TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
HEARING ON PROPOSED)
AMENDMENTS TO APPELLATE RULES)
)

Pages: 1 through 136

Place: Washington, D.C.

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Date: February 14, 2025

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ADMINISTRATIVE OFFICE OF THE U.S. COURTS

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Suite 206
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1220 L Street, N.W.
Washington, D.C.

Friday,
February 14, 2025

The parties met remotely, pursuant to the notice, at 10:02 a.m.

COMMITTEE MEMBERS:

HONORABLE ALLISON H. EID, United States Court of Appeals, Denver, CO, Chair
PROFESSOR EDWARD HARTNETT, Seton Hall University School of Law, Newark, NJ, Reporter
PROFESSOR BERT HUANG, Columbia Law School, New York, NY, Member
LISA B. WRIGHT, Esquire, Office of the Federal Public Defender, Washington, D.C., Member

WITNESSES TESTIFYING:

ALEX ARONSON, Court Accountability
LISA BAIRD, DRI Center for Law & Public Policy Amicus Committee
THOMAS BERRY, Cato Institute
MOLLY CAIN, NAACP Legal Defense and Educational Fund
LAWRENCE EBNER, Atlantic Legal Foundation
AVITAL FRIED, Yale Law School

DOUG KANTOR, NACS Advancing Convenience and Fuel Retailing
SETH LUCAS, The Heritage Foundation
TYLER MARTINEZ, National Taxpayers Union Foundation
SHARON MCGOWAN, Public Justice
PATRICK MORAN, NIFB Small Business Legal Center

WITNESSES TESTIFYING: (Cont'd.)

CARTER PHILLIPS, U.S. Chamber Litigation Center
JUDITH RESNIK, Yale Law School
SAI, Fiat Fiendum
JAIME SANTOS, Goodwin Proctor
ANNA SELBREDE, Yale Law School
STEPHEN SKARDON, American Property Casualty Insurance Association
ZACK SMITH, The Heritage Foundation
GERSON SMOGER, Smoger & Associates
TAD THOMAS, American Association for Justice
JULIA UDELL, Yale Law School
LARISSA WHITTINGHAM, Retail Litigation Center
KIRSTEN WOLFFORD, American Council of Life Insurers

P R O C E E D I N G S

(10:02 a.m.)

CHAIR EID: With that, let's get started. We will hear from witnesses on the Form 4 amendments first, followed by testimony on the amendments to Rule 29. All right. Our first person testifying today is Sai. I would like to call on Sai.

SAI: Good morning.

CHAIR EID: Good morning.

SAI: Good morning, Professor Hartnett and, Your Honor, the Chair, and members of the Committee. I am glad that this issue has finally gotten to the point of being moved to a rules proposal. The proposed form is certainly an improvement over the current one, but I believe it still has some fundamental flaws and some things that should be improved.

For one, the text of 28 U.S. Code 1915 and of the Prison Litigation Reform Act is very clear that the affidavit of finances is required only for prisoners. It says of things such prisoner possesses, and the word "prisoner" cannot possibly be read to mean person neither in the text of the statute nor in the context of the Act, which is how it must be read. Therefore, I recommend inserting a question at the

beginning, after the statement issues and before all the other questions, which says, are you a prisoner? If no, skip the rest of the form.

Second, this form does not give any statement of the qualification standards, and without a rooting in what is being judged against, the reasons for the questions is not motivated and a person filling it out cannot independently tell whether they qualify. I, therefore, propose a statement of that, but I will also speak it, namely, you will automatically qualify for IFP status if (a) you are not a prisoner and (b) either (1) you are on means tested welfare benefits (2) you're represented by a public defender or legal aid funded by the Legal Services Corporation or (3) your income and savings are both less than 1.5 times the federal poverty guidelines published by the U.S. Department of Health and Human Services. Otherwise, the Court will make an individualized determination based on your financial situation.

Obviously, that last part is only relevant if you do not accept my suggestion for question zero, which is that nothing is relevant to be stated unless it is present. Likewise, what is currently Question 8 at the end about welfare benefits should be moved to

the top because it is really an automatic point, so I would suggest rephrasing it to: Do you receive any welfare benefits from income-based state or federal government programs, such as SNAP (food stamps) because that is the normal term for it, Medicaid, or SSI, or are you being represented by a public defender or by a legal aid program funded by the Legal Services Corporation? If yes, and you're not a prisoner, skip all the following questions. If no, or you are a prisoner, for the remaining questions.

Question 5, assets should exclude the house somebody lives in and the assets that they use for work, like a computer or their primary car. The prisoner assets paragraph should be moved after Comments. The Yale commenters suggested putting a caveat in front of it. I think it is much simpler to just move it to the bottom and that way it is not going to be confusing.

I would also suggest a couple more structural changes. One is to make this form automatically sealed with instruction to file under seal. Second is to make it give community under 18 U.S. Code 6002, in accordance with the Supreme Court's decisions in Simmons v. U.S. and U.S. v. Kahn. I'll drop the references to those in chat and say what

circumstances will trigger a need to update the form.

Lastly, I would suggest that this be applied to civil also, not just issued by the Administrative Office, and, structurally, I would suggest that the Committee have representation from pro ses, not just people who have a structural bias to view pro ses as a problem, and allow more participation in the consideration process. Thank you.

CHAIR EID: Thank you. Now I turn to my Committee members who have any questions. It does not appear so. Thank you for your testimony.

SAI: Thank you.

CHAIR EID: Our next presenter is Professor Judith Resnik and three others, Avital Fried, Anna Selbrede, and Julia Udell.

MS. RESNIK: Good morning, Judge. I'm Judith Resnik, the R.T. Lyman Professor of Law. I hope you can hear me all right.

CHAIR EID: Yes.

MS. RESNIK: Is my sound all right? Good. Thank you.

CHAIR EID: Yes, please proceed. Thank you.

MS. RESNIK: I'm never sure in technology.

So, first of all, thank you for this opportunity for us to augment the comments that we

submitted in support of the proposed revision, and I should just add the written testimony was submitted on behalf of Law Professors Myriam Gilles, Andrew Hahn, Alexander Reinert, Tanina Rostain, and myself, as well as the other presenters here. We're augmenting to give you a little bit more information we hope will be helpful, and as we discussed with your staff in advance, we'll then field whatever questions you may have.

First, obviously, we're supporting the shift to the shortened form and hope you say yes.

Second, I just wanted to provide a little bit of background information about what we do and don't know about people seeking fee waivers at trial and appellate levels, and as you just heard, the courts have often encountered challenges in responding because the rules have been written with those of us who are lawyers and becoming lawyers in mind. So it's familiar, I assume, that about a quarter of the filings at the trial level and more than a half on appeal, as Appellate Judges know well, are people filing without lawyers, and in an article we wrote, we called them lawyerless litigants. Pro se is the term of art in the Administrative Office tables.

And I've been working on a series of

projects trying to understand the use of the federal courts managerial judging filings in state and federal aggregation and more, and I wanted to know more about the relationships between people who represent themselves and the use of the IFP, In Forma Pauperis, system. A new trove of data is now available. It's called SCALEs, which stands for the Systematic Content Analysis of Litigation Events and which coded all the docket sheets in 2016 and 2017 of federal civil cases, and then the researchers issued a report that said, in 80 percent of the cases, people who seek IFP status at the district court level get it. Well, it turns out that when you dig deeper in, the coders were not able on their first run to analyze a hundred percent of the docket sheets but only 40 percent.

And so we went and looked at the District of Connecticut, where we sit, and we understood why quite quickly, which is what voters will call there's lots of noise in the data because, in fact, you can't just find grant or deny. Sometimes you find submit more information or tell us more or back and forth that make it harder to put things in easy boxes. The punchline is that this is a time-consuming process for litigants, court staff, and judges, and the forms at the trial level have not made it as easy as it could

be for any of them to work as required under 28 U.S.C. 1915, and so the simplified form that you're providing is a great move forward and its uniformity will, we hope, be a role model at the trial level as well as the appellate.

It's also important to just flag that as far as we know, we haven't been able to find research on grant/deny rates at the appellate level or just the practices or processes. There are a few Federal Judicial Center reports that address it. And so the other point to underscore is that by creating uniformity, it'll save Administrative Office staff time in training staff and then in coding materials, and we can all have a system be more fair, more accurate, and more uniform.

And I was just reading the Federal Judiciary's long-range plan for information technology for its looking forward in 2025. I think these moves are completely consistent with that enterprise, and we applaud the movement forward and hope you will spread your wings across the rulemaking process.

I now turn to introduce Avital Fried, who will add, again, briefly. We're aiming to be right under your time limits. Thank you, and I'll mute myself but stay on camera for a moment more.

CHAIR EID: Thank you.

MS. FRIED: Good morning, Your Honor, and thank you for the opportunity to be here this morning. My name is Avital Fried, and I'm a second-year student at Yale Law School. As the Advisory Committee has already identified, the current IFP application process in federal courts can be challenging both for litigants and for court staff and, as Professor Resnik mentioned, our research primarily focused on district court IFP forms, but we've also looked at the IFP forms available online for the different circuits. We were pleased to see more uniformity across the appellate courts than we did at the district court level.

We also noticed some differences across circuits both in terms of the content and formatting. For instance, some forms still request Social Security numbers. We know that that's something that can sometimes be missed and not removed before docketing as a mistake, leading Social Security numbers to end up online. We know that the Committee has identified this privacy concern in the past, and we believe that having a new form, such as the one proposed, will solve that problem because it'll give circuits an opportunity to refresh their forms and resolve that

issue.

We also notice that the formatting varies quite a bit across circuits. For instance, some circuits offer a fillable Form 4, which can be really helpful for litigants. What's great about a fillable form is that people with computers can fill it out more easily online and people without computers can print it out and fill it out by hand. Some circuits also include a link to instructions for how to fill out the form, which we think is great.

It's also the case that the current forms, like many of the forms we reviewed at the district court level, can be confusing to litigants, and when forms are confusing to litigants, they're more likely to fill them out improperly or incorrectly, so then, when court staff are reviewing those forms, they may get into a back and forth to get the needed information in order to make an IFP determination. For self-represented litigants, this could mean that their case might not be able to go forward because of a mistake in an IFP application, and that has been noticed in the past.

Judge Rosenbaum on the Eleventh Circuit has noticed that forms often fail to communicate the consequences of their answers, and that can lead cases

to not go forward. We are excited to see that the proposed Form 4 addresses many of these issues, and with that, I will turn it over to Anna to further elaborate on how the proposed form fixes these problems. Thank you.

CHAIR EID: Thank you.

MS. SELBREDE: Good morning. My name is Anna Selbrede, and I'm also in my second year at Yale Law School. Form 4 effectively addresses many of the difficulties with the current IFP process that Avital identified by simplifying the form for litigants, judges, and court staff, and asking only for information that the court actually needs pursuant to 28 U.S.C. § 1915. This simplification aligns with best practices highlighted by the White House Legal Aid Interagency Roundtable based on recommendations from legal aid organizations. The Roundtable recommended simplified forms with plain language, which would help to reduce the current burden from the fact that 35 percent of individuals seeking legal assistance need help filling out their forms.

Form 4 directly addresses that goal with its simpler language and shortened two-page length. The revised form is also supported by research produced by law schools which have developed what they call

justice labs. These labs do empirical work to figure out how to make it easier for people to use courts and find ways to get remedies. These labs sometimes work with courts and sometimes run experiments that have people who are not in court fill out or use forms or other tools to test them. These labs' goals are to use innovative methods to help litigants provide correct information and to help courts do better at eliciting that information.

Stanford's Legal Design Lab, for example, produced a filing fairness toolkit which compiles evidence on the benefits of simplified forms and provides directions to courts on how to make them. The Harvard Access to Justice Lab is conducting a randomized control trial right now on simplified court forms. The lab is building on a preliminary survey of 22 states conducted by the Texas Access to Justice Commission. In the survey, all states reported increased judicial efficiency and economy from using these forms.

Finally, we see the uniform simplification in Form 4 as a model for improvements in district courts across the country. As Professor Resnik mentioned, we hope to see district courts follow along by using simple, straightforward forms as well,

decreasing the differences and difficulties we saw while researching for our article. From there, I would like to turn it over to Julia to sketch our small suggestions for the form.

CHAIR EID: Okay. Thank you.

MS. UDELL: Hello, everyone. My name is Julia Udell, and like Anna and Avital, I'm in my second year at Yale Law School. I want to reiterate that we hope the Advisory Committee will approve the recommendation to revise Form 4. We think highly of the revisions and we support the proposal completely. In reading through the revisions, we thought of just a few minor suggestions to make the form even clearer. I'll explain some of these, and then all four of us will be happy to answer any questions.

So, to start, one minor suggestion is to identify in Question 8 that public benefits programs may have different names depending on the state. So, in Connecticut, which is where the four of us are located, the name for Medicaid is Husky Health. In Delaware, it's called Diamond State Health Plan. In Missouri, it's MO HealthNet. And in Virginia, it's Cardinal Care. And they continue to vary state by state, and so our hope is that by flagging this variance with just, you know, an additional short

phrase, the new form will prevent confusion about whether a litigant receives the relevant public benefits that are mentioned in Question 8.

And for similar reasons, we also recommend expanding the fourth question to include the phrase old age or other dependence needs in its list of necessary expenses. As people in the United States are living longer, elder care has become an increasingly substantial expense for many Americans. Our hope here is that this minor tweak will ensure that the form captures this financial obligation that may affect an applicant's ability to pay court fees.

We also recommend modifying the first question to read what is your monthly take home pay, if any, from work? This small addition of the phrase "if any" acknowledges that many applicants may not actually have current employment income at all. We think that adding "if any" will make the new form even clearer than it already is.

Finally, we hope all litigants will be aware that they can add additional explanations for why they might be unable to pay the filing fees. As we explained in our written comment, we noticed that the current proposal invites litigants to add additional explanations at the bottom of the page after the

paragraph that specifically addresses prisoners, so in order to make sure that litigants who are not prisoners also know that they can add additional language, we encourage including the phrase "for all applicants."

In sum, we hope the Advisory Committee will approve these recommendations for submission to the Standing Committee. Doing so will be a model for clarifying and simplifying the IFP process throughout the federal courts. Thank you, and we welcome your questions.

CHAIR EID: Thank you. Does the Committee have any questions? I do not see any. Thank you so much for your presentation today.

MS. RESNIK: We appreciate your time and that you enabled us all to offer comments. Many thanks.

CHAIR EID: Thank you.

