NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

February 6, 2015

The Hon. Jeffrey Sutton, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judicial Building
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Appellate Procedure 29 and 32

Dear Judge Sutton,

I write in response to the Committee's proposed changes to Rules 29 and 32 of the Federal Rules of Appellate Procedure.

I am the Director of Litigation at the National Immigrant Justice Center (NIJC). We are active litigators in all of the geographic federal circuits on immigration matters. We frequently co-counsel with pro bono law firms, and attempt to provide consistently high-quality briefing to the Courts of Appeals. NIJC tends to become involved in cases which are particularly likely to establish significant precedent. NIJC cases have resulted in more than 80 published Court of Appeals opinions in the past ten years, and in multiple grants of certiorari.

NIJC files amicus curiae briefs with some frequency, both at the merits stage and in support of rehearing efforts. NIJC's amicus briefs have been cited and presumably found helpful by appellate bodies, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013); *Anaya-Aguilar v. Holder*, 697 F.3d 1189 (7th Cir. 2012); *Diouf v. Napolitano*, 634 F. 3d 1081, 1087 (9th Cir. 2011), and NIJC has on occasion participated as amicus in argument. *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc). NIJC amicus briefs in support of rehearing have resulted in modification of panel decisions, *see*, *e.g.*, *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011) (amending 641 F.3d 1103); *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012) (replacing 658 F.3d 1222); *Carrillo de Palacios v. Holder*, 708 F.3d 1066 (9th Cir. 2013) (replacing 662 F.3d 1128, 651 F.3d 969); *Zahren v. Holder*, 637 F.3d 698 (7th Cir. 2011) (supplementing 487 F.3d 1039); in one case, an amicus brief we filed helped convince a unanimous panel to grant rehearing to reverse itself. *Walji v. Gonzales*, 500 F.3d 432 (5th Cir. 2007) (vacating 489 F.3d 738).

Rule 32 Word Count:

I share the committee's sense that some appellate briefs are too long or of poor quality, and that most briefs should be less than 12,500 words in length. In preparing this comment, I reviewed approximately two dozen NIJC briefs filed in recent years, and all or nearly all were less than 12,500 words in length.

That said, some appeals have involved such a plethora of complex issues that we have approached the current word limit. For instance, in *Samirah v. Ashcroft*, 335 F.3d 545 (7th Cir 2003) and *Samirah v. Holder*, 627 F.3d 652 (7th Cir. 2010), our briefs needed to address (a) habeas authority, (b) authority under § 1331, mandamus, and the APA, (c) the potential jurisdictional bars at 8 U.S.C. § 1252(a)(2)(B); (d) novel questions of statutory interpretation; (e) novel questions of regulatory interpretation; (f) the political question doctrine; (g) the doctrine of consular nonreviewability; (h) the application of the law of the case doctrine and res judicata; (i) procedural due process, including the existence *vel non* of a liberty interest, (j) remedy issues including 8 U.S.C. § 1252(g), and (k) disputed procedural and factual issues relating to our client's prior legal status. Indeed, even then the case was decided on a basis which we briefed only in passing, which avoided many of the legal issues briefed by the parties. A lower word count limit would likely have caused us to seek the Court's leave to exceed those limits.

Likewise, in *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006), we were required to brief novel jurisdictional issues under 8 U.S.C. § 1252(a)(2)(C); novel statutory issues relating to eligibility for asylum and withholding of removal triggered by a particularly serious crime finding; factual and legal issues relating to the Convention Against Torture (CAT); and a complex habeas corpus issue applying *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) and *Demore v. Kim*, 538 U.S. 510, 523 (2003), to a situation of extended detention. Our client's victory in the Court of Appeals on the CAT issues vindicated our decision to argue those issues. Our client's release mooted the habeas arguments, which have subsequently prevailed in the Third and Ninth Circuits. The Supreme Court's grant of certiorari as to the other legal issues, 128 S.Ct. 29 (2007) (voluntarily dismissed at 128 S.Ct. 828 (2007)), shows the significance of the issues on which we did not prevail in the Court of Appeals. At the Court of Appeals, we were (barely) able to fit within a 14,000 word limit; but it would have done injustice to our client, and a disservice to the Court of Appeals, to cabin such a complex matter into a smaller space.

