MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 13, 2024

I. Introduction

The Advisory Committee on the Appellate Rules met on Wednesday, April 10, 2024, in Denver, Colorado. The draft minutes from the meeting accompany this report.

The Advisory Committee seeks final approval of amendments to Rule 39, dealing with costs, and Rule 6, dealing with appeals in bankruptcy cases. These amendments were published for public comment in August of 2023, and the Advisory Committee recommends final approval as published. (Part II of this report.)

It also seeks publication of two amendments. The first proposed amendment is to Appellate Form 4, dealing with applications to proceed in forma pauperis, with a simplified version of Form 4. The second deals with amicus briefs and consists of amendments to Rule 29, along with conforming amendments to Rule 32 and the Appendix of Length Limits. (Part III of this report.)

Other matters under consideration (Part IV of this report) are:

- intervention on appeal;
- excessively voluminous appendices; and
- a new suggestion to amend Rule 15 to deal with premature petitions seeking review of agency actions.

The Committee also considered and removed one item from the Committee's agenda (Part V of this report):

- a new suggestion to make PACER access free.

II. Action Items for Final Approval

A. Costs on Appeal (21-AP-D)

In the spring of 2021, the Supreme Court held that Rule 39, which governs costs on appeal, does not permit a district court to alter a court of appeals' allocation of costs, even those costs that are taxed by the district court. *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). The Court also observed that "the current Rules and the relevant statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals." *Id*. at 1638.

That fall, the Advisory Committee appointed a subcommittee to examine the issue, and, in June of 2023, the Standing Committee approved publication of proposed amendments to Rule 39. The proposed amended rule is included with this report in Attachment A. The Advisory Committee seeks final approval as published.

The amended Rule is designed to accomplish several things:

First, it clarifies the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals, the district court (or the clerk of either) calculating and taxing the dollar amount of costs upon the proper party or parties. It uses the term "allocated" for the former and the term "taxed" for the latter. Rule 39(a) establishes default rules for the

allocation of costs; these default rules can be displaced by party agreement or court order.

Second, it codifies the holding in *Hotels.com*, providing that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court.

Third, it responds to the need identified in *Hotels.com* for a clearer procedure that a party should follow if it wants to ask the court of appeals to reconsider the allocation of costs. It does this by providing for a motion for reconsideration of the allocation. To prevent delay, it provides that the mandate must not be delayed while awaiting determination of such a motion for reconsideration while making clear that the court of appeals retains jurisdiction to decide the motion.

Fourth, it makes Rule 39's structure more parallel. The current Rule lists the costs taxable in the district court but not the costs taxable in the court of appeals. The proposed amendment lists the costs taxable in the court of appeals.

The proposal does not, however, have a mechanism for making the judgment winner in the district court aware of the magnitude of the costs it might face under Rule 39 (or even the obligation to pay such costs) early enough to ask the court of appeals to reallocate the costs. While most costs on appeal are so modest that this is not a serious concern, one such cost—the premium paid for a supersedeas bond—can run into the millions of dollars. In our report requesting publication, the Appellate Rules Committee noted that it believed that the easiest time for disclosure is when the bond is before the district court for approval and had requested the Advisory Committee on Civil Rules to consider amending Civil Rule 62 to require that disclosure.

The Advisory Committee received three comments. Two of them are positive; one is negative.

The Minnesota State Bar Association's Assembly, its policy-making body, voted to support the proposed rule. The Committee on Appellate Courts of the California Lawyers Association's Litigation Section "believes that the proposal provides clarity to courts and practitioners regarding the respective authority of circuit courts and district courts to allocate and tax costs," and "cogently addresses the issues regarding FRAP 39 raised" by the Supreme Court in *Hotels.com*. And it "agrees that the Rules Committee should explore an amendment to Federal Rules of Civil Procedure 62."

Andrew Straw suggested that no costs should be allocated against a party who was allowed to proceed in forma pauperis. However, the IFP statute provides,

"Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings," 28 U.S.C. § 1915(f)(1).

The Advisory Committee does not believe that these public comments warrant any changes to the proposed amendments. Instead, it unanimously recommends final approval of the proposed amendments as published.[1]

In addition, it notes that, to the extent there are reasons not to amend Civil Rule 62(b) to require disclosure of the premium paid for a supersedeas bond, perhaps the Advisory Committee on Civil Rules might consider adding a cross-reference to Appellate Rule 39 in Civil Rule 62(b) so that litigants seeking district court approval of a supersedeas bond are alerted to this possibility.

B. Appeals in Bankruptcy Cases (no number assigned)

These proposed amendments to Rule 6, dealing with appeals in bankruptcy cases, arose from requests by the Advisory Committee on Bankruptcy Rules. In June of 2023, the Standing Committee approved publication of proposed amendments to Rule 6. The proposed amended rule is included with this report in Attachment A. The Advisory Committee seeks final approval as published.

The proposed amendments address two different concerns.

Resetting Time to Appeal

The first concern involves resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case. Federal Rule of Appellate Procedure 4(a)(4)(A) resets the time to appeal if various post-judgment motions are timely made in the district court. To be timely in an ordinary civil case, the motion must be made within 28 days of the judgment. Fed. R. Civ. P. 50(b), 52(b), 59. But in a bankruptcy case, the equivalent motions must be made within 14 days of the judgment. Fed. R. Bankr. P. 7052, 9015(c), 9023.

So what happens if a district court itself—rather than a bankruptcy court—decides a bankruptcy proceeding in the first instance and a post-judgment motion is made on the 20th day after judgment? Does the motion have resetting effect or not?

[1] After the meeting of the Advisory Committee, an additional comment was submitted and docketed as a new suggestion. This comment was circulated to the members of the Advisory Committee with a question whether any member wanted to reopen the matter. None did.

The proposed amendment to Appellate Rule 6(a)—the rule that deals with bankruptcy appeals where the district court exercised original jurisdiction—makes clear that it does not. It provides that the reference in Appellate Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read in such cases as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. And it warns that this time may be shorter than the time allowed under the Civil Rules. The Committee Note provides a table of the equivalent motions and the time allowed under the current version of the applicable Bankruptcy Rules.

Direct Appeals

The second concern involves direct appeals in bankruptcy cases. Appeals in bankruptcy are governed by 28 U.S.C. § 158. The default rule for appeals from an order of the bankruptcy court is that such appeals go either to the district court for the district where the bankruptcy court is located or (in the circuits that have established a bankruptcy appellate panel (BAP)) to the BAP for that circuit. Under § 158, the losing party then has a further appeal as of right to the court of appeals from a final judgment of the district court or BAP.

In some circumstances, however, a direct appeal to the court of appeals can be authorized under § 158(d)(2). The requirements are similar to, but looser than, the standards for certification under 28 U.S.C. § 1292(b), which permits courts of appeals to hear appeals of interlocutory orders of the district courts in certain circumstances. Moreover, the certification can be made by the bankruptcy court, district court, BAP, or the parties. Under the Bankruptcy Rules, even if a bankruptcy court order has been certified for direct appeal to the court of appeals, the appellant must still file a notice of appeal to the district court or BAP in order to render the certification effective. As with § 1292(b), the court of appeals must also authorize the direct appeal.

Under this structure, a court of appeals' decision to authorize a direct appeal does not determine whether an appeal will go forward, but instead in what court the appeal will be heard. The party asking that the appeal from the bankruptcy court be heard directly in the court of appeals might be an appellee rather than an appellant. Accordingly, the Advisory Committee on Bankruptcy Rules is seeking final approval of a clarifying amendment to Bankruptcy Rule 8006(g) providing that any party to the appeal may file a request that the court of appeals authorize a direct appeal.

Current Appellate Rule 6(c), which governs direct appeals, largely relies on a cross-reference to Rule 5, which governs appeals by permission. But the proposed amendment to the Bankruptcy Rules revealed that Appellate Rule 5 is not a good fit for direct appeals in bankruptcy cases. That's because Rule 5 was designed for the situation in which the court of appeals is deciding whether to allow an appeal at all.

