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It's a Trap! A (Likely Unconstitutional) Solution in Search of a Problem: A Partisan Push for Unneeded Amicus Disclosure Rules

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KEY TAKEAWAYS

Amicus briefs are used by progressives, conservatives, industries, activists, and others who want to have a voice in our judicial system.

The notion that judges should refuse to consider an argument because it might advance certain disfavored interests is incompatible with judicial integrity.

Judges should recognize that attempts to convince them otherwise are nothing more than a trap.

Introduction

As Admiral Akbar sailed the Rebel Fleet into what was supposed to be a surprise attack on the Death Star, he realized just in time that he had been tricked and lured into an unfavorable fighting position. In shock, he famously exclaimed: "It's a trap!"[1]

So too today are demands for more strident disclosure requirements for those who file amicus curiae briefs in the federal court system. Since Roman times, the amicus curiae—Latin for "friend of the court"—has played a variety of roles in Western legal systems. In the United States, the amicus brief has become a means for groups interested in a case's outcome to provide additional perspectives, information, or arguments. Amicus briefs are widely used by progressives, conservatives, industries, activists, and others who want to have a voice in our judicial system.

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Lately, however, the amicus curiae has come under attack. Decrying recent judicial decisions with which they disagree, Senator Sheldon Whitehouse (D–RI), Representative Hank Johnson (D–GA), and others have insinuated without proof that these decisions were influenced by amicus curiae who, entangled in clandestine networks of dark money, are engaged in sinister efforts to manipulate the federal judiciary. The solution, they argue, is onerous disclosure and reporting requirements that expose every detail of an amicus's associations.

These proposals do not spring from a pure-hearted concern for good government and the judiciary's integrity. Instead, they are part of a broader partisan effort to undermine public confidence in the courts and harm perceived political enemies. Because of the obvious partisan politics at play, Whitehouse's and Johnson's ideas have gained little traction in the halls of Congress. So they have turned elsewhere. They have now asked the Judicial Conference of the United States—the governing body of the federal judiciary—to do their dirty work for them and enact via rule changes what they could not get Congress to enact.

Sadly, the Judicial Conference has fallen into their trap. Acquiescing to Whitehouse's and Johnson's demands, it has spent over three years studying and recommending changes in the current amicus disclosure regime in the lower federal courts. Now it has proposed rules that open the door for intense scrutiny of every dollar going to an amicus and every person or group with which an amicus associates—scrutiny that likely will have a chilling effect on the willingness of amici to file briefs. But unlike the Rebel Fleet, the Judicial Conference is chasing only the illusion of a Death Star. Not only do Whitehouse's and Johnson's proposed disclosures—and the proposed Judicial Conference rules changes inspired by them—suffer from constitutional and practical concerns, but they are also fundamentally a solution in search of a problem.

At the end of the day, Whitehouse and Johnson have placed themselves in a win-win position politically while placing the Judicial Conference in a lose-lose situation. If the proposed disclosure rule changes are adopted, Whitehouse and Johnson can declare political victory. If not, Whitehouse and Johnson can yet again rail against what they portray as a corrupt cabal of federal judges. Similarly, if the proposed rule changes are adopted, the Judicial Conference will have signed off on a constitutionally problematic solution to a nonexistent problem and needlessly injected the federal judiciary into partisan politics.

None of that needs to happen. The Judicial Conference can minimize the damage by stopping the train now and refusing to adopt the proposed rule

changes. To that end, this *Legal Memorandum* proceeds in four parts. The first reviews the role and evolution of the amicus curiae in our legal system and outlines the background of the current system against which Whitehouse and Johnson rage. The second discusses the current controversy around amicus disclosure rules both at the U.S. Supreme Court and within the lower federal courts and explains Whitehouse's and Johnson's failed efforts in Congress to change the current disclosure regime legislatively. The third outlines the Judicial Conference Rules Committee's specific proposal, and the fourth assesses the constitutional and practical concerns raised by those proposals.

The Role of the Amicus Curiae

History of the Amicus Curiae. Dating back to Roman times,[2] the amicus curiae has played a variety of roles throughout its history. Initially, the amicus curiae was seen as a disinterested bystander seeking to assist the court with information on relevant law or facts. In the United States, the amicus curiae emerged originally as an advocate for unrepresented interests, especially the interests of third parties. Today, at least at the U.S. Supreme Court, a new phenomenon has emerged: skilled advocates facilitating amicus participation to signal noteworthy petitions for certiorari and provide a curated and coherent body of perspectives to aid the Court in deciding a case.

Originally, the amicus curiae—Latin for "friend of the court"[3]—was viewed as a disinterested third party who sought to aid a court by proffering helpful information on law or facts relevant to a case.[4] One vintage dictionary explained that "[w]hen a judge is doubtful or mistaken in matter of law, a bystander may inform the court thereof as amicus curiae,"[5] which could be done, for example, by pointing to a case the court had not considered or of which it was unaware. Another explained that the "friend of the court" is "a bystander, who without having an interest in the cause," provides helpful information "on a point of law or of fact."[6] In an early example involving a case where the meaning of a particular statute was disputed, a member of Parliament who had been present when the statute was passed sought to inform the court of Parliament's intent.[7] In 1606, two amici earned a sharp rebuke for failing to "perform[] the office of a good friend or of a good informer" by omitting a clause from an Act of Parliament.[8]

Despite its professed disinterestedness, the role of amicus curiae also provided an avenue for third parties with an interest at stake in a case to participate in the case.[9] Common law systems in particular disfavored

third-party involvement in trials.[10] But in another early case, the amicus curiae represented the interest of a third party whose marital status would have been challenged by the suit, leading to exposure of the suit as collusive.[11] The role of the amicus curiae as a friend of the court and as representative of a third party thus overlapped.[12] In light of such examples, at least one scholar has argued that the amicus curiae role may have been a solution to the problem of representation of third parties in adversarial disputes.[13]

In the U.S. Supreme Court, the amicus curiae role developed early on as a device for advancing third-party interests.[14] In *Green v. Biddle,* a dispute over land holdings in Kentucky to which Kentucky was not a party, Kentucky instructed Henry Clay to appear as an amicus curiae and seek rehearing after the Supreme Court's decision in the case.[15] The Court first allowed the motion, granted it, and then later allowed Clay to argue the case.[16] Three decades later, the Court allowed the U.S. Attorney General to participate as an amicus curiae in *Florida v. Georgia* to speak on the public interests involved.[17] And in 1864, California's Attorney General filed a brief in a suit where the constitutionality of a California statute was at issue.[18] For a time, the Court also allowed third parties with cases pending elsewhere—or who were involved below but had not joined the appeal—to participate as amicus curiae or intervenors "depending on the situation and requests of the litigants or agreements of the counsel."[19]

A shift in the role of amicus curiae began to emerge in the early 1900s. Throughout the late 1800s and for the first decades of the 1900s, the authoring attorneys were seen and identified as the amicus curiae.[20] By the 1930s, however, this was replaced with identification of the sponsor of the brief as the amicus curiae.[21] Not only that, but amicus briefs became a tool to drive social and policy objectives. Under the leadership of Attorney General Charles Bonaparte, the Department of Justice increasingly sought to advance social change and public policies through amicus briefs. Increasingly, regulated industries, racial minorities, and organizations like the National Association for the Advancement of Colored People (NAACP) and American Civil Liberties Union (ACLU) also began to rely on the amicus brief to advance their interests as well as broader public interest goals.[22]

As the number of amicus briefs rose, the Supreme Court began to implement formal rules. In 1937, the Court formalized what was then common practice by requiring amici to obtain consent from the parties to file a brief or, if consent was denied, leave of the Court.[23] In 1949, the Court further expounded on these procedures, explaining that motions for leave to file were "not favored."[24] Subsequently, leave was granted less often, and the Solicitor General began to routinely deny consent.[25] Amicus participation

subsequently declined.[26] In 1957, faced with criticism from the Court for such rote denials, the Department of Justice clarified that it disfavored amicus briefs with academic or propaganda interest but would grant consent where the proposed amicus "has a concrete, substantial interest in the decision of the case" and sought to present "relevant arguments or materials which would not otherwise be submitted."[27] The number of briefs continued to rise, however, resulting in an 800 percent increase from the 1950s by the turn of the century and a 95 percent increase between 1995 and 2014.[28] In the early 1900s, amicus briefs "were filed in only about 10% of the Court's cases"; by the end of the century, they were filed in nearly 85 percent of argued cases.[29] In 2023, the Court eliminated the requirement for consent from the parties.[30]

