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February 17, 2025

Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Opposition to Proposed Amendments to FRAP Rule 29
Regarding submission of *Amicus Curiae* briefs

Dear Judge Bates:

These comments are submitted on behalf of Free Speech Coalition, Inc. ("FSC") and the Free Speech Defense and Education Fund, Inc. ("FSDEF"), as well as other nonprofit organizations listed in the appendix. FSC and FSDEF alone have filed 62 *amicus* briefs since 1994, and combined with the other commenters, these nonprofits have filed literally hundreds of *amicus* briefs in the U.S. Supreme Court, federal courts of appeals, federal district courts, and state courts. Formed 32 years ago, FSC is an association of nonprofit organizations and for-profit corporations concerned with the preservation of the rights of nonprofit advocacy organizations. Formed 30 years ago, FSDEF is a public charity exempt under IRC § 501(c)(4). We appreciate the opportunity to comment on the Proposed Amendments to Federal Rule of Appellate Procedure 29 (Aug. 15, 2024).

## SUMMARY

The Committee is considering a proposed amendment to Federal Rules of Appellate Procedure ("FRAP") Rule 29, which would make it more difficult for interested parties to file *amicus* briefs, by requiring a motion for leave and leave of court before filing any *amicus* brief, and by requiring that "[a]n amicus brief must name any person — other than the amicus or its counsel — who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief, unless the person has been a member of the amicus for the prior 12 months." Federal judges and the federal rules are not above the Constitution, and the proposed rules would violate *amici*'s First Amendment rights of speech, association, and petition. The interests posited by the Committee cannot and do not override the First Amendment's constitutional protections. The entire proposal should be rejected. If it is implemented, it will be challenged, and, according to applicable Supreme Court tests, we believe it will be struck down.

## COMMENTS

### I. THE PROPOSED RULES INDICATE A HOSTILITY TO HIGHLY VALUABLE *AMICUS* BRIEFS NOT SHARED BY THE U.S. SUPREME COURT.

The Committee's recommendations for amendments appear to be predicated on the low view of *amicus* briefs generally held by their principal sponsor Senator Sheldon Whitehouse (D-RI).[1] But the U.S. Supreme Court values them. As one study noted, "of all [U.S. Supreme Court] opinions published between 1986 and 1995, approximately fifteen percent cited at least one amicus brief by name, and thirty-seven percent referred to at least one amicus brief."[2] A recent law review article states:

> Justice Breyer has said that these briefs "play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our decisions." Justice Alito concurs, observing that "[e]ven when a party is very well represented, an amicus may provide important assistance to the court … [by] collect[ing] background or factual references that merit judicial notice." And former Supreme Court law clerks have remarked that it is the "non-legal" information provided by amici that is the most useful. As one clerk publicly explained: "As a rule, the farthest thing from a party argument is what is most helpful. For example, hard facts or social science data…. Often you wish you knew more facts than you get from a party brief."[3]

No court has more *amicus* briefs in each case than the Supreme Court, yet the High Court has not evidenced the hostility to *amicus* briefs shown by the Whitehouse proposed rule. Demonstrating how out-of-step these rules are, in 2020, the U.S. Supreme Court made it easier to file *amicus* briefs — both eliminating the requirement to obtain consent or leave of Court before filing merits *amicus* briefs, and requiring only notice be given before filing *amicus* briefs on petition.[4]

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[1] *See* https://www.whitehouse.senate.gov/news/release/whitehouse-welcomes-judicial-conferences-proposed-amicus-brief-disclosure-rules/.

[2] K. Lynch, "Best friends? Supreme Court law clerks on effective amicus curiae briefs," JOURNAL OF LAW AND POLITICS, 20(1), 33, 35 (2004).

[3] A. Larsen, The Trouble with Amicus Facts, 100 VA. L. REV. 1757 (Dec. 2014) (endnotes omitted).

[4] Supreme Court Rule 37.

Also, the proposed rule rejects the view of *amicus* briefs by those Courts of Appeals which have also found them valuable. One author noted that they are "cited by Sixth Circuit judges in between 20 to 40% of the cases that attract amicus filings. The circuit substantively relies on an *amicus* filing in about 10% of the cases that attract an amicus" in the Sixth Circuit.[5] The rule proposed would impede the filing of such briefs.

Without examining motives, three illegitimate reasons for the proposed rule can be identified.

