

January 4, 2019

The Honorable John G. Roberts
Chief Justice
Supreme Court of the United States
One First St. NE
Washington, D.C. 20543-0001

The Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
One First St. NE
Washington, D.C. 20543-0001

Dear Chief Justice Roberts and Mr. Harris:

I have followed with interest recent reports about the Court's invocation of Supreme Court Rule 37.6, which states that briefs presented to the Court on behalf of *amici curiae* "shall identify every person other than the *amicus curiae*, its members, or its counsel, who made [a] monetary contribution" "to fund the preparation or submission of the brief." According to these reports, the Court recently rejected an *amicus* submission made by the U.S. Alcohol Policy Alliance for its failure to comply with Rule 37.6, since its brief failed to disclose the names of each of the group's donors, many of whom had contributed to the brief through the "crowdfunding" website GoFundMe.¹ As a result, *amicus* was forced to return donations from individuals who wished to remain anonymous, and re-file its brief, disclosing the names of individuals who had supported the GoFundMe campaign. Donations to the brief ranged from \$25-\$500.

In a statement to *The National Law Journal*, the Court's public information office said: "The Clerk's Office interprets this language [of Rule 37.6] to preclude an *amicus* from filing a brief if contributors are anonymous." It is difficult, however, to reconcile that interpretation with the Court's practice of routinely accepting *amicus curiae* briefs from special interest groups that fail to disclose their donors. For example, as I recently brought to the Court's attention,² in the orchestrated challenge to union agency shop fees first initiated in *Friedrichs v. California Teachers Association*, one organization, the Lynde and Harry Bradley Foundation, not only bankrolled the nonprofit law firm bringing the case, but also donated to eleven different organizations that filed *amicus curiae* briefs supporting the plaintiffs. Surely, if Rule 37.6 were operating to its intended effect, the Court would have required disclosure of that funding. Yet

¹ Tony Mauro, *Supreme Court Rule Crimps Crowd-Funded Amicus Briefs*, *The National Law Journal* (Dec. 10, 2018).

² Brief for Senators Sheldon Whitehouse and Richard Blumenthal as Amici Curiae in Support of Respondents, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S.Ct. 2448 (2018), at 16-17.

none of those *amicus* filers disclosed the Bradley Foundation (or any other source) as the source of its funding for the brief under Rule 37.6, and none of those briefs was rejected by the Court for such lack of disclosure.

The rule's transparency aims are also undercut by its own terms, which exempt disclosure by member-funded *amici*. The U.S. Chamber of Commerce, for example, routinely files influential *amicus* briefs in Supreme Court litigation, including in cases where its members are parties in interest. The Chamber can comply with Rule 37.6 simply by affirming that "no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission."³ But the Chamber takes pains to conceal the identity of its membership, having an official policy "not to distribute or make public information about our members."⁴ As a result, its Rule 37.6 disclosure is effectively meaningless, and the deep-pocketed corporate contributors to the Chamber's *amicus* activity can enjoy the fruits of its unparalleled Supreme Court win rate – 9-1 in cases in which it participated last term – in complete anonymity. That the Court allows this type of concealment by the Chamber as a matter of course, while forcing anonymous \$25 donors to return their contributions, is a perverse result indeed.

The Court's disparate treatment of the crowdfunded, small-dollar-backed brief filed by the U.S. Alcohol Policy Alliance and the well-heeled, repeat-player *amici* who routinely flood the Court with anonymously funded briefs is troubling, and telling. It reflects an elemental tension in a democracy between two classes of citizens. One is an influencer class that occupies itself with favor-seeking from government, and therefore desires rules of engagement that make government more and more amenable to its influence. The second class is the general population, which has an abiding institutional interest in a government with the capacity to resist that special interest influence. This is a centuries-old tension.⁵ When the Court establishes and applies rules designed to promote transparency and integrity, it should not overlook this latter abiding interest.

³ See, e.g., Brief for the Chamber of Commerce of the United States as Amicus Curiae, *Epic Systems v. Lewis*, 138 S.Ct. 1612 (2018), at n.1 (emphasis added).