But in the direct appeal context, that's not the question. Instead, in the direct appeal context, there is an appeal; the question is which court is going to hear that appeal.

More generally, experience with direct appeals shows considerable confusion in applying the Appellate Rules. This is primarily due to the manner in which Rule 6(c) cross-references Rule 5 and to its failure to take into account that an appeal of the bankruptcy court order in question is already proceeding in the district court or BAP, which results in uncertainty about precisely what steps are necessary to perfect an appeal after the court of appeals authorizes a direct appeal.

For these reasons, the proposed amendments overhaul Rule 6(c) and make it largely self-contained. Parties will not need to refer to Rule 5 unless Rule 6(c) expressly refers to a specific provision of Rule 5. Rule 6(c) makes Rule 5 inapplicable except to the extent provided for in other parts of Rule 6(c).

The proposed amendments also spell out in more detail how parties should handle initial procedural steps in the court of appeals once authorization for a direct appeal is granted, taking into account that an appeal from the same order will already be pending in the district court or BAP. The proposed Rule 6(c)(2) permits any party to the appeal to ask the court of appeals to authorize a direct appeal. It also adds provisions governing contents of the petition, answer or cross-petition, oral argument, form of papers, number of copies, and length limits and provides for calculating time, notification of the order authorizing a direct appeal, and payment of fees. It adds a provision governing stays pending appeal, makes clear that steps already taken in pursuing the appeal need not be repeated, and provides for making the record available to the circuit clerk. It requires all parties, not just the appellant or applicant for direct appeal, to file a representation statement. Additional changes in language are made to better match the relevant statutes.

None of these are intended to make major changes to existing procedures but to clarify those procedures.

We received only one public comment. The Minnesota State Bar Association's Assembly, its policy-making body, voted to support the proposed rule. It stated that the proposed changes "will foster transparency and possibly efficiency between parties and the court." The Advisory Committee on Bankruptcy Rules has not received any comments objecting to the amendments either.

The Advisory Committee unanimously recommends final approval of the proposed amendments as published.

III. Action Items for Approval for Publication

A. IFP Status Standards—Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

In 2019, the Civil, Criminal, and Appellate Rules Committees received suggestions calling for changes to the standards for granting IFP status and for simplification of the applicable forms. That same year, an article published in the Yale Law Journal proposed similar changes, noting the degree of variation among district courts. Andrew Hammond, *Pleading Poverty in Federal Court*, 128 Yale L.J. 1478, 1482, 1522 (2019). The issue was further complicated by confusion resulting from the 1996 amendment of the governing statute, 28 U.S.C. § 1915, by the Prison Litigation Reform Act (PLRA). Hammond, 128 Yale L.J. at 1490-1492.

Only the Appellate Rules Committee is actively pursuing reforms in this area. No advisory committee is seeking to try to establish standards for granting IFP status, an issue that might not be appropriate under the Rules Enabling Act in any event. As for the applicable forms, which specify the level of detail required in an IFP application, the district courts and the courts of appeals are differently situated. The forms used in the district courts are generally produced by the Administrative Office of the U.S. Courts, and therefore not subject to the rulemaking procedures of the Rules Committees. But Appellate Form 4 is a part of the Federal Rules of Appellate Procedure, adopted pursuant to the Rules Enabling Act. For these reasons, the Advisory Committee has focused its attention on possible revisions to Form 4.

The Advisory Committee has produced a simplified Form 4 and asks that it be published for public comment. The goal of the revised Form 4 is to reduce the burden on individuals seeking IFP status while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status. The Advisory Committee circulated an earlier draft to the senior staff attorney in each of the circuits. The response was overwhelmingly positive, and the Advisory Committee made some changes to the draft Form 4 based on comments from those senior staff attorneys.

Historical Background

Individuals have long been able to avoid prepaying fees and costs associated with litigation if they are unable to do so because of poverty. 28 U.S.C. § 1915. *See* Act of July 20, 1892, c. 209, 27 Stat. 252 (providing this opportunity to citizen plaintiffs); Act of June 25, 1910, c. 435, 36 Stat. 866 (extending IFP status to defendants and appellants); Act of Sept. 21, 1959, Pub. L. No. 86-320, 73 Stat. 590 (extending IFP status to noncitizens); *cf. Rowland v. Cal. Men's Colony*, 506 U.S. 194 (1993) (holding that only natural persons qualify for IFP status).

In 1948, the Supreme Court explained that a person need not be destitute or a public charge to qualify for IFP status because "[t]he public would not benefit if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support." *Adkins v. DuPont Co.*, 335 U.S. 331, 339 (1948). The Court observed that an affidavit in support of an application for IFP status is sufficient if it "states that one cannot because of his poverty, pay or give security for the costs . . . and still be able to provide himself and dependents with the necessities of life." *Id.* at 339. For years, the Court accepted an affidavit with those words and no more as sufficient. *See* Stern & Gressman's Supreme Court Practice § 8.7 (11th edition 2019).

When the Federal Rules of Appellate Procedure took effect in 1968, Form 4 contained five questions. 28 U.S.C. appendix (1964 edition, supp. I, 1968). In 1996, Congress enacted the Prison Litigation Reform Act (PLRA), which amended 28 U.S.C. § 1915. In 1998, Form 4 was revised and became a much more detailed questionnaire, including numerous questions about an applicant's spouse. 28 U.S.C. appendix (1994 edition, supp. V, 1995-2000).

The amendment to § 1915 produced a statute that makes little sense. It provides, in relevant part:

> [A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.

28 U.S.C. § 1915. It switches, mid-sentence, from referring to a "person" who submits an affidavit to "such prisoner" whose assets must be stated in the affidavit and then back again to the "person" who is unable to pay fees. To make sense of this provision, courts have generally read it to require any *person* seeking IFP status to submit a statement of all assets such *person* possesses, even if the person is not a prisoner.

The Advisory Committee believes that proposed Form 4, which calls for a statement of "the total value of all your assets" is consistent with the statutory provision calling for a "statement of all assets," even though it does not call for an enumeration of those assets (and assuming that § 1915 requires all persons, not just all prisoners, to submit such an affidavit).

The Advisory Committee also believes that the statute does not require that Form 4 include an intrusive inquiry into information about an applicant's spouse. Prior to 1998, Form 4 did not include such questions, and nothing in the PLRA refers

to spouses. Of course, there may be situations in which a spouse's income or assets are relevant. *See Escobedo v. Applebees*, 787 F.3d 1226, 1236 (9th Cir. 2015), but the same is true of other family members that existing Form 4 does not ask about. *See*, *e.g.*, *Zhu v. Countrywide Realty Co.*, 148 F. Supp. 2d 1154, 1156 (D. Kan. 2001) (close family members); *Williams v. Spencer*, 455 F. Supp. 205, 209 (D. Md. 1978) (parents of minors).

Nothing in proposed Form 4 would preclude a court from making further inquiry where appropriate. For example, if an applicant stated that he had little or no income or assets but substantial expenses, a court might inquire how those expenses were being paid. But based on the experience in the courts of appeals, the Advisory Committee does not believe that such cases are sufficiently common to warrant the detail required by current Form 4.

The foregoing analysis demonstrates that the streamlined proposal for Form 4 is consistent with the provisions of § 1915. Alternatively, if there were any question about the requirements of the statute, the level of detail required in an application for IFP status is a proper subject for the Rules Enabling Act process—as the history of Form 4 reveals—and a revised Form 4 can supersede any contrary requirement of the PLRA. 28 U.S.C. § 2072(b) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."); *Callihan v. Schneider*, 178 F.3d 800, 803 (6th Cir. 1999) (holding that a 1998 amendment to Federal Rule of Appellate Procedure 24 superseded provisions of the Prison Litigation Reform Act).

The proposed Form 4 would call for all persons, not just prisoners, to complete the form and require a statement of "the total value" of a person's assets, rather than an enumerated list of assets. Prisoners would continue to be required to provide statements from their institutional accounts. 28 U.S.C. § 1915(a)(2). The Advisory Committee believes the changes to Form 4 would serve the interests of the public, litigants, and the courts.

