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.

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.

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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,

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