U.S. CHAMBER OF COMMERCE

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October 6, 2021

Honorable Jay S. Bybee
Chair, Advisory Committee on Appellate Rules
Lloyd D. George U.S. Courthouse
333 Las Vegas Boulevard South
Las Vegas, Nevada 89101-7065

Re: Potential Amendments to Rule 29

Dear Judge Bybee:

I write to express the views of the Chamber of Commerce of the United States of America regarding the AMICUS Act Subcommittee's recommendations on potential amendments to the amicus disclosure requirements of Rule 29. As described below, Rule 29 strikes an appropriate balance between the interest in disclosing those who fund or control amicus briefs and the interest in protecting the First Amendment rights of a wide variety of associational organizations, including business and labor groups, environmental and landowner organizations, plaintiffs' lawyer and defense counsel associations, and any number of different religious, civil rights, and civil liberties organizations.

The Supreme Court's decision last Term in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2382 (2021), underscores that broader disclosure requirements would, at a minimum, raise serious constitutional questions. And for no clear, much less compelling, benefit. Disclosure requirements should remain anchored to situations where an amicus receives a monetary contribution for the preparation or submission of a particular brief. The Chamber opposes proposals that would trigger disclosure of general financial support for organizations filing amicus briefs.

Congress, of course, retains authority to legislate rules for the federal courts of appeals—as consistent with the Constitution. The Advisory Committee, however, should hew to the basic framework established in the current version of Rule 29, and decline to adopt the overbroad disclosure requirements being considered. Moreover, given the Supreme Court's recent decision in *Americans for Prosperity Foundation,* it is possible if not likely that there will be additional litigation over disclosure requirements, which would establish additional guidance on the constitutional limits in this area. At the very least, the Advisory Committee should wait for such guidance before proposing any new disclosure rules.

A. The Existing Disclosure Requirements Of Rule 29 Protect Against Misuse And Assure That Amicus Briefs Reflect The Views Of Amici

Since 2010, Rule 29 has required that all amicus briefs submitted on appeal indicate whether "a party's counsel authored the brief in whole or in part; a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and a person—other than the

amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person[.]" Fed. R. App. P. 29(a)(4)(E). This disclosure requirement was "modeled on Supreme Court Rule 37.6," which imposes similar disclosure requirements. Fed. R. App. P. 29 advisory comm. notes; *see* Sup. Ct. R. 37.6.

Rule 29 "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief." Fed. R. App. P. 29 advisory comm. notes (citation omitted). In this way, the rule assures that amicus briefs reflect the views and interests of the amicus submitting the brief—not those of a party to the case, or some other entity or person, that is writing or paying for the brief.

Supreme Court Rule 37.6 reflects the same purpose. As Scott Harris, the Clerk of the Supreme Court, recently explained in correspondence with Senator Whitehouse, Supreme Court Rule 37.6 "provides information about funding directly aimed at *advocating specific positions*" in court. Letter from Sen. Sheldon Whitehouse & Rep. Henry C. Johnson to Hon. John D. Bates at 1 (Feb. 23, 2021) (Whitehouse Letter) (quoting Letter from Scott S. Harris, Clerk, U.S. Supreme Court, to Sen. Sheldon Whitehouse (Feb. 27, 2019)) (emphasis added).

B. Recent Concerns Expressed To This Committee Are In Tension With The Core Purposes Of Rule 29 And The First Amendment

Senator Whitehouse and Representative Johnson recently wrote to Judge Bates to request that the Committee on Rules of Practice and Procedure establish a working group "to address the problem of inadequate funding disclosure requirements for organizations that file *amicus curiae* briefs in the federal courts." Whitehouse Letter at 1. Although the Whitehouse Letter criticizes Rule 29 and Supreme Court Rule 37.6 for failing to "[a]chieve [t]heir [i]ntended [g]oals," *id.* at 2, many of the goals identified in the Whitehouse Letter are not only unrelated—or even hostile—to the purposes underlying Rule 29, but also raise significant First Amendment concerns.

