



Hon. Scott S. Harris
Clerk of Court
Supreme Court of the United States
One First Street NE
Washington, D.C., 20543

January 31, 2022

Dear Clerk Harris:

We write to ask that the Supreme Court adopt its own version of Rule 29(a)(2) of the Federal Rules of Appellate Procedure, which allows courts of appeals to “prohibit the filing of” or “strike an amicus brief that would result in a judge’s disqualification.”

Amid an ongoing and dramatic rise in the number and influence of amicus briefs at the Supreme Court, and light of recent reporting, we believe the adoption of such a rule would help insulate the institution against outside calls for recusal and protect its integrity in the eyes of the public.

We suggest that any new rule that would permit striking amicus briefs cover those written and submitted, or signed onto, by: individuals, companies or associations against which a justice has a personal bias or prejudice; publicly traded companies in which the justice owns stock; and close family members (cf., 28 U.S.C. §455(b)).

We also believe that if a brief were filed by someone with ties to the justice that, by virtue of its being filed, would make a reasonable person question a justice’s impartiality in a case or petition (cf., 28 U.S.C. §455(a)), that brief should be struck, as well.

In addition, the rule might state that the Court could deny leave to file an amicus brief that would tick any of the above boxes. We believe such a rule can be consistent with the Court’s Rule 37 and reflective of the Court’s unique role in our constitutional system.

Based on a review of lower court cases since FRAP 29(a)(2) went into effect in 2018, we believe it has been invoked only a handful of times to strike amicus briefs. In those cases, a court’s decision to strike a brief has reinforced notions of integrity and impartiality.

For example, in 2019 the Fifth Circuit disallowed an amicus brief from the law firm Gibson, Dunn & Crutcher in a health care case, purportedly because of Judge James Ho’s conflicts with the firm — Judge Ho was a partner there until his 2018 confirmation, and his wife is currently a partner. In 2020 the Fourth Circuit struck an amicus brief filed by dozens of companies in an immigration case when the court determined the filing would force the recusal of a judge in an en banc hearing. Though we do not yet possess lower court judges’ 2020 financial disclosure reports, we believe that, based on the 2019 reports, the brief was struck because at least one of the circuit’s judges owns stock in at least one of the companies that signed the brief.

As the salience of amicus briefs at the Supreme Court continues to rise, the public will expect the Court to seriously consider if the relationship between a justice and amicus party creates the appearance of impropriety. We hope the Court takes the aforementioned proactive step to strengthen the public’s trust in its judgements, and we thank you for your consideration.

Sincerely,
Gabe Roth Tyler Cooper
Executive Director Senior Researcher
Fix the Court Fix the Court