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Submitted online

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Advisory Committee on Appellate Rules
Committee on Rules of Practice & Procedure
Judicial Conference of the United States

AMENDMENTS TO APPELLATE RULES PROPOSED FOR COMMENT, Aug. 2024

To the Committee and Staff:

The National Association of Criminal Defense Lawyers (NACDL) is pleased to submit our comments on the proposed amendments to Rule 29 of the Federal Rules of Appellate Procedure and to Appeals Form 4. Overall, the theme of our comments is that the proposals appear to overlook the particular characteristics of federal criminal and related appeals, and would impose unwarranted burdens on many amici and on the judiciary itself in the great majority of appeals where the concerns that animate the proposals do not arise.

Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. Our association has more than 10,000 direct members. With NACDL's 90 state and local affiliates spanning nearly every state, we represent a combined membership of some 40,000 private attorneys, public defenders, and interested academics.

APPELLATE RULE 29 – BRIEFS OF AMICUS CURIAE

NACDL has an active amicus curiae program, which we administer through a large volunteer committee of our members, with minimal staff support and virtually no budget. Our amicus program supports our organization's public policy goals as a non-profit professional association devoted to the integrity and reform of the criminal justice system, to the competent and otherwise ethical representation of persons charged with or convicted of crime, and to the rights of the accused as guaranteed by law. After careful evaluation and strategic planning, the organization's Board of Directors judged a multi-faceted strategy best suited to advancing our mission of advocating criminal law reform to achieve a fair, rational, and humane criminal legal system. The filing of amicus briefs is a core component of that strategy. We have reason to believe, based on feedback from numerous judges and from members who are former appellate law clerks, that our briefs are generally held in high regard by the judiciary and found to be useful in the just disposition of cases and in the setting of appropriate precedent.

NACDL's amicus committee has seven national co-chairs, who supervise the overall work of the committee and personally oversee our filings at the Supreme Court of the United States. In addition, the committee has 31 vice-chairs, two or three of whom are assigned by geography to each of the various circuits. The vice-chairs identify cases of particular interest and importance, and then recruit and supervise volunteer authors (most but not all of whom are members of

NACDL) for filings in our name in those cases. The committee operates under strict written "protocols" that ensure that only cases presenting issues of importance to our mission are supported; a member of NACDL has no entitlement to (or even preference in) having their "own" case supported. According to the AO there were 9649 federal criminal appeals in Fiscal Year 2023 (the most recent year reported). We are probably the most prolific amicus filer in criminal and related appeals nationwide, yet in 2024 NACDL filed amicus briefs in just 23 selected federal appellate cases nationwide – not more than one to four per Circuit (along with 16 at the Supreme Court and 20 in state supreme courts). As stated on NACDL's website, we seek to file briefs in "cases that present issues of importance to criminal defendants, criminal defense lawyers, and/or the criminal justice system as a whole, and to do so in a manner that is consistent with NACDL policy and [that] complements NACDL's public policy advocacy initiatives."

The concerns that appear to animate the current proposal do not apply outside the context of high-stakes civil litigation in which they arose. In the criminal, civil rights, habeas and related cases in which NACDL participates, we rarely see special-purpose "amici" with ties to the parties. In our cases there is almost never a concern with monied interests trying to influence the outcome of specific cases or the setting of precedent through paid or puppet amicus participation. Never do we experience a flood of duplicative or self-serving amicus briefs filed in connection with a criminal appeal. Yet the committee's proposal will adversely affect all amici, including NACDL. Against this background, we are acutely concerned with how any amendment to Rule 29, including those which are now proposed, would adversely affect NACDL's and similarly structured organizations' ability to advance their respective missions.

A. <u>The proposed elimination of filing on consent, with a requirement to seek leave</u>

Allowing courts to reject tendered amicus briefs, particularly without explanation, creates an enormous disincentive for small, volunteer-reliant, and/or financially strapped organizations such as NACDL to prepare them at all. That could reshape resource allocation and strategy for many organizations. Anything that injects uncertainty into our ability to pursue that strategy would force us to reevaluate our strategic plan and our First Amendment-protected allocation of resources.