Proposed Form 4

Proposed Form 4 simplifies the existing Form 4, reducing the existing form to two pages. It is designed not only to reduce the burden on individuals seeking IFP status but also to provide the information that courts of appeals need and use, while omitting unnecessary information. The Advisory Committee learned from the various circuits that IFP status is denied far more frequently for lack of a non-frivolous issue on appeal than for lack of indigency. For that reason, the first page of proposed Form 4 informs the applicant of the need to show that there is a non-frivolous issue on appeal and visually highlights the requirement to state such issues at the outset. Page two contains eight questions. Questions one and two ask about monthly income, first from work and then from any other source. Questions three and four ask about

costs (a topic not covered in the 1968 form), first for housing and then for any other necessary expenses. Questions five and six are devoted to assets and debt. For questions two through six, the proposed form includes appropriate illustrations, such as unemployment benefits, social security, childcare, transportation, bank accounts, credit cards, and student loans. Question seven asks how many people the applicant supports. Question eight asks about receipt of certain public benefits, which may provide a means-test verified by other government agencies that might yield a shortcut for approving eligibility. After informing prisoners of the need to provide a certified statement of their institutional accounts, the proposed form ends with space for an applicant to provide additional information.

The Advisory Committee unanimously approved the proposed revised Form 4 with the recommendation that it be published for public comment. It is included in Attachment B to this report.

B. Amicus Curiae Briefs (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-A; 23-AP-B; 23-AP-E; 23-AP-I; 23-AP-K)

After years of careful consideration, the Advisory Committee recommends publication for public comment of proposed amendments to Rule 29, dealing with amicus curiae briefs. Conforming amendments to Rule 32(g) and the Appendix of Length Limits are also proposed.

Background

In October 2019, after learning of a bill introduced in Congress that would institute a registration and disclosure system for amici curiae like the one that applies to lobbyists, the Advisory Committee appointed a subcommittee to address amicus disclosures. In September 2020, the Clerk of the Supreme Court wrote to the Standing Committee on Rules of Practice and Procedure, attaching his correspondence with the Congressional sponsors of that bill. He noted that Appellate Rule 29 includes disclosure requirements similar to those of Supreme Court Rule 37.6, and that the Committee might wish to consider whether to amend Rule 29, which would in turn "provide helpful guidance" on whether Supreme Court Rule 37.6 should be amended. In February of 2021, Senator Whitehouse and Congressman Johnson wrote to Judge Bates requesting the establishment of a working group to address the disclosure requirements for organizations that file amicus briefs. Judge Bates was able to respond that the Advisory Committee on the Federal Rules of Appellate Procedure had already established a subcommittee to do so.

Appellate Rule 29(a)(4)(E) currently requires that most amicus briefs include a statement that indicates whether:

> (i) a party's counsel authored the brief in whole or in part;
>
> (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
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> (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

Significantly, the current rule requires disclosure of earmarked contributions not only by parties to the case, but by nonparties as well—with the exception of such contribution by the amicus itself, its members, or its counsel.

The Advisory Committee's early focus was on a close analysis of the proposed AMICUS Act and the concerns of its sponsors, including that parties could fund amicus briefs, that donors could anonymously fund a party or multiple amici, and that the existing rule was inequitable because it prohibited crowdfunding with small anonymous donations. *See* Spring 2021 agenda book at 133. At the same time, the Advisory Committee was also focused on respect for the First Amendment, asking "whether more expansive disclosure requirements could benefit the courts and the public without infringing on constitutional rights." *Id*. at 138 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) and *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958)).

The Advisory Committee determined early on that, unlike the proposed AMICUS Act, any additional disclosure requirements should apply to all non-government amici, not just to repeat filers. It also determined early on that amicus briefs are significantly different from lobbying. Amicus briefs are filed with a court, available to the public, and the arguments made by amici can be rebutted by the parties. Lobbying activity, by definition, consists of non-public attempts to influence the legislative or executive branch. *See* 2 U.S.C. § 1602(8)(B) (excluding communications "distributed and made available to the public" or "submitted for inclusion in the public record of a hearing" from the definition of "lobbying contact").

The Advisory Committee also readily concluded that any possible loophole that could be produced by a narrow reading of the phrase "preparing or submitting" a brief was easily remedied by clarifying that every step of the brief writing process was covered.

Similarly straightforward was the conclusion that parties should not be able to evade disclosure of earmarked contributions by making earmarked contributions to amicus organizations of which they are members. That is, the specific disclosure requirement for parties in current Rule 29(a)(4)(E)(ii) should trump the general exception for members of an amicus in current Rule 29(a)(4)(E)(iii)—and if there were any doubt about this, the Rule could be amended to make it clear. Almost as easy was the idea that there should be some de minimis threshold for earmarked contributions by nonparties.

Several issues proved far more challenging.

One such issue was whether there should be additional disclosure requirements concerning the relationship between a party and an amicus, including non-earmarked contributions to an amicus by a party and, if so, at what level of contribution should disclosure be triggered.

A second such issue was whether there should be additional disclosure requirements concerning the relationship between a nonparty and an amicus, including non-earmarked contributions to an amicus by a nonparty and, if so, at what level of contribution should disclosure be triggered.

The third, and perhaps the most difficult, was whether to retain the existing exception for earmarked contributions by members of an amicus.

In addressing these issues, and in proposing all these amendments, the Advisory Committee seeks to improve the integrity and fairness of the federal judicial process. By providing more information about amici, these amendments would place judges, parties, and the public in a better position to assess the independence and credibility of the arguments and perspectives offered by amici. By clarifying arguably unclear language and closing potential loopholes, these amendments would reduce opportunities for evasion and gamesmanship. At the same time, the Advisory Committee has been careful to avoid placing unnecessary burdens on amici, their members, and their contributors, and kept in mind their First Amendment interests. The First Amendment cases discussed below arose in markedly different circumstances than the ones presented by these amendments. Those cases involved situations where disclosure was required because an entity engaged in political speech or solicited contributions as a charitable organization. These proposed amendments are far more limited, modifying disclosure requirements that already exist for those who choose to submit amicus briefs to assist a court in deciding a case.

The AFP Decision

The Advisory Committee was aware in the spring of 2021 of the pendency of *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021). When the Committee met again in the fall of 2021 after that case was decided, it considered an analysis of that decision and focused on the government's interest in amicus briefs, its interest in disclosure by amici, and the burdens on amici from disclosure—including both the administrative burden of compliance and the possibility that a potential amicus might decline to file a brief rather than disclose what it did not want to disclose. *See* Fall 2021 agenda book at 164, 166.[2]

In *AFP*, the Supreme Court held California's charitable disclosure requirement to be facially unconstitutional. *AFP*, 141 S. Ct. at 2389. California had required charities that solicit contributions in California to disclose the identities of their major donors (donors who have contributed more than $5,000 or more than 2% of an organization's total contributions in a year) to the Attorney General.

To evaluate the constitutionality of the California disclosure requirement, the Court applied "exacting scrutiny," meaning that "there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id*. at 2383 (cleaned up) (opinion of Roberts, C.J.).[3] "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." *Id.* (opinion of the Court). Moreover, the Court concluded that the narrow tailoring requirement is not limited to "laws that impose severe burdens," but is designed to minimize any unnecessary burden. *Id.* at 2385.

The Court concluded that California's disclosure regime did not satisfy the narrow tailoring requirement. It accepted that "California has an important interest in preventing wrongdoing by charitable organizations." *Id.* at 2385-86. But it found "a dramatic mismatch" between that interest and the state's disclosure requirements.

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[2] Some might even decline to join an association for fear that the organization might file an amicus brief that requires disclosure.

[3] Of the six justices in the majority, three—Roberts, Kavanaugh, and Barrett—would have held that exacting scrutiny, rather than strict scrutiny, applies to all First Amendment challenges to compelled disclosure. Justice Thomas would have held that strict scrutiny applied, and Justices Alito and Gorsuch declined to decide because, in their view, California's law failed under either test. The dissenters addressed the California law under the exacting scrutiny standard and would have held it met that standard.