First, although federal courts are authorized only to resolve "cases" and "controversies," much federal court litigation does much more than resolve the dispute between the parties. Particularly in recent years, nationwide injunctions have been issued which purport to usurp the authority of the political branches. When numerous *amicus* briefs are filed in courts of appeals, it is more likely that potential usurpation of authority is exposed and briefed. Rather than impair the filing of such briefs, the courts should facilitate the filing of briefs by non-parties whose interests will be affected, if not determined by a decision in a case to which they were not a party. Should the courts return to the days when the decision issued affected only the parties, some rationale for the proposed rule could be identified, but that is highly unlikely to ever happen.

Second, some federal judges may dislike *amicus* briefs because they require them to do more work — assuming all judges read the *amicus* briefs. Page and word limits already make it difficult for parties to do more than what is minimally required of them, without bringing to the court's attention the broader ramifications of a decision. As they say in England, judges appreciate "a short day," but that is no reason to artificially reduce the number of *amicus* briefs filed.

Lastly, federal judges may dislike *amicus* briefs because *amici* are often more aggressive in making arguments. Parties must be careful not to offend judges, and thus pull their punches in party briefs. *Amici* are often driven by broader concerns, and will be more likely to challenge erroneous precedent without self-censoring as parties may do. Although parties generally feel constrained to argue based on established lines of judicial authority, *amicus* briefs are more willing to challenge those prior lines of cases as being contrary to the approach of the Framers. Such plain talk to a court about error should be encouraged, not discouraged.

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[5] C. Paulson, "Amicus Briefs, OSHA, and the Sixth Circuit," SixthCircuitAppellateBlog.com (Dec. 2, 2021).

## II. THE "DISCLOSURE" REQUIREMENT OF PROPOSED RULE 29(e) WORKS SEVERE BURDENS ON THE RIGHTS OF ASSOCIATION, SPEECH, AND PETITION.

### A. The "Disclosure" Requirement Works Severe Burdens on the Right of Association.

The requirement to disclose any donor of more than $100 to fund a particular *amicus* brief would have a severe chilling effect on associational rights, particularly in our modern, exceptionally polarized environment. Federal judges have the protection of U.S. Marshals, but ordinary Americans who would like their views heard by the courts before ruling on matters that affect the nation do not, chilling their free expression for fear of being listed to be targeted by political opponents.

The U.S. Supreme Court recently struck down a California rule requiring all charitable organizations to disclose their donors to the state. The Court applied "exacting scrutiny," and found that, despite the state's "substantial governmental interest[] in protecting the public from fraud," a blanket disclosure requirement was not narrowly tailored to that interest, and the rule was facially unconstitutional. *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021) (hereinafter "*AFPF*").

At least in *AFPF*, California identified the problem it sought to address — preventing fraud in charitable solicitations — where the Committee here has not identified a real problem. The AFPF Court noted that "[t]he Attorney General receives complaints each month that identify a range of misconduct, from 'misuse, misappropriation, and diversion of charitable assets,' to 'false and misleading charitable solicitations,' to other 'improper activities by charities soliciting charitable donations.' … Such offenses cause serious social harms." *Id.* at 612. Here, while positing the possibility, the Committee has not demonstrated that any *amicus* briefs have caused social harm.

The *AFPF* Court noted the dangers inherent in coerced disclosure, particularly for groups on the "wrong side" of majority opinion on controversial subjects. The Court cited its seminal case on compelled disclosure, *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958). The Court noted that "NAACP members were threatened with economic reprisals and violence" if their membership was disclosed. *AFPF* at 606. The Court "explained that [e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association … and … noted the vital relationship between freedom to associate and privacy in one's associations." *Id.* The Court emphasized that "First Amendment freedoms need breathing space to survive." *Id.* at 609 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

The danger of disclosure is not unique to the NAACP. Indeed, the year after *AFPF*, the dangers of disclosure made national headlines, and the safety of the Justices themselves was

the story. After the Supreme Court's draft *Dobbs v. Jackson Women's Health Organization* decision, 597 U.S. 15 (2022) (which overturned *Roe v. Wade*) was leaked by USAID-funded *Politico* on May 2, 2022, pro-abortion groups released the home addresses of the justices in the majority, prompting a wave of picketing outside the homes of the justices.[6] One protestor was arrested for attempting to murder Justice Brett Kavanaugh, after being picked up outside the Justice's home with a gun, a knife, and pepper spray.[7]

