 381 (1886) (describing tribes as "having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations"). "Tribal sovereignty does not derive from the United States. Federal law acknowledges that tribal powers stem, not from acts of Congress, but are inherent sovereign powers that have never been extinguished. This sovereignty predates the formation of the United States and persists unless diminished by federal law." Cohen's Handbook of Federal Indian Law § 1.01 (2024).

authority to criminalize conduct,[3] levy taxes, [4] and adjudicate disputes,[5] and they possess sovereign immunity.[6] This inherent power makes them similarly situated with other governmental entities currently listed in Rule 29. As sovereigns, tribes are imbued with greater authority than cities, counties, or towns, which exercise only the authority delegated by states.[7] Unlike cities and towns, tribes have an interest in advocating for their sovereign powers and advancing their unique interests and the interests of tribal members.

Including Indian tribes in Rule 29's list of sovereign entities that do not need leave of the court to file is consistent with how other branches of government treat tribes. Congress has long recognized that tribes have inherent authority on par with states.[8] *See* Indian Civil Rights Act, 25 U.S.C. § 1301(2) (2020) ("'[P]owers of self-

---

[3] *United States v. Wheeler*, 435 U.S. 313, 328 (1978) (discussing criminal prosecution and explaining "when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty"); *Talton v. Mayes*, 163 U.S. 376, 380 (1896) (explaining Tribe had "power to make laws defining offenses and providing for the trial and punishment of those who violate them when the offenses are committed by one member of the tribe against another one of its members within the territory of the Nation").

[4] *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) ("The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.").

[5] *See Williams v. Lee*, 358 U.S. 217, 223 (1959) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations.").

[6] *Bay Mills Indian Community*, 572 U.S. at 788 ("Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" (quoting *Santa Clara Pueblo*, 436 U.S. at 58)).

[7] *See Wheeler*, 435 U.S. at 318 (1978) (describing "dual sovereignty" and distinguishing tribes from cities); *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) ("Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.").

[8] Congress relied on both tribes and states to assist in the response to the COVID-19 pandemic. *See* Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. 116-123, 134 Stat. 147 (2020) ("[N]ot less than $950,000,000 of the amount provided shall be for grants to or cooperative agreements with States, localities, territories, tribes, tribal organizations, urban Indian health organizations, or health service providers to tribes, to carry out surveillance, epidemiology, laboratory capacity, infection control, mitigation, communications, and other preparedness and response activities[.]"). And tribes,

government' means and includes all governmental powers possessed by an Indian tribe . . .; and means the inherent power of Indian tribes, hereby recognized and affirmed to exercise criminal jurisdiction over all Indians."). Congress has reaffirmed tribes' inherent sovereign powers in reauthorizing statutes like the Violence Against Women Act. 25 U.S.C. § 1304(b)(1) ("[T]he powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons."). Accordingly, Rule 29 should also respect the similar status of states and tribes.

II. Indian Tribes Must Often Participate as Amici to Protect Their Rights.

Questions relating to Indian tribes' governmental authority, treaty rights, and resources often are litigated in cases in which tribes are not parties. In those cases, tribes participate as amici. It is, therefore, critical that tribes have unfettered access to provide fulsome briefing outlining their interests put at issue by other parties.

For example, *Hooper v. City of Tulsa*, 71 F.4th 1270 (10th Cir. 2023) directly implicated the Cherokee, Muscogee (Creek), Chickasaw, Quapaw, Seminole and Choctaw Nations. None of the tribes, however, were parties to the suit—in fact, because of the nature of the action, a dispute over an individual's traffic ticket, they *could not* be parties to the suit.[9] Instead, the Tribes participated as amici. There are

---

like states, contribute to national preparedness initiatives and are eligible for grants from the Federal Emergency Management Agency. *See* Tribal Homeland Security Grant Program, https://www.fema.gov/grants/preparedness/tribal-homeland-security (last visited April 21, 2022). *See also* S. Rep. No. 698, 45th Cong., 3d Sess., 1–2 (1879). The Senate Judiciary Committee analyzed the Chickasaw Nation's Permit Law and stated that tribes have authority to "enact the requisite legislation to maintain peace and good order, improve their condition, [and] establish school systems" and that "*they undoubtedly possess the inherent right to resort to taxation to raise the necessary revenue for the accomplishment of these vitally important objects*—a right not in any sense derived from the Government of the United States[.]" *Id.* Under several federal environmental laws, tribes are treated as states for purposes of implementing and managing certain environmental programs and functions. United States Environmental Protection Agency, Tribes Approved for Treatment as a State, https://www.epa.gov/tribal/tribes-approved-treatment-state-tas (last visited Jan. 27, 2025); *see also* Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7245 (Feb. 12, 1998).

[9] *See also Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017) *aff'd sub nom Sharp v. Murphy*, 591 U.S. 977 (2020) (Muscogee (Creek) Nation participation as amicus curiae); *United States v. Cooley*, 919 F.3d 1135 (9th Cir. 2019), *vacated and*

countless examples of such cases dating back to the founding era. *Johnson v. M'Intosh* and *Worcester v. Georgia* are bedrock Indian law cases which laid the foundation for the next 200 years of Indian law jurisprudence.[10] No tribe, however, was a party in either case.

Cases implicating tribal interests present themselves in a variety of ways—often without tribes as a party. Circuit Courts are regularly asked to decide cases involving inherent tribal authority. *See, e.g.*, *Plains Com. Bank v. Long Family Land and Cattle Co.*, 491 F.3d 878 (8th Cir. 2007) (analyzing tribal court civil jurisdiction to hear discrimination claim); *Strate v. A-1 Contractors*, 76 F.3d 930 (8th Cir. 1996) (analyzing tribal civil jurisdiction over nonmembers). In these cases, tribes participated as amici curiae at the Circuit and Supreme Court levels to voice their concerns and advocate for their interests.

The United States' participation in these types of cases cannot always adequately represent tribal interests, especially as the positions of the United States and tribes are not always aligned. *See NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015), *cert. denied sub nom Little River Band of Ottawa Indians Tribal Gov't v. NLRB*, 136 S. Ct. 2508 (2016).[11]

Courts also regularly adjudicate tribes' treaty rights without tribes as a party. *See United States v. Dion*, 762 F.2d 674 (8th Cir. 1985), *rev'd in part*, 476 U.S. 734 (1986) (assessing hunting rights under 1858 treaty signed by the United States and by representatives of the Yankton Tribe). In treaty rights cases, the United States can participate as an amicus without leave of the Court, as can individual States (which are not parties to the treaties at issue). Yet under Rule 29 both at present and as proposed, Indian tribes that are sovereign signatories to these treaties, and that might not be allowed to participate as parties, must request and may be denied leave of court to participate as amici. Rule 29 should be updated to remedy this asymmetry.

---

remanded, 593 U.S. 345 (2021) (Crow Tribe of Indians participated as amicus curiae); *United States v. Lara*, 324 F.3d 635 (2003) *rev'd*, 541 U.S. 193 (2004) (eighteen American Indian Tribes participated as amici curiae).

[10] *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 542 (1823) (determining validity of Indian land transfers); *Worcester*, 31 U.S. (6 Pet.) at 515 (adjudicating key questions regarding Cherokee Nation's treaty rights and jurisdiction).

[11] *See also* Brief of Amicus Curiae National Congress of American Indians in Support of Respondent at 6, *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019) (No. 16-1498), 2018 WL 4659224 at *6; Brief for the United States as Amicus Curiae Supporting Respondent, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 1478583.

III. Cases Involving Indian Tribes Have Shaped Foundational Constitutional Law Principles.

Changing Rule 29 to better facilitate tribal participation will allow tribes to provide important information and context to the Circuit Courts. This is particularly important in cases implicating foundational constitutional law principles, which often come up in the context of federal Indian law.[12]

For example, *Brackeen v. Haaland* addressed constitutional questions related to the bounds of congressional authority and anti-commandeering. 994 F.3d 249 (5th Cir. 2021), *aff'd in part, vacated in part, rev'd in part*, 599 U.S 255 (2023). *Winters v. United States* continues to define water rights across the West. 148 F. 684 (9th Cir. 1906), *aff'd* 207 U.S. 564 (1908) (adjudicating Indian reservation water rights without any tribe as a party). Federal Indian law cases contribute to our understanding of Congress' commerce powers,[13] administrative law,[14] and the Citizenship Clause.[15] Amending Rule 29 to provide greater access to tribal amici ensures the Circuit Courts have access to relevant information when they consider these types of foundational constitutional cases.

IV. Indian Tribes Have Diverse Sovereign and Business Interests Affected by Litigation in Every Circuit.

Revising Rule 29 to include Indian tribes would also standardize how tribes participate as amici in cases across all Federal Circuit Courts. There are 574 federally recognized Indian tribes spread across the United States who live, own land, and do business in almost every Circuit Court region.[16] As discussed above,

---

[12] Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1793 (2019).

[13] *Brackeen v. Haaland*, 994 F.3d at 300 (analyzing Indian Commerce Clause); *United States v. Lara*, 541 U.S. 193 (2004) (same).

[14] *Morton v. Ruiz*, 462 F.2d 818 (9th Cir. 1972), *aff'd*, 415 U.S. 199 (1974) (analyzing authority of Bureau of Indian affairs to implement and interpret Social Security Act).

[15] *Elk v. Wilkins*, 112 U.S. 94 (1884) (one of two cases interpreting Citizenship Clause); *see also* Brief of Amicus Curiae National Congress of American Indians in Support of Appellees, *Trump v. New York*, 141 S. Ct. 530 (2020), (No. 20-366), 2020 WL 6873531.

[16] Bureau of Indian Affairs, U.S. Sovereign Nations: Land Areas of Federally-Recognized Tribes, https://bia-geospatial-internal.geoplatform.gov/indianlands/ (last visited Feb. 11, 2025).

Indian tribes regularly participate in cases addressing their jurisdiction, treaty rights, and other sovereign interests. Tribes also participate in cases concerning state administrative law,[17] environmental regulation,[18] federal land use,[19] and myriad other issues that affect tribal governments, tribal citizens, and tribal businesses. In this respect, Indian tribes are again exercising their governmental authority similarly to how the federal government and states participate as amici. Tribes should be afforded the same treatment under Rule 29 as their fellow sovereigns.

V. Allowing Indian Tribes to Participate as Amicus Curiae Without Leave of Court Would Not Create Undue Recusal Problems for the Courts of Appeals.

The Advisory Committee proposes eliminating the consent option and requiring leave of court to file amicus briefs in part because of a concern that "unconstrained filing of amicus briefs in the courts of appeals would produce recusal issues."[20] Rule 29 both at present and as proposed permits the courts of appeals to "prohibit the filing of or . . . strike an amicus brief that would result in a judge's disqualification"—at least with respect to non-governmental and tribal amicus briefs. [21] But Rule 29 gives the United States and the individual States an unqualified right to file amicus briefs without leave of court.[22] Presumably, such briefs might occasionally present recusal issues. Allowing Indian tribes to file amicus briefs without leave of court would, likewise, occasionally present recusal issues. But Indian tribes participate in federal appellate litigation far less frequently than either the States or the Federal Government, and consequently allowing for tribal amicus filing without leave of court would have little (if any) effect on recusals. Moreover, because amicus briefing is often the only avenue for Indian tribes to participate in cases that directly affect their unique sovereign interests, the equities favor including tribes among those sovereign governments with an unqualified right to file amicus briefs.

---

[17] *HCI Distribution v. Hilgers*, 110 F. 4th 1062 (8th Cir. 2024) (Thirteen Indian Tribes submitted amicus brief).

[18] *Center for Biological Diversity v. Regan*, 734 F. Supp. 3d (D.C. Cir. 2024) (amicus brief filed by Miccosukee Tribe of Indians of Florida).

[19] *Apache Stronghold v. United States*, 101 F. 4th 1036 (9th Cir. 2024) (amicus brief filed by Tohono O'odham Nation, Tonto Apache Tribe, and San Juan Southern Paiute).

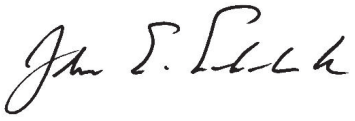
[20] Preliminary Draft at 26.

[21] Fed. R. App. P. 29(a)(2); Preliminary Draft at 29.

[22] *Id.*

For the aforementioned reasons, we respectfully request Rule 29 be revised to remove the leave of court requirement for tribal amici.

Sincerely,



John Echohawk
Executive Director, Native American Rights Fund

Larry Wright, Jr.
Executive Director, National Congress of American Indians

Professor Dan Lewerenz
Northern Plains Indian Law Center
University of North Dakota School of Law

February 17, 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

Judge Bates:

Thank you for the opportunity to submit written comments on the proposed amendments to Federal Rule of Appellate Procedure 29 ("Rule 29").

Introduction

The Retail Litigation Center, Inc. (the "RLC") is a 501(c)(6) nonprofit trade association that represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC's members employ millions of people throughout the U.S., provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than 250 amicus briefs on issues of importance to the retail industry. Its amicus briefs have been helpful to courts throughout the United States, as evidenced by citation to RLC amicus briefs in numerous precedential opinions. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 184 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013); *Chewy, Inc. v. U.S. Dep't of Lab.*, 69 F.4th 773, 777–78 (11th Cir. 2023); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020).

Analysis

The RLC opposes the proposal to: 1) remove the ability to file amicus briefs upon consent of the parties and; 2) embed a standard within Rule 29 for which amicus briefs are favored or disfavored.

1. Rule 29 already contains safeguards to address the Committee's concerns about filing amicus briefs upon consent of both parties.

The May 13th Report of the Advisory Committee (the "Report") states that the "Advisory Committee considered eliminating" the requirement for *any* leave of court to file non-governmental briefs–as was done in the United States Supreme Court–but "[a]micus practice in the Supreme Court differs from that in the court of appeals in at least two relevant ways." Thus, instead of amending Rule 29 to make the filing of amicus briefs more open, this Committee proposed amending Rule 29 to make the filing of amicus briefs more restrictive by recommending the removal of the provision allowing filing an amicus brief without leave of court if both parties consent. However, neither of the two concerns cited in the Report for leaning away from the more liberal standard (used by the Supreme Court) justify removing the provision allowing the filing of briefs by consent.

The Report claimed that the "unconstrained filing of amicus briefs in the courts of appeals would produce recusal issues." However, Rule 29 already addresses this concern, saying a court of appeals

"may strike an amicus brief that would result in a judge's disqualification." A closer look at the example identified in the Report is illustrative of the true problem.

> The clerk's office does a comprehensive conflict check, and if an amicus brief is filed during the briefing period with the consent of the parties, it could cause the recusal of a judge at the panel stage *without the judge even knowing*.

Report, at 21 (emphasis added). The problem described is a problem with systems, not the federal rules. Conflicts systems that disqualify potential panelists, despite the express inclusion in the existing Rule 29 of the right to strike an amicus brief that would result in that judge's disqualification, is an issue that needs resolved through updating systems and/or processes. An example of a way to solve this problem is to conduct conflict checks for *amici* upon selection of a panel, and if a selected panelist would be disqualified due to an amicus brief filed upon consent, the judge can then decide whether to strike the brief, as contemplated in Rule 29's current text.

The only other reason identified in the Report for revising Rule 29 in a manner more restrictive than that used by the United States Supreme Court is that the requirement amicus briefs be filed as printed booklets in the Supreme Court "operates as a modest filter on amicus briefs." In other words, the Committee appears concerned about the number of amicus briefs filed in the circuit courts. However, amicus briefs filed in the Supreme Court far outnumber the amicus briefs filed in the circuit courts. Moreover, cases in the courts of appeals that attract multiple briefs do so because of the weight and import of the legal issues before the Court. As a result, amicus briefs from multiple sources may help the Court understand the breadth of the law affected by the issues.

2. The courts of appeals do not need a standard for which amicus briefs are favored and which are disfavored and, if one is drafted, such a standard must take into account the many ways amicus briefs may help a court.

The RLC opposes the proposal to create a standard in Rule 29 for which amicus briefs are favored or disfavored. As it is, judges are able to use their discretion and familiarity with a particular case to make a decision in each unique set of circumstances. The courts of appeals are already using this discretion to rule on opposed motions for leave to file amicus briefs.

Moreover, if a standard were to be added, the criteria identified in the proposed amendments do not sufficiently encompass the many ways in which amicus briefs may help a court. Specifically, the proposed amendments add these two sentences:

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

As an initial matter, the "purpose" sentence that the Committee proposes to add to Rule 29(a)(2) fails to recognize the many ways in which an amicus brief may be helpful to a court. The only thing said to help the court in the proposed purpose section is "discussing relevant matter not already mentioned by the parties." That is certainly *one* way that an amicus brief may be helpful, but it is far from the only way. Particularly if paired with a motion requirement with no exception for consent of the parties, this standard will certainly be litigated in disputed motion practice. Thus, any textual standard in Rule 29 should not limit the types of amicus briefs courts of appeals may favor.

In addition to discussing relevant matter not already raised by the parties, amicus briefs may add value by offering examples of real-life applications of how the issues discussed by the parties would apply beyond that case. Relatedly, amicus briefs may offer relevant data about the background or impact of matters raised by the parties. Similarly, amicus briefs from experts or professors may provide added depth or history to matters raised by, but not exhausted in, party briefing.

While the text of the standard in the proposed amendments is similar to that of Supreme Court Rule 37, there is a higher likelihood of disputed motion practice on the application of this standard in the courts of appeals (particularly, though not exclusively, if the proposal to remove the filing by consent provision goes forward). As multiple witnesses testified during the hearing before the Advisory Committee on Appellate Rules, the plain text of this proposed purpose ("relevant matter not already mentioned by the parties") is likely to be read too narrowly once adjudicated and is likely to be adjudicated if passed.

Lastly, the proposal to "disfavor" amicus briefs that are "redundant with" other briefs would be especially detrimental to smaller organizations with important voices, and difficult to administer. When *amici* can work together to offer a single helpful brief to a court, they often do so. That is because *amici* already have an interest in ensuring, to the extent possible, that their briefs have a unique message just to make sure each brief is helpful to the court, read, and persuasive. As an example, the RLC 12 briefs in federal court in 2024. In over half of those cases, the RLC joined with one or more other associations. But in some cases, multiple briefs are necessary to offer unique expertise and perspectives. A court seeking only to prevent "redundant" briefs may allow the broadest perspective that appears as *amici*, at the cost of smaller organizations who also bring important insights into the legal issues of a particular case.

Indeed, the potential for multiple briefs in support of the same party may be extremely beneficial for a court once it is time to draft an opinion, but may be difficult to ascertain the impact at an early stage of the appeal, if the court were required to do so at a motion stage. For instance, an appeal involving the application of law to new or evolving technology may inspire amicus briefs from several sectors. On first review, multiple amicus briefs describing the technology and how various industries use the technology may appear redundant. However, once a judge takes the pen to draft an opinion with the intent of a limited ruling, referencing multiple amicus briefs may add significant value when deciding what words to use when precisely articulating a rule without unknowingly expanding its reach.

Conclusion

The Retail Litigation Center encourages the Committee to reject the proposed amendments to Rule 29(a). Thank you for the opportunity to submit written comments and testify at the February 14, 2025 hearing.

Sincerely,

/s/ Larissa M. Whittingham

Larissa M. Whittingham
Litigation Counsel
Retail Litigation Center, Inc.
Larissa.whittingham@retaillitcenter.org

PDW
LEGAL

J. RANDOLPH PICKETT | R. BRENDAN DUMMIGAN | KIMBERLY O. WEINGART | CHRISTOPHER A. LARSEN | DEENA D. SAJITHARAN
KYLE T. SHARP | RACHEL M. JENNINGS | SAMANTHA N. STANFILL | MAYRA A. LEDESMA | JULIANA B. MINN

February 17, 2025

Submitted via regulations.gov

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

Re: Proposed Amendments to Federal Rule of Appellate Procedure 29

Judge Bates:

I write in my personal capacity to urge the Committee to reject the proposed amendment to Federal Rule of Appellate Procedure 29 requiring an amicus to move for leave of the court to participate. I am an attorney in private practice focused on plaintiff's personal injury litigation and appeals. Amicus briefs are an important aspect of civil appeals, particularly in cases where issues extend beyond the interests of the specific parties involved in any one case. Amicus participation serves important purposes for our appellate justice system and access to participation should be expanded, not hampered. The proposed amendments to Rule 29 setting a motion requirement should be rejected.

For my practice, representing plaintiffs in litigation and on appeal generally means my client is an individual or family, bringing claims against a business entity or insurance carrier. On appeal, the business entity or insurance carrier is far more likely to have a rolodex of trade groups and industry advocates ready to file amicus briefs on its behalf. These groups are far more likely to have interrelated membership and funding. These groups are also far more likely to be repeat amicus players with organized amicus groups ready to buzz into action when the request for a brief comes in. These groups are in a much better position to cooperate in advance of filing their briefs, communicate on which issues each brief will focus on to reduce the appearance of redundancies, and coordinate motions and briefing between the different groups. Which is to say, having a motion requirement for amicus participation will disadvantage individual plaintiffs and favor industry players, although industry players seem as opposed to the proposed rule changes as groups tending to favor plaintiffs.

