Congress of the United States

Washington, DC 20510

February 17, 2025

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

Dear Judge Bates:

We write to supplement our initial comment on the Advisory Committee's proposed amendments to Federal Rule of Appellate Procedure 29. Following our submission, several commenters urged the Advisory Committee to abandon its proposal to improve amicus curiae disclosures. Those comments are misguided, and we urge the Advisory Committee to stay the course.

First, some opponents of the proposed amendments claim requiring greater amicus disclosure is unnecessary because the strength of an amicus's arguments is the only factor that will influence a court. But the judiciary has long recognized the importance of knowing—in one judge's words—"the real power behind the throne" when considering arguments made in amicus briefs.[1] Such disclosures provide information crucial not only to determining whether an amicus filing presents a conflict of interest, but also to understanding how much weight to give the presence of multiple amici in a given case.

Even the Chamber of Commerce, which opposes the amendments, acknowledges that "assessing the sheer number of amicus briefs filed in a particular case can be useful" to courts, as it was in *Americans for Prosperity Foundation v. Bonta*.[2] Citing the large number of amicus filings in that case, the Supreme Court explained that the merits of the petitioner's arguments were "further underscored by the filings of hundreds of organizations as amici curiae" from across "the ideological spectrum."[3] That statement shows that courts can find the number of amici in a case persuasive, and that when amici show up in flotillas to echo the same arguments, it can place a thumb on the scale in favor of the party they support. This signaling effect can be even more important in close cases or when litigants try to legitimize a novel legal theory.[4]

But when the same interest is behind multiple amicus briefs, it can distort the decision-making process by creating the impression that a particular argument enjoys more support than it actually does. Without transparency, wealthy donors and corporate interests can covertly fund dozens of seemingly distinct amici—as well as the "scholarship" and "studies" those amici cite in their

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[1] Nate Raymond, *U.S. judiciary panel expresses support for amicus brief financial disclosures*, REUTERS (Jan. 4, 2022), https://www.reuters.com/legal/litigation/us-judiciary-panel-expresses-support-amicus-brief-financial-disclosures-2022-01-04/.

[2] Letter from U.S. Chamber of Commerce Litigation Center to Hon. John D. Bates at 9 (Dec. 19, 2024).

[3] *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 617 (2021).

[4] Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/. *See, e.g.*, Allison Orr Larsen, *Becoming a Doctrine*, 76 FLA. L. REV. 1, 37-39, 42-43 (2024) (discussing the "concerted amicus campaign" to "mainstream" the major questions and independent state legislature doctrines).

briefs—to create the illusion of credibility and broad support where none exists.[5] As detailed in our initial submission, this sort of covertly funded amicus encouragement has been a feature of several high-profile cases, including *AFPF v. Bonta*. In that case, at least sixty-nine amici that the majority found so persuasive were funded by the same eleven groups, and at least forty-five received funding from the political network spearheaded by the party those amici supported.[6] Good judging does not require ignoring how well-funded actors can try to manipulate the legal process, and the Advisory Committee should not accept narratives that suggest otherwise.

Second, some commenters claim that the proposed amendments may be vulnerable to a First Amendment challenge because no compelling government interest supports improving amicus transparency. Not so. Safeguarding "public perception of judicial integrity is 'a state interest of the highest order'" because the judiciary "depends in large measure on the public's willingness to respect and follow its decisions."[7] Requiring minimally burdensome disclosures about the true interests behind an amicus brief advances this interest by bolstering the "fairness and integrity" of the judicial process.[8] Those who lobby Congress must make significant disclosures about their identity and funding because trust in government requires the public know who is spending money to influence their elected officials.[9] The same principles apply to the judicial process, where greater transparency can prevent well-funded donors from secretly spending their way to victory in federal court.

Finally, we have always engaged the Judicial Conference in a respectful manner befitting communication with a co-equal branch of government and recognizing that protecting the integrity of the judicial process is not a partisan matter. Regrettably, instead of engaging with the Advisory Committee's proposal in good faith, some other congressional commenters have resorted to intimidation and insults. They "warn[]" the Advisory Committee that it has gone too far by entertaining the Supreme Court's request that it consider this issue and suggest that doing so "bring[s] the judiciary into disrepute for partisan purposes."[10] They attack the intelligence of the Judicial Conference members who contributed to the proposed amendment, saying the proposal "reflects the judgment of a body that apparently understands neither campaigns nor judging."[11] And in response to the Committee's note that "the identity of an amicus does matter, at least in some cases, to some judges," they threateningly demand that "Judge Bybee and his

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[5] *See, e.g.*, Will Van Sant, *The NRA's Shadowy Supreme Court Lobbying Campaign*, POLITICO (Aug. 5, 2022), https://www.politico.com/interactives/2022/nra-supreme-court-gun-lobbying/ (finding that "at least 24 NRA-friendly briefs in [*New York State Rifle & Pistol Association v. Bruen*] . . . [cited] legal scholars whose work the gun group has long supported financially").

[6] Sen. Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 Yale L.J.F. 141, 147-149 (2021).

[7] *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 445-446 (2015) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

[8] *Williams-Yulee*, 575 U.S. at 445.

[9] *See* 2 U.S.C. 1601(3) ("the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.").

[10] Letter from Sens. Mitch McConnell, John Cornyn, and John Thune to Hon. John D. Bates at 1, 4 (Sept. 10, 2024); Letter from Scott S. Harris to Hon. David G. Campbell & Hon. John D. Bates (Sept. 18, 2020).

[11] Letter from Sens. Mitch McConnell, John Cornyn, & John Thune, *supra* note 10, at 3.

colleagues . . . name names."[12] We condemn these remarks and hope that the Advisory Committee will not be intimidated by overheated rhetoric and name-calling.

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In sum, and as detailed in our initial comment, connections of amici to the nominal party in interest will reveal little to the court, the other parties and the public where the true protagonist is the litigating group that selected its plaintiff of convenience for the proceedings, and the proceedings are really driven by the litigating group and its coordinated flotilla of commonly-funded amici. (In one case, the nominal petitioner was put on the payroll of the litigating group; that occurred only after the litigating group cycled through several plaintiffs until one was found to confer standing.)[13] Because the lawyers involved set up the flotilla for the donors who fund the operation, to ask them to disclose what they already know will not be unduly burdensome. So we urge you to consider that the real issue here is the intrusion into litigation by coordinated and commonly-funded front groups, and look beyond links only to the nominal plaintiff/petitioner they have chosen.

Thank you again for the Advisory Committee's extensive consideration of this issue and the opportunity to comment on this matter.

Sincerely,

SHELDON WHITEHOUSE
Ranking Member, 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, Artificial Intelligence, and the Internet

[12] *Id.* at n.18; Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to Federal Rules (Aug. 2024) at 20.

[13] 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; Noam Scheiber & Kenneth P. Vogel, *Behind a Key Anti-Labor Case, a Web of Conservative Donors*, N.Y. TIMES (Feb. 25, 2018), https://www.nytimes.com/2018/02/25/business/economy/labor-court-conservatives.html.