Recent history also demonstrates the use of associational ties to discriminate on the basis of political viewpoint by the government. Under the Biden Administration, Secretary of Defense Lloyd Austin sought to review social media pages of potential military recruits to screen their political views.[8] Austin then sought an independent review to scrutinize the possibility of "extremism" and "radicalization" within the ranks.[9] Failing to find much evidence thereof after searching for a year and a half, the report instead turned its focus to eradicating political "polarization," arguing that "the risk to the military from widespread **polarization and division** in the ranks may be a greater risk than the radicalization of a few service members." *Id.* (emphasis added). How the military is to suppress political "polarization and division" without suppressing dissident speech is difficult to imagine. Indeed, a number of Republicans expressed concern that Austin's politicized screening and review would cause "conservative members of the military, in particular supporters of former President Donald Trump, [to] feel targeted for their private political views." *Id.*

As a result of this politicization, the concerns of Americans in our "cancel culture" are widespread, and those concerns are certainly shared by the donor class, as discussed in a recent *USA Today* op-ed.

> Millions of Americans today are afraid to express their opinions on matters of public importance. A summer poll by the Cato Institute found that 62% of Americans were afraid to reveal their opinions; nearly one third (32%) of employed Americans feared that they would lose their job or miss out on career opportunities if their views became known. Out of fear of harassment or social banishment, **many donors to certain causes prefer to make their gifts**

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[6] H. Keene, "Activists vow to continue protesting at justices' houses, despite alleged attempt to kill Kavanaugh at home," *Fox News* (June 8, 2022).

[7] D. Wallace, D. Spunt, and B. Mears, "Armed suspect arrested near Justice Kavanaugh home identified," *Fox News* (June 8, 2022).

[8] S. Losey, "Pentagon Eyes Plan to Intensify Social Media Screening in Military Background Investigations," *Military Times* (Mar. 3, 2021).

[9] J. McIntyre, "Quiet release of DOD extremism report sparks conservative backlash," *Washington Examiner* (Jan. 5, 2024).

> **anonymously**. Unfortunately, some politicians today want to require charities to turn over their donor lists to the state…. Politicians may be seeking donor information … to create informal enemy lists….[10]

Indeed, many ordinary Americans decline even to put a sign in their yard for a political candidate, for fear of the backlash. According to one survey, "40% of voters are … concerned about offending or angering neighbors and loved ones and vandalism [and] 36% didn't want to be harassed by other neighbors."[11] The chilling effect that the proposed rule would have is real.

The U.S. Supreme Court has repeatedly emphasized that the right to anonymity is a critical component of the First Amendment. This certainly applies in the context of speech, as the Court noted in 1960 that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California*, 362 U.S. 60, 64 (1960). "[P]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all," the Court noted. "Even the Federalist Papers … were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." *Id.* at 64-65. The tradition of anonymous advocacy "is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed 'Publius.' Publius' opponents, the Anti-Federalists, also tended to publish under pseudonyms." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 n.6 (1995).

The Court has long made explicit that the First Amendment's protection of anonymity protects not just speech, but association also. In *Shelton v. Tucker*, 364 U.S. 479 (1960), the Court considered an Arkansas statute compelling public school teachers to disclose the identity of any association to which they belonged. Although the Court agreed that the state had an important interest in and right to "investigate the competence and fitness of those whom it hires to teach in its schools," it ruled that even a "legitimate and substantial" governmental interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 485, 488.

This is why, in *NAACP v. Alabama*, Justice Harlan wrote, "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association…." *Id.* at 460.

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[10] J. Braceras, "Freedom of association is under attack. Will the Supreme Court protect it?," *USA Today* (Jan. 25, 2021) (emphasis added).

[11] E. Dean, "Some Voters Cautious About Displaying Political Signs in Yard," *FloridaDaily.com* (Nov. 1, 2024).

Justice Harlan explained that an "unconstitutional intimidation of the free exercise of the right to advocate" can manifest itself with "a congressional committee investigating lobbying and of an Act regulating lobbying.... The governmental action challenged may appear to be totally unrelated to protected liberties [such as] [s]tatutes imposing taxes." *Id.* at 461. He drew upon a powerful and painful historical lesson when he found "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs [to be] of the same order" as a "'requirement that adherents of particular religious faiths or political parties wear identifying arm-bands.'" *Id.* at 462. With this illustration, Justice Harlan reminded us that principles of anonymity are not second-order concerns that can be disregarded or suppressed, but instead are standards indispensable to both the protection of individual liberty and the preservation of our republic.