While the proposed changes in Rule 29 aimed at transparency and disclosure are less likely to affect my practice, and I see the value of requiring disclosure where an amicus has an interest in the outcome of a case or financial motivation to participate that falls outside the current disclosure rules, the proposed amendments raise fundamental constitutional questions. These questions have been addressed by other commenters and witnesses. Focusing instead on the requirement that a potential amicus obtain leave of the court through motions practice, these amendments should be rejected as unworkable, impractical, contrary to judicial economy, and contrary to improving access to justice.

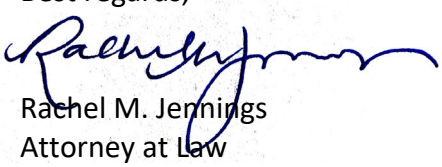
The current rules provide for amicus participation through consent of the parties or leave of the court. This system works well and provides access to the appellate process without imposing impractical hurdles to participation. Contrary to the purported motivation for the proposed amendments, there is little evidence this system has created a burdensome number of redundant or unhelpful amicus briefs that needs to be corrected. Tellingly, as of January 2023, the Supreme Court of the United States no longer requires consent of the parties *or* leave of the court to participate as amicus to the Court. As many commenters have wondered, if our appellate courts have such an amicus brief problem, why would the Supreme Court make its amicus rules *more permissive* rather than restrictive? This is the direction we urge the Committee to go in as well. As written, the proposed amendments run counter to many of the stated purposes they aim to achieve and are inconsistent with the amicus rules currently in effect at the Supreme Court. These practical considerations weigh against the proposed amendments.

Further, having a motion requirement will inevitably result in contested motions practice. This is simply a reality in our inherently adversarial justice system. Adding additional filings and the need for a hearing or other means by which a contested motion would then be decided adds work and calendared events to the court's docket, rather than simplifying or streamlining dockets. The proposed amendments thus do not further judicial economy, they detract from it. And as several witnesses expressed, in light of the Supreme Court's shift toward more amici instead of fewer, the changes at the circuit court level will result in fewer amici in general at this level with a focus instead on the Supreme Court—which undermines the purpose of having an amici system by effectively reducing the information provided to the court instead of expanding it.

Finally, the proposed amendments fail to accurately capture the realities of how a case makes its way through our circuit courts. The proposed amendments assume parties have accurate information in advance on their potential amici, while working to avoid the level of involvement that would convert an amicus into essentially an arm of a party. Amici briefs are due at the same time as the party's brief the amicus is supporting, meaning there is little a party can do to coordinate these briefs in a way that eliminates all possible appearances of overlap or could somehow categorize which amici are addressing which issue. Once the briefs are filed, there is no method by which the court can then determine which amicus is helpful and which then becomes redundant and unhelpful if there is any overlap, perceived or actual. This reality exists regardless of whether a motion for leave is filed first because, quite simply, courts do not have the means to evaluate the sufficiency or helpfulness of an amicus brief until it reads the amicus brief itself. Adding a motion requirement thus is unworkable, does not further the Committee's stated purposes, and would only create bigger problems than it attempts to resolve.

If the Committee considers any revision, a revision in line with the Supreme Court's rule change on amicus should be considered instead of creating additional barriers to participation. The benefit of amici is more information, more voices, more input. This is a net positive for our justice system, not something to be corrected through onerous rule changes. Please reject the proposed amendments to Rule 29.

Best regards,



Rachel M. Jennings
Attorney at Law
rachelj@pdw.legal

February 17, 2025

Hon. 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
RulesCommittee_Secretary@ao.uscourts.gov

I. Introduction

We are members of law school clinics across the country.[1] We write to express our concern regarding the proposed changes to Federal Rule of Appellate Procedure 29 ("FRAP 29") and their potential impact on our educational experience and on appellate practice more broadly.

The proposed amendment states that an amicus brief "that brings to the court's attention relevant matter not already mentioned by the parties may help the court. An amicus brief that does not serve this purpose—or that is redundant with another amicus brief—is disfavored."[2] This overbroad and ambiguous language would significantly restrict our ability to engage in amicus advocacy and limit opportunities for valuable experiential learning. If codified, these changes would likely result in decreased amicus briefing from student clinics and the underrepresented interests for whom they advocate, which in turn would limit student interest and training in appellate work and negatively impact appellate practice and jurisprudence generally.

II. Clinical Amicus Practice: Benefits to Law Students

Student clinics provide invaluable experiential learning opportunities that are difficult to replicate through other forms of legal education. Law schools teach us to "think like lawyers" by primarily employing analytical frameworks. However, this approach typically focuses on the intellectual realm and does not always foster the skills necessary to the work of lawyering, such as policy advocacy, interdisciplinary research, and arguing creatively.[3] In clinics, we engage in real-world cases that require us to synthesize different aspects of our learning.[4] Indeed, research has consistently shown that such experiential learning opportunities are crucial for developing professional legal skills and judgment.[5]

[1] Cornell Law School students Nate Lo, Debbie Morales, Paige Osgood, and Ritika Vemulapalli served as the primary drafters of this comment, under the supervision of G.S. Hans (Clinical Professor of Law, Civil Rights and Civil Liberties Clinic, Cornell Law School) and Jake Karr (Acting Director, Technology Law & Policy Clinic, New York University School of Law).
[2] Proposed Federal Rule of Appellate Procedure 29(a)(2).
[3] *See* Susan Bryant et al., *Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy* 14 (2014).
[4] *Id.* at 28.
[5] Tamar Ezer, *Teaching Written Advocacy in a Law School Clinic*, 27 Clinical L. Rev. 167 (2019).

This kind of development is especially true for student clinicians who work in the amicus context. As amicus advocates, we must learn to work creatively to change the law to accept our client's view rather than molding our clients to fit the law's view.[6] For example, Harvard's Cyberlaw Clinic submitted an amicus to the Ninth Circuit in *Center for Investigative Reporting v. DOJ*, which was frequently cited in the majority opinion.[7] The Clinic's brief played a pivotal role in shaping the court's interpretation of the Freedom of Information Act, highlighting how clinic amicus work can empower and teach law students to drive legal change through client-centered advocacy.[8]

Further, unlike direct representation—which focuses primarily on fact-intensive casework and individual client needs—amicus briefing requires us to engage in advanced legal analysis, consider policy implications, and address systemic issues. The variety of cases, clients, and considerations amicus briefing provides helps us see how courts approach statutory cases differently from constitutional ones, private parties from government parties, and the like.[9] For example, Cornell Law School's Civil Rights and Civil Liberties Clinic worked with Professors Nelson Tebbe and Lawrence Sager on a free exercise amicus brief exploring how a free exercise challenge to a Colorado anti-discrimination law could disrupt broader constitutional doctrine.[10] In drafting the amicus brief, students quickly familiarized themselves with complex theoretical frameworks developed by scholars to interpret the free exercise clause. This process required students to engage in a kind of advocacy that most clinical work does not offer—though the clinic was representing clients with a clear perspective and goal, the amicus advocacy centered on finding a result that would not frustrate pre-existing constitutional doctrine and crafting a brief that would provide the court with a deeper understanding of the broader implications of their resolution of the case.

Through participation in amicus briefing, we also cultivate essential skills in legal research, writing, and strategy. The writing process teaches us how to present legal issues in ways that resonate with courts while connecting to broader advocacy movements. Amicus writing requires us to think critically and deeply about our perspective and adopt a tone and voice that is different from that of first-year legal writing courses or law school exams.[11] For example, Howard University's Human and Civil Rights Clinic filed an amicus brief in *Dobbs v. Jackson Women's Health Organization* that discussed the racial discrepancy in maternal mortality rates. The dissenting justices cited the clinic's brief for the proposition that Black women were three to four

---

[6] *See id.*

[7] *See* Clinic Staff, *Clinic Files FOIA Amicus on Behalf of Government Transparency Researchers,* Cyberlaw Clinic (July 24, 2024), https://clinic.cyber.harvard.edu/2024/07/24/clinic-files-foia-amicus-on-behalf-of-government-transparency-researchers.

[8] *See id.*

[9] *See* Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 Stan. L. Rev. 137, 164 (2013) ("A clinic's educational mission also incentivizes it to have a mixture of cases at any given point across a variety of dimensions," including "a mixture of parties and amici, individuals and (sometimes more sophisticated) institutions").

[10] *See* Brief of Professors Lawrence G. Sager and Nelson Tebbe as Amici Curiae Supporting Appellees and Affirmance, St. Mary Catholic Parish in Littleton v. Roy, No. 24-1267, 2024 WL 4579340 (10th Cir. Oct. 23, 2024).

[11] Steven J. Alagna, *The Pedagogical Value of Clinical Amicus Advocacy*, 75 Wash. U. J.L. & Pol'y 47, 65 (2024) (making a case for why clinical appellate amicus advocacy is particularly well suited to foster valuable experiential learning in the public interest).

times more likely to die during or after childbirth than white women.[12] Through that brief, student clinicians were able to give voice to a marginalized and often unnoticed demographic and, even in a dissent, played an important part in shaping legal development.

In addition, the amicus process encourages a multidisciplinary research approach that enhances our legal education. While, as discussed above, amicus briefs can focus on doctrine, they also typically enjoy more latitude for creative arguments than principal-party briefs depending on the identity of amici.[13] For example, Harvard Law School's Religious Freedom Clinic students conducted extensive historical research examining eighteenth and nineteenth century newspapers in both digital databases and physical archives when they drafted their brief in *Ramirez v. Collier*.[14]

In summary, amicus briefing holds a central place in clinical legal education because it provides students with critical skills, knowledge, and strategic thinking necessary for effective advocacy. Limiting this important venue for experiential training could harm students and diminish the legal profession's overall capacity for effective, justice-oriented litigation.

III. Clinical Amicus Practice: Benefits to Courts

Our clinical amicus work provides substantial benefits to courts through both its immediate contributions and its role in developing future appellate practitioners. Courts have repeatedly recognized the unique value of clinical amicus briefs that bring focused expertise to bear on specific issues. For instance, when Georgetown Law clinic students in the Institute for Public Representation filed an amicus brief on behalf of children's television policy advocates in *FCC v. Fox Television Stations, Inc.*, they synthesized social science research on V-Chip technology's limitations, which directly influenced oral arguments before the Supreme Court.[15] In addition, Yale Law School's Community and Economic Development clinic wrote an amicus for the Second Circuit, in the case of *Gilead Community Services v. Town of Cromwell*. Out of all the amici written, the students' amicus was the only one cited in that case.[16] Also, in *Center for Investigative Reporting v. U.S. Department of Justice*, the Ninth Circuit frequently cited an amicus brief authored by the Harvard Law Cyberlaw Clinic arguing that searching, filtering, sorting, and other forms of database manipulation did not constitute the creation of a new record.[17] The court even

[12] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 396 n.13 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).
[13] Alagna, *supra* note 10, at 65.
[14] *See* Olivia Klein, *Supreme Court Cites Religious Freedom Clinic Students' Historical Research in Precedent-Setting Prisoners' Rights Case*, Clinic Stories (Apr. 19, 2022), https://hls.harvard.edu/clinic-stories/in-the-news/supreme-court-cites-religious-freedom-clinic-students-historical-research-in-precedent-setting-prisoners-rights-case/.
[15] *See* Angela J. Campbell and Coriell Wright, Brief of Amici Curiae American Academy of Pediatrics et al. In Support of Neither Party, Federal Communications Commission v. Fox Television Stations (2008) (No. 07-582), *U.S. Supreme Court Briefs*, https://scholarship.law.georgetown.edu/scb/51.
[16] *See* Gilead Cmty. Servs. v. Town of Cromwell, 112 F.4th 93, 21 (2d Cir. 2024) (citing the CED brief for their proposition of "stressing the importance of deterring town officials from capitulating to the discriminatory wishes of constituents.").
[17] *See* Ctr. for Investigative Reporting v. U.S. Dep't. of Just., 14 F.4th 916, 937-40 (9th Cir. 2021) (citing Brief of Amici Curiae Five Media Organizations and Sixteen Data Journalists in Support of Appellant and Reversal, Ctr. for Investigative Reporting v. U.S. Dept' of Just., 14 F.4th 916 (9th Cir. 2021) (No.18-17356).

adopted the brief's language.[18] Similarly, Yale Law School's Free Exercise Clinic's brief in *Groff v. DeJoy* provided such valuable perspective on behalf of religious minorities that the Court not only cited the brief, but also directly quoted it.[19]

These examples demonstrate how clinical amicus briefs contribute unique institutional perspectives that aid judicial decision-making, particularly when addressing technical or specialized issues that benefit from academic expertise and research capabilities. Law school clinics bring valuable resources to bear, including faculty expertise, extensive library collections, and connections to broader university research. As all the aforementioned examples of clinic amicus briefing demonstrates, this institutional knowledge can provide courts with crucial historical, empirical, or theoretical context for their decisions.

IV. Impact of Proposed Amendments

The proposed amendments to FRAP 29 contain two distinct changes that raise different concerns for clinical legal education.

A. Motion Requirement

The proposed requirement for advance approval of amicus filings would create unnecessary administrative burdens that outweigh any potential benefits. Unlike administrative agencies conducting rulemaking under the APA, courts already have a more efficient mechanism for handling unhelpful amicus briefs: they can simply choose not to consider them. Requiring courts to formally rule on advance requests for permission to file would actually create more work than the current practice of allowing judges to disregard unhelpful submissions.

B. Restrictions on "Redundant" Arguments

The proposed amendments state that "[a]n amicus brief that does not [brin[g] to the court's attention relevant matter not already mentioned by the parties]—or that is redundant with another amicus brief—is disfavored."[20] This overlap with party briefing reflects an important principle that we *already* embrace as clinical students and future professionals. Under our supervisors' guidance, we carefully screen potential amicus projects to ensure they will contribute unique perspectives, insights, or expertise not likely to be addressed in depth by the parties. We routinely decline opportunities to file "pile-on" briefs that would merely duplicate arguments already being capably made by others, viewing such redundant submissions as a poor use of both our educational time and judicial resources.

However, codifying this sound practice into a formal rule creates significant practical problems that outweigh its benefits:

---

[18] *Id.* at 938 n.20 (adopting the term "query" as defined by amici Five Media Organizations and Sixteen Data Journalists).

[19] *See Unanimous SCOTUS Opinion Cites Free Exercise Clinic Brief*, Yale Law School (Oct. 11, 2023), https://law.yale.edu/yls-today/news/unanimous-scotus-opinion-cites-free-exercise-clinic-brief.

[20] Proposed Federal Rule of Appellate Procedure 29(a)(2).

1. Line-Drawing Challenges: The proposed rule's overbroad language provides no clear standard for determining when an argument moves from helpful elaboration to disfavored redundancy. Indeed, the proposed rule suggests that courts should disfavor briefs that raise matters "already mentioned" by the parties.[21] A "mention" is an inscrutable unit of communication. It covers in-depth treatments, passing references, and possibly more in between. Consider also the nature of the mention. Multiple amici could bring various arguments and perspectives on a singular matter, but if that matter is "already mentioned," are they redundant? How much and what kind of a "mention" is sufficient for a given matter and how would a court or clinic measure? This uncertainty would likely lead many clinics to forgo valuable contributions rather than risk investing substantial student time and resources into briefs that might be rejected.

2. Timing Constraints: We must typically begin work on amicus briefs well before parties file their briefs, making it nearly impossible to know in advance what arguments might be deemed "redundant." Waiting until after the parties file leaves little time to write the bulk of an amicus brief and would put immense strain on our capacities as students, which disincentives student clinic amicus work.

3. Chilling Novel Contributions: Even when an argument touches on similar territory as party briefing, our briefs often provide valuable additional support, context, or implications that inform the court's analysis. For example, Georgetown Law's Institute for Public Representation brief, providing social science research on V-Chip technology's limitations, built upon parties' arguments while contributing unique empirical evidence that proved valuable during oral arguments.[22]

While we strongly support the goal of ensuring amicus briefs provide unique value to courts, we believe this is better achieved through continued adherence to clinical best practices and professional judgment rather than through a formal rule that could deter thoughtful contributions.

V. Conclusion

The current rules appropriately balance courts' need for diverse input with reasonable limitations on amicus participation. The proposed amendments to FRAP 29 would undermine both the pedagogical value of our clinical experiences and the benefits our work provides to courts. We respectfully urge the committee to maintain the current rules to preserve these important opportunities for law students and courts alike.

[21] Proposed Federal Rule of Appellate Procedure 29(a)(2). *See also* Advisory Committee Note to Proposed Rule 29 Subdivision (a).
[22] Angela J. Campbell and Coriell Wright, *supra* note 14.

Sincerely,

Steven J. Alagna
Interim Director of the Appellate Clinic and Lecturer in Law
Washington University in St. Louis School of Law

Gopal Balachandran
Associate Professor of Clinical Law
Penn State Dickinson Law School

John H. Blume
Samuel F. Leibowitz Professor of Trial Techniques
Cornell Law School

Asha Brundage-Moore
Christopher N. Lasch Clinical Teaching Fellow, Environmental Law Clinic
University of Denver, Sturm College of Law

Genevieve Byrne
Interim Director of Energy Clinic and Professor of Law
Vermont Law and Graduate School

Eduardo R.C. Capulong
Professor of Law & Director of Experiential Learning
University of Hawai'i at Manoa William S. Richardson School of Law

Alexandra Carter
Everett B. Birch Innovative Teaching Clinical Professor of Law
Columbia Law School

Holly L. Christian
Assistant Professor of Law
University of Detroit Mercy School of Law

Christophe Courchesne
Associate Professor of Law and Director, Environmental Advocacy Clinic
Vermont Law and Graduate School

Melodi Dinçer
Lecturer-in-Law & Fellow, UCLA Institute of Technology, Law and Policy
UCLA School of Law

Margaret Drew
Associate Professor of Law
University of Massachusetts School of Law

Yelena Duterte
Assistant Professor of Law, Director of the Veterans Legal Clinic
University of Illinois Chicago School of Law

Dennis Fan
Associate Clinical Professor of Law
Columbia Law School

Richard Frankel
Professor of Law and Founder, Appellate Litigation Clinic
Drexel University Thomas R. Kline School of Law

Nicole B. Godfrey
Assistant Professor of Law
University of Denver Sturm College of Law

G.S. Hans
Clinical Professor of Law
Cornell Law School

Daniel Harawa
Professor of Clinical Law
New York University School of Law

Kathy Hessler
Asst. Dean, Animal Law
George Washington University Law School

Jake Karr
Acting Director, Technology Law & Policy Clinic
New York University School of Law

Jay Knight
Clinical Teaching Fellow
University of Baltimore School of Law

Mason Kortz
Senior Clinical Instructor and Lecturer on Law
Harvard Law School

Vivek Krishnamurthy
Associate Professor of Law
Director of the Samuelson Glushko Technology Law and Policy Clinic
University of Colorado Law School

Ian Matthew Kysel
Associate Clinical Professor of Law
Cornell Law School

Melissa Lee
Visiting Assistant Clinical Professor
Seattle University School of Law

Jack I. Lerner
Clinical Professor of Law
University of California, Irvine School of Law

Yanmei Lin
Professor of Law
Vermont Law and Graduate School

Kevin Lynch
Professor of Law, Environmental Law Clinic
University of Denver Sturm College of Law

Beth Lyon
Clinical Professor of Law
Cornell Law School

Michael W. Martin
Clinical Professor of Law
Fordham University School of Law

Julie McConnell
Professor of Law, Legal Practice
University of Richmond School of Law

Binny Miller
Professor of Law and Associate Dean for Experiential Education
American University Washington College of Law

Eugenio Mollo, Jr.
Clinical Assistant Professor of Law
The University of Toledo College of Law

Christopher J. Morten
Associate Clinical Professor of Law and Director of the Science, Health & Information Clinic
Columbia Law School

Elora Mukherjee
Jerome L. Greene Clinical Professor of Law & Director, Immigrants' Rights Clinic
Columbia Law School

JaneAnne Murray
Associate Clinical Professor of Law, Director of Clemency Clinic
University of Minnesota Law School

Camille Pannu
Associate Clinical Professor of Law and Director, Environmental & Climate Justice Clinic
Columbia Law School

Reena Parikh
Assistant Clinical Professor
Boston College Law School

Kim D. Ricardo
Lucy Sprague Professor in Public Interest; Associate Dean of Experiential Education
University of Illinois Chicago School of Law

Jennifer Rosen Valverde
Associate Professor of Law
Rutgers Law School

Christopher S. Ross
Clinical Assistant Professor of Law
The Catholic University of America, Columbus School of Law

Laura Rovner
Professor of Law & Director, Civil Rights Clinic
University of Denver College of Law

Jennifer Safstrom
Assistant Clinical Professor of Law, Director Stanton Foundation First Amendment Clinic
Vanderbilt Law School

Wyatt Sassman
Associate Professor of Law, Environmental Law Clinic
University of Denver Sturm College of Law

Anita Sinha
Professor of Law
American University Washington College of Law

Vincent Southerland
Associate Professor of Clinical Law
New York University School of Law

Erik Stallman
Assistant Clinical Professor of Law
Samuelson Law, Technology & Public Policy Clinic
University of California – Berkeley School of Law

Sarah Steadman
Professor of Law
University of New Mexico

Loralee Sundra
Associate Director, Doc Film Legal Clinic
UCLA School of Law

Deborah M. Weissman
Reef C. Ivey II Distinguished Professor of Law
University of North Carolina

Institutions provided for identification purposes only

February 17, 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 write to express the concerns of the American Legislative Exchange Council (ALEC), regarding the proposed amendments to Federal Rule of Appellate Procedure (FRAP) 29. ALEC appreciates the opportunity to comment on the proposed rules to the Federal Rules of Appellate Procedure being considered by the Committee.

