NO. 21-84

IN THE
Supreme Court of the United States

FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, ET AL.,

Petitioners,

v.

VICTIM RIGHTS LAW CENTER, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom is a non-profit, public-interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect constitutional liberties. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in dozens of cases before this Court, numerous courts of appeals, and federal and state courts across the nation.

Alliance Defending Freedom often represents putative intervenors whose liberty interests were insufficiently safeguarded by existing parties—including governmental entities. Amicus participation would not have adequately protected those liberty interests. Alliance Defending Freedom therefore has a strong interest in ensuring that the possibility of amicus participation does not defeat a movant from intervening if that movant can satisfy Federal Rule of Civil Procedure 24's modest requirements.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2, and all parties consented to its filing.

SUMMARY OF THE ARGUMENT

"[M]ost cases before this Court involve matters that affect far more people than the immediate record parties," Justice Hugo Black once explained. Mary-Christine Sungaila, *Effective Amicus Practice Before the United States Supreme Court: A Case Study*, 8 S. Cal. Rev. L. & Women's Stud. 187, 188 (1999). What was true of this Court in the past is true of most federal courts today. At every level, "lawsuit[s] often [are] not merely a private fight and will have implications on those not named as parties." Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1901 (3d ed. 2002). Accordingly, the Federal Rules of Civil Procedure require courts to "permit anyone . . . who . . . claims an interest relating to the . . . transaction that is the subject of" a lawsuit to intervene in that lawsuit "unless existing parties adequately represent [the putative intervenor's] interest." Fed. R. Civ. P. 24(a)(2).

This Court has traditionally held that the burden to show inadequate representation—even when the government is the purported representative—"should be treated as minimal" and is satisfied if the putative intervenor can show "that representation of his interest *'may be'* inadequate." *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (emphasis added); accord *Forest Conservation Council* v. *U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) (holding that putative intervenors made the "minimal showing" that the government "may not adequately represent their interests").

Yet some courts, like the First Circuit here, instead impose a heavy burden on putative intervenors. If a movant seeks to intervene on the government's side, then these courts require the putative intervenor to make "a *strong* affirmative showing" that the government "is not fairly representing" his interests. Pet. App. 8a (emphasis added). Even if the movant can demonstrate divergent interests from the government, these courts will nonetheless deny intervention. That's because these courts presume that the government always adequately represents the movant's interests, and that amicus participation gives the movant a sufficient avenue to present its views.

This presumption of adequate government representation conflicts with Civil Rule 24's plain text and this Court's construction of it. What's more, the First Circuit's anti-intervention presumption ignores the significant differences between intervention and amicus participation. Amicus curiae and intervention are separate legal tools with distinct historical pedigrees. Both serve important but unique functions. But by relegating to amicus status those putative intervenors who cannot overcome an extratextual presumption, the First Circuit blurs the line between the two tools—thus diminishing the efficacy of both.

The Court should grant the petition and clarify that amicus participation is no substitute for intervention. Intervenors who satisfy Civil Rule 24's requirements have concrete interests that amicus participation cannot—indeed, is not designed to—protect. Accordingly, courts should not impose an onerous burden that originates outside Civil Rule 24's text and eviscerates the balance that the Rule sensibly strikes.

ARGUMENT

I. Amicus participation is no substitute for intervention.

The First Circuit—and the other courts that follow its rule—requires putative intervenors to show that "the amicus procedure [does not] provide[ ] sufficient opportunity for them to present their view[s]." Pet. App. 14a. This requirement is foreign to the Civil Rules, and it obliterates the relevant distinctions between amicus curiae participation and intervention.

A. Amicus curiae and intervention have similar but distinct historical pedigrees.

Both amicus curiae and intervention trace their roots to Roman law. The Romans allowed amicus participation to "provide[ ] information on areas of law beyond the expertise of the court." Michael K. Lowman, *The Litigating Amicus Curiae*: *When Does the Party Begin After the Friends Leave?*, 41 Am. U. L. Rev. 1243, 1248 (1992). The amicus did not have "an interest in the cause" but instead possessed "knowledge . . . on a point of law or of fact" that was useful to the court. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 694 (1963).

Likewise, under Roman law, "intervention practice . . . was rather extensive," with leave given "on the theory that the losing party might refuse to appeal or might not be vigilant in prosecuting the appeal and the [intervenor's] interest thus be inadequately protected." James W. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene*

and Reorganization, 45 Yale L.J. 565, 568 (1936). Though the putative intervenor had to show "some good reason," Roman jurists interpreted this statement expansively. *Ibid.* For example, they allowed intervention by a creditor "in a suit against his debtor, if the latter did not faithfully defend" and by "a relative of a person sentenced to death." *Id.* at 568–69.