With the rise of the "Supreme Court Bar," a new amicus curiae phenomenon has developed: the curation of amicus briefs to signal noteworthy petitions for certiorari or collectively provide additional information or perspectives not in a party's briefing.[31] As one article has explained:

> Today, elite, top-notch lawyers help shape the Court's docket by asking other elite lawyers to file amicus briefs requesting that the Court hear their case. When the Court grants certiorari (or "cert"), these very lawyers strategize about which voices the Court should hear and they pair these groups with other Supreme Court specialists to improve their chances with the Court.[32]

This curation of amici may take the form of an "amicus wrangler"—an amici recruiter.[33] But it may also take the form of an "amicus whisperer"—coordination of what briefs are filed, who joins those briefs, and what arguments the briefs raise.[34] In *Hamdan v. Rumsfeld*, for instance, Neal Katyal (who argued the case for the petitioner) not only worked relentlessly to discourage briefs he thought would "blunt the impact" of stronger briefs, but also arranged for David Remes (then with Covington & Burling) to oversee the amici's writing process so that the amici would stay on message.[35] This use of an "outside 'amicus whisperer'" not only aids advocates in tracking amici, scholars have since observed, but also ensures that "the person coordinating the amici message…has a lot more editing leeway without running afoul" of Supreme Court Rule 27.6 regarding party authorship or funding of amicus briefs.[36]

Amicus Curiae Influence in Theory and Practice. Scholars have proffered three theories about the impact of amicus briefs in courts. The first, the informational theory, views judges as "seeking to resolve cases in accordance with the requirements of the law" and thus views amicus briefs

as helpful when they contain new legal arguments or factual information.[37] The second, the attitudinal model, assumes that judges have "fixed ideological preferences" and rely on legal norms "only to rationalize outcomes after the fact."[38] In this model, amicus briefs that merely offer additional information are of little help to the judge.[39] Under the third model, the public interest or affected groups theory, amicus briefs are more akin to lobbyists or a public opinion barometer.[40] Both the fact that the brief was filed and the identities of the amici are important data points apart from the contents of the brief.[41] Amicus briefs under this third model are helpful to a judge insofar as they signal how interested groups want the case decided.[42] As explained below, however, this third theory is not valid—yet it appears to be the one adopted by the Judicial Conference.

Available data reveal that the role of amicus briefs is in reality complex. Across the federal judiciary, government amici are generally viewed as particularly helpful.[43] Similarly, "special interest groups are generally well regarded as amici curiae," but some scholars surmise that the value the Supreme Court places on the brief varies with a group's reputation for quality arguments and "the extent of their interest in the issue."[44] A majority of judges in one survey found a litigant's and amicus curiae's financial relationship "relevant to consideration of a proposed brief."[45] A majority of judges in the same survey viewed briefs offering new legal arguments or insights into the material impacts of a particular outcome on the amicus curiae's interest as "moderately or very helpful."[46]

The Supreme Court appears to view new relevant information absent from parties' briefing or the record as more helpful than lower courts do.[47] Slight majorities of judges affirmed that "the identity, prestige, or experience of the amicus" are "moderately or significantly influential."[48] But a survey of former Supreme Court clerks indicates that, at least at the high court, an amicus's identity or its counsel can serve as a heuristic for a presumption of the brief's quality.[49] The number of amicus briefs filed, however, appears to have little impact on a case's outcome except in narrow circumstances.[50]

The data are unclear as to exactly why some judges find relevant the parties' financial relationship to an amicus and the amicus's or its counsel's identity. If they are in fact playing identity politics and discounting a brief based solely on the identities of individuals or organizations with which the amicus is associated—as the Judicial Conference's rationale for its proposed rules suggests judges should do—those judges are likely violating judicial ethics and disregarding basic principles of justice. If they are considering those things to see whether the parties and an amicus are complying with

existing procedural rules, they are acting safely in their judicial role—but this means that the proposed rule changes are not needed. If what occurs at the Supreme Court is representative of anything, however, it suggests that the identity of an amicus or its counsel is a heuristic for the quality of arguments the judge or a clerk can expect in a brief. As former Justice Ruth Bader Ginsburg remarked, in her view, an attorney's experience "would be a likely barometer of the quality of arguments" in the brief.[51]

Thus, these and other data suggest that the informational theory more accurately, even if not fully, explains the impact of amicus briefs in the courts. As Professors Joseph Kearney and Thomas Merrill explain in the context of their 50-year survey of cases argued at the Supreme Court:

> Contrary to what the attitudinal model would predict, amicus briefs do appear to affect success rates in a variety of contexts. And contrary to what the interest group model would predict, we find no evidence to support the proposition that large disparities of amicus support for one side relative to the other side result in a greater likelihood of success for the supported party. In fact, it appears that amicus briefs filed by institutional litigants and by experienced lawyers—filers that have a better idea of what kind of information is useful to the Court—are generally more successful than are briefs filed by irregular litigants and less experienced lawyers. This is consistent with the legal model's prediction that amicus briefs have an influence to the extent they import valuable new information.[52]

In sum, although the identity of an amicus or its counsel may serve as a heuristic of the brief's quality, the value of the brief is—and should be—determined by the brief's quality and contents.

Current Controversy and Efforts by Whitehouse and Johnson

In recent years, some have questioned the usefulness and appropriateness of amicus briefs. Senator Whitehouse in particular has been a vocal critic of current practices—decrying the "flotillas of amicus briefs" that in his view amount to nothing more than inappropriate judicial lobbying.[53] He has asserted that "[a]nonymously funded, coordinated amicus efforts are just one component of a larger strategy to capture the federal judiciary for the benefit of a self-interested donor class and for Republican Party electoral interests."[54] He has advanced this partisan view despite the fact that one of the principal media reports he cited to support this proposition

admits that in the seven cases it reviewed, "the conservative parties had [only] a slight advantage, accounting for 50 percent of the amici curiae," while "46 percent [of amici filed in] support of the liberal parties and about 4 percent filed in support of neither party."[55] Nonetheless, Whitehouse has pursued changes in amicus disclosure rules as part of his larger institutional assault on the U.S. Supreme Court.[56] Representative Hank Johnson has joined him as a prominent proponent of those efforts.[57]

AMICUS Act. One notable effort has been Whitehouse's and Johnson's endeavor to impose onerous disclosure requirements on those who wish to file amicus briefs. In 2019, Whitehouse first introduced his Assessing Monetary Influence in the Courts of the United States (AMICUS) Act,[58] which he described as seeking "to address the problem of undisclosed judicial-branch lobbying by dark-money interests."[59] Johnson introduced an identical companion bill in the House.[60] Under the terms of his proposed act, "any person, including any affiliate of the person, that files not fewer than 3 total amicus briefs in any calendar year in the Supreme Court of the United States and the courts of appeals of the United States" would have to register with the Administrative Office of the United States Courts.[61] Registration would have to occur within 45 days of triggering the registration requirement (the filing of three amicus briefs), and the party would also have to register on January 1 "of the calendar year after the calendar year in which the amicus" submitted at least three briefs.[62]

The details that would have to be provided as part of this registration are extensive and intrusive. As part of the registration, the amicus filer would have to disclose its name, a general description of its business or activities, and the names of anyone who contributed to the preparation or submission of an amicus brief, the names of anyone who contributed at least 3 percent of the gross annual revenue for the previous calendar year (if the amicus is not an individual), and the names of anyone who contributed more than $100,000 to the amicus in the previous year. Additionally, the registrant would be required to include a statement of the general issue areas in which the amicus expects to engage and "to the extent practicable, specific issues that have, as of the date of the registration, already been addressed or are likely to be addressed in the amicus activities of the registrant."[63] The act would also require the Administrative Office of the U.S. Courts to make this information publicly available indefinitely on its website.[64] Anyone who knowingly failed to comply with these onerous registration and disclosure requirements would be subject to a civil fine of up to $200,000.