The American Legislative Exchange Council is America's largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets, and federalism. Comprised of nearly one-quarter of the country's state legislators and stakeholders from across the policy spectrum, ALEC members represent more than 60 million Americans and provide jobs to more than 30 million people in the United States.

ALEC members include state lawmakers and policy experts across the political and ideological spectrums, unified and driven to increase the level of fairness and accountability in our justice systems. While ALEC provides educational resources on a variety of policy subjects and issues, a large component of our educational efforts are dedicated to upholding the integrity of the judiciary at both state and federal levels. This has often occurred through submission of amicus curiae briefs to help provide the courts, including the Supreme Court of the United States, with additional perspectives and resources as they adjudicate important policy matters and questions of law which affect hundreds of millions of Americans[1].

[1] *See*, ALEC: Amicus Briefs, https://alec.org/periodical/amicus-briefs/.

ALEC is one of many non-profit organizations that participate in the judicial process through the submission of amicus briefs to federal courts. We represent our members' perspectives and values through educational programming, a democratic model policy development process, and amicus brief submissions. Such briefs are intended to supply courts with additional viewpoints, relevant historical material, and alternative legal arguments the court may not otherwise hear from the parties or even their judicial staff. This is of the utmost importance to our members when a litigation is centered on a public interest matter related to their organizational missions and values.

There have been numerous comments submitted in opposition to the proposed amendments to FRAP 29, highlighting several concerning consequences—we agree with the arguments in these submitted comments.[2] The most impactful and concerning consequences of the amendments to FRAP 29 include the expanded amicus disclosure requirements under proposed amendments 29(b) and (e), as they require the public disclosure of contributors to amicus filers. Such disclosure requirements constitute violations of free association and speech rights protected by the First Amendment to the U.S. Constitution and will impose significant burdens on the individuals and organizations who desire to participate in the judicial process.

These proposed amendments threaten to chill and halt the public's civic participation in legal matters, as aggressive government disclosure measures have proven to show throughout time[3]. Further, ALEC does not believe that the Committee has demonstrated a compelling enough interest to justify disclosure requirements of the proposed amendments, as required by law and recently affirmed in *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021).

Further, unlike a public comment to a proposed rule whose consideration is required under the Administrative Procedures Act, amicus briefs serve only as an additional resource a court is free to disregard[4]. Courts should not be prohibited the

[2] *See, e.g.,* Comment from Americans for Prosperity Foundation, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0218. Comment from U.S. Chamber of Commerce, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0018; Comment from Philanthropy Roundtable, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0028; Comment from American Property Casualty Insurance Association, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0021, Comment from The Buckeye Institute, https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0212.

[3] *See,* ALEC Amicus Brief: AFP v. Baccera, https://alec.org/publication/amicus-brief-afp-v-baccera/.

[4] *See,* 5 U.S.C. § 553(c).

opportunity to benefit from additional insights the public may have to offer, and the public should not be significantly discouraged and intimidated away from doing so. Issuing the proposed amendments to FRAP 29 would have such impacts.

ALEC respectfully urges the Committee to withdraw the proposed amendments to Federal Rule of Appellate Procedure 29, as they would require disclosures likely to violate the free association and speech rights of amicus filers and their contributors.

Thank you for providing the opportunity to comment on this very important matter. We appreciate your consideration.

Sincerely,
Nino Marchese
Director, Judiciary Task Force
American Legislative Exchange Council
2733 Crystal Drive, Suite 1000
Arlington, VA 22202
(703) 373-0933
Nmarchese@alec.org

STEVEN FINELL
Attorney at Law
777 FRAZIER AVENUE
SANTA ROSA, CA 95404-5823

(707) 495-9086

NEW YORK OFFICE:
30 WALL STREET, 8TH FLOOR
NEW YORK, NY 10005-2205

Finell@StevenFinell.com

February 17, 2025

Honorable John D. Bates, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
1 Columbus Circle, N.E.
Washington, DC 20544

Comments on Proposed Amendments to Appellate Rule 29

Dear Judge Bates:

I respectfully submit these comments on the proposed amendments to Fed. R. App. P. 29, which would allow non-governmental would-be amicus curiae to submit a brief only by obtaining leave to file it. Under current practice, most proffered non-governmental amicus briefs are filed with the consent of the parties to the appeal. I appreciate the very substantial work that the Standing Committee and the Appellate Rules Advisory Committee have invested in these proposed amendments during the past several years. These are complex issues, which explain why the proposed amendments have changed significantly during the Advisory Committee's and the Standing Committee's consideration.

To summarize my comments:

1. I support expanding the disclosures required of those who proffer a brief amicus curiae, which will help the courts of appeals to understand who is behind the offered amicus brief and to ensure that the would-be amicus is not merely carrying water for the supported party.

2. I support eliminating submission of an amicus brief upon party

consent, although *not* with the result that the proposed amendments intend.

3. I propose that the courts of appeals accept for filing all proffered amicus briefs for whatever they may be worth.

4. Most importantly, however, I propose *discontinuing* the authority of the courts of appeals, created by an amendment effective December 1, 2010, under *present* Fed. R. App. P. 29(a)(2), to refuse to file or to strike an amicus brief to avoid a conflict of interest for a judge. One problem, which has not received adequate attention, is that a conflicted judge cannot ethically participate in the case. Refusing to file or striking the amicus brief does not eliminate the conflict of interests between the judge and the amicus, nor does it eliminate the appearance of impropriety that the conflicted judge's participation in deciding the appeal would cause. In addition, the courts of appeals already carefully screen judges to avoid conflicts of interest in assigning cases to three-judge panels. Below, I will address this last point first.

Refusing an Amicus Brief Cannot Ethically Cure a Judge's Conflict of Interest and Is Usually Unnecessary

A Conflicted Judge Cannot Sit

"A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." Code of Conduct for United States Judges Canon 3(C)(1). For example, a judge must disqualify if

> the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding . . . .

Canon 3(C)(1)(c). To achieve that requirement:

> A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

Canon 3(C)(2). 28 U.S.C. § 455 is to similar effect as these canons of judicial ethics; it expressly applies to justices of the Supreme Court.

These canons of judicial ethics forbid a federal judge from participating in a case in which the judge, directly or indirectly, has a financial interest in the outcome. Refusing or striking an amicus brief does not eliminate a conflict of interest between a judge and an amicus curiae.

In Advisory Opinion No. 63: Disqualification Based on Interest in Amicus that Is a Corporation, 2B GUIDE TO JUDICIARY POLICY, Ch. 2, at 87–88 (June 2009), https://www.uscourts.gov/file/document/published-advisory-opinions-1, the Judicial Council's Committee on Codes of Conduct concluded that when a judge has a financial interest in a corporation that files an amicus curiae brief, regardless of the amount, the judge must disqualify because the judge's impartiality might reasonably be questioned. The opinion recognized, without deciding, that other relationships between the judge and an amicus, such as when the amicus's counsel is on the judge's disqualification list or when the judge has an interest in an amicus's nonprofit organization, might require disqualification.

The Courts of Appeals' Conflict Avoidance System Obviates Most Disqualifications

The courts of appeals have an elaborate, automated, and effective system to detect and avoid assigning a judge's to a panel that would hear an appeal, motion, or petition in which the judge would have a conflict of interest, which could include a conflict with an amicus or with an amicus's counsel. 2C GUIDE TO JUDICIARY POLICY, Ch. 4, https://www.uscourts.gov/sites/default/files/2024-12/guide-vol02c-ch04.pdf. This system should weed out most, if not all, conflicts of interest before a panel is chosen.

On a motion to consider or reconsider an appeal en banc, or in deciding an appeal en banc, a judge who has a conflict of interest with an amicus (or party or counsel) must disqualify. However, that is not necessarily a tragedy—and a conflicted judge cannot ethically participate in deciding an appeal, motion, or petition, so that is not an option.

The Courts of Appeals Should Accept All Proffered Amicus Briefs for Whatever They May Be Worth

Courts are not required to consider, or even read, every filed amicus brief. Judges and their support staff can quickly determine whether the amicus brief they are skimming contributes information that will help the court decide the appeal. Each court of appeals can adopt an efficient procedure, based on its own personnel, for evaluating an amicus brief. Deciding a motion for leave, on the other hand, requires the judges who decide the motion to conscientiously read and evaluate each amicus brief, and the amicus' (and opponent's?) motion papers with care. That can waste more time and effort than it saves.

The proposed amendments also require both the motion and the proposed brief to provide specific information intended to show whether the amicus and the brief are worthy. I support the proposed additional disclosures about who the amicus is and its general background. However, any lawyer can concoct adequate statements about the amicus's background and experience, along with how the amicus's brief will help the court decide the appeal. Most of these statements will not be worth the time it takes the judges to read them. The best evidence of whether a brief will help the court decide the appeal is for someone to read or skim through it.

Therefore, I propose that the courts of appeals file all amicus briefs that are offered. Then the courts can take from them whatever might help in deciding the appeal.

Respectfully submitted,

Steven Finell

NATIONAL ASSOCIATION OF Manufacturers

February 14, 2025

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

Re: Proposed Amendments to Federal Rule of Appellate Procedure 29

Dear Judge Bates,

The National Association of Manufacturers ("NAM") appreciates the opportunity to provide comments to the Committee on Rules of Practice and Procedure (the "Committee") in response to its proposed amendments to Federal Rule of Appellate Procedure 29, the rule governing submission of amicus briefs to federal courts of appeal.[1]

The NAM is the largest manufacturing association in the United States, representing 14,000 manufacturers of all sizes, in every industrial sector and in all 50 states. Manufacturing employs nearly 13 million people across the country, contributing $2.93 trillion annually to the U.S. economy.[2] The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM frequently files amicus briefs to explain the ramifications of a particular ruling on the manufacturing industry, providing the broader regulatory or commercial context of a dispute as well as industry expertise to assist courts in resolving cases. *See*, *e.g.*, *Richter v. Syngenta Crop Protection LLC* (7th Cir.) (supporting the trial court's application of Federal Rule of Evidence 702); *Liberty Global, Inc. v. USA* (10th Cir.) (discussing the proper application of the economic substance doctrine). Amicus briefs, like the ones the NAM files, "bring[] relevant matter to the attention of . . . [courts] that has not already been brought to [their] attention by the parties" and are "of considerable help to" courts. Fed. R. App. P. 29, Committee Notes on Rules—1998 Amendment, Subdivision (b).

The proposed amendments threaten to stymie amicus filings by requiring: (1) amicus curiae to file a motion for leave of court to file all amicus briefs; (2) that an amicus brief not be "redundant" with other amicus briefs; (3) the disclosure of whether a party or its counsel has contributed 25% or more to the revenue of amicus curiae for its prior fiscal year; and (4) the disclosure of any person who pledged to or contributed more than $100 to the preparing, drafting or submission of an amicus brief unless the person was a member of amicus curiae in the 12 months prior to the contribution. For purposes of this comment, we refer to the first two proposed changes as the "motion and redundancy requirements" and the latter two proposed changes as the "relationship disclosure requirements." The NAM urges the Committee not to

[1] Preliminary Draft of Proposed Amendments to Federal Rules ("Preliminary Draft"), available at https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment.

[2] National Association of Manufacturers, Facts About Manufacturing, available at https://nam.org/manufacturing-in-the-united-states/facts-about-manufacturing-expanded/.

finalize these proposed changes to avoid chilling useful amicus filings and abridging the exercise of core First Amendment rights.

1. **The Motion and Redundancy Requirements Could Chill Useful Amicus Filings Without Much Added Benefit**

The NAM, like other amicus curiae, benefits from the current practice where both parties to a case generally consent to the filing of amicus briefs—obviating the need to move for leave to file—and the NAM files those briefs *without* establishing that its briefs are not redundant with other briefs that will be filed. The proposed amendments' motion for leave and redundancy requirements threaten to chill useful amicus filings by increasing the labor and financial costs required to file amicus briefs. The vagueness of the redundancy requirement could also chill useful amicus filings.

The NAM is a non-profit business organization that promotes the interests of manufacturers, including through its amicus program. Its program engages outside counsel to file amicus briefs covering the incredibly vast legal, regulatory and compliance issues affecting the manufacturing sector. In 2024, for example, we filed 57 amicus briefs across 26 different federal and state courts addressing federal statutes like the Employee Retirement Income Security Act, the Toxic Substances Control Act, the False Claims Act, the Inflation Reduction Act and the National Labor Relations Act as well as tort and product liability law, the First Amendment, class actions and more. The motion and redundancy requirements would add to the NAM's costs for filing amicus briefs, straining its limited resources. Take first the need to determine whether an anticipated amicus brief is redundant. This unworkable requirement necessitates amicus curiae taking, at a minimum, the following steps to attempt to satisfy it:

1. Discern the universe of groups interested in weighing in on a case (without knowing whether we reached every possible party).
2. Find contact information for those groups.
3. Communicate with those groups to inquire about whether they intend to file an amicus brief and, if so, on what topic.
4. Analyze the topics other amicus curiae intend to address.

After satisfying the referenced steps, the NAM may have to engage counsel to assist with drafting and filing the brief who would likely charge more because of the additional work required (e.g., filing a motion for leave and rerunning checks to certify that the amicus brief is not redundant with other amicus briefs that will be filed)—all of this without the certainty of knowing whether an amicus brief will be accepted or considered "redundant" by the relevant appellate court. The risk of incurring costs to file briefs that are ultimately rejected by an appellate court alone could serve to discourage amicus participation.

Indeed, the redundancy standard is ambiguous at best and could further discourage the NAM's participation. The proposed amendments fail to define the term and instead leaves to courts of appeals' discretion how it is interpreted. Is the term intended to preclude the filing of amicus briefs that contain any overlap even if the overlap is slight (e.g. one sentence or a paragraph)? Does the term only preclude significant overlap? The lack of clarity around the standard leaves the NAM and other amicus curiae to guess whether their amicus briefs will be accepted, again a deterrent to filing amicus briefs in first place.

The benefit of the proposed redundancy and motion requirements are minimal. As an initial matter, the Preliminary Draft does not identify a flood of amicus briefs as being the reason for

the proposed rule. Rather, "[t]he amendments seek primarily to provide the courts and the public with more information about an amicus curiae." Preliminary Draft at 38. The redundancy and motion requirements do nothing more to accomplish that goal than an amicus brief does itself. In fact, amicus curiae are already required to disclose their interest in the case. These statements are not perfunctory. They generally describe the reasons an amicus curiae believes its brief can be of use to a court. *See* Fed. R. App. P. 29(a)(4)(D) (requiring amicus briefs to include "a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file"). The Committee has not indicated that it has surveyed courts to discern whether courts perceive redundant amicus briefs to be a problem. The redundancy and motion requirements therefore appear to be a solution in search of a problem. They will only serve to create a rush to file amicus briefs to avoid the disqualifying "redundant" designation. Rushed amicus briefs, in turn, may suffer in quality.

2. <u>The Relationship Disclosure Requirements Likely Violate First Amendment Associational Rights</u>

The relationship disclosure requirements stand on shaky constitutional footing. Rule 29 is one of the Federal Rules of Appellate Procedure which Congress authorized the Supreme Court to promulgate so long as the rules do "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). One such substantive right is the First Amendment right of freedom of association. *Williams v. Rhodes*, 393 U.S. 23, 38 (1968) (Douglas, J. concurring) ("The right to engage in association for advancement of beliefs and ideas is one activity . . . that has First Amendment protection." (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)). As the U.S. Supreme Court has explained, "[c]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *NAACP*, 357 U.S. at 462). Indeed, the Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam). Just as disclosure requirements can chill individuals from giving money to nonprofit organizations, so too can they chill nonprofits from soliciting contributions from donors who do not wish to be identified publicly. *See NAACP*, 357 U.S. at 459-60. Thus, the relationship disclosure requirements burden First Amendment rights because they mandate disclosure of anyone new to membership within the past 12 months who has contributed more than $100 towards the filing of a brief or any party or party's counsel who contributes 25% or more towards an organization's revenue.

The Committee's interest in the appearance of judicial integrity and accountability, *see* Preliminary Draft at 13, 20, is not closely drawn to the relationship disclosure requirements and therefore fails to justify them. *See McCutcheon v. FEC*, 572 U.S. 185, 197 (2014) ("'significant interference' with protected rights of political association may be sustained if" the asserted important government interest "employs means closely drawn to avoid unnecessary abridgment of associational freedoms." (quoting *Buckley*, 424 U.S. at 25)). The Committee appears to rely on *Buckley* and its progeny to establish otherwise. *See* Preliminary Draft at 20 (describing the relationship disclosure requirements as "analogous to campaign finance disclosures that help voters to evaluate those who seek to persuade them."). To the extent it does, that reliance is misplaced.

Buckley—the U.S. Supreme Court's seminal campaign finance disclosure decision—addressed the scope of regulating campaign related speech by requiring disclosure of campaign contributions. In holding that the Federal Election Campaign Act of 1971's disclosure

requirements did not violate First Amendment rights, the U.S. Supreme Court identified three categories of significant government interests—pertinent to the free functioning of government—that outweighed the interests protected by the First Amendment: (1) providing the electorate with information; (2) deterring corruption and avoiding the appearance of corruption; and (3) gathering data to detect violations of contribution limits. *Buckley*, 424 U.S. at 66-67. As relevant here, the Court explained that it was necessary to provide the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" because the source of contributions (1) "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches"; and (2) "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id*. at 67. In other words, the government's interest in the election process was "in deterring the 'buying' of elections and the undue influence of large contributors on officeholders," *id.* at 70, which certainty bare on the free functioning of government. Unlike campaign contributions in *Buckley*, the relationship disclosure requirements proposed by the Committee neither bare on nor impact the free functioning of government.

True, protecting the appearance of judicial integrity is a government interest "of the highest order[,]" *Williams-Yulee v. Florida Bar Ass'n*, 575 U.S. 433, 446 (2015), but the Committee has failed to proffer any evidence demonstrating that financial contributions to organizations that file amicus briefs impact the public's view of judicial integrity or fairness. The absence of documented harm to public perception undermines the Committee's claim that the proposed relationship disclosure requirements serve to "improve the integrity and fairness of the federal judicial process." *See* Preliminary Draft at 13, 20; *cf. United States v. Nat'l Treasury Emples. Union*, 513 U.S. 454, 472 (1995) (noting the lack of "evidence" supporting that "the vast rank and file" of employees "misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities" undermines government interest in banning the compensation).

Notably, the Committee has not provided a concrete example of how the public knowing who contributes monetarily to an organization or amicus brief—at the incredibly low $100 threshold—would positively impact the public's confidence in the judiciary. Nor could it. A person's contributions to an organization or its filing of an amicus brief reveal only that that person is supportive of an organization's mission, or the position(s) advocated for by an organization. The contributions say nothing about how a court will resolve a case before it.

The Committee's claim that the proposed relationship disclosure requirements serve to help "courts evaluate the submissions of those who seek to persuade them[,]" Preliminary Draft at 20, also fails to justify the proposal for two reasons. First, the relationship disclosure requirements do not educate judges like voters are educated by campaign disclosure laws as the Committee suggests. *Id*. As noted, the U.S. Supreme Court has described campaign disclosure laws as necessary for voters to know more about a political candidate so that voters can form judgments about how a candidate might act upon assuming office. By contrast, courts need not know who contributes to an organization or amicus brief to make the correct decision in a case. After all, "[i]t is emphatically the providence and duty of the judicial department to say what the law is." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 369 (2024) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). Amicus curiae generally only attempt to help the court understand the ramifications of a particular course of action or provide further background on an issue.