All right. We are now going to turn to Carter Phillips, and we have now moved to Rule 29 comments.

MR. PHILLIPS: Judge Eid, can you see me and hear me okay?

CHAIR EID: Yes, thank you.

MR. PHILLIPS: Okay. I apologize. It

wasn't clear to me whether I was controlling this or whether the system was controlling it.

In any event, I appreciate very much the opportunity to be here. My name is Carter Phillips. I represent the U.S. Chamber of Commerce. I suspect there will be a little more controversy with respect to Rule 29 than there was with respect to the forms, and I look forward to discussing it with you.

Let me just give you a little of my own perspective on this because I guess, for me, the hardest question I have is, why do the courts of appeals want to deviate in their amicus practice from the path that the U.S. Supreme Court has taken? And the reason I ask that question is that, frankly, most of my practice has over the years been at the U.S. Supreme Court, and I have watched the amicus practice there change pretty dramatically over time at least in terms of the number of briefs, the variety of briefs.

And in that context, the U.S. Supreme Court has obviously adopted a very liberal rule. It eliminated both the requirement of consent and motions. It freely allows briefs to be filed and treats them as appropriate. With respect to disclosures, it has the same disclosure rule that exists in the current Federal Rules of Appellate

Procedure, which is obviously a party should disclose if the party or counsel has, in fact, contributed to the amicus brief, but, otherwise, the Supreme Court, I think quite wisely, has protected the associational freedoms or the protections that organizations have so that if a member of the organization contributes to a particular brief, and as long as it's not a party to the case, that fact remains non-disclosed.

And I guess the, you know, fundamental question I have is, you know, why -- or you might have is, so what's wrong with disclosure? And, you know, in the Supreme Court's cases, right, in the NAACP decisions and the Court was talking about the very serious risks of being identified in a particular case and the consequences that would come from that, I don't think those kinds of consequences arise in the current world, but disclosure does carry with it significant risks, and they're not risks that come from the judiciary. They are risks that come, frankly, from the Executive Branch or maybe from the Legislative Branch, and I'll give you a specific example in mind. This is not a particular case. It's just a problem that I was thinking of as a hypothetical.

So, if you had a Foreign Corrupt Practices

Act case that obviously affects anyone who does business outside of the United States and an organization is inclined to want to file a brief in that case that would narrow the interpretation of the Foreign Corrupt Practices Act, I can assure you that no organization, no individual member of the organization, is going to want to stick up its hand and say I'm here arguing a particular position with regard to the Foreign Corrupt Practices Act.

And the reason why they don't want to do that is not because they're worried that the judiciary would either react one way or the other to that but rather that they say, well, now you're basically saying to the rest of the world maybe you have a problem under the Foreign Corrupt Practices Act even when, candidly, you don't or at least you don't know that you have one, but why do you want to be identified specifically under those circumstances?

And so the need for that kind of associational protection is every bit as strong, I would argue, at least in most contexts as it would be in others, and, you know, anytime you're asked to make compelled disclosures by organizations, you obviously implicate First Amendment protections.

And I would urge the Committee to re-

evaluate in light of the fact that the Supreme Court has studiously avoided creating those kinds of risks. I don't see the point of chilling more participation. You know, in the Supreme Court, I see in almost every case I work on dozens, not always dozens, but at least a dozen amicus briefs, and most of the court of appeals cases I work on I see zero amicus briefs. Occasionally, there are some. I'm sure there are some cases that obviously generate more than others, but in reality, any rule you adopt that creates a barrier to filing a brief seems to me to chill free expression, and, again, I would go back to the way the Supreme Court looks at it and the way most lawyers look at it.

I mean, the reason why we routinely consented was we expect the court to get the benefit of the widest range of views, however expressed, on the amicus side and for the court to evaluate them, take the ones they like, discard the ones they don't like, and make the decision based on the law. And going beyond that seems to me all you're doing is chilling speech or chilling organizational rights in a way that's not warranted or at least I haven't seen a problem that justifies making that switch.

Shifting gears slightly to the consent versus the motion, consent motion issue, there, I

think you're creating a really cumbersome process because, if your fear is redundancy, we'll start with that one, the problem is that in the real world, I usually am asked to write am amicus brief sometime about a week or two before that brief is done if I'm lucky. It's very rare that you end up coordinating cases, especially in the courts of appeals, well ahead of time, so the truth is I have no idea what other amici are going to do.

And usually what happens is the party whom I'm supporting files a brief, and then I have a week to get another brief in, and most of that week is spent trying to articulate what my client's views are but also attempting to, you know, find something that's not being covered by the party that would nevertheless be helpful to the court, and what you're asking us now is to consider the possibility of trying to evaluate that as against all of the other potential amici who may be filing, and, obviously, if redundancy is the fear and it's difficult to coordinate, then what you do is create a race to the courthouse, which seems to me completely untoward.

It shouldn't be whoever gets their idea in first then bars every other articulation of that idea, and, more importantly, in a world in which we are much

more globally focused, I can tell you that the rules that make it more difficult to file amicus briefs do affect foreign entities significantly more than they do domestic entities because --

CHAIR EID: Okay. I need to stop you there.

MR. PHILLIPS: All right. That's fine.

CHAIR EID: Can you wrap it up? Your five minutes has expired.

MR. PHILLIPS: I've said what I wanted to say, Judge Eid.

CHAIR EID: Okay. Thank you so much. Do we have any questions from the Committee? I do not see any. Thank you so much for your testimony.

MR. PHILLIPS: I think Professor Hartnett might have a question.

MR. HARTNETT: Judge? Judge Eid? Judge, if I can jump in?

CHAIR EID: Oh. Yes. Sorry. Go ahead.

MR. HARTNETT: Sure. Sure. Mr. Phillips, I just want to understand whether your objection to revealing -- disclosing financial relationships between a party and an amicus is categorical or whether the concern is with the percentage. That is, you know, if a hundred percent of the resources that an amicus have comes from a party, why shouldn't the

court know that?

MR. PHILLIPS: Well, yeah, no, that -- but you're talking about a different problem. Look, if a party is funding the amicus brief, that's already required to be disclosed.

MR. HARTNETT: Right. No, but if it's funding the overall activities of the amicus, if an amicus has no resources other than what's coming from a party, is there a categorical objection to that?

MR. PHILLIPS: Well, I've actually never experienced that situation, so I'm not sure. I mean, I don't know of any situation. I mean, I guess it could happen, but I've never seen anything like that happen, and it's obviously an artifice to avoid. I mean, we don't have any problem making sure that parties are not controlling amicus filings. You know, I lived in a world before the rule was adopted where that took place, and I think everybody was uncomfortable with that, and I thought that was a smart rule. But, to get at the problem you've identified, Professor, 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.

CHAIR EID: All right. Do we have any other comments?

MR. PHILLIPS: Thank you for allowing me to speak. I appreciate it.

CHAIR EID: Thank you.

All right. Next, we're turning to Alex Aronson.

MR. ARONSON: Good morning. Nice to be with you. My name's Alex Aronson. I'm the Executive Director of Court Accountability. We're a nonpartisan, nonprofit organization committed to improving transparency and accountability within the judicial system. I'm honored to testify here today in support of the proposed disclosure amendments to Rule 29. We believe these amendments serve as a necessary and very important step toward a fairer and more transparent appellate process.

Of course, at their best, amicus briefs play a vital role in appellate litigation, providing courts with diverse perspectives and expertise, but as we've seen and as I think the Advisory Committee has really helpfully documented, amici can often act as alter egos of parties or even third-party interest campaigns with negative consequences for judicial administration and fairness. Under the current form of Rule 29,

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're associated through financial connections.

This was the case, for example, in the pending Ninth Circuit appeal in Google v. Epic Games, where I served as amicus counsel in a little bit of kind of a meta appearance in amicus briefs to Professor Paul Collins, who's a leading expert on amicus briefs and their impact. He's a political scientist and a legal studies professor, and Professor Collins's brief identified that of the 18 briefs filed in support of Google in that appeal, amici associated or on the briefs of at least 16 of those briefs had documented financial ties to Google, and none of those ties, importantly, was required to be disclosed under the current version of Rule 29.

As the Committee has recognized, the identity of an amicus does matter at least in some cases to some judges, and members of the public can use disclosures to monitor courts, thereby serving both an important governmental interest and appropriate accountability and public confidence in the courts, and this transparency rationale applies

equally to knowing the identity of those who significantly fund amici, as the proposed amendments reflect.

The limitations of the current funding disclosure regime allow meaningful financial entanglements to go undisclosed. 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 brief filed by that organization, the organization's amicus filing need not disclose that party's contribution in a case involving that party. These limitations have fueled the proliferation of what scholars have deemed the amicus machine, in which amici under the control or influence of a party flood the docket with highly coordinated briefs.

Indeed, this amicus machine appears to have been deployed in force today here in this hearing in organized opposition to the proposed amendments to Rule 29. As detailed in our written submission, the proposed amendments make several improvements that will help deter disclosure avoidance schemes, and, overall, the proposed amendments enhance the adversarial process and promote fairness in appellate proceedings, improving access to information about the

interests behind amicus briefs, and this disclosure will help courts distinguish between genuinely independent and expert briefs and those influenced by undisclosed interests which can unfairly advantage litigants by amplifying the arguments of deeper-pocketed parties.

I wanted to make one comment about the First Amendment objections that some other commenters have raised, and we think that the Advisory Committee in its deliberations got this right. We believe that these amendments are fully consistent with legal precedent regarding funding disclosure, including Americans for Prosperity v. Bonta, which, incidentally, was a case that had an unusually high volume of amicus participation for many of the same interests that have shown up here to oppose the proposed amendments.

And we dispute the right -- the premise rather that there is a right to fund amicus briefs anonymously or that disclosure obligations on such funding require strict scrutiny, not least because, as the Advisory Committee observed, a would-be amicus does not have the right to be heard in court, and there are numerous other fora available for speech. But, even under that standard, the government has a

compelling interest in requiring disclosure of amicus fundings for reasons articulated in the Advisory Committee's memorandum.

If I have a few more minutes, I wanted to note that while we do strongly support the proposed rule changes, given the breadth of the risk that covert amicus influence and control pose to the integrity and transparency of the appellate process, we do respectfully suggest additional improvements to the rule. We believe that the 25 percent funding threshold is set a bit too high as it allows significant financial contributions below this level to remain undisclosed. Practically speaking, a donor that contributes 15 to 20 percent of an organization's revenue still exerts considerable influence on that amicus's operation and messaging.

And, second, we also support the request by Senator Sheldon Whitehouse and Representative Hank Johnson for a requirement of additional disclosure of financial links among amici given the extent to which we have seen this amicus machine materialize where the party in interest might not actually be even kind of funding its own operations but is actually itself a part of the amicus machine, and we can see through open-source investigative research or other, you know,

external documentation the financial connections among the amici and connecting them to the party.

It should not fall on reporters or independent researchers to document those connections if they exist and they are meaningfully contributing to the ways in which litigation is proceeding through the courts. That's something that we believe is important for courts to be aware of, for the public to be aware of. That --

CHAIR EID: Thank you. I think that's five minutes.

MR. ARONSON: Yeah.

CHAIR EID: More than five minutes.

MR. ARONSON: I appreciate your patience with me, but thank you for having us and for your consideration of these important changes.

CHAIR EID: Thank you. Does the Committee have any questions? I do not see any. Thank you for your presentation.

All right. We are now going to turn to Lisa Baird.

MS. BAIRD: Thank you. As you said, my name is Lisa Baird. I'm here today as Chair of the Amicus Committee for DRI's Center for Law and Public Policy commenting on the proposed changes to Rule 29. DRI is

the largest membership organization of attorneys defending the interests of business and individuals in civil litigation. Many of our 14,000 members regularly practice in the federal circuit courts, and DRI's Center for Law and Public Policy has an amicus committee, of which I am the Chair, and we file almost a dozen amicus briefs each year in cases that present issues of importance to the civil justice system and to civil litigation defense attorneys and their clients.

We join in the thoughtful comments provided by Mr. Phillips, and we find it notable that so many groups with varying interests in political perspectives in the written comments were united in raising concerns with these proposed amendments. We're also strongly of the view that the underlying belief that seems to have motivated these proposed amendments is that the courts should clamp down on the number of amicus briefs is misguided and based on misunderstandings about the role played by amicus briefs and the value they add to the judicial decision-making process when more perspectives are heard rather than less.

That said, for my testimony today, I wanted to focus some attention on what we see as the

practical problems inherent in the proposed Rule 29 amendments. Regarding the recommended amendment requiring leave of court for non-governmental amicus briefs, DRI's Center for Law and Public Policy requests that the proposed amendment be rejected. As an initial matter, I note that on January 6, 2023, we wrote the Committee to recommend eliminating the requirement of consent even, let alone court permission, for the filing of amicus briefs.

We continue to believe that the Federal Circuit should adopt the Supreme Court's current approach as reflected in Rule 37. In announcing that rule change, the Supreme Court Clerk explained that even a rule that allowed filing of amicus briefs on consent of the parties imposes unnecessary burdens on the litigants and the courts, so when you go even a step further and require leave of court for the filing of amicus briefs, you're adding a requirement that's all the more unnecessarily burdensome. In practice, we think that this will result in a requirement of motions for leave of court, and it will be a burden on the courts as well as amici.

You know, you have the elimination of consent. You have additional language suggesting that amicus briefs are disfavored, so you are inviting and

encouraging not only motion practice but contested motion practice, and contested motion practice over amicus briefs is going to force the courts to devote time and resources analyzing the motion and whether that proposed brief meets the standard of helpfulness that is in the proposed amendments and which a number of commenters have identified as being insufficiently defined and rather vague. Why not let the federal appellate courts just get to the heart of the matter of the amicus brief on the merits of the appeal?

If a particular brief raises disqualification concerns, it can be stricken under existing rules, but if not, the courts consider or disregard that amicus brief once on the merits instead of once in the motion practice context and again then on the merits. In sum, the proposed amendment eliminating the filing of briefs on party consent is burdensome and impractical.

And I know I'm running very short on time, but moving to the proposed amendments regarding disclosures, we have no view on whether additional disclosures are good or bad, but, to the extent they are necessary, they have to be straightforward, easy to comply with, and located in one place, and we have outlined in our written comments why we think the

proposed amendments on disclosure rules are unnecessarily convoluted, confusing, they're in multiple places, and they will present a particular challenge of compliance not just for, you know, amicus like DRI that regularly appear but certainly for individuals who may only appear once or twice in their careers as an amicus.

