RETIRED JUDGES: NO LONGER FRIENDS OF THE COURT?

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INTRODUCTION

The retired judge is a unique figure. Although no longer presiding over cases, retired judges are, in the eyes of the general public, "living representative[s] of the judicial system."[1] Because of this unique role, several federal circuit courts have evaluated whether it is appropriate to allow retired judges to participate in ongoing federal judicial actions as amici curiae. The debate over this issue, though sparse and relatively mild, raises important questions about our expectations for judges—even after their time on the bench—within our tripartite system of government.

The Fifth Circuit Court's recent decision in *Lefebure v. D'Aquilla* entertains this question of whether federal circuit and district courts should permit retired judges to participate as amici curiae.[2] The *Lefebure* opinion comprises part of a broader discussion without a clear consensus, in which the D.C. Circuit and Third Circuit courts have also taken part.

The narrow question the Fifth Circuit entertained in *Lefebure* has not received much scholarly attention. Instead, scholarship in this area focuses on the general development of judicial participation via amicus filings and possible reforms to rein in the influx of friendly filings. Specifically, many academic articles evaluate and respond to Seventh Circuit Judge Posner's apparent disfavor of amicus participation, particularly since amici have taken on a more significant advocative role.[3] However, the degree to which retired judges, in particular, should participate in the judicial process as amici raises important fairness and separation of powers considerations.[4] Consequently,

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[1] Marla N. Greenstein, *Ethics for Former Judges*, A.B.A. JUDGES' J., Nov. 2020, at 40, 40.

[2] (*Lefebure II*), 15 F.4th 670, 671–72 (5th Cir. 2021).

[3] *See, e.g.*, Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 395 (2015); *see also generally* Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315 (2008) (exploring Judge Posner's disfavor of amicus participation as expressed in *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062 (7th Cir. 1997) and subsequent opinions).

[4] *See* discussion *infra* Sections II.A and II.B.

though the volume of modern discussion on this topic is unimpressive, those who have engaged with this issue demonstrate the fundamentality of its subject matter, with courts, judges, and commentators falling on both sides of the question. For those who support categorically excluding amicus briefs filed by retired judges, their primary concern is fairness to the litigating parties.[5] On the other hand, those opposed to categorial exclusion share then-Judge Alito's concern that "[a] restrictive policy with respect to granting leave to file may . . . create at least the perception of viewpoint discrimination."[6]

Luckily, a discussion of this particular topic need not spring forth from nothing. Many of the arguments relevant to the narrower question of the propriety of retired judges as amici echo and borrow from the larger discussion about whether federal courts should adopt an open-door policy toward amici generally. However, a few key considerations are unique to the narrow question at hand, particularly because of the ethical rules judges must observe even post-retirement.

This article describes the essential division in the federal circuit courts' respective policies regarding amicus briefs filed by retired judges (hereinafter described as "judicial amici") and examines the arguments underpinning these discrepancies. In recent years, amicus briefs have transformed from purely informative filings into opportunities for outside persons to advocate on behalf of a certain litigant.[7] Consequently, the prospect of allowing retired judges to engage in this practice raises concerns about fairness, free speech rights, and the constitutional separation-of-powers scheme, of which the independent judiciary is an integral part. However, as this note explores, proponents on both sides of this issue raise similar concerns, though they take different forms. Ultimately, however, more is gained by allowing retired judges to participate in this manner than by categorically excluding them.

Consequently, as the Fifth Circuit recommends, federal courts should permit retired judges to file amicus briefs. But sitting judges should be

[5] *See* Boumediene v. Bush, 476 F.3d 934, 935 n.1 (D.C. Cir. 2006) (Rogers, J., dissenting) (quoting Advisory Opinion No. 72, Committee on Codes of Conduct, Judicial Conference of the United States (2009)) (noting that a litigant whose adversary's lawyer is called "Judge" may lose faith in the impartiality of the judiciary).

[6] Neonatology Assocs., P.A. v. Comm'r, 293 F.3d 128, 133 (3d Cir. 2002).