Moreover, current Rule 29 is sufficient to assist courts with evaluating submissions. As noted, that rule requires amicus curiae to include in their briefs a statement of their identity, interest in the case, whether a party or its counsel contributed to the brief and whether "a 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)(D), 29(a)(4)(E)(i)-(iii). This information is sufficient to inform courts of who is responsible for the content of amicus briefs which are filed on the public docket and the perspective of the filer. *See* Preliminary Draft at 38 (identifying courts consideration of "the identity and perspective of an amicus to be relevant" as a reason for "some disclosures about an amicus . . . to promote the integrity of court processes and rules"). And courts can evaluate amicus curiae's positions in a brief by reading the arguments and legal authority cited therein for support. Simply put, the relationship disclosure requirements do not establish that "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" as the Committee suggests, *see* Preliminary Draft at 39, considering: (1) an organization must serve the interests of all, not just one, of its members; and (2) that Rule 29 already requires, as noted, amicus curiae to indicate whether "a party's counsel authored the brief in whole or part."

* * *

For the reasons stated above, the NAM requests that the Committee not proceed forward with the referenced proposed changes to Rule 29.

Sincerely,

Michael A. Tilghman II

Michael A. Tilghman II
Senior Litigation Counsel

TAB 5E

Summary of Comments on Amicus Proposal

The following comments are arranged into groups, based on the position taken on the two major issues, the proposed motion requirement and the proposed additional disclosures. While more possibilities are possible, because no commenter argued in favor of the motion requirement, they fall into five basic groups.

- The first group consists of comments that oppose the motion requirement, but do not take a position for or against disclosure. (N, --)
- The second group consists of comments that oppose the motion requirement, and oppose disclosure. (N, N)
- The third group consists of comments that oppose the motion requirement, but favor disclosure. (N, Y)
- The fourth group consists of comments that do not take position for or against the motion requirement, but oppose disclosure. (--, N)
- The fifth group consists of comments that do not take position for or against the motion requirement, but favor disclosure. (--, Y)

A sixth group consists of comments that do not address either of these issues but raise some other point.

I
Opposed to Motion Requirement; No Position For or Against Disclosure

USC-RULES-AP-2024-0001-0003
Andrew Straw
Amicus briefs are an expression of the First Amendment right to petition courts on matters of public interest. It costs virtually nothing to allow amicus briefs to be filed and they should always be allowed regardless of the consent of any party. The Court is under no obligation to do what an amicus wants, but it should always allow such statements in the public record.

USC-RULES-AP-2024-0001-0009
Alan Morrison
Morrison argues that the proposed elimination of the right to file an amicus brief based on the consent of all parties is problematic. He suggests that the Appellate Rules Committee should seek guidance from the Committee on Codes of Judicial Conduct to establish standards for recusal when an amicus brief might trigger disqualification.

USC-RULES-AP-2024-0001-0012
Atlantic Legal Foundation
The Atlantic Legal Foundation opposes the proposed amendments to Rule 29, particularly the elimination of the option to file amicus briefs on consent. Ebner argues that the current system, which allows filing on consent, works well and that the proposed changes would deter the preparation and submission of valuable amicus briefs. He contends that requiring a motion for leave to file would create uncertainty and additional burdens for amici and the courts. Ebner also highlights that the Supreme Court has recently adopted a more permissive approach to amicus briefs, allowing them to be filed without a motion or consent. He suggests that the federal appellate courts should follow the Supreme Court's lead and maintain or even relax the current rules to facilitate the filing of amicus briefs.

USC-RULES-AP-2024-0001-0013
Maria Diamond
Amicus briefs play an important role in educating judges on issues of wide-ranging importance. They provide an opportunity for experts, such as academics, non-profits, and think tanks, to educate the court on those issues. They assist judges by presenting ideas, arguments, theories, insights, factual background, and data not found in the parties' briefs. My primary concern regarding the proposed rule change is elimination of the party consent option, requiring leave of court for the filing of all amicus briefs. I believe this is a move in the wrong direction. In contrast to the proposal, the United States Supreme Court has changed its rules in the opposite direction, freely allowing the filing of amicus briefs without leave of court or consent of the parties. The proposed change will place additional burdens on the court that outweigh the purported concern over recusal issues.

Furthermore, I am concerned about the proposed content restrictions. While I understand the desire to reduce redundancy, I seriously question how the proposed amendment will prevent redundancy without coordination between amici and the parties. The proposal may also significantly increase the rate of amicus denials, thereby chilling amicus curiae filings. This unintended consequence will deprive the courts of valuable assistance to aid their decision-making on issues of public importance.

USC-RULES-AP-2024-0001-0015
Securities Industry and Financial Markets Association (SIFMA)
SIFMA opposes the proposed amendments to Rule 29, specifically the elimination of the option to file amicus briefs on consent and the new purpose requirement. SIFMA argues that the premise of the proposal, which seeks to filter out unhelpful amicus briefs, is flawed and unsupported by evidence. They believe that the benefit of filtering out unhelpful briefs is outweighed by the burdens imposed by requiring motions for leave. SIFMA also contends that the standard for accepting amicus briefs should not be more stringent in the courts of appeal than in the Supreme Court. They

argue that the proposed amendments would create unnecessary barriers and reduce the number of valuable amicus briefs, which provide important perspectives and information to the courts.

USC-RULES-AP-2024-0001-0116
Richard Kramer
We need more, not less, access to the courts! The proposed amendments would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction. The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts.

This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process."

USC-RULES-AP-2024-0001-0019
National Federation of Independent Business (NFIB)
The NFIB opposes the proposed amendments to Rule 29, arguing that the changes would impose significant burdens on amicus curiae filings and hinder the representation of small businesses in federal courts. They contend that the proposed motion requirement and the subjective standards for assessing the relevance and helpfulness of amicus briefs would create financial and logistical barriers for small organizations. NFIB believes that the current system, which allows filing on consent, works well and that the proposed changes would reduce the number of valuable amicus briefs. They suggest that the federal appellate courts should adopt the same standards as the Supreme Court, which recently eliminated the motion and consent requirements for amicus briefs.

USC-RULES-AP-2024-0001-0024
DRI Center for Law and Public Policy's Amicus Committee
The DRI Center for Law and Public Policy's Amicus Committee opposes the proposed amendments to Federal Rule of Appellate Procedure 29. They argue against the elimination of the ability for nongovernmental amici curiae to file briefs with the consent of the parties. DRI believes that the current system works well and that the proposed changes would create unnecessary burdens, discourage the preparation of valuable amicus briefs, and waste judicial resources. They also express concerns about the new disclosure requirements, arguing that they are overly complex and impractical. DRI suggests that the disclosure requirements should be

straightforward and centrally located within Rule 29 to ensure compliance without dissipating limited resources.

USC-RULES-AP-2024-0001-0027
California Academy of Appellate Lawyers
The California Academy of Appellate Lawyers argues that the revisions would impose unnecessary burdens and costs on amici curiae and their counsel without providing significant benefits. The Academy contends that the current system, which allows filing on consent, works well and that the proposed changes would create additional burdens for both amici and the courts. It also argues that the proposed motion requirement is unnecessary to avoid recusal issues, as courts already have the power to strike amicus briefs that would result in a judge's disqualification. It proposes a way to enable judges to consider whether to recuse or strike an amicus brief. The Academy believes that the proposed changes would not provide a useful filter on the filing of unhelpful amicus briefs and would instead multiply the burdens on the court.

USC-RULES-AP-2024-0001-0032
Federation of Defense and Corporate Counsel (FDCC)
The FDCC opposes the proposed amendments to Rule 29, particularly the elimination of the option to file amicus briefs with the consent of the parties. The FDCC believes that the proposed changes would discourage the preparation and filing of amicus briefs by organizations that rely on volunteer attorneys to prepare and submit amicus briefs in carefully selected cases. It suggests that the Committee should instead follow the Supreme Court's lead and allow for the timely filing of amicus briefs without the court's permission or the parties' consent, as well as providing that an amicus brief does not require recusal.

USC-RULES-AP-2024-0001-0140
National Association of Home Builders (NAHB)
The NAHB opposes the proposed changes to Rule 29, particularly the elimination of the option to file amicus briefs with the consent of the parties. The NAHB believes that the proposed changes would create additional burdens for amici, the parties, and the judiciary. It also does not support the proposed language regarding redundancy.

USC-RULES-AP-2024-0001-0151
Alan Morrison
Alan Morrison notes that the Supreme Court Justices apparently do not make recusal judgments based on who owns or controls an amicus and asks, “If the Justices do not care, why should judges of the courts of appeals?”

USC-RULES-AP-2024-0001-0215
Roderick & Solange MacArthur Justice Center
The Roderick & Solange MacArthur Justice Center argue that requiring motions to submit amicus briefs in all cases and curtailing the substance of these briefs would burden courts, parties, and amici curiae. The Center emphasizes that amicus briefs are valuable even if they address issues already mentioned by the parties, as they can offer different analytical approaches, highlight nuances, explain broader contexts, provide practical perspectives, and supply empirical data. They argue that the proposed changes would increase litigation regarding the purpose of amicus briefs and create uncertainty, deterring amici from filing briefs. The Center also points out that the Supreme Court has recently adopted a more permissive approach to amicus briefs, and suggests that the federal appellate courts should follow suit.

USC-RULES-AP-2024-0001-0216
Federal Public Defender for the District of Nevada
The proposed amendments would create substantial hardships for their clients and adversely affect the development of constitutional and criminal law. The Committee should consider exceptions for amicus briefs supporting a defendant in a criminal case or a habeas petitioner, or at least amend Rule 29(a)(2) to include Federal Public or Community Defender organizations as entities that may file amicus briefs as a matter of course.

USC-RULES-AP-2024-0001-0217
George Tolley
Elimination of the party consent option likely will add to the burdens on the appellate courts, without providing a substantial benefit. As amended, FRAP 29 would require an appellate court to read and consider the merits of a motion for leave to file as to every proposed amicus brief. Amici cannot know in advance of filing their amicus brief whether an appellate court might deem the brief redundant of one or more briefs filed by other amici. An appellate court that rejects proposed briefs from amici supporting one side or the other — justly or unjustly, fairly or unfairly — could be ill-equipped to defend itself against charges of impermissible bias for or against one side or the other.

USC-RULES-AP-2024-0001-0219
Lawyers' Committee for Civil Rights Under Law
The Lawyers' Committee for Civil Rights Under Law argues that the amendments would unnecessarily burden the freedom of expression of amici and create an unworkable system. The Committee emphasizes that amicus briefs provide valuable perspectives and information to the courts, even if some portion of the arguments is repetitive or redundant. They point out that the current system, which allows filing on consent, has not overwhelmed the courts with unhelpful briefs, and that the proposed changes would increase the burden on judges by requiring them to rule on motions for leave to file. The Committee also argues that the proposed redundancy

filter is unworkable, as it is unclear how amici can ensure they are not replicating the arguments of others without significant coordination.

USC-RULES-AP-2024-0001-0221
Leukemia & Lymphoma Society (LLS)
The Leukemia & Lymphoma Society (LLS) opposes the proposed amendments to Rule 29. The proposed changes would create additional burdens for judges and clerks. The proposed standard for determining whether a brief is helpful is unclear and would deter nonprofit organizations with limited resources from filing briefs. LLS suggests that the Supreme Court's approach, which allows the filing of timely amicus briefs without the need to obtain consent or leave, would be preferable.

USC-RULES-AP-2024-0001-0222
NAACP Legal Defense and Educational Fund (LDF)
LDF raises concerns about the proposed language regarding the purpose of amicus briefs, arguing that it could discourage helpful amicus participation and lead to arbitrary application. It also raises concerns about the language disfavoring redundant amicus briefs, highlighting the practical challenges of predicting and coordinating with other potential amici.

USC-RULES-AP-2024-0001-0225
Americans United for Separation of Church and State
Americans United for Separation of Church and State argue that the proposed changes would make it difficult for broad coalitions to submit briefs due to the word count limitations and additional disclosure requirements. This could lead to multiple parties filing individual, duplicative briefs, increasing the burden on courts. Additionally, the requirement for non-governmental amici to seek the court's leave to file would elevate the amicus process to something akin to a motion for intervention, increasing the burden on courts and potentially driving concerned parties to pursue the more onerous process of intervention.

USC-RULES-AP-2024-0001-0264
New York Intellectual Property Law Association (NYIPLA)
The New York Intellectual Property Law Association (NYIPLA) argues that the changes would impose unnecessary burdens on amici and the judiciary, particularly by eliminating the option to file amicus briefs with the consent of the parties. It is concerned that the proposed changes would create uncertainty and discourage the preparation of amicus briefs, particularly for organizations that rely on volunteer efforts. NYIPLA also opposes the proposed standard for determining whether a brief is helpful, arguing that it fails to capture the ways amicus briefs can be beneficial. It recommends aligning the rule with the Supreme Court's approach, which allows the filing of amicus briefs without the need to obtain consent or leave. It is concerned that

the limit of 6500 words would not be expanded if the parties are given permission for longer briefs.

USC-RULES-AP-2024-0001-0307
National Association of Criminal Defense Lawyers (NACDL)
The National Association of Criminal Defense Lawyers (NACDL) argues that the changes would impose unwarranted burdens on amici and the judiciary, particularly in federal criminal and related appeals. NACDL emphasizes that their amicus briefs are highly regarded by the judiciary and can provide a more thoroughly researched, broader and deeper, or more nuanced presentation of the issues in the case. Eliminating filing on consent would deter volunteer-reliant organizations from preparing briefs. At least make any mandatory-motion rule inapplicable to criminal, civil rights, and habeas appeals, where there is not even arguably any problem of abuse of amicus participation to be solved. Ini addition, the proposed substantive standard fails to capture the many ways amicus briefs can be helpful. NACDL has no objection to the expanded disclosure requirements, but suggests clarification whether the required disclosures include the value of in-kind contributions.

USC-RULES-AP-2024-0001-0310
American Academy of Appellate Lawyers
The American Academy of Appellate Lawyers argues that the changes would create uncertainty and discourage the preparation of amicus briefs. It suggests that the rule should be revised to align with Supreme Court Rule 37, which allows the filing of amicus briefs without the need to obtain consent or leave. It is one thing to provide guidance about the proper scope of an amicus brief. But it is quite another thing to convert guidance into a requirement. The redundancy provision is impractical , given the short time after a party's brief for filing an amicus brief.

USC-RULES-AP-2024-0001-0405
Retail Litigation Center (RLC)
The Retail Litigation Center (RLC) argues that the changes would impose unnecessary burdens on amici and the judiciary, particularly by eliminating the option to file amicus briefs with the consent of the parties. The recusal problem is a problem with systems, not the federal rules. Conflicts systems that disqualify potential panelists, despite the express inclusion in the existing Rule 29 of the right to strike an amicus brief that would result in that judge's disqualification, is an issue that needs resolved through updating systems and/or processes. An example of a way to solve this problem is to conduct conflict checks for amici upon selection of a panel, and if a selected panelist would be disqualified due to an amicus brief filed upon consent, the judge can then decide whether to strike the brief, as contemplated in Rule 29's current text. RLC also opposes the proposed standard for determining whether a brief is helpful, arguing that it fails to capture the many ways amicus briefs can be beneficial. Particularly if paired with a motion requirement with no exception

for consent of the parties, this standard will certainly be litigated in disputed motion practice.

USC-RULES-AP-2024-0001-0406
Rachel Jennings
Rachel Jennings argues that the changes would disadvantage individual plaintiffs and favor industry players, who are more likely to have organized amicus groups ready to file briefs on their behalf. Jennings emphasizes that the current system, which allows filing on consent, works well and provides access to the appellate process without imposing impractical hurdles. Jennings also argues that the proposed changes would create more work for courts by increasing contested motions practice. Any revision should align the rule with the Supreme Court's approach, which allows the filing of amicus briefs without the need to obtain consent or leave.

USC-RULES-AP-2024-0001-0407
Law school clinics
Members of law school clinics argue that the proposed amendments would significantly restrict their ability to engage in amicus advocacy and limit valuable experiential learning opportunities for law students. They emphasize the importance of amicus briefs for developing professional legal skills and judgment, as well as for providing unique perspectives and expertise to the courts. They point to the potential negative impact of the proposed requirement for advance approval of amicus filings and the language disfavoring redundant arguments. They commenters argue that these changes would present line-drawing challenges, cause difficulties because of timing constraints, and chill novel contributions.

II
Opposed to Motion Requirement; Opposed to Disclosure

USC-RULES-AP-2024-0001-0004
Washington Legal Foundation
The Washington Legal Foundation (WLF) argue that requiring nongovernmental amici to obtain leave of court to file amicus briefs is unnecessary and inefficient, as judges already have effective methods for filtering unhelpful briefs. WLF contends that the proposal would increase the burden on the judiciary and create uncertainty for amici, potentially discouraging amicus participation. It also raises First Amendment concerns regarding the proposed disclosure requirements, arguing that they are unnecessary and may violate associational rights.

USC-RULES-AP-2024-0001-0018
Chamber of Commerce of the United States
The Chamber of Commerce of the United States argues that the current Rule 29 already protects the integrity of amicus briefs while respecting First Amendment rights. The proposed disclosure amendments, which require amici to disclose significant contributors and the identities of certain non-party members, are unnecessary and potentially harmful to associational rights. The Chamber contends that these amendments would deter amicus participation, reduce the quality of amicus briefs, and burden the courts with additional motions. They also argue that the proposals to eliminate the consent option and reduce the number of amicus briefs are misguided, as the current framework promotes judicial economy and allows courts to manage unhelpful or duplicative briefs effectively.

USC-RULES-AP-2024-0001-0021
American Property Casualty Insurance Association (APCIA)
APCIA, strongly opposes the proposed amendments to Rule 29. APCIA argues that the elimination of the option to file amicus briefs on consent would limit the valuable role of amici in providing critical context, insight, and analysis to the courts. They contend that the proposed amendments would infringe on First Amendment rights, discount the speech of nonparties, and have a chilling effect on amicus activity. APCIA also criticizes the new disclosure requirements and the subjective standard for assessing the helpfulness of amicus briefs. They believe that the current rule works well and that the proposed changes would create unnecessary barriers, reduce the number of amicus briefs, and deprive the courts of valuable information.

USC-RULES-AP-2024-0001-0023
American Council of Life Insurers
The American Council of Life Insurers argues that the proposed changes, including the elimination of the option to file amicus briefs by consent and additional disclosure requirements, would hinder amicus participation and add unnecessary costs. It believes the current Rule 29 already provides adequate safeguards and that the proposed changes would not benefit judicial efficiency or the public interest.

USC-RULES-AP-2024-0001-0026
Young America's Foundation
Young America's Foundation argues that the proposed amendments would hinder free speech and impose unfair restrictions on amicus briefs. It believes the proposed requirement for amici to obtain leave of court to file briefs is unfair and that government amici should not have more rights than citizen amici. The Foundation also opposes the proposed disclosure requirements, arguing that they violate Supreme Court precedent and would deter donors from supporting amicus efforts. They contend that the proposed changes would restrict speech and do not further a compelling governmental interest.

USC-RULES-AP-2024-0001-0035
Various National and State Organizations
A coalition of national and state organizations argue that the proposed disclosure requirements infringe on First Amendment rights by mandating broad disclosures that are not sufficiently justified. The organizations also oppose the requirement for amici to file a motion for leave in every case, arguing that it would burden the courts with unnecessary motions and discourage amicus participation. They believe the current Rule 29 already provides adequate safeguards and that the proposed changes would undermine judicial efficiency and the public interest.

USC-RULES-AP-2024-0001-0110
William Kahl
This proposal will limit the role that amici play in our judicial process, would slow down the process and discourage the submission of briefs, and would threaten First Amendment rights by requiring amici to disclose financial details about their donors.

USC-RULES-AP-2024-0001-0207
Southeastern Legal Foundation
The Southeastern Legal Foundation argues that the changes would hinder the judicial process and restrict the role of amicus briefs. It contends that the proposed changes to Rule 29(a)(2) are vague, overbroad, and unnecessary, potentially leading to discrimination and chilling effects on amici participation. The Foundation also criticizes the additional disclosure requirements under Rule 29(b)(4), asserting that they would drain judicial resources and increase the risk of bias. It believes the current rules already provide adequate safeguards and that the proposed changes would not benefit judicial efficiency or the public interest.

USC-RULES-AP-2024-0001-0213
Alliance Defending Freedom (ADF)
The ADF is critical of the proposed amendments dealing with redundancy, consent, and disclosures. The organization argues that the proposed changes could discourage amicus participation, complicate the filing process, and impose unnecessary burdens on amicus parties. The proposed solution is not only in search of a problem—it is a problem. The option that best "promotes public confidence in the integrity and impartiality of the judiciary" is not for a conflicted-out judge to decide whether to recuse or exclude an amicus brief that could be of substantial help to the court, especially when amicus briefs are most often filed in high-profile matters of significant legal importance.