The current disclosure rules are simple, straightforward, easy to follow, and we suggest that the proposed amendments on the disclosure be rejected for practical concerns. Thank you very much.

CHAIR EID: Thank you. All right. Do we have any questions from the Committee? I call on Professor Hartnett.

MR. HARTNETT: Yes. Obviously, I defer to any Committee members, but if there aren't any Committee members, I'll list just one question here, and that is, do I understand that the objection to the standard, that is, that it bring to the court's attention relevant matter not already brought to the attention of the court by the parties, the notion of it being of help to the court in briefs that don't serve this purpose not being favored, do I understand correctly that it isn't -- that that standard wouldn't bother you if the consent option were maintained?

And the reason I phrase it that way is that that language about being of help to the court and that if it doesn't serve that purpose it's disfavored, that is in the Supreme Court Rule 37, so I just want to understand that the objections to the standard are tied to the requirement of a motion. Is that right?

MS. BAIRD: The motion requirement is the primary objection, but we think that there perhaps is a misperception about the ways in which an amicus brief can be of assistance to the court and, you know, there's language about redundancy and other standards that, if you're requiring motion practice, would potentially require the court to evaluate and we think that -- I can speak to what we as DRI do. A big chunk of every decision we make as to whether to file a brief, an amicus brief in a given case, is what can we add that's new and different and important? What context will we provide that no other party or amicus is going to speak to?

We don't ever want to -- you know, we want to be helpful to the court, and so that is -- and I think you'll probably hear the same from most of the other people providing testimony today. That is the motivating factor behind any of these organizations that have regular amicus committees that look to

participate in the judicial process. It's to provide help to the courts in analyzing the issues. So I recognize you need to have some standard about the helpfulness of a brief, but the reality also is that the courts, if it's not helpful, you know, it doesn't get past the clerks. It doesn't get read. It certainly doesn't change any minds. So that would be my response there.

MR. HARTNETT: Thank you.

CHAIR EID: Anything else from any member of the Committee?

(No response.)

CHAIR EID: All right. Thank you for your testimony this morning.

MALE VOICE: Judge? Judge, I see a hand. I don't -- I can't tell who it is. I think it might be Lisa Wright.

CHAIR EID: Oh. All right. You're right. Lisa Wright?

MS. WRIGHT: Okay. Here I am. Sorry, I was having trouble unmuting. I guess my question is about the concern about motion practice and if you are, you know, asking yourself if we're only going to file this brief, what can we add that's new, and, presumably, that would be put in the motion, what do you see

people could say really that would defeat that such that there would be any incentive to be having this contested motion practice? I mean, if that's articulated in the motion, I'm not understanding really that it would be worthwhile for someone to try to pose that.

MS. BAIRD: Well, the motion itself is an administrative burden on the amicus party, and I can speak for our organization. We have a set budget that, you know, it's a line item paid out, you know, set out from the regular dues of the paying members, like the lights or the rent, and we have to parcel that out to worthy cases. If we have to now add the preparation of a motion on top of the preparation of the brief itself, that will, of course, be a consideration that will limit our ability to participate in the judicial process, and it will potentially lead us to not participate because we only have limited resources.

But I would add that the briefs themselves also articulate the basis of the value. What is new? What is the different perspective? And, again, if the courts -- why not just let the courts get to the issue, right? Why make them go through this hurdle of motion practice when, if they are reviewing the amicus

brief in the context of the merits, they only have to do it once, so they're not burdened either, and they can evaluate the brief in context. Is it adding value? If not, it gets set, you know, aside in the do-not-bother pile.

Perhaps the other factor is that -- well, I've lost my train of thought, but, you know, I guess what I would say from more than 20 years of experience is, if you encourage litigants and lawyers to take -- you know, if you give them an avenue and you suggest that a motion should be opposed, they will oppose for no other reason than to impose costs and burdens, and that's why the current rule of, you know, this professional consideration of each party granting consent to anyone that wants to participate has become the standard. You know, the approach is to be professional and lenient and generous in granting consent, and this proposed rule is going to flip a switch, and once you flip that switch, you know, the parties that are perhaps -- you know, they know that they'll be on the other side of whatever brief you file, they're going to fight it. And now we're in contested motion land and the courts are going to have to deal with that, and it seems unnecessary.

MS. WRIGHT: Okay. So you see it as if

somebody that was willing to give consent would then file a motion to oppose just because?

MS. BAIRD: Yeah.

MS. WRIGHT: Okay. I understand. Thank you.

MS. BAIRD: And, again, it's possible if --

MS. WRIGHT: Thank you.

CHAIR EID: All right. Thank you. Is there any other comment?

(No response.)

CHAIR EID: Okay. Seeing none, I'm going to -- actually, we're going to take the next three witnesses. We were going to have a break here, but we're going to move it after the next three witnesses because we're ahead. So I'm going to call upon Thomas Berry.

MR. BERRY: All right. Thank you to the Committee for allowing me to testify today. My name is Thomas Berry. I'm the Director of the Cato Institute's Robert A. Levy Center for Constitutional Studies. I'm speaking today in my personal capacity, not on behalf of Cato.

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 will focus on the proposed requirement that all non-governmental 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. It would force federal judges to read and rule on motions for leave to file when their time is better spent on other matters.

I want to speak 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 appellate courts. We file roughly 60 amicus briefs per year. I can say that there are at least three times that many cases where we would file if we had the 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 have to 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 appellate courts and nearly all the rest in the Supreme Court. But, if these proposed amendments took

effect, we 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 one-in-four 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 our resources to producing that brief.

Under the current Supreme Court rules adopted in 2023, it's guaranteed the briefs submitted to the 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 brief that might not even be accepted. We could instead spend that time producing a Supreme Court brief that would be guaranteed to be accepted.

This rule would not just reduce the number of amicus briefs by rejecting some for filing, it would also reduce the number of appellate amicus briefs by causing many to not even be written in the first place. Thus, I urge the Committee to consider a likely unintended consequence of this rule. It would 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.

In 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. When they do, they're usually far less in quantity than the Supreme Court would receive in a case asking the same question. To give just one recent example, the Supreme Court received 30 amicus briefs in a case asking whether the CFPB's funding scheme violated the Appropriations Clause. The Fifth Circuit below had received only one amicus brief.

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's more expensive to file amicus briefs at the Supreme Court due to printing costs, but, 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. It eliminated the consent 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. It's the court that receives by far the most amicus briefs per case, and it's 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're 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. They should be allowed to continue doing so without interposing an unnecessary motion stage.

Finally, the limited time and resources of amicus filers is itself a reason why amicus briefs tend not to be overly duplicative. In my experience, the major frequent filers on the same side of a case will check with each other to ensure they're not repeating each other. That's the smart thing to do when we all have limited time. If there's no unique

angle to contribute in a case, I won't dedicate Cato's resources to producing a me-too brief. The rational interests of amicus filers largely serve to address concerns of duplicative briefs. There's no need for a motion stage to try to enforce an unpredictable rule against being overly duplicative.

I welcome the Committee's questions.

CHAIR EID: Thank you. Do we have any questions from the Committee? I do not see any. Thank you for your testimony today.

MR. BERRY: Thank you.

CHAIR EID: All right. We're going to turn to Molly Cain.

MS. CAIN: Good morning, Your Honor and members of the Committee. My name is Molly Cain, and on behalf of the NAACP Legal Defense and Educational Fund, or LDF, I appreciate the opportunity to testify today about the Committee's proposed amendments to Rule 29. LDF has extensive experience submitting amicus briefs to federal appellate courts, and based on that experience, we would like to comment on two specific aspects of the proposed revisions to Rule 29(a)(2) that we worry will have unintended negative consequences.

So, first, we are concerned that the

requirement that amicus briefs be limited to relevant matter not already mentioned by the parties could be understood to say that any subject matter is off limits if a party's merely mentioned it, even if the party mentioned it only briefly, or if the amicus believes that the party's discussion is 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 puts careful effort into writing amicus briefs that illuminate underexamined or underdeveloped issues, but in doing so, we are always mindful that American courts follow the principle of party presentation, which means courts often won't consider arguments from amici that weren't raised by parties, so even when our amicus briefs strive to provide important historical context or to elaborate on the purposes or nuances of legal doctrine with which we are familiar, our briefs generally expand upon a matter that parties have at the very least mentioned first.

And so we warn you that courts may interpret this language to refuse consideration of helpful

amicus briefs simply because those briefs address matters that the parties have already mentioned, and, thus, we urge the Committee to delete the first sentence of the proposed amendments to Rule 29(a)(2), but if the Committee is inclined to include some version of this language, we recommend that the language be more narrowly tailored to discourage amicus briefs that merely parrot merit 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.

And second, we are concerned about the language in 29(a)(2) disfavoring an amicus brief that is redundant with another amicus brief. We share the Committee's goal of reducing the burdens imposed by extraneous and unhelpful briefs. That is why, under the current rules, we spend considerable effort attempting to proactively identify other likely amici and coordinate our efforts with those organizations, and we often submit a joint brief on behalf of multiple amici. For much of the same reasons 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 difficult for litigants to navigate and for courts to enforce.

Even with coordination, it is impossible to predict what other amicus briefs may be filed or what they will argue, and 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, and, therefore, an amicus will often have no notice of what arguments would or would not be redundant before they file, and then courts may lack a principled basis for deciding which of the several amicus briefs they receive on the same day will be deemed the redundant ones and which briefs they will accept.

Further, the proposed rule would likely increase burdens on courts rather than alleviating them because courts will have to review all the proposed amicus briefs in order to police against redundant amicus submissions, and this is a time-consuming mode of review that is, at best, tangential to the merits of the case. And imposing this burdensome review is not necessary to achieve the Committee's goals, especially because other proposed

revisions will meaningfully enhance a court's ability to assess each potential amicus on its own individual merits and will provide a robust filter for unhelpful briefs.

So we share a common goal to ensure that amici are able to participate in ways that are actually helpful to the court of appeals, but it's also important that the courts remain open to hearing a variety of perspectives and are able to benefit from genuine expertise, and so, for these reasons, we think the Committee should carefully reconsider these revisions that we highlighted to clarify the first two sentences of proposed Rule 29(a)(2). Thank you.

CHAIR EID: Thank you. I open it up to questions. I do not see any, so thank you so much for your testimony today.

MS. CAIN: Thank you.

CHAIR EID: All right. We will now turn to Lawrence Ebner.

MR. EBNER: Good morning. I'm Lawrence Ebner. I'm Executive Vice President and General Counsel of the Atlantic Legal Foundation. Our organization is a nonprofit public interest law firm that was founded almost 50 years ago. We focus on cases involving civil justice from a free enterprise,

limited government, and sound science in the courtroom point of view, and we often file amicus briefs in the federal courts of appeals as well as in the Supreme Court.

I'd like to emphasize, as have a couple of other speakers this morning, the court of appeals amicus briefs are very important. Because fewer amicus briefs are filed in courts of appeals than in the Supreme Court, we believe they are more likely to be read and have an impact on judicial decision-making. It's important for the Advisory Committee to understand that researching and drafting a court of appeals amicus brief requires substantial effort, time, and expense.

I personally am a very experienced amicus brief writer, but it still takes me 50 to 75 hours and sometimes more to research and draft an amicus brief, and I'd like to list for you some of the steps involved in strategizing, researching, and writing a court of appeals amicus brief. The process begins with carefully reviewing a steady stream of amicus support requests that we receive at the Atlantic Legal Foundation and deciding in which cases to file while declining many other worthy requests for amicus support.

After we select a court of appeals case for amicus support, here's what's involved. First, reviewing the relevant district court briefs, transcripts, and other record materials; then analyzing the district court's opinion. We then move on to formulating amicus arguments that do not replicate the supported party's arguments and, to the extent possible, do not repeat other amici's arguments, and let me say that those of us who are experienced appellate attorneys take the admonition against duplication very seriously and we invariably try our best not to repeat arguments.

Next step, researching and analyzing key case law and researching and analyzing secondary source materials, such as legislative history and Law Review articles. That's very important for enhancing the perspective provided by an amicus brief rather than just replicating arguments. We try to draft a court of appeals amicus brief well before the supported party's brief is filed. In our experience, the seven-day filing deadline for court of appeals amicus briefs makes it impossible in most circumstances to wait for the supported party's brief.

It happens sometimes, but in our experience, we usually have enough advance notice so that we don't

have to engage in that type of hurried exercise, but we do review the supported party's brief as filed and then make any revisions to our amicus brief draft as a result of what we read, and it's a common practice in appellate litigation, at least in the amicus brief world, to share a near final draft of the amicus brief with supported party's counsel and to consider any substantive, not editorial, but substantive comments that they may have, and that's built right into the 2010 comments to Rule 29 that this is not considered asking the party to participate in drafting a brief. It's an effort in part to avoid duplication.

Then there's polishing, proofreading, cite-checking, and finalizing the brief and working with the printer and paying for its services. Nonprofits like Atlantic Legal, with a small legal staff and limited financial resources, cannot invest this type of effort, time, and expense required to prepare a court of appeals brief if there is any risk that the brief will not be accepted for filing. Currently, there is very little risk. Instead, there is what I like to call a culture of consent where experienced appellate attorneys routinely consent to the filing of court of appeals amicus briefs.

In my experience over many decades,

oppositions are rare and, when they happen, they usually come from trial lawyers who do not understand the culture of consent or the civility and courtesies routinely involved in appellate litigation practice. Requiring a motion for leave would destroy or seriously undermine this culture of consent by inviting, if not encouraging, oppositions to motions for leave, and I refer the Committee to our written comments which explain in some detail the mischief that would occur by requiring a motion for leave.

It would create a risk that an already-drafted amicus brief with all those steps, all that time and effort and expense, will not be accepted for filing, and that, in turn, would deter the preparation and filing of amicus briefs that would be helpful to a court of appeals in a particular case.

In our view, the Advisory Committee should withdraw the motion for leave proposal. With due respect, this proposal is a half-baked idea. Instead, the Advisory Committee should follow the Supreme Court's lead by amending the rules to neither require consent nor leave for court of appeals amicus briefs. I appreciate the opportunity to speak with the Committee. Thank you very much.

CHAIR EID: Thank you. Do we have any

questions from the Committee? I don't see any, so thank you for your testimony. And we are going to take a 10-minute break until, let's see, 11:21. Thank you.

(Whereupon, a brief recess was taken.)

CHAIR EID: All right. I think we can reconvene. Our next witness is Doug Kantor.