### B. The "Disclosure" Requirement Works Severe Burdens on the Freedoms of Speech and Press.

The Committee argued that "[d]isclosure is especially valuable for any *amicus* who uses a dubious or misleading name." This strongly suggests the danger of viewpoint discrimination by judges, who ought to consider the persuasiveness and the legal arguments made in briefs, not their personal subjective feelings about the motivation of the *amici*.

Judges are free to accord as much or as little weight as they desire to any brief. But the requirement to obtain leave as a threshold matter, combined with the Committee's expressed concern over "dubious or misleading name(s)" of *amici* smacks of recycling the politicized targeting of "disinformation and misinformation" by government over the last few years. Although the Supreme Court eventually found that the plaintiffs did not have standing, the words of the district court judge in *Missouri v. Biden,* 680 F. Supp. 3d 630 (W.D. La. 2023), still ring true, as he found that the government's suppression of speech on the grounds that it constituted "disinformation" and "misinformation" was "arguably ... the most massive attack against free speech in United States' history." *Id.* at 641. Appellate courts should not repeat the mistake of allowing the government to suppress any speech.

As Justice Stevens put it in *McIntyre*, "[t]he interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is ... protected by the First Amendment." *McIntyre* at 342.

The *McIntyre* rule protects the constitutional right of the individual against forced disclosure even if the purpose of the disclosure requirement is to make the market participant accountable to someone other than a government official, including the general public. Just as these venerable precedents protect the speaker's anonymity, they should be applied here to protect the anonymity of those persons who fund the speaker.

### C. The "Leave of Court" Requirement Restricts Access to the "Courthouse Door" and Works Hardship on the Right to Petition for Redress of Grievances.

The Supreme Court has long recognized the foundational importance of access to the courts in our American republican form of government. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Balt. & O. R. Co.*, 207 U.S. 142, 148 (1907). Although this right is primarily directed toward litigants themselves, the importance of the voices of *amici* should not be underestimated. Harvard law professor Martha Minow has noted that "an amicus brief can offer the court a picture of the larger context of the issues presented–and that context can include impact on legal doctrines and judicial administration, historical trends, or social and economic effects of the decision."[12]

The U.S. Supreme Court has recognized that the right to petition the government for redress of grievances includes the right of access to the courts, ruling in 1972, "[t]he right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The Court added, "[w]e conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not … use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view…." *Id.* at 510-11.

Among the constitutional bases for the right of access to courts the Supreme Court has identified are "the Article IV Privileges and Immunities Clause, … the First Amendment Petition Clause, … the Fifth Amendment Due Process Clause, … and the Fourteenth Amendment Equal Protection … and Due Process Clauses." *Christopher v. Harbury*, 536 U.S. 403, 415, n.12 (2002) (collecting cases). Circuit after circuit has likewise repeated the importance of the right of access to the courts. The Third Circuit has stated:

> The right to petition the courts, no less than the right to petition the legislative or administrative bodies, is protected by the first amendment…. The freedom to associate for the purpose of exercising the right of petition is protected conduct as well…. As the Court explained in *NAACP v. Alabama ex rel. Patterson*, … "[e]ffective advocacy of both public and private points of view, particularly controversial cases, is undeniably enhanced by group association." In the context of this case, these Supreme Court authorities teach no more than the principle that "groups can unite to assert their legal rights." Nor may the state "burden" or "abridge" those first amendment rights.

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[12] A. Gutman, "Amicus briefs can help a party. They can also hurt," *Harvard Law Bulletin* (Spring 2006).

> [*Brookins v. O'Bannon*, 699 F.2d 648, 652-53 (3d Cir. 1983) (some internal quotations omitted) (emphasis added).]

The Fifth Circuit has also recognized the "First Amendment right to petition the courts for relief." *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 862 (5th Cir. 2000).

The Sixth Circuit concurs: "It is settled law that the first amendment right to petition the government for redress of grievances includes the right of effective access to the courts … and extends to the states via the due process clause of the fourteenth amendment." *Holt v. Jefferson County*, 1988 U.S. App. LEXIS 13619, at *9 (6th Cir. 1988) (citation omitted).

