



February 17, 2025

Committee on Rules of Practice and Procedure
Judicial Conference of the United States

Via: <https://www.regulations.gov/docket/USC-RULES-AP-2024-0001/document>

**Re: Proposed Amendments to Federal Rule of Appellate Procedure 29
(Amicus Briefs)¹
Docket ID: USC-RULES-AP-2024-0001**

Dear Members of the Committee on Rules of Practice and Procedure:

The Electronic Frontier Foundation (EFF) appreciates the opportunity to submit these comments on the proposed changes to Federal Rule of Appellate Procedure 29 regarding amicus briefs, as drafted by the Advisory Committee on Appellate Rules.

EFF is a San Francisco-based, member-supported, nonprofit civil liberties organization that has worked for 35 years to protect free speech, privacy, security, and innovation in the digital world. With over 30,000 members, and harnessing the talents of lawyers, activists, and technologists, EFF represents the interests of technology users in court cases and policy debates regarding the application of law to the internet and other technologies.²

I. Rule 29(a)(2) on “Purpose” is Overbroad

A. “Already Mentioned by the Parties”

Rule 29(a)(2) should not be amended to state that an amicus brief that addresses issues (“relevant matter”) that are “already mentioned” by the parties is disfavored. This language is unduly broad³ and may have foreclosed amicus briefs that EFF has filed over

¹ Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure, and the Federal Rules of Evidence* (Aug. 2024), <https://www.uscourts.gov/file/78921/download>.

² See <https://www.eff.org/>.

³ The Third Circuit, for example, has a local rule with more reasonable language, suggesting that some overlap between party briefs and amicus briefs is understandable and appropriate: “Before completing the preparation of an amicus brief, counsel for an amicus curiae must attempt to ascertain the arguments that will be made in the brief of

the years. We often file amicus briefs that expand upon issues only briefly addressed by the parties, either because of lack of space given other issues that party counsel must also address on appeal, or a lack of deep expertise by party counsel on a specific issue that EFF specializes in. We see this often in criminal appeals when we file in support of the defendant. We also file briefs that address issues mentioned by the parties but additionally explain how the relevant technology works or how the outcome of the case will impact certain other constituencies.

Here are a few examples of amicus briefs that may have been disfavored under this “already mentioned” standard, but nevertheless provided help to the courts:

- In *United States v. Cano*, we filed an amicus brief⁴ that addressed the core issue of the case—whether the border search exception to the Fourth Amendment’s warrant requirement applies to cell phones. We provided a detailed explanation of the privacy interests in digital devices, and a thorough Fourth Amendment analysis regarding why a warrant should be required to search digital devices at the border. The Ninth Circuit extensively engaged with our brief to vacate the defendant’s conviction. *United States v. Cano*, 934 F.3d 1002, 1012 (9th Cir. 2019).
- In *United States v. Hasbajrami*, we filed an amicus brief⁵ that expanded upon the central Fourth Amendment question in the case—whether warrantless access to Americans’ international communications collected “incidentally” pursuant to Section 702 is unconstitutional. The Second Circuit extensively engaged with our brief in remanding the case back to the district court. *United States v. Hasbajrami*, 945 F.3d 641, 665 (2d Cir. 2019).
- In *United States v. Bosyk*, we filed an amicus brief⁶ that addressed the central Fourth Amendment question on appeal—whether probable cause existed to issue a warrant—but provided in-depth technical details about how Uniform Resource Locators (URLs) work, which included explaining how the mere fact that a person clicked on a link does not establish probable cause, particularly because a URL’s appearance may not identify the origin of the outbound link or the content of the materials on the linked resource (e.g., webpage). The Fourth Circuit’s

any party whose position the amicus is supporting, with a view to avoiding any *unnecessary* repetition or restatement of those arguments in the amicus brief.” Third Circuit Local Appellate Rule 29.1 (emphasis added),

https://www.ca3.uscourts.gov/sites/ca3/files/2011_LAR_Final.pdf.

⁴ <https://www.eff.org/document/eff-amicus-brief-us-v-cano>

⁵ <https://www.eff.org/document/hasbajrami-eff-aclu-amicus-brief>

⁶ <https://www.eff.org/document/amicus-brief-40>

opinion and the dissent cited our brief. *United States v. Bosyk*, 933 F.3d 319, 325, 355 n.1 (4th Cir. 2019) (Wynn, J., dissenting).

