U.S. Chamber of Commerce
Litigation Center

March 28, 2024

Honorable Jay S. Bybee
Chair, Advisory Committee on Appellate Rules
Lloyd D. George U.S. Courthouse
333 Las Vegas Boulevard South
Las Vegas, Nevada 89101-7065

Re: Potential Amendments to Federal Rule of Appellate Procedure 29

Dear Judge Bybee:

I write to express the views of the Chamber of Commerce of the United States of America regarding the Advisory Committee's consideration of the latest potential amendments to Rule 29 of the Federal Rules of Appellate Procedure. 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 consistent with the First Amendment. The contemplated amendments to Rule 29 are unnecessary, and they are not sufficiently tailored to avoid encroachment on the associational rights of membership organizations.

In particular, the Advisory Committee should reconsider the potential amendment requiring amici to disclose the identities of certain non-party associational members who contribute to the preparation of their own association's amicus brief. Such an amendment would infringe on core associational rights. The amendment also discriminates against established membership organizations compared to ad hoc amici by requiring greater disclosure of established organizations' members. That differential treatment, which itself raises First Amendment concerns, should be rejected.

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 December 6, 2023 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." Dec. 6, 2023 Report at 3; *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, and the suggestion from

some members of Congress that membership associations 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, misunderstands the judicial process. The influence of an amicus curiae is directly proportional to the persuasive value of the arguments presented in the briefs submitted by that amicus. Courts do not accord substantial weight to amicus briefs submitted by the ACLU, for instance, because of the identities of that organization's donors. Rather, they accord weight commensurate with the strength of the arguments made in the brief. Indeed, the anonymity of an association's members guarantees that an amicus brief submitted by that association will be accorded weight on the basis of the strength of its arguments, rather than the identities or perceived influence of the association's members. Compelled disclosure of the members or donors of an amicus would create an appearance of judicial influence on the part of those members and donors where there currently is none, either in appearance or in fact.

Concerns over the "influence" of the supporters and members of amicus organizations are therefore unfounded. And the consequent calls for compelled disclosure of associational membership are 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*, 141 S. Ct. 2373, 2382 (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 2383 (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.* Any such compulsion must serve a "sufficiently important governmental interest," one that "reflect[s] the seriousness of the actual burden on First Amendment rights." *Id.* (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 among amicus organizations and their members, and thus do not deter amicus organizations or their members from submitting amicus briefs.

B. The Contemplated Amendments Raise Serious First Amendment Concerns

The amendments contemplated by the Advisory Committee reflect a subtle—but nevertheless 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, such information to 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 the 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. Thus, an amicus would be forced to disclose "whether a party, its counsel, or any combination of parties and their counsel has, during the 12-month period before the brief was filed, contributed or pledged to contribute an amount equal to or greater than 25% of the gross revenue of the amicus curiae for the prior fiscal year." Draft Proposal Rule 29(b)(4). And the amicus would further be required to disclose the identities of any such party or counsel. Draft Proposal Rule 29(c).

These provisions are unnecessary, counterproductive, and chilling. 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)(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 implies 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 $1000 intended to fund (or intended as compensation for) preparing, drafting, or submitting [an amicus] brief," unless the person "has been a member of the amicus *for the prior 12 months*." Draft Proposal Rule 29(d) (emphasis added).[1] Yet the contemplated amendment exempts *newly formed* amicus organizations from this disclosure requirement, providing that if "an amicus has existed for fewer than 12 months, an amicus brief need not disclose contributing members, but must disclose the date of creation of the amicus." *Id.* This proposal would directly interfere with the associational rights of membership organizations.

There is no reason to depart from the existing "member exclusion" to the disclosure requirement. 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). 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 non-party 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*,

[1] It is our understanding that the Amicus Subcommittee has recently suggested lowering the threshold from $1000 to $100. It seems doubtful that organizations could efficiently "crowdfund" solely with contributions less than $100. But regardless of the threshold, any disclosure requirement that does not include an exemption for members of an amicus organization would seriously threaten the First Amendment rights of associations and their members.

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 in this manner. The December 6, 2023 report to the Standing Committee noted the basis for this singling out, stating that the rule would, "[i]n effect, … treat recent members as nonmembers, thereby blocking the easy evasion of the current rule." Dec. 6, 2023 Report at 5. 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 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 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 formation of the association, not its 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* Draft Proposal Rule 29(d). 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 $1000 (or 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*, 141 S. Ct. at 2383.

The Chamber appreciates the Advisory Committee's concern for the interests of newly formed amicus organizations and its concomitant interest in "enabling anonymous crowdfunding of an amicus brief." Dec. 6, 2023 Report at 5; *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 often 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 Advisory 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 $1000 (or $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.

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

Respectfully,

Daryl Joseffer

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