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Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure of
the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite 7-240
Washington, D.C. 20544

Re: *Comments on Proposed Amendment to Rule of Appellate Procedure 32*

Dear Mr. Rose:

I submit this letter on behalf of the members of the Appellate, Writs, and Constitutional Law Practice of Enterprise Counsel Group ALC. Thank you for providing the opportunity to comment on the proposal to reduce the maximum size for principal briefs. I oppose the proposal mainly for the following four reasons.

First, reducing the maximum size for principal appellate briefs by more than ten percent (from 14,000 to 12,500 words) is likely to result in the proliferation of principal briefs as well as motions to file oversized briefs, thereby significantly increasing the administrative workload of both chambers and clerks' offices and unnecessarily extending the life of an appeal. One unavoidable consequence of the proposed reduction will be the motivation for separately represented parties to file their own principal briefs rather than simply joining in a single principal brief, meaning much more reading for judges, law clerks, and staff attorneys. As is the case with nearly all oversized-briefing motions, practitioners will file them on the eve or day of the principal briefs deadline (along with the proposed oversized brief), thus calling on the clerk's office, appellate commissioner, motions panel, merits panel, or some combination thereof to resolve the motion probably after allowing the opposing party/ies a reasonable amount of time to respond. At that later juncture, the court will either grant the motion and direct the clerk's office to accept and process the lodged oversized brief, or deny the motion and grant additional time for the filing of a brief that does not exceed the maximum word count. While certain of those motions will be the product of prolixity, others will be necessitated by the complexity of a given case. In either event, appellate litigation proceedings will be

multiplied and the circuit courts will be saddled with the burden of reviewing and resolving additional motions.

Many state appellate courts follow the federal rules, specifically when it comes to the size of briefs. Appellate practitioners in states, including California, New York, Pennsylvania, and Texas, are familiar with size limitations of at least 14,000 words for principal briefs. Accordingly, if the proposed amendment to Rule 32 is approved, appellate practitioners who do not relegate their practice to federal courts and agencies are likely to more frequently file oversized-briefing motions.

Second, more complex or multiple-issue appeals presenting, for example, challenges to multiple trial court rulings or agency determinations typically warrant principal briefs in excess of 12,500 words. Not only would the proposed rule change essentially require practitioners in such cases to bear the burden of preparing additional paper in the form of an oversized-briefing motion and supporting declaration, but it would disadvantage the litigants before the various circuit courts that have expressed a stringent policy disfavoring such oversized-briefing motions.

For instance, Circuit Rule 32-2 of the United States Court of Appeals for the Ninth Circuit states in part: “The Court looks with disfavor on motions to exceed the applicable page or type-volume limitations.” Similarly, Local Rule 27.1(e)(1) of the United States Court of Appeals for the Second Circuit states: “The court disfavors motions to file a brief exceeding the length permitted by FRAP 32(a)(7).” The Third Circuit’s standing order likewise warns that oversized briefs are “strongly disfavored” and will be granted “only upon demonstration of extraordinary circumstances.” While disfavor is deserved for unduly excessive briefing, a litigant in a truly complex or multi-issue appeal should not be disadvantaged in presenting appellate challenges and concomitant background explications and legal analysis solely on the basis of brief length.

Third Circuit Chief Judge Theodore A. McKee shared the findings of an informal survey of 12 circuit courts conducted by the Clerk of the Third Circuit. Hon. Theodore A. McKee, *Permission to Exceed the Page or Word Limitations for Briefs is Now the Exception, Not the Rule*, On Appeal, Mar. 2012, at 1 (accessible at http://thirdcircuitbar.org/newsletters/ThirdCircuitBarAssociationNewsletter_6-1_March_2012.pdf). Nine of those circuits reported they “rarely” or “almost never” grant motions to file oversized briefs. *Id.* A concern had arisen among Third Circuit judges that the Third Circuit was routinely permitting oversized briefs

without a thorough review of the merits supporting such requests. *Id.* at 2. Subsequently, Chief Judge McKee explained, the Third Circuit issued its standing order to “severely limit the number of over-length briefs that are filed” despite the fact that “compliance with the Order may sometimes be difficult and will almost always take more time than submitting a longer brief.” *Id.* In other words, there is nothing to suggest that circuit courts are prepared to dispense with the current policy reserving oversized briefing only for the *most* extraordinary cases.

Third, there is a dearth of data indicating any need for the proposed rule change. Rather than repeating what other commenters have articulated in greater detail, I would respectfully draw the Committee’s attention to the data recently compiled by the Clerk of the United States Court of Appeals for the Eighth Circuit, which places the debate in its proper context. Clerk Michael E. Gans Sept. 3, 2013 Letter to Hon. Steven M. Colloton at 1-2 (accessible at www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Appellate/2014-04-Appeals-Agenda-Book.pdf). More specifically, the compiled data signals the proposed rule change may be “a solution in search of a problem” because such a change is expected to affect the maximum size of briefs in only approximately ten percent of appeals. *Id.* Moreover, the proposed rule change would do nothing to help mitigate the problem of unnecessarily lengthy appellate briefs (that remain at or under 12,500 words).

The actual problem this Committee is commendably attempting to address is wordiness, which is born out of poor written advocacy, *not* maximum word limitations. Circuit judges certainly have reason to complain that many briefs are unjustifiably lengthy. Circuit judges know the effectiveness of concise and cogent written advocacy (short, persuasive sentences accessible to lay person and scholar alike) and the presentation of only the strongest issues (as opposed to every possible issue). We teach associate attorneys and law students that shorter appellate briefs are more effective in securing better results for clients. The problem of wordiness can be effectively addressed only within the unique context of law school writing courses, continuing legal education for practitioners, and the practice of law. That principle has always been the wisdom guiding our venerable discipline of appellate advocacy, and perhaps with greater force than in other legal disciplines. If we were to now retreat from this core wisdom for the hope of enticing a few shorter briefs, the only expected result will be a few shorter briefs that still suffer from a lack of proper craftsmanship, and at the (greater) cost of limiting good advocacy in complex appeals that need the extra space to adequately address the appellate challenges at play. See Committee’s Draft Apr. 2014 Minutes (“traditionally the Rules

Committees do not amend a rule unless there is a *very good* reason to do so” (emphasis added)).

Fourth, aside from the burden placed on courts, advocates, and litigants, the stated rationale for the proposed rule change merits reconsideration. The Committee noted that the proposal is aimed at correcting an inadvertent increase to the length of principal briefs that occurred in 1998. It appears that the rationale of the Committee is to preserve status quo. Hon. Frank H. Easterbrook, the American Academy of Appellate Lawyers, the Appellate Section of the State Bar of Texas, and the Committee on Federal Courts of the Association of the Bar of the City of New York each submitted comments providing compelling evidence that the length of principal briefs was not mistakenly increased in 1998. And even if one were to assume the length of principal briefs did mistakenly increase in 1998, a correction after approximately 17 years can no longer be said to preserve the state of affairs of appellate *procedure*.

For these additional reasons, I urge the Committee to retain the current maximum word count for appellate briefs.

Respectfully submitted,



James S. Azadian

Shareholder and Chair of Appellate, Writs,
and Constitutional Law Practice

cc: Molly Dwyer (Ninth Circuit Clerk)