USC-RULES-AP-2024-0001-0214
American Civil Liberties Union (ACLU)
The ACLU argues that the proposed disclosure requirements would burden First Amendment associational rights and that limiting amicus briefs to matters "not already mentioned" by the parties would be unduly restrictive. The ACLU also opposes the motion requirement for filing amicus briefs, citing the considerable cost

and little benefit. It emphasizes the critical role of amicus briefs in assisting courts and ensuring that decisions do not have unintended consequences.

USC-RULES-AP-2024-0001-0218
Americans for Prosperity Foundation (AFPF)
AFPF argues that the current Rule 29 already provides adequate disclosures and that the proposed changes would unnecessarily burden courts and infringe on First Amendment rights. AFPF believes that amicus briefs serve a valuable purpose and should be freely allowed, and it contends that the proposed motion requirement would needlessly burden courts. It adds that the Advisory Committee correctly decided against requiring disclosure of non-earmarked contributions by nonparties.

USC-RULES-AP-2024-0001-0255
Pacific Legal Foundation
The Pacific Legal Foundation argues that the current rule is effective and that the proposed changes might be perceived as politically motivated. The Foundation believes that the new disclosure obligations could discourage participation in amicus advocacy and raise concerns related to freedom of association. It also contends that addressing redundant briefs through the proposed approach might reduce the quality of amicus participation.

USC-RULES-AP-2024-0001-0306 (identical at 0410)
National Association of Manufacturers (NAM)
The National Association of Manufacturers argues that the proposed changes could hinder the filing of amicus briefs and infringe on First Amendment rights. It contends that the motion and redundancy requirements could chill useful amicus filings without much added benefit and that the relationship disclosure requirements likely violate First Amendment associational rights.

USC-RULES-AP-2024-0001-0318
Thomas Berry
Thomas Berry agrees with the First Amendment and donor privacy concerns that others have raised. He argues that the proposed changes would discourage organizations from filing briefs in federal appellate courts and could lead to an even greater focus on writing briefs for the Supreme Court instead. Berry urges the Committee to look to the Supreme Court's approach to amicus briefs as a better model.

USC-RULES-AP-2024-0001-0339
Complex Insurance Claims Litigation Association (CICLA)
The Complex Insurance Claims Litigation Association argues that the changes would impose unwarranted barriers to amicus participation and deprive courts of important information critical to judicial decision-making. CICLA is concerned that the proposed standard, combined with the motion requirement, would unduly restrict the

scope of amicus participation by "disfavoring" an amicus brief that addresses an issue "mentioned" by one of the parties. It also think that the proposed new disclosure requirements are arbitrary and not narrowly tailored to their stated purpose.

USC-RULES-AP-2024-0001-0353
Free Speech Coalition
The Free Speech Coalition argues that the changes would violate the First Amendment and indicate hostility to amicus briefs, It identifies three illegitimate reasons for the proposed rule: amicus briefs reveal judicial usurpation, make more work for judges, and are often more aggressive than party briefs.

USC-RULES-AP-2024-0001-0366
Various Banking Associations
The Independent Community Bankers of America and various state banking associations argue that the changes would threaten First Amendment rights and create practical challenges for amici participation in appellate litigation.

USC-RULES-AP-2024-0001-0368
Institute for Justice
The Institute for Justice does not support any of the proposed amendments, but focuses on the elimination of the option to file amicus briefs by consent. It argues that this change would create administrability problems and unpredictability in the judicial process. The Institute highlights that motions to file amicus briefs are often decided by judges or clerks who are not familiar with the merits of the case. It points to D.C. Circuit Local Rule 29(a)(2) as an adequate way to deal with recusal issues. [That Rule provides, "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."]

USC-RULES-AP-2024-0001-0370
Investment Company Institute (ICI)
The Investment Company Institute argues that the changes would create obstacles for filing amicus briefs, potentially limiting informed judicial decision-making. ICI is concerned about the possibility of an overly broad reading of the redundancy and the burdens of a motion requirement. It is at least conceivable that a provision like proposed Rule 29(b)(4) could require financial disclosure in an ICI amicus brief if the percentage threshold were set low enough and a large enough number of members were parties to the same litigation. If this compelled speech requirement were triggered, ICI would be forced to choose between (a) protecting the legitimate privacy and associational interests of ICI and its members and (b) advocating on behalf of investors, the markets, and ICI members. And were ICI to file a brief with the required financial disclosure, some courts may discount unfairly the brief's value, under the erroneous belief that it represents only the narrow interests of the litigants.

III
Opposed to Motion Requirement; Support Disclosure

USC-RULES-AP-2024-0001-0011
Michael Ravnitzky
Michael Ravnitzky supports the proposed disclosure amendments to the Federal Rules of Appellate Procedure and Evidence, emphasizing the need for enhanced transparency and disclosure in amicus curiae briefs. He argues that transparency is essential for maintaining trust in the judicial process and preventing undue influence. Ravnitzky also calls for the disclosure of connections among amici and major donors, asserting that this will prevent hidden influences from shaping legal outcomes. He also supports retaining the consent requirement for filing amicus briefs.

USC-RULES-AP-2024-0001-0020
Stephen J. Herman
Stephen J. Herman states that the currently proposed amendments do not appear problematic. He highlights the distinction between the resources available to plaintiff and defense interests in preparing amicus briefs and notes that while the current proposal is not specifically addressed to this asymmetry, it effectively accounts for it. He also opposes the motion requirement, suggesting that, if anything, the courts of appeals should follow the Supreme Court and allow amicus briefs without requiring a motion or consent of the parties. He is concerned that the standard r, this proposed language will aid the Court, and I am concerned that, if the proposed standard is applied overbroadly, it may discourage the filing of briefs that might be helpful.

USC-RULES-AP-2024-0001-0033
Gerson Smoger
Gerson Smoger argues that eliminating the ability to file an amicus brief by consent would create unnecessary burdens and discourage the filing of valuable amicus briefs. He also expresses concerns about the proposed content restrictions, suggesting that they may not effectively reduce redundancy and could discourage the filing of helpful briefs. Smoger emphasizes the importance of amicus briefs in enhancing transparency and providing the court with insights on the broader implications of decisions. Smoger supports the proposed financial disclosure requirements but suggests that the 25-percent funding threshold is too high, but is an important first step.

USC-RULES-AP-2024-0001-0034
American Association for Justice (AAJ)
The American Association for Justice (AAJ) argues that the proposed amendments could negatively impact the filing and consideration of amicus briefs in federal courts. It contends that the proposed requirement for amici to seek leave of court to file briefs

would be burdensome and inefficient, potentially discouraging the submission of valuable briefs. AAJ also opposes the proposed language disfavoring briefs that are redundant with other amicus briefs. It argues that the proposed amendments will lead to increased motion practice and hinder the courts' ability to consider diverse perspectives. It supports the idea of the proposed disclosure requirements but contends that they are, but should not be, more stringent for non-parties than for parties.

USC-RULES-AP-2024-0001-0220
California Lawyers Association, Litigation Section
The California Lawyers Association's Litigation Section argues that elimination of the consent option for filing amicus briefs, that it could lead to fewer amicus briefs and deny the court valuable input. It is also concerned that if a brief is rejected because of recusal issues, the conflict may remain. The Association supports the new disclosure requirements between a party and amicus curiae, as well as between a nonparty and amicus curiae, as they promote transparency and fairness. It emphasizes the importance of disclosing financial contributions to ensure that the court and the public can determine how much weight to give the amicus brief.

USC-RULES-AP-2024-0001-0311
American Economic Liberties Project (AELP)
The American Economic Liberties Project (AELP) supports the Committee's efforts to enhance transparency and public confidence in amicus curiae practices but recommends several revisions to the proposed amendments to Federal Rule of Appellate Procedure 29. AELP advocates for preserving the party-consent mechanism for filing amicus briefs, developing a simple form for motions for leave, and striking the proposed anti-redundancy provision. AELP also suggests lowering the disclosure threshold for general contributions to 10% with an alternative minimum of $100,000, requiring disclosure of the date of amici creation since the underlying case was filed, lengthening the contribution disclosure time frame to four years, and requiring amici to disclose whether their law firms frequently represent a party to the litigation. AELP emphasizes the importance of these revisions to balance administrative burdens, potential judicial recusal, and public confidence in the judicial system.

USC-RULES-AP-2024-0001-0340
Committee to Support Antitrust Laws (COSAL)
The Committee to Support Antitrust Laws (COSAL) generally supports the proposed amendments to Federal Rule of Appellate Procedure 29 but raises three main concerns. First, it argues that eliminating the option to file an amicus brief with the consent of all parties will result in unfairness and inefficiency, increasing the burden on courts and creating delays. Second, COSAL believes the standard for permissible amicus briefs—those that address issues not mentioned in the parties' briefs and are not redundant—is too stringent and unworkable, potentially eliminating useful

briefs. Third, it contends that the threshold for disclosure of party contributions to amici is too high and suggests it should be lowered to 10%. COSAL emphasizes the importance of transparency and fairness in the judicial process and supports increased disclosure requirements to ensure the integrity of the judicial system.

USC-RULES-AP-2024-0001-0322
Brady Center to Prevent Gun Violence
Eliminating the consent option will burden the courts and may lead to the public perception that courts favor certain viewpoints in allowing amicus briefs. In addition, parties need to know whether a brief has been accepted so they know whether to respond to it in their briefs. The proposed standard would create problems because of the short time between when a party filed a brief and when amicus briefs are due. Brady generally supports the increased disclosure requirements proposed, but suggests clarifying the meaning of member.

USC-RULES-AP-2024-0001-0350
Electronic Frontier Foundation (EFF)
The Electronic Frontier Foundation (EFF) opposes the elimination of the consent provision, stating that it will lead to increased motion practice and hinder the participation of less-resourced amici. It is cautiously comfortable with the 25% threshold but would not want this threshold to be any lower. It supports the disclosure exemption when the donor has been a member for the prior 12 months—EFF suggests exempting the new disclosure requirements from the word count to allow for substantive arguments in amicus briefs.

USC-RULES-AP-2024-0001-0409
Steven Finell
Steven Finell supports expanding the disclosures required of those who proffer amicus briefs to help courts understand who is behind the briefs and ensure that amici are not merely supporting a party. However, he opposes the proposed amendments that would eliminate the submission of amicus briefs upon party consent and require leave of court. Finell proposes that courts of appeals should accept all proffered amicus briefs for whatever they may be worth, rather than requiring motions for leave, which he believes would waste more time and effort than it saves. He also argues that refusing or striking an amicus brief cannot ethically cure a judge's conflict of interest and that the courts of appeals' existing conflict avoidance system is sufficient to address potential conflicts.

IV
No Position For or Against Motion Requirement; Opposed to Disclosure

USC-RULES-AP-2024-0001-0008
Senators Mitch McConnell, John Thune, and John Cornyn
Senators Mitch McConnell, John Thune, and John Cornyn expresses strong opposition to the proposed amendments regarding amicus brief disclosure. The senators argue that the amendments threaten First Amendment rights and are driven by partisan motives. They believe the amendments would chill free speech and association, undermine the judiciary's integrity, and are unnecessary. If enacted, they encourage affected parties to immediately challenge these provisions in court. They contend that humoring bad-faith political actors is like rewarding a whining child with treats.

USC-RULES-AP-2024-0001-0016
National Taxpayers Union Foundation (NTUF) & People United for Privacy Foundation (PUFPF)
The NTUF and PUFPF express concerns about the proposed amendments to Federal Rule of Appellate Procedure 29, particularly regarding donor privacy and First Amendment rights. The organizations argue that the amendments fail the "exacting scrutiny" standard required by the Supreme Court and do not demonstrate a substantial government interest. They believe the proposed disclosure requirements are not narrowly tailored and could deter participation in the judicial process. They contend that there are no alternative channels for amicus arguments. They emphasize the importance of protecting donor privacy to ensure robust public debate and prevent harassment of individuals supporting nonprofit organizations.

USC-RULES-AP-2024-0001-0028
Philanthropy Roundtable
The Philanthropy Roundtable argues that the expanded amicus disclosure requirements threaten First Amendment rights and could undermine civil society by chilling participation in civic and charitable activities. It emphasizes the importance of protecting the privacy of donors and supporters to ensure diverse perspectives and robust public debate.

USC-RULES-AP-2024-0001-0030
Heritage Foundation
The Heritage Foundation argues that the amendments are politically motivated, constitutionally questionable, and could undermine judicial integrity. The letter emphasizes that judges should decide cases based on the merits, not the identity of the individuals or organizations involved. The Heritage Foundation believes the

proposed amendments are unnecessary and would drag the federal judiciary into partisan politics.

USC-RULES-AP-2024-0001-0212
The Buckeye Institute
The Buckeye Institute argues that the proposed changes could stifle participation and infringe on First Amendment rights. It emphasizes the importance of amicus participation in the democratic process and the judicial system. The Buckeye Institute believes the proposed disclosure requirements are not narrowly tailored and could deter individuals and organizations from filing amicus briefs. It also suggests that the Committee should propose rules governing amicus participation at the district court level to facilitate broader participation.

USC-RULES-AP-2024-0001-0408
American Legislative Exchange Council (ALEC)
ALEC argues that the disclosure requirements violate free association and speech rights protected by the First Amendment and could chill public participation in legal matters. It believes the Committee has not demonstrated a compelling interest to justify the proposed amendments. It emphasizes the importance of allowing courts to benefit from additional insights provided by amicus briefs without discouraging public participation.

V
No Position For or Against Motion Requirement; Support Disclosure

USC-RULES-AP-2024-0001-0005
Anonymous
Amicus briefs have become a conduit for hyper-fixated interest groups, lobbying organizations, and partisan political entities to unduly influence the legal and factual proceedings of federal courts. All judges know that receiving amicus briefs is like getting junk mail in that you might be fooled into reading a brief in the same way you might be fooled to reading junk mail that uses a font that resembles someone's natural handwriting. However, at the end of the day, judges know that what's in amicus briefs is much like what's in junk mail: something written by an entity that wants to influence you to do something you'd otherwise not do, most often by emotional trickery and undergraduate-psychology-class marketing tactics.

USC-RULES-AP-2024-0001-0006
Senator Sheldon Whitehouse and Representative Hank Johnson
Senator Sheldon Whitehouse and Representative Hank Johnson argue that the current lack of transparency allows for covert influence by well-funded interests, which can distort judicial decision-making. If adopted, the new rule would yield a

long-overdue, if incomplete, improvement over existing amicus disclosure requirements. They also suggest additional measures, such as requiring amici to disclose links with other amici and ensuring lawyers conduct due diligence in their disclosures.

USC-RULES-AP-2024-0001-0014
Anonymous
In addition to supporting the proposed amendments, this college student would encourage the Committee to go further to strengthen the disclosure requirements. It is in the American public interest for all of us to know who exactly is trying to influence our judicial system through amicus curiae briefs. We – college students, young people, and average American citizens – have every right to have this disclosure, donor or otherwise, from these organizations. I am quite shocked by, yet resigned to, the partisan politicization surrounding these disclosure enhancements.

USC-RULES-AP-2024-0001-0017
Mia Andrade
Mia Andrade thinks that the proposed changes are essential for improving the clarity, efficiency, and fairness of the appellate process. By updating the rules, we can ensure that the legal system remains responsive to contemporary issues, reducing unnecessary delays and ambiguities. This helps maintain the integrity of the judicial process and reinforces public confidence in the legal system, which is crucial for ensuring justice and fairness for all parties involved.

USC-RULES-AP-2024-0001-0025
Anonymous
I strongly urge the passing of this rule to support fairness and justice in the judicial process.

USC-RULES-AP-2024-0001-0031
Court Accountability
Court Accountability emphasizes the need for enhanced transparency and accountability in amicus curiae brief disclosures. It argues that current disclosure requirements are insufficient, allowing parties to use amici to circumvent page limits and mislead courts about their independence. The proposed amendments would require amici to disclose significant financial contributions from parties or their counsel, close loopholes related to member payments, and provide detailed information about the amicus's identity and purpose. It also suggests lowering the 25-percent funding threshold for disclosure and supports additional transparency regarding financial links between amici.

USC-RULES-AP-2024-0001-0374
Professor Allison Orr Larsen
Professor Allison Orr Larsen emphasizes the need for improved funding disclosure for amicus briefs to enhance judicial transparency and reliability. She highlights the increasing influence of the "amicus machine," where coordinated amicus briefs shape judicial reasoning and outcomes. Larsen argues that the proposed amendments will help courts assess the credibility of amicus submissions and enable courts to scrutinize amicus facts more carefully. As any new researcher is taught and any cross-examiner knows well, a source's motivation is intrinsically tied to its credibility.

USC-RULES-AP-2024-0001-0401
Senator Sheldon Whitehouse and Representative Hank Johnson
Senator Sheldon Whitehouse and Representative Hank Johnson respond to arguments against the greater amicus disclosure. They argue that knowing the true interests behind amicus briefs is crucial for assessing potential conflicts of interest and the weight of multiple amici in a case. They emphasize that these changes are necessary to prevent well-funded interests from covertly influencing judicial decisions and to maintain public confidence in the integrity of the judicial process. They hope that the Advisory Committee will not be intimidated by overheated rhetoric and name-calling.

USC-RULES-AP-2024-0001-0402
Various organizations and individuals
A group of organizations and individuals argue that enhanced amicus brief disclosure requirements will improve transparency and integrity in judicial proceedings. They highlight the importance of understanding the interests and relationships behind amicus briefs to evaluate their credibility and biases. They believe the proposed amendments will discourage the creation of front organizations and provide courts with valuable context to assess the reliability of amicus submissions.

VI
Other

USC-RULES-AP-2024-0001-0369
International Attestations LLC
International Attestations LLC emphasizes the need for inclusivity and consideration of global events in the context of U.S. rule formation. It argues that the proposed changes to amicus brief standards and in forma pauperis (IFP) considerations should account for upcoming global events, such as the World Cup 2026 and the Los Angeles Olympics 2028. The comment highlights the importance of preparing for these events by ensuring access to the courts for American-born individuals and entities. Kotulski also raises concerns about the proposed

amendments' potential impact on the filing of amicus briefs, arguing that the changes could discourage valuable contributions and hinder access to justice.

USC-RULES-AP-2024-0001-0222
Native American Rights Fund, National Congress of American Indians, and Northern Plains Indian Law Center
The Native American Rights Fund, the National Congress of American Indians, and the Northern Plains Indian Law Center request that federally recognized Indian tribes be added to the list of entities exempt from the leave of court requirement for filing amicus curiae briefs. They argue that Indian tribes, as sovereign entities, should be afforded the same treatment as the United States and individual states, which are already exempt from this requirement. The commenters emphasize that cases defining tribal governmental authority and rights often do not include tribes as parties, making amicus briefs the only avenue for their participation. They highlight the importance of tribal perspectives in cases involving foundational constitutional law principles and advocate for the inclusion of tribes in Rule 29 to ensure their voices are heard. The organizations also point out that the U.S. Supreme Court has already recognized Indian tribes as governmental entities in its rules governing amicus participation, and the Federal Rules of Appellate Procedure should align with this recognition.

There were **58 identical comments** filed by different individuals, but the comment was identical and copied below. The comment numbers end in 0054, 0065, 0069, 0087, 0089, 0092, 0098, 0099, 0109, 0127, 0136, 0139, 0146, 0153, 0156, 0160, 0166, 0170, 0177, 0182, 0183, 0188, 0189, 0190, 0193, 0194, 0195, 0196, 0198, 0206, 0234, 0236, 0237, 0245, 0248, 0253, 0258, 0260, 0266, 0286, 0291, 0293, 0298, 0304, 0317, 0319, 0333, 0348, 0358, 0361, 0364, 0371, 0376, 0379, 0380, 0390, 0391, and 0395.

> I am writing to express my deep opposition to the proposed amendments to Federal Rule of Appellate Procedure 29. This proposal would severely undermine the efficiency of our judicial process and place unnecessary burdens on public-interest groups and individuals who participate in legal advocacy.
>
> Currently, the courts have an efficient process for handling amicus briefs. Judges and clerks are fully capable of filtering out unhelpful briefs without the need for additional steps. Requiring amici to file motions only increases the workload on the judiciary, delaying important cases and wasting resources. The Supreme Court, recognizing this inefficiency, has eliminated the need for amici to seek permission to file briefs, and there is no logical reason for appellate courts to go in the opposite direction.
>
> The proposed rule would disproportionately affect smaller organizations that rely on filing amicus briefs to make their voices heard in important legal decisions. Many of these groups provide valuable perspectives that help the courts make well-informed rulings. If this rule goes into effect, the uncertainty surrounding the filing of amicus briefs will discourage participation and reduce the diversity of viewpoints presented to the courts.
>
> This proposal is unnecessary and counterproductive. I urge you to withdraw it immediately and protect the integrity of the judicial process.