The majority of NIJC cases involve significant and novel matters, and well over 50% result in published opinions. Even so, most issues can be adequently briefed in 12,500 words or less. But as Judge Easterbrook noted, Court of Appeals cases have not had issues narrowed through the certiorari process, and cases may present numerous complex or novel issues; and a court may not be equipped in advance of full briefing

and oral argument to perceive all of those issues, much less to choose among the issues which it should address.

The comments submitted thus far to the Committee demonstrate that many judges feel that many briefs are too long and waste their time; but that many experienced appellate advocates feel that the proposed rule change would waste time in different ways.

I join my voice to that of other litigators who believe that the rule proposed by the committee would create substantial ancillary work for the courts and for attorneys (in NIJC's case, pro bono attorneys). It appears to me that Judge Easterbrook is likely correct in suspecting that a reduction in the size of briefs would likely – in those cases – trigger additional work for us as attorneys and for the Court by triggering additional requests for leave to file over-length briefs. It strikes me that the likely time-savings from a reduction in brief size in some small number of cases would likely be outweighed by the costs of adjudicating those additional motions for leave to file over-length briefs.

I note further that there may be costs to courts where such overlength motions are denied. For instance, a party denied leave to file an overlength brief may thereafter file a brief which does not adequately address some issues. Courts generally decline to address issues not adequately addressed in an opening brief; but such a court might feel unhappy doing so where the party tried to address the issue in the proposed overlength brief (attached as an exhibit to a motion for leave to file an over-length brief) but did not do so in the shorter brief. Yet the court could face a conundrum in such a situation. If a court has denied leave to file an overlength brief, the opposing party would naturally produce a brief responsive to the brief actually accepted for filing by the court. Should a court thereafter find that it would be prudent to address that inadequately briefed issue (perhaps to prudentially avoid other more complex issues) it would find that the opposing party did not have a fair opportunity to respond to the briefing; and would then find itself forced to choose between a suboptimal approach to resolving the appeal, and ordering supplemental briefing. Needless to say, the effect of a word count reduction in that scenario would be substantial inefficiency.

I would also submit that the number of overlenghth brief motions might become greater because of a perception that the word count reduction may affect judicial attitudes toward motions for leave to file overlength briefs. The current perception that courts strongly disapprove of overlength briefs is a strong check upon their filing. If motions to file overlength briefs appear more reasonable, then courts will view them less disapprovingly, and will grant them more often. This will likely have a cyclical effect; if such motions are granted with some regularity, that will reduce the perceived downside risk in filing such motions, and encourage more numerous motions; which will further increase the judicial workload.

I would suggest a middle ground option which might suffice to address the Committee's concerns while avoiding the downsides of the proposed rule. The Committee might adopt a rule which would discourage the filing of briefs exceeding 12,500 words, but do so not by changing the word count limitation, but by requiring an additional attestation by counsel filing briefs between 12,500 and 14,000 words. The attestation could require counsel to attest that the length of the brief is required by the legal or factual complexity of the issues in the case, and that after exercising reasonable diligence, the brief could not be made to fit within 12,500 words. Such an attestation could be included within the scope of the Rule 32(a)(7)(C) attestation already filed with briefs.

Such an approach would have the effect of discouraging the filing of briefs exceeding 12,500 words, without triggering any increase in motions for leave to file overlength briefs. This could accomplish a slight reduction in brief size without triggering the need to expend judicial time to police the new limits and to adjudicate resulting ancillary motions. (A similar approach could be applied to reply brief deadlines.)

Rule 29 Rehearing-Stage Amicus Changes:

NIJC welcomes additional rulemaking to clarify the standards for amicus briefs filed at the rehearing stage, but submits that the word count limitations are likely so limited as to be unhelpful to courts of appeals.