[7] Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 676–77 (2008) (describing the shift in amici curiaes' role from the "unbiased or neutral outsider" to "third party representatives"; "away from neutrality and toward advocacy").

willing to deny leave to file in rare circumstances where the presence of judicial amici will weigh heavily in favor of one litigant. These fairness concerns are most forcefully implicated where no one files amicus briefs in support of one litigant, and a retired judge's amicus brief is the only or among only a few amicus brief(s) filed in favor of the opposing litigant.[8] However, a categorical exclusion of judicial amici is not likely to best serve the ends of justice, nor is such a rule generally followed, even by courts that have espoused it.[9]

I. THE CIRCUIT SPLIT

As of 2022, the D.C. and Fifth Circuits are the only federal appellate courts that have squarely addressed the propriety of judicial amici. The Third Circuit has also weighed in on the issue, but only indirectly and inconsistently.[10] The following discussion demonstrates that on a scale from "no hostility toward judicial amici" to "complete hostility toward judicial amici," the Fifth Circuit would fall on the extreme left, the D.C. Circuit at the extreme right, and the Third Circuit would land somewhere in the middle depending on the case under review.

A. The D.C. Circuit's Categorical Prohibition on Judicial Amici

The D.C. Circuit's panel decision in *Boumediene v. Bush* announced a policy of categorically excluding amicus briefs filed by retired judges, representing one far end of the "attitudes toward judicial amici" scale.[11] In *Boumediene*, a group of retired federal jurists sought the court's leave to file as amici curiae in support of petitioners regarding the interpretation of the Military Commissions Act of 2006.[12] In a single-paragraph 2-1 decision, the D.C. Circuit denied the motion for leave to file, citing the Judicial Codes of

[8] *See* discussion *infra* Section II.A.

[9] *See* discussion *infra* Section I.C.

[10] Carl Tobias, *Resolving Amicus Curiae Motions in the Third Circuit and Beyond*, 1 DREXEL L. REV. 125, 134–35 n.38 (2009) (discussing then-Third-Circuit-Judge Alito's decision in *Neonatology Assocs.*, 293 F.3d at 131, in which he questioned the propriety of the panel's decision in *American College of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644, 645 (3d. Cir. 1983), in which the panel interpreted Fed. R. App. P. 29(a) as requiring amici to represent an individual or organization with a legally cognizable interest in the subject matter at issue).

[11] 476 F.3d 934, 934–35 (D.C. Cir. 2006) (per curiam).

[12] *See id.*

Conduct Committee's Advisory Opinion No. 72 in support of the denial.[13] The advisory opinion cautions judges to ensure "that the title 'judge' is not used in the courtroom or in papers involved in litigation before them to designate a former judge unless the designation is necessary to describe accurately a person's status at a time pertinent to the lawsuit."[14]

Judge Rogers, the sole dissenter in *Boumediene*, viewed the committee's advisory opinion as inapposite because it is limited to situations where a former judge appears as *counsel*, not as amicus curiae.[15] Indeed, the opinion, by its terms, addresses the "prospect of former federal judges *actively practicing* in federal courts" and such a prospect's potential to turn "what otherwise might be an academic question into a matter of practical significance."[16] However, the *Boumediene* majority evidently considered the fairness implications of retired-judge-as-counsel relevant to the retired-judge-as-amicus discussion, though the brevity of the opinion leaves the majority's rationale to one's imagination.[17]

Those in favor of permitting retired judges to participate as amici may characterize this short panel decision as a one-off misinterpretation of the ethical obligations imposed upon both retired judges and the sitting judges deciding whether to permit such retired judges to file amicus briefs. But the significance of *Boumediene* is that it constitutes one of the very few discussions of this issue at the federal appellate level and, until the *Lefebure* decision fifteen years later, represented a point of view that no other tribunal had directly challenged.

B. The Third Circuit's "Legal Interest" Rule and Subsequent Developments

In 1983, over twenty years before *Boumediene*, the Third Circuit in *Thornburgh* indicated that it would not grant leave to a party wishing to file an amicus brief unless the party purported to represent an individual or organization with a "legally cognizable interest" in the subject matter at

[13] *Id.* (citing Advisory Opinion No. 72, *supra* note 5).

[14] *Id.*

[15] *Id.* at 935 (Rogers, J., dissenting).

[16] Advisory Opinion No. 72, *supra* note 5 (emphasis added).