The Judicial Conference and Its Rulemaking Process. Whitehouse and Johnson are politicians. They know that their radical proposals have

little chance of passing either the Senate or the House as those bodies are currently composed. So they changed tack and decided to bully the judiciary into doing their dirty work for them. Essentially, they want the Judicial Conference of the United States (the judicial body responsible for making policy recommendations to the federal judiciary—including proposed rule changes) to adopt many, if not most or all, of their radical proposals.

By way of background, Congress created the Judicial Conference's predecessor organization in 1922 at the behest of then-Chief Justice William Howard Taft. Taft came to the position of Chief Justice after holding numerous executive positions—including the position of Chief Executive (President) of the United States—and sought to professionalize and optimize the administrative apparatus behind the federal courts. At his urging, Congress established the Conference of Senior Circuit Judges. "With the chief justice presiding, the senior judge (now known as chief judge) of each circuit court of appeals gathered to report on the judicial business of the federal courts and to advise Congress on possible improvements in judicial administration."[65] Eventually, with some changes in composition, this body expanded its responsibilities and became known as the Judicial Conference of the United States.[66] Included among its many responsibilities is a mandate to consider changes to the procedural rules governing litigation in federal courts. It does this by dividing and subdividing its work among various committees and subcommittees related to specific issue areas. Relevant to this issue, Whitehouse and Johnson have pressured the Committee on Rules of Practice and Procedure and its Advisory Committee on Appellate Rules to adopt their proposals.

This is a win-win maneuver for Whitehouse and Johnson. If the Judicial Conference adopts their policies, they keep their hands clean while chilling many of their perceived opponents who might want to weigh in on important cases. If it does not, Whitehouse and Johnson can continue to rail against the alleged capture and corruption of the federal judiciary, of which the Judicial Conference is a part.[67]

Rules Committee Response and Proposals

Amicus participation in federal courts of appeals is governed by Rule 29 of the Federal Rules of Appellate Procedure.[68] If the court is considering a case on the merits, an amicus seeking to file a brief in that case must disclose (1) its identity, (2) its interest in the case, (3) why its brief "is desirable" and "relevant," (4) certain corporate affiliations if the amicus is a corporation, (5) whether a party in the case or a party's counsel authored or directly funded

the brief, and (6) the identity of any person who directly funded a brief.[69] Rule 29 does not require disclosure if the person who funded the brief is the amicus, a member of the amicus, or the amicus's counsel.[70]

In October 2019, at a meeting of the Judicial Conference's Advisory Committee on the Appellate Rules, Judge Michael Chagares of the U.S. Court of Appeals for the Third Circuit initiated a discussion on Senator Whitehouse's AMICUS Act.[71] The ensuing discussion quickly noted that while current rules focus on direct funding of briefs, the proposed legislation would require certain amici to disclose their own sources of funding.[72] Questioning which organizations this could affect and noting that the bill could move through Congress quickly, the Committee members agreed to appoint a subcommittee "to deal with amicus disclosures."[73] In April 2020, the subcommittee reported that because the bill was not moving, no action appeared necessary other than additional research into who would be affected by its provisions.[74]

In September 2020, Scott Harris, Clerk of the U.S. Supreme Court, wrote to the Judicial Conference's Committee on Rules of Practice and Procedure about Rule 29.[75] Harris noted that the Court received a letter from Senator Whitehouse and Representative Johnson regarding disclosure requirements for amicus curiae briefs at the Court.[76] Harris then suggested that "in light of the similarity" between Supreme Court Rule 37.6 and Appellate Rule 29(a)(4)(e), both of which govern disclosure of the identity of whoever contributed money to fund a brief, the Committee "may wish to consider whether an amendment to Rule 29 is in order."[77] Harris further emphasized that "[t]he Committee's consideration would provide helpful guidance on whether an amendment to Supreme Court Rule 37.6 would be appropriate."[78] He did not say whether the Chief Justice—or any Justice for that matter—was involved or even interested in the question, though the Chief Justice does serve as head of the Judicial Conference.

In February 2021, after learning from Harris that he referred their letter to the Committee, Senator Whitehouse and Representative Johnson directly asked the Committee "to address the problem of inadequate funding disclosure requirements" for amicus briefs.[79] In their view, parties, amicus groups, and their funders had "exploited" the current rules "to exert anonymous influence" on the courts, "compromising judicial independence and the public perception thereof."[80] The letter cited four primary examples of such perceived exploitation: (1) donations by Google and Oracle to groups that participated as amici in *Google LLC v. Oracle American Inc.*;[81] (2) a foundation that funded both 11 organizations that filed amicus briefs and a law firm representing a party in *Friedrichs v. California Teachers*

Association;[82] (3) a funder who financially supported the Federalist Society as well as 13 amici in *Seila Law LLC v. CFPB*,[83] and (4) the U.S. Chamber of Commerce, which does not disclose either its members or "who is influencing the positions the Chamber takes in litigation."[84] The letter, as well as an attached article by Senator Whitehouse, argued that "wealthy and sophisticated players have exploited" the Supreme Court's rules to create "a massive, anonymous judicial lobbying program."[85] The letter did not assess whether the appellate rules governing conduct in the courts of appeals were similarly exploited,[86] but it did threaten that "a legislative solution may be in order to ensure much-needed transparency around judicial lobbying."[87]

Shortly thereafter, citing Harris's letter while denying that it acted under pressure, the Advisory Committee began to consider potential additional disclosure requirements.[88] The Committee pushed back on the idea that amicus briefs are like lobbying, noting that they are public and lobbying is done in private.[89] It also emphasized that neither public registration nor fines fall within the scope of the rulemaking process.[90] The Committee noted concerns, however, that parties could use amicus briefs that falsely appeared to be independent as a way to evade page limits—even though the current rule already addresses this problem.[91] Worrying about "the influence of 'dark money' on the amicus process," the Committee also noted other concerns that someone "with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus."[92]

On the other hand, the Committee also admitted that the First Amendment does allow anonymous speech.[93] Considering the then-recent decision in *Americans for Prosperity v. Bonta*, the Committee argued that the California law at issue there was different from amicus disclosures in four ways.[94]

- California's law and Rule 29 target different activities, and "[t]here can be little doubt" that more can be required of amicus filers than is required of charitable organizations generally.[95]

- Rule 29 and its Supreme Court counterpart already required disclosure of the identities of those who make direct contributions to fund a brief, and "[p]resumptively, the Court viewed those requirements as constitutional when it imposed them."[96]

- Rule 29 disclosures are already public, while California's mandated disclosures were meant to be confidential.[97]

- Rule 29's current 10 percent ownership and contribution disclosure threshold is higher than California's 2 percent or $5,000 disclosure threshold.[98]

Although the Subcommittee and the Advisory Committee initially considered requiring additional disclosures of who funds an amicus, members settled for additional disclosures solely regarding an amicus's identity, interests, and financial relationship to a party.[99] The Amicus Disclosure Subcommittee explained that "little if any support" existed for requiring disclosure of funding from nonparties not earmarked for a particular amicus brief.[100] One member also suggested holding the idea for "coordinat[ion] with disclosure of third-party litigation funding."[101] Regarding additional disclosures, the Subcommittee noted that requiring additional information on an amicus's identity and interests would aid the court and public in better evaluating how helpful a brief could be.[102] Similarly, it argued, certain levels of financial support by a party, such as majority ownership or control, would indicate that an amicus is not a "broad-based amicus."[103] Moreover, by requiring disclosure of members of an amicus who joined the amicus within the past year and then donated funds directly for an amicus brief, the draft rule would close an opportunity for parties to evade disclosure.[104]