The Ninth Circuit has stated:

> Restricting access to the courts is, however, a serious matter. [T]he right of access to the courts is a fundamental right protected by the Constitution. The First Amendment right of the people … to petition the Government for a redress of grievances, which secures the right to access the courts, has been termed one of the most precious of the liberties safeguarded by the Bill of Rights. [*Ringgold-Lockhart v. County of L.A.*, 761 F.3d 1057, 1061 (9th Cir. 2014) (internal quotations and citations omitted).]

In their comments to this Committee, Senator Sheldon Whitehouse (D-RI) and Congressman Hank Johnson (D-GA) equate *amicus* briefs to lobbying of Congress, and urge that the disclosure contemplated in the proposed Rule will somehow limit the influence of powerful corporate interests. Although Whitehouse and Johnson's comments claim to be made in the name of "transparency" and "competitiveness," in reality, the effect of the Rule would operate to clear the field of any competition to powerful corporate interests. Large corporate interests are not limited to *amicus* briefs to advance their positions in the courts. They are financially well-equipped to bring test cases as plaintiffs or to intervene as parties defendant, with plenty of resources to litigate cases as parties.

Meanwhile, small *amici* such as FSC and FSDEF and the other commenters here, dependent almost entirely on funds from like-minded citizens who rely on these organizations to represent their concerns through *amicus* briefs, will be far more likely than powerful corporate interests to find those resources drying up as ordinary Americans choose to avoid the myriad of difficulties that come with the loss of anonymity in their donations. Their ability to assist in pointing the courts' attention to the broader effect of their decisions beyond just the parties will be significantly damaged.

The Proposal shows no understanding whatsoever of the problem or the issues involved, stating: "A putative *amicus* who refrains from filing an *amicus* brief to avoid disclosure is not silenced in any way…." Proposed Rule at 22. The Committee appears undisturbed by the fact that the "leave of court" requirement will likely close the courthouse

door to some *amici*. The Committee notes that Supreme Court brief formatting requirements give the Supreme Court more ability than the current Rule 29 to place a "modest filter on amicus briefs." Proposed Rule at 25. Elsewhere, the Committee appears to be concerned with limiting the "unconstrained filing of amicus briefs." *Id.* at 26. The Supreme Court should not be accused of adopting the formatting requirements to filter out *amicus* briefs.

## III. THE PROPOSED RULE IS ARBITRARY.

The proposed rule proposes a requirement much more draconian than the disclosure regime struck down in *AFPF*, which required disclosure only of donors to charities who contributed more than $5,000 in a year, and it is far more likely to have a chilling effect. In *AFPF*, the information was required to be disclosed only to the government, not to the general public. The Court noted the district court's factual findings that confidential information of thousands of donors to charities was "inadvertently" released to the public (*id.* at 604), and noted that "disclosure requirements can chill association [e]ven if there [is] no disclosure to the general public." *Id.* at 616 (internal quotation omitted). Here, the Committee's entire purpose in requiring disclosure is to make the information public. The chilling effect is not accidental here, but purposeful.

In addition, the proposed Rule 29 is underinclusive. Notably, no such disclosures are required of parties to litigation by Rule 26.1. Corporate parties must disclose corporate ownership, but are not required to disclose donors. If the very parties before the court "lobbying" for relief are not obligated to disclose donors, then discriminating against *amici* as the Proposed Rule would do is insupportable.

Adopting the proposed rule would tell Americans that courts are influenced in making decisions by evaluating the organizations filing them — a message that would lead to an enormous loss of public confidence.

## CONCLUSION

The Committee should reject the proposed rule changes.

Sincerely yours,
/s/
William J. Olson
Legal Counsel

WJO:gw
Attachment

**APPENDIX: NONPROFIT ORGANIZATIONS JOINING COMMENTS**

America's Future
American Studies Center
Citizens United
Citizens United Foundation
Conservative Legal Defense and Education Fund
DownsizeDC.org
Downsize DC Foundation
Free Speech Coalition
Free Speech Defense and Education Fund
Grass Roots North Carolina
Gun Owners of America
Gun Owners Foundation
Judicial Action Group
Leadership Institute
LONANG Institute
One Nation Under God Foundation
Patriotic Veterans
Public Advocate of the United States
Restoring Liberty Action Committee
Rights Watch International
Tennessee Firearms Association
Tennessee Firearms Foundation
The Senior Citizens League
U.S. Constitutional Rights Legal Defense Fund
Virginia Citizens Defense Foundation
Virginia Citizens Defense League