THE BUCKEYE INSTITUTE

February 13, 2025

Submitted via Regulations.gov

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle Northeast
Washington, DC 20544

Re: Request for Comments on Proposed Amendments to Rule 29

Dear Judge Bates,

The Buckeye Institute submits this response to the Committee's request for comments on proposed changes to Rule 29 of the Federal Rules of Appellate Procedure. The Buckeye Institute thanks the Committee for its work on this Rule to facilitate effective communication by amici to the appellate courts.

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. To fulfill its mission, The Buckeye Institute regularly files amicus briefs in the federal courts of appeals, filing 16 amicus briefs in 2024, along with 32 amicus briefs with the Supreme Court. The Buckeye Institute advocates for the right to speak and associate through amicus briefs without forcing the disclosure of amici's financial supporters.

Under current Rule 29, membership organizations are not required to disclose the identities of their members, even if a member has contributed funds earmarked for a brief. Fed. R. App. P. 29(a)(4)(E)(iii). The Committee's proposed changes would require disclosure of a member's identity if the member (1) joined a membership organization that is older than 12 months, (2) joined the organization within the 12 months leading up to the filing of the brief, and (3) contributed or pledged to contribute more than $100 for preparing, drafting, or submitting the brief. Proposed Fed. R. App. P. 29(e). Because the proposed disclosure risks stifling amicus participation and poses serious First Amendment concerns, The Buckeye Institute urges the Committee to reject these proposed changes.

I. Amicus participation is important to the democratic process.

The democratic process involves all three branches of government. The judicial branch is unique in that it is the final arbiter of many disputes. The court's decision in many of those disputes will impact non-parties to the case before the court and will shape—and sometimes create—policies

that affect all of society. Accordingly, the courts should have as much relevant information and legal thought as possible.

It is commonly believed that amicus curiae participation in the legal process originated in Roman law. *See*, *e.g.*, Paul M. Collins, *The Use of Amicus Briefs*, 14 Annual Rev. of L. & Social Science 219, 220 (2018). English courts later adopted this practice. *Id.* In the 1820s, the first amicus curiae participated in a U.S. Supreme Court case. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 Rev. Litig. 669, 711 n.31 (2008) (citing *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823)). Since then, amicus participation has grown exponentially. *See*, *e.g.*, Adam Feldman, ***Amicus Citations in OT 2022 and 2023***, Empirical SCOTUS (July 22, 2024).

"[A]micus participation serves an expressive function in a democratic system." Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 Fla. St. U. L. Rev. 315, 337–38 (2008)3. "Through these briefs, amici can present courts with new or alternative legal positions, social scientific and factual information, and perspectives regarding the policy implications of their decisions." Collins, *supra*, at 220. Amicus participation can help level the playing field by offering a relatively low-cost option for groups and individuals to unite and influence governmental policy. Garcia, *supra*, at 332. By promoting nongovernmental groups' access to the courts, the courts have access to more information, more legal analysis, and more points of view. *See id.* Some have raised concerns—without evidence—about an "imbalance of resources that may skew amicus participation toward the wealthy," *see id.* But that is speculative given that many non-profit organizations with broad financial support and representing a broad group of individuals, not necessarily wealthy members or donors, actively submit amicus briefs. And even if one could show that amici largely support the interests of wealthy people or entities, such a concern is "no different than in any other area of litigation." *Id.* Such concerns should motivate efforts to empower, not discourage, more groups with diverse views to file amicus briefs.

The Committee has expressed concern about excessive influence by members who donate funds for a specific brief. That concern is misplaced. When a membership organization files an amicus brief, it speaks on behalf of the organization and all members. If the organization were to become a mouthpiece for one member who earmarked funds for a brief in a way inconsistent with the organization's or the members' interests, it would betray its own mission and its other members. These internal dynamics prevent the established organizations that are the subject of the proposed changes from becoming mouthpieces for just one person or a small group of members with financial power. Further, the proposed rule presumes that amici organizations are—at least sometimes—acting in bad faith. Such a concern should be dispelled by the requirement that amici include a statement of interest that identifies the organization's purpose and its interest in the particular case. If this representation is false or inconsistent with the organization's purpose, members will then have the remedy of challenging the organization's actions or terminating their membership.