Members repeatedly recognized, however, that no clear problem existed at the appellate level. Judge John Bates of the U.S. District Court for the District of Columbia and Ms. Danielle Spinelli both underscored that they had been "asked by the Supreme Court" to address the issue.[105] Ms. Spinelli argued that the Committee consequently "should be reluctant" to say that no problem existed and do nothing.[106] When pressed for examples, she emphasized "legitimate concerns about evasion and transparency" as well as "anecdotal evidence in the Supreme Court."[107] One member asked, without receiving a direct answer, whether judges were in fact misled "in a significant number of cases" about the identity of amici.[108] Another remarked that "[t]here may not be an actual problem without party behavior," even though broad agreement existed "that we should know if it does happen; there may be more of an issue with nonparty behavior, but less agreement about what to do about it."[109] Other members remarked that in their view, no problem exists.[110]

Nonetheless, the Advisory Committee forged ahead. In May 2024, the Committee distributed its final draft of the proposed amendments, which it published for public comment in August 2024. Among other changes, such as the word limit for amicus briefs, the amendments would impose four new requirements.[111]

- Amici other than the United States, an officer or agency of the United States, or a state must seek permission from the appeals court to file a brief.
- An amicus would need to disclose additional information about itself, such as its history and experience.
- An amicus would need to disclose whether a party or a party's counsel (1) has a majority interest in or majority control of the amicus or (2) contributed 25 percent or more of the amicus's revenue in the 12 months before the brief was filed.
- The amicus would need to reveal whether a person contributed $100 or more to fund the brief in the 12 months before the brief was filed unless the person was a member of the amicus for more than 12 months or if the amicus existed for less than 12 months (which, if so, the amicus must also disclose).

The Advisory Committee also laid out its final reasoning for the proposed amendments. Most of that reasoning focused on justifying the proposed disclosure requirements. Tellingly, however, the Committee hinged its arguments on the rather novel claim that the proposed disclosure requirements are just like campaign finance laws.[112] The disclosures, it explained, would help judges to "evaluate the submissions of those who seek to persuade them, in a way that is analogous to campaign finance disclosures that help voters evaluate those who seek to persuade them."[113] Carrying this theme forward, the Committee argued that disclosures would reveal whether an amicus "may be sufficiently susceptible to" a party's influence and that "[k]nowing who made a contribution that was earmarked for a brief provides information to evaluate that brief in a way analogous to the way that knowing who made a contribution to a candidate helps evaluate that candidate."[114] It further added that "views expressed in the amicus brief might be disproportionately shaped by the interests of that contributor" to the point that the brief functions "simply as a paid mouthpiece." Moreover, the Committee explained, the proposed amendments treat a new member of an amicus as a nonmember because someone could otherwise simply join an amicus as a way to underwrite a brief anonymously.[115] At bottom, the Committee concluded, because an amicus "does not have a right to be heard in court" and can speak elsewhere if it wishes, any burden the new rules might impose would be minimal.[116]

Assessing Current Reform Proposals

In light of the fact that this entire episode is, as noted, likely nothing more than a solution in search of a problem, the apparent constitutional and practical problems presented by the proposed solutions glare even more brightly.

- **Practical Concerns.** Additional disclosures are unnecessary. Recent challenges to the Supreme Court's amicus disclosure requirements as inadequate are rooted in policy disagreement with the Court's decisions and the belief that the Court should consider or discount arguments based on the identity of groups before it.[117] Pressure to adopt more sweeping disclosure requirements throughout the judiciary arises from unfounded concerns that individuals or groups are misleading courts with amicus briefs that veil hidden interests or create an illusion of broad support for certain outcomes. Neither Senator Whitehouse nor the committee members raised a single example of an undisclosed relationship between an amicus and another party that threatened the judiciary's integrity. With only one exception,[118] the examples of alleged abuses that Senator Whitehouse provided were of donors who gave money both to amici and to someone else who advocated for positions he disfavored. Such financial relationships are not problematic unless judges should decide cases based on the identity of who is on each side, which would upend judicial impartiality and undermine public trust.

- **Additional disclosure requirements are unnecessary from a practical perspective.** As committee members repeatedly noted, no clear problem actually exists. As an initial matter, the sweeping disclosures created by the Committee and pushed by Senator Whitehouse are not widespread. The Supreme Court lacks such requirements,[119] and no similar requirement is common in state courts. On the contrary, many states' rules for amicus participation require disclosures largely paralleling those required by Appellate Rule 29.[120]

  But aside from the lack of parallels, no evidence that parties are exploiting Rule 29—even occasionally—was ever presented by Senator Whitehouse, the Amicus Subcommittee, or the Advisory Committee. Senator Whitehouse's examples were generally of third parties that funded organizations that in turn became involved in litigation as

parties, counsel for a party, or amici. Only one example, in which Google and Oracle donated to eventual amici, showed a party relationship with amici. None revealed party control of an amicus, however. Similarly, throughout discussions about potential revisions in Rule 29, no Subcommittee or Advisory Committee member raised a single example of a party controlling or even unduly influencing an amicus. Members instead referenced only concerns—which they failed to support with instances of problematic amicus curiae behavior.

Consequently, it is not clear that the rules will stop or reveal any problematic behavior. A party truly committed to financially controlling amici will simply change its practices to evade disclosure under a modified Rule 29.[121] If the proposed changes are adopted, a judge who suspects that an amici's disclosure is insufficient, misleading, or outright false will still need to seek additional information. But a judge already has the power to remedy a Rule 29 violation, including by striking the noncompliant brief. Moreover, the additional burdens of disclosure, as well as the risk of nonparticipation, created by the proposed amendments are not counterbalanced by resolution of an actual problem.

- **Discouraging coordination of amicus briefs—including by parties—disserves judicial decision-making.** Coordination of amicus briefs is increasingly common and is accomplished through means other than financial control. The proposed amendments would therefore do nothing to reduce the level of influence a party or third party might have on the amicus process. Nor should they have such a deterring influence. Coordination—including by a party—aids courts by reducing duplicity and, when done by skilled advocates, by increasing the quality of the briefs.

Amicus coordination by other means is a normal practice in appellate litigation, particularly at the Supreme Court. Evidence exists that amici were coordinated in *Roe v. Wade*.[122] Then-attorney Ruth Bader Ginsburg "was known for her skill at coordinating amici when she was litigating before the [Supreme] Court in the 1970s and 1980s."[123] Mary Bonauto, Legal Director of Gay & Lesbian Advocates & Defenders, coordinated amici in *United States v. Windsor*, as did supporters and opponents of the Affordable Care Act in *King v. Burwell* and the ACLU in *Hobby Lobby*.[124] Indeed, Big Law advocates recognize the necessity

of such coordination before the Supreme Court in particular—with one advocate going so far as to recruit a confidant at Covington & Burling to micromanage and control amici's collective message in *Hamdan v. Rumsfeld*.[125]

Such coordination appears to be helpful, not harmful. Judges and Justices alike have complained about repetitive "me too" briefs. Some courts have even adopted rules requiring some measure of coordination to prevent overlap in substance. As Allison Larsen and Neal Devins argue, at least at the Supreme Court, coordination of amicus briefs by specialized practitioners can aid the court by presenting information and perspectives that the practitioners know the Court will find helpful in reaching a decision.[126] The Justices themselves have viewed this as ensuring that they will hear the best arguments.[127] As Larsen and Devins further point out, the advocates engaged in such litigation and coordination are responding to the signals sent by the Justices in their opinions about what arguments would be most persuasive to them.[128] There is no reason to think that the situation is different in the lower courts. In fact, a majority of lower court judges have indicated that they find amicus briefs helpful when those briefs offer unique legal arguments or explain the impact of a case on an amicus's interests. Coordination seems to be in the interest of judges who want to hear those arguments—and as one member remarked, such coordination is expected.

- **The public and courts have no interest in knowing an amicus's financial sources, nor should they have such an interest.** No interest is served by mandating disclosure of an amicus's financial sources. The Committee was therefore right to drop the disclosure provisions regarding third-party funding sources or financial control. Unlike funds earmarked for a brief by donors who have an interest in what the brief says and thus, in a sense, have interests represented by the brief, general funding aims at advancing the overall mission of the organization. The organization is thus empowered to advance interests shared by its funders. An organization that veils its actual mission with an artificial one is already violating Rule 29 by lying to the court about its interests.