Id. at 2386. While California required every charity to disclose the names, addresses, and total contributions of their top donors, ranging from a few people to hundreds, it rarely if ever used this information to investigate or combat fraud. Moreover, the state "had not even considered alternatives to the current disclosure requirement" that might be less burdensome. *Id.* A facial challenge was appropriate because the "lack of tailoring to the State's investigative goals is categorical—present in every case—as is the weakness of the State's interest in administrative convenience." *Id.* at 2387.

A fuller understanding of the First Amendment limits in this area can be gained by considering both the Supreme Court cases on which *AFP* built and the subsequent court of appeals cases applying *AFP*.

Pre-*AFP* Cases

The leading case prohibiting compelled disclosure because of a chilling effect on freedom of association is *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). As Chief Justice Roberts described it:

> *NAACP v. Alabama* involved this chilling effect in its starkest form. The NAACP opened an Alabama office that supported racial integration in higher education and public transportation. In response, NAACP members were threatened with economic reprisals and violence. As part of an effort to oust the organization from the State, the Alabama Attorney General sought the group's membership lists. We held that the First Amendment prohibited such compelled disclosure. We explained that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and we noted "the vital relationship between freedom to associate and privacy in one's associations." Because NAACP members faced a risk of reprisals if their affiliation with the organization became known—and because Alabama had demonstrated no offsetting interest "sufficient to justify the deterrent effect" of disclosure—we concluded that the State's demand violated the First Amendment.

AFP, 141 S. Ct. at 2382 (citation omitted).

NAACP did not use the term "exacting scrutiny." Instead, that term can be traced to a campaign finance case, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), where the Court said, "We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP*

v. Alabama we have required that the subordinating interests of the State must survive exacting scrutiny." *Id*. at 64 (footnote omitted).

Buckley refused to distinguish *NAACP* on the grounds that *NAACP* involved members while *Buckley* involved donors. The Court explained that funds are often essential to advocacy, that financial transactions can reveal much about associations and beliefs, and observed that its "past decisions have not drawn fine lines between contributors and members but have treated them interchangeably." *Buckley*, 424 U.S. at 66 (citing *United States v. Rumely*, 345 U.S. 41 (1953); *Bates v. Little Rock*, 361 U.S. 516 (1960)).

But *Buckley* did distinguish *NAACP* on a different ground and upheld the disclosure requirements of the Federal Election Campaign Act. It concluded that there were three governmental interests of sufficient importance to justify the disclosure requirements: (1) providing the electorate with information; (2) deterring corruption and avoiding the appearance of corruption; and (3) gathering the data to detect violations of contribution limits. 424 U.S. at 66-69.

The Court elaborated:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
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> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return. And . . . Congress could reasonably conclude that full disclosure during an election campaign tends to prevent the corrupt use of money to affect elections.
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> * * *

> Third . . . disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations. . . .

424 U.S. at 66-69 (cleaned up).

Section 201 of the Bipartisan Campaign Reform Act of 2002 (BCRA) requires any person who spends more than $10,000 on electioneering communications within a calendar year to file a disclosure statement identifying the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. 2 U.S.C. § 434(f). In *McConnell v. Federal Election Com'n*, 540 U.S. 93 (2003), the Court relied on *Buckley* to uphold this requirement. *Id*. at 195 (referring to the "important state interests" in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions"). It criticized the plaintiffs for wanting to spend funds on ads referring to candidates in the sixty days before the election "while hiding behind dubious and misleading names." *Id*. at 197.

Even as *Citizens United v. Federal Election Com'n*, 558 U.S. 310 (2010), overruled part of *McConnell* and held unconstitutional BCRA's restrictions on independent corporate expenditures, it continued to uphold BCRA's disclosure requirements, again relying on the public's interest "in knowing who is speaking about a candidate shortly before an election." *Id*. at 369. Noting that *McConnell* had recognized that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed, the Court rejected Citizens United's as-applied challenge because it offered no evidence that its members may face similar threats or reprisals. *Id*. at 370.

Post-*AFP* Cases

In *Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021), the court of appeals held that Rhode Island's campaign disclosure requirements—including disclosure of donors who contributed $1000 or more to an organization's general fund that was used to spend $1000 or more on independent expenditures or electioneering communication and on-ad disclosure of its top five donors—were constitutional under *AFP*. The court understood *AFP* to have increased the rigor of exacting scrutiny:

> Prior to the Court's recent decision in *Americans for Prosperity*, exacting scrutiny was widely understood to require only a "substantial

> relation" between the challenged regulation and the governmental interest. In refining its articulation of exacting scrutiny, the *Americans for Prosperity* Court heightened this requirement, emphasizing that in the First Amendment context, fit matters. The Court went on to say that exacting scrutiny requires a fit that is not necessarily perfect, but reasonable. A substantial relation is necessary but not sufficient for a challenged requirement to survive exacting scrutiny. And in addition, the challenged requirement must be narrowly tailored to the interest it promotes.

Id. at 85.

The court nevertheless concluded that the disclosure requirements were narrowly tailored. First, the challenged provisions apply only to organizations spending more than $1000 on independent expenditures or electioneering communications in a calendar year, thus tailoring the statute to reach only larger spenders in the election arena and helping the electorate understand who is speaking and properly weigh the message. Second, the temporal limitation links the disclosures to the objective of an informed electorate. Third, the definition of electioneering communication narrows the scope to the relevant electorate. Finally, the statute provides off-ramps: contribute less than $1000 or opt out of having the contribution used for independent expenditures or electioneering communication—effectively an opt-out earmark. Taken together, the statute requires "disclosure of relatively large donors who choose to engage in election-related speech." *Id*. at 88-89. And the on-ad disclosure of top donors "provides an instantaneous heuristic by which to evaluate generic or uninformative speaker names." *Id*. at 91.

In *No on E v. Chiu*, 85 F.4th 493 (9th Cir. 2023), the court of appeals affirmed the denial of a preliminary injunction against enforcement of a local law requiring the disclosure of the top three donors in all paid ads by independent expenditure committees. The court held that "[d]isclosure of who is speaking enables the electorate to make informed decisions and give proper weight to different speakers and messages," noting that "[a]n appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another." *Id*. at 505 (cleaned up).

The court upheld a secondary disclosure requirement—that is, the disclosure of the top donors to certain donors—because such disclosure was "designed to go beyond the ad hoc organizations with creative but misleading names and instead expose the actual contributors to such groups." *Id*. (cleaned up).

The court also concluded that it was not fatal to the disclosure requirement that it "goes beyond donations that are earmarked for electioneering," because it is constrained in other ways, reaching "only the top donors to a committee that is, in turn, a top donor to a primarily formed committee." *Id*. at 510.

Nine judges dissented from the denial of rehearing en banc. They agreed "that the government has an interest in informing voters about who is funding political ads." *Id.* at 526 (VanDyke, J., dissenting). That's because "learning a political advertiser's financiers can serve as a reasonable proxy for informing the voter of where the speaker falls on the political spectrum. Or as I emphasized above, channeling the Greek moralist: 'A man is known by the company he keeps.' " *Id*. at 527 (quoting Aesop, Aesop's Fables 109 (R. Worthington, trans., Duke Classics 1884)). They dissented from the extension of this principle to secondary contributors, reasoning that a "man is not known by the company of the company he keeps," and that "a voter cannot reasonably infer any relevant information about a political speaker or an advertisement by knowing the speaker's secondary contributors," who "may contribute to the primary contributor for a variety of reasons unrelated to the primary contributor's support for a political speaker." *Id*.[4]

Smith v. Helzer, 95 F.4th 1207 (9th Cir. 2024), largely followed *No on E* in affirming the denial of a preliminary injunction against the enforcement of an Alaska campaign finance law. One of the statutory provisions requires that donors disclose their contributions of more than $2000 in a calendar year to an entity that makes independent expenditures in an election—and do so within 24 hours of making the donation. The court rejected the argument that because the recipients are already required to report the receipt of such contributions, there is no state interest in requiring donors to also report, explaining that "[p]rompt disclosure by both sides of a transaction ensures that the electorate receives the most helpful information in the lead up to an election." *Id*. at 1216. Requiring prompt reporting at all times rather than just near elections gave the court some pause, but it ultimately concluded that it was not an onerous burden. *Id*. at 1218-19. A partial dissent concluded that the burdens on individual donors are too great and saw no justification for a year-round 24-hour reporting requirement. *Smith*, 95 F.4th at 1221 (Forrest, J., concurring in part and dissenting in part).