As a general matter, the Whitehouse Letter suggests that amicus briefing is itself somehow suspect, asserting that federal courts "are susceptible to [the] influence" of "those who seek to shape the law through the courts." *Id.* at 2-3. Among other things, the letter attacks "sophisticated repeat players" for using amicus briefing to engage in "anonymous judicial lobbying." *Id.* at 6. The Letter specifically criticizes the Chamber for declining to "disclose its members to the public." *Id.*

In our view, this critique reflects a flawed understanding of the purpose and practice of amicus briefing, as well as the First Amendment. Senator Whitehouse and Representative Johnson seem to treat amicus briefing as a form of influence peddling. But courts are not legislatures, and amicus briefs are not an analogous form of "judicial lobbying." To the contrary, they are a well-accepted—and widely lauded—form of legal advocacy in the appellate system in particular. The point of an effective amicus brief is to "bring[ ] to the attention of the Court relevant matter not already brought to its attention by the parties." Sup. Ct. R. 37.1. Amicus briefs seek to persuade judges through legal argument and by putting individual cases in their broader context—not by blunt reference to the power or influence of the amicus. And opposing parties have an opportunity to respond to amicus briefs; there is nothing secretive about them.

Indeed, amicus briefs are public, not anonymous. They are publicly filed and widely available, and the names of the amicus or amici whose views are represented appear on the cover page of the brief, as do the names of the lawyers who authored the brief. As noted, under the existing Rule 29, an amicus brief also must identify any "person—other than the amicus curiae, its members, or its counsel—[who] contributed money that was intended to fund preparing or submitting the brief[.]" Fed. R. App. P. 29(a)(4)(E).

The names of the persons who financially support the general operations of the amicus are not disclosed. But such persons typically do not participate in the exchange of the brief and are often unaware of the arguments presented. Mandating the disclosure of an organization's general contributors in amicus briefing would create a false impression of the purpose of amicus briefs, spurring an appearance of lobbying where none exists. That is especially true with respect to large organizations like the Chamber, which has hundreds of thousands of members and engages in far more (First Amendment-protected) activities than just amicus briefs. Not every member of the Chamber always agrees with, or even cares about, the position taken by the Chamber as amicus in every case. Disclosure of an organization's members in an amicus brief would result in an implicit attribution of views that may not be held by every single member. As discussed below, such a draconian disclosure requirement also would chill core First Amendment interests.

Furthermore, there is nothing surprising (or sinister) about the fact that many amici are "sophisticated repeat players" that promote various "long-term interests." The courts are a co-equal branch of our government that frequently decide issues of great public importance. It is natural and desirable for groups to file amicus briefs seeking to educate the courts on the practical implications of their decisions. The courts, as well as the broader public, benefit from that process. That is true regardless of the particular interests pursued by particular organizations. The amicus process is rightly one that is available for all comers, with different perspectives. It is a good, not bad, thing that groups of all backgrounds—ranging from civil rights groups like the NAACP to business groups like the Chamber—have sophisticated amicus capabilities.

Moreover, under Rule 29(a)(4)(D), amici are required to include "a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file." Organizational amici who appear regularly in the federal courts are therefore open about their interests and their organization. The Chamber, for example, states in each of its amicus briefs that it represents approximately 300,000 direct members, and regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. Other leading amici are similarly candid about their membership and interests. *See, e.g.*, Br. for the Electronic Frontier Foundation et al. as Amici Curiae in Support of Petitioners at 1, Americans for Prosperity Foundation v. Bonta, 141 S. Ct. 2373 (2021) (No. 19-251), 2021 WL 842009 (noting that the EFF represents "more than 34,000 members" and "has become a leading authority on First Amendment issues" as it "work[s] to ensure that rights and freedoms are enhanced and protected as our use of technology grows"); Br. Amici Curiae of the American Civil Liberties Union, Inc. et al. in Support of Petitioners at 1, Americans for Prosperity Foundation v. Bonta, 141 S. Ct. 2373 (2021) (No. 19-251), 2021 WL 826687 (noting that the ACLU is a "nationwide, nonpartisan organization with nearly 2 million members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws"); *id.* at 2 (noting that the "NAACP Legal Defense and Educational Fund, Inc. . . . is a non-profit, non-partisan legal organization founded in 1940 to achieve racial justice and to ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other communities of color").

Far from a novel development, such amicus efforts are a long-accepted—and justly celebrated—aspect of litigation in American courts. *See, 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) (noting that the "ACLU's Ginsburg-led campaign during the 1970s to dismantle laws that classified by sex followed the blueprint of the NAACP's [Thurgood] Marshall-led campaign during the 1940s and 50s to dismantle laws that classified by race"); Stephen L. Wasby, Civil Rights Litigation By Organizations: Constraints and Choices, 68 Judicature 337 (1985). Amicus briefs representing the interests and perspectives of all corners of American life have made an invaluable contribution to the judicial process, and to the country.

