ATLANTIC LEGAL FOUNDATION

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Hon. John D. Bates
Chair, Committee on Rules of Practice
and Procedure
Judicial Conference of the United States
One Columbus Circle, NE
Washington, DC 20544

Re: USC-RULES-AP-2024-0001

Dear Judge Bates:

On behalf of the Atlantic Legal Foundation, I am submitting these comments on the proposed amendments to Federal Rule of Appellate Procedure 29. The Advisory Committee on Appellate Rules has indicated that it "is particularly interested in receiving comments on the proposal to eliminate the option to file an amicus brief on consent during a court's initial consideration of a case on the merits." These comments focus on that proposal, which we believe is both unwarranted and impractical, and should be rejected.

By way of background, the Atlantic Legal Foundation (atlanticlegal.org) is a nonprofit, nonpartisan, public interest law firm founded almost a half-century ago. We are a frequent filer of *amicus curiae* briefs in the federal courts of appeals as well as in the Supreme Court. Our amicus briefs address legal issues that align with one or more of our six advocacy mission areas: individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice.

We endeavor to foster the fundamental, judicially beneficial purpose of amicus briefs, as well as comply with the rules governing their preparation and submission. In particular, we strive to draft amicus briefs that enhance an appellate court's perspective on, and understanding of, the legal issues in a case, rather than duplicating the arguments presented by the supported party, and to the extent possible, by other *amici curiae.* We also believe that the federal rules should open the appellate process—and give a voice—to all organizations and individuals with an interest in the legal questions presented by a case. This can be accomplished only by rules that facilitate, not hinder, the filing of amicus briefs. Requiring a motion for leave would undermine this objective by deterring preparation and submission of worthwhile amicus briefs, in addition to unnecessarily burdening appellate judges.

My Law360 essay, ***Requiring Leave To File Amicus Briefs Is a Bad Idea*** (Apr. 4, 2024), discusses the practical problems and inevitable mischief that eliminating filing-with-consent, and requiring a motion for leave, would engender in federal courts of appeals. For example, requiring proposed amicus filers to demonstrate that the arguments and information in their already-drafted amicus briefs are "helpful" may encourage non-supported parties to oppose motions for leave in an effort to deprive courts of appeals of amicus briefs that offer persuasive arguments and/or useful information. Requiring a motion for leave also may motivate non-supported parties to attack amicus filers and perhaps their counsel simply for seeking to serve as a friend of the court.

Equally important, requiring a motion for leave would create uncertainty regarding whether a proposed amicus brief will be accepted for filing—uncertainty that may deter many nonprofit organizations such as the Atlantic Legal Foundation from investing their limited resources in researching and drafting briefs that would be helpful to courts of appeals.

The purported rationale offered by the Advisory Committee for the proposed motion-for leave requirement—enabling circuit judges to reject the filing of amicus briefs that would require their recusal—not only is a rare occurrence, but already is expressly addressed by Rule 29(a)(2) ("a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification"). It is important to note that the Code of Conduct that the Supreme Court's Justices adopted in November 2023 states that "Neither the filing of a brief *amicus curiae* nor the participation of counsel for *amicus curiae* requires a Justice's disqualification."

The current system works well: Except in unusual circumstances, litigating parties' appellate counsel routinely consent to the timely filing of amicus briefs; non-supported parties, if they wish, can address amicus arguments in their own merits briefs (which they typically decline to do); and the merits panel can afford a particular amicus

brief whatever weight it deserves. *Indeed, as the Atlantic Legal Foundation previously has suggested to the Advisory Committee, if Rule 29 is to be amended at all, it should be to adopt the Supreme Court's enlightened approach of allowing timely, rules-compliant amicus briefs to be filed without having to obtain the court's permission or even the parties' consent*. *See* Sup. Ct. R. 37, as amended Jan. 1, 2023.

Thank you for your consideration.

Sincerely,

/s/Lawrence S. Ebner
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