⁴ Chamber of Commerce of the United States, Frequently Asked Questions, <https://www.uschamber.com/about/about-the-us-chamber/frequently-asked-questions>.

⁵ See Theodore Roosevelt, *New Nationalism Speech* (1910) ("[T]he United States must effectively control the mighty commercial forces[.] . . . The absence of an effective state, and especially, national, restraint upon unfair money-getting has tended to create a small class of enormously wealthy and economically powerful men, whose chief object is to hold and increase their power."); DAVID HUME, *PHILOSOPHICAL WORKS OF DAVID HUME* 290 (1854) ("Where the riches are in a few hands, these must enjoy all the power and will readily conspire to lay the whole burden on the poor, and oppress them still farther, to the discouragement of all industry."); Andrew Jackson, 1832 Veto Message Regarding the Bank of the United States (July 10, 1832) (transcript available in the Yale Law School library) ("It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purpose . . . to make the richer and the potent more powerful, the humble members of society . . . have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of the Government."); NICCOLO MACHIAVELLI, *THE PRINCE* IX (1532) ("[O]ne cannot by fair dealing, and without injury to others, satisfy the nobles, but you can satisfy the people, for their object is more righteous than that of the nobles, the latter wishing to oppress, whilst the former only desire not to be oppressed.").

The number of *amicus* briefs the Court receives has increased by almost 100% since 1995.⁶ That increase – and the concomitant rise in high-dollar investment in *amicus* participation – reflects a growing recognition among the influencer class that the Supreme Court, like any policymaking body, is susceptible to its influence. Rule 37.6 recognizes, and the Court’s recent rejection of the brief filed by the U.S. Alcohol Policy Alliance reinforces, that Americans deserve to know who is behind these judicial lobbying efforts. If that rule, by its terms or by its enforcement, operates to prohibit contributions by only small-dollar donors and not wealthy and corporate interests, it is failing to meet that objective. I hope you agree that state of affairs presents a threat to the Court’s reputation as neutral arbiter of laws, which I know you value and strive to protect.

I believe a legislative solution may be in order to put all *amicus* funders on an equal playing field. To that end, in the near future, I intend to introduce the Assessing Monetary Influence in the Courts of the United States Act of 2019, which would require disclosure of contributions over a certain threshold to repeat-player *amici* in the Supreme Court of the United States and the lower federal courts of appeals. I have attached a copy of the bill text and would welcome the benefit of your feedback or any additional information about Rule 37.6 and its enforcement that you believe may be relevant to this legislative effort.

Sincerely,



Sheldon Whitehouse
United States Senator

⁶ Anthony J. Franze & R. Reeves Anderson, *Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm*, Nat’l L.J. (Aug. 19, 2015); Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 Law & Soc. Inquiry 955, 961 (2007).

116TH CONGRESS
1ST SESSION

S. _____

To amend title 28, United States Code, to require certain disclosures related to amicus activities.

IN THE SENATE OF THE UNITED STATES

Mr. WHITEHOUSE introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend title 28, United States Code, to require certain disclosures related to amicus activities.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the [“_____ Act
5 of _____”.]

6 **SEC. 2. DISCLOSURES RELATED TO AMICUS ACTIVITIES.**

7 (a) IN GENERAL.—Chapter 111 of title 28, United
8 States Code, is amended by adding at the end the fol-
9 lowing:

1 **“§ 1660. Disclosures related to amicus activities**

2 “(a) DEFINITION.—In this section, the term ‘covered
3 amicus’ means any person, including any affiliate of the
4 person, that files not fewer than 3 total amicus briefs in
5 any calendar year in the Supreme Court of the United
6 States and the courts of appeals of the United States.