[17] Judge Ho, writing for the Fifth Circuit in *Lefebure*, acknowledged that "reasonable minds can disagree over whether the logic of the advisory opinion still applies when a retired judge participates as amici, rather than as counsel." 15 F.4th 670, 672 (5th Cir. 2021).

issue.[18] In *Thornburgh*, a group of male and female law professors sought to communicate, through an amicus filing, their thoughts about how the Court should interpret the salient law regarding abortion.[19] In yet another short 2-1 decision, the *Thornburgh* majority found no persuasive reason to grant the motion to file but did permit organizations like the Greater Pittsburgh Y.W.C.A. and the Philadelphia Reproductive Rights Organization to file amicus briefs.[20] Though the *Thornburgh* decision did not directly address the propriety of *judicial* amici, it necessarily impacts the question of whether retired judges may participate as amici in their capacity as citizens and legal experts though they, like the law professors who sought leave, often lack such a legally cognizable interest in the case.[21] Indeed, the defendant in *Lefebure* employed that very argument when it invoked *Thornburgh* to suggest that the judicial amici in that case should be denied leave to file because they lacked such an interest.[22]

Twenty years after the panel decision in *Thornburgh*, then-Judge Alito, writing for the Third Circuit, reinforced the requirement that an amicus has an adequate "interest" in the case.[23] However, Alito acknowledged that this basic interest requirement is a condition imposed by Federal Rule of Appellate Procedure 29(a).[24] Whether the *Thornburgh* panel's narrow interpretation of this requirement was correct is a separate question.[25] The central significance of Alito's opinion is that it subtly undermines what appeared to be a considerably restrictive policy toward amicus filings announced by the *Thornburgh* panel. Ultimately, the Third Circuit's jurisprudence underscores the built-in limitation on judicial amici participation insofar as Rule 29(a) requires amici to demonstrate an "interest" in the case, whatever that may mean. In this way, the Third Circuit approach offers a case-by-case analysis that represents somewhat of a middle way

[18] 699 F.2d 644, 645 (3d Cir. 1983).

[19] *Id.*

[20] *Id.*

[21] *Lefebure II*, 15 F.4th at 673 (noting *Thornburgh* would bar the retired judges' amicus brief in the present case).

[22] *Id.* at 672; *see also* Bernie Pazanowski, *Former Federal Judges Can File Amicus Brief in Civil Rights Suit*, BLOOMBERG L., Oct. 6, 2021, at 1 (describing the circuit split and the *Lefebure* defendant's reliance on D.C. and Third Circuit precedent).

[23] Neonatology Assocs., P.A. v. Comm'r, 293 F.3d 128, 131 (3d Cir. 2002).

[24] *Id.* at 130–31 (observing that the requirement in Fed. R. App. P. 29 that a movant state the movant's interest in the case implies that the motion should be denied absent an adequate interest).

[25] *See id.*

between the more categorical approaches to this issue espoused by the D.C. and Fifth Circuits.

C. Lefebure *and the Fifth Circuit's Contribution to the Split*

The Fifth Circuit, the circuit court to most recently and robustly consider this issue, declined to adopt either of the rules espoused by the D.C. and Third Circuits.[26] The *Lefebure* case arose out of a District Attorney's decision not to prosecute a man accused of sexually assaulting Priscilla Lefebure.[27] Because of the District Attorney's failure to prosecute, Lefebure sued, alleging, among other things, conspiracy and abuse of process.[28] Although the district court found that Lefebure had constitutional standing to bring suit, the Fifth Circuit reversed, concluding that she lacked standing to seek judicial review of what was essentially an executive decision.[29]

Importantly for the purposes of this discussion, a group of retired federal judges submitted an amicus brief in support of Lefebure's petition for rehearing en banc, attacking the Fifth Circuit panel's initial decision from February 2021.[30] These retired judges included the Honorable Alex Kozinski, former Chief Judge of the Ninth Circuit; the Honorable F.A. Little, Jr., former Chief Judge of the U.S. District Court for the Western District of Louisiana; and the Honorable Michael B. Mukasey, former Chief Judge of the U.S. District Court for the Southern District of New York and former Attorney General of the United States.[31] In the statement of their interest in the case, the judges explained:

> *Amici* are interested in this case because of their decades of service to the federal judiciary, which provides them a unique "both sides" perspective among practitioners on issues of federal jurisdiction and court procedure. As former public servants, they also have an ongoing commitment to fairness for all litigants, preserving the public's positive perception of the judiciary, and sound management of the

[26] *See generally* Lefebure v. D'Aquilla (*Lefebure I*), 15 F.4th 650 (5th Cir. 2021).

[27] *Id.* at 652.

[28] *Id.* at 653.

[29] *Id.* at 655.

[30] *See generally* Brief of Retired Federal Judges as Amici Curiae in Support of Plaintiff-Appellee, Lefebure v. D'Aquilla, 15 F.4th 650 (5th Cir. 2021) (Nos. 19-30702, 19-30989), 2021 WL 4780511.

[31] *Id.* at *2–3.

