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March 14, 2022

Hon. Roslynn R. Mauskopf, Director
Administrative Office of the United States Courts
United States Judicial Conference
One Columbus Circle, NE
Washington, D.C. 20544

Via email: RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposal to Amend Federal Rule of Appellate Procedure 29(a)(2)

Dear Judge Mauskopf:

The Reporters Committee for Freedom of the Press (the “Reporters Committee”) writes regarding the changes to Federal Rule of Appellate Procedure 29 under consideration by the Advisory Committee on Appellate Rules. The Reporters Committee understands that the subcommittee appointed to address Rule 29 has thus far focused on the issue of disclosures by amici curiae. In addition to that important issue, the Reporters Committee urges the Judicial Conference to also consider an amendment to or guidance for the application of Rule 29(a)(2), which governs when the filing of an amicus brief is permitted.

In 2018, Rule 29 was amended to authorize a court of appeals to prohibit the filing of or strike an amicus brief if that brief would result in a judge’s disqualification. *See* Fed. R. App. P. 29(a)(2) advisory committee’s note to 2018 amendment. Currently, the rule does not provide standards for when an amicus brief requires a judge’s disqualification, nor does it require any notice or disclosure when that provision is invoked.¹ *Id.* Accordingly,

¹ The Reporters Committee is aware that Associate Dean Alan Morrison of the George Washington University School of Law has proposed that the subcommittee provide standards for when an amicus brief triggers disqualification. *See e.g.*, Report to the Standing Comm., Advisory Comm. on Appellate Rules of the Judicial Conf. of the U.S., 110 (Dec. 8, 2021); Advisory Comm. on Appellate Rules, Agenda for Apr. 7, 2021 Meeting of Advisory Comm. on Appellate Rules, 217–23 (2021); Letter from Alan Morrison, Associate Dean, George Washington Univ. Law Sch., to Hon. David Campbell, Chair, Comm. on Rules of Prac. and Proc. (Jun. 1, 2017) (“Morrison 2017 Letter”), <https://perma.cc/NPT9-GFK4>. The Reporters Committee takes no position on Associate Dean Morrison’s proposal. However, as explained herein, the Reporters Committee’s proposal does not conflict with that proposal and would not implicate concerns identified by Associate Dean Morrison in his 2017 letter regarding en banc review and potential strategic amicus briefs.

for the reasons herein, the Reporters Committee proposes that the Advisory Committee on Appellate Rules amend Rule 29(a)(2) to require courts that prohibit or strike an amicus brief pursuant to that provision to (i) issue a written order, filed on the public docket in the relevant case, that cites that provision, and (ii) identifies each amicus or amicus counsel whose involvement would result in a judge’s disqualification.

Specifically, the Reporters Committee proposes the following amendment (added text bold) to Rule 29(a)(2):

(a)(2) When Permitted. The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge’s disqualification.

(A) If a court of appeals prohibits the filing of or strikes an amicus brief under this paragraph it shall issue a written order on the docket in the relevant case that:

(i) identifies Rule 29(a)(2) as the basis for the decision; and

(ii) identifies each amicus curiae or amicus curiae counsel that, if permitted to appear as or on behalf of amicus curiae in the matter, would result in a judge’s disqualification.

* * *

Founded in 1970, the Reporters Committee is an unincorporated nonprofit association that provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Reporters Committee attorneys frequently represent coalitions of media organizations as amici curiae in appellate cases that present legal issues of importance to members of the press. By participating in Reporters Committee-led amici coalitions, media organizations have the ability to speak collectively, with a unified voice, to provide courts of appeals with relevant information, argument, and perspective that can assist those courts in ruling on cases with implications for journalists’ rights—considerations that may be unrepresented or underrepresented in party filings.

In *Cause of Action v. F.T.C.*, for example, Cause of Action, a government accountability group, sued the Federal Trade Commission after it denied the group’s requests for a fee benefit as a “representative of the news media” and a public interest fee waiver under the Freedom of Information Act (FOIA). *See* 799 F.3d 1108 (D.C. Cir. 2015). The Reporters Committee, along with eight other media groups, filed an amicus

brief with the D.C. Circuit to argue that the current test agencies and courts use to define “representative of the news media” is too narrow and does not accord with the language of the 2007 FOIA amendments or the congressional intent behind those amendments, and does not leave room for evolving media outlets to qualify for waivers. *See* Br. of Amici Reporters Comm. for Freedom of the Press, et al., *Cause of Action v. F.T.C.*, 799 F.3d 1108 (D.C. Cir. 2015) (No. 13-5335). As advocates for the media’s ability to gather information from the government and disseminate information to the public, the Reporters Committee highlighted the acute need to ensure that both established and new media outlets are able to obtain a reduction and/or waiver of fees for public records under FOIA.

By filing amicus briefs on behalf of coalitions of media organizations, the Reporters Committee can present the collective perspective of the news media, emphasize the weight of the issues at stake for newsgathering and First Amendment rights, and avoid repetitive amicus filings from media organizations. However, because they are frequently submitted on behalf of large coalitions of diverse media interests, Reporters Committee-led amicus briefs are also exposed to potential Rule 29(a)(2) prohibition. For instance, in *Parekh v. CBS*, 820 F. App’x 827 (11th Cir. 2020), the Reporters Committee and 33 media organizations wrote collectively as amici to offer their unique perspective on the application of Florida’s anti-SLAPP law in federal court. As representatives of the news media, who are frequently the target of Strategic Lawsuits Against Public Participation (SLAPPs), the amici that joined that brief shared a strong interest in ensuring that state anti-SLAPP laws are properly applied in diversity cases so that newsgathering, reporting, and other First Amendment-protected activities remain shielded from meritless claims.