MR. KANTOR: Thank you for the opportunity to speak to you. I'm Doug Kantor. I'm General Counsel of the National Association of Convenience Stores. I've been Counsel to our Association for 24 years. For 20 of those years, at outside law firms, I was counsel to several other associations as well.

The proposed changes to Rule 29 do give me major concerns, and I do think they implicate important First Amendment associational rights, and I'd like to give you a sense of the practicalities of the advocacy that I do and that folks representing associations do generally as to why these do raise concerns.

Our association, just as one example, and these associations come in many sizes, shapes, forms, there are 152,000 convenience stores across the country. Well over 90,000 of those, 60 percent of the industry, are single-store operators. Very, very few

of our members have in-house counsel of their own. They rely on the association to let them know when there are legal issues of significance to -- or potentially of significance to their business or to the industry generally, and we have to balance all of those interests and figure out when to deploy the limited resources of the association to let courts know how cases before them might impact this broad industry.

And these things are not budgeted ahead of time, right? We don't know what cases might be coming. We often, as the Committee's already heard earlier, get very little notice when we find out, oh, here's a case that we weren't aware of but actually may have a very significant impact on us, and so that matters for quite a few of the proposed rules and the difficulties with them. So one, for example, the set of requirements on redundancy and perspectives. We often try when we can, if we know other associations may be interested, to try to submit joint amicus briefs to help the court make it easier and provide our perspective.

Sometimes we don't know who else is interested. Sometimes we're surprised by that, and sometimes even friends of ours we've worked with

before submit or don't submit in a way that is not expected on our part, but the knowledge of that or not is difficult in a coordination issue already. Adding this redundancy requirement adds to that.

And, frankly, adding to the cost of having to come up with a motion to justify why your perspective is different each time is a huge concern. These briefs are very expensive. We try to do very good work and make them relevant to the court and the case at issue, but there's a big cost factor, and having a separate motion and motions practice related to that will add very significantly to these costs that are already quite high.

In a similar way, the identification of particularly non-party funders is a major concern. Most of the briefs that we do are just funded by the association and all of our members generally from a general fund, but sometimes we can't do that. As I said, these are unbudgeted and often not expected or planned, and sometimes we have to go to individual members to ask for specific funding.

When we need to do that, we obviously pay very close attention to making sure we follow the party rules and we're not having parties to a case fund those briefs, but that does not necessarily

indicate members that have some special interest in a case that's different than the rest of the association's members, and it often has more to do with who we have tried to ask for funding more recently and who we have not.

And we have to balance those financial requests in a similar way that we do substantive requests, and, frankly, even the aspersions that were cast earlier about advocacy around this proposal, not to mention other amicus briefs, I think are exactly the reason why we have to worry about associational rights here and the rights not to have to disclose associational members and non-party funders of particular briefs. That's important.

Right now, the system actually works quite well in that consent is usually granted, folks can move forward with certainty that briefs will be accepted, and courts are free to evaluate fully the arguments of amici and decide whether they're helpful or not. We think that not having that same consent system is very problematic.

I would also say the requirement of someone having this 25 percent measure of the organization's revenue and disclosing that is also problematic, and I will tell you why. We, for example, and this is not

unusual, have many different sources of funding of our association. It's not just membership dues. That is something. We have a big trade show where members may buy booth space. They may have dozens of employees come attend the trade show. We have educational programs. We have research offerings. We do not, across all of these different revenue streams, account for and conglomerate what individual companies pay in all of these different areas. We would have to start doing that if this rule went into effect in order to continue filing amicus briefs.

It is, I think, very doubtful we would ever have someone come anywhere close to the 25 percent number, but we would not know unless we actually put in a new accounting system to track across many different business units and many different sources of revenue where that revenue comes from.

So all of those new proposals present real concerns in a system that, in our view, works well today and where, in fact, the courts benefit from getting a diversity of views from very different-looking interests and industries that they can take into account as they see fit on a case-by-case basis. So I will stop there and would welcome questions.

CHAIR EID: Thank you. Do we have any

questions from the Committee. Professor Hartnett?

MR. HARTNETT: Yes. On the earmarked contributions for particular briefs, the proposed rule lets you go to your current members. What the proposed rule is trying to guard against is somebody coming up to you and saying, hey, you know, are you planning to file? No, I'm not. Well, you know, if I give you a hundred thousand, will you file? Under the existing rule, if that person says is there any way to avoid having to disclose that I've given you a hundred thousand for this particular brief, you say, sure there is, just fill out this form and become a member.

Under the proposed rule, either you have to be a member for a while and not simply have, you know, joined the week before or a couple weeks before, or you have to be willing to make that contribution to the organization's general fund rather than simply to underwrite this brief. Can you tell me a little bit more about how that imposes a burden?

MR. KANTOR: Yes, and I really appreciate you asking because I had meant to speak to that and did not. So, yeah, so life is never as simple as we would like it to be. We do have thousands of members and we have a whole department, for example, whose job it is to keep them fully engaged and make sure they

renew their membership on time every year, and many of them don't, and it's a constant source of difficulty and frustration, and so, at any given time, I may have a member that in my own mind has been a member for 30 or 40 years who let their membership lapse in the last 12 months.

And the only way for me to know that is to go to our folks who are already quite busy tracking folks down and trying to keep this machine running and pepper them with these kinds of requests, and so it's, one, a big administrative burden to do that. They're already pretty burdened and would not appreciate me doing that. And, two, it doesn't actually reflect what I think you're trying to reflect in terms of who's a member just for the purposes of a brief versus somebody who, you know, we have administrative difficulty making sure they pay their dues on time, and so, you know, I would tell you that for whatever it's worth, we don't -- look, we wish people would just be willing to throw money our direction who are not our members. It doesn't tend to happen, but we do have this administrative issue with figuring out who's been a member when and who's lapsed when and all those sorts of things that is hard enough for us to keep the association running.

CHAIR EID: Thank you. Anyone else?

(No response.)

CHAIR EID: All right. I don't see any more questions, so thank you so much for your testimony today.

MR. KANTOR: Thank you.

CHAIR EID: All right. The next person on our list, Dana Livingston, is not able to make it and is relying on submitted comments, so we're going to turn to Seth Lucas.

MR. LUCAS: Good morning. So my name is Seth Lucas. I am a senior research associate at The Heritage Foundation and a law student at the Antonin Scalia Law School, George Mason University. I want to thank you for hosting today's hearing. I'm here today to urge this Committee to withdraw, as many of the people who have already spoken today, to withdraw the proposed Rule 29 amicus disclosure amendments, which I'll refer to for ease of reference as the association disclosure rules.

As my colleague, Zack Smith, and I explained in the legal memorandum we recently published and filed with our comment letter, the proposed rules are unnecessary, politically motivated, and Constitutionally suspect. I will address why this

Committee has not provided a legitimate justification for the proposed rules, while Zack will later address the proposed amendment's political origins and their Constitutional problems.

The Committee justifies the proposed association disclosure rules by analogy to campaign finance disclosures in voting. I would like to point out that this justification flies in the face of judicial impartiality and also is a post hoc justification that was never raised during deliberations about the proposed rules. As several submitted comments have already ably explained, judging is not at all like voting.

In an election, it does matter who or what will influence a candidate's policy decisions if a person is elected. Voters have an interest in knowing that information, but judges have no similar interest when deciding a case. Judges are not supposed to decide cases based on who is on either side or the changing winds of public opinion. Judges are instead supposed to decide cases based on the facts and the law. When judges look at amicus briefs as parameters of public opinion or for indicia of what outcome is favored by one's friends or political opponents, that violates the principle of judicial impartiality.

It's one thing to use the identity of an amicus or its author as a heuristic of the quality of a brief or an indicator of what kind of argument might be raised. After all, who wouldn't ignore a brief from Seth Waxman, Lisa Blatt, or Paul Clement? It's another thing entirely to weigh the merits of an argument based on the identity of who is making the argument or whom that argument might benefit.

Besides that, the analogy to campaign finance is a post hoc justification never before raised by members of this Committee. Not once from October 2019 to May 2024 did anyone seriously contend that judging is like voting and that campaign finance-like rules are needed. If someone did, it's just not in the minutes for the public to examine. In fact, the May 2024 memorandum regarding the association disclosure rules is the first time this argument was seriously discussed in the record. Instead, for over three years, the Committee struggles to clearly articulate a reason for changing Rule 29, as the minutes evidence.

First, this Committee didn't consider amendments at all. It was only contemplating what the amicus act might do, and when the bill didn't move, the Committee seemed to drop the matter, aside from

investigating who might be affected by its provisions. Then, after receiving a letter from Scott Harris, Clerk of the Supreme Court, this Committee does begin considering changes to Rule 29, and when Senator Sheldon Whitehouse and Representative Hank Johnson contact the Rules Committee after this, this Committee quickly assures them that it's already working on amendments.

The Advisory Committee subsequently claims that the Supreme Court had asked it to consider amendments and that it wouldn't be right to say that no problem exists and to do nothing, but Scott Harris only asked this Committee to consider whether a change was needed, not to actually amend Rule 29, and he never said that the Chief Justice, much less any justice, was interested in the question.

Moreover, he sent the letter only after Senator Whitehouse and Representative Hank Johnson threatened the Supreme Court with adverse legislation if it didn't change its rules. To say that the Supreme Court had made the ask was at the very least an exaggeration. At other times, members tossed around purported concerns about dark money, evasion of existing rules, or a single person funding amicus briefs to form a misleading appearance of consensus,

but none of these arguments stuck. None of them are enduring.

When pressed for actual evidence of a problem, one member who seemed particularly concerned about the issue was able to cite only vague concerns about evidence evasion and transparency and anecdotes at the Supreme Court. When another member asked if judges were actually being frequently misled by amicus briefs, no one bothered to answer. Others expressed skepticism that a problem even exists.

In light of this record, it's no wonder that this Committee doesn't make an effort today to justify the proposed association disclosure rules with carefully articulated rationales developed through extensive deliberations. Frankly, there weren't any.

After three years, all members could point to as justification for the proposed changes were unsubstantiated allegations and concerns that were ultimately rooted in insinuations of misconduct raised by a Senator and Congressman who were incensed by judicial opinions they didn't like.

In sum, the only thing we all can agree upon today is that, like Mr. Potter in "It's a Wonderful Life," Senator Whitehouse and Representative Hank Johnson are talking about something they can't get

their fingers on and it's galling them, and now, as my colleague will explain later today, they want the Judicial Conference to do what Congress rightly refuses to do.

So I urge this Committee not to drag the judiciary into identity politics by adopting what ultimately is a partisan solution in search of a problem. It should, therefore, withdraw the proposed association disclosure rules. Again, thank you for the opportunity to appear today, and I welcome any questions you might have.

CHAIR EID: All right. Do we have any questions. Professor Hartnett?

MR. HARTNETT: So I take it your answer to the question that I had asked Mr. Phillips is yes, you do have a categorical objection to revealing financial ties between a party and an amicus so that if a party contributes 100 percent of the funds of an amicus, you don't believe that should be revealed?

MR. LUCAS: I would actually answer that a little different way. The current rules aim to identify when an amicus is just an arm of the party. In other words, it's trying to prevent parties from getting two bites at the apple. But the current proposals are premised on a different inquiry, whether

someone is influencing amicus, but it seems that the proposed rules want to have its cake and eat it too. On one hand, the rules suppose that influence by a party on amicus participation is bad and somehow this needs to be disclosed.

But, as the notes to the current rule explains and as members have repeatedly brought up during deliberations, it's a good thing when amicus are coordinating with each other and with the parties to make sure they're not duplicating arguments, to make sure that they're unique. And other people who have testified today have explained that they are consciously trying to prevent this. As the memo that Zack and I published explains, the practice of amicus wrangling and, in fact, what some call amicus whispering is very common at the Supreme Court.

And the Supreme Court has loosened its rules apparently in recognition that this is actually a good thing when parties are having someone else go out and help amici coordinate with each other to provide unique and carefully developed arguments that aren't repeating the party's decision. So, to answer your question, the problem isn't money. It's whether the parties are getting a second bite at the apple. The current rules do prevent that, and the new rules are

premised on a totally different inquiry.

CHAIR EID: All right. Any other questions? I see none, so thank you so much for your testimony, and we are moving on to Tyler Martinez.

MR. MARTINEZ, Judge Eid and members of the Committee, thank you for having me today. I'm going to also talk about donor privacy issues. I wrote my set of comments on behalf of the National Taxpayers Union Foundation and People United for Privacy. Look, we didn't file two sets of comments. We filed one. We filed one together, proving that these things can be done together and that sort of thing.

I have, you know, 10 pages. It's about the length, ironically enough, of an amicus brief. I have 10 pages of law that I put in there, and the Committee can read it, but I want to focus today on just a few things from what we wanted to talk about and then hopefully get questions because, at heart, I'm an appellate lawyer and there's nothing worse than a cold bench, so, hopefully, I can get some questions.

First, amicus briefs are good, especially in areas of arcane law, like tax, National Taxpayers Union Foundation, or campaign finance, which is where I worked for 10 years as well, working on donor privacy issues. These areas are full of traps for the

unwary, things where the statute doesn't necessarily line up because it's been in judicial receivership since 1976, for example, in campaign finance laws' case. There's been all kinds of stuff that goes on. We can be helpful. Now my day job is not to write amicus briefs all the time. I write. Yeah, I litigate. My main job is to litigate and protect taxpayers all across the country at the Taxpayer Defense Center.

When I have time, I write amicus briefs. Ironically enough, I was up until 2 a.m. last night working on a Supreme Court brief, but I write when I have time to try and lend my expertise on some of these really arcane, strange areas of law. So amicus briefs are good.

Moving to my actual comments and hopefully what this Committee is most concerned about, donor privacy is really important and has been protected by exacting scrutiny. Exacting scrutiny, as you all are aware, requires a sufficiently important governmental interest and that it be narrowly tailored. We already know that.

What you might want to consider, and I think where the Committee notes and proposals and comments have been tripped up, is there's actually two lines of

thought on exacting scrutiny. There's the well-tread area of law in campaign finance law where you have people saying, oh, well, we're really talking about issues, we're not talking about politics, and so a lot of these cases are on the line between what is support for or against a candidate versus talking about issues that come up every year, you know, the hot-button issues that people care about a lot that animate the electorate. You know, abortion questions, gun questions, tax questions sometimes, all those sorts of things that really animate men are on the ballot in the states or are major parts of political campaigns.

Those areas of law are well tread, and the case of Nixon versus Shrink Missouri Government PAC tells us that if it's well tread, you don't have to put up a lot of effort into meeting exacting scrutiny because the work has already been done. But, when you do something new or when it's outside of campaign finance, then it gets a lot tougher, and this is the area that the Federal Rule of Appellate Procedure 29 is going to fall into.