As noted above, NIJC is relatively active in supporting and seeking rehearing and rehearing en banc, filing approximately a dozen such motions annually. Many circuits lack a local rule or precedential decision governing this situation, which triggers substantial uncertainty amongst clerks offices and counsel.

NIJC views the proposed timing of amicus briefs as sensible. The current Seventh Circuit rule, *see Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers) – which requires same-day filing of amicus briefs – strikes us as artificial and on verging on inviting impropriety. I acknowledge that it might be efficient for courts considering rehearing petitions to receive all supportive filings at the same time, but that efficiency is outweighed by other considerations. The *Fry* rule effectively (as it acknowledges) requires a putative amicus to work directly with the party to obtain extensions, if required, and even to coordinate on brief content. An *amicus curiae* is not supposed to repeat arguments made by a party; but the only way to know if a party which has not yet filed a brief will make a given argument is to ask that party what they intend to argue. Certainly, it is common that parties share briefs with *amicus curiae*, and vice versa; but it is not always appropriate. Forcing putative amici to coordinate with a party is at best unwise. NIJC suspects that amicus briefs can

be very helpful to a court when a party misperceives the issues in the case, or chooses to frame them in a way which might be helpful to the party but may also obscure possible (often preferable) resolutions of those issues. Yet under the *Fry* rule, an amicus is beholden to the party in various respects, which tends to facilitate amicus briefs which do not directly address party arguments. A same-day filing rule hinders an amicus from undertaking the sometimes delicate, nuanced analysis which would often be most helpful to a court. We commend the Committee for proposing a different rule.

NIJC finds it easy to function under the current, generous Ninth Circuit rule, but the Ninth Circuit presumably employs that rule because (given the massive size of its docket) its judges do not consider a rehearing matter before its amicus brief deadline. Likewise, we appreciate the Tenth Circuit local rule (permitting 7 days to file), but given that Court's relatively light docket, a potential amicus may worry that Tenth Circuit judges will form judgments about a rehearing petition sooner than the 7 day mark. As amici supporting rehearing, we often feel an impetus to file quickly, but without any firm deadlines. Courts which review rehearing petitions expeditiously presumably find it inefficient to wait for several weeks to adjudicate rehearing petitions; and cannot know whether an amicus brief is even being considered. It seems evident that a court will find an amicus brief less helpful if the court has already considered, and formed judgments about, a rehearing petition. The proposed three-day rule seems to us to strike the right balance.

However, NIJC is concerned about the proposed 2000 word limit on amicus briefs. When the Tenth Circuit adopted Local Rule 29.1, it initially proposed a 7.5 page limit to briefs, similar to the limit proposed by the Committee. NIJC submitted comments to the Tenth Circuit, urging that Court to set a higher word limit; and the Tenth Circuit subsequently adopted a 3000 word limit, approximately 11 pages. (By email communication, the clerk of that court indicated to me that the Court had altered its rule in response to our comments.)

I would submit to the Committee, as I urged the Tenth Circuit some years ago, that by definition, the party seeking rehearing has already failed to persuade the Court of the merits of its claim. This might be because the claim is weak, but it might also be because the claim was poorly presented. I practice immigration law. Regrettably, the immigration bar has become known for the proliferation of poor or substandard representation (this might be due to the relative lack of resources on the part of immigrants facing removal). Thus, courts are commonly making judgments about immigration matters on the basis of briefing which fails to contain significant points in support of arguments. Courts naturally attempt to make the best decision possible on the record before them (and generally decline to address issues not raised in the briefs). Because precedential decisions can only be overturned by the en banc court - a process

which requires significant resources and is not appropriate except for relatively major issues - it would be advantageous for panels addressing rehearing petitions to have relatively fuller briefing before them, so that any modifications may be made using fewer appellate resources. The alternative, particularly where one court would end up issuing a decision which would disagree with other Courts of Appeals (a circumstance which would invite repeated en banc requests), would often require greater resources to remedy.