On the other hand, the court in *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1245 (10th Cir. 2023), concluded that the "public still has an interest in knowing who speaks through WyGO," despite its stand on gun rights being obvious from its name,

[4] A separate dissent contended that the disclosure requirements took up too much space in the ads. *No on E,* 85 F.4th at 511 (Collins, J., dissenting).

but that the state statute is not narrowly tailored as applied. The statute requires disclosure of contributions that "relate to" electioneering communication, and the identity of the contributor if the contribution exceeds $100. But this vague standard is particularly burdensome for an organization that has no way of knowing which donor contributions "relate to" a particular expense. *Id*. at 1247. The alternative of disclosing all donors who give more than $100 is not narrow tailoring. *Id*. The court explained:

> Rather than leave WyGO to twist in the wind, the statute could have outlined an earmarking system. We have already recognized the role earmarking can play in tailoring a disclosure law. . . . . It is no surprise that at least one of our district courts has found the absence of an earmarking provision central to concluding that a disclosure regime fails exacting scrutiny. *See, e.g., Lakewood Citizens Watchdog Grp. v. City of Lakewood*, No. 21-CV-01488-PAB, 2021 WL 4060630, at *12 (D. Colo. Sept. 7, 2021). Instituting an earmarking system better serves the state's informational interest; it directly links speaker to content, whereas the Secretary's solution dilutes the statutory mission. The Secretary does not explain why this solution is beyond Wyoming's reach.

Gray, 83 F.4th at 1248. The Court distinguished a decision from the Court of Appeals for the Third Circuit which had upheld a disclosure requirement without an earmarking limitation (while conceding that such a limitation would result in a more narrowly tailored statute) as "a relic of pre-*[AFP]* exacting scrutiny." *Id*. at 1249 (citing *Delaware Strong Families v. Attorney General of Del.*, 793 F.3d 304 (3d Cir. 2015)).

The Advisory Committee's Resolution

With these First Amendment concerns in mind, the Advisory Committee resolved—at this publication for public comment stage—the three difficult issues noted above.

The starting point is the court's interest in amicus briefs in the first place: to help a court make the correct decision in a case before it. Unlike parties, a would-be amicus does not have a right to be heard in court. Amicus briefs may serve the *amicus* as a method of fundraising, as a method of showing its members that it is working on their behalf, as communication to the broader public, or as a method of advertising for the lawyers involved. But these are not the reasons that *courts* allow amicus briefs. Limitations on filing amicus briefs, whether direct prohibitions or indirect incentives caused by disclosure requirements, do not prevent anyone from speaking

out—in books, articles, podcasts, blogs, advertisements, social media, etc.—about how a court should decide a case.

For an amicus brief to be helpful to a court, the court must be able to evaluate the information and arguments presented in that brief. Disclosure requirements in connection with amicus briefs serve an important government interest in helping courts evaluate the submissions of those who seek to persuade them, in a way that is analogous to campaign finance disclosures that help voters to evaluate those who seek to persuade them.

The Advisory Committee considered 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. But the identity of an amicus does matter, at least in some cases, to some judges. In addition, members of the public can use the disclosures to monitor the courts, thereby serving both the important governmental interest in appropriate accountability and public confidence in the courts. Disclosure is especially valuable for any amicus who uses a dubious or misleading name.

Accordingly, the Advisory Committee decided to require all amicus briefs to include "a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will help the court." Rule 29(a)(4)(D). To deal with the possibility that an amicus might have been created for purposes of this particular case, the proposed rule also requires an amicus that has existed for less than 12 months to state the date the amicus was created. Rule 29(a)(4)(D).

In addition to the interests involved regarding any amicus brief, there are additional government interests at stake with regard to the relationship between a party and an amicus. First, in our adversary system, parties are given a limited opportunity to persuade a court and should not be able to evade those limits by using a proxy. Second, a court should not be misled into thinking that an amicus is more independent of a party than it is.

For this reason, the Advisory Committee decided to treat the relationship between parties and amici differently than the relationship between nonparties and amici.

Just as the government interests are different in the two situations, so too are the burdens of disclosure. The burdens of disclosure are far greater with regard to nonparties. There are far more nonparties than parties in any given case. The more

that an amicus has to disclose relationships with nonparties, the greater the administrative burden of identifying and producing the information. Similarly, the burden on associational rights is greater with regard to nonparties. There are far more people who might either choose not to associate with the amicus because of the risk of disclosure or whose fear of disclosure might lead the potential amicus to not submit a brief.

Relationship between a party and an amicus.

With regard to the relationship between a party and an amicus, the Advisory Committee concluded that two new disclosure requirements should be added. The first has been relatively uncontroversial: requiring the disclosure of whether "a party, its counsel, or any combination of parties or their counsel has a majority ownership interest in or majority control of a legal entity submitting the brief." Rule 29(b)(3). If a party has majority ownership or control of an amicus, a court should know that and be able to take that into account in evaluating the arguments in the amicus brief.

The Advisory Committee also concluded that—at some level—contributions by a party to an amicus created a sufficient risk of party influence that disclosure was warranted. There is an unavoidable trade-off here: the lower the threshold, the more information provided but the greater the burden on the amicus. The AMICUS Act would set the disclosure threshold at 3% of the revenue of the amicus. One member of the Advisory Committee, whose term has since expired, argued that the threshold should be 50%, reasoning that at any level less than that, other contributors had a greater voice than the party. Another possibility was 10%, drawing on the corporate disclosure rule, Rule 26.1.

The Advisory Committee settled on 25%, reasoning that an amicus that is dependent on a party for one quarter of its revenue may be sufficiently susceptible to that party's influence to warrant disclosure, thereby enabling a judge to consider that potential influence in evaluating the brief. Rule 29(b)(4). The administrative burden of such disclosure is likely to be low: top officials at an amicus are likely to be aware of such a high-level contributor without having to do any research at all. So, too, is the burden on associational rights: An amicus would be unable to submit a brief ostensibly designed to help the court decide a case without revealing that a party to that case is a major contributor. Instead, it would have to choose between filing an amicus brief with such a disclosure or refrain from filing.

The Advisory Committee took other steps to narrowly tailor this disclosure requirement. Most obviously, but worth reiterating, disclosures are limited to those seeking to file amicus briefs. They do not reach (for example) all charities, as in *AFP*,

or all speakers. A putative amicus who refrains from filing an amicus brief to avoid disclosure is not silenced in any way. Limiting required disclosures to such high value contributions is also an important aspect of narrow tailoring to serve the goal of helping courts understand how much the party may be speaking through an amicus and properly weigh the message. In addition, the temporal limit, which requires disclosure only of contributions with the 12-month prior to the filing of the brief, serves to narrowly tailor the requirement to focus on a connection between the contribution and the filing of the brief.[5] The Advisory Committee also crafted the method of computation to relieve burdens: the threshold for disclosure is calculated using the total revenue for the prior fiscal year, making for simple and infrequent determination.

The proposed amendment requires self-disclosure by any party or counsel who knows that he should have been disclosed by an amicus but was not. This is not duplicative, but merely a backstop if an amicus fails to comply with the rule.

The Advisory Committee considered using a standard rather than a rule for disclosure of contributions, such as requiring disclosure if a party has made sufficient contributions to the amicus curiae 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. In a sense, such a standard would be exactly tailored to the government interest because it would require disclosure in all cases (but only those cases) where a reasonable person would see a significant influence by the party over the amicus. But the Advisory Committee rejected such an approach, precisely because of the burdens it would place on amici. It would be difficult for an amicus to be sure when disclosure would be required, leading scrupulous amici to over-disclose or unnecessarily refrain from filing. (It could also lead less scrupulous amici to under-disclose.)

