December 2, 2024

Via Federal eRulemaking Portal at: https://www.regulations.gov

Judicial Conference of the United States
Committee on Rules of Practice and Procedure
Attn: Honorable John D. Bates, Chair
Advisory Committee on Appellate Rules
Attn: Honorable Jay S. Bybee, Chair
Washington, DC 20544

Re: Proposed Amendments to Federal Rules and Forms:
SIFMA Comment on Proposed Amendments to
FRAP 29 (Amicus Curiae Briefs)

Dear Judges Bates and Bybee:

The Securities Industry and Financial Markets Association (***"SIFMA"***)[1] appreciates the opportunity to comment on the Judicial Conference Committee on Rules of Practice and Procedure's proposed amendments to Federal Rule of Appellate Procedure 29 (the ***"Proposal"***).[2]

SIFMA and its predecessor organizations have been filing amicus briefs in various state and federal court cases for the past fifty years. Today SIFMA files approximately twenty amicus briefs per year. We file amicus briefs in court cases that raise significant issues that impact our industry and markets. Our briefs educate courts about established industry and market practices and highlight important policy concerns that transcend the particular case.

We have two primary concerns with the Proposal. The first is the elimination of the option to file an amicus brief on consent of the parties. Under current Rule 29, an amicus may file a brief by leave of court or on consent of all parties. The Proposal would eliminate the option to file an amicus brief on consent of all parties. SIFMA strongly opposes eliminating the

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed-income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit http://www.sifma.org.

[2] *See* https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment.

option to file on consent.

Our second concern is the new purpose requirement. It requires that the brief "bring[] to the court's attention relevant matters not already mentioned by the parties" in order to "help the court." Amicus briefs that do not serve this purpose or that are "redundant with another amicus brief" are "disfavored." Amicus filers must address the purpose requirement in both the motion and the body of the brief. The motion must explain why the brief is "helpful." SIFMA opposes the new purpose requirement, as drafted.

SIFMA offers the following policy and practical arguments in support of our opposition to these two discrete elements of the Proposal:

RULE 29 SHOULD CONTINUE TO ALLOW CONSENT OF THE PARTIES TO FILE AN AMICUS BRIEF.

1. The premise of the Proposal – that there is a current unmet need to filter-out the filing of "unhelpful" amicus briefs – is flawed.

The Proposal identifies as the problem "[t]he unconstrained filing of amicus briefs in the courts of appeals."[3] Thus, the Proposal seeks to impose "[l]imitations on filing amicus briefs"[4] and a "filter on amicus briefs."[5] Such a filter, the Proposal argues, would prevent "the filing of *unhelpful* briefs."[6] (Emphasis added). The Proposal asserts that because "the consent requirement fails to serve as a useful filter,"[7] it should be eliminated.

The Proposal, however, offers no evidence that "unhelpful" amicus briefs are now being, or have historically been, filed in significant numbers in the courts of appeal.[8] Even if one accepts the premise that some amicus brief filings may be deemed "unhelpful," the Proposal offers no assessment or estimation of the scope or magnitude of "unhelpful" briefs versus helpful

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[3] *Id.* at p. 26.

[4] Preliminary Draft of Proposed Amendments to Federal Rules (Aug. 2024), https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2024.pdf (***"Preliminary Draft"***), at p. 20.

[5] *Id.* at p. 25.

[6] *Id.* at p. 40.

[7] *Id.*

[8] Notably, at the Supreme Court level, amicus briefs are cited in roughly half of cases, suggesting a general level of helpfulness to the Court. National Law Journal (Nov. 2020), *Amicus Curiae at the Supreme Court*, https://www.arnoldporter.com/-/media/files/perspectives/publications/2020/11/amicuscuriae-at-the-supreme-court.pdf. An amicus brief can "perform a valuable subsidiary role by introducing subtle variations of the basic argument, or emotive and even questionable arguments that might result in a successful verdict, but are too risky to be embraced by the principal litigant." Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 711 (1963). Amicus briefs can produce "additional social, scientific, legal, or political information" to assist the judges. Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 Law & Soc'y Rev. 807, 808 (2004). There is a common misconception that amicus briefs "are not very important; that they are at best only icing on the cake. In reality, they are often the cake itself." Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U. L. Rev. 603 (1984).

briefs. Finally, the Proposal does not articulate any burden imposed or harm caused by "unhelpful" briefs, much less the scope or magnitude of such alleged burden or harm.