> federal courts' jurisdiction and decision-making processes. They are concerned that the panel opinion dramatically curtails the federal courts' civil rights jurisdiction, and does so through a process that is ill-suited to such momentous work on a topic of surpassing present importance.[32]

Ultimately, the Fifth Circuit granted the federal judges' motion seeking leave to file but denied Lefebure's motion for rehearing.[33] Despite denying the motion for rehearing, the panel issued an opinion in October 2021 to replace the February opinion, incorporating and rejecting the arguments contained in the amicus brief.[34]

The *Lefebure* opinion came after fifteen years of otherwise radio silence among the circuit courts regarding this issue. During that time, many of these courts, including the Third Circuit, accepted amicus briefs from retired judges without discussion of their propriety.[35] Judge Ho, writing for the panel, based his decision to depart from the other circuits on several considerations, including: (1) his disagreement with the D.C. and Third Circuits' restrictive and inconsistent approaches to the question, (2) issues of fairness and impartiality, and (3) the Supreme Court's practice of liberally accepting amicus filings from a variety of parties, including retired judges.[36]

Judge Ho began his discussion in the Lefebure motion by taking up many of the arguments of Judge Rogers, the sole dissenter in *Boumediene*, and Judge Higginbotham, the sole dissenter in *Thornburgh*.[37]

Beginning with the D.C. Circuit's categorical rule of excluding judicial amici, Judge Ho conceded that, perhaps, Advisory Opinion No. 72, which addresses the fairness implications of using the title of "judge" to refer to a retired judge who appears as counsel, could apply to the judicial amici context as well.[38] According to Judge Ho, "[a] case could be made that it undermines confidence in the judiciary if a litigant is forced to face an

[32] *Id.* at *2.

[33] *Lefebure II*, 15 F.4th 670, 671 (5th Cir. 2021); *Lefebure I*, 15 F.4th at 651.

[34] *Lefebure I*, 15 F.4th at 653 ("We now withdraw our earlier opinion in this matter and substitute this opinion in order to explain why the arguments presented in the petition for rehearing en banc and amicus brief are foreclosed to this court as a matter of Supreme Court precedent.").

[35] *Lefebure II*, 15 F.4th at 673 (citing, e.g., *Reeves v. Fayette SCI*, 897 F.3d 154, 165 (3d Cir. 2018) (McKee, J., concurring) as an example of the Third Circuit's practice of accepting amicus briefs from federal judges notwithstanding its earlier decision in *Thornburgh*).

[36] *See generally id.*

[37] *Id.* at 672–73.

[38] *Id.* at 672.

adversary supported by any person who 'is called "Judge"'—regardless of whether that person serves as opposing counsel or merely as opposing amici."[39] Ultimately, however, Judge Ho reasoned that there is an "obvious difference in quantity (if not in quality)" between a single adverse amicus brief and the day-in, day-out task of facing off against a retired judge throughout the course of the litigation.[40] Furthermore, Judge Ho pointed out that the D.C. Circuit occasionally departs from the rule it announced in *Boumediene*, accepting amicus briefs from former judges notwithstanding the earlier decision.[41]

Judge Ho then criticized the Third Circuit's "legally cognizable interest" requirement for amici, agreeing with the *Thornburgh* dissenter that Rule 29(a) does not require amici to demonstrate such an interest.[42] Again, Judge Ho further criticized the Third Circuit for failing to follow its own rule, observing that the court has accepted amicus briefs from former federal judges in the past.[43]

After explaining why the Fifth Circuit would not adopt either of the rules announced in other circuits, Judge Ho outlined the principles he relied upon in adopting a liberal policy toward accepting amicus briefs, including those filed by former judges.[44] First, Judge Ho noted that although courts enjoy broad discretion to grant or deny leave to amici under Rule 29, judges should always "be on guard for the risk of judicial bias when it comes to [such] discretionary practices."[45] He echoed then-Judge Alito's warning in *Neonatology Associates* that a restrictive policy toward granting leave to file may give the impression of "viewpoint discrimination."[46] In addition to protecting the appearance of impartiality in granting leave to file, Judge Ho rooted his decision in the foundational principles of our adversarial legal system.[47] Specifically, Judge Ho remarked that even if the judicial amici's sharp criticisms are "not sincere or well-founded in the law," as the *Lefebure*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 673 (citing, e.g., *In re Flynn*, 961 F.3d 1215, 1219 (D.C. Cir. 2020) (listing amicus brief of former federal district judges); *In re Leopold*, 964 F.3d 1121, 1123 (D.C. Cir. 2020) (listing amicus brief of former federal magistrate judges)).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 672–74.