When you have this new area demanding broad donor disclosure, you're going to have to prove it, and when that was expanded in campaign finance law in what was commonly known as the McCain-Feingold Bill,

which is technically known as the Bipartisan Campaign Reform Act of 2002, the court case that generated that created a hundred-thousand-page record. That's what a showing under exacting scrutiny needs to look like. That's when you're saying, okay, we're regulating new areas of speech, new areas of core First Amendment activity. Here's why we absolutely needed it.

And it passed. It passed Constitutional muster. But, when you're talking about things that aren't that, like Americans for Prosperity Foundation versus Bonta, you have a situation where the government can't meet that either as applied or often facially, and you've already heard today that AFPF was a big-deal case. It certainly was. It generated a ton of amicus briefs at the U.S. Supreme Court. Why? It was all across the ideological spectrum. You had everyone from the ACLU to the Institute for Free Speech to -- you had people all across the ideological spectrum writing on this saying this is going to be a danger to our operations, to the ability for us to advocate on behalf of our people, especially on areas that are hot-button issues that create a real danger of threats, harassments, or reprisals.

So, at that point, it failed, and so I caution the Committee to remember that you can't just

say, oh, look, this was approved in some campaign finance case, though that often gives you the articulation of the test. Campaign finance area has been well litigated since 1976, since the passage of the Federal Election Campaign Act in the wake of the Nixon Administration's, shall we say, extracurricular activities, and so, as a result, that is important for the Committee to remember.

And, lastly, I'm happy to talk about anything else that has come up here, but I was trying to stay in my lane as exactly what these rules are asking for, what courts always ask for. No one wants to read duplicative briefs. No one wants any of that sort of thing. But what you do want to do is get that expertise, and sometimes the parties get the law wrong and sometimes the amicus can help you see something that wasn't there. And so I'll happily take any of your questions. Thank you.

CHAIR EID: Thank you. Do we have questions from the Committee? Professor Hartnett.

MR. HARTNETT: You've heard this question if you've been sitting there. Is your --

MR. MARTINEZ: I have.

MR. HARTNETT: So is the objection categorical or is it to the percentage being too low?

That is, if we were dealing with, you know, 90 percent, 75 percent, you know, a hundred percent of the funding of an amicus coming from a party, you still have a problem with all of those?

MR. MARTINEZ: As it's drafted now, yes, it's a categorical problem. If you're concerned and your question has been repeated to everyone who's talked about donor privacy, 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, certainly, it has to be much more than 50 percent, but if there's some way that there's control over the promoted amicus, at that point, it's an issue. When you come up to, like, something dealing with earmarking or not earmarking, the problem has been proven in campaign finance law knowing what qualifies as earmarking has gone back and forth in the D.C. Circuit and it has been heavily litigated by the FEC.

MR. HARTNETT: Thank you.

CHAIR EID: All right. Anyone else? I see no further questions. Thank you so much for your testimony today.

MR. MARTINEZ: Thank you for having me.

CHAIR EID: All right. Now we're going to

Sharon McGowan.

MS. MCGOWAN: Thank you so much, Your Honor, and thank you to the Committee. My name is Sharon McGowan, and I am the Chief Executive Officer of Public Justice, a nonprofit and nonpartisan legal advocacy organization founded in 1982 that focuses, among other things, on preserving access to justice for civil litigants. While we provide direct representation as counsel in many of our cases, we also regularly file amicus briefs in the federal courts of appeals. We greatly appreciate this opportunity to comment on the proposed amendments.

We asked to speak today specifically to urge the Committee to reconsider its proposal to require motions for leave to file all non-governmental amicus briefs, and I would just say that, you know, the current package of proposed amendments to FRAP 29 seem to have connected the consent and motion requirement to the Committee's concerns about disclosure and recusals, but we believe that these issues can and should be decoupled. Specifically, requiring motions for leave to file, regardless of consent, at the initial merits stage is not necessary to prevent recusal, may prematurely eliminate helpful briefing, and undermines larger efforts by the courts to promote

cooperation and instead may promote additional and unnecessary litigation.

First, Public Justice understands that the Committee is concerned with amicus briefs forcing recusal, but the existing amicus rule addresses that concern. Existing Rule 29(a)(2) permits a court of appeals to strike an amicus brief at any time if it would result in a judge's disqualification. In other words, it is already true that amicus briefs need not force recusal regardless of whether the brief was filed on consent or contingent on a motion. Also, all of the information that points to whether recusal is proper is contained in the brief itself. The motion provides no additional information relevant to recusal. Moreover, motions for leave to file amicus briefs are often filed and ruled on well before the panel hearing the merits is assigned, too soon to know whether a brief, if accepted, would force recusal.

Second, the Committee expressed that motions may be useful as a tool to screen out unhelpful or duplicative amicus briefs. I know a number of folks have talked about that today prior to my testimony, but let me just reiterate, you know, that because motions for leave to file amicus briefs are often considered well before the panel hearing the merits is

assigned and are frequently decided by the clerk or motions panel, they are unlikely, and by "they," I mean the motion requirement, these motions are unlikely to further that goal either.

As such, members of the court that are in the best position to determine whether an amicus brief is likely to be helpful, namely, the panel that will be considering the case on the merits, are often not those deciding whether to grant motions for leave to file amicus briefs. As a result, truly useful amicus briefs may be screened out before any member of the court has an opportunity to understand the breadth of the merits, and unhelpful amicus briefs may be permitted to proceed. Motions for leave are simply not an effective screening tool. And so let me just offer our own experience here at Public Justice which illustrates these points.

In one case, we filed a motion for leave to file an amicus brief in the Eighth Circuit which was opposed on the basis that our brief would be generally duplicative of a party's briefing. Just one day after briefing on the motion was complete but before the completion of merits briefing and well before the assignment of a merits panel, the motion was granted.

In another case in the Tenth Circuit, we

filed an opposed motion for leave to file a brief in support of neither party, meaning that it was filed before the appellee had even submitted its brief. That was provisionally granted one day after the motion briefing was complete. That motion was decided by a two-judge motions panel that had no overlap with the merits panel.

And in a Sixth Circuit case, we filed a motion for leave after one of the parties declined to consent, but the party then did not go on to file an opposition and the clerk granted the motion.

In all of these cases, our being forced to file a motion merely resulted in our request being added to the workload of the motions panel or clerk when the merits panel would have been far better positioned to determine whether our brief was helpful to its consideration of the merits. In fact, in the Sixth Circuit example that I mentioned, the merits panel affirmatively stated during argument that it found our brief helpful in deciding the case.

But, even putting aside the question of who would rule on such a motion for leave, whether a motions panel or the merits panel, no denying or granting of additional motions is needed for the merits panel to decide which briefs are valuable and

should be given careful consideration and which should be disregarded. The panel simply can do so without the parties having to litigate and the court having to decide whether they should be permitted to file their brief in the first place.

As the Committee's well aware, this is now the practice of the Supreme Court. It permits all amicus briefs to be filed without consent or motion and considers their contents if they are useful and ignores them if they are not, and that brings me to my third and final point, which I know some of the other witnesses have touched on today. At a time when the courts are trying to promote cooperation and consultation among counsel to decrease litigation expense, delay, and strain on judicial resources, this amendment tacks in the opposite direction.

Requiring these additional motions does not produce any clear benefit. It will not solve recusal concerns and is not an effective means of screening for utility to the court. All it will do is require more litigation time and expense, and, moreover, imposing this requirement of motion potentially opens the door for substantially more and unwarranted opposition to the filing of amicus briefs, which would also demand more of the courts' time not only with

respect to deciding whether to accept the brief at all but also in refereeing the attendant request for extension of time and other disputes that motion practice can sometimes manifest.

And so, on this point specifically, I just want to urge this Committee to not adopt a rule requiring a motion, and I just want to make sure that I emphasize that a number of the comments of other witnesses are very much consistent with our experience and, as you've seen, the broad range of different groups with whom we are often not aligned on substantive matters, but I think we all can generally speak to, you know, the culture of consent, the desire to sort of let the court have the benefit of these arguments.

But also, to the point that Ms. Cain and Mr. Berry made, we often are trying to make sure that we are offering something of unique value and expertise to the court and will join forces with other organizations to make sure that we are not necessarily engaging in duplicative efforts because, you know, that is effective advocacy, and so, you know, I think it is important to not only sort of recognize that there is not really a problem in this regard that's in need of solution, but putting this rule in place, Mr.

Carter Phillips recognized, you know, does also create a question of, you know, if we're overpolicing duplication, then what does that look like, and does it really contribute to a race to the courthouse.

And that, in many ways, we think would be completely counterproductive to what amicus practice is designed to accomplish, which is truly to be a friend and a helper to the court in deciding the important issues that are being decided in the courts of appeals across the country. So we thank you so much for your consideration, and we urge the Committee to decline to require motions for leave to file amicus briefs in all cases.

CHAIR EID: Thank you.

MS. MCGOWAN: And I welcome your questions.

CHAIR EID: Okay. Thank you. Do we have questions? Ah, Professor Huang, please ask your question.

MR. HUANG: Thank you, Judge. Can you hear me okay?

CHAIR EID: Yes.

MS. MCGOWAN: Yes.

MR. HUANG: Great. Ms. McGowan, thank you very much for your testimony and for the written comments. Are you going as far as -- I mean, would

your position be to go as far as to remove the consent requirement altogether?

MS. MCGOWAN: We actually think that the Supreme Court rule has worked well in practice, and so we would absolutely be comfortable with a rule in that regard. To the extent we were trying to sort of address the particular sort of proposal that the Committee has put forth, we wanted to make sure to sort of weigh in on that, but in our experience, the Supreme Court rule has worked well, and we certainly would encourage, if this Committee wanted to go back and revisit that, we would be very comfortable under that approach.

CHAIR EID: All right. Anyone else? All right. I see no more questions. Thank you so much for your testimony today.

MS. MCGOWAN: Thank you so much.

CHAIR EID: All right. We're moving on to Patrick Moran.

MR. MORAN: Thank you, members of the Committee. My name is Patrick Moran, and I'm a senior attorney with the National Federation of Independent Business, Small Business Legal Center. The NFIB Legal Center is a nonprofit public interest law firm established to provide legal resources and be the

voice for small businesses in the nation's courts. It is an affiliate of the National Federation of Independent Business, which is the nation's leading small business association. We are regular amicus filers in federal courts of appeals.

Small business owners are not lobbyists and many of them are not lawyers. The outcome of litigation often affects them. Yet, by themselves, your average small business owner can't do much about it, and that's why they depend on the NFIB Legal Center to act as a true friend of the court, helping judges to see how their decisions may affect small businesses. The proposed amendments to Rule 29 will get in the way of that important mission. NFIB opposes the proposed amendments for three reasons: First, they discourage helpful briefs. Second, they are costly. And third, they are needlessly out of step with the Supreme Court rules on the same topic.

First, the discouraging of helpful briefs. The proposed helpful and relevant standards will act as an unnecessary barrier to the filing of amicus briefs. After all, what one judge finds helpful another may find unhelpful, and, currently, there's already a remedy for that. A judge can disagree with an amicus brief's arguments and decide that case in a

different way. But that's not the end of the story.

Even if a judge does not agree with the content of an amicus brief, those briefs can inform the greater legal discussion, including dissenting opinions, Law Review articles, and even arguments in other cases, but under this new standard, the punishment for an argument that is not in line with the decision to come will be perhaps the worst one conceivable -- wasted time, wasted effort, wasted money, and an inability to be on the record -- and it creates a new problem. Amici will only submit a brief if they suspect the judge will agree with its arguments, creating a judicial echo chamber.

Second, the cost. In short, filing amicus briefs can be expensive for nonprofits like ours. Small teams of attorneys can't be barred everywhere and often need local counsel. Sometimes we can find it pro bono, but oftentimes we'll need to pay and this can cost thousands of dollars. Even if we draft a brief entirely in house and really only need local counsel for the limited purposes of formatting and filing, it can still cost thousands of dollars.

Adding in a motion requirement will drive this price tag up significantly, especially when you consider the content of the motion, which is an

argument in itself trying to persuade the judge just to allow the brief, and all this for a brief that may still get tossed out under the relevant and helpful standards. Nonprofits seem to be good stewards of the resources entrusted to us, not taking speculative gambles. The proposed rules are thus creating the very uncertainty they claim to solve and will discourage briefs.

Finally, the proposed amendments are completely the opposite of the Supreme Court's amicus rules. As we noted in our comment letter, it would make sense for the courts of appeals to build some levees if they have a flood of amicus briefs that the Supreme Court isn't experiencing. Yet, as the Committee has acknowledged, the Supreme Court receives significantly more briefs than the courts of appeals. Yet, instead of raising barriers for amici, the Supreme Court has gotten rid of the notice and consent requirements. So what problem are the courts of appeals dealing with that the Supreme Court isn't? If the answer is recusal, why change the rules for amici rather than relying on the rules as they are, which already solve the issue?

The proposed amendments certainly do not provide a satisfactory answer to these problems.

There appears to be no evidence of a problem that would justify such a radical departure from the Supreme Court's approach. If there is a problem, conformity to the Court's approach can solve it. The proposed amendments will result in less-developed records, intimidated amici, wasted resources, and uncertainty. The Committee has stated clearly that it wants to eliminate confusion. I encourage you to live up to that standard by adopting a rule consistent with the Supreme Court's rules so that there is one clear standard for amicus briefs, not two opposing ones.

Thank you for your time. I welcome any questions from the Committee.

CHAIR EID: Thank you. Do we have any questions? Lisa Wright.

MS. WRIGHT: Hi. Thanks for your testimony. When you were saying the concern about discouraging helpful briefs and perhaps only submitting briefs if expecting the court would agree with the position, I mean, are you suggesting that you would fear that judges would reject the filing of an amicus brief or an amicus brief because they would disagree with the position you're putting forth or --

MR. MORAN: Yeah, I mean, that's certainly it.

MS. WRIGHT: -- what's the reason that they would deny it? What are you contemplating they would be?

MR. MORAN: Right. So I think it kind of echoes the concerns that some of the previous speakers brought up, right? It's like there's a problem first that it could be content-based. I mean, is it? Will it not? We don't really know at this point. But the major concern, I think, is that there's a question of duplication, and that can be very broad and very unclear, right? So, if two filers have, let's say, a similar point or a similar angle, which, you know, a lot of times amici can coordinate with each other but not always. We don't always know who's filing, you know, and oftentimes it's a pile of briefs on the same day that get filed, so it can be difficult to know who's filing what on what topic, and if there's overlap, does that mean that a brief automatically gets struck? I mean, that raises a real problem for us resource-wise, so we have to consider that.