Amicus briefs are also "a formidable tool in the effectuation of social change through litigation." Simard, *supra*, at 677–78. This too is part of democracy. Groups from all sides of the political and social spectrum have used amicus briefs to inform and advise courts. "The Department of Justice

was one of the first entities to effectively invoke the amicus device in pursuit of public policy change and, in the early part of the twentieth century, state attorneys general and minority groups recognized the opportunity to use the tool to shape public policy." *Id.* at 678.

The NAACP, for example, "began its campaign against legal segregation by filing amicus briefs in a 1950s case involving the Westminster School District in Orange County, California. Garcia, *supra*, at 341. "Thurgood Marshall and Robert L. Carter, among other NAACP and ACLU lawyers, filed an amicus brief on behalf of the [segregated Mexican-American] children," outlining some of the initial data that would be used in *Brown v. Board of Education*. *Id.* That was not a politically correct position at the time and forcing disclosure of one-time donors supporting a specific brief certainly could have chilled such donations. Today, the ACLU and the United States Chamber of Commerce—organizations often on opposing sides of issues—are two of the most prolific filers of amicus briefs at all court levels. *See* Adam Feldman, ***Amicus Deep Dive 2024***, Legalytics (Jan. 2, 2025). Just as with the NAACP, the ACLU and the Chamber (and other amici) sometimes assert controversial or unpopular positions. The court should not discourage one-time donors from funding a brief that asserts a certain unpopular, but legally viable viewpoint.

Amicus briefs from organizations convey the organization's views to the court, its members, and society at large. As a long-standing and essential advocacy tool, participation by amici in the legal process should be encouraged rather than discouraged.

II. The First Amendment protects Amicus participation in the legal process and the proposed rule unlawfully infringes on the First Amendment.

The First Amendment prohibits the government from "abridging the freedom of speech" and interfering with "the right of the people . . . to petition the government for a redress of grievances." U.S. Const. amend. 1. Throughout history, litigation has served as a means of expression and a form of petition for redress of grievances. Garcia, *supra*, at 333. "Amicus briefs, like all briefs, are a form of speech." *Id.* at 334. When an organization has a vested interest in the outcome of litigation but cannot join the lawsuit—or when joining the lawsuit is not the most effective or efficient use of resources—filing an amicus brief becomes synonymous with activity that has historically been considered part of the Petition Clause. *See id.* at 337.

Whether one views amicus briefs as only a form of speech or additionally as a form of petition for redress of grievances, one thing is clear—the "Court has 'long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.'" *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). "Protected association [through amicus briefs] furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority,'" *see id.* (quoting *Roberts*, 468 U.S. at 622). And forced disclosure of a member's identity is akin to restricting one's "'right to associate' with their preferred publisher 'for the purpose of speaking.'" *See TikTok Inc. v. Garland*, No. 24-656, 2025 WL 222571, at *10 (U.S. Jan. 17, 2025) (Sotomayor, J., concurring in part and

concurring in the judgment) (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 68 (2006)).

The proposed rule infringes on both aspects of the First Amendment. Such infringement must pass the exacting scrutiny analysis. To satisfy exacting scrutiny, there must be a "'substantial relation between the disclosure requirement and a sufficiently important governmental interest,' and [ ] the disclosure requirement [must] be narrowly tailored to the interest it promotes." *Americans for Prosperity Found.*, 594 U.S. at 611 (quoting *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010)). While preventing an amicus from becoming a mouthpiece for a party may be an important governmental interest, that interest is satisfied by the party-relation disclosure portion of the rules. That claimed interest has little bearing on non-party members' interest in funding amicus briefs. Additionally, the courts lack a sufficiently important governmental interest in knowing which members funded an organization's amicus brief.

