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March 18, 2013

13-AP-B

Hon. Steven M. Colloton
Chair, Advisory Committee
on Appellate Rules
United States Circuit Judge
110 East Court Avenue, Suite 461
Des Moines, Iowa 50309

Dear Judge Colloton:

I write to urge the Advisory Committee to consider amending the Federal Rules of Appellate Procedure to address the permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc, in Circuits that permit such filings. My suggestion is to leave the question whether to accept such amicus briefs up to each Circuit, but to resolve questions of timing and length explicitly in FRAP. Please allow me briefly to explain the confusion that exists under the current Rules and why I believe removing that uncertainty would be beneficial to the Courts of Appeals and to litigants.

The problem is well illustrated by *Fry* v. *Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723 (7th Cir. 2009), which was decided shortly after the Appellate Rules Committee's previous consideration of these issues. Appellate Rule 29(d) states, in relevant part, that "[e]xcept by the court's permission, an amicus brief may be no more than one-half of the maximum length authorized by these rules for a party's principal brief." Rule 29(e) states, in relevant part, that "[a]n amicus curiae must file its brief . . . no later than 7 days after the principal brief of the party being supported is filed." In *Fry*, Judge Easterbrook (writing for a unanimous panel) relied on the use of the phrase "principal brief" in subparagraphs (d) and (e) to conclude that the rule does not encompass amicus filings in support of a rehearing "petition." 576 F.3d at 725. Therefore, there is no requirement that an amicus brief be limited to one-half the permissible length of a rehearing petition, but also no 7-day grace period, after the filing of a rehearing petition, within which to file a supporting amicus brief.

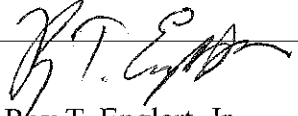
Despite the analysis of *Fry* – analysis that I personally find unassailable – it is not unusual to find that a Clerk's Office or a Local Rule either limits the length of rehearing-stage

amicus briefs to 7-1/2 pages, or authorizes their filing 7 days after the rehearing petition, in apparent reliance on the very same reading of the phrase "principal brief" in Rule 29 that the *Fry* Court rejected. To be certain that an amicus brief will be accepted by both the Clerk's Office and the Court itself, one must limit it to 7-1/2 pages (lest someone construe "principal brief" to include rehearing petitions, making Rule 29(d) applicable) *and* file simultaneously with the rehearing petition (lest someone construe "principal brief" to exclude rehearing petitions, making Rule 29(e) inapplicable). In practice, most amici follow whatever advice they get from the Clerk's Office, running the risk that one or more judges will later disagree, and in practice most judges refrain from second-guessing Clerk's Offices on these questions, so in pragmatic terms the system works reasonably well. Yet it works reasonable well *only* at the expense of accepting uncertainty in reading the Appellate Rules and, if the Seventh Circuit and I are right, at the expense of persistently misreading the Appellate Rules.

When this subject was considered at multiple Advisory Committee meetings several years ago, before *Fry* was decided, it was suggested that the absence of a specific provision regarding amicus briefs in support of rehearing appropriately leaves each Circuit the flexibility to discourage or prohibit such filings. The premise for that assertion, as I understand it, was that amicus briefs in support of rehearing in the Courts of Appeals are analogous to amicus briefs in support of rehearing in the Supreme Court and are therefore of little value. In my view, that analogy is inapt. Rehearing in the Supreme Court occurs once every decade or so – and thus there is little reason to encourage the filing of such petitions, much less amicus briefs in support of them – but rehearing in the Courts of Appeals is relatively common. Every Circuit rehears one or more cases each year, and courts devote significant attention to determining which cases to rehear. Amicus briefs serve an important signaling function about which cases are truly important, just as they do at the certiorari stage in the U.S. Supreme Court. Nevertheless, in deference to individual Circuits' apparently strong desires to chart their own paths with respect to the desirability of amicus briefs, I do not propose a rule that would constrain a court's ultimate decision whether to accept a particular filing. But a provision clearly establishing <u>when</u> such briefs are due (if permitted at all) and <u>how long</u> they ought to be would remove uncertainty; would unify practice across the Circuits; and would prevent determination of important practical questions through Circuit-by-Circuit interpretation of a Rule that is now, at best, ambiguous and, at worst, being systematically misapplied to govern a situation in which it has no applicability.

Thank you for considering this request. Please do not hesitate to let me know if there is any additional information or assistance I might provide.

Respectfully,



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