Although disclosure of large funders of a specific amicus brief may help to reveal what interests an amicus brief truly advances, and thus

which interests may be impacted by the case, neither the public nor judges have an interest in knowing who is funding an organization generally. Under both dispute resolution theory and law declaration theory of judicial decision-making, third parties whose interests are affected by the outcome of a dispute are welcome to aid the court by presenting arguments or information that further delineate the issue so that the court can make an informed decision. That is, after all, the fundamental purpose of the amicus curiae, whether in 17th century England or 21st century America. Rules requiring disclosure of the individuals or organizations directly involved with a brief can—but do not necessarily—facilitate that role. An organization that is but a shell for a hidden interest (for example, a pro-business organization masquerading as a consumer interest group) would flatly violate Rule 29 as it currently exists if it created a false interest to cover its true interest.

There is, however, no problem with groups that share views on a legal or policy issue partnering generally, including through funding, and not disclosing those broader relationships when one or more file an amicus brief. Disclosure of the identities of general funders advances no public interest unless we want judges to make identity-based decisions—which would violate the rule of law and undermine judicial impartiality and fairness. Public trust of the judiciary does not depend on who has access to the courthouse—though it should be open to all. Nor does it depend on who makes certain arguments. Public trust instead depends on judges deciding a case fairly without bias either for or against any party.

Of course, we do not and should not want judges to approach the bench as tabula rasas. Every judge will and should have a philosophy of judging. But no one, living constitutionalist or textualist or otherwise, would argue that the identity of the party making an argument should determine whether the judge is or is not persuaded by that argument. It is one thing to look at the identity of an amicus or its attorneys as a heuristic for either the quality of the argument being made or the interests the brief will seek to advance. It is another thing to discount a brief's arguments because of who is making them—or who empowered the amicus, directly or indirectly, to make them.[129] The former is a technique for identifying good arguments; the latter injects identity politics into the proceedings of a court that should be impartial.

> Rule 29 aims to ensure that third parties can aid judges in understanding the contours of a case. The informational interest of politics—knowing who is trying to influence one's vote and why—is simply not present in the courts, nor should it be. In fact, with political figures seeking to investigate private citizens for constitutionally protected civic engagement,[130] it may serve the public interest more to veil rather than disclose amici's funding sources. Public criticism and the courage to face it are one thing, but violence by activists and unjustified scrutiny and harassment by politicians and federal bureaucrats for engaging in constitutionally protected civic engagement are another thing entirely. Anonymity is in the public interest in the latter circumstances.

Constitutional Concerns. If that were not enough, the proposals also suffer from constitutional concerns. Senator Whitehouse's AMICUS Act specifically provides that nothing in it should "be construed to prohibit or interfere with" someone's "right to petition the Government for the redress of grievances," "right to express a personal opinion," or "right of association, protected by the First Amendment of the Constitution of the United States."[131] But it seems that Whitehouse "doth protest too much."[132] The provisions of the proposed act and the Supreme Court's interpretation of the First Amendment cannot be reconciled—and the same can be said of the Rules Committee's recent proposals.

Aware of the constitutional concerns, the Advisory Committee engaged in a lengthy discourse about why, in its view, the proposed changes in Rule 29 pass constitutional muster.[133] Its analysis is perplexing and unconvincing. As Senators Mitch McConnell (R–KY), John Thune (R–SD), and John Cornyn (R–TX) pointed out, if the rule changes are implemented, it "will be a sorry sight to see the judiciary haled into its own courts for violating one of our most fundamental rights, but it will be necessary."[134]

- **Compelled disclosure is long disfavored under the First Amendment and Supreme Court precedent.** Compelled disclosure issues impinging on the First Amendment are nothing new. The Supreme Court confronted them in earnest during the fight against segregation and Jim Crow laws. In *NAACP v. Alabama*,[135] one of the seminal cases dealing with the issue, the Court held that the First Amendment prohibited the Alabama Attorney General from requiring the NAACP to turn over its membership lists. To put that demand in context, it is important to remember that NAACP members faced "economic

reprisals and violence" as a result of that organization's opening "an Alabama office that supported racial integration in higher education and public transportation."[136] The Alabama Attorney General's request for the group's membership lists was part of an effort to have a chilling effect on the group's activities. The Supreme Court later referred to this as a First Amendment "chilling effect in its starkest form."[137]

The Court subsequently addressed compelled disclosure issues primarily in the context of lobbying and campaign finance–related cases. In *Buckley v. Valeo,* the Court upheld the disclosure regime in the Federal Election Campaign Act, noting that three governmental interests could justify it: (1) providing voters with information to inform their choices, (2) deterring actual corruption or even the appearance of corruption, and (3) providing information needed to detect and investigate violations of the law.[138]

- **Proposals fail to meet the exacting scrutiny test.** The Supreme Court most recently addressed First Amendment concerns regarding compelled disclosures in *Americans for Prosperity Foundation v. Bonta*.[139] The California Attorney General had sought to require charitable organizations within the state to disclose the identities of their major donors by turning over certain tax documents. Several of these organizations objected and filed suit, arguing that this violated their First Amendment rights to associate freely with others. In a six-to-three decision, the U.S. Supreme Court agreed. Chief Justice John Roberts, writing for the majority, explained that "each governmental demand for disclosure brings with it an additional risk of chill,"[140] and because of that risk, courts apply "exacting scrutiny" when evaluating whether such demands for disclosure violate the First Amendment. Roberts explained that under "that standard, there must be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'"[141] For the first time, the Court clarified that while "exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest."[142] It is not quite strict scrutiny, but it is close.

  The Court further explained that "a dramatic mismatch" existed between the California Attorney General's stated goal of combatting charitable fraud and "the disclosure regime" he implemented.[143]

Moreover, the Court underscored that "a reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring"—which means that the more unnecessary a disclosure regime proves to be, the more likely it is that it cannot survive exacting scrutiny.[144] Even if one steps away from the tiers-of-scrutiny analysis, it is clear that the "text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously."[145]

- **The lack of a need for rules should end the analysis, and the analogy to campaign finance cases makes little sense.** As the Court has repeatedly stressed, in "the First Amendment context, fit matters."[146] Also, as explained above, even though the government might have an interest in requiring some disclosures from amicus filers, those interests are adequately served by the current regime implemented by Appellate Rule of Procedure 29. The lack of a need for enhanced disclosures, the arbitrary limits for disclosure in the new proposed regime, and the resulting lack of fit between any government interest and the proposed disclosures all counsel against them as violating the First Amendment.

Perhaps this is why the Advisory Committee of the Judicial Conference attempted to analogize the proposed amendments to the campaign finance laws that the Supreme Court has upheld to justify courts' interest in knowing who is sponsoring the entities filing briefs in their proceedings. "Disclosure requirements in connection with amicus briefs," it argued, "serve an important government interest in helping courts evaluate the submissions of those who seek to persuade them, in a way that is analogous to campaign finance disclosures that help voters to evaluate those who seek to persuade them."[147] More troublingly, the Committee remarked that it rejected "the perspective that the only thing that matters in an amicus brief is the persuasiveness of the arguments in that brief, so that information about the amicus is irrelevant." It then emphasized that "the identity of the amicus does matter, at least in some cases, to some judges."[148]

Think about that for a moment. Essentially, the Committee is justifying constitutionally suspect disclosure rules on the basis that some judges might care more about who is supporting certain positions than

> they care about the merits of the arguments made. If so, it is shameful and blatant partisanship and a flagrant rejection of the idea that lady justice wears a blindfold. Because of this, it is doubtful that any individual judge would sign his or her name to such a statement—and if he or she did do so, it would likely be a sound basis for a judicial ethics complaint.
>
> The Advisory Committee's campaign finance analogy is thus inapposite. Moreover, as Senators McConnell, Thune, and Cornyn have made clear, "courts are not Congress, litigation is not an election, and an appellate docket is not a free-for-all"—meaning that the "justifications for campaign-finance disclosure identified in *Buckley* do not apply here." As they further observed, that "the Advisory Committee saw fit to analogize the two reflects the judgment of a body that apparently understand neither campaigns nor judging."[149]

Conclusion

At the end of the day, courts are courts of law, not courts of public policy. For many judges, policy may play a role in judicial decision-making (for example, in evaluating the impact of a legal rule on various interests), but federal judges are bound to say what the law is, not what they think it ought to be. Under either a law declaration or a dispute resolution theory of judging, what matters is whether the judge decides a case according to law—not according to politics.