Relationship between a nonparty and an amicus.

With regard to the relationship between a nonparty and an amicus, the Advisory Committee considered the addition of parallel disclosure requirements of major contributors to an amicus. But it decided against it. First, the information obtained would be less useful in evaluating the arguments made in an amicus brief.

[5] This temporal limitation significantly reduces the risk that someone might decline to make a significant contribution to avoid disclosure, unless they are already a party to litigation (or see it on the near horizon) in which the organization might file an amicus brief.

Entities that submit amicus briefs come in all shapes and sizes. For some, amicus briefs may be a regular and important part of what they do. For some, amicus briefs may be a rarity. Most engage in a wide variety of activities other than submitting amicus briefs. As a result, people contribute to organizations that submit amicus briefs for reasons that have nothing to do with the submission of amicus briefs, making disclosure of their identity less useful in evaluating an amicus brief—and a requirement to do so less narrowly tailored to that interest. Second, the burdens of such disclosure would be much greater. Amici would have to determine and reveal major contributors (or decide not to file to avoid disclosure) in all cases, not only when the major contributor is a party to that case. With such a broad disclosure requirement, not limited to cases in which the contributor is a party, people might decline to make significant contributions to avoid disclosure.

Membership exception for earmarked contributions.

Perhaps the most difficult issue the Advisory Committee faced was whether to retain the existing exception for earmarked contributions by members of an amicus. The existing rule requires the disclosure of all earmarked contributions, both by parties and nonparties. But the current rule does not require disclosure of earmarked contributions by the amicus itself, its counsel, or members of the amicus.

Disclosure of earmarked contributions by a party is not controversial. It is in the existing rule, and the proposed amendment, by treating parties and nonparties separately, makes this requirement even clearer.

In general, disclosure of earmarked contributions provides more useful information and is less burdensome than disclosure of non-earmarked contributions. Knowing who made a contribution that was earmarked for a brief provides information to evaluate that brief in a way analogous to the way that knowing who made a contribution to a candidate helps evaluate that candidate. Disclosure is less burdensome because it is limited to contributions to fund that brief, not general contributions to an organization. Limiting required disclosure to earmarked contributions is an important aspect of narrow tailoring. *See, e.g.*, *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1245 (10th Cir. 2023).

A reason to exempt members of the amicus from such disclosure, as the existing rule does, is that an organization speaks for its members and its members speak through the organization. From that perspective, one might think that no information is gained by knowing the members of the organization, and the willingness to join an organization is burdened by disclosure.

On the other hand, a member who makes earmarked contributions for a particular amicus brief deliberately stands out from other members with regard to the brief, and therefore additional information is provided by disclosure of that earmarked contribution. The views expressed in the amicus brief might be disproportionately shaped by the interests of that contributor. At the extreme, the amicus may be serving simply as a paid mouthpiece for that contributor.

For that reason, the Advisory Committee considered eliminating the member exception. But it was persuaded that doing so would unfairly distinguish between those organizations (typically larger) that regularly file amicus briefs and therefore budget for them from general revenue and those organizations (typically smaller) that do not and therefore have to pass the hat for an amicus brief.

Yet retaining the member exception as is would leave a gaping loophole in the rule: a person who wished to underwrite a brief anonymously need only join the organization to do so. To close this loophole, the Advisory Committee decided to retain the member exception, but to limit the exception to those who have been members for the prior 12 months. A new member making contributions earmarked for a particular brief is effectively treated as a non-member for these purposes and must be disclosed. This limitation is narrowly tailored to the problem and imposes a minimal burden. New members are free to join the amicus, and their general contributions are not subject to disclosure. And old members can make earmarked contributions without disclosure. It is only nonmembers and new members who choose to make contributions earmarked for a particular brief who must be identified in that brief to help the court evaluate the arguments in that brief.

That solution raised another issue: what to do with newly-formed amici? The Advisory Committee decided that requiring the disclosure of *all* earmarked contributions would be too burdensome. Doing so would effectively treat any new organization as having no members, a mere façade. Instead, the Advisory Committee decided to extend the membership exemption to these new organizations but require that they disclose the date of their formation.

The point is not to treat these new organizations more favorably than older, more established organizations. To the contrary, a requirement that such new organizations reveal themselves in this way may serve to unmask organizations established for the purpose of the litigation, particularly if there are multiple such new organizations created for the purpose of artificially creating the appearance of widespread support for a position. But some new organizations might not fit such a description, and stripping all new organizations of member protection would effectively treat all new organizations with the same broad brush. Under the

approach in the proposed rule, it is up to a new amicus to provide sufficient information about itself to inform the court's evaluation of that brief.

Leave of Court or Consent of the Parties

Current Rule 29(a)(2) requires that non-governmental amicus briefs receive either leave of court or consent of the parties to be filed during the initial consideration of a case on the merits. Current Rule 29(b) requires that non-governmental amicus briefs receive leave of court to be filed during consideration of whether to grant rehearing.

The Advisory Committee considered eliminating both of these requirements. The Supreme Court made such a change to its own rules, freely allowing the filing of amicus briefs. Supreme Court Rule 37.2 (effective January 1, 2023). Initially, the Advisory Committee did not see any reason not to follow the Supreme Court's lead here. But further reflection led the Advisory Committee in the opposite direction: amending Rule 29(a)(2) to require leave of court for all amicus briefs, not just those at the rehearing stage.

Amicus practice in the Supreme Court differs from that in the courts of appeals in at least two relevant ways.

First, amicus briefs in the Supreme Court, unlike those in the courts of appeals, must be in the form of printed booklets. Supreme Court Rule 33.1(a) (6 1/8 by 9 1/4 booklet using a standard typesetting process); Supreme Court Rule 37 (requiring that amicus briefs, except in connection with an application, be filed in booklet format). This operates as a modest filter on amicus briefs.

Second, under the Supreme Court's recently announced Code of Conduct, "[n]either the filing of a brief amicus curiae nor the participation of counsel for amicus curiae requires a Justice's disqualification." S. Ct. Code of Conduct, Canon 3(B)(4). Existing Federal Rule of Appellate Procedure 29(a)(2), which permits a court to prohibit the filing of or strike an amicus brief, rests on the assumption that an amicus brief can result in recusal in the courts of appeals. And that assumption reflects practice: circuit judges do recuse on the basis of amicus briefs. *See* Committee on Codes of Conduct Advisory Opinion No. 63: Disqualification Based on Interest in Amicus that is a Corporation (addressing whether recusal is required when a judge has an interest in a corporation that is an amicus curiae, but not other recusal questions that may arise in relation to amici, such as when a law firm that is on a judge's recusal list represents an amicus, or when a judge has an interest in a nonprofit organization that is an amicus).

The unconstrained filing of amicus briefs in the courts of appeals would produce recusal issues. These would be particularly acute at the rehearing en banc stage, making it especially important to retain the requirement of court permission at that stage. Yet amicus briefs filed without court permission can cause problems at the panel stage as well. The requirement of consent is not a meaningful constraint on amicus briefs because the norm among counsel is to uniformly consent without seeing the amicus brief. 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. By contrast, if the consent option is eliminated, a judge is involved in deciding whether to deny leave to file the brief or to recuse. While this does impose a burden on an amicus to make a motion, requiring the filing of a motion is hardly a severe burden on someone who seeks to participate in the court system—bearing in mind that the point of an amicus brief is to be helpful to the court. See Rule 27(a) ("An application for an order or other relief is made by motion unless these rules prescribe another form.").

Other Matters

Existing Rule 29(a)(5) sets the length limit for amicus briefs at the initial merits stage as one-half of the length authorized for a party's principal brief. There appear to be two reasons why it is phrased that way, rather than simply as a word limit—which is the way existing Rule 29(b)(4) is phrased for amicus briefs at the rehearing stage.