There were **57 identical comments** filed by different individuals, but the comment was identical and copied below. The comment numbers end in 0040, 0046, 0049, 0055, 0057, 0076, 0088, 0095, 0104, 0105, 0106, 0112, 0114, 0115, 0122, 0125, 0126, 0129, 0131, 0157, 0163, 0164, 0173, 0187, 0191, 0204, 0205, 0210, 0238, 0241, 0243, 0244, 0246, 0256, 0262, 0263, 0268, 0270, 0271, 0277, 0282, 0284, 0300, 0309, 0316, 0320, 0324, 0329, 0343, 0345, 0355, 0367, 0377, 0381, 0382, 0389, and 0400.

> I am writing to express my concern about the proposed amendments to Federal Rule of Appellate Procedure 29. These changes would require amici curiae to obtain court approval before filing briefs and disclose financial information, including donor identities. This is not only an unnecessary burden on the courts but also an attack on First Amendment rights.
>
> The requirement to disclose donor information threatens the right to free association. The U.S. Supreme Court has consistently held that individuals and organizations have the right to associate privately without fear of public disclosure. Forcing amici to disclose their donors would discourage many from contributing, stifling the voices of smaller organizations that play a crucial role in advocating for justice and fairness in our legal system.
>
> This proposal is a step in the wrong direction, and I urge the Committee to withdraw it.

There were **47 identical comments** filed by different individuals, but the comment was identical and copied below. The comment numbers end in 0037, 0050, 0053, 0056, 0058, 0059, 0064, 0070, 0079, 0085, 0094, 0102, 0107, 0113, 0121, 0123, 0133, 0142, 0144, 0150, 0165, 0168, 0186, 0202, 0223, 0229, 0230, 0231, 0239, 0257, 0273, 0274, 0275, 0278, 0285, 0288, 0289, 0297, 0302, 0312, 0321, 0331, 0337, 0365, 0383, 0388, and 0399.

> I am writing to strongly oppose the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure. This rule represents an unnecessary intrusion into a well-functioning system and threatens to limit access to the courts for many public-interest organizations.
>
> Judges are already capable of screening out unhelpful amicus briefs without additional motions. The proposal's claim that this will improve efficiency is misguided by forcing amici to seek leave to file, the rule would actually increase the burden on the courts. More motions, more delays, and more bureaucracy will be the result. Moreover, the proposal would require amici to disclose intrusive financial details, including donor information, which raises serious First Amendment concerns.
>
> Forcing organizations to reveal their financial supporters undercuts the fundamental right to free association. This chilling effect could deter many groups from participating in important legal matters, especially smaller organizations that rely on private donations to fund their advocacy.
>
> This proposal does more harm than good. It places additional burdens on the judiciary, limits the ability of organizations to advocate for justice, and threatens constitutional rights. I urge the Committee to reject it.

There were **59 identical comments** filed by different individuals, but the comment was identical and copied below. The comment numbers end in 0045, 0060, 0062, 0063, 0066, 0073, 0077, 0080, 0084, 0090, 0091, 0093, 0097, 0103, 0111, 0117, 0119, 0124, 0130, 0135, 0143, 0147, 0152, 0161, 0167, 0171, 0172, 0175, 0176, 0181, 0199, 0209, 0211, 0226, 0232, 0240, 0249, 0261, 0276, 0279, 0280, 0290, 0301, 0313, 0314, 0326, 0330, 0342, 0344, 0351, 0354, 0357, 0360, 0362, 0375, 0386, 0392, 0393, and 0396.

> I am writing to oppose the proposed amendments to Federal Rule of Appellate Procedure 29, which would create unnecessary barriers for filing amicus curiae briefs.
>
> Forcing all amici to seek court permission before filing briefs would slow down the judicial process and discourage smaller organizations from participating.
>
> Worse, the proposal to require amici to disclose donor information raises serious constitutional concerns. The U.S. Supreme Court has affirmed that organizations have a right to protect the privacy of their supporters. This rule would have a chilling effect on individuals and groups that want to contribute to important legal advocacy but fear exposure of their private affiliations.
>
> This proposal is both unnecessary and harmful. I strongly urge you to withdraw it and protect the integrity of the judicial process.

There were **56 identical comments** filed by different individuals, but the comment was identical and copied below. The comment numbers end in 0041, 0042, 0043, 0047, 0048, 0052, 0068, 0071, 0078, 0081, 0100, 0108, 0118, 0132, 0138, 0154, 0155, 0158, 0159, 0162, 0169, 0179, 0200, 0208, 0224, 0227, 0228, 0235, 0242, 0252, 0259, 0267, 0272, 0281, 0283, 0292, 0294, 0295, 0296, 0303, 0308, 0315, 0323, 0325, 0327, 0328, 0332, 0335, 0336, 0347, 0349, 0359, 0363, 0378, 0384, and 0394.

> I am writing to voice my strong opposition to the proposed changes to Federal Rule of Appellate Procedure 29. This proposal will not only create unnecessary bureaucratic hurdles but will also severely limit the role that amici play in our judicial process, a role that has been crucial to ensuring fair and balanced rulings.
> Amici often provide the courts with critical insights that the parties to a case may not present. In many cases, amici play an important role in clarifying broader implications that go beyond the immediate interests of the parties involved. This kind of input helps the courts to issue rulings that consider the wider impact of their decisions.
>
> Requiring amici to seek court approval would slow down the process and discourage the submission of briefs, especially from smaller organizations and individuals who do not have the resources to engage in lengthy legal battles. Judges and their clerks are already proficient at filtering out unhelpful briefs, and this proposal would only add unnecessary steps to an already complex process.
>
> This rule change also threatens First Amendment rights by requiring amici to disclose financial details about their donors. Such a requirement would have a chilling effect on organizations and individuals who want to support causes they care about but are unwilling to have their personal information disclosed publicly.
>
> I strongly urge you to reconsider this proposal and withdraw it to protect both the efficiency of the courts and the constitutional rights of those who support legal advocacy.

There were **54 identical comments** filed by different individuals, but the comment was identical and copied below. The comment numbers end in 0036, 0038, 0039, 0044, 0051, 0061, 0067, 0072, 0075, 0082, 0083, 0086, 0096, 0101, 0120, 0128, 0134, 0137, 0141, 0145, 0148, 0149, 0174, 0178, 0180, 0184, 0185, 0192, 0197, 0201, 0203, 0233, 0247, 0250, 0251, 0254, 0265, 0269, 0287, 0299, 0305, 0334, 0338, 0341, 0346, 0352, 0356, 0372, 0373, 0385, 0387, 0397, 0398, and 0404.

> I strongly oppose the proposed changes to Rule 29 of the Federal Rules of Appellate Procedure.
>
> This rule would create unnecessary delays in the appellate process, as courts would be forced to review motions from amici before even considering the briefs themselves. Judges and clerks already have effective methods for filtering out unhelpful amicus briefs, so there is no need for this additional bureaucratic step.
>
> I urge the Committee to reconsider this harmful proposal and withdraw it.

TAB 5F

Summary of Testimony from February 14, 2025 Hearing

Where a witness submitted both a written statement and an oral statement, this summary draws on both.

Carter Phillips (Chamber of Commerce of the United States)

The Chamber of Commerce opposes the proposed amendments to Rule 29, citing concerns about First Amendment rights. Current Rule 29 already protects the judicial process and that the proposed disclosure amendments are unnecessary and overly burdensome. The Chamber also opposes the elimination of the consent option and the proposal to bar redundant amicus briefs, arguing that these changes would reduce the quality of amicus participation and burden the courts with unnecessary motions.

Carter Phillips questions why the courts of appeals want to deviate from the U.S. Supreme Court's approach to amicus practice, including liberal filing of amicus briefs without requiring consent or motions and less disclosure than proposed here. Phillips argues that the proposed disclosure requirements could have significant risks, particularly from the Executive and Legislative branches, and could chill free expression. He provides a hypothetical example involving the Foreign Corrupt Practices Act to illustrate the potential negative consequences of disclosure. Phillips also criticizes the requirement for leave of court for non-governmental amicus briefs, arguing that it would create a cumbersome process and discourage valuable amicus participation. He emphasizes that the current system, which allows filing by consent, works well and that the proposed changes would create unnecessary burdens for the courts and parties involved. In response to a question whether the objection to disclosing financial relationships between a party and an amicus is categorial or whether the concern is with the percentage; that is, why shouldn't a court know if 100% of the resources of an amicus comes from a party, Phillips responded, "But, to get at the problem you've identified . . . it seems to me that you would target that specifically in a particular way about the relationship between the party and the amicus, not by requiring more disclosure of organizations that provide amicus support."

Alex Aronson (Court Accountability)

Alex Aronson, Executive Director of Court Accountability, testifies in support of the proposed disclosure amendments to Rule 29. Court Accountability supports the proposed amendments to Rule 29, arguing that they will enhance transparency and accountability in amicus curiae brief disclosures. The amendments will deter gamesmanship and provide courts with additional information to evaluate the credibility of amicus submissions.

He argues that the amendments are necessary to improve transparency and accountability within the judicial system. Aronson highlights the negative consequences of amici acting as alter egos of parties or third-party interest campaigns, citing the example of the pending Ninth Circuit appeal in Google vs. Epic Games, where many amici had financial ties to Google that were not disclosed. He emphasizes that the identity of an amicus matters, and that transparency is crucial for public confidence in the courts. Aronson also addresses First Amendment objections raised by other commenters, arguing that the proposed amendments are consistent with legal precedent and do not infringe on free speech rights. He suggests that the 25 percent funding threshold for disclosure is too high and recommends additional disclosure of financial links among amici.

Lisa Baird (DRI—Defense Research Institute)

Lisa Baird, Chair of the Amicus Committee for DRI's Center for Law and Public Policy, testifies against the proposed amendments to Rule 29. She argues that the amendments are misguided and based on misunderstandings about the role of amicus briefs. She finds it notable that so many groups with varying interests and political perspectives are united in raising concerns. Baird emphasizes that the current system, which allows filing by consent, works well and should be retained. She highlights the practical problems with the proposed requirement for leave of court for non-governmental amicus briefs, arguing that it would create unnecessary burdens for the courts and discourage valuable amicus participation. While DRI takes no position on the substance of the disclosure requirements, Baird criticizes the proposed disclosure requirements as convoluted and confusing. She recommends that any disclosure requirements be straightforward and located in one place. Baird urges the Committee to adopt the Supreme Court's approach to amicus filings. In response to a question about motion practice, she predicted that if you give lawyers an avenue and suggest that a motion should be opposed, they will oppose for no other reason than to impose costs and burdens, so this proposal threatens to flip the switch from the current norm of consent.

Thomas Berry

Thomas Berry, speaking in his personal capacity, argues that the requirement for leave of court for non-governmental amicus briefs would add significantly to the federal appellate workload and discourage valuable amicus participation. Berry highlights that drafting an amicus brief is a time-consuming process and that the proposed amendments would make it difficult to justify dedicating resources to producing briefs that might not be accepted. He emphasizes that the current system, which allows filing by consent, works well and that the proposed changes would create unnecessary burdens for the courts and parties involved. Berry also argues that the proposed amendments would incentivize amicus filers to focus more on the Supreme Court, which already receives a high volume of amicus briefs, rather than

the federal appellate courts. He urges the Committee to adopt the Supreme Court's approach to amicus filings.

Molly Cain (LDF—NAACP Legal Defense and Educational Fund)

Molly Cain, representing the NAACP Legal Defense and Educational Fund (LDF), argues that the requirement for amicus briefs to be limited to relevant matter not already mentioned by the parties is too restrictive and could discourage helpful amicus participation. Cain emphasizes that LDF's amicus briefs often expand upon matters mentioned by the parties and that the proposed language could lead courts to refuse consideration of valuable briefs. She also criticizes the language disfavoring redundant amicus briefs, arguing that it would be difficult for litigants to navigate and for courts to enforce. Cain highlights that amicus briefs supporting the same party share the same deadline, making it impossible to predict what other amicus briefs may be filed or what they will argue. This could result in courts lacking a principled basis for deciding which briefs are redundant and which are not.

Lawrence Ebner (Atlantic Legal Foundation)

Lawrence Ebner, Executive Vice President and General Counsel of the Atlantic Legal Foundation, emphasizes the importance of amicus briefs in the courts of appeals, noting that fewer amicus briefs are filed in these courts compared to the Supreme Court, making them more likely to be read and impactful. Ebner outlines the substantial effort, time, and expense involved in researching and drafting an amicus brief, including reviewing relevant materials, formulating arguments, and avoiding duplication. The proposed changes would deter the preparation and submission of worthwhile amicus briefs and unnecessarily burden appellate judges. Requiring a motion would undermine the current culture of consent, where experienced appellate attorneys routinely consent to the filing of amicus briefs. This requirement would create a risk that already-drafted briefs may not be accepted, deterring the preparation and filing of helpful briefs. Ebner urges the Committee to follow the Supreme Court's lead by not requiring consent or leave.

Doug Kantor (National Association of Convenience Stores)

Doug Kantor, General Counsel of the National Association of Convenience Stores, expresses major concerns about the proposed changes to Rule 29, particularly regarding First Amendment associational rights. He explains the practical challenges faced by associations in deploying limited resources to advocate on behalf of their members. Kantor highlights the difficulties in coordinating with other associations and the added costs of justifying the uniqueness of each amicus brief through a motion. He also raises concerns about the requirement to disclose non-party funders, noting that associations may need to seek specific funding for unbudgeted cases. Deciding which members to ask often has more to do with who we have tried to ask for funding more recently and who we have not than that member

having some special interest in a case. While it is very doubtful that we would ever have someone come anywhere close to the 25 percent number, we have multiple sources of funding (dues, booth space at big trade shows, educational programs) and do not currently conglomerate what individual companies pay in each of these areas. In response to a question about earmarked funding, he explained that some longtime members let their dues lapse.

Seth Lucas

Seth Lucas, a senior research associate at The Heritage Foundation and a law student, argues that the proposed rules are unnecessary, politically motivated, and constitutionally suspect. Lucas criticizes the Committee's justification for the proposed rules, which analogizes them to campaign finance disclosures, arguing that judging is not like voting and that judges should decide cases based on facts and law, not public opinion. He highlights the lack of a clear rationale for the proposed changes and the absence of evidence of a problem that needs to be addressed. Lucas urges the Committee not to adopt the proposed association disclosure rules, arguing that they would drag the judiciary into identity politics and are a partisan solution in search of a problem. In response to the question whether the opposition to disclosing the financial relationship between a party and an amicus is categorical, he responded, "the problem isn't money. It's whether the parties are getting a second bite at the apple."

Tyler Martinez National Taxpayers Union Foundation and People United for Privacy Foundation)

Tyler Martinez, representing the National Taxpayers Union Foundation and People United for Privacy, emphasizes the importance of amicus briefs in areas of arcane law, such as tax and campaign finance, and argues that donor privacy has been protected by exacting scrutiny. Martinez explains that exacting scrutiny requires a sufficiently important governmental interest and narrow tailoring, and he cautions the Committee against assuming that campaign finance disclosure standards can be applied to amicus briefs. He highlights the challenges of meeting exacting scrutiny for new areas of regulation and argues that the proposed amendments would fail to meet this standard. The proposed disclosure requirements fail to meet this standard and do not provide a substantial government interest. The proposed amendments are not properly tailored and there are no alternative channels for amicus arguments. . In response to the question whether the opposition to disclosing the financial relationship between a party and an amicus is categorical, he responded, "As it's drafted now, yes, it's a categorical problem. . . . if the real worry there is that you're just an arm of a party, and I think the current rules already would allow for enforcement of that. If it's some sort of major amount of funding . . . it has to be much more than 50 percent."

Sharon McGowan (Public Justice)

Sharon McGowan, Chief Executive Officer of Public Justice, opposes the requiring motions for leave to file non-governmental amicus briefs. Public Justice does not take a position on the disclosure proposal. At a time when courts are trying to promote cooperation among counsel, this amendment tacks in the opposite direction. She argues that the existing Rule 29 already addresses concerns about amicus briefs forcing recusal and that the motion requirement would not provide additional relevant information. McGowan highlights the inefficiency of requiring motions for leave, as they are often decided by the clerk or motions panel before the merits panel is assigned. She provides examples from Public Justice's experience where motions for leave added to the workload of the motions panel or clerk without improving the court's ability to assess the briefs' utility. McGowan also argues that the proposed amendments would increase litigation time and expense and could lead to unwarranted opposition to amicus briefs. In response to a question, she encouraged the Committee to adopt the Supreme Court's approach, which allows all amicus briefs to be filed without consent or motion.

Patrick Moran (NFIB—National Federation of Independent Business)

Patrick Moran, a senior attorney with the National Federation of Independent Business (NFIB) Small Business Legal Center, argues that the proposed helpful and relevant standards would act as unnecessary barriers to the filing of amicus briefs, discouraging helpful briefs and creating a judicial echo chamber. Moran highlights the high costs of filing amicus briefs, especially for small teams of attorneys, and argues that the motion requirement would drive up these costs and stifle the voices of small businesses in federal courts. He also criticizes the proposed amendments for being out of step with the Supreme Court's amicus rules, which do not require notice and consent. Moran urges the Committee to adopt a rule consistent with the Supreme Court's rules.

Jaime Santos

Jaime Santos, in her personal capacity, argues that the appropriate purpose of an amicus brief is to provide information to a court that can aid in judicial decision-making. Santos criticizes the proposed amendment to Rule 29(a)(2) for suggesting that an amicus brief can only be helpful if it discusses a matter not mentioned by the parties or other amici. She argues that redundancy among briefs can be helpful: A pharmaceutical company saying in its merits brief the rule the other side is asking you to adopt will have disastrous consequences for patients might be compelling or it might not, given the party's financial interest in winning. But three amicus briefs by patient groups, physician groups, and insurers who are willing to go to the trouble to retain counsel to say no, really, this will completely mangle the way we operate, that can be enormously helpful and powerful and relevant despite being duplicative of something a party says. Santos also opposes the proposed motion for leave requirement, arguing that it would lead to more work for under-resourced and overworked courts and increase the amount of uncompensated work required by

lawyers. She notes that parties in the court of appeals typically consent, because withholding consent "violates what I think of as FRAP 101, don't be a jerk." But in the district court, where motions are required, the motions are almost invariably opposed, often for pretty ridiculous reasons. Santos also criticizes the proposed new detail disclosure rules, arguing that they would make it difficult for numerous small organizations to band together because of the space needed to describe each of them and the lack of access to the required financial information. In response to a question whether a small organization wouldn't know any 25% donors, she responded that "may be right," but between micro grants and irregular funding streams, there may be not sufficient infrastructure to keep track and give counsel the confidence to make a representation in a brief.

Stephen Skardon (APCIA—American Property Casualty Insurance Association)

Stephen Skardon, Assistant Vice President, Insurance Counsel at the American Property Casualty Insurance Association (APCIA), emphasizes that APCIA, representing a significant portion of the U.S. property casualty insurance market, frequently files amicus briefs to provide courts with a broad national perspective on insurance-related matters. Skardon argues that the proposed amendments would limit the valuable role of amici by eliminating the option to file briefs on consent, which would deprive courts of critical context and analysis. He also criticized the proposed standard for assessing the helpfulness of amicus briefs, noting that it would result in fewer briefs being filed and would be detrimental to both the courts and the public. APCIA argues that the proposed disclosure requirements would infringe on First Amendment rights. It recommends maintaining the current permissive filing standard or adopting the Supreme Court's approach of eliminating the consent requirement.

Zack Smith

Zack Smith, Senior Legal Fellow and Manager of the Supreme Court and Appellate Advocacy Program at The Heritage Foundation, argues that the proposed changes, particularly those related to donor disclosures, are a solution in search of a problem and are driven by partisan politics. Smith highlights that the proposed amendments likely violate the First Amendment, as they would not pass the exacting scrutiny test required for compelled disclosures. He also criticized the Committee's rationale that the identity of the amicus matters to some judges, arguing that this undermines the principle of judicial impartiality. In response to the question whether he would object to requiring disclosure if a party provide 100% of the funds to an amicus, Smith responded, "Yes, as drafted, and more to the point . . . I'm not sure throughout the Committee's study of this matter there's been an identified purpose, and . . . given this lack of a clarified governmental interest, it's hard to see how these proposed changes could pass the exacting scrutiny test."