Judges have an interest in knowing whether the parties are playing by the rules. That, after all, is the purpose of disclosing whether a party authored or funded a brief. But any demand to know with whom an amicus otherwise associates should raise concerns about partiality and bias. The notion that judges should refuse to consider an argument because it might advance certain disfavored interests is incompatible with judicial integrity. Judges should recognize that attempts to convince them otherwise are nothing more than a trap.

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Endnotes

1. Star Wars: Return of the Jedi (1983), https://www.youtube.com/watch?v=wk-6DPrcMv4.
2. Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access Efficiency, and Adversarialism*, 27 Rev. Litig. 669, 676 (2008).
3. *Amicus Curiae*, Black's Law Dictionary (11th ed. 2019).
4. Simard, *supra* note 2, at 676; Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 694–95 (1963).
5. Krislov, *supra* note 4, at 695 (quoting Holthouse's *Law Dictionary*).
6. *Id.* at 694 (quoting Abbott's *Dictionary of Terms and Phrases*).
7. *Id.* at 695 (citing Horton & Ruesby, Comb. 33, 90 Eng/Rep. 326 (K.B. 1686)).
8. *Id.* (quoting *The Prince's Case*, 8 Coke 1, 29a, 77 Eng. Rep. 481, 516 (1606)).
9. *See id.* at 696.
10. *See id.*
11. *Id.* at 696–97 (citing *Coxe v. Phillips*, 95 Eng. Rep. 152 (K.B. 1736)).
12. *Id.*
13. *Id.*
14. *Id.* at 699–700. Krislov explains that participating as an amicus curiae was one of several paths for third-party involvement at the time. *Id.* at 699 (citing Hersman, *Intervention in Federal Courts*, 61 Am. L. Rev. 1, 4–6 (1927)).
15. *Id.* at 699 (citing *Green v. Biddle*, 11 U.S. (7 Cranch) 116 (1812)). Note that 1821, when Clay appeared as an amicus curiae, was the first year the Court accepted written filings. Joseph Kearney & Thomas Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 744 n.1 (2000).
16. Krislov, *supra* note 4, at 699–700.
17. *Id.* at 701–02 (citing *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854)). The states objected, thus requiring the Court to decide on its own whether the Attorney General could participate. *Id.* What might have made this decision difficult was that the case fell under the Court's original jurisdiction, but, as Justice Curtis noted in a dissent, the United States had an interest in the suit and so was at least a quasi-party. *Id.* (citing *Florida*, 58 U.S. (17 How.) at 498)). Under Article III, Justice Curtis explained, all jurisdictional grants involving the United States as a party fell under the Court's appellate jurisdiction, not its original jurisdiction. *See Florida*, 58 U.S. (17 How.) at 504–05.
18. Krislov, *supra* note 4, 702.
19. *Id.* at 702–03.
20. *Id.* at 703.
21. *Id.*
22. *Id.* at 707–08; *see also*, *e.g.*, Tomiko Brown-Nagin, *In Memoriam: Justice Ruth Bader Ginsburg, The Last Civil Rights Lawyer on the Supreme Court*, 56 Harv. C.R.-C.L.L. Rev. 15, 15 (2021) ("The ACLU's Ginsburg-led campaign during the 1970s to dismantle laws that classified by sex followed the blueprint of the NAACP's Marshall-led campaign during the 1940s and 50s...."); Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 Harv. J.L. & Gender 251, 279 (2009) (observing that the Supreme Court decided *Reed v. Reed*, 404 U.S. 71 (1971), on the same grounds raised by Ginsburg and the ALCU as a secondary argument in an amicus brief).
23. *Id.* at 713.
24. *Id.* at 713–14.
25. *Id.*
26. Kearney & Merrill, *supra* note 15, at 763.
27. Krislov, *supra* note 4, at 715.
28. Kearney & Merrill, *supra* note 15, at 749; Allison Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L.R. 1901, 1902 & nn. 2–3 (2016).
29. Kearney & Merrill, *supra* note 15, at 744.
30. Scott Harris, *Revisions to Rules of the Supreme Court of the United States* (2022), https://www.supremecourt.gov/filingandrules/SummaryOfRuleChanges2023.pdf.
31. *See generally* Larsen & Devins, *supra* note 28.
32. Larsen & Devins, *supra* note 28, at 1903.

33. *Id.* at 1919.
34. *Id.* at 1924–26.
35. *Id.*
36. *Id.* at 1926.
37. Kearney & Merrill, *supra* note 15, at 748; *see* Simard, *supra* note 2, at 682; Larsen & Devins, *supra* note 28, at 1913.
38. Kearney & Merrill, *supra* note 15, at 748.
39. *Id.*
40. *Id.*; Larsen & Devins, *supra* note 28, at 1913; Simard, *supra* note 2, at 681.
41. Simard, *supra* note 2, at 681.
42. Kearney & Merrill, *supra* note 15, at 748.
43. *See* Simard, *supra* note 2, at 697; Kelly Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Politics 33, 46–49 (2004) (discussing former Supreme Court clerks' views on briefs filed by the U.S. Solicitor General, by states, and by other governmental entities).
44. Simard, *supra* note 2, at 698; Lynch, *supra* note 43, at 46–51.
45. Simard, *supra* note 2, at 700.
46. *Id.* at 690, 692.
47. *Id.* at 695.
48. *Id.* at 688.
49. *See* Lynch, *supra* note 43, at 46–47, 49–56.
50. *See* Simard, *supra* note 2, at 689–90 (explaining that a majority of judges viewed the number of amici or amicus briefs as having "little or no influence" on the dispute's outcome); Larsen & Devins, *supra* note 28, at 1940 (observing that "amicus participation at the cert stage serves as a valuable signal to law clerks [at the Supreme Court] in an era where circuit splits—the traditional dominant reasons for granting cert—are less common."); Lynch, *supra* note 43, at 61 (describing, in the view of former Supreme Court clerks, that the composition and quality of a brief filed by several amici is what matters, not the number of amici on the brief); Kearney & Merrill, *supra* note 15, at 801 (explaining that one or two amicus briefs on one side with none on the other can have some effect on the success of a petitioner, but that the effect "largely disappears" after the number rises to three or more briefs); *id.* (explaining that the Solicitor General enjoys a "heightened probability of success" as a party and amicus that can mask or overcome the effect of having one or two amicus briefs on one side with no amicus briefs on the other). Note that the rise of the Supreme Court Bar in recent years may have blunted the Solicitor General's "heightened probability of success" and thus shaped the effect of amicus briefs in cases where the Solicitor General participates as a party or amicus. *See* Larsen & Devins, *supra* note 28, at 1940 (explaining that the Supreme Court Bar has created "a broader reputation market.").
51. *Simard*, *supra* note 2, at 688.
52. Kearney & Merrill, *supra* note 15, at 750.
53. Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 Yale L.J.F. 141, 162 (2021).
54. *Id.* at 153 (citations omitted).
55. Heidi Przybyla, *"Plain Historical Falsehoods": How Amicus Briefs Bolstered Supreme Court Conservatives*, Politico (Dec. 3, 2023), https://www.politico.com/news/2023/12/03/supreme-court-amicus-briefs-leonard-leo-00127497; *see also* Heidi Przybyla, *Judiciary Democrats Call for Stronger Transparency on Amicus Brief Funding*, Politico (Dec. 15, 2023), https://www.politico.com/live-updates/2023/12/15/congress/whitehouse-on-amicus-briefs-conservative-scotus-00132056 (noting that in "a Dec. 14 letter to the Judicial Conference, the policymaking body for federal courts, Sen. Sheldon Whitehouse of Rhode Island and Rep. Hank Johnson for Georgia, said a POLITICO investigation published earlier this month illustrates the need for such reforms").
56. *See, e.g.*, Robert Barnes, *Warning or Threat? Democrats Ignite Controversy with Supreme Court Brief in Gun Case,* Wash. Post (Aug. 16, 2019), https://www.washingtonpost.com/politics/courts_law/warning-or-threat-democrats-ignite-controversy-with-supreme-court-brief-in-gun-case/2019/08/16/2ec96ef0-c039-11e9-9b73-fd3c65ef8f9c_story.html (noting that Senator Whitehouse and several of his Democratic colleagues filed an amicus brief with the Court that could be "characterized as both a brassy reality check and unprecedented political bullying"); *see also* Michael Macagnone, *Supreme Court Ethics Code Doesn't Satisfy Democratic Appetite for Legislation,* Roll Call (Nov. 14, 2023), https://rollcall.com/2023/11/14/supreme-court-ethics-code-doesnt-satisfy-democratic-appetite-for-legislation/ (describing Senator Whitehouse as "the main Senate backer for Supreme Court ethics legislation").
57. Hank's Court Reform Platform, Hank Johnson for Congress, https://hankforcongress.com/hanks-court-reform-platform/ (last accessed Aug. 6, 2024).
58. S. 1411, 116th Cong. (2019).
59. Whitehouse, *A Flood of Judicial Lobbying*, *supra* note 53, at 142.