Though Roman law gave wide latitude to both amicus curiae and intervention, Anglo-American courts did not. The common law viewed both practices with skepticism, and courts were "particularly resistant to expanding third-party involvement at the trial level." Lowman, 41 Am. U. L. Rev. at 1248–49. After all, most common law procedures developed from "trial by duel." *Ibid.*

But strict adherence to third-party exclusion would have, in some cases, resulted in injustice. So Anglo-American courts adapted. Initially, they viewed the amicus curiae as the most suitable tool to prevent injustice while simultaneously curtailing third-party interference. *Ibid.* In *Coxe* v. *Phillips*, for instance, "the court permitted the amicus to inform the court that the suit between the parties was collusive in nature, ultimately designed to attack the marital status of the amicus." *Id.* at 1249. This adaptation shifted the amicus from its Roman roots as an impartial judicial friend to a positional advocate. Thus, despite "the pretense that the duty of the amicus was solely to protect and inform the court," it allowed the amicus "to stray from this exclusive obligation and defend the interests of one not a party to the law suit." Krislov, 72 Yale L.J. at 697.

At the Founding, American courts initially carried over English hostility to third-party involvement. Federal law provided no formal mechanism whereby third parties could insert themselves into a lawsuit, no matter what interests the third party had in the case's outcome. Yet unlike English courts, American courts eschewed the amicus curiae. That proved problematic when an unrepresented Kentucky appeared before this Court in a significant land dispute. *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 17–18 (1823). Unwilling to let the matter pass with one party unrepresented, this Court allowed Henry Clay to act as amicus curiae and argue on Kentucky's behalf. This is the first recorded instance of an amicus-curiae appearance in federal courts.

Over the next century, courts sporadically allowed both the federal government and the States to act as amici, primarily in land-grant cases. Krislov, 72 Yale L.J. at 702. But there was little room for private parties to add their voice to ongoing litigation as intervenors. Though federal courts allowed some form of intervention, historical "[e]vidence for intervention in actions at law in federal court is minimal." Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 Wash. U. L.Q. 215, 244 (2000). It mostly occurred in admiralty or *in rem* proceedings. *Ibid.*; Krislov, 72 Yale L.J. at 699.

So, like Henry Clay in *Green*, "private organizations [started] appearing [as amicus curiae], no longer in an essentially professional relation to the court but openly as advocates of some group or class struggle desiring to support the contentions of a party to the litigation." Ernest Angell, *The Amicus Curiae:*

American Development of English Institutions, 16 Int'l & Comparative L.Q. 1017, 1018 (1967). As a result, "[t]he line between a formal intervenor and an *amicus curiae* was becoming blurred." *Ibid.*

The situation needed "legislative clarification." Krislov, 72 Yale L.J. at 702. But the Civil Rules initially did not solve the problem. While the Civil Rules introduced a formal mechanism so outsiders could intervene as parties, the standard was too high. Under Civil Rule 24's original wording, a movant seeking to intervene as of right had to show that "representation of the [movant's] interest by existing parties is or may be inadequate and the [movant] *is or may be bound by a judgment in the action*." Amy M. Gardner, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. Chi. L. Rev. 681, 688 & n.40 (2002) (emphasis added).

In 1966, Civil Rule 24 was amended to (1) eliminate the judgment requirement, and (2) flip the presumption to favor intervention. Under this amended rule, federal courts must allow intervention "*unless* existing parties adequately represent [the movant's] interest." Fed. R. Civ. P. 24(a)(2) (emphasis added). "This alteration [was] obviously designed to liberalize the right to intervene in federal actions." *Nuesse* v. *Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967). The amended wording "underscore[d] both the burden on those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention." *Nuesse*, 385 F.2d at 702. It also reflected "a liberal spirit that would seem to favor minimizing the requirements placed on parties seeking to intervene." Gardner, 69 U. Chi. L. Rev. at 688.

B. Amicus curiae and intervention serve important though different roles.

Today, Civil Rule 24 represents a "codification of general doctrines of intervention." *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 508 (1941). Its amendment in 1966 made clear that, despite a shared heritage, amicus curiae and intervention serve different roles in modern federal litigation.