MS. WRIGHT: Thank you.

CHAIR EID: And anyone else? I see no other questions, so thank you for your testimony.

MR. MORAN: Thank you.

CHAIR EID: And it was contemplated we take

a break now, but we're so far ahead. We're just going to go ahead to the next person, Jaime Santos.

MS. SANTOS: Hi, Judge Eid. It's Jaime Santos, but it is spelled like Jaime Santos.

CHAIR EID: Oh, okay.

MS. SANTOS: In the spirit of appellate practice, may it please the Committee. I'm Jaime Santos, and I'm the Co-Chair of the Supreme Court and Appellate Practice at Goodwin Proctor, but I do want to be clear that my testimony today isn't being offered on behalf of my firm or any of my clients, and it doesn't reflect their views and might even contradict them. Instead, I'm just testifying in my own capacity as someone with a particularly nerdy interest in appellate rules and also someone who's filed dozens of amicus briefs at basically every level of the federal court system, and I'm planning to focus my comments today on the practical implications of the proposed amendments.

I'll start with the proposed amendment to Rule 29(a)(2) which newly defines the purpose of a permissible amicus brief. In my view, the appropriate purpose of an amicus brief is to provide information to a court. It might be legal, factual, historical, or contextual that can aid in judicial decision-

making. I think the proposed amendment to Rule 29(a)(2) goes awry by suggesting that an amicus brief can only be helpful if it discusses a matter mentioned by the parties or by other amici or if it's not mentioned by the parties or other amici, and I don't think that's right for a couple reasons.

First, and I think particularly focusing on the kind of disfavoring duplicative points, I think the same basic point in a brief can be framed in different ways, or it can be accompanied by different examples or different analogies that might resonate more powerfully with one judge or another and it can still help the court reach informed conclusions, and I think that's especially true where non-parties and their lawyers might have more on-the-ground experience with the matter and they can explain the issues in ways that might be more digestible or persuasive than some of the parties or their lawyers.

Second, I think that the notion that redundancy among briefs isn't helpful is fundamentally wrong. I think there are many cases in which the sheer breadth of and quantity of non-parties that are willing to get involved as amici can itself offer important context to courts, so 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. And, of course, redundancy can sometimes be unhelpful, but, if that's the case, courts can ignore unhelpfully redundant information in amicus briefs just like they ignore unhelpfully redundant information in party briefs every day.

Next, I'd like to address the proposed motion for leave requirement. I too strongly urge the Committee to reject this proposed amendment, and if anything, I urge the Committee to adopt the Supreme Court's opposite approach. I have the rare experience of having filed dozens of amicus briefs in district court and in the court of appeals and, as you know, courts of appeals don't currently require motions for leave when there's consent, and parties typically don't withhold consent because doing so violates what

I think of as FRAP 101, don't be a jerk.

But, in district court, where motions for leave have to be filed even with consent, lawyers and parties for some reason cannot help themselves in my experience. For the district court amicus briefs I filed, and, again, I filed dozens in district court, the party that's not supported by the brief has filed an opposition almost without exception, and they often make pretty ridiculous arguments in lengthy oppositions that distract from the substantive issues in the case.

In my view, the proposed motion for leave requirement will just lead to more work for under-resourced and overworked courts. Judges typically have to read a proposed amicus brief to see if leave to file is warranted, and your brain can't really unread a brief that's already read, so the leave requirement serves very little purpose from a judicial decision-making perspective aside from forcing courts to read not only amicus briefs themselves but also motions for leave, oppositions, and replies.

Moreover, amicus briefs are often written pro bono or at deeply discounted rates. Adding motion practice in every case will only increase the amount of uncompensated work required by lawyers like myself,

and if an interested non-party goes through all the trouble to hire a lawyer to prepare an amicus brief or if a lawyer spends dozens and dozens of hours writing an amicus brief pro bono only for a court to deny leave even with consent, it's an extraordinary waste of resources, not to mention demoralizing to those of us who serve as officers of the court and are doing our level best to offer information to aid judges in making decisions. And, again, courts already have a very powerful tool to deal with unhelpful briefs. They can simply ignore them when reaching a decision.

Finally, I wanted to offer three quick points regarding the proposed new detail disclosure rules, which I urge the Committee to reject. First, appellate litigators like myself frequently represent many small organizations that band together to offer their viewpoint in cases of public importance, and I think that would be all but impossible under these disclosure rules, and the vast amount of space the proposed disclosures will take up for each organization will mean less room that we have to provide substantive information that could be helpful to the court.

Second, technical compliance with the disclosure rule might be easy for regular players like

the ACLU or the Cato Institute, but for organizations that file less frequently and may not have detailed revenue, donation, and funding information at their immediate disposal, I think the proposed disclosure rules will make it impossible for them to lend their perspective, especially on the tight timelines in which amicus briefs are usually prepared. So, as a practical matter, I think the proposed rules will simply mean fewer helpful perspectives being offered.

And, third, all of us who testified today are basically serving as amici to the Rules Committee. None of us was required to provide the disclosures proposed in the Rule 29, and yet the Committee seems completely capable of evaluating our comments on their merits, and, surely, the members of the federal appellate courts can do the same. Thank you.

CHAIR EID: Thank you. Do we have any questions? I don't --

MS. SANTOS: I was just -- oh, sorry.

CHAIR EID: Oh, go ahead.

MS. SANTOS: I was just going to say there was one question asked of Ms. Baird from DRI earlier that I think I might be able to provide a helpful answer to, and if I promise I won't violate proposed Rule 29(a)(2) by being duplicative, could I offer a

response?

CHAIR EID: Yeah, please do.

MS. SANTOS: Okay. Thank you. So Ms. Baird was asked something along the lines of the following. I think she was asked, if it's true that amici don't file redundant briefs, then why are you worried about oppositions being filed? Because, if there's no good grounds to oppose, then parties won't file oppositions.

So, in my experience, parties have offered a whole range of non-compelling reasons for opposing amicus briefs, and I'll just give a few examples.

So, if the amicus briefs address an issue mentioned by a party, oppositions argue that they're improperly duplicative. If amicus briefs address an issue not mentioned by a party, oppositions argue that they're improperly novel. If a party's well-represented by experienced counsel, then oppositions argue that there's no need for amicus advocacy. And if a party is not well-represented by experienced counsel, oppositions argue that amicus briefs can't fill gaps that are left by party counsel.

I've seen oppositions argue that amicus briefs are just kind of altogether inappropriate at the trial court level, as if trial court judges are

somehow unsuited to evaluate legal or contextual arguments, which I just think is wrong. I think our trial court judges do important and hard work every day.

And I've also seen amicus briefs that just throw potshots at the lawyers filing grace on behalf of clients, saying things like that lawyer once represented one of the parties in a different case, so this is clear collusion. I remember a couple briefs that accused me of being a mercenary on behalf of an amicus I represented, which, to be honest, I found a little bit amusing after I got over being offended.

So I guess, in my experience generally and also specifically in the context of filing amicus briefs in district courts, the fact that there's no compelling reason to oppose a motion does not stop parties or lawyers from filing an opposition. I think sometimes lawyers just can't help themselves, and sometimes party clients actually direct the filing of an opposition, which ethics rules would require lawyers to do if they can't convince their clients that it's a waste of time or money. I just think that all of these points distract from the substantive issues before a court.

CHAIR EID: Thank you. Anyone else?

Professor Hartnett.

MR. HARTNETT: Yes, two questions. One is I'd like to hear a little bit more about the concern that there may be certain amicus filers who don't have sufficient records to comply with the 25 percent requirement. I guess I'm just sort of skeptical that somebody wouldn't be able to tell fairly readily if a party to the case has provided that much of their revenue. And my second question is, can we treat what you said about FRAP 101 as a suggestion for a new rule?

MS. SANTOS: So I guess, to the second point, I would say I would be happy to see that in the rules. I feel like it's a governing principle that I try to use in my own life every day, but I do think that kind of the role the Supreme Court adopts, which is let's just let the parties get -- let's just let everyone express their views, is probably the right one.

But, as to the other question, so let me give you an example. So, in the Affordable Care Act case, well, one of the many Affordable Care Act cases that was before the Supreme Court, I think it was called California versus Texas, but I don't know that that is all that helpful as a case title. So I filed

a brief on behalf of, I think, 80 different organizations that all kind of banded together to talk about the rights, you know, women's rights essentially, and how the ACA, if validated, would deeply impact women, particularly in marginalized communities and in health deserts.

I think, as I think about it now, this is not the best example because, presumably, California and Texas didn't provide material financial support to any of these organizations, but pretend that these involved corporations or they involved public interest organizations that provide kind of mini grant funding to smaller organizations.

The way that the kind of amicus-wrangling process works is that we would work on a brief maybe with one or two organizations, and then we would talk to a whole bunch of organizations that say, you know, this is what this brief says, I completely agree with it. It resonates with my experience, and I want to be part of it because I want to show the court that this isn't just one off organization feeling this way. This is 150 religious congregations across the United States or, you know, a hundred women's rights organizations feeling similarly.

And so, when all of this happens in a pretty

short time frame, it can just be a couple of days even, for organizations that don't have a kind of large established financial and legal kind of department, trying to sort through okay, wait, let's make sure, you know, did anyone that's affiliated with a party or that's on the board of a party contribute money last year? I think that could actually be really, really difficult, especially for a lot of these smaller organizations, and I know that funding really varies often, and it is also incredibly common for parties now in lawsuits to be themselves industry groups, to be numerous -- you could have intervenors.

So I just think that for small organizations it actually could be really difficult, and I think that having to get sign-off and having to get confirmation is more likely to just have parties not join those briefs, which I think would be a downside to the courts.

MR. HARTNETT: Can I just follow that up? I mean, I certainly understand that at a low enough percentage, but I guess I'm having a hard time imagining any, you know, small organization that you've mentioned there, you know, some local religious organization, some women's health organization, who wouldn't be able to tell you off the top of their head

somebody who gave them 25 percent of their revenue.

MS. SANTOS: You may be right, Professor, but, I mean, I guess I think that some organizations, they have really varying kind of funding from year to year, and sometimes a particular contribution from -- and, again, I think micro grants are really common, especially with small business organizations or civil rights organizations, and so it may well be that -- or even like kind of local chapters, things like that.

If you don't have a kind of consistent stream of funding that's the same all the time, if it varies and you might get a large donation -- I remember during in 2021, early 2021, there was this mass infusion of funding into civil rights nonprofits to try to battle some of the -- to challenge some of the federal actions of the new administration in 2021, and so that, I think, that type of thing is not infrequent and it really can create a kind of enormous recordkeeping issue.

And many of those organizations that are really getting involved in trying to make sure to vindicate the rights of individuals in the United States might not have the infrastructure to kind of, like, track all of that stuff, and the time it takes even just to kind of verify for a lawyer like me to

feel confident making a representation in a brief to a court, I just think it could be difficult to happen on the type of timeline that some of this litigation involves, especially when you think about how much litigation now involves emergency dockets, motions to stay, and extremely expedited proceedings.

MR. HARTNETT: Thank you.

CHAIR EID: All right. Anyone else?

(No response.)

MS. SANTOS: Thank you, your Honor.

CHAIR EID: Thank you. All right. We will move to Stephen Skardon.

MR. SKARDON: Good afternoon. My name is Stephen Skardon and I'm an Assistant Vice President, Insurance Counsel, at the American Property Casualty Insurance Association, or APCIA. On behalf of APCIA, I want to thank the Committee for the opportunity to participate in today's hearing. As set forth in our January 10, 2025, comment letter, APCIA strongly opposes the Committee's proposal to amend Rule 29(a)(2) to eliminate the option of filing an amicus brief on consent.

By way of background, APCIA, a registered 501(c)(6) tax-exempt organization, is the primary national trade association for home, auto, and

business insurers. APCIA's member companies represent 65 percent of the U.S. property casualty insurance market and write more than 673 billion in premiums annually. APCIA files amicus 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.

Since 2020, APCIA has filed more than 80 amicus briefs in federal courts, including in each of the 12 U.S. courts of appeals and the United States Supreme Court. Drawing on the experience of its member companies, APCIA offers a unique perspective and considerable expertise to assist the court 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.

Federal courts have repeatedly recognized the critical role amici like APCIA play in addressing public policy issues concerning the insurance market. Indeed, in recent years, multiple federal courts of appeals have invited APCIA as amicus counsel to participate in oral arguments. The Committee's

proposal to eliminate the option to file an amicus brief on consent threatens to limit the valuable role amici play. The proposed amendment would deprive federal courts of appeals of critical context, insight, and analysis. Moreover, it would have adverse consequences for the public as federal courts would have less access to information regarding the potential public policy consequences of their decisions.

In its May 13, 2024, memorandum to the Committee, the Advisory Committee on Appellate Rules 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. Instead, they supported the assertions by referring to Committee on Code of Conduct Advisory Opinion Number 63, which is titled Disqualification Based on Interest in Amicus That Is a Corporation. Advisory Opinion Number 63 applies to amicus briefs filed by corporations in which a judge or certain family members have a "financial interest." It does not

apply to tax-exempt organizations like APCIA and for good reason. Tax-exempt organizations like APCIA and others that have testified today do not present the type of financial or other conflicts contemplated in Advisory Opinion Number 63 or Federal Rule of Appellate Procedure 26.1 that would require recusal.

Nevertheless, organizations like APCIA stand to see their amicus activities significantly curtailed by the proposed amendment. 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. As Ms. Cain mentioned earlier in her testimony, it's unclear whether "mentioned as used in the proposed amendment" means a passing reference in a party's brief or something more substantive.

The lack of a clear standard that can be easily and uniformly applied across circuits, coupled with the presumption that amicus briefs are disfavored, will result in fewer amicus briefs being filed. This would be detrimental to federal courts of

appeals and the public. Rather than unnecessarily amend the rule and create an unworkable subjective standard, the Committee should leave the rule unchanged and allow courts of appeals judges or their clerks to do what they have always done: determine for themselves which amicus briefs are helpful.

APCIA again thanks the Committee for the opportunity to participate in today's hearing.

CHAIR EID: Thank you. Do we have any questions? I do not see any, so thank you for your testimony.

All right. We will move to Zack Smith.

