Congress of the United States

Washington, DC 20510

September 12, 2024

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
One Columbus Circle NE
Washington, D.C. 20544

Dear Judge Bates:

Thank you for the Advisory Committee's long and thorough deliberations on necessary amendments to Federal Rule of Appellate Procedure 29. Without taking a position on other provisions of the proposed amendment, we strongly encourage the Committee to adopt the provisions improving disclosures related to amici curiae. If adopted, the new rule would yield a long-overdue, if incomplete, improvement over existing amicus disclosure requirements. To further bolster the Committee's proposal, we offer several additional recommendations for consideration.

It is important to understand the context that makes these improvements to the rule necessary. In brief summation, a campaign to influence our federal courts began some time ago, signaled by then-attorney Lewis Powell's memorandum to the United States Chamber of Commerce urging the Chamber to join other groups in "exploiting judicial action."[1] According to Powell, "especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change," making the courts "a vast area of opportunity for the Chamber . . . if . . . business is willing to provide the funds."[2] Industries familiar with the tactic of regulatory capture, sometimes called agency capture, had a ready template from which to proceed in this campaign.

The campaign had multiple vectors: one, to put amenably-minded judges and justices on the bench; two, to forge helpful legal doctrines in amenable think tanks and universities; three, to fund litigating and amicus groups to provide helpful court advocacy regarding those doctrines.

The legal groups operate in various ways. Sometimes they represent a party, often a party they have sought out or recruited; contra the ordinary process of injured parties choosing their lawyers. Although this practice, standing alone, is not always problematic, these groups have taken it to a new level. One nominal plaintiff even ended up on the payroll of the litigating group.[3] Sometimes they swap out plaintiffs and swap in new ones for strategic reasons or to protect their claims to standing.[4] Often, multiple legal groups file amicus briefs aligned with the litigating group, hence the importance of this rule. Sometimes they swap positions: in *Friedrichs*

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[1] Memorandum from Lewis F. Powell, Jr. to Eugene B. Snydor, Jr. at 26 (Aug. 23, 1971), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo.
[2] *Id.* at 26-27.
[3] Mitchell Armentrout, *Mark Janus quits state job for conservative think tank gig after landmark ruling*, CHICAGO SUN-TIMES (July 20, 2018), https://chicago.suntimes.com/2018/7/20/18409126/mark-janus-quits-state-job-for-conservative-think-tank-gig-after-landmark-ruling.
[4] *See* Mary Bottari, *Behind* Janus*: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2018), https://inthesetimes.com/features/janus_supreme_court_unions_investigation.html.

v. California Teachers Association, 136 S. Ct. 1083 (2016) (per curiam), petitioner's counsel became an amicus when the same question returned to the Supreme Court in *Janus v. AFSCME*, 585 U.S. 878 (2018);[5] a petitioner's litigating group in *Janus* had been an amicus in *Friedrichs*.[6] Often, they file in orchestrated and harmonized flotillas: the usual number in the chorus is around ten or twelve;[7] in matters of particular impact and importance to the influence campaign, we've seen as many as fifty-five, even at the certiorari stage.[8] In one such case, the petitioner was the 501(c)(3) twin of the 501(c)(4) right-wing political battleship Americans for Prosperity, which sits at the center of the political network that funded numerous of the amicus filers, but none of that was disclosed.[9]

Some advocacy groups seem to have no business or function other than to interpose themselves between corporate interests and courts, screening from the judicial proceedings the corporate identities behind them (some perform that function in administrative proceedings too); some are well-established trade groups recruited to the cause (perhaps for compensation—trade associations like the U.S. Chamber of Commerce refuse to deny or disclose this); some are practically pop-ups, appearing for particular cases, as the Committee has noted with its less-than-twelve-months-of-existence provisions. In sum, a robust and coordinated system operates to flood appellate court proceedings with covertly funded amicus encouragement, while denying courts, the parties, and the public essential knowledge to evaluate the true interests behind the briefing and any resulting conflicts.