Tad Thomas (AAJ—American Association for Justice)

Tad Thomas, past president of the American Association for Justice (AAJ) and current Chair of AAJ's Legal Affairs Committee, supports increased transparency and strongly believes that the true identity of the amici should be easy to determine by the courts, the parties, and the public. The 25 percent rule is not a problem at all; in many cases, the tax status of the organization requires it to keep detailed documentation of donations. 29. He emphasized the importance of amicus briefs in educating the court on critical legal issues and noted that AAJ frequently files such briefs through party consent. Thomas argued that removing the party consent provision would increase the burden on courts and lead to unnecessary motions practice. He provided an example from the Eleventh Circuit where AAJ faced opposition to their amicus brief, which resulted in additional work for the court. Thomas also recommended removing or simplifying the proposed purpose section, as it could lead to unintended consequences and promote favoritism for certain well-known amici. He urged the Committee to adopt the Supreme Court's approach to amicus briefs or retain the current consent provision.

Larissa Whittingham (RLC—Litigation Counsel for the Retail Litigation Center)

Larissa Whittingham, Litigation Counsel for the Retail Litigation Center (RLC), testified against the proposed amendments to Rule 29(a). She argued that the existing rule already contains safeguards to address concerns about recusal and that the proposed amendments would create unnecessary burdens and promote adversarialness. The remedy to the recusal problem the report noted is to appropriately configure systems and processes to allow the implementation of existing Rule 29, not by amending the rule. Whittingham emphasized that amicus briefs provide valuable perspectives and data that parties may not be able to offer, and that the proposed standard for assessing the helpfulness of briefs is too limited. She also noted that the proposed amendments would be particularly detrimental to smaller organizations and would be difficult to administer. Whittingham urged the Committee to reject the proposed amendments and maintain the current rule.

Kirsten Wolfford (ACLI—American Council of Life Insurers)

Kirsten Wolfford, representing the American Council of Life Insurers (ACLI), argues that the amendments would create unnecessary burdens and have a chilling effect on the filing of amicus briefs. Eliminating the option to file by consent and adding new disclosure requirements would discourage amicus participation and increase costs without clear benefits. ACLI believes the current Rule 29 adequately prevents "dark" money from influencing amicus briefs. Wolfford emphasizes the unique perspective that amicus briefs provide, which cannot always be replicated by the parties in a matter. She highlights the value of ACLI's amicus briefs in providing background

information on the life insurance industry and argues that creating hurdles for these briefs would hinder the court's ability to make informed decisions.

Gerson H. Smoger

Gerson Smoger, an attorney at Smoger & Associates, emphasizes the importance of amicus briefs in providing information to the court that may not be raised by the parties and highlights the challenges faced by pro bono amicus brief writers. Smoger supports the 6500-word limit for amicus briefs and the requirement for a concise description of the identity and interest of the amicus. However, he opposes the requirement for motions for leave to file amicus briefs, arguing that it would create unnecessary work and limit the ability of the actual panel to hear the briefs. Smoger also supports the 25 percent rule for disclosing financial contributions but argues that it should be lowered to 10 percent. "I've been involved for a long time in . . . multiple boards and multiple organizations, and you always know who gave 25 percent . . . . Everybody's struggling for money. People do always know who's given at least 10 percent because then they're coming back to them, and 25 percent, frankly, is ridiculous because people absolutely know."

TAB 5G

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: IFP Subcommittee

Re: Form 4

Date: March 1, 2025

Proposed amendments to Form 4, dealing with applications for IFP status, were published in August for public comment. The subcommittee has reviewed the public comments and the testimony of witnesses at a public hearing and recommends final approval of the amendments to Form 4, with some minor changes.

Sai, who originally suggested both revisions to Form 4 and clarifications of the standards used for granting IFP status, found the revised Form 4 an improvement but still short of ideal. But the subcommittee viewed the suggestions offered by Sai as addressing questions about the proper interpretation of 28 U.S.C. §1915 better left to judicial interpretation of that statute.

A group of students from Yale Law School, led by Professor Judith Resnik, voiced support for the revised Form 4. The changes recommended by the subcommittee reflect the changes suggested by this group. In particular,

- The phrase "if any" is added to question 1, which is about take-home pay from work.

- The sentence "These programs may go by different names in some states" is added to question 8, which asks about receipt of SNAP, Medicaid, or SSI.

- The phrase "If you are a prisoner" is moved to the beginning of the paragraph addressing the requirements of the PLRA.

- The phrase "For all applicants" is added to the beginning of the paragraph inviting additional information so that it is clear that it applies to all applicants, not just to prisoners.

The subcommittee does not recommend adding the phrase "old-age or other dependents' needs," to question 4, which asks about necessary expenses. The parenthetical list of necessary expenses is illustrative, and the subcommittee thinks it better to keep it simple.

For similar reasons, the subcommittee does not recommend adding the sentence suggested by NACDL: "No affidavit is required, and this Form does not

apply, if counsel has been appointed for you under the Criminal Justice Act." If counsel has been appointed, counsel can determine whether the form needs to be completed. While including the sentence might save some appointed counsel some time, the risk that including this sentence might cause confusion for the vastly larger number of people using this form who lack appointed counsel leads the subcommittee to recommend leaving it out.

[Note that minor stylistic changes were made by the style consultants implementing the changes noted above.]

TAB 5H

UNITED STATES DISTRICT COURT

for the

<_____> DISTRICT OF <_____>

<Name(s) of plaintiff(s)>,	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	Case No. <Number>
<Name(s) of defendant(s)>,	)	
	)	
Defendant(s)	)	
	)	

AFFIDAVIT ACCOMPANYING MOTION
FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the filing fees of my appeal or post a bond for them. I believe I am entitled to relief. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed: _____ Date _____

The court may grant a motion to proceed in forma pauperis if you show that you cannot pay the filing fees and you have a non-frivolous issue on appeal. Please state your issues on appeal. (Attach additional pages if necessary.)

My issues on appeal are:

1.	What is your monthly take-home pay, if you have any, from your work?	$_____
2.	What is your monthly income from any source other than take-home pay from work (such as unemployment benefits, alimony, child support, public assistance, pension, and social security)?	$_____
3.	How much are your monthly housing costs (such as rent and utilities)?	$_____
4.	How much are your monthly costs for other necessary expenses (such as food, medical care, childcare, and transportation)?	$_____
5.	What is the total value of all your assets (such as bank accounts, investments, market value of car or house)?	$_____
6.	How much debt do you have (such as credit cards, mortgage, and student loans)?	$_____
7.	How many people (including yourself) do you support?	
8.	Do you receive SNAP (Supplemental Nutrition Assistance Program), Medicaid, or SSI (Supplemental Security Income)? These programs may go by different names in some states.	Yes No

Are you are a prisoner seeking to appeal a judgment in a civil action or proceeding? If so, then no matter how you answered the questions above, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

For all applicants: if there is anything else that you think explains why you cannot pay the filing fees, please feel free to explain below. (Attach additional pages if necessary.)

TAB 5I

UNITED STATES DISTRICT COURT

for the

<_____> DISTRICT OF <_____>

<Name(s) of plaintiff(s)>,	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	Case No. <Number>
<Name(s) of defendant(s)>,	)	
	)	
Defendant(s)	)	
	)	

AFFIDAVIT ACCOMPANYING MOTION
FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the filing fees of my appeal or post a bond for them. I believe I am entitled to relief. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed: _____ Date _____

The court may grant a motion to proceed in forma pauperis if you show that you cannot pay the filing fees and you have a non-frivolous issue on appeal. Please state your issues on appeal. (Attach additional pages if necessary.)

My issues on appeal are:

1.	What is your monthly take-home pay from work?	$_____
2.	What is your monthly income from any source other than take-home pay from work (such as unemployment benefits, alimony, child support, public assistance, pension, and social security)?	$_____
3.	How much are your monthly housing costs (such as rent and utilities)?	$_____
4.	How much are your monthly costs for other necessary expenses (such as food, medical care, childcare, and transportation)?	$_____
5.	What is the total value of all your assets (such as bank accounts, investments, market value of car or house)?	$_____
6.	How much debt do you have (such as credit cards, mortgage, and student loans)?	$_____
7.	How many people (including yourself) do you support?	
8.	Do you receive SNAP (Supplemental Nutrition Assistance Program), Medicaid, or SSI (Supplemental Security Income)?	Yes No

No matter how you answered the questions above, if you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

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.)

Committee Note

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.

TAB 5J

Comments on Form 4

USC-RULES-AP-2024-0001-0007
Simon Hernandez

The Proposed Form 4 to apply for in forma pauperis in an appellate court will considerably ease those who are in need. As stated in the proposed amendment, the current Form 4 is overly complicated, intrusive, and includes unneeded information. If a court believes that someone is lying about their status, they can inquire. But why put up one more barrier for someone who already is struggling to navigate the complicated appellate process. For example, the current form includes the employment history of a filer for the last two years. This is not likely relevant to the process of establishing if they are qualified for in forma pauperis, the simplified form which includes only income and expenses will do the job. The Proposed Form 4 is an example of how a government form can be better and should.

USC-RULES-AP-2024-0001-0010
Anonymous

The FRAP should be more flexible for incarcerated inmates.

USC-RULES-AP-2024-0001-0011
Michael Ravnitzky

Michael Ravnitzky supports the proposed changes to Appellate Form 4 to simplify the process for waiving fees and costs in appellate cases.

USC-RULES-AP-2024-0001-0017
Mia Andrade

I agree with the proposed amendments to the Federal Rules of Appellate Procedure. These changes are essential for improving the clarity, efficiency, and fairness of the appellate process. By updating the rules, we can ensure that the legal system remains responsive to contemporary issues, reducing unnecessary delays and ambiguities. This helps maintain the integrity of the judicial process and reinforces public confidence in the legal system, which is crucial for ensuring justice and fairness for all parties involved.

USC-RULES-AP-2024-0001-0025
Anonymous

I strongly urge the passing of this rule to support fairness and justice in the judicial process.

USC-RULES-AP-2024-0001-0029
Avital Fried, Myriam Gilles, Andrew Hammond, Alexander A. Reinert, Judith Resnik, Tanina Rostain, Anna Selbrede, Lauren Sudeall, and Julia Udell

They support the proposed revision of Appellate Form 4, which aims to simplify the form, reduce the burden on individuals seeking in forma pauperis (IFP) status,

and provide necessary information to the courts while omitting unnecessary details. They recommend revising the language of specific questions in Appellate Form 4 to make them clearer and more inclusive. For Question 1, they suggest adding "if any" to clarify that the question applies even if the applicant has no income. For Question 4, they recommend including "old-age or other dependents' needs" to the list of necessary expenses. For Question 8, they propose adding a note that the names of programs like SNAP, Medicaid, or SSI vary by state. Lastly, they suggest rephrasing a sentence about explaining inability to pay filing fees to ensure it applies to all applicants, not just prisoners.

USC-RULES-AP-2024-0001-0307
National Association of Criminal Defense Lawyers
NACDL suggests that Form 4 should be amended to include information indicating that a person for whom counsel has been appointed under the Criminal Justice Act (CJA) is automatically entitled by law to appeal in forma pauperis and is not required to complete Form 4.

TAB 5K

Summary of Testimony from February 14, 2025 Hearing

Where a witness submitted both a written statement and an oral statement, this summary draws on both.

Sai

Sai expresses gratitude for the opportunity to testify on the proposed amendments to Form 4, which he has been advocating for since 2015 and 2019. He acknowledges that the proposed form is an improvement but identifies several fundamental flaws. Sai emphasizes that 28 U.S.C. § 1915 and the Prison Litigation Reform Act clearly state that the affidavit of finances is required only for prisoners. He suggests adding a question at the beginning of the form asking if the applicant is a prisoner, and if not, to skip the rest of the form. Sai also recommends including a statement of qualification standards to help applicants understand if they qualify for IFP status. He proposes that the form should automatically qualify non-prisoners who are on means-tested welfare benefits, represented by a public defender or legal aid, or have income and savings below 1.5 times the federal poverty guidelines. Sai further suggests moving the question about welfare benefits to the top of the form and excluding assets like the primary residence and work-related items from the asset calculation. He also recommends sealing the form automatically and providing immunity under 18 U.S.C. § 6002. Lastly, Sai advocates for the form to be applied to the Civil Rules (rather than just a form from the Administrative Office) and for the Committee to include representation from pro se litigants.

Professor Judith Resnik, Avital Fried, Anna Selbrede, and Julia Udell

They support the proposed revisions to Appellate Form 4, aimed at simplifying the process for individuals seeking to appeal in forma pauperis (IFP) and improving accessibility to the legal system. They argue that the proposed revisions would reduce the burden on individuals seeking IFP status and provide the necessary information to the courts while omitting unnecessary details. The group also offers several modest revisions to further improve the form, such as clarifying language and adding explanations for certain questions. They emphasize the importance of simplifying forms to increase accessibility and reduce costs for both litigants and the courts.

Professor Judith Resnik describes the challenges faced by people seeking fee waivers at trial and appellate levels. She highlights that a significant portion of filings at both levels are from self-represented litigants and that the current forms are not user-friendly. Avital Fried adds that the current IFP application process can be confusing and that the proposed form addresses privacy concerns and formatting inconsistencies across circuits. Anna Selbrede discusses the benefits of simplified forms, citing research from justice labs and the positive impact on judicial efficiency. Julia Udell offers minor suggestions to further improve the form, such as noting that

the names of public benefits programs may vary depending on the state and including elder care expenses. The proposed revisions can serve as a model for district courts.

TAB 6

TAB 6A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Intervention on appeal (22-AP-G; 23-AP-C)

Date: March 1, 2025

The Federal Judicial Center, as the request of the Appellate Committee, is conducting extensive research into motions to intervene in the courts of appeal. This research is not complete. The subcommittee decided to await the results of this research before attempting further drafting.

Tim Reagan informs me that best practices call for not providing an interim report until he has worked through all of the circuits. Accordingly, the subcommittee decided not to meet this spring. It expects to meet before the fall meeting.

TAB 6B

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Reopening time to appeal (24-AP-M)

Date: March 1, 2025

At the fall 2004 meeting, a subcommittee was formed in response to the suggestion by Chief Judge Sutton, echoed by Judge Gregory, that the Advisory Committee look into reopening the time to appeal under Rule 4(a)(6). See *Winters v. Taskila*, 88 F.4th 665 (2023); *Parrish v. United States*, 2024 WL 1736340 at *1 (April 23, 2024).

Since then, the Supreme Court granted certiorari in *Parrish*. No. 24-275, 2025 WL 226838, at *1 (U.S. Jan. 17, 2025).

The question presented is:

> Ordinarily, litigants must file a notice of appeal within 30 or 60 days of an adverse judgment. 28 U.S.C. § 2107(a)-(b). Under 28 U.S.C. § 2107(c) and Fed. R. App. P. 4(a)(6), however, district courts can reopen an expired appeal period when a party did not receive timely notice of the judgment. The Courts of Appeals have divided about whether a notice of appeal filed after the expiration of the ordinary appeal period but before the appeal period is reopened becomes effective once reopening is granted.
>
> The Question Presented is whether a litigant who files a notice of appeal after the ordinary appeal period expires must file a second, duplicative notice after the appeal period is reopened.

www.supremecourt.gov/qp/24-00275qp.pdf

In opposing cert, the Solicitor General pointed to the formation of this subcommittee and argued that the Court's review is unwarranted "because the Advisory Committee has already taken steps to study whether changes to Rule 4(a) may be warranted." Brief in Opposition at 16. Immediately prior to the conclusion, the Solicitor General stated:

> Because the relevant provisions in Rule 4(a)(6) may well change as a result of the rulemaking process, the question whether the current language of the rule supports petitioner may be of limited prospective importance. And the Advisory Committee is fully capable of addressing the policy concerns that petitioner raises here.

Id. at 17 (citation omitted).

Because the Supreme Court granted cert, fully aware of the Advisory Committee's actions, the subcommittee decided not to meet this spring but instead await the decision in *Parrish*.

TAB 6C

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Administrative Stays Subcommittee

Re: Administrative stays (24-AP-L)

Date: March 6, 2025

FRAP 8 governs stays and injunctions pending appeal. There is no specific provision governing administrative stays.

The term "stay" in this context is typically used as shorthand for the full range of orders available under Rule 8, including orders suspending, modifying, restoring, or granting an injunction while an appeal is pending. *See* FRAP 8(a)(1). In accordance with common usage, this memo uses the term in the more encompassing sense. But the text of the proposed amendment below is more precise, referring to the relief mentioned in Rule 8(a)(1).

Will Havemann of Hogan Lovells has called for rulemaking to address administrative stays:

> The rules should be amended to require that administrative stays be limited to the purpose of deciding whether to grant a stay pending appeal, and to specify that administrative stays can't be used to grant indefinite relief. Critically, the rules should mandate that an administrative stay expire no later than the end of a limited period—say, 10 business days.

Supreme Court's Texas Order Highlights Abuse of Dubious Shortcut, US Law Week (March 26, 2024).

In the case that prompted Havemann's suggestion, Justice Barrett, joined by Justice Kavanaugh, wrote:

> If the Fifth Circuit had issued a stay pending appeal, this Court would apply the four-factor test set forth in *Nken v. Holder* . . . to decide whether to vacate it. 556 U.S. 418, 434 (2009). But the Fifth Circuit has not entered a stay pending appeal.
>
> Instead, in an exercise of its docket-management authority, it issued a temporary administrative stay and deferred the stay motion to a merits panel . . . .
>
> Administrative stays do not typically reflect the court's consideration of the merits of the stay application. Rather, they "freeze legal

> proceedings until the court can rule on a party's request for expedited relief." R. Bayefsky, *Administrative Stays: Power and Procedure*, 97 Notre Dame L. Rev. 1941, 1942 (2022) (Bayefsky). Deciding whether to grant a stay pending appeal requires consideration of the four *Nken* factors, which include an assessment of the applicant's likelihood of success on the merits. That is not always easy to evaluate in haste, and an administrative stay buys the court time to deliberate. . . . . After receiving an emergency application, this Court frequently issues an administrative stay to permit time for briefing and deliberation . . . . The courts of appeals use the procedure to the same end.
>
> That such stays are "administrative" does not mean they are value neutral. Their point is to minimize harm while an appellate court deliberates, so the choice to issue an administrative stay reflects a first-blush judgment about the relative consequences of staying the lower court judgment versus allowing it go to into effect.
>
> . . . .
>
> The real problem—and the one lurking in this case—is the risk that a court will avoid *Nken* for too long. An administrative stay should last no longer than necessary to make an intelligent decision on the motion for a stay pending appeal. Once the court is equipped to rule, its obligation to apply the *Nken* factors is triggered—a point that some judges have pressed their Circuits to consider. The United States suggests that, on several occasions, the Fifth Circuit has allowed administrative stays to linger for so long that they function like stays pending appeal.

United States v. Texas, 144 S. Ct. 797–800 (2024) (Barrett, J., concurring in denial of applications to vacate stay) (footnotes and citations omitted).

Justice Sotomayor, joined by Justice Jackson, dissented:

> An administrative stay . . . is intended to pause the action on the ground for a short period of time until a court can consider a motion for a stay pending appeal. For that reason, at a minimum, administrative relief should (1) maintain the status quo and (2) be time limited. The Fifth Circuit's administrative stay here was neither, and thus constituted an abuse of discretion.

United States v. Texas, 144 S. Ct. 797, 802 (2024) (Sotomayor, J., dissenting). Justice Kagan also dissented:

> I do not think the Fifth Circuit's use of an administrative stay, rather than a stay pending appeal, should matter. Administrative stays surely have their uses. But a court's unreasoned decision to impose one for more than a month, rather than answer the stay pending appeal issue before it, should not spell the difference between respecting and revoking long-settled immigration law.

United States v. Texas, 144 S. Ct. 797, 805 (2024) (Kagan, J., dissenting).

At the fall meeting of the Advisory Committee, this subcommittee was appointed to explore the possibility of adding a provision to the Federal Rules of Appellate Procedure addressing administrative stays. The subcommittee thinks that such a provision is worth pursuing. The issue arises in a number of cases, not only high-profile cases. In some situations, it is not controversial, but in others, whether an administrative stay is granted can make an enormous difference. This is especially true if an administrative stay is left in place for a long time.

Some district courts have now begun to grant administrative stays.

The subcommittee does not think that it is wise for a rule to address the criteria for granting an administrative stay, any more than Civil Rule 65 addresses the criteria for granting an injunction, or Appellate Rule 8 addresses the criteria for granting a stay pending appeal. A rule, however, can address the purpose of an administrative stay and impose a time limit. Cf. Civil Rule 65(b)(2) ("The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension.").

The subcommittee believes that this proposed amendment can be ready for publication this summer. Here is the proposed amendment:

Rule 8. Stay or Injunction Pending Appeal

* * *

(b) Administrative Order. The court of appeals or one of its judges may enter an administrative order temporarily providing the relief mentioned in Rule 8(a)(1) while the court receives briefing and deliberates on a party's motion. The order may last no longer than necessary to enable the court to make an informed decision on the motion and expires at a time—not to exceed 14 days—that the court sets.