7 “(b) DISCLOSURE.—

8 “(1) IN GENERAL.—Any covered amicus that
9 files an amicus brief in the Supreme Court of the
10 United States or a court of appeals of the United
11 States shall list in the amicus brief the name of any
12 person who—

13 “(A) contributed to the preparation or sub-
14 mission of the amicus brief; or

15 “(B) contributed not less than 5 percent of
16 the gross annual revenue of the amicus filer if
17 the amicus filer is not an individual

18 “(2) EXCEPTIONS.—The requirements of this
19 subsection shall not apply to amounts received by
20 the amicus filer in commercial transactions in the
21 ordinary course of any trade or business conducted
22 by the amicus filer or in the form of investments
23 (other than investments by the principal shareholder
24 in a limited liability corporation) in an organization
25 if the amounts are unrelated to the amicus filing ac-
26 tivities of the amicus filer.

1 “(e) REGISTRATION.—

2 “(1) IN GENERAL.—Each covered amicus shall
3 register as a covered amicus in any court in which
4 the covered amicus files an amicus brief.

5 “(2) CONTENTS.—The registration described in
6 paragraph (1) shall include—

7 “(A) the name, address, business telephone
8 number, and principal place of business of the
9 registrant;

10 “(B) a general description of the business
11 or activities of the registrant;

12 “(C) the name, address, and principal
13 place of business of any person described in
14 subsection (b)(1);

15 “(D) a statement of the general issue
16 areas in which the registrant expects to engage
17 in amicus activities; and

18 “(E) to the extent practicable, specific
19 issues that have, as of the date of the registra-
20 tion, already been addressed or are likely to be
21 addressed in the amicus activities of the reg-
22 istrant.

23 “(3) DEADLINE.—Each amicus shall submit to
24 the applicable courts the registration required under
25 this subsection not later than—

1 “(A) 45 days after the date on which the
2 amicus becomes a covered amicus; and

3 “(B) **[January 1]** of the calendar year
4 after the calendar year in which the amicus was
5 a covered amicus.

6 “(d) **AUDIT.**—The Comptroller General of the United
7 States shall conduct an annual audit to ensure compliance
8 with this section.

9 “(e) **PUBLICLY AVAILABLE LISTS.**—The clerk of the
10 Supreme Court and each clerk of a court of appeals of
11 the United States shall periodically update the website of
12 the applicable court with the information described in sub-
13 section (c)(2).

14 “(f) **PROHIBITION ON PROVISION OF GIFTS OR TRAV-**
15 **EL BY COVERED AMICI TO JUDGES AND JUSTICES.**—No
16 covered amicus may make a gift or provide travel to a
17 judge of a court of appeals of the United States or an
18 associate justice or Chief Justice of the Supreme Court
19 of the United States.

20 “(g) **CIVIL FINES.**—Whoever knowingly fails to com-
21 ply with any provision of this section shall, upon proof of
22 such knowing violation by a preponderance of the evi-
23 dence, be subject to a civil fine of not more than \$200,000,
24 depending on the extent and gravity of the violation.

25 “(h) **RULES OF CONSTRUCTION.**—

1 “(1) CONSTITUTIONAL RIGHTS.—Nothing in
2 this section shall be construed to prohibit or inter-
3 fere with—

4 “(A) the right to petition the Government
5 for the redress of grievances;

6 “(B) the right to express a personal opin-
7 ion; or

8 “(C) the right of association, protected by
9 the First Amendment to the Constitution of the
10 United States.

11 “(2) PROHIBITION OF ACTIVITIES.—Nothing in
12 this section shall be construed to prohibit, or to au-
13 thorize any court to prohibit, amicus activities by
14 any person or entity, regardless of whether such per-
15 son or entity is in compliance with the requirements
16 of this section.

17 “(i) SEVERABILITY.—If any provision of this section,
18 or the application thereof, is held invalid, the validity of
19 the remainder of this section and the application of such
20 provision to other persons and circumstances shall not be
21 affected thereby.”.

22 “(b) TECHNICAL AND CONFORMING AMENDMENT.—
23 The table of sections for chapter 111 of title 28, United
24 States Code, is amended by adding at the end the fol-
25 lowing:

“1660. Disclosures related to amicus activities.”.