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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.

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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

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