Advancing the orderly development of decisional law on issues affecting their constituents and priorities is a core element of advocacy for countless organizations, including NACDL. It's a pillar of reform efforts for many. The committee report makes no mention of this. Instead, the committee mentions only self-serving and secondary motives, stating that "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." (Report, at 20 of 109.) If those are the principal motives of any groups that regularly file amicus briefs, it is certainly not true for NACDL. None of NACDL's roughly $10 million annual budget (a fact made public by our annual IRS Form 990 filing as a recognized § 501(c)(6) tax-exempt organization) is allocated to the support of our active amicus program; it is near 100% volunteer effort. One staff member – who has multiple other responsibilities in connection with NACDL's criminal justice reform efforts – supports the committee's operations, but does not render assistance to our volunteer authors. We can count on the fingers of one hand the number of times a paid staffer has authored a NACDL amicus brief, thinking back a couple of decades. Moreover, our three dozen chairs and vice-chairs volunteer their time to screen potential cases and then to recruit authors and edit or approve the final product for filing. When a member –

or non-member supporter – volunteers to write an amicus brief, they are donating their services (and any related clerical or paralegal support), either individually or on behalf of a law firm, and, in fact, they cover the printing and filing costs as well. It is very unlikely that we could continue to persuade our volunteers to contribute these hundreds of hours (worth hundreds of thousands of dollars *in toto*) of donated time if there were a significant chance that the brief thus produced would not even be accepted for filing and consideration by the Court. NACDL would be forced to turn its criminal law reform efforts away from advancing the orderly development of precedent, contrary to its own best (First Amendment-protected) judgment as to how to advance its mission. This impediment to our advocacy should be avoided unless deemed essential to achieving a countervailing public interest, such as defeating a substantial burden on the judicial process.

Under the present rule, we receive consent nearly 100% of time from both the government and the defendant's counsel, predicated on our history and reputation for quality and integrity in our briefing and on longstanding collegial, cordial relations with Main Justice and U.S. Attorney's Office appellate prosecutors. The proposed Advisory Committee Note says only that the consent requirement "fails to serve as a useful filter" (*l.* 236), but there is no suggestion that the circuits are inundated with consented-to amicus briefs, much less with unhelpful ones, to the point that any filter is needed. Much less is there any basis for thinking that the volume of amicus briefs in the circuits is such that the burden of deciding a mandatory motion accompanying each – which subsumes analyzing the details of that brief against other amicus briefs and the party brief – would be lower. At least as applied to criminal and related appeals, there is no reason to change the present rule in this respect.

The committee suggests that the consent option may leave a potential amicus "needing to wait until the last minute to know whether to file a motion." (prop. Adv.Comm.Note, *ll*. 238–39.) But the proposed amended rule creates a much worse situation, as it leaves all amici (other than the government, the adversary in nearly all the cases we participate in) in limbo on whether to write the brief at all, all the way through filing and beyond. A completed brief must be attached to the motion as an exhibit. Prop. Rule 29(a)(3). Of course, we do not claim a right to have any given brief accepted, but time and resources are finite for every professional as for every organization. Uncertainty about whether our views will be received at all would strongly discourage NACDL from choosing to devote its efforts to preparing amicus briefs at all, even when it is our own First Amendment-protected decision to do so in aid of our non-profit mission in service of the pursuit of justice. (This is a different First Amendment argument from the one advanced by the ACLU and the Chamber of Commerce in their comments, with which NACDL also agrees.)

We urge the committee not to adopt a mandatory-motion rule, or at least to make it inapplicable to criminal, civil rights, and habeas appeals, where there is not even arguably any problem of abuse of amicus participation to be solved.

B. <u>The proposed substantive standard</u>

The committee suggests amending paragraph (a)(2) of the FRAP 29 to say that the filing of an amicus brief "is disfavored" unless it "brings to the court's attention relevant matter that is not already mentioned by the parties" and is not "redundant with another amicus brief." For two reasons, NACDL opposes injecting these standards into the Rule, whether or not the proposed motion requirement (discussed under Point A of this letter) is implemented.