- In *B.L. v. Mahanoy Area School District*, we filed an amicus brief⁷ that addressed the core First Amendment issue of the case—whether a high school student should be punished for her off-campus social media speech. We made a legal argument that *Tinker*’s “substantial disruption” test should not apply to off-campus speech, which the Third Circuit ultimately embraced. *B.L. v. Mahanoy Area School District*, 964 F.3d 170, 184 n.8, 186 (3d Cir. 2020), *affirmed by Mahanoy Area School District v. B. L.*, 594 U.S. 180 (2021). We also provided an explanation of how young people use social media for good and valid reasons, which the court cited in discussing the various ways young people use social media. *Id.* at 179.
- In *NetChoice, LLC v. Attorney General of Florida*, a First Amendment case about social media content moderation, we filed an amicus brief⁸ that elaborated on points only briefly made by the parties about the prevalence of specialized social media services reflecting a wide variety of subject matter focuses and political viewpoints. Several of the examples we provided were used by the 11th Circuit in its opinion. *NetChoice, LLC v. Attorney General of Florida*, 34 F.4th 1196, 1213-14 (11th Cir. 2022), *vacated and remanded by Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).
- In *Center for Investigative Reporting v. DOJ*, a FOIA case, we filed an amicus brief⁹ that provided technical expertise describing the growth of government databases and how many Americans’ personal information is increasingly being collected and stored in government databases. The argument was directly relevant to the legal issue: whether FOIA permits agencies to disclose aggregate data based on those databases. Our brief pointed out that such disclosure is essential to ensure transparency and government oversight while protecting personal privacy. The Ninth Circuit agreed and cited our brief. *Center for Investigative Reporting v. DOJ*, 14 F.4th 916, 937 (9th Cir. 2021).
- In *UMG Recordings, Inc. v. Shelter Capital Partners*, the issue on appeal was the scope of the “safe harbor” provisions of the DMCA, 17 U.S.C. §512(c). UMG had sued Veoh, a now-defunct competitor of YouTube, in an effort to hold Veoh liable for users uploading UMG music videos. UMG argued that the statute’s protection from liability for “infringement of copyright by reason of the storage at

⁷ <https://www.eff.org/document/eff-amicus-brief-bl-v-mahonoy-area-school-district-3d-cir>

⁸ <https://www.eff.org/document/eff-amicus-brief-netchoice-v-florida>

⁹ <https://www.eff.org/document/cir-v-doj-eff-amicus-brief>

the direction of a user” only applies when a user uploads content, and not later when others access that content. Our amicus brief¹⁰ explained the internet’s history of online service providers and web hosting services to show that UMG’s interpretation of the statute was too narrow, and that Veoh was entitled to safe harbor protection. The Ninth Circuit approvingly cited our brief in ruling in Veoh’s favor. *UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F.3d 1006, 1018 (9th Cir. 2013).

B. “Redundant With Another Amicus Brief”

Rule 29(a)(2) should not be amended to state that an amicus brief that is “redundant with another amicus brief is disfavored.” Some circuits already have local rules that encourage amici to coordinate and avoid overlap,¹¹ and EFF always endeavors to do this. However, it is unrealistic to expect that there should be no overlap among amicus briefs, given that any amicus cannot precisely know or control what every other amicus will write.

Additionally, the proposed rules appear to present an internal conflict. This rule would force the parties to create an amicus strategy to avoid redundancy among amicus briefs, yet the new disclosure rules appear to reflect a policy against greater coordination between the parties and amici. *See infra* Part III.

II. Rule 29(a)(2) Should Not be Amended to Remove the Consent Provision

Rule 29(a)(2) should not eliminate the consent provision at the panel stage. The rule should continue to permit amicus briefs with party consent or pursuant to a motion and leave of court for the initial panel consideration of a case.

Eliminating the consent provision will dramatically increase motion practice for circuit courts, putting administrative burdens on the courts as well as amicus brief filers. As the Advisory Committee recently acknowledged, “There was substantial concern about this proposal at the Standing Committee meeting in June of 2024, particularly about the additional work for lawyers and courts on motions that are not currently required.”¹²

¹⁰ <https://www.eff.org/document/eff-and-public-interest-group-amicus-support-veoh>

¹¹ *See, e.g., Ninth Circuit Advisory Committee Note to Rule 29-1* (“The filing of multiple amici curiae briefs raising the same points in support of one party is disfavored. Prospective amici are encouraged to file a joint brief.”), <https://cdn.ca9.uscourts.gov/datastore/uploads/rules/frap.pdf>.