[45] *Id.* (citing Rollins v. Home Depot USA, 8 F.4th 393, 398 (5th Cir. 2021)).

[46] *Id.* at 674.

[47] *Id.*

defendant alleged, "[n]o benefit would be served by depriving the court of the opportunity to engage with critical analysis of its past work—to the contrary," Judge Ho continued, "[doing so] would contradict the whole point of our adversarial legal system."[48] Ultimately, Judge Ho reasoned that the critical step for evaluating the propriety of amici efforts is not in considering the motion for leave to file but in judging the brief on its merits once filed.[49]

Finally, Judge Ho grounded his decision in his observation that parity with the Supreme Court is the gold standard, and the Supreme Court has adopted, and therefore "blessed," this more liberal approach to accepting amicus briefs.[50] Judge Ho remarked that even after the categorical rule announced in *Boumediene*, "[o]ur circuit, *like the Supreme Court*, does not categorically exclude amicus briefs" from former judges.[51] Ultimately, the Fifth Circuit found little to recommend a prohibition on amici participation by former judges and, instead, adopted a position of openness toward amici that has been a hallmark of Supreme Court practice under Supreme Court Rule 37.[52]

II. UNIQUE CONSIDERATIONS IN THE CONTEXT OF RETIRED JUDGES AS AMICI

As previously intimated, the narrow issue of whether retired judges should serve as amici curiae gives rise to several unique considerations. At the heart of the matter is the struggle between ensuring a fair forum for all litigants and upholding the adversarial nature and high quality of our judicial decisions. This section explores these considerations and, specifically, the similarity of the arguments on each side of the issue.

A. Fairness Concerns

As articulated by the D.C. Circuit, one of the primary arguments for categorically rejecting amicus filings from retired judges is that the prestige

[48] *Id.*

[49] *Id.* at 671–72 ("And if there is something wrong with this particular amici effort, we can judge the brief on its merits—there is no need to exclude it from these proceedings altogether.").

[50] *See id.* at 672–73.

[51] *Id.* at 671 (emphasis added).

[52] *See* Tobias, *supra* note 10, at 126–27 ("The [Supreme Court] Justices have granted virtually all motions for leave to file amicus briefs, and numerous judges and legal scholars have observed that the Supreme Court effectively allows unlimited participation by amici and that the Justices will probably not modify this solicitous approach in the future.").

and learnedness associated with the title of "judge" may unduly tip the scales in favor of the litigant the former judge supports.[53] Indeed, this fear is somewhat borne out in practice, as one study reports that judges at all levels of the federal bench favor amicus curiae briefs offered by persons with government ties because of their "institutional expertise."[54] Furthermore, the same study shows that federal judges are influenced by factors beyond the content of the amicus brief, such as identity, prestige, or experience, and circuit and district courts are more deeply influenced by these considerations than are members of the Supreme Court.[55]

These unfairness concerns are, perhaps, exacerbated by the disparity in volume between amicus filings in federal circuit and district court cases versus filings in the average Supreme Court case.[56] Though much of the empirical research regarding amicus filings focuses on the Supreme Court, a 2002 survey ascertained that "appellate court amicus involvement was significantly less pervasive" than in the Supreme Court, with amici tendering a total of 635 briefs across only 413 out of approximately 5,000 reported appellate cases.[57] And this relative lack of amicus participation at the intermediate appellate level means that in cases with amicus participation, the parties supported by amici may have a significant advantage, particularly when a retired judge authors the amicus brief. Specifically, where there is a small number of briefs offered for one side with no briefs for the other side, this disparity may translate into higher success rates among the supported parties, according to one study.[58] Notably, this power imbalance was the

[53] *See generally* Boumediene v. Bush, 476 F.3d 934 (D.C. Cir. 2006).

[54] Simard, *supra* note 7, at 697.

[55] *Id.* at 688. *See, e.g.*, Dable v. Barr, 794 F. App'x 490, 495 n.6 (6th Cir. 2019) (observing that "[g]iven the collective experience of the amicus retired immigration judges, their position warrants serious consideration" despite "far-reaching practical consequences").

[56] *See* Tobias, *supra* note 10, at 128 (observing that "[a]micus curiae practice is less widespread in the federal appellate courts").

[57] *Id.* at 130 (citing John Harrington, Note, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RSRV. L. REV. 667, 677–88 (2005)); *see also id.* at 127 (noting that, in the United States Supreme Court, amici tender briefs in well over eighty five percent of cases) (citing Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744 (2000)).