MR. SMITH: Good afternoon. Thank you for the opportunity to testify today. My name is Zack Smith, and I currently serve as a Senior Legal Fellow and the Manager of the Supreme Court and Appellate Advocacy Program at The Heritage Foundation.

Like my colleague, I urge you to withdraw the proposed amendments to Federal Rule of Appellate Procedure 29. Fundamentally, these proposed changes, particularly the ones related to donor disclosures, are a solution in search of a problem, and this troubling fact becomes even more apparent when you consider how this entire effort to amend Rule 29 began. Decrying recent judicial decisions with which

they disagreed, Democratic Senator Sheldon Whitehouse from Rhode island and Democratic Representative Hank Johnson from Georgia 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 donor disclosure and reporting requirements that expose many details of an amicus's associations. But let's be clear. Their proposals do not spring from a pure-hearted concern for good government and the judiciary's integrity. Instead, they're part of a broader partisan effort to undermine public confidence in the courts and to harm their perceived political enemies, and because of these obvious partisan politics at play, Whitehouse's and Johnson's ideas have gained little traction in the halls of Congress, so they've turned elsewhere and they're now asking the Judicial Conference of the United States, the governing body of the federal judiciary, to do their dirty work for them and to enact via a rule change what they could not get Congress to enact.

I urge you, don't fall for their trap. This is particularly important because the proposed

changes, as others have mentioned, requiring onerous donor disclosure information likely run afoul of the First Amendment. The Supreme Court most recently addressed First Amendment concerns regarding compelled disclosures in Americans for Prosperity versus Bonta. In that decision, Chief Justice Roberts, writing for the majority, explained that each governmental demand for disclosure brings with it an additional risk of chill, and because of that risk, courts apply exacting scrutiny when evaluating whether such demands for disclosure violate the First Amendment.

The Court clarified in Bonta 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. It's not quite strict scrutiny, but it's close. As the Court has repeatedly stressed in the First Amendment context, that matters, and even though the government might have an interest in some disclosures from amicus filers, those interests, as my colleague addressed, are adequately served by the current regime implemented by Appellate Rule of Procedure 29.

The lack of need for enhanced disclosures, the arbitrary limits for disclosure in the new

proposed regime, and the resulting lack of fit between any governmental interest and the proposed disclosures all counsel against them as violating the First Amendment. The Advisory Committee's campaign finance analogy is inopposite. As several Senators opposed to these changes have explained in their comments, 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 disclosures do not apply here.

And even if we step away from the tiers of scrutiny analysis, it's clear, as Justice Clarence Thomas has explained, that the text and history of the Assembly Clause suggests that the right to assemble includes the right to associate anonymously.

On a related and, in my mind, more troubling note, the Committee, in explaining its rationale for adopting these proposed amendments, explicitly 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." The Committee then emphasized that again, I have a direct quote, that "the identity of the amicus does matter at least in some cases to some judges."

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 being made. If that's true, it's shameful and it's a rejection of the idea that Lady Justice wears a blindfold.

For all of these reasons, I urge the Committee to reject the proposed donor disclosure changes to Federal Rule of Appellate Procedure 29. I appreciate the opportunity to testify before you today, and I welcome any questions the Committee might have.

CHAIR EID: Thank you. Do we have any questions? Professor Hartnett.

MR. HARTNETT: Yes. You've heard this question before, and that is -- I want to make sure -- I mean, I think I understand your position, but I want to be sure that I do.

MR. SMITH: Sure.

MR. HARTNETT: That is that your objection to revealing financial relations, financial ties between a party and an amicus, is such that you would object to requiring disclosure if a party provided 100

percent of the funds to an amicus.

MR. SMITH: Yes, as drafted, and more to the point, Professor, look, I'm not sure throughout the Committee's study of this matter there's been an identified purpose, and as I mentioned in my testimony and as Seth and I mentioned in our written submission as well, given this lack of a clarified governmental interest, it's hard to see how these proposed changes could pass the exacting scrutiny test to make sure that they are indeed -- the Committee's proposals are indeed narrowly tailored to achieve the government's goal because, frankly, I'm not sure that the compelling governmental interest has been clearly articulated throughout this process.

MR. HARTNETT: Can I ask you on a different note, given the way you've articulated the idea that judges might care about the identity of an amicus in some cases --

MR. SMITH: Sure.

MR. HARTNETT: -- am I right then that you reject the argument that we just heard from the prior witness that it properly does make a difference when, for example, as we just heard, that an argument made by an interested party, an actual party to the case, that if the court were to accept their argument, it

would create real problems, say, for patient health throughout the nation, that that argument is supported by amicus filers representing lots of patients and lots of doctors? Is it inappropriate then for a court to consider, in your view, the fact that those amicus filers were representing doctors and patients?

MR. SMITH: Well, I think that the question may be slightly different. I think the issue may be slightly different at least as framed by the Committee. Yes, certainly, I think, if a healthcare company or a doctor is filing on issues related to medical care or how certain changes or interpretations to a statute may be dealing with Medicare payments or Medicaid payments, certainly, that could be relevant. I think it goes to the point my colleague, Seth Lucas, was making as well that, certainly, I think courts and judges may appropriately view certain filers, use it as a shorthand for the quality of briefs.

If you know certain repeat filers regularly provide helpful information to the courts, yes, I think that's something that is common practice and I doubt anyone would have an objection to. I think the perception at least that's been given by the Committee's comments is that judges may care more about who is filing certain comments without weighing

the merits of their arguments. For instance, I don't think it will come as a surprise to anyone on this Committee that unpopular parties, who likely many of us would disagree with their substantive views on certain issues, often make pretty compelling First Amendment arguments to the courts, and I think the concern would be there at least that the perception from what the Committee is saying is that the court may not weigh those valid First Amendment arguments simply because of who is presenting them, and that is inappropriate.

CHAIR EID: Okay. Lisa Wright.

MS. WRIGHT: Yes. Hi. I guess my question is that, you know, under the current rule that doesn't require some of the disclosures that would be required under the new proposal, there's been a lot of examples in recent years of that information that hasn't been disclosed becoming public through research and the press articles, et cetera, that the public does end up learning this information and it becomes -- they learn that, in fact, briefs were filed that had various, you know, funding and other connections with parties and other amicus, and I'm wondering if the judiciary you think should be concerned that that reflects on them in a way that undermines public trust when the public

does learn that the case was decided based on briefing that had these undisclosed connections, so it's not as if, you know, if you believe that that does reflect poorly or is something the courts should be concerned about, the judiciary --

MR. SMITH: Sure, and I --

MS. WRIGHT: -- needs to be concerned about.

MR. SMITH: Sure, and I appreciate the question. If there are specific examples that you're thinking of, I would certainly appreciate hearing them because, at least in the research that Seth and I did, we did not find that to be the case. There was one instance we mentioned in our legal memorandum which we submitted for comment involving Oracle and Google in that case where there was some research about the same donor had donated to multiple parties.

But, other than that one limited example, we did not come across this as being a widespread practice or a widespread problem, and, in fact, that was the only example that we found where that was even raised as a potential issue. And so, at least this perception that this has been a widespread problem or that there are multiple examples where issues like this have come to the forefront, at least as far as I know, that has not been the case.

MS. WRIGHT: Thank you.

MR. SMITH: Sure.

CHAIR EID: All right. Anyone else?

(No response.)

CHAIR EID: Okay. Thank you for your testimony.

MR. SMITH: Thank you very much.

CHAIR EID: We will now turn to Gerson Smoger.

(No response.)

CHAIR EID: Maybe not. Can we turn to Tad Thomas? Thank you.

MR. THOMAS: Hi. Good afternoon. Thank you.

CHAIR EID: Good afternoon.

MR. THOMAS: Thank you for providing an opportunity for public comment on the proposed amendments to Rule 29. My name is Tad Thomas. I am a past president of the American Association for Justice, and I'm the current Chair of AAJ's Legal Affairs Committee, which oversees our Amicus Curiae program as well as its positions on rules amendments.

AAJ is the world's largest plaintiff trial bar association whose core mission is to protect the Seventh Amendment right to trial by jury. As a

practicing trial lawyer, I appreciate the role that amicus briefs play in educating the court regarding critical legal issues. In addition to my testimony today, AAJ has filed a public comment.

I would also like to point out, as was pointed out earlier, that rarely do the plaintiff and defense bars align on issues involving rules amendments, and I think it's important for the Committee to note, at least on the issue of party consent today, you see quite a bit of alignment on the proposed rule changes, and I would ask the Committee to take note of that.

Also, briefly, I would like to say that AAJ supports the proposed amendment's goal for 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.

We agree with the previous speaker, Mr. Aronson from Court Accountability, on the issue of transparency, and I will point out, as having led our association, I don't believe that the 25 percent rule is a problem at all. I would also point out that in many cases, given the tax status of these organizations, they're actually required to keep detailed documentation of who is donating to them, so

I believe that that's a little bit of a red herring. We definitely believe that amici should not hide behind sham identities with names that don't accurately represent their core beliefs or their intentions.

Our main concern as an organization, though, is with Section (a)(2) of the proposed amendments, the removal of the party consent provision, as has been discussed quite often today. We would ask that there be substantial revision to this section. Last year, AAJ filed 10 out of our 11 federal circuit court briefs through party consent. However, we also believe, if party consent is not permitted and permission for leave to file from the court is the only option, it will increase the burden on the courts and lead to unnecessary motions practice.

One of your speakers earlier said that it's typically the trial lawyers who object to the consent. You know, trial lawyers don't understand the culture of consent, but I'd like to cite to you an experience that AAJ had in the Eleventh Circuit in Williams versus D'Argent Trust, et al. Defense counsel withheld consent to our amicus brief filing. We filed a motion for leave of court. We detailed AAJ's identity, the purpose of our brief, and the defense

counsel responded by filing an opposition to that motion, arguing that AAJ should be denied leave because, in their opinion, our filing did nothing new or added nothing new to the briefing.

The defense in that case went so far as to list all of the authorities that AAJ and the plaintiff appellees mutually relied upon in an attempt to demonstrate the duplicative nature of the amicus brief. While we were wrongly accused of regurgitating arguments made by the plaintiff appellees, our brief provided a much broader perspective on the common law of contracts than what was found in the parties' briefs. Simply put, the courts would not be aided if the Federal Rules prohibited amici and the parties from citing the same case law or from providing a broader perspective on legal issues at hand. Indeed, the amici may even disagree about what the same case means.

The defense opposition also wrongfully claimed that Rule 29 prohibited AAJ from filing an amicus brief because counsel for the plaintiff appellees were dues-paying members of our association. We filed a reply rebutting those arguments, citing this Committee's 2010 advisory note explicitly excluding general membership dues from those funds

intended to fund preparation or submission of an amicus brief. The court granted AAJ's motion three weeks later.

If an appellate court really does not want to spend time reading a brief, it doesn't have to even with party consent, but requiring court permission will create additional work for the courts, requiring them to read and consider the contents of briefs, and our experience in the Eleventh Circuit reflects that. You know, we would encourage the Committee to adopt the same rule as the Supreme Court and allow all briefs. However, if they choose not to do that, we would suggest going back to the consent provision as originally written.

I would also like to add that we recommend removing or simplifying the proposed purpose section as we also believe it leads to unintended consequences. The purpose section essentially places a value judgment on certain types of briefs, with the first sentence favoring relevant matter not mentioned by the parties and a second sentence disfavoring redundancy, and we question how the courts might accomplish these goals without reading the briefs and determining which briefs should be filed.

In a rule with a laudable goal of

transparency, we fear that the purpose section could promote favoritism for certain well-known amici at the expense of lesser-known or resource-strapped ones. Additionally, the purpose section would be hard to execute in practice. Even with some coordination, amici will not always know who is preparing a brief and what issues their brief will cover. Will there be a race to the courthouse, with the first amici seeking permission to receive approval possibly denying the court the opportunity to read a better-crafted brief from a renowned legal scholar on the same topic? Or will the court wait until all briefs have been submitted, review for redundancy and uniqueness, and only accept a few?

Under the first scenario, the court may be deprived of helpful legal augmentation. In the second scenario, the courts have expended time and the parties have expended both time and resources on a brief that may not even be considered. With that, I'll turn it over for questions. Thank you.

CHAIR EID: Thank you. Do we have any questions? I do not see any, so thank you for your testimony.

MR. THOMAS: Professor Hartnett.

CHAIR EID: Oh, oh, oh, Professor Hartnett.

MR. HARTNETT: Yeah. You know, you got a law professor here. I got to keep asking questions. With regard to your concerns about the purpose section, how much of that concern is tied to the elimination of the consent option? Now that is the proposed rule has some differences but is pretty similar to the existing Supreme Court rule and we haven't heard anybody complain about that, so I wonder if you would be as concerned with the purpose if it weren't linked to the elimination of the consent option?

MR. THOMAS: I would agree, Professor, they are linked, and I think, if you remove the consent issue, that section becomes less of a problem.

MR. HARTNETT: And one other thing, I just want to thank you in particular for calling attention to the comments submitted by the California Academy of Appellate Lawyers. I mean, obviously, we would see it anyway, but having that flagged for us, I think, was very helpful as an alternative way of dealing with the recusal issue, so thank you for flagging that.

MR. THOMAS: No problem. Thank you, Professor.

CHAIR EID: All right. Anyone else?

(No response.)

MR. THOMAS: Thank you all.

CHAIR EID: Thank you.

Okay. We're going to go back to Gerson Smoger.

(No response.)

CHAIR EID: All right. I guess we'll go to Larissa Whittingham.

MS. WHITTINGHAM: Hello. Good afternoon, and thank you for the opportunity to testify. My name's Larissa Whittingham, and I work as Litigation Counsel for the Retail Litigation Center. The RLC is a nonprofit trade association that files approximately 20 amicus briefs per year in federal and state courts. I am here today to testify about Rule 29(a).

First, the Retail Litigation Center opposes the proposal to remove the right to file amicus brief upon consent of the parties. Rule 29 already contains safeguards to address the Committee's concerns.

The May 13 report of the Advisory Committee identifies the potential for recusal as a reason to amend Rule 29. As Ms. McGowan from Public Justice rightly pointed out earlier, the existing Rule 29 addresses this concern, saying a court of appeals may strike an amicus brief that would result in a judge's disqualification. The May 13 report notes a

particular problem. Specifically, "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."

While the RLC does not dispute this could be a problem, it is a problem caused by processes or configurable computer systems, not by rules. The solution to that problem should be to update systems to allow a judge to exercise the rights already provided by the existing Rule 29, striking a brief that would result in that judge's recusal. So, as an alternative to limiting potential panelists, a computer system could generate an alert to a judge who may have had a conflict with an already-filed amicus brief if that judge is selected for the panel, and the court could then decide whether to strike that brief before relying on it.