First, it preserves the ability of an amicus to rely on page limits. That seems to be of significance only to pro se litigants, and it is hard to see any reason to retain it for amici. Second, it means that the length limits for amicus briefs in other proceedings might be shorter where the length limit for party briefs is shorter than 13,000 words. But the occasion for such reductions seems sufficiently small that the Advisory Committee thinks that the simplicity of a flat number of 6,500 words is worth it. Rule 32(e) continues to permit a court of appeals, by local rule or order in a particular case, to accept documents that do not meet the length limits set by these rules, so this change does not create a problem in those circuits that generally permit party briefs that are longer than 13,000 words or amicus briefs that are longer than 6,500 words.

By limiting amicus briefs to 6,500 words, the requirement to file a certification under Rule 32(g)(1) can be simplified to require a certification in all cases, rather than just when length is computed using a word or line limit.

In the course of evaluating Rule 29, the Advisory Committee also considered other concerns that have been raised about amicus practice, including arguments

that courts sometimes inappropriately rely on waived or forfeited arguments or untested factual information in amicus briefs. But the Committee decided against dealing with such concerns by rule making. For example, some arguments cannot be waived, some forfeitures can be excused, and some factual information is properly considered as subject to judicial notice or as legislative facts rather than adjudicative facts. It would be difficult to draft a rule that accurately captured what information is and is not properly considered, and different judges on a panel might disagree. In addition, a rule that sought to bar certain arguments or information from amicus briefs would likely invite unproductive motions to strike.

The Advisory Committee unanimously recommends that the proposed amendments to Rule 29, Rule 32(g), and the Appendix of Length Limits be published for public comment. The proposed amendments are included in Attachment B to this report.

IV. Other Matters Under Consideration

A. Possible Rule on Intervention (22-AP-G; 23-AP-C)

The Federal Rules of Appellate Procedure do not have a rule that governs intervention on appeal. The closest is Rule 15(d), which sets a 30-day deadline for motions to intervene in a proceeding to review an agency action but does not set any standards for such intervention. In the absence of a governing rule, courts borrow from Civil Rule 24, but that rule is not crafted for intervention on appeal and contains its own ambiguities.

About a dozen years ago, the Advisory Committee explored the issue and decided not to take any action. Since then, the Supreme Court has observed that there is no appellate rule on this question. *Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002, 1010 (2022). Twice in recent years it has granted cert to address intervention on appeal, but both cases became moot. An academic brief in one of those cases suggested rule making and included a list of items that rule makers might consider.

A subcommittee of the Advisory Committee has produced a working draft to guide discussion. The basic principle is to follow the general approach of the courts of appeals and limit intervention on appeal to exceptional cases for imperative reasons. The Advisory Committee does not want to encourage circumvention of district court discretion or the standard of review. And it does not want to replicate the ambiguity of Civil Rule 24—or take a position on the proper interpretation of that Rule.

The Advisory Committee is not proposing a new rule at this time, and it may yet conclude that no amendment is warranted. The Department of Justice has

highlighted three concerns. First, the district court is where the scope of an action should be shaped, and an appeal should remain focused on the correctness of the district court decision. A rule on intervention might skew incentives and encourage parties to wait until an appeal to intervene. Second, existing parties should generally be able to make strategic decisions whether to appeal at all or to limit any appeal they take. Third, to the extent that the current desire to intervene is driven by courts issuing remedies that reach beyond the parties to the case, limitations on that practice would reduce the need for a rule on intervention, so waiting to see if such limitations are imposed may be appropriate.[6]

The Advisory Committee will gather information about existing intervention practice, including from Circuit Clerks and the Department of Justice, and perhaps with the help of the Federal Judicial Center.

[6] Since the meeting of the Advisory Committee, five justices have expressed doubts about the propriety of remedies that reach beyond the parties to the case. *Labrador v. Poe by & through Poe*, 144 S. Ct. 921 (2024) (Gorsuch, J., joined by Thomas and Alito, JJ.) (criticizing the "universal injunction"); *id.* at 931 (Kavanaugh, J., joined by Barrett, J.) (noting that "prohibiting nationwide or statewide injunctions may turn out to be the right rule as a matter of law").

Here is the working draft that was before the Advisory Committee for discussion:

Rule 7.1 Intervention on Appeal	It is not clear where a new rule should be located. Its placement might depend, in part, on its scope. Current Rule 15(d) provides for a motion to intervene in a proceeding to review or enforce an agency order. Should a new rule apply only to appeals from lower courts, leaving in place existing practice regarding direct review of agency action? Should a new rule be limited to civil cases? If the scope of a new rule is limited along these lines, should there be a provision or committee note making clear that existing practices in those areas are left in place, to avoid an implication that a new rule covers the field and prohibits intervention in cases not covered by the new rule?
(a) Motion to Intervene. The preferred method for a nonparty to be heard is by filing an amicus brief under Rule 29. Intervention on appeal is reserved for exceptional cases. A person may move to intervene on appeal by filing a motion in accordance with Rule 27. The motion must	
(1) be timely filed;	The subcommittee thinks that it makes sense to a have a timeliness requirement in subsection (a) that is focused on the timeliness of the motion to intervene in terms of the appeal itself. Because of the many different events that might trigger the need to intervene, the subcommittee has not attempted to set a more precise timeframe.

	The current working draft borrows "timely" from FRCP 24. Would the use of the same term as in the FRCP tend to be confusing or clarifying?
(2) show that the movant meets the requirements of (b); and (3) specify and explain the movant's legal interest required by (c).	
(b) Criteria. A court of appeals may permit a movant to intervene on appeal who	FRCP 24 distinguishes between intervention as of right and permissive intervention. Intervention as of right under FRCP 24(a) is not as absolute as it may seem, because it remains subject to a timeliness requirement. And permissive intervention under FRCP 24(b) requires the permission of the court. The subcommittee considered creating a parallel structure, with both intervention as of right and permissive intervention, but thinks that it is better not to do so. Instead, working draft avoids the terms "as of right" and "permissive," and treats all intervention on appeal as subject to the discretion of the court of appeals. As discussed below, that discretion may be constrained by some statutes.
(1) demonstrates a compelling reason why intervention was not sought at a prior stage of the litigation or, if it was sought previously, provides a compelling explanation of how circumstances have changed; (2) has a legal interest as described in (c);	The subcommittee thinks that it makes sense to have a separate timeliness requirement in subdivision (b), this one focused on timeliness in relation to the proceedings at a prior stage of the litigation.

(3) is so situated that disposing of the appeal in the movant's absence may as a practical matter impair or impede the movant's ability to protect that interest;	This language is drawn from FRCP 24(a) dealing with intervention as of right and equivalent language in FRCP 19(a) dealing with persons who are required to be joined if feasible. Does such a provision belong in an appellate rule? On appeal, there will be a particular order or judgment that binds the particular parties and is under review. If it is deleted, does it make it too easy to qualify for intervention? It does seem important to allow someone who is a required party under FRCP 19 but was ignored in the district court to be able to intervene at least for the purpose of seeking a remand to consider its interests. Perhaps this concern would be better addressed directly with a specific provision in (c).
(4) shows that existing parties will not adequately protect that interest; (5) shows that submission of an amicus brief would be insufficient to protect that interest; (6) shows that existing parties will not be unfairly prejudiced by permitting intervention; and (7) in any civil action of which the district courts have original jurisdiction founded solely on section 1332 of title 28, shows that intervention would be consistent with the	

jurisdictional requirements of section 1367(b) of title 28.	
(c) Legal Interests. The following legal interests support intervention on appeal:	The point of this subdivision is to insist that a proposed intervenor have a legally protected interest to vindicate in the case, not merely some more generalized interest in how the appeal is decided. Merely having such an interest, however, does not mean that intervention must be granted. The criteria in subdivision (b) must also be met, and even then, the court of appeals has discretion. At the last meeting, some members of the Advisory Committee found the prior version of (c) to be difficult to parse. This draft is an attempt to make it easier to follow. Is it easier to follow?
(1) a claim by the intervenor to a property interest in the property that is the subject of the action;	These two kinds of claims are moved to the top because they are the classic kind of interest that one might seek to protect by intervening.
(2) a claim by the intervenor that is being litigated on behalf of the proposed intervenor by a party acting in a representative capacity;	The interests of those whose rights are being litigated by a representative, such as when a trustee is litigating on behalf of beneficiaries or a named representative is litigating on behalf of a class, have long been considered a legal basis for intervention.
(3) a claim by an intervenor that can be currently asserted against an existing party;	If a proposed intervenor has a live claim against an existing party, that is a legally-protected interest.