[58] Simard, *supra* note 7, at 672 (citing Kearney & Merrill, *supra* note 57, at 749–50). Simard acknowledges that Kearney and Merrill found that, overall, amicus briefs have a marginal impact on the outcome of litigation, save the occasional higher success rates when the circumstances described above are present.

precise situation presented in *Lefebure*, where only one amicus brief was filed in support of the plaintiff, with none filed in support of the defendant.[59]

But the flip side of the fairness coin, as Judge Ho reiterated, is that categorically excluding retired judges from participating as amici curiae comes uncomfortably close to viewpoint discrimination in violation of these retired judges' constitutional free-speech rights.[60] Though the fairness of the judicial process to the litigants themselves should be of foremost importance, the process should also be fair to all the players involved, including retired judges seeking to serve as friends of the court.

B. Separation of Powers Implications

Lurking beneath the circuit courts' discussions about fairness is the inescapable reality that the resolution of this question implicates the separation of powers that undergird our governmental structure. In the Federalist Papers, No. 78, Alexander Hamilton observed that an "independent spirit" among judges "is essential to the faithful performance" of their arduous duties.[61] The independence of the courts as institutions and of judges as individuals is, according to the Framers and their contemporaries, necessary to protect the rights of the political minority, rights which the democratic branches are not designed to protect.[62] Consequently, it may prove difficult to discard the fiction that sitting judges do not harbor individual opinions regarding the cases and controversies over which they preside.[63] This fiction persists even after retired judges have transitioned out of their role as independent and impartial arbiters.[64] Indeed, the prevailing view on judges today not only fails to discard this fiction; it promulgates it.[65]

The modern reality is that "[a]micus curiae participation [injects] . . . democratic input into what is otherwise not a democratic branch of government."[66] And the expectation that judges, even after retirement, will

[59] 15 F.4th 670, 671 (5th Cir. 2021).

[60] *Id.* at 673–74. *See* Garcia, *supra* note 3, at 319–20 (placing the right to file amicus briefs within the First Amendment right to petition because of their contribution to "deliberative democracy").

[61] THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[62] *Id.*

[63] Anderson, *supra* note 3 at 406−08.

[64] *Id.*

[65] *See id.* at 409–10.

[66] *Id.* at 361.

not act with partiality so as to undermine public confidence in the judiciary is expressed in the official code of conduct for federal judges.[67] The current version of the Code of Conduct for United States Judges contains several provisions directly relevant to this discussion.[68] For example, Canon 1 counsels that a judge should uphold the integrity and independence of the judiciary.[69] Canon 2 encourages judges to avoid impropriety and the appearance of impropriety in all activities, including participating in extrajudicial activities that compromise the appearance of judges' impartiality.[70] Importantly for this discussion, the code requires judges eligible for recall to judicial service to comply with many provisions of the code post-retirement.[71] To be sure, not every judge will choose to become available for recall service, and such service is part-time only.[72] However, the requirements for such judges constitute a recognition of further duties beyond formal retirement and a hesitancy to free these judges from the strictures of rules promoting impartiality.[73] Furthermore, the idea that a judge who retires on Monday can spend Tuesday writing and submitting a brief in support of a party to a legal dispute is frankly distasteful to some.[74] Though dramatic, this immediate transition from impartial arbiter to impassioned advocate might offend the sensibilities of those attuned to founding-era political philosophy and the importance of an independent judiciary.

Interestingly, the foregoing discussion reveals that protecting public confidence in the impartiality of the judiciary and its members is a concern that animates *both* sides of this issue.[75] For example, the Fifth Circuit justified its liberal policy toward amicus participation, including participation by retired judges, by noting that such a policy helps courts arrive at the best results, which engenders trust in the legal system.[76] Judge Ho wrote, "[s]o

[67] 2A GUIDE TO JUDICIARY POLICY ch. 2, at 3–4 (last revised Mar. 12, 2019).

[68] *See generally id.* (providing guidelines aiming at judicial impartiality).

[69] *Id.* at 2.

[70] *Id.* at 3–5.

[71] *Id.* at 18–19.

[72] *See* 38 U.S.C. § 7257 for a description of the expectations for retired federal judges who have opted to be recalled to service.

[73] *See id.*

[74] *See, e.g.*, Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATH. U. L. REV. 841, 900 (2011) (suggesting that Article III judges should be prohibited from returning to practice to preserve judicial independence and impartiality).

[75] *See* discussion *supra* Sections II.A and II.B.