Major corporations as parties have been caught funding amici that filed briefs in their case arguing positions helpful to their cause.[10] Major funders of multiple amicus briefs in the same case have been caught "orchestrat[ing] . . . amicus efforts" in addition to helping fund "the actual, underlying legal actions."[11] Entities that are mere "fictitious names" for other entities have filed briefs that failed to disclose the actual corporate entity behind the fictitious name, and failed to disclose that entity's other fictitious names and related corporate entities.[12] We have filed amicus briefs describing for the Supreme Court undisclosed funding links we could find

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[5] *Id.*
[6] *Id.*; Amicus Curiae Brief of the National Right to Work Legal Defense Foundation, Inc., In Support of Petitioners, 578 U.S. 1 (2016) (No. 14-915).
[7] *See* Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, YALE L.J.F. 141, 149-150 (2021).
[8] *Id.* at 147-148 (2021).
[9] *Id.* at 147-149.
[10] *See, e.g.*, Shawn Musgrave, *The Gaping Hole in Supreme Court Rules for Tracking Links Between Litigants and Influence Groups*, THE INTERCEPT (Apr. 18, 2024), https://theintercept.com/2024/04/18/supreme-court-amicus-briefs-secret-conservative-funders/; Naomi Nix & Joe Light, *Oracle Reveals Funding of Dark Money Group Fighting Big Tech*, BLOOMBERG (Feb. 25, 2020), https://www.bloomberg.com/news/articles/2020-02-25/oracle-reveals-it-s-funding-dark-money-group-fighting-big-tech.
[11] Lisa Graves, *Snapshot of Secret Funding of Amicus Briefs Tied to Leonard Leo-Federalist Society Leader, Promoter of Amy Barrett*, TRUE NORTH RESEARCH (Oct. 9, 2020), https://truenorthresearch.org/2020/10/snapshot-of-secret-funding-of-amicus-briefs-tied-to-leonard-leo-federalist-society-leader-promoter-amy-coney-barrett/.
[12] Hansi Lo Wang, *This conservative group helped push a disputed election theory*, NPR (Aug. 12, 2022), https://www.npr.org/2022/08/12/1111606448/supreme-court-independent-state-legislature-theory-honest-elections-project.

among multiple amici appearing in the case, but since so much of the funding of these groups is secret, the linkages we found are necessarily an incomplete picture.[13]

In light of all the above, the chief recommendation we propose is that a subsection be added related to connections among amici. The Committee is justifiably attentive to the difference in burden between disclosing links between amici and parties versus disclosing links between amici and the world at large. Some disclosures by amici are easily managed, however. For example, the Committee should require amici to disclose at least major donors funding multiple amici. To ensure consistency, the Committee could adopt the same disclosure thresholds as it has with respect to amicus-party connections.

While "[t]he burdens of disclosure are far greater with regard to nonparties,"[14] the relevant universe of "flotilla amici" and their major donors amounts to an extremely small list of individuals or entities in most cases, known to each other through coordination and common funding. Amicus organizations should have little difficulty tracking individuals or entities whose contributions amount to at least 25% of the organization's prior year revenue—a number organizations need calculate only once per year. As the Committee notes, "top officials at an amicus are likely to be aware of such a high-level contributor without having to do any research at all."[15] Thus, this is a very simple requirement, and it can be made the responsibility of the lawyers filing the briefs to aver that they have done the necessary due diligence and made the necessary disclosures, subject to discipline by the court where they have failed or misled a court.

Because the nominal plaintiff or petitioner may be a "plaintiff of convenience" but not the real party in interest, requiring disclosure only of links to the nominal party will often be a vain effort. Too often, cases are "faux litigation"—the litigating group found the client, judge-shopped the court, and participated in an orchestrated campaign of judicial lobbying by an amicus flotilla. It is the flotilla of coordinated amicus filings and the common funders and orchestrators of the flotilla that need disclosing. Flotillas of coordinated amicus briefs add little beyond a false appearance of numerosity and a great many extra pages, so there is little added value to the court from all the filings. Redundancy is disfavored, and so should subterfuge be.