The Eleventh Circuit denied the Reporters Committee’s motion for leave to file its amicus brief in that case, citing Rule 29(a)(2) but providing no further detail. *See* Order Denying Motion for Leave to File as Amicus, *Parekh v. CBS*, 820 F. App’x 827 (11th Cir. 2020) (No. 19-11794). Because the court did not identify which of the amici media organizations or counsel for amici was the source of a potential conflict, the Reporters Committee was unable to address the situation. And, crucially, that lack of information has left the Reporters Committee on uncertain ground when it comes to the filing of future coalition amicus briefs in the Eleventh Circuit. The proposed amendment to Rule 29(a)(2) would enable the Reporters Committee to avoid potential conflicts with future briefs filed in that court by, for example, excluding specific media organizations from future amici coalitions.

The benefits of the amendment proposed above are not unique to briefs authored or joined by the Reporters Committee. For example, in December 2020, the Fourth Circuit cited Rule 29 in its order striking an amicus brief filed on behalf of 104 companies in *CASA de Md., Inc. v. Trump*, a case challenging the Trump administration’s “public charge” immigration rule. *See* Marcia Coyle, *4th Circuit Scraps McDermott Amicus Brief in Rare Nod to Recusal Rule*, Nat’l L.J., Dec. 4, 2020. Similarly, in April 2019, the Fifth Circuit struck an amicus brief submitted on behalf of First Focus and Children’s Partnership pursuant to Rule 29 in *Texas v. United States*, a case involving a

challenge to the Affordable Care Act. *Id.* In both instances the amicus briefs were removed from the record.

The proposed amendment is of particular importance for matters heard en banc, where the likelihood of a conflict or potential conflict triggering application of Rule 29(a)(2) is highest. In *Nunes v. Lizza*, No. 20-2710 (8th Cir. 2020), for example, the Reporters Committee and 35 national and local media organizations and journalists filed an amicus brief urging en banc rehearing of the panel’s decision in that libel case. The court denied the potential amici’s motion for leave to file the brief, citing Eighth Circuit Rule 29A(a).² Counsel for the amici coalition, attorneys at the law firm of Ballard Spahr LLP, filed a motion for reconsideration asking the court to allow “the filing of the brief without the participation of the amicus or amici that previously necessitated denial of the motion for leave to file the brief under Rule 29A(a).” *See* Motion of Amici Curiae for Reconsideration of the Court’s November 5, 2021 Order, *Nunes v. Lizza*, at 3 (8th Cir. 2020) (No. 20-2710). The court denied the motion for reconsideration as well and struck the proposed amicus brief from the record. The coalition of media organizations thus went unheard, despite its various members’ strong interests in the outcome of the matter. The petition for rehearing was subsequently denied.

The proposed amendment would increase transparency and help prevent conflicts that would trigger application of Rule 29(a)(2). If an organization is aware that its participation as amicus curiae could present a conflict within a given circuit, it could choose, proactively, not to participate and organizations like the Reporters Committee could exclude that party from future coalition amicus briefs to avoid having that brief struck from the record. Often, the contents of a coalition amicus brief are not dictated by the participation of any particular amici; removing an individual party from subsequent coalition amicus briefs is a simple way to avoid Rule 29(a)(2) conflicts. And altering the rules in this manner would allow the court to continue to benefit from amicus participation.

The proposed amendment would not require the court to disclose which judge is at risk of disqualification. As Associate Dean Morrison indicated in his 2017 letter to the Judicial Conference, identifying individual judges’ conflicts could pose a potential risk that future litigants could game the system by attempting to intentionally trigger the recusal of judges, especially during en banc proceedings. *See* Morrison 2017 Letter, *supra*. The Reporters Committee’s proposal, however, requires only the disclosure of which amicus or amicus counsel would trigger Rule 29(a)(2).

Amicus briefs can provide a unique, valuable perspective to the courts of appeals, beyond what parties can provide. And amicus briefs filed on behalf of broad coalitions of similarly situated amici enables those interested parties to speak with a unified voice and

² Eighth Circuit Rule 29A(a) is substantially similar to Rule 29(a)(2). It provides: “The court will prohibit the filing of or strike an amicus brief that would result in the recusal of a member of the panel to which the case has been assigned or in the recusal of a judge in regular active service from a vote on whether to hear or rehear a case en banc.”

decreases the likelihood of redundant amicus filings. The Reporters Committee's proposed amendment would thus have a profoundly beneficial impact on the amicus process, as it would allow organizations like the Reporters Committee to continue filing amicus briefs on behalf of coalitions without the risk for the potential prohibition of a brief under Rule 29(a)(2).

* * *

Thank you for your consideration. Please do not hesitate to contact Reporters Committee Deputy Executive Director and Legal Director Katie Townsend (ktownsend@rcfp.org) with any questions. We would be pleased to provide any additional information to the Judicial Conference in aid of this important work.

Sincerely,
Reporters Committee for Freedom of the Press