Committee Note

Subdivision (b). Subdivision (b) is new. When confronted with a motion to stay an order pending appeal—or to suspend, modify, restore, or grant an injunction pending appeal—a court of appeals frequently needs to hear from all parties and take time to deliberate. Sometimes it is important to grant temporary relief while that briefing and deliberation is underway. It is also important, however, that such administrative orders last only as long as necessary to serve their purpose. *See United States v. Texas*, 144 S. Ct. 797 (2024).

The amendment provides explicit authority for such administrative orders. It also makes clear that an administrative order may last no longer than necessary to enable the court to make an informed decision on the underlying motion and cannot last more than 14 days. If an administrative order is left in place for more than 14 days, it may be appropriate to treat it as effectively granting relief pending appeal, just as a temporary restraining order that lasts longer than the time permitted by Federal Rule of Civil Procedure 65 is treated as a preliminary injunction. *See Sampson v. Murray*, 415 U.S. 61, 86–87 (1974) ("A district court, if it were able to shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions, would have virtually unlimited authority over the parties in an injunctive proceeding."); *see also* 11A Wright & Miller, Fed. Prac. & Proc. Civ. § 2953 (3d ed.) (noting that "it undoubtedly is appropriate to allow an appeal from the restraining order in order to test its validity once it has been extended beyond the time allowed by the rule").

Existing subdivisions are re-lettered.

And here is the proposed amendment as redlined with the existing Rule 8:

(a) Motion for Stay.

(1) Initial Motion in the District Court.

A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a bond or other security provided to obtain a stay of judgment; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) Motion in the Court of Appeals; Conditions on Relief.

A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(A) The motion must:

(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(E) The court may condition relief on a party's filing a bond or other security in the district court.

(b) Administrative Order. The court of appeals or one of its judges may enter an administrative order temporarily providing the relief mentioned in Rule 8(a)(1) while the court receives briefing and deliberates on a party's motion. The order may last no longer than necessary to enable the court to make an informed decision on the motion and expires at a time—not to exceed 14 days—that the court sets.

(c) Proceeding Against a Security Provider.

If a party gives security with one or more security providers, each provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as its agent on whom any papers affecting its liability on the security may be served. On motion, a security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly send a copy to each security provider whose address is known.

~~(c)~~ (d) Stay in a Criminal Case.

Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.

TAB 6D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: FRAP 15 Subcommittee

Re: FRAP 15 (24-AP-G)

Date: March 6, 2025

At the spring 2024 meeting, the Advisory Committee considered a suggestion by Judge Randolph that FRAP 15 be amended in a way similar to the way in which FRAP 4 was amended in 1993. Prior to that amendment, premature notices of appeal from district courts under FRAP 4 would self-destruct if a party filed certain post-judgment motions in the district court, requiring the filing of a new notice of appeal. Something similar happens on review of agency actions under FRAP 15, under what is known as the "incurably premature" doctrine.

Judge Randolph writes that this doctrine "deserves reconsideration, either by our court en banc or through an amendment to Rule 15 of the Federal Rules of Appellate Procedure." *Nat'l Ass'n of Immigration Judges v. Fed. Labor Relations Auth.*, 77 F.4th 1132, 1139 (D.C. Cir. 2023) (Randolph, J., concurring). He explains that, under that doctrine:

> if a petition for judicial review of agency action is rendered non-final by the filing of a motion for agency reconsideration, the petition will be deemed "incurably premature." That is, the petition will not ripen or become valid to confer appellate jurisdiction even after the agency disposes of the reconsideration motion. If the party aggrieved by agency action fails to file another petition for review after the agency acts on the reconsideration motion, our court must dismiss the party's original petition for judicial review.
>
> In the past, a similar regime controlled appeals from judgments of the district courts. Like petitions seeking judicial review of agency action, appeals from district court judgments – with a few exceptions – had to be from "final decisions." Rule 4(a) of the Federal Rules of Appellate Procedure had provided that if a litigant files a notice of appeal before a post-judgment motion was made or while a post-judgment motion was pending, the court of appeals lacked jurisdiction unless the litigant timely filed a new notice of appeal after the district court acted on the post-judgment motion. . . .
>
> In 1993, appellate Rule 4(a)(4) was amended to eliminate this "particular wrinkle." Since then, if "a party files a notice of appeal" before the district court disposes of a post-judgment motion, "the notice becomes effective to appeal a judgment or order, in whole or in part,

when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B)(I).

> The case for reform of our "incurably premature" doctrine is even stronger than reasons for amending Rule 4(a)(4) in 1993. Both dealt with "final decisions" and both set a "trap for the unwary." But at least the pre-1993 requirement that a new notice of appeal had to be filed was set forth in the Federal Rules of Appellate Procedure, although the rule was "complicated" and "buried in Rule 4 of the appellate rules, which anyway are less familiar than the rules of [civil] procedure." In contrast, the "incurably premature" doctrine is nowhere to be found in the appellate rules, including where one would expect to find such a requirement – that is, in either Rule 15 itself, which is entitled "Petition for Review or Appeal of Agency Action; Docketing Statement," or in our Circuit Rule 15. . . .
>
> A petition for review filed during the pendency of a motion for reconsideration could automatically be stayed, and then automatically become effective after—but only after—the agency rules on the pending reconsideration motion. That is the approach now embodied in Rule 4 of the Federal Rules of Appellate Procedure.

Nat'l Ass'n of Immigration Judges, 77 F.4th at 1139-40 (citations omitted).

At the spring 2024 meeting, a subcommittee was appointed to consider this suggestion.

The subcommittee discovered that a proposal along these lines was published for public comment back in 2000. The latest version of that proposed amendment considered by the Advisory Committee read as follows:

> **Rule 15. Review or Enforcement of an Agency Order—How Obtained; Intervention**
>
> * * *
>
> **(f) Premature Petition or Application**. If a petition for review or application to enforce is filed after an agency announces or enters its order—but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-reviewable—the petition or application becomes effective to appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

Although the Advisory Committee at the time appears to have favored the amendment, the strong opposition of the D.C. circuit judges led the Advisory Committee to abandon it.

The subcommittee thinks that it is worth pursuing this proposal again. There has been almost a complete turnover among active judges on the Court of Appeals for the D.C. Circuit and, as least so far, we have heard no opposition. In addition, the proportion of administrative agency cases handled in other circuits has increased. Moreover, technological and administrative changes may reduce the burdens that concerned the circuit judges decades ago. The benefits of such an amendment may be more important now than in the past, and the downsides of such an amendment may be more manageable now than in the past. In particular, the value of procedural uniformity across circuits, only some of which have adopted the "incurably premature" doctrine, may have grown over time.

The subcommittee worked from the prior proposal and considered several other issues.

First, because review of agency action is party-specific (unlike the case-as-a-whole norm in civil appeals from district courts), the subcommittee thinks that the party-specific nature of review should be clearly reflected in the text of the rule.

Second, because review of agency action is more similar to civil appeals than to criminal appeals, the subcommittee thinks that the rule should make clear that if a party intends to challenge the agency's disposition of the request for reconsideration it must file a new or amended petition for review or application to enforce. That is what must be done in civil appeals. FRAP 4(a)(4)(B)(ii). In criminal appeals, on the other hand, such a premature notice of appeal "is effective—without amendment—to appeal from an order disposing of" certain post-judgment motions. FRAP 4(b)(3)(C).

Here is the subcommittee's proposal:

Rule 15. Review or Enforcement of an Agency Order—How Obtained; Intervention

* * *

(d) Premature Petition or Application. This subdivision (d) applies if a party files a petition for review or application to enforce after an agency announces or enters its order—but before the agency disposes of any petition for rehearing, reopening, or reconsideration that renders that order nonreviewable as to that party. The premature petition or application becomes effective to review or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration. A party intending to challenge the

disposition of a petition for rehearing, reopening, or reconsideration must file a new or amended petition for review or application to enforce in compliance with Rule 15(a).

Committee Note

Subdivision (d). Subdivision (d) is new. It is modeled after Rule 4(a)(4)(B)(i), as amended in 1993, and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal. Recognizing that while review of district court orders is generally case based, *see* Fed. R. Civ. P. 54, review of administrative orders is generally party based, subdivision (d) refers to an order that is made "non-reviewable as to that party" by a petition for rehearing, reopening, or reconsideration.

Subdivision (d) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-reviewable as to a party. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. Rather, subdivision (d) provides that when, under governing law, an agency order is non-reviewable as to a particular party because of the filing of a petition for rehearing, reopening, or reconsideration, a premature petition for review or application to enforce that order will be held in abeyance and become effective when the agency disposes of the last such petition—that is, the last petition that renders the order non-reviewable as to that party.

Subdivision (d) is designed to eliminate a procedural trap. Some circuits hold that petitions for review of agency orders that have been rendered non-reviewable by the filing of a petition for rehearing (or similar petition) are "incurably premature," meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *See, e.g., Nat'l Ass'n of Immigration Judges v. Fed. Labor Relations Auth.*, 77 F.4th 1132, 1139 (D.C. Cir. 2023); *Aeromar, C. Por A. v. Dept. of Transp.*, 767 F.2d 1491, 1493 (11th Cir. 1985) (relying on the pre-1993 treatment of notices of appeal and applying the "same principle" to review of agency action). In these circuits, if a party aggrieved by an agency action does not file a second timely petition for review after the petition for rehearing is denied by the agency, that party will find itself out of time: Its first petition for review will be dismissed as premature, and the deadline for filing a second petition for review will have passed. Subdivision (d) removes this trap.

50 51 52 53 54	As with appeals in civil cases, *see* Rule 4(a)(4)(B)(ii), the premature petition becomes effective to review the original decision, but a party intending to challenge the disposition of a petition for rehearing, reopening, or reconsideration must file a new or amended petition for review or application to enforce.
55	Subsequent subdivisions are relettered.

The subcommittee considered the possibility of phrasing the proposed amendment in a way that would map onto the language of the Multicircuit Petition Statute, 28 U.S.C. § 2112. The reason to try to make the rule and the statute mesh would be to avoid a party missing the opportunity to participate in the lottery to select a circuit. This could happen because a petition needs to be filed with the court and delivered to the agency within the ten-day period set in 28 U.S.C. § 2112(a)(1), and that ten-day period may expire before a premature petition becomes effective under the proposed rule. The subcommittee decided against pursuing this possibility for two reasons.

First, the phrase used in § 2112(a)(1) is "issuance of the order." Courts of appeals have different views as to what counts as "issuance" of an order, so including the term "issuance" invites importing that dispute into the rule.

Second, the point of this proposal is to save a premature petition for review that would otherwise be dismissed due to the failure of the petitioner to file a second petition. A petitioner whose premature petition is saved by this proposal is not in much of a position to complain that the petition might be heard in a circuit other than their preferred circuit. That possibility, of course, is inherent in the random selection process. Plus, so long as there is one petition for review in a circuit, that circuit is entered into the lottery. "Multiple petitions for review pending in a single circuit shall be allotted only a single entry in the drum." JPMDL Rule 25.5(a). Thus, the only situation in which this problem would matter is if the premature petitioner is the only petitioner seeking review in a particular circuit. Finally, a petitioner seeking to participate in the multicircuit lottery will already be paying close attention to such procedural details as when a petition must be time-stamped by the court and delivered to the agency.

The subcommittee considered adding a provision designed to avoid making a court's statistics look bad if the amendment results in a case being held in the courts of appeals for months or years while an agency decides whether to reconsider. But the subcommittee thinks that any such administrative concerns should be handled administratively rather than by provisions in the rules.

Finally, the subcommittee considered the possibility of codifying the incurably premature doctrine. This approach does not eliminate the trap for the unwary,

although by putting litigants on notice it should make some litigants more wary and less likely to fall into the trap. That's the way Rule 4 worked prior to its 1993 amendment, and Rule 4 was amended to eliminate the trap rather than to codify it.

Depending on what (and whether) we hear from the circuit judges in D.C., this proposal may be ready for publication this summer. Because the entire subdivision is new, this memo does not include a redline.

TAB 7

TAB 7A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Time computation (24-AP-N)

Date: March 3, 2025

Appellate Rules 26 provides:

> (a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.
>
> (1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time:
>
> (A) exclude the day of the event that triggers the period;
>
> (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
>
> (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Jack Meltzer, Senior Assistant Disciplinary Counsel at the Office of Disciplinary Counsel, suggests that FRAP 26(a)(1)(B) be amended to start counting with the first day that is not a Saturday, Sunday, or holiday. He contends that the existing rule enables counsel to deliberately file a motion late on a Friday, thereby putting two weekends inside the 10-day period for responses to motions set by Rule 27(a)(3). Usually, a 10-day period has only one intervening weekend. By deliberately filing a motion on a Friday, counsel can reduce the number of workdays available to work on a response.

These provisions are the result of a major time-computation project designed to simplify and clarify the computation of deadlines across the rule sets. *See, e.g.*, Civil Rule 6; Criminal Rule 45. I am loath to start down the path of undoing that valuable project, particularly its "days-are-days" approach. As the report regarding the Time-Computation Project explained in its May 2008 report to the Standing Committee, the "principal simplifying innovation" of that project was "its adoption of a 'days-are-days' approach to computing all periods of time, including short time periods," rather than omitting intermediate weekends and holiday when computing short periods but including them for long periods. Standing Committee Agenda Book,

volume 1, page 150 (June 2008) www.uscourts.gov/sites/default/files/fr_import/2008-06-Standing-Agenda-Book-Vol-I.pdf.

If the Advisory Committee thinks that this is a significant problem, I suggest that the better solution would be to amend Rule 27(a)(3) to provide for either 7 days or 14 days to respond to a motion. *See* Committee Note FRAP 26 (2009) ("Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method—two Saturdays and two Sundays were excluded, giving 14 days in all, [and the] advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days").

Prior to the Time-Computation Project, FRAP 27(a)(3) provided 8 days to respond to a motion. It was increased to 10 days as part of that project, which was the typical result of 8 days under the old system which did not count weekends. It was not increased to 14 days because of the need for prompt responses.

TAB 7B

From: Jack Metzler
To: RulesCommittee Secretary
Subject: Suggestion for FRAP 26(a)(1)(B)
Date: Thursday, October 10, 2024 4:52:09 PM

Hi Thomas,

I wanted to follow up on our conversation at the Inn of Court the other night, but I seem to have misplaced your business card so I'm sending this to the public facing email. I found the half-written rules proposal I mentioned, which is as follows (new text in red):

Rule 26. Computing and Extending Time
(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.
(1) **Period Stated in Days or a Longer Unit.** When the period is stated in days or a longer unit of time:
(A) exclude the day of the event that triggers the period;
(B) count every day, including intermediate Saturdays, Sundays, and legal holidays, starting with the first day that is not a Saturday, Sunday, or legal holiday; and
(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

The intent here is to address the pernicious practice of filing motions at the end of the day on a Friday, especially before a holiday. Under Rule 27(a)(3), the opposing party nominally has 10 days to respond, including weekends and holidays. Since any 10 day period will include at least one weekend, the actual working time to respond is 8 days, but the current rule gives parties the ability to significantly reduce that time by choosing to file on Friday. With no holiday, filing on Friday gives the opposing party 6 business days to work with rather than 8 if the motion were filed earlier in the week. When there is a holiday in the period, filing on Friday reduces the available work days by a whopping 37.5%, from 7 business days to 5. It would be nice if lawyers refrained from such tactics as a matter of professionalism, but experience suggests otherwise. At a minimum, the rules should not enable attorney gamesmanship; the current version of the rule rewards it. If this revision were implemented, attorneys could still file on Friday, but they would not be rewarded for doing so.

The main drawback I foresee is making it slightly more cumbersome to calculate *longer* filing dates, such as for briefs, because one would have to check whether the filing was on a Friday before simply adding 30 days and seeing if the result is a weekend or holiday. That seems like a very minor inconvenience since attorneys are already used to checking whether the last day is a weekend or holiday.

Happy to discuss if you find this interesting.

Best,

JACK METZLER
Senior Assistant Disciplinary Counsel
Office of Disciplinary Counsel
515 5th Street N.W.
Building A, Room 117
Washington, D.C. 20001

TAB 8

Effective Date	Rule	Summary
December 2018	8, 11, 39	Conforms the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term "supersedeas bond" and makes plain an appellant may provide either "a bond or other security."
	25	Amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.
December 2019	3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.
	26.1, 28, 32	Rule 26.1 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1.
	25(d)(1)	Eliminated unnecessary proofs of service in light of electronic filing.
	5, 21, 26, 32, 39	Technical amendment that removed the term "proof of service."
December 2020	35, 40	Amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.
December 2021	3	Amendment addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The structure of the rule is changed to provide greater clarity, expressly rejecting the expressio unius approach, and adds a reference to the merger rule.
	6	Amendment conforms the rule to amended Rule 3.
	Forms 1 and 2	Amendments conform the forms to amended Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.
December 2022	25	Treats remote electronic access to Railroad Retirement Act cases like Social Security cases.
	42	Requires dismissal of appeal if parties agree.

December 2023	2, 4	Rules for Future Emergencies
	26, 45	Add Juneteenth as holiday
December 2024	32, 35, 40, appendix of length limits	Amendments consolidate the provisions for panel rehearing and rehearing en banc into a single rule.

MEMORANDUM

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Judge Thomas

Re: Proposed Amendments to Rule 29/Consent filings

I write in response to the Amicus Subcommittee's memo of March 7, 2025.

After reviewing the comments to our proposed changes, the proposed changes to the corresponding Ninth Circuit Rule (and related comments), and giving further consideration to the issue, I suggest we simply retain our current amicus rule as it pertains to consent filing.

As you recall, I raised the particular recusal problem the Ninth Circuit has with amicus briefs filed by consent. The most acute problem occurs during consideration of petitions for rehearing en banc. Thus, our Court will consider an amendment to our Circuit Rule 29-2, to require leave of court to file amicus briefs to support or oppose petitions for rehearing (excepting governmental entities). This proposed amendment will bring our Circuit in conformance with the national rule. (As an aside I note that our Circuit did not change our rule when FRAP was amended in 2016. It does not appear from our records that our Rules Committee discussed it in any detail.) I believe that this amendment will solve our most pressing recusal issue.

The question of whether to require leave of court for all other amicus filings remains. However, we do not plan to make any changes at this time, and we will review it at a later date.

I do not support the proposed amendment that would purport to allow Circuit Courts to alter their internal practices as to assignment of cases. We already have that authority. The addition of specific language would imply that we do not. Our Circuit has also long recognized that the filing of an amicus brief does not *require* recusal. It is the choice of the individual judge. However, given public scrutiny, most judges on our Court choose to be careful.

In the Ninth Circuit, we have an enormous case volume--about a third of the appellate cases filed nationally. In the last calendar year, over 8,000 new appeals were filed in our Circuit, and we terminated 8,115 appeals. We usually terminate between 10,000-11,000 cases per year. We have had years in which our new filings were around 16,500 cases. To manage this workload, we have developed a sophisticated computerized case assignment system, which contains hundreds of thousands of lines of code. It assigns cases randomly, within a structure. The algorithm takes into consideration case complexity, identification of common issues, panel composition, and other matters.

Following the national adverse publicity concerning recusal issues a few years ago, we expended significant time and resources to develop an electronic recusal system that would integrate into our computerized case assignment system. That system protects judges and litigants from judges inadvertently participating in cases in which the judge has a recusal issue. The consequences of an inadvertent conflict are serious--generally involving unwinding an entire case and starting from scratch. And when a judge discovers a late recusal issue, we have to scramble to find a replacement--often from a geographically inconvenient location. In short, preventing recusal issues is very important to us.

While we appreciate the attention given by the California Academy of Appellate Lawyers to the recusal issue, the solution is not workable for us, and we would not adopt it. It would not solve our recusal issue, and it would seriously compromise and complicate our court operations. In essence, it would send us back to manual recusal checks, which is not workable given our volume. I can elaborate if necessary.

In addition, the proposal would not at all solve our larger issue of recusals during the pendency of petitions for rehearing. During that period, a judge is not "assigned" a case. Rather, if there is an en banc call by a judge, judges vote on the call. If an amicus brief is filed by consent that forces a judge to recuse, the judge can't vote, and also cannot be drawn for the en banc court. This is the problem that we have increasingly encountered in recent years.

Further, the current wording of the proposal states that "the judge may either recuse or strike the brief." However, it takes a majority of the panel to strike a brief or take other action. It would be a sea change for us to allow one judge to enter an order striking a brief.

For the same reasons, we do not support the original proposal that would allow anyone to file an amicus brief without leave of court or consent of the parties. That would put us in an untenable position with recusals.

The better solution from our point of view is to leave the existing Rule 29 intact insofar as it pertains to consent amicus filings. We will monitor the issue in our Circuit, and the Advisory Committee can review the situation in the future if necessary. However, we believe adjustment of our local rule to conform to the existing national rule concerning the filing of amicus briefs during the pendency of petitions for rehearing will solve our most pressing problem.