Given that courts of appeal are free to read, use and/or address – or *not* – amicus briefs at their discretion, it is hard to imagine any appreciable burden or harm to the courts of appeal from the filing of presumably some small number of amicus briefs that are later deemed to be "unhelpful." The Proposal thus fails to make the case that the filing of "unhelpful" amicus briefs is a legitimate problem in need of a solution, or that the solution should include eliminating the consent requirement.

2. The benefit of filtering-out "unhelpful" amicus briefs is far outweighed by the burdens imposed by pre-vetting <u>all</u> amicus briefs through motions for leave.

Admittedly, given the choice, there would probably be some marginal benefit to having all amicus briefs filed be "helpful" versus having some small number be "unhelpful." But if the cost of receiving that marginal benefit means that every last amicus brief must be pre-vetted through a motion for leave, then the trade is not worth it. The courts of appeal would be burdened by having to review many hundreds, perhaps thousands, of additional motions for leave annually. Prospective amicus filers, by the Proposal's own admission,[9] would also be burdened by having to make a motion for leave in every case.[10]

3. The standard for accepting amicus briefs should not be more stringent in the courts of appeal than in the Supreme Court.

The Proposal acknowledges that the Supreme Court recently changed its own rules to freely allow the filing of amicus briefs.[11] The federal appellate courts' rules should be aligned with the Supreme Court's rules. Federal appellate courts should have the benefit of all available legal, policy, and practical arguments, and amicus perspective, to best inform their decision-making. Moreover, neither the Supreme Court Justices, nor amicus participants, should have to wait until a case elevates to the Supreme Court to hear or voice, respectively, an amicus participant's perspective because a lower court determined that such perspective would not be "helpful."

4. The differences in amicus practice in the Supreme Court versus the courts of appeals do not justify a more stringent rule in the courts of appeal.

The Proposal distinguishes Supreme Court amicus practice from that in the courts of appeals on two grounds: (i) Supreme Court amicus briefs must be in the form of printed booklets; and (ii) under the Supreme Court's Code of Conduct, an amicus brief filing does *not*

[9] Preliminary Draft at p. 26.

[10] In addition, in cases that elevate to the Supreme Court, the Court would be deprived of having certain amicus briefs in the appellate record (because a court of appeals deemed them to be "unhelpful"), which amicus briefs would be otherwise freely allowed in the Supreme Court.

[11] Preliminary Draft at p. 25 (citing Supreme Court Rule 37.2 (effective Jan. 1, 2023)).

require a Justice's disqualification. The Proposal suggests that these two grounds justify a more stringent rule to filter-out amicus filings in the courts of appeal.

On ground one, the Proposal states that the printed booklet requirement "operates as a modest filter on [Supreme Court] amicus briefs."[12] We do not accept this statement as true, nor do we believe that there is any basis for making it. SIFMA has filed hundreds of amicus briefs over several decades, many in the Supreme Court, and we are not aware of any individual or entity, ever, who was deterred from filing a Supreme Court amicus brief because of the printer requirement. If an individual or entity is inclined to file an amicus brief in the Supreme Court, the printer requirement would likely never be the decisive factor against doing so. The Supreme Court's printed booklet requirement was not intended to, and does not in fact, operate as a filter that limits the filing of Supreme Court amicus briefs.

On ground two, the Proposal suggests that "unconstrained filing of amicus briefs in the courts of appeals" would produce recusal issues that do not exist in the Supreme Court.[13] But under current Rule 29, the court is already free to strike an amicus brief that would result in a judge's disqualification. Thus, the rules already provide a mechanism for addressing recusal issues. There is no indication that this mechanism has not worked properly over the many years, or that it now requires the intervention of a judge prior to the filing of an amicus brief.

Thus, neither booklet printing requirements nor recusal issues justify a more stringent amicus filing rule in the courts of appeal than in the Supreme Court.