Restrictions on exercising a protected right through association by requiring disclosure can result in at least two distinct harms. First, such restrictions can chill participation in the judicial process. *See*, *e.g.*, *Americans for Prosperity Found.*, 594 U.S. at 616–618. Organizations and their members may feel intimidated into forgoing participation in or providing funding for amicus briefs. Although they may have no nefarious motives, members might fear that disclosing their identities could lead to "economic reprisal" and "other manifestations of public hostility." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *Talley v. California*, 362 U.S. 60, 65 (1960) ("identification and fear of reprisal *might* deter perfectly peaceful discussions of public matters of importance" (emphasis added)). "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Americans for Prosperity Found.*, 594 U.S. at 609 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Second, rules that chill individuals' association can hinder the effectiveness of the organization's amicus briefs by identifying culturally or politically unpopular individual members. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 462. As the Committee recognized, courts consider the identity of the amicus organization and the disclosed members when considering the validity of the arguments presented. When answering whether she was influenced by the identity, prestige, or experience of the amicus curiae, Justice Ginsburg noted that "her clerks often divide the amicus briefs into three piles: those that should be skipped entirely, those that should be skimmed, and those that should be read in full." Simard, *supra*, at 688. Similarly, in a study of 60 circuit court judges, with at least one from each circuit, a majority (55.3%) indicated that the amicus' identity, prestige, or experience are moderately or significantly influential. *Id.*[1] Although this reality encourages organizations to file well-reasoned and well-written briefs to develop a positive reputation with the courts, it is not necessarily a positive reality. Our justice system fundamentally lies on the concept that "justice is blind," meaning that justice is impartial: It dispenses justice the same to the rich and poor—and everyone in between—alike. *See*, *e.g.*, *Figures*

[1] 26.8% indicated that these factors had at least some influence. *Id.* at n.83.

of Justice*, Information Sheet*, Office of the Curator, Supreme Court of the United States[2] (the blindfold on the statue at the Supreme Court depicting justice "is generally accepted as a symbol of impartiality"). Hence, requiring amici to disclose certain individual members is peaking from underneath the blindfold, abandoning impartiality, or at least giving the appearance of partiality. It facilitates bias against any disfavored persons, whether because of wealth or political viewpoint, Facebook postings, tweets, or other characteristics and risks having amici relegated to the "should be skipped entirely" pile. Amicus briefs should be judged on the content of the brief, not who donated money to the organization—either as a general financial contribution or a directed donation.

Moreover, the size of the donation or the identity of the member/donor designating a sum for an amicus brief gives very little information to the court. Consider a billionaire who donates $1,000,000 to an organization *with no strings attached*, and the organization submits an amicus brief that it knows will please its billionaire donor and encourage another million-dollar donation. That amicus need not disclose the billionaire's identity. But if a middle-class person feels strongly about an issue and joins an entity that represents his/her views and donates $150 for the purpose of funding a specific brief, the amicus must disclose that person's identity. Assuming the identity of the $150 donor is disclosed under the new rule, the Court has learned very little about the real power behind the amicus organization. But the minor donor may well be dissuaded from donating because of the new disclosure rule. Indeed, under the new rule, the million-dollar donor could fund the creation of a new non-profit entity to file an amicus brief with the explicit purpose of funding a specific brief. And under new Rule 29(e), the new entity would only need to disclose the date of creation, but not the identity of the billionaire donor. *See* Proposed Fed. R. App. P. 29(e) ("If an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members, but must disclose the date the amicus was created."). Thus, the proposed rule actually facilitates greater amicus influence by wealthy individuals and discourages participation by publicity-shy minor donors—the exact opposite of the Committee's stated intent.[3]

The Committee must consider the importance that amici play in the judicial system and the First Amendment harm that may result from restrictions on amici participation. The proposed rule is unwise and fails the exacting scrutiny test.

III. The Committee should propose rules governing amici participation at the district court level.

Although the Committee's work addresses only appellate rules, The Buckeye Institute encourages the Committee to propose rules regarding participation at the district court level to facilitate amicus participation there. Increased amici participation at the district court level would help judicial economy by allowing the trial court and the parties to address amici's arguments with the benefit of full briefing and evidence rather than waiting for the appellate court to hear the arguments for the first time. Yet the Federal Rules of Civil Procedure lack specific rules regarding

[2] **Figures of Justice**, SupremeCourt.gov.

[3] The Buckeye Institute does not advocate the disclosure of such donors. Such a requirement would only further chill the exercise of First Amendment rights.

amicus participation. Amici must hope that the district court grants a motion for leave to file an amicus brief—after investing time and resources into preparing the brief—and must guess the proper procedure for filing. The Committee's time would be well spent addressing these deficiencies and promoting amicus participation at that level, too.

Respectfully,
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The Buckeye Institute