Hearkening back to its Roman roots, today the amicus curiae exists principally to *inform*. Lowman, 41 Am. U. L. Rev. at 1283 ("The informal method of amicus representation . . . traditionally allows [a] third party to play only the limited role of an advisor or information provider."). Amici play "only a limited role in the litigation of important social issues." *Ibid.* Some courts, in fact, restrict amici to the status they served at common law: the impartial judicial servant. These courts explicitly disallow amicus participation if the putative amicus offers "a partisan, rather than impartial view." *E.g.*, *Leigh* v. *Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982); accord *Am. Coll. of Obstetricians & Gynecologists* v. *Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983).

Such courts treat amici and intervenors "as being at the opposite ends of a spectrum of direct involvement in the case." Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. Rich. L. Rev. 361, 403 (2015). To these courts, "amici curiae should be disinterested friends of the court, while intervenors must have sufficient interest in the dispute to be a party." *Ibid.*

Most courts, however, have allowed amici to "abandon their common law trait of impartiality." Lowman, 41 Am. U. L. Rev. at 1258. After all, "the fundamental assumption of our adversary system [is] that strong (but fair) advocacy on behalf of opposing views promotes sound decision making." *Neonatology Assocs., P.A.* v. *CIR*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.). "Thus, an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend." *Ibid.*

Yet even as advocates, amici serve an intentionally limited function. Amici are usually restricted "to providing information to the courts, raising jurisdictional and other important issues overlooked by the parties, assuring the presentation of [a] complete factual scenario, and suggesting potential implications of the court's decision." Lowman, 41 Am. U. L. Rev. at 1258–59. They cannot "fil[e] pleadings, enforc[e] consent decrees or judgments, request[ ] rehearings, or appeal[ ] a case in which [they] participated." *Id.* at 1259–60. And in some courts, amici cannot raise issues that the parties did not. *E.g.*, *Sindi* v. *El-Moslimany*, 896 F.3d 1, 31 n.12 (1st Cir. 2018).

These limitations distinguish amici from intervenors. Unlike amici, intervenors attain full-party status. They can participate in the "course of the litigation," Lowman, 41 Am. U. L. Rev. at 1260, including the critical power to appeal an adverse decision. That means that intervenors get a "seat at the table for settlement discussions" whereas amici do not, thus making it possible for "the original parties . . . [to] ignore [amici's] legitimate concerns and the impact of the litigation on them." Appel, 78 Wash. U.

L.Q. at 299. Intervenors also get such practical benefits as an expanded word count so that they can fully express their arguments and protect their interests. See Fed. R. App. P. 29(a)(5) (limiting amicus brief length to "one-half the maximum length . . . [of] a party's principal brief").

C. Blurring the distinction between amicus curiae and intervention diminishes the efficacy of both tools.

For most of history, "there has been a bright-line distinction between amicus curiae and . . . real parties in interest in a case." *United States* v. *Michigan*, 940 F.2d 143, 165 (6th Cir. 1991). The First Circuit's onerous burden blurs this distinction by channeling most putative intervenors into amici status. And by relegating putative intervenors with a concrete interest to amici participation, the First Circuit diminishes the efficiency of both tools.

First, though amici can advocate, the rules do not contemplate that they can directly litigate. Experience shows the "limits of the flexibility of the amicus curiae role" and why courts should not treat amicus participation as a substitute for intervention. Anderson, 49 U. Rich. L. Rev. at 383. In *Michigan*, for example, the federal government sued Michigan over prison conditions. 940 F.2d at 145–46. A group of prisoners tried to intervene but were instead denominated "litigating amicus curiae" and allowed to file pleadings. *Id.* at 147. This authorized the prisoners—who lacked a sufficiently concrete interest to intervene—to nonetheless "assume[ ] effective control of the proceedings in derogation of the original parties to [the] controversy." *Id.* at 164.

The Sixth Circuit decried this "litigating amicus curiae" as a "legal mutant," one whose existence would "erode the future core stability of American adversary jurisprudence." *Ibid.* Ever since this strong rebuke, "there have been few references to 'litigating amicus curiae' in the case law." Anderson, 49 U. Rich. L. Rev. at 382. And a recent survey shows that federal judges overwhelmingly approve its demise. "Specifically, 90.9% of Circuit Court respondents and 89% of District Court respondents indicated that litigating amici are a hindrance . . . in litigation. Two Supreme Court respondents [also] indicated that litigating amici would be a hindrance." Linda Sandstrom Simard, *An Empricial Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency & Adversarialism*, 27 Rev. Litig. 669, 694 (2008).