[76] *Lefebure II*, 15 F.4th 670, 675 (5th Cir. 2021).

courts should welcome amicus briefs for one simple reason: '[I]t is for the honour of a court of justice to avoid error in their judgments.'"[77] Similarly, the retired judges' brief in *Lefebure* cited this same concern, noting their "ongoing commitment to fairness for all litigants, *preserving the public's positive perception of the judiciary*, and sound management of the federal courts' jurisdiction and decision-making processes."[78] On the other hand, the basis for the D.C. Circuit's categorical denial of judicial amici was the concern that permitting such filings would erode the public's impression of the court as a fundamentally fair forum.[79] At bottom, this question of amicus participation among former judges implicates the understanding that judges do not shed their black robes immediately upon retirement, whether reflected in official codes of judicial conduct or simply in the minds of those attuned to the design for American government.

C. Opportunity for Greater Scrutiny of Judicial Amicus Briefs

Although somewhat divorced from the foregoing discussions regarding fairness and separation of powers, another unique feature of permitting retired judges to file as amici is that their briefs may be more closely scrutinized, as the Fifth Circuit's order granting leave to file in *Lefebure* demonstrates.[80] Similar to the greater scrutiny of judicial nominees with an extensive paper trail,[81] retired judges have often taken positions during their time on the bench similar to those they will take as amici curiae, providing fertile ground for criticism of any perceived hypocrisy or disjointedness.[82] This criticism may discourage retired judges from amicus participation, irrespective of a certain court's policy towards granting them leave to file, as their participation may hurt a litigant more than it helps them. In other words, even if retired judges *can* participate as amici, *should* they?

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[77] *Id.* (citing The Protector v. Geering, 145 Eng. Rep. 394 (K.B. 1686)).

[78] Brief of Retired Federal Judges as Amici Curiae in Support of Plaintiff-Appellee, Lefebure v. D'Aquilla, 15 F.4th 650 (5th Cir. 2021), (Nos. 19-30702, 19-30989), 2021 WL 4780511, at *2 (emphasis added).

[79] *See generally* Boumediene v. Bush, 476 F.3d 934 (D.C. Cir. 2006).

[80] *See Lefebure II*, 15 F.4th at 675–76.

[81] NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 251 (1998) (observing that the politicization of the Senate confirmation process created an incentive for the President to select nominees whose paper record will not excite serious opposition or who have no paper record at all).

[82] *See Lefebure II*, 15 F.4th at 675–76 ("[T]he proposed amicus brief contradicts a number of views that amici held when they served on the bench.").

Of course, sitting judges can be expected to separate the quality and consistency of a former judge's amicus brief arguments from the merits of the underlying case, but the *Lefebure* merits decision demonstrates that judges are not unwilling to discuss a judicial amicus's inconsistency within the opinion on the merits.[83] The motivation for this degree of scrutiny may stem, in part, from the nature of the particular judicial amicus brief filed in *Lefebure*. Specifically, the retired judges who filed the brief relied on their expertise and lengthy tenure on the bench to seemingly bolster the persuasiveness of their arguments.[84] Not only did Judge Ho and the panel majority in the underlying merits case attack the judges' inconsistency with their prior published opinions, but chastised them for making arguments apparently based on ignorance of common federal court practice.[85] Specifically, Judge Ho remarked:

> Here, the proposed amicus brief contradicts a number of views that amici held when they served on the bench. The panel majority notes a few examples. *See, e.g.*, *Lefebure v. D'Aquilla*, 15 F.4th 650, 656–58 (5th Cir. 2021) (explaining how the amicus brief conflicts with BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 87, 121 (2016) (collecting cases); *id.* at 676 (explaining how the amicus brief conflicts with *Carter v. Derwinski*, 987 F.2d 611, 613 n.1 (9th Cir. 1993) (Kozinski, J.) (en banc)).
>
> And there are more. To note just one other example: Amici criticize the court for deciding this case without oral argument. But that is a common practice in the federal circuits . . . . Amici should know this, having decided countless appeals without oral argument—including appeals that (unlike this one) present constitutional and regulatory issues of first impression. *See, e.g.*, *United States v. Albers*, 136 F.3d 670, 673 (9th Cir. 1998) (Kozinski, J.); *Lowry v. Barnhart*, 329 F.3d 1019, 1021–22 (9th Cir. 2003) (Kozinski, J.). What's more, the Federal Rules of Appellate

[83] *Lefebure I*, 15 F.4th at 657.