In short, 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. The only other reason identified in the May report for going the direction of restricting briefs rather than making the

ability to file more liberal, as the U.S. Supreme Court did, is that the requirement amicus briefs be filed at the Supreme Court as booklet 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, as has been pointed out today, amicus briefs filed in the Supreme Court far outnumber the amicus briefs filed in the circuit courts. Cases that attract multiple briefs do so because of the weight and import of the legal issues before the court. Thus, amicus briefs from multiple parties or non-parties thus help the court understand the breadth of the law affected by the issues.

Second, the Retail Litigation Center opposes the proposal to create a standard in the rules for which briefs are favored or disfavored, particularly when paired with the motion requirement, which would promote unnecessary adversarialness. When amicus briefs are opposed, judges are already able to use their discretion and familiarity with a particular case to make a decision in that set of circumstances. If a standard were to be added, the criteria identified in these proposed amendments do not sufficiently encompass the many ways in which amicus

briefs may help a court and could harmfully impact the filing of helpful briefs.

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 brief is disfavored." Initially, the purpose intent 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.

I recognize what has been mentioned today that Supreme Court Rule 37 possesses a preference similar to this one. However, the pairing of this standard with the increased likelihood of contested motions if the full proposed Rule 29 amendments went forward would encourage litigation over the scope of the standard, and the plain text of the proposed purpose is too limited. 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 far from the only way.

Amicus briefs may also provide examples of

real-life applications of how the issues discussed by the party would apply beyond that case and give more sophisticated data into the impact of matters raised by the parties but not discussed thoroughly in party briefing. And amicus briefs from experts such as those with technical expertise or professors may provide added depth or history to matters raised by but not exhausted in party briefing.

As Ms. Cain and Mr. Skardon both said earlier, the standard of relevant matter not already mentioned by the parties could be read too narrowly once adjudicated, and particularly with a motion requirement, this standard will almost certainly be adjudicated. In support of that claim, I echo the experience Ms. Santos shared earlier, which is that amicus briefs RLC has filed in district courts without the consent exception are routinely opposed instead of following the civility tradition of consent in appellate courts.

That said, Profession Hartnett, to the questions you've asked a few of whether the purpose sentence would be problematic without the motion requirement, I do think it still would be. I think it's worth rescinding that purpose statement. I recognize it's in the Supreme Court rule, but

particularly in the circuit courts, where appellate courts are ruling on such a large type of cases, many with technical natures, there is a variety of purposes beyond just the ones identified, and while briefs are allowed by consent, to the point a few people have raised today, not every brief is consented to, and I hope this is not the case, but the culture of civility is not guaranteed, and to the extent that briefs are opposed, a court should be able to use its own discretion without having to pinpoint a particular standard. So the RLC would request removing that purpose sentence even if the motion requirement is -- even if the consent is kept in or, at the minimum, expanding the scope of purpose.

Next, the proposal to disfavor amicus briefs that are redundant with other briefs would be especially detrimental to smaller organizations with important voices and would also be difficult to administer. The RLC filed 12 briefs in federal courts in 2024. In over half of those cases, the RLC joined one or more other associations. When amici can work together to provide a single helpful voice to the court, they often do so. But, in some cases, multiple briefs are necessary to offer unique perspectives and expertise.

In those cases, while the legal argument or factual application may be a common one and thus something a court may, on quick review, deem as redundant, the differing analysis may prove extremely useful when a court begins to write an opinion and assess the impact of the panel's legal conclusion on various scenarios. A clear example of this is impact of legal conclusions on highly technical facts, such as evolving technology, where multiple technical amicus briefs may prove extremely beneficial to a court when deciding what words to use when precisely articulating a rule without unknowingly and unwittingly expanding its reach.

In conclusion, the Retail Litigation Center encourages the Rules Committee to reject the proposed amendments to Rule 29(a). Thank you for the opportunity to testify.

CHAIR EID: Thank you. All right. Do we have any questions? We see one question, but it's an unidentified person. Is there a question there? No.

All right. Anyone else? Professor Huang.

MR. HUANG: Ms. Whittingham, thank you for your testimony, and welcome back to being questioned. You mentioned at a couple points that there were other purposes, especially at the appeals level, the circuit

level, for amicus briefs. If you had some examples in mind of what some of those sort of, I guess, external purposes might be, please feel free to spell it out.

MS. WHITTINGHAM: Yeah, absolutely, and some of this goes back to how a court, if they're forced to apply the standard of relevant matter raised by other parties, how deeply they look into that relevant matter. I think there's a lot of examples of industry groups like the Retail Litigation Center being able to provide very specific data on the retail industry or, for example, a brief we filed in the Ninth Circuit in a case around session replay code. We were able to provide additional context into what session replay code is, how retailers use it, some of the technology. We have professors write briefs with that kind of theme.

All of those issues were raised similarly by the parties. They had to explain what session replay code is. They had to talk a little bit about the issues and data and how it affects -- maybe they don't have to talk about how it affects an industry, but have to raise the concept, but then we can dive deeper as an industry or a professor can dive deeper into the history, and so I think it's worked at the Supreme Court because there's a general understanding that

that's going to happen, but when litigated, if a court has to look at the plain text and say, well, it's a relevant matter, it was raised by other parties, then it could exclude a lot of briefs. Thank you for the question.

CHAIR EID: Okay. Anyone else? Okay. I don't see anyone. Thank you.

All right. We're going to turn to Kirsten Wolfford.

MR. HARTNETT: Judge? Judge, there's somebody I can't identify with a hand raised. I'm not sure who that is.

CHAIR EID: Yeah, I called on that person before.

MR. HARTNETT: Oh, okay.

CHAIR EID: I don't know who it is.

MR. HARTNETT: Okay. Same person. Never mind. Okay.

CHAIR EID: Yeah, I don't know. I think we'll go ahead.

MS. WOLFFORD: Hello. Thank you. Thank you so much. My name is Kirsten Wolfford on behalf of the American Council of Life Insurers, ACLI. Thank you for the opportunity to provide testimony today and expand upon our written submitted comments.

Rule 29 should remain as written in our opinion without the proposed amendments for three reasons. First, the proposed amendments would provide unnecessary burdens that could provide a chilling effect on amicus briefs. Second, amicus briefs provide a unique perspective that cannot always be replicated by parties in a matter. And, third, the benefit of amicus briefs to the courts in case outcomes cannot be overstated. Any changes to Rule 29 that hinder or discourage the filing of amicus briefs should be avoided and this amendment should not pass forward.

I acknowledge that many parties today have provided testimony and agree with many of those assertions and, therefore, will keep my remarks brief. First, the proposed amendment, among other things, would eliminate the option to file an amicus brief by consent. As many have stated, this does not allow for situations where parties prefer to consent, saving time and resources of the court and all parties involved. Additionally, the proposed amendment would require specified statements of interest in the motion and the brief and assurances to the content of the brief. These provisions add extra cost to those wishing to file amicus briefs with no obvious benefit,

as so many people have pointed out today. The result of these changes would be less amicus briefs filed, which brings me to my second point.

Amicus briefs provide a unique perspective that cannot always be replicated by parties in a matter. The value of these briefs are significant and should not be hindered by amendments which do not serve an overly beneficial purpose. For example, ACLI typically submits three to five amicus briefs a year in federal courts which provide a rich background for the courts to consider in matters involving the life insurance industry.

ACLI in its usual practice gathers and analyzes data, confers with employees of life insurers, monitors product development, consumer trends, and works with policymakers in crafting laws, regulations, and administrative information. This wealth of knowledge is a product of dedicated years of advocacy in this space and is invaluable to consider in these matters concerning the industry and those products.

Lastly, ACLI is just one example of an area that is complex and could be difficult for a party to capture in a matter allowing the court the opportunity to receive this crucial information and weigh the

impact an outcome would have on consumers and stakeholders. These outcomes often are very widespread and could impact many of these consumers in ways that the courts might not imagine if they did not have the benefit of this sort of amicus brief background.

Parties have limits in their own brief writing and typically do not have the luxury of expanding into these types of explanations, and amicus briefs can supply this context at no cost to the court. Creating hurdles for this type of brief would significantly hinder this important resource to the court in making important decisions. Overall, the protections which these amendments seek to address would create an unintended result which would harm future outcomes and important matters, and for these reasons, we ask that the amendments to Rule 29 not pass forward and Rule 29 remain as it is today. Thank you for your time and happy to take any questions.

CHAIR EID: All right. Do we have any questions? I do not see any, so thank you so much for your testimony.

MS. WOLFFORD: Thank you.

CHAIR EID: All right. We are going to go back to Gerson Smoger. You need to unmute. You need

to unmute. I think we'll just pause for a moment and see if we can take care of any technical difficulties we might be having. There we go. We can hear you.

MR. SMOGER: This is why I went into law and not engineering.

CHAIR EID: Please proceed.

MR. SMOGER: So I'm now on my third computer. So it's a pleasure to be able to talk to this panel. My name is Gerson Smoger, and I'm at Smoger & Associates. I come to you somewhat differently than the others. I write maybe four to six amicus briefs a year. I do them all pro bono. I've never been paid for any of them and I would never take any money. I choose the projects that I want to get involved for a large number of organizations and groups, but that gives me a lot of experience in knowing that the purpose is -- and I think we're not talking about generally the underlying purpose of the amicus briefs.

The outside parties don't control who comes up in a case and which case goes up because most of my work is either in the appellate courts, in circuit courts, or the Supreme Court, not the district court, and not knowing who's going to be there, often you find that there can be counsel that just don't raise

the arguments that are necessary to be raised, and you see that by experience because sometimes they're first-time people that are just getting to the court and never been there before, so there are arguments that aren't given.

There's also issues that come up where the record in appellate courts is fairly early, so you've got a motion to dismiss granted but nothing -- there's no record of the case or what the underlying facts are. Would that affect other things? And then, finally, there are cases that have larger implications both legally or factually outside of the cases before the court so that amicus briefs alert the court. Now, in my testimony about the courts' positions, I am in favor and I do not oppose limitations and I'll get into these generally on the court.

There are two things that we're trying to do. One is disclosure of information so the courts are as informed as possible --

AUTOMATED VOICE: It's 1:00.

MR. SMOGER: -- as to who's coming before them and what information is there. I support the disclosure. I don't support things that would -- items that might limit the ability for courts to hear it all, and I think Sharon McGowan had a point that

the court itself doesn't -- that the motions panel or other panels hear or the clerks hear whether an amicus brief should go forward, and I think that the court should have the benefit of amicus brief, and I would oppose the restrictions.

Now nobody has talked about the 6500-word limit. I support it, though I've struggled to meet it, but I think that a clear word limit rather than the way the rule was written before is beneficial and absolutely clear. I also support -- there's language in 23(a)(4)(I) which sets a concise description of the identity and it goes into what should be in there. I can tell you that every brief I've ever filed has followed those even though they weren't expressly written, and there's no reason not to include them.

As to concerns about redundancy, I would say the record before this -- the record now before the Federal Rules evidences that. If the record is replete with multiple redundant comments, that I think one of the comments takes from a paragraph that I wrote in my submission, and now you will hear that multiple times in other comments, it is what happens. There is a redundancy problem, but are we curing that? I think everybody -- I think most people, they request for leave of court. I don't see that that's helpful

or necessary. The way it really works now, for the most part, it is experienced appellate counsel give leave. Inexperienced don't.

When inexperienced don't, the leave is granted, but it's a lot of work to file that motion because the motions come at the end. You have to have your -- it has to come after your brief's already written because the leave test is showing the brief, and now you're asking for extra work. From my position as pro bono, it's like why need that work? Why restrict the ability of the actual panel to hear it?

Now the only reason I've seen that's been given as to why this is helpful is for recusal of judges, and, I mean, let's be factual. 29(a)(2) allows the judge to say this brief can't be submitted because it would cause recusal, but who is going to write a motion and highlight bases for recusal if surreptitiously they wanted it to occur in their motion? It's not going to happen, so it doesn't really help what we want, and there's already the power to give the recusal later.

The other question is on the questions of redundancy which are, I think, dealt with one of giving that power. I don't think it's helpful or

necessary to give the power to require everybody to file a motion, and I think there's a lot of reasons everybody has given that, and I don't think anybody has supported it, so I won't go further on that in the comments. The other comments are the two comments about what the court should disfavor, and that's not a rule. It's just saying here's what we should and shouldn't do.

I disagree with some of the other amici. Seven days after the merits brief, you can scrub your brief. You can look at them. If you're absolutely having a point that's totally redundant, and I have because I want my briefs to be read and I know if the briefs that I'm spending all this time writing just are copycat briefs, then the clerks and the judges aren't going to read it. They're going to see that and push it aside. So I think you make a point of saying here's what's new. If you have to reference what's in the other brief, you've got them seven days after and you just say as stated by the other party on page 23 and then go on to say but they didn't include X, Y, and Z. That's easily done.

The other thing is like redundant but --

CHAIR EID: Excuse me. You're at five minutes already.

MR. SMOGER: Okay.

CHAIR EID: So can you wrap it up?

MR. SMOGER: Okay. I will wrap it up with that I support the 25 percent rule. I actually think it should be 10 percent. I don't know where 25 percent comes in. If the SEC makes a party disclose to give information to the public at 10 percent, that's fine. And in response to a question, I'm on multiple -- I've been involved for a long time in boards and multiple boards and multiple organizations, and you always know who gave 25 percent and you always know 10. 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 that, and to say otherwise just doesn't talk about the realities of running any type of organization or any type of nonprofit.

CHAIR EID: Thank you. Do we have any questions? All right. I don't see any questions, so thank you for your testimony.

MR. SMOGER: Thank you for your time, and I'm sorry for the delay and my technical problems.

CHAIR EID: No worries.

MR. SMOGER: Thank you.

CHAIR EID: All right. We've come to the end of our agenda, so I'm going to pause here to see if anyone else has a comment, a question. This is your last moment to speak.

(No response.)

CHAIR EID: Nobody? All right then. I want to thank all the Committee members, the witnesses, and the observers for attending our hearing today, and we are done. Thank you.

(Whereupon, at 1:07 p.m., the hearing in the above-entitled matter was adjourned.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A

CASE TITLE: Hearing on Proposed Amendments to Appellate Rules

HEARING DATE: February 14, 2025

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: February 28, 2025

David Jones
Official Reporter
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