The Whitehouse Letter's insistence that an organization like the Chamber must "disclose its members to the public" so as to reveal "who is influencing the positions the Chamber takes in litigation," Whitehouse Letter at 6, not only misunderstands the purposes of Rule 29 but also disregards important First Amendment principles. "[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)). Because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and because there is a "vital relationship between freedom to associate and privacy in one's associations," *id.* (quoting *Patterson*, 357 U.S. at 460, 662), the First Amendment demands "exacting scrutiny" of rules that compel associations to disclose their members or supporters, *id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)).

The kind of broad disclosure requirements proposed in the Whitehouse Letter cannot withstand such scrutiny. For one thing, it is doubtful that the disclosure rule proposed by the Whitehouse Letter is backed by any "substantial government interest." *Id.* at 2386 (quoting *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 636 (1980)). As noted above, there is no reason why the identities of an organization's financial supporters or members are relevant to the authorship of a particular amicus brief: absent direct participation in the drafting of an amicus brief, or specified financial support for the amicus brief, many of an organization's members or supporters are unlikely to be aware of any one brief. Indeed, in the amicus context, some members may disagree in certain respects with the litigation position taken by the amicus, while others may be indifferent. Mandating disclosure of an organization's members in such instances is more likely to mislead than inform, misattributing the views of the amicus to the supporters or members of the organization. Whatever the fear or speculation driving such proposals, they are unsupported by real-world evidence of an actual problem tied to the lack of the disclosure of membership rolls.

In addition, even assuming that there is a substantial government interest with respect to such disclosure, the rules advocated by the Whitehouse Letter and the AMICUS Act are far from narrowly tailored: the AMICUS Act would compel the identification of any person who has contributed at least three percent of the gross revenues of the amicus, or more than $100,000, in the previous calendar year. *See* S. 1411 § 2(b), 116th Cong. (2019). That disclosure rule is almost certain to sweep in many members or donors who have had no role in "influencing the positions the [amicus] takes in litigation," especially in litigation concerning discrete issues. Whitehouse Letter at 6. As the Supreme Court has explained, such "[b]road and sweeping state inquiries" are likely to "discourage citizens from exercising rights protected by the Constitution," *Americans for Prosperity Foundation*, 141 S. Ct. at 2384 (quoting *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality opinion)), such as presenting their views in a publicly filed amicus brief.

The Whitehouse Letter recognizes that disclosure rules of the kind proposed in the AMICUS Act "may implicate associational and/or speech rights, such as those at issue in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958))." It nevertheless contends that not "*all* membership organizations" are entitled to such rights, and suggests that "business networks" like the Chamber may be freely compelled to divulge their membership. Whitehouse Letter at 6. But, of course, the First Amendment emphatically rejects drawing lines based on a group's views, beliefs, or perspectives, whether they be business-oriented or otherwise.

Indeed, in *Patterson* itself the Supreme Court recognized that it is "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters": any restrictions on such association, no matter the character of the association, are subject "to the closest scrutiny." *Patterson*, 357 U.S. at 460-61. And the Supreme Court recently reaffirmed that principle in *Americans for Prosperity Foundation*, noting that the disclosure rules addressed in that case imposed an unconstitutional "deterrent effect" on associations "span[ning] the ideological spectrum, and indeed the full range of human endeavors." 141 S. Ct. at 2388. The fact that only some of those organizations represented "uniquely sensitive causes" did not detract from, but rather "underscored," the "gravity of the privacy concerns in this context." *Id.* If anything, the argument for intrusive disclosure requirements is especially weak as applied to an organization like the Chamber whose interests are fully transparent.

C. The AMICUS Act Subcommittee's Recommendations Go Too Far In Accommodating The Concerns Voiced In The Whitehouse Letter

The AMICUS Act Subcommittee correctly recognizes that "the most fundamental concern expressed in the [Whitehouse Letter] and underlying the AMICUS Act"—namely, that "the current disclosure rules allow deep-pocketed persons or organizations to wield outsize influence through amicus briefs"—erroneously "treats the filing of amicus briefs as akin to lobbying," and disregards the constitutional "right to participate anonymously in the public square." *See* AMICUS Act Subcommittee Memorandum Re: AMICUS Act and Potential Amendments to Rule 29, at 6 (Mar. 12, 2021) (Subcommittee Memo). The Subcommittee Memo also properly recognizes that the kind of broad and virtually open-ended disclosure favored by the Whitehouse Letter and proposed in the AMICUS Act would "raise concerns regarding freedom of association." *Id.* at 9 (citing *Patterson*, 357 U.S. at 449). The Chamber agrees with those conclusions, as well as with the Subcommittee's view that because "rules of procedure typically apply evenhandedly to all participants in litigation," the Advisory Committee should reject the AMICUS Act's proposal discriminating between "repeat filers" and other amici with respect to the imposition of disclosure rules. Subcommittee Memo at 7.