[84] *Id.* at 657; *Lefebure II*, 15 F.4th at 675–76; Brief of Retired Federal Judges as Amici Curiae in Support of Plaintiff-Appellee, Lefebure v. D'Aquilla, 15 F.4th 650 (5th Cir. 2021), (Nos. 19-30702, 19-30989), 2021 WL 4780511, at *2 (citing their years of judicial service and asserting that their tenure afforded them a "both sides perspective" to the particular standing issue in *Lefebure*).

[85] *Lefebure II*, 15 F.4th at 675–76.

> Procedure specifically contemplate the denial of oral argument in cases such as this—as amici again should know. *See* FED. R. APP. P. 31(c) . . . .[86]

Ultimately, the above excerpt demonstrates that courts may hold retired judges to a higher standard than they would other friends of the court.[87]

III. THE PATH FORWARD

Although the Fifth Circuit's *Lefebure* decision creates a clear split between the circuit courts, the Supreme Court is unlikely to resolve this "dispute" because each circuit court is afforded discretion in crafting its respective approach to amicus brief filings.[88] Thus, though not compelled to adopt a uniform approach to this issue, circuit courts should not be dissuaded from the friendly engagement of retired judges because the unfairness and separation of powers implications are largely overstated. However, in rare circumstances, it may be appropriate to deny a retired judge leave to file, and sitting judges should be careful to monitor for such situations. Judge Ho and those before him persuasively assert that the review of a brief's persuasiveness should occur after it is filed and not before.[89] But when it comes to allowing retired jurists to stamp their briefs with the distinguished title of "judge," even if preceded by "former," it may be difficult to undo any damage.

Of course, the Supreme Court, in concert with an advisory committee, crafted Federal Rule of Appellate Procedure 29(a) to address when U.S. district and intermediate appellate courts should grant leave to file.[90] Evidently, the Court did not contemplate the need for any special rules pertaining to retired judges.

Indeed, retired judges who are not subject to recall are permitted to return to the practice of law post-retirement.[91] However, the American Bar Association offers guidelines for judges who choose to do so that go beyond, in some ways, the formal judicial code of conduct requirements.[92] For

[86] *Id.*

[87] *See id.*

[88] *Id.* at 673 (acknowledging that "Courts enjoy broad discretion to grant or deny leave to amici under Rule 29").

[89] *Id.* at 674.

[90] FED. R. APP. P. 29.

[91] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-391 (1995).

[92] *Id.*

example, the ABA counsels that "[a] former judge who returns to the practice of law may not continue to use the titles 'Judge' or 'The Honorable.'"[93] The ABA's stated reason for this prohibition is that "the use of the title 'Judge' in legal communications and pleadings . . . is misleading insofar as it is likely to create an unjustified expectation about the results a lawyer can achieve and to exaggerate the influence the lawyer may be able to wield."[94] Specifically, the ABA is concerned that use of judicial honorifics to refer to a lawyer may give the former judge's client an unfair advantage over his opponents in court.[95] Although a former judge filing an amicus brief is not in the same advocative position as a former judge acting as named counsel in a live controversy, the transformation of amicus briefs into instruments of advocacy creates similar concerns for mere friends of the court.[96] However, despite the parallels between former judges as lawyers and former judges as amici curiae, the ABA has not set forth analogous guidelines in this latter context, although judicial amici sometimes cite the filer's judicial title and experience to bolster the persuasiveness of the brief.[97] However, it may be impractical to ask retired judges to obscure their identity as former judges, as they are required to identify their interest in the case, which is often a product of their prior experience on the bench or familiarity with the area of law at issue.

CONCLUSION

In conclusion, while federal circuit courts will likely continue to enjoy discretion as to whether federal judges may remain friends of the court, permitting them to remain so does not seriously undermine fairness or the separation of powers scheme. However, sitting judges and their retired counterparts alike should, in making these decisions, remember that to many, "a judge is always a judge."[98]

[93] *Id.* at 1.

[94] *Id.* at 2; *see also* Advisory Opinion No. 72, *supra* note 5.

[95] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-391 (1995).

[96] Simard, *supra* note 7, at 676.

[97] *See, e.g.*, Brief of Retired Federal Judges as Amici Curiae in Support of Plaintiff-Appellee, Lefebure v. D'Aquilla, 15 F.4th 650 (5th Cir. 2021), (Nos. 19-30702, 19-30989), 2021 WL 4780511, at *2 ("*Amici* are interested in this case because of their decades of service to the federal judiciary, which provide them a unique 'both sides' perspective among practitioners on issues of federal jurisdiction and court procedure.").

[98] Greenstein, *supra* note 1, at 40.