60. H.R. 3993, 116th Cong. (2019) (identical companion House bill).
61. S. 1411, 116th Cong. (2019).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Administrative Bodies: Judicial Conference of the United States, 1948–Present*, Federal Judicial Center, https://www.fjc.gov/history/administration/administrative-bodies-judicial-conference-united-states-1948-present (last visited Jan. 10, 2025).
66. Zack Smith & Matthew Turner, *Time for Scrutiny of DEI Policies of Administrative Office of US Courts, Judicial Conference*, Daily Signal (Nov. 6, 2023), https://www.dailysignal.com/2023/11/06/time-for-scrutiny-of-dei-policies-of-administrative-office-of-us-courts-judicial-conference/ (briefly recounting the current composition of the Judicial Conference).
67. Sheldon Whitehouse, Speech, The Scheme 28: The Judicial Conference, https://www.whitehouse.senate.gov/news/speeches/the-scheme-28-the-judicial-conference/; *see also No Friend-of-the Court Senator*, Wall St. J. (updated Feb. 25, 2019, 2:26 pm ET), https://www.wsj.com/articles/no-friend-of-the-court-senator-11551046568?mod=article_inline (noting that "Mr. Whitehouse is ginning up this fuss now because he wants to discredit the Roberts Court as somehow politically corrupt").
68. Fed. R. App. P. 29.
69. *Id.*
70. *Id.*
71. Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 2 (Oct. 30, 2019) [hereinafter *Oct. 2019 Minutes*], https://www.uscourts.gov/sites/default/files/minutes_of_the_october_2019_meeting_of_the_advisory_committee_on_appellate_rules_final_0.pdf; Of course, Whitehouse introduced the Act only after he had sent a letter to Chief Justice John Roberts and Supreme Court Clerk Scott Harris notifying them that he intended to do so and letting them know that in his view, "a legislative solution may be in order to put all *amicus* funders on an equal playing field." Letter from U.S. Senator Sheldon Whitehouse to Chief Justice John G. Roberts, Jr. and Supreme Court Clerk Scott Harris (Jan. 4, 2019), https://www.whitehouse.senate.gov/wp-content/uploads/imo/media/doc/1.4.19%20Letter%20to%20Chief%20Justice%20Roberts.pdf.
72. *Oct. 2019 Minutes*, *supra* note 71, at 2.
73. *Id.*
74. Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 2 (Apr. 3, 2020), https://www.uscourts.gov/sites/default/files/final_-_minutes_of_the_april_3_2020_meeting_of_the_advisory_committee_on_appellate_rules_0.pdf.
75. Letter from Supreme Court Clerk Scott Harris to Judge David Campbell and Judge John Bates (Sept. 18, 2020), in Agenda Book, Advisory Committee on Rules of Appellate Procedure 151 (Apr. 7, 2021) [hereinafter Apr. 2021 Agenda Book], https://www.uscourts.gov/sites/default/files/appellate_agenda_book_spring_2021_final.pdf.
76. *Id.*
77. *Id.*
78. *Id.*
79. Letter from U.S. Senator Sheldon Whitehouse and U.S. Representative Henry Johnson, Jr., to Judge John Bates (Feb. 23, 2021), in Apr. 2021 Agenda Book, *supra* note 75, at 153.
80. *Id.* at 155–58.
81. 593 U.S. 1 (2021).
82. 578 U.S. 1 (2016).
83. 591 U.S. 197 (2020).
84. *Id.* at 158.
85. *Id.*
86. *See id.* at 153.
87. *Id.* at 160.
88. Memorandum from Judge Jay Bybee, Chair of the Advisory Committee on Appellate Rules, to Judge John Bates, Chair, Committee on Rules of Practice and Procedure, at 6 (Dec. 8, 2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_appellate_rules_-_december_2021_0.pdf ("At the June meeting of the Standing Committee, the Advisory Committee reported that it had begun careful exploration of whether additional disclosures should be required.").
89. *Id.*

90. *Id.*
91. *Id.* at 6–7.
92. *Id.* at 7.
93. Memorandum from AMICUS Act Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure, at 6 (Mar. 12, 2021), in Apr. 2021 Agenda Book, *supra* note 75, at 133–42.
94. Memorandum from Judge Jay Bybee, *supra* note 88, at 10.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 11.
99. *See* Memorandum from AMICUS Act Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure, at 9–11 (Sept. 8, 2021), in Agenda Book: Advisory Committee on Rules of Appellate Procedure 153–73 (Oct. 7, 2021), https://www.uscourts.gov/sites/default/files/2021-10-07_appellate_rules_agenda_book_0.pdf; Memorandum from Judge Jay Bybee, Chair of the Advisory Committee on Appellate Rules, to Judge John Bates, Chair, Committee on Rules of Practice and Procedure, at 5–8 (Dec. 6, 2023), in Agenda Book: Advisory Committee on Rules of Appellate Procedure 219–27 (Jan. 4, 2021), https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for_standing_committee_meeting_final_0.pdf.
100. Memorandum from Amicus Disclosure Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure, at 4 (Mar. 3, 2023), in Agenda Book: Advisory Committee on Rules of Appellate Procedure 166 (Mar. 29, 2023) [hereinafter Mar. 2023 Agenda Book], https://www.uscourts.gov/sites/default/files/2023-03_appellate_rules_committee_agenda_book_final_updated_3-21_0.pdf.
101. Memorandum from Amicus Disclosure Subcommittee to Advisory Committee on the Federal Rules of Appellate Procedure, at 4 (Mar. 3, 2023), in Mar. 2023 Agenda Book, *supra* note 100, at 163–67.
102. *Id.* at 2–3.
103. *Id.* at 3.
104. *Id.* at 4.
105. Advisory Committee on Appellate Rules, Minutes of the Advisory Committee on Appellate Rules, at 6 (Oct. 7, 2021) [hereinafter Oct. 2021 Minutes], https://www.uscourts.gov/sites/default/files/final_-_minutes_appellate_rules_committee_fall_2021_1.pdf.
106. *Id.*
107. *Id.*; Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 4 (Mar. 30, 2022) [hereinafter *Mar. 2022 Minutes*], https://www.uscourts.gov/sites/default/files/2022-04_appellate_rules_meeting_minutes_final_0.pdf.
108. Advisory Committee on Appellate Rules, Minutes of the Advisory Committee on Appellate Rules, at 7 (October 13, 2022) [hereinafter *Oct. 2022 Minutes*], https://www.uscourts.gov/sites/default/files/2022-10_appellate_rules_committee_meeting_minutes_final_0.pdf.
109. Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 5 (Oct. 19, 2023) [hereinafter *Oct. 2023 Minutes*], https://www.uscourts.gov/sites/default/files/2023-10_minutes_appellate_rules_committee_fall_2023_final.pdf.
110. *See Oct. 2021 Minutes*, *supra* note 107, at 6 ("Mr. Byron asked if the subcommittee was making a recommendation, and Ms. Spinelli answered that it was not making one. Mr. Byron thought that this was telling; he doesn't see a problem that needs to be addressed in the appellate rules."); *Mar. 2022 Minutes*, *supra* note 107, at 7–8 (seeing no problem with existing rules regarding party control); Advisory Committee on Appellate Rules, *Minutes of the Advisory Committee on Appellate Rules*, at 10 (March 29, 2023) [hereinafter *Mar. 2023 Minutes*]; https://www.uscourts.gov/sites/default/files/2023-03_advisory_committee_on_appellate_rules_meeting_minutes_final_0.pdf.
111. *See generally* Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure, and the Federal Rules of Evidence 20–45 (2024) [hereinafter Proposed Amendments], https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2024.pdf.
112. This argument does not appear to have been raised at any point during the development of the proposed amendments—and stands in stark contrast to concerns about "dark money," "transparency," or whether an amicus is "broad-based." *See generally*, *e.g.*, *Oct. 2019 Minutes*, *supra* note 71 (no mention of elections or campaign finance); *Mar. 2023 Minutes*, *supra* note 110, at 13 (mentioning campaign finance only in reference to difficulty in forming "ironclad rules"); Committee on Rules of Practice and Procedure, *Minutes*, at 10 (Jan. 4, 2023), https://www.uscourts.gov/sites/default/files/2023-01_standing_committee_meeting_minutes_final.pdf (referencing campaign finance only in brief comment making comparison of draft rules to disclosures "required for dark-money contributions to political campaigns").
113. Proposed Amendments, *supra* note 111, at 20.
114. *Id.* at 22–24.
115. *Id.* at 24.
116. *Id.* at 20.

