



ATLANTIC LEGAL FOUNDATION

atlanticlegal.org

Lawrence S. Ebner
Executive Vice President & General Counsel
1701 Pennsylvania Ave., NW, Suite 200
Washington, DC 20006
914-303-1597 or 202-729-6337
lawrence.ebner@atlanticlegal.org

April 5, 2022

Scott S. Harris
Clerk of the Court
Attn: Rules Committee
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

Re: Comments on Proposed Revisions to Rule 37

Dear Mr. Harris:

The Atlantic Legal Foundation (“ALF”), a nonprofit, nonpartisan, public interest law firm, appreciates the opportunity to comment on the Court’s proposed revisions to Supreme Court Rule 37, specifically, elimination of the requirement that an *amicus curiae* either obtain the parties’ consent or file a motion for leave to submit its brief. Since its founding in 1977, ALF has filed hundreds of petition-stage and merits-stage amicus briefs in cases presenting legal issues that align with one or more of its mission areas: advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. Based on ALF’s 45 years of experience filing amicus briefs in this Court, we support and welcome elimination of the consent requirement.

ALF agrees with your comment that the consent requirement imposes unnecessary burdens and no longer serves a useful purpose. As a practical matter, counsel for the supported party virtually always consents to the filing of amicus briefs. Although counsel for non-supported parties typically consent, attorneys who lack Supreme Court experience sometimes withhold

or delay consent, thereby creating unnecessary logistical burdens and costs, including the need to draft a motion for leave, which Rule 37.2(b) states is not favored.

Further, at the petition stage, it sometimes is difficult for amicus counsel to identify who (if any) among multiple lower court attorneys from different law firms will be serving as the respondent's (or respondents') counsel of record. This necessitates requesting consent from all such attorneys with the hope that one will respond with timely consent. Even when the respondent is federal government, or a state or local government, there often is delay in obtaining consent, thereby impeding amicus counsel's finalization of their brief and transmission to the printer.

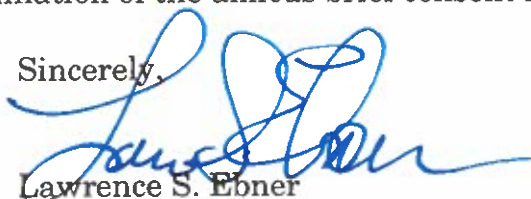
It also is important to note that the Rule 37.2(a) requirement to provide advance notice of intent to file a petition-stage amicus brief obviates any need for a respondent's counsel to rely on receipt of consent requests to learn that one or more amicus briefs will be filed, and thus, that a time extension for responding to the certiorari petition may be desired.

More fundamentally, ALF believes that a requirement to obtain the parties' consent for the filing of an amicus brief is inconsistent with the true purpose of such a brief: serving as a friend *of the Court*. Although amicus briefs usually support one side of an appeal or the other, they are supposed to "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties." Sup. Ct. R. 37.1. The benefit to the Court of an amicus brief that provides such helpful, non-duplicative legal argument, or additional perspective or information relevant to the question presented, should not be dependent upon the parties' consent.

ALF also believes that Supreme Court amicus briefs serve the additional important function of opening our nation's judicial process at the highest level to any organization or individual with an interest in the question presented by an appeal. Providing non-litigants with such a voice in this Court fosters our democracy and helps ensure quality in American jurisprudence.

Again, thank you for the opportunity to comment on, and enthusiastically endorse, the proposed elimination of the amicus brief consent requirement.

Sincerely,



Lawrence S. Ebner