¹² *Report of the Advisory Committee on Appellate Rules* at 3 (Dec. 16, 2024), available within Committee on Rules of Practice and Procedure, *Agenda Book* at 195 (Jan. 7,

Additionally, eliminating the consent provision does not appear necessary. The Advisory Committee cites the risk of recusal as the primary reason for eliminating the consent provision at the panel stage, favoring the striking of amicus briefs through the motion process over the recusal of a conflicted judge.¹³ However, current Rule 29(a)(2) states that a circuit “may prohibit the filing of or may strike an amicus brief that would result in a judge’s disqualification,” even if originally filed based on party consent. That is, the consent provision does not prevent a later striking of an amicus brief to avoid a recusal.

Moreover, the Advisory Committee explains that the filing of an amicus brief with consent of the parties “could cause the recusal of a judge at the panel stage *without the judge even knowing*.”¹⁴ This appears to be in reference to the Second, Ninth, and Tenth Circuits’ concerns about how their computer systems work:

“The filing of an amicus brief on consent can lead the clerk’s office, operating under a computer program that checks for recusals, to block a case from being assigned to a judge before the case is assigned to a panel. That means that a judge is stricken from a case at the outset, as a result of the consent of the parties. By requiring a motion, a judge would decide whether to recuse or to strike the brief—as opposed to the computer simply not assigning the judge to the case in the first place.”¹⁵

If certain circuits have a computer system that recuses judges automatically, without a judge knowing or before a panel is created, it would be more prudent for these circuits to reprogram their computer systems to prevent this from happening—instead of increasing the burden to file amicus briefs.

Eliminating the consent provision ultimately is not in the interests of justice. Having to write and file a separate motion may disincentivize certain parties from filing amicus briefs, especially people or organizations with limited resources. The Advisory Committee should not be more concerned about allowing a single judge to remain on a panel than having the panel—regardless of which judges comprise the panel—hear the full panoply of arguments that may help the panel reach the right decision. And as the Advisory Committee acknowledged, requiring a motion and leave of court for all amicus

2025), https://www.uscourts.gov/sites/default/files/2024-12/2025-01_standing_committee_agenda_book_final_12-19.pdf.

¹³ *Preliminary Draft* at 25-26.

¹⁴ *Preliminary Draft* at 26 (emphasis added).

¹⁵ *Report of the Advisory Committee on Appellate Rules* at 3 (Dec. 16, 2024), contained in Committee on Rules of Practice and Procedure, *Agenda Book* at 195 (Jan. 7, 2025), https://www.uscourts.gov/sites/default/files/2024-12/2025-01_standing_committee_agenda_book_final_12-19.pdf.

briefs is counter to Supreme Court Rule 37.2, which no longer even requires party consent for the filing of amicus briefs.¹⁶ The circuits should, at minimum, maintain the current language in Rule 29(a)(2) to facilitate the participation by diverse organizations at all stages of the appellate process—where appeals often do not just deal with discrete disputes between parties, but instead deal with matters of constitutional and statutory interpretation that will impact the rights of Americans for years to come.

Finally, while it is true that, should the consent provision be eliminated, circuits could reinstate it via their local rules, having Rule 29(a)(2) amended in this way sends a negative message that the Judicial Conference disfavors amicus briefs. The Judicial Conference should not alter a system that has generally been working well.

III. Rules 29(a)(4)(D), (E), and (F) [incorporating Rules 29(b), (c) and (e)] on Disclosures Should be Approached With Caution

We understand that it can be difficult for courts to ascertain who an amicus entity really represents, and that “the identity of an amicus does matter, at least in some cases, to some judges.”¹⁷ As such, we are comfortable with the new language in Rules 29(a)(4)(D) and (E), expanding the Statement of Interest and requiring the disclosure of a creation date if the amicus organization has been in existence for less than 12 months; although we suggest that they and the other disclosure requirements be exempted from the word count. *See infra* Part IV.

However, we have some additional thoughts on Rule 29(a)(4)(F), which incorporates Rules 29(b), (c) and (e). The Advisory Committee is correct that mandated disclosures of members or finances of amicus organizations burden First Amendment rights, including the freedom of association.¹⁸ However, we believe that the Advisory Committee’s focus on campaign finance law, rulings about which have generally favored more disclosure, is misplaced. Amicus briefs do not pose the same risk of corruption of the courts as do financial contributions to elected officials, where a lack of transparency in that context may provide elected officials cover to enter quid pro quo relationships with donors.