(4) a defense by an intervenor to a claim by an existing party that could be currently asserted against the intervenor;	It would seem that if an existing party has a live claim against a proposed intervenor, but the existing party has not yet asserted the claim, the proposed intervenor has a legally-protected interest. That represents the classic case for a declaratory judgment: a would-be defendant (say, an insurance company), rather than wait to be sued (say, by someone claiming to be a beneficiary), goes to court first. Perhaps this should be deleted, on the theory that any such intervention should have been sought below. But if the criteria of subdivision (b) are met—including the compelling reason or explanation required by (b)(1)—should intervention for such a person be flatly foreclosed? Perhaps the provision is too broad when applied to the government as a party. If so, should it be limited to private parties? Or should it not be so limited, leaving the government to rely on other criteria to defeat intervention when appropriate?
(5) a claim by an intervenor that could be asserted against an existing party if the current case resulted in a judgment sought by an existing party;	This provision allows for the assertion of a contingent claim, loosely analogous to an impleader claim under FRCP 14. The idea is that if the judgment sought in this case gives rise to a claim by a proposed intervenor against an existing party, it might be more efficient to hear the competing claims in a single case. Again, meeting this interest would not itself mandate intervention. The court of appeals would continue to have discretion under the criteria in subdivision (b). This provision might be most useful in cases involving review of administrative action, although

	its usefulness is not limited to such cases.[7] If a new rule does not apply to such cases, perhaps it could be deleted. There is no proposal of a further provision concerning a contingent claim by an existing party against a proposed intervenor. That seems a contingency too far, because it is contingent not only on the outcome of the appeal, but also the

[7] Professor Nelson observes:

> [I]magine that A is suing B for an injunction that would require B to behave in a particular way, but C believes that this behavior would violate C's rights in such a way as to give C a claim for relief against B. Even if that claim is not currently ripe (because B does not want to behave in the way that allegedly would violate C's rights), C's potential claim against B might still support intervention; if the court were to enter the injunction that A is seeking and if B were to comply with it, C would have a ripe claim for relief against B at that point, and the "interest" underlying that claim might be enough to support intervention now. . . .
>
> Suppose that a federal agency conducts a rulemaking process, during which A and B disagree about the content of the rule that the agency should promulgate; A supports Option #1 and B supports Option #2. Ultimately, the agency selects Option #1, and B sues the United States under the cause of action for judicial review that the Administrative Procedure Act has been understood to supply. To decide whether Rule 24(a) entitles A to intervene, courts could ask whether A would have a cause of action for judicial review if the agency were to do what B is seeking. To be sure, A does not *currently* have such a cause of action; the agency did what A wanted, and A wants the court to uphold the agency's rule. But if the court were to set aside the rule and force the agency to select Option #2 instead, the Administrative Procedure Act might then enable A to sue the United States for judicial review of the agency's revised rule. Rather than making these suits proceed sequentially, courts could conclude that A is eligible to intervene in the current litigation.

Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 389 (2020).

	further contingency of an existing party seeking to bring a claim against the proposed intervenor. That is, if an intervenor is saying, "If one of the existing parties wins the judgment it is seeking, I will have a claim against a party and I want to assert it now," intervention might well be warranted. But if an intervenor is saying, "If one of the existing parties wins the judgment it is seeking, a party have a claim against me, and if that party sues me, I have a defense," intervention should not be permitted.
(6) being a person who should have been joined if feasible under FRCP 19;	Is it best to say this directly as the kind of legal interest that supports intervention? Perhaps so, if (b)(3) is deleted.
(7) But the precedential effect of a decision, standing alone, is not a sufficient legal interest.	Given the restrictive account of what legal interests support intervention, is this necessary? Is it worth it for emphasis?
(d) Governments, Agencies, and Officials. (1) The United States, a State, or a tribal government may move to intervene to defend any law it has enacted or action it or one of its agencies or officers has taken. (2) An agency or officer of the United States, of a State or of a tribal government may also move to intervene to defend any law it has enacted or action it or one of its agencies or officers has taken, if that agency or officer is authorized by the applicable	There are statutes that provide for a right to intervene in a court of appeals. E.g., 35 U.S.C. § 143 ("The Director [of the United States Patent and Trademark Office] shall have the right to intervene in an appeal from a decision entered by the Patent Trial and Appeal Board in a derivation proceeding under section 135 or in an inter partes or post-grant review under chapter 31 or 32."); 28 U.S.C. § 2403 (in any case "in a court of the United States . . . wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality"). The working draft uses the word "may," reflecting that courts applying these statutes typically require timeliness. The working draft includes tribal governments.

law to defend the law or action.	
(3) The United States may move to intervene to defend its foreign relations interests.	
(4) The United States, a State, or a tribal government may also move to intervene under (a), (b), and (c).	The point is to make clear that the special provisions for government intervention are not exclusive, so that governments can also protect their proprietary rights in the same way that any private litigant can.
(5) A motion under (d)(1) through (d)(3) need not comply with (a)(2), (a)(3), (b), or (c).	When the special provisions for government intervention apply, the motion to intervene must be timely. But the other requirements do not. Should any other requirements also apply to the government?
(e) Disposition of Motion. The court may grant the motion, deny the motion, or transfer the motion to the district court. If the court grants the motion, the intervenor becomes a party for all purposes, unless the court orders otherwise. Denial of a motion to intervene does not preclude the filing of an amicus brief under Rule 29.	The subcommittee thinks that the default should be that intervention is for all purposes. This both underscores the distinction between an amicus and a party. It also means that a court need not delineate the scope of intervention any time it grants a motion to intervene. The court can, however, if it chooses, limit the scope of intervention. If a party wants to intervene for a limited purpose, it should so specify.

B. Appendices

In the spring of 2018, the Advisory Committee decided not to act on a concern that appendices were too long and contained irrelevant information. Instead, it put the matter off for three years in the hope that changing technology might solve the problem with briefs that cite to the electronic record of the district court. In the spring of 2021, the Committee again put the matter off for three years for similar reasons.

The Advisory Committee is gathering information from circuit clerks before deciding how to proceed.

C. New Suggestions

The Advisory Committee has received one new suggestion that remains under consideration.

Judge Randolph has suggested that Rule 15 be amended in a way similar to the way in which Rule 4 was amended in 1993. Prior to that 1993 amendment, premature notices of appeal from district courts under Rule 4 would self-destruct if a party filed certain post-judgment motions in the district court, requiring the filing of a new notice of appeal. Something similar happens on review of agency actions under Rule 15, under what is known as the "incurably premature" doctrine.

Judge Randolph writes that this doctrine "deserves reconsideration, either by our court en banc or through an amendment to Rule 15 of the Federal Rules of Appellate Procedure." *Nat'l Ass'n of Immigration Judges v. Fed. Labor Relations Auth.*, 77 F.4th 1132, 1139 (D.C. Cir. 2023) (Randolph, J., concurring).

A subcommittee has been created to explore this suggestion.

The Advisory Committee has also received several comments on the proposed amendments to Rule 29, dealing with amicus briefs. Because these comments were submitted before a proposed amendment was published for public comment, they have been docketed as separate suggestions, but the Advisory Committee has treated them as comments.

V. Item Removed from the Advisory Committee Agenda

The Advisory Committee considered a suggestion by Andrew Shaw (23-AP-J) to make access to PACER free. The Advisory Committee, without dissent, voted to remove the suggestion from the agenda, viewing it as not a matter for rule making.