But the Chamber opposes the Subcommittee's suggestion—made before the Court's recent decision in *Americans for Prosperity Foundation*—that amici should be compelled to disclose an association with a litigating party or party's counsel in any circumstance where the party or party's counsel has a 10% or greater ownership interest in the amicus, or where a party or party's counsel has contributed 10% or more of the gross annual revenue of the amicus during the twelve-month period preceding the filing of the amicus brief. *See* Subcommittee Memo at 8-9. If any change is to be made, the Chamber agrees that adopting a percentage-based approach is more sensible than an arbitrary monetary figure (given that an amount that might be significant to one organization and trivial to another). Although this proposal is more measured than the broad-scale disclosure requirements proposed in the Whitehouse Letter, the 10% trigger—not tied to contributions made to the brief itself—still is not sufficiently tailored to address the constitutional questions raised by

such a rule. Moreover, there is no evidence of any actual problem that would be addressed by such an amendment to Rule 29.

Compelled disclosure of an association between a private advocacy organization and its members implicates the First Amendment principles discussed above. *See supra* at 4-5. Compelled disclosure of a party's earmarked financial contribution to fund an amicus brief is one thing. But the additional disclosure requirement contemplated by the Subcommittee would require disclosure of associational ties in many cases where such ties are *not* directed at a particular amicus brief, or even at advocacy of legal positions at all, and thus are not intended to evade the disclosure rules set out in the current version of Rule 29.

Under the Subcommittee's proposal, members and donors who wish to remain anonymous might withhold funding from an advocacy organization to avoid disclosure, even though their interest in participating in the organization had nothing to do with amicus briefs. That would put organizations to the Hobson's choice of foregoing amicus activity altogether or risk losing members and donors for other, First Amendment-protected advocacy activities, such as lobbying and voter education. In short, the disclosure requirement contemplated by the subcommittee is overbroad because it would chill associational rights in a substantial number of applications judged in relation to its "legitimate sweep." *Americans for Prosperity Foundation*, 141 S. Ct. at 2387 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

Moreover, the chilling effect would have knock-on effects for the presentation of amicus briefing to the courts in ways that run counter to the policy goals of Rule 29. It is not unreasonable to assume that, if the rule suggested by the Subcommittee were put into practice, at least some regular litigants would cut their contributions to advocacy organizations with which they are generally aligned for fear of triggering the amicus disclosure rules, even when funding is not tied to amicus briefs. To the extent that such cuts reduce the resources and the briefing capacity of such advocacy groups, the result will be less speech, in the form of a decrease in the number amicus briefs filed in the appellate courts. But Rule 29 and Supreme Court Rule 37 are built on the principle that amicus briefs are generally helpful—and the more the better so long as they present distinct arguments and authorities to the reviewing court. *See* Sup. Ct. R. 37.1 ("An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court."). Such advocacy is a vital part of this nation's vibrant public discourse and should be celebrated, not discouraged.

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No disclosure system will perfectly address the policy concerns that motivate the disclosure rules set out in Rule 29. But the current disclosure regime strikes an appropriate and time-tested balance between the interest in protecting the integrity of the amicus process and the protection of associational rights. The AMICUS Act and proposals made in the Whitehouse Letter, meanwhile, rest on a basic misconception of the role of amicus briefing in federal litigation and contravene important First Amendment associational rights. In considering whether and how to modify the disclosure rules set out in Rule 29, the Advisory Committee should adhere to the purposes behind the current set of disclosure rules, and reject broad disclosure rules that needlessly raise constitutional problems recently highlighted by *Americans for Prosperity Foundation*. In this situation, the Committee is better served by continuing to monitor the situation rather than rushing ahead with the material amendments that have been proposed to Rule 29.

Thank you for your consideration.

Respectfully,

Daryl Joseffer

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