SOUTHEASTERN LEGAL FOUNDATION

560 W. Crossville Rd., Ste. 104
Roswell, Georgia 30075
www.SLFLiberty.org

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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
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[3] *See* Preliminary Draft at 35, 42.