I urge the Committee that 2000 words is rarely enough space to make arguments which would be helpful to a court considering rehearing. NIJC engages in amicus briefing under the principle that courts do not value an amicus brief as a "vote" for an outcome, or as evidence of the importance of an issue; presumably the fact of publication evidences the importance of a court decision. We do hope that we may earn the trust and respect of federal courts through consistently strong representation. But we assume that courts value our amicus briefs for their legal content. A rehearing stage amicus brief which is only 2000 words in length will rarely have time to do more than gesture at issues raised in a court decision, issues which the Court has presumably already considered at some length. Adoption of the Tenth Circuit's word limit would be more likely to permit helpful amicus filings at the rehearing stage, precisely because that limit would allow an amicus to explain context, where helpful; develop arguments; and explore implications of the court's earlier opinion.

The proposed word limits might be sufficient for amicus efforts which focus on the importance of an issue for en banc review; but this is surely not the only (or even the principle) benefit of amicus briefing at the rehearing stage. A grant of full en banc rehearing is always rare, even in the Ninth Circuit; decision modification is much less so. One major utility of amicus briefs on rehearing may be to convince a panel to alter or modify its decision. The proposed rule seems to ignore this significant utility of the rehearing amicus.

For instance, the initial panel decision in *Carrillo de Palacios v. Holder*, 651 F.3d 969 (9th Cir. 2011), denied a petition for review on two alternate grounds. One of those grounds was not only a novel holding without any precedent in any court, but ran contrary to (uncited) subregulatory agency authority. The government subsequently chose not to defend that part of the panel opinion. The Court of Appeals eventually denied en banc rehearing, but issued a new decision affirming that outcome based only on the other, less controversial, ground. *Carrillo de Palacios v. Holder*, 708 F.3d 1066 (9th Cir. 2013).

Similarly, a panel may write a decision which unintentionally sweeps more broadly than intended by the Panel. In *Anaya-Aguilar v. Holder*, 683 F. 3d 369 (7th Cir. 2012), the Seventh Circuit adopted a rule precluding jurisdiction over certain decisions of the Board of Immigration Appeals, but employed language which appeared to bar not only

claimed abuse of discretion, but legal and constitutional claims. On rehearing, the Court of Appeals issued a brief order clarifying the scope of its earlier decision, ensuring that its decision was consistent with precedent and avoiding the need for plenary en banc review. *Anaya-Aguilar v. Holder*, 697 F.3d 1189 (7th Cir. 2012). The petitioner in that case had little incentive to ask the court to modify or clarify its precedent; to the contrary, the court's clarification likely reduced the chances of a grant of certiorari. An amicus like NIJC, which frequently practices in that circuit, had the means and incentive to raise the issue.

In the rehearing context, there is often alignment between the interests of an amicus and the interests of judicial efficiency. Both benefit from clear and correct rules, while a party may benefit from the case law remaining in confusion, or from it appearing erroneous enough to attract the attention of the Supreme Court.

We submit that these cases illustrate one of the primary utilities of the rehearing process: i.e., to permit a panel to clarify or correct its decision – including to reserve issues (the complexity of which may not have been initially evident) for future resolution – without requiring the resources of the full en banc court. I listed a number of other similar outcomes in my introduction to these comments.

In sum, in my experience, amicus briefs at the rehearing stage are often the most helpful to a court when prior representation has been the most unhelpful. Limiting rehearing stage amicus briefs to 2000 words (approximately 8 pages, much of which is consumed by required sections such as the statement of the amicus) would constitute a regrettable limitation on the ability of groups like NIJC to provide courts with that assistance. It would be an unfortunate and unnecessary limitation, which would impede the utility of an otherwise useful and efficient amendment to the rules.

I thank the Committee for the opportunity to submit these comments.

Respectfully Submitted,

s/ Charles Roth
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