First, the suggested criteria fail to capture the many ways that amicus briefs can be helpful and appropriate, as are the briefs that NACDL routinely files. Whether the "relevant matter" is factual in nature or takes the form of legal argument, it is hard to imagine a proper amicus brief that does not advance arguments (if not issues) that the parties do not at least "mention" in the principal briefs. What amici such as NACDL can and do provide, in many cases, is a more thoroughly researched, broader and deeper, or more nuanced presentation of the issues in the case. This is particularly true in criminal appeals, where defendants – typically the appellant – are often represented by a trial lawyer who is not an appellate specialist. (Many Circuits by local rule require trial counsel to continue on appeal unless excused.) In contrast, the government is usually represented by a trained appellate lawyer or at least by an attorney supervised by appellate specialists. And even when the defendant's appellate counsel is highly skilled, they have an obligation to cover much more territory, both factual and legal, even considering the greater allowable word-count for the merits brief. The amicus, by contrast, can limit its recitation of the case-specific facts, permitting greater depth or breadth of presentation on points on which the party can only touch. Yet such briefs would apparently be viewed as "disfavored" under the proposed rule, to the detriment of both the amicus organization's ability to fulfill its mission and of the court's final product.

Relatedly, amici such as NACDL can assist the court by flagging the potential value of a broader (or narrower) *ratio decidendi* for the court's decision, and of the ramifications of a given holding, while the party's counsel is ethically bound to argue only what is best for the particular client. Moreover, the filing of an amicus brief inherently raises the profile of a case, thus providing expert assistance to the court in selecting cases for oral argument and/or for precedential treatment. The proposed amended language for Rule 29(a)(2) does not communicate to potential amici that such briefs are welcome and useful, nor does it encourage courts considering motions for leave to file to grant permission to the full range of helpful amicus briefs. See *Neonatology Associates, P.A. v. Comm'r*, 293 F.3d 128 (3d Cir. 2002) (per Alito, J., overruling objections to filing of amicus brief and explaining why courts should give a broad reading to Rule 29(a)).

As to the second proposed limitation (redundancy), in our experience an amicus like NACDL is unlikely to know what points other amici (if any) plan to argue, or even whether any other amici intend to file. There is no mechanism by which prospective amici would necessarily learn of one another, unless each has communicated with the party and party counsel has connected them. And even then, it is unlikely that multiple amici would have sufficiently complete draft briefs to exchange in time to evaluate and modify each for potential redundancy, even if they could agree to attempt a coordinated effort. It would be difficult at best, then, for NACDL to be in a position to allege in a motion under (a)(3)(B) that its arguments are not "redundant" of those presented by another amicus. Moreover, how would NACDL ascertain that it was *our* brief that was "redundant" and not that of the other amicus? Would a busy judge be more likely to accept the brief filed by the better-known lawyer, firm, or amicus, rather than the better brief?

The wording of the proposal is also unclear whether each amicus submission must eschew redundancy entirely or merely limit it. If the latter, the degree of acceptable similarity is left in doubt. A smaller organization working on an issue in the rural heartland may have a subtly different perspective from that of a larger organization working on the same issue in an urban center. Would their briefs be "redundant" of each other, and/or a party's brief, because they address the same issue? In our view, this proposed amendment could be implemented, if at all, only with the benefit of hindsight. Our experience suggests that it would not work at all in the real world of appellate practice.

In addition, the mere fact of receiving multiple amicus briefs making similar points but from diverse sources may further validate those points in the minds of the judges, dispelling any suspicion of special pleading, bias, or idiosyncratic viewpoints. In this way, some redundancy can actually advance the proper purposes of amicus briefing.

Indeed, a given amicus brief may contain a nugget of insight that will resonate importantly with one judge on the merits panel, even if not with others, in a way that contributes significantly to a better outcome. If a motions panel rejects the brief, that insight will never reach the judge who would have found it helpful. If the merits panel decides whether to accept a brief, would two panel members' votes to reject it require the judge who finds it helpful to eschew reliance on its insight? Far better for all concerned for each member of a panel to simply toss aside any amicus briefs that judge finds unhelpful – making the same individualized decisions judges and their law clerks easily make now.