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[13] *See, e.g.,* Brief of Senators Sheldon Whitehouse and Richard Blumenthal as Amici Curiae in Support of Respondents at 16-17, Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 585 U.S. 878 (2018) (No. 16-1466); Brief of Amicus Curiae Senator Sheldon Whitehouse in Support of Respondent at n.18, Kisor v. Wilkie, 588 U.S. 558 (2019) (No. 18-15); Brief of Senators Sheldon Whitehouse et al. as Amici Curiae in Support of Respondents at 8-9, N.Y. State Pistol & Rifle Ass'n v. City of New York, New York, 139 S. Ct. 939 (2019) (No. 18-280); Brief of Amici Curiae U.S. Senators Sheldon Whitehouse et al. in Support of Court-Appointed Amicus Curiae at 19, Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197 (2020) (No.19-7); Brief of Senators Sheldon Whitehouse et al. in Support of Respondents at 18-19, Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021) (No. 20-107); Brief of U.S. Senators as Amici Curiae in Support of Respondent at n.29, Ams. for Prosperity Found. v. Bonta, 594 U.S. 595 (2021) (No. 19-251); Brief of U.S. Senators Sheldon Whitehouse et al. as Amici Curiae in Support of Respondents at 14-15, 18-19, West Virginia v. EPA, 597 U.S. 697 (2022) (No. 20-1530); Brief of Amici Curiae U.S. Senator Sheldon Whitehouse and Representative Herny "Hank" Johnson, Jr. in Support of Respondents at 23-28, 30-33, Moore v. Harper, 600 U.S. 1 (2023) (No. 21-1271); Brief of Amici Curiae U.S. Senators Sheldon Whitehouse et al. in Support of Respondents at 15-17, Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2023) (No. 22-451).

[14] Memorandum from Hon. Jay Bybee to Hon. John D. Bates at 16 (Aug. 15, 2024).

[15] *Id.* at 17.

It would require minimal effort for amici to provide the court and the public with important information about the true interests behind the briefs. For instance, the Committee could require amici to disclose known links between them and other amici. An obvious part of this disclosure would be for amici that are part of a network of related corporate entities, as "fictitious names" of other entities or otherwise, to disclose the other entities in the network, including coordination of multiple amici by a third party, as was the case in *Friedrichs* and *King v. Burwell*, 576 U.S. 473 (2015).[16]

Disclosure of links among amici is a burden easily managed, as no one knows better than the amici operating in coordinated flotillas how and why and how much they were coordinated. Unjustified burden is virtually nil. It is really just a matter of disclosing what the lawyers already know or can readily determine. The connected entities in the flotillas have a pretty good idea who they all are, and the number of amici on one side in these cases is usually around a dozen, so the burden of research and disclosure is not great. The importance of courts standing above and apart from the campaign of influence is paramount to public confidence in courts' integrity; it creates a perilous situation when the public cannot tell where the influence campaign ends and the judiciary begins. Disclosure draws a good line. It is in the interest of judicial integrity that entities presenting themselves in judicial proceedings present themselves unmasked, for who they really are. Lawyers who facilitate masking operations degrade the institution of the judiciary, and it is not unreasonable to put them under a duty of candor about proper disclosure.

A related recommendation therefore is that, if the Committee requires disclosure of links among amici, it also require the lawyer presenting an amicus brief make a declaration in the brief that he or she has conducted a duly diligent effort to understand the connections among his or her client and other amicus filers, and has given the court a candid, thorough, plain and honest description of the amicus filer's various funding and additional links with other amici. The requirement that a counsel knowing of a disclosure failure by any amicus must report it is a very good step, but an added requirement of due diligence as to the links with the amicus client would be advisable. In this context, the Committee may want to consider additional language accounting for creative funding structures intended to evade disclosure, such as promises of post-filing payments. This is an area where a lot of hiding is done, and closing off technical loopholes with broad language and broad lawyer candor responsibility would be advisable.

[16] Graves, *supra* note 11.

In Congress, those who lobby the institution must make quite robust disclosures about their activities and payments.[17] It is time to clean up this avenue of anonymous lobbying of the judiciary. We are grateful at the steps you have taken and urge your favorable consideration of the above suggestions.

Sincerely,

SHELDON WHITEHOUSE
Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

HENRY C. "HANK" JOHNSON, JR.
Ranking Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

[17] 2 U.S.C. § 1604.