117. *See, e.g.*, Senator Sheldon Whitehouse, *Dark Money and U.S. Courts: The Problem and Solutions*, 57 Harv. J. on Legis. 273 (2020) (describing how amici funded by "dark money" are helping to shape what he views as problematic decisions by the U.S. Supreme Court).
118. *See infra* "Additional disclosure requirements are unnecessary from a practical perspective."
119. *See* Sup. Ct. R. 37.
120. *See*, *e.g.*, Ariz. R. Civ. App. P. 16(b)(3) (requiring identification of the sponsor, the sponsor's interest, and anyone "other than members of the sponsoring group or organization that provided financial resources for the preparation of the brief."); Ark. Sup. Ct. R. 4-6(c) (requiring disclosure of "every person or entity, other than the amicus curiae, its members, or its counsel, who…collaborated in [the brief's] preparation" in addition to requirements paralleling Rule 29); Cal. R. Ct. 8.200(c) (paralleling Rule 29); Minn. R. Civ. App. P. 129.03 (paralleling Rule 29); N.C. R. App. P. 28.1(b)(3) (requiring disclosure of "every person or entity (other than the amicus curiae, its members, or its counsel) who helped write the brief or who contributed money for its preparation"); N.D. R. App. P. 29(4) (listing same requirements as Federal Rule of Appellate Procedure 29); N.M. R. App. P. 12-320(C) (paralleling Rule 29); N.Y. Ct. App. R. 500.23(a)(4) (including similar disclosure requirements but without the membership exception contained in Rule 29); W. Va. R. App. P. 30(e)(5) (paralleling Rule 29). *But see* Ill. Sup. Ct. R. 345 (listing no disclosure requirements); Nev. R. App. P. 29 and Nev. R. App. P. 26.1 (containing no disclosure requirements similar to those in Rule 29); Tex. R. App. P. 11 (requiring disclosure of "the source of any fee paid or to be paid for preparing the brief").
121. *See Oct. 2022 Minutes*, *supra* note 108, at 5 (discussing the possibility that under the proposed rule regarding disclosure of financial relationships with nonparties, some organizations could change their funding structure).
122. Larsen & Devins, *supra* note 28, at 1920.
123. *Id.*
124. *Id.* at 1920–22.
125. *Id.* at 1920, 1924–26.
126. *Id.* at 1954–57.
127. *Id.* at 1957.
128. *Id.* at 1963.
129. One example is Senator Whitehouse's argument in his own amicus brief that the Supreme Court should discount briefs filed in *Moore v. Harper* by amici who previously supported Donald Trump's efforts to challenge the results of the 2020 election. *See* Brief of Amici Curiae U.S. Senator Sheldon Whitehouse and Representative Henry "Hank" Johnson, Jr. In Support of Respondents, *Moore v. Harper*, 600 U.S. 1 (2022) (No. 21-1271).
130. The recent weaponization of American government against its own citizens—and even political figures in government—is now an undisputable fact. For example, when the National School Boards Association called for parent protests at school board meetings to be treated as the "equivalent" of "domestic terrorism," then-Attorney General Merrick Garland called for the FBI to begin investigating parents who engaged in those protests. Kendall Tietz, *Merrick Garland Directs FBI to Target Parents Responsible for "Disturbing Spike in Harassment, Intimidation" Against Schools*, Daily Signal (Oct. 5, 2021), https://www.dailysignal.com/2021/10/05/merrick-garland-directs-fbi-to-target-parents-responsible-for-disturbing-spike-in-harassment-intimidation-against-schools/. The Biden Administration's Department of Justice unsuccessfully prosecuted Mark Houck, who was praying with his son near an abortion clinic, for merely attempting to protect his son from a clinic worker shouting obscenities. *"Long Guns Pointed at Me and My 7 Children": Pro-Life Dad Tells Lawmakers About Arrest*, Daily Signal (May 16, 2023), https://www.dailysignal.com/2023/05/16/pro-life-dad-mark-houck-tells-lawmakers-about-arrest/. A Richmond FBI field office was forced to rescind a report targeting for "mitigation" several Catholic groups listed by the discredited Southern Poverty Law Center as "hate groups." Tyler O'Neil, *Breaking: FBI Rescinds Memo Citing Southern Poverty Law Center After Daily Signal Report*, Daily Signal (Feb. 9, 2023), https://www.dailysignal.com/2023/02/09/breaking-fbi-rescinds-radical-traditionalist-catholic-ideology-document-citing-southern-poverty-law-center/. And that's not to mention Senator Chuck Schumer threatening *public* figures, Justices Brett Kavanaugh and Neil Gorsuch, that they would "reap the whirlwind" if they ruled in a way disfavored by abortion proponents. Ian Millhiser, *The Controversy Over Chuck Schumer's Attack on Gorsuch and Kavanaugh, Explained*, Vox (Mar. 5, 2020), https://www.vox.com/2020/3/5/21165479/chuck-schumer-neil-gorsuch-brett-kavanaugh-supreme-court-whirlwind-threat. The list could go on.
131. S. 1411, 116th Cong. (2019).
132. William Shakespeare, Hamlet act 3, sc.2.
133. *See* Proposed Amendments, *supra* note 111, at 11–21.
134. Comment Letter from Senators Mitch McConnell, John Thune, and John Cornyn on Proposed Amendments to Federal Rule of Appellate Procedure 29 (Sept. 10, 2024) [hereinafter McConnell et al. Comment Letter], https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0008.
135. 357 U.S. 449, 462 (1958).
136. *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 606 (2021) (citing *NAACP v. Alabama ex rel. Patterson,* 357 U.S. at 462).
137. *Id.*
138. 424 U.S. 1 (1976); *see also Citizens United v. Federal Election Comm'n*, 558 U.S. 210 (2010) (ruling unconstitutional certain restrictions on independent corporate expenditures but upholding the Bipartisan Campaign Finance Act's disclosure regime).

139. 594 U.S. 595 (2021).
140. *Id.* at 618.
141. *Id.* at 596 (quoting *Doe v. Reed,* 561 U.S. 186, 196 (2010)).
142. *Id.* at 608.
143. *Id.* at 612.
144. *Id.*
145. *Id.* at 619–20 (Thomas, J., concurring); see also Joel Alicea & John Ohlendorf, *Against the Tiers of Scrutiny*, Nat'l Aff., Fall 2019, at 72.
146. *Americans for Property Foundation*, 594 U.S. at 609 (citing *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014)).
147. McConnell et al. Comment Letter, *supra* note 134, at 20.
148. Proposed Amendments, *supra* note 111, at 20.
149. McConnell et al. Comment Letter, *supra* note 134, at 107.