But the First Circuit's presumption that amici status will satisfy parties with concrete interests in a case's outcome runs the risk that the unpopular "legal mutant" will rise again. And even if it does not, relegating putative intervenors to amicus status risks that their arguments might be ignored. Now more than ever, courts are inundated with amici briefs—none more than this Court. As a result, "[n]ot all amicus briefs are read by all of the Justices." Eugene Gressman, Kenneth A. Geller, Stephen M. Shapiro, Timothy S. Bishop & Edward D. Hartnett, SUPREME COURT PRACTICE 665 (9th ed. 2007). As Justice Ginsburg lamented, "a gem contained in one brief could be missed by the sheer volume of briefs that are presented to the Court." Simard, 27 Rev. Litig. at 700 (cleaned up).

That means that "[t]he voices of the litigants"—those with a concrete stake in the outcome—"get lost as more and more friends muscle their way into court." Anderson, 49 U. Rich. L. Rev. at 366. Amicus status, with its "restricted contributions," does not ensure that putative intervenors' interests will be protected. See Note, Katharine Goepp, *Presumed Represented: Analyzing Intervention as of Right When the Government is a Party*, 24 W. New Eng. L. Rev. 131, 164 (2002) (noting that a presumption that the government adequately represents a putative intervenor's interests not only "potentially infringe[s] upon" those interests but "effectively silence[s]" the movant's voice).

But even if amicus participation "fulfills part of the intervenor's purpose in having its voice heard, the concern remains that the interest is not adequately protected." *Id.* at 173. A putative intervenor is "the best judge of the adequacy of the representation of his own interests" because he can best gauge what arguments will serve those interests. John E. Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 Ky. L.J. 329, 354 (1969). Yet some courts, like the First Circuit, do not allow amici to raise arguments that the parties omitted. *E.g.*, *Sindi*, 896 F.3d at 31 n.12. This means that a putative intervenor relegated to amicus status is stuck with whatever arguments the government advanced, regardless how adequately these arguments protect the movant's interests. Moreover, if the government decides not to appeal an issue or press an argument, putative intervenors relegated to amici status cannot pick up the banner and carry forward, no matter how those decisions adversely impact the intervenor's interests.

Even if the government makes arguments that the putative intervenor finds meritorious, the intervenor faces "the distasteful task of showing that the [government] attorney . . . is incompetent," lest the movant be relegated to amici status. *Neonatology Assocs.,* 293 F.3d at 132 (Alito, J.). Most lawyers "would normally be unwilling to state . . . that the counsel for the party being supported will do an inadequate job." *Ibid.* (quoting Robert L. Stern, APPELLATE PRACTICE IN THE UNITED STATES 306 (2d ed. 1989)). Yet that is precisely what the First Circuit's rule incentives. Putative intervenors who do not want to participate as amici may be forced to eviscerate their own allies to overcome the "strong presumption" that the government adequately represents their interests.

* * *

Civil Rule 24 draws a line between third parties who have a concrete interest and want to intervene and those who lack such an interest and thus cannot. Amicus status should be reserved for the latter. *Ryan* v. *Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). "The intent and purpose of the Federal Rules should not be evaded by acts of judicial legerdemain." *Michigan*, 940 F.2d at 165.

If courts are uncertain whether the government adequately represents a putative intervenor's interests, then they should grant intervention rather than transmogrifying the amicus tool. "Regardless of its flexibility, amicus curiae should be used only when the court is *certain* that the interests do not differ materially enough to warrant intervention." Goepp, 24 W. New Eng. L. Rev. at 174 (emphasis added).

This approach would be more faithful to the 1966 amendments to Civil Rule 24, mandating intervention "unless existing parties adequately represent [the putative intervenor's] interest." Fed. R. Civ. P. 24(a)(2). And it would also be more faithful to this Court's construction of that Rule to require only that the putative intervenor show "that representation of his interest *'may be'* inadequate"—a burden that "should be treated as minimal." *Trbovich*, 404 U.S. at 538 n.10 (emphasis added). If a party satisfies this "minimal" requirement, then that party should be allowed to intervene.

That some circuits do not follow this approach mandates this Court's immediate attention. "[A] circuit split in an area as fundamental as whether a party's voice can be heard in litigation in which it has an interest is highly problematic." Gardner, 69 U. Chi. L. Rev. at 698. This Court should therefore grant the petition, clarify that amicus participation is not an adequate substitute for intervention, and direct the First Circuit to apply the plain and relatively undemanding text of Civil Rule 24 when considering an intervention request.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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