A. Relationship Between Amicus and a Party

Rules 29(b)(4) and (c) would require an amicus to disclose when a **party** or the party’s counsel “during the 12 months before the brief was filed, contributed or pledged to contribute an amount equal to **25% or more of the total revenue** of the amicus curiae

¹⁶ *Preliminary Draft* at 25.

¹⁷ *Preliminary Draft* at 20.

¹⁸ *Preliminary Draft* at 14.

for its prior fiscal year.” This is not limited to money designated for a specific amicus brief, but instead broadly applies to general operating revenue of the amicus organization.

While EFF’s mission is focused on protecting the rights of technology users, sometimes our interests align with those of corporations to the extent a case ultimately implicates the rights of users; for example, in cases related to copyright (fair use), Section 230 (47 U.S.C. § 230), or government requests for user data. As such, we sometimes file amicus briefs in support of the company defendant in these cases. We are cautiously comfortable with the 25% threshold because no single corporation contributes more than a quarter of our annual revenue—in fact, our corporate donations are far below that threshold.¹⁹ But we would not want this threshold to be any lower. While the 25% threshold should not affect EFF, we are concerned that it may be detrimental to amicus participation by other public interest organizations with valuable insights to provide to the courts. We frequently write amicus briefs that are joined by other organizations that are smaller and less well-resourced than EFF and thus can have their funding percentages misleadingly skewed by a large donation, even if they also exercise donor independence like we do.²⁰

Additionally, we would not want the standard to change from an easily applicable numerical one to a more amorphous one. The Advisory Committee was right to reject this alternative standard: “requiring disclosure if a party has made sufficient contributions to the amicus that a reasonable person would, under the circumstances, attribute to the party a significant influence over the amicus curiae with respect to the filing or content of the brief.”²¹

B. Relationship Between Amicus and a Nonparty

Rule 29(e) would require an amicus to disclose the name of “**any person**—other than 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.” EFF does not solicit donations for amicus briefs. As long as this rule only applies to money given or promised *for a specific amicus brief*, this provision will not apply to EFF.

We oppose a general nonparty donor disclosure requirement for each filed amicus brief. We agree with the Advisory Committee that “people contribute to organizations that submit amicus briefs for reasons that have nothing to do with the submission of

¹⁹ For fiscal year 2023, EFF only received \$256,700 of donations from multiple corporations, which is a fraction of our over \$19 million budget. *See EFF 2023 Annual Report*, <https://annualreport.eff.org/#financials>.

²⁰ EFF has a strict policy of independence from our donors. *See EFF, Donor Policy*, <https://www.eff.org/pages/membership-faq#donorpolicy>.

²¹ *Preliminary Draft* at 22-23.

amicus briefs.”²² And such a requirement would be less useful to the court and would be a greater administrative and associational privacy/First Amendment burden for EFF and its donors and members.²³ It is important, as the Advisory Committee stated, that “[n]ew members are free to join the amicus, and their general contributions are not subject to disclosure.”²⁴

If EFF ever were to receive a donation for a *specific amicus brief*, we support the disclosure exemption when the donor has been a member for the prior 12 months—because many of our donors and members have supported EFF for years or decades.

IV. Rule 29(a)(5)’s Word Count Should Exclude New Statement of Interest and Disclosure Requirements

Based on our experience, we have found that 7,000 words is an ideal length for amicus briefs. But we appreciate the written clarification in Rule 29(a)(5) that 6,500 words is the default rule. As the Advisory Committee acknowledged, it is important that the circuits remain free to revert to 7,000 words as they see fit under their local rules, per Rule 32(e).²⁵

Additionally, given this reduced amicus brief word count and the expanded requirements for the Statement of Interest in Rule 29(a)(4)(D), as well as additional required disclosures per Rule 29(a)(4)(E) and (F) [which incorporates the disclosures under Rule 29(b), (c) and (e)], we propose that **Rule 32(f)** be amended to *exempt* these new requirements from the amicus brief word count, to allow ample space for an amicus to provide substantive arguments that will help the court.

Respectfully submitted,

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²² *Preliminary Draft* at 23.

²³ *Preliminary Draft* at 21, 23.

²⁴ *Preliminary Draft* at 24.

²⁵ *Preliminary Draft* at 26.