Equally problematic with respect to the proposed substantive amendment of Rule 29(a)(2) is how it would be enforced in a real case, assuming for purposes of discussion that the motion requirement is also enacted (which we oppose in the preceding portion of this comment). In our experience, the merits panel is not assigned to a given appeal until after the appellee's brief is filed. Will all motions for leave to file amicus briefs be held under advisement until all the briefs are in, and then evaluated by the merits panel for compliance with Rule 29(a)(2)? If so, there is no saving in judicial resources, as the briefs will all have to be closely scrutinized, and all the arguments researched and weighed, to fairly apply either the "not already mentioned" or the "[not] redundant with another amicus brief" criterion. If, on the other hand, a given Circuit uses a pre-merits motions panel (whether of one, two or even three judges) the waste of judicial resources to implement and enforce the amended rule would be exponentially increased, far outweighing any benefit from the weeding out of unhelpful amicus submissions, and the merits panel potentially deprived in the end of useful information for the just disposition of the case.

Whether or not the motion requirement is enacted, the new language in (a)(2) would still be pertinent to the statement in the amicus brief itself, required by new Rule 29(a)(4)(D), as to how the brief will be "helpful." The proposed language, given its narrow scope, would discourage scrupulous lawyers, including those volunteering with NACDL, from preparing and submitting many of the kinds of amicus briefs that experience has shown to be useful to courts in developing the law and reaching just outcomes in individual cases. In short, the proposed amendment to Rule 29(a)(2) would not improve the appellate process and should not be forwarded by the Advisory Committee to the Standing Committee and the Judicial Conference.

C. <u>The proposed amended disclosure requirements</u>

Of the proposed expanded disclosure requirements (prop. rev. FRAP 29(b)-(e)), only proposed paragraph (e) would apply to NACDL. We do not permit defendants' counsel to ghost-author our amicus briefs or to pay the filing costs for those submissions (much less to compensate our volunteer brief-writers), nor does any individual or group contribute as much as 25% of NACDL's total revenues. As previously noted, NACDL does not "pass the hat" to fund our amicus briefs (prop. Adv.Comm.Note, *l.* 363), nor do we pay anyone to write for us. Our volunteer authors contribute not only their professional services but also the out-of-pocket costs for the production and filing of the briefs they write under NACDL's auspices. As for proposed Rule 29(e), it unlikely but possible that someone other than the volunteer author herself or a long-

standing member of NACDL might contribute more than $100 toward a given amicus filing; if so, NACDL would have no objection to that disclosure.

We do suggest, however, that the Rule or Note make clear whether the required disclosures include the value of in-kind contributions (be they in the form of professional services, clerical and paralegal services, or printing), or only the amount of cash contributions.

APPELLATE FORM 4 – APPLICATION TO PROCEED *IN FORMA PAUPERIS*

As with the proposed changes to the amicus rule, the proposed amendment to Form 4 overlooks the different circumstances of criminal appeals. The Form should be further amended to add the information that a person for whom counsel has been appointed under the Criminal Justice Act is automatically entitled by law to appeal *in forma pauperis*, so such appellants are not required or expected to complete Form 4. *See* 18 U.S.C. § 3006A(d)(7) ("If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28."). A small number of criminal appeals do involve appellants eligible for *in forma pauperis* status but without CJA counsel. These include *pro se* cases, instances where a family member or friend has retained private counsel for an indigent defendant, and cases taken *pro bono*. Those appellants will still have to use the form to obtain IFP status and a waiver of filing fees. So it would not be correct simply to say the form does not apply to criminal cases. Conversely, there are civil appeals where counsel may have been appointed under the CJA, including *habeas corpus*, *coram nobis* and § 2255 cases. The Form is not to be used in those cases. None of this is taken into account, much less made clear, by the present version of Form 4 or the current proposal to amend it.

For these reasons, NACDL suggests that the Committee further amend Form 4 by adding – perhaps between the heading ("Affidavit Accompanying Motion ...") and the Affidavit box itself – the words, "**No affidavit is required, and this Form does not apply, if counsel has been appointed for you under the Criminal Justice Act**."

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NACDL thanks the Committee for its valuable work and for this opportunity to contribute our thoughts. We look forward to continuing our longstanding relationship with the advisory committees as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
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