THE PROPOSAL'S NEW PURPOSE TEST IS UNCLEAR ON WHAT IS "HELPFUL" AND WHAT IS "REDUNDANT."

1. The scope of what is deemed "helpful" should be clarified, broadened and permissive.

The Proposal defines "helpful" as "[a]n amicus curiae brief that brings to the court's attention relevant matter not already mentioned by the parties."[14] The term "relevant matter not already mentioned" could be read and applied quite narrowly so as to significantly reduce the number of amicus briefs that are deemed "helpful" and thus allowed to be filed. We recommend that the Proposal clarify that the term should not be read or applied in that manner, but instead with a presumption of permissiveness.

The Proposal asserts that "[l]imitations on filing amicus briefs … do not prevent anyone from speaking out … about how a court should decide a case."[15] This is so, the argument goes, because such persons are free to voice their views "in books, articles, podcasts, blogs,

[12] *Id.*

[13] *Id.* at p. 26.

[14] *Id.* at p. 28.

[15] *Id.* at p. 20.

advertisements, social media, etc."[16] This argument completely misses the point. The court is *not* reading the articles, blogs, social media, etc., but it will likely read the amicus brief if it is allowed to be filed. Otherwise, the Proposal would in fact operate to prevent voices from being heard in a meaningful way (i.e., before the judges deciding the case).

Accordingly, we recommend that the scope of what is deemed "helpful" should be broad and permissive, erring in favor of finding some modicum of helpfulness and thus permitting the filing of the amicus brief. For example, when an association like SIFMA which represents an entire industry files an amicus brief, that brief should be deemed *per se* helpful. It is *per se* helpful to hear and understand the consolidated views of an entire industry on the particular issues in a case. The Proposal itself acknowledges that "the identity of an amicus does matter, at least in some cases, to some judges."[17] With respect to industry trade associations like SIFMA, we recommend that identity be deemed dispositive on the determination of the helpfulness of the amicus brief to the court.

2. The scope of what constitutes "redundant" should be clarified and sharply narrowed.

The Proposal also states that an amicus brief that is "redundant with another amicus brief" is "disfavored."[18] The term "redundant" is unreasonably vague and needs to be clarified. For example, what level of redundancy is disfavored? Is a brief that is 1% redundant and 99% non-redundant with another brief acceptable? What about a brief that is 99% redundant and 1% non-redundant? Where do you draw the line?

The Proposal's redundancy standard also seems impractical from a compliance perspective. Would an industry trade association like SIFMA need to contact all of the other financial services trades, find out which ones are filing an amicus brief in the same case, identify any redundant arguments, and then negotiate away the redundancy? Which trade group would have the final say on who takes what arguments? How could trades even have such conversations without compromising their common interest privilege with their members?

Moreover, even so-called "redundant" amicus briefs may be helpful to the court. What about a scenario in which several different industries, or distinct lines of business within the same or similar industries, file amicus briefs whose substance and content is generally redundant? Is not there still value in the court hearing and understanding that the views of these different constituencies are largely consistent? It seems that it would be inherently helpful to the court to know that these multiple different amici decided the issue was important enough to spend the time, effort and expense to submit a brief, and it would helpfully inform the court about the weight of support for or against a particular legal and/or policy position. Similar to our earlier point, the discretely different identities of these amicus filers should be deemed dispositive on the determination of the non-redundancy of their amicus briefs.

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[16] *Id.*

[17] *Id.*

[18] *Id.* at p. 28.

Finally, what about briefs that are deemed to be "redundant"? Which brief(s) are the redundant ones? Is the standard essentially a race to the courthouse where the first to file is accepted, but subsequent briefs deemed "redundant" are rejected? That does not seem fair or appropriate.

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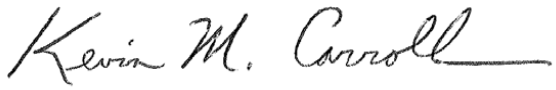
We are happy to further engage with you on these important issues. If you have questions or would like to further discuss, please contact the undersigned at 202-962-7300.

Sincerely,



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