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A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency

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ABSTRACT. This Essay explores how amicus briefs became a tool for coordinated judicial lobbying by dark-money interests. I show how current funding-disclosure rules for amici fail to provide genuine transparency—undermining fairness—and discuss reforms that could improve the judiciary's amicus-disclosure regime and restore faith in the courts.

INTRODUCTION

Over the past several years, the prevalence of anonymously funded amicus curiae briefs at the Supreme Court has expanded. Supreme Court rules purport to require disclosure of amicus funding to prevent anonymously funded briefs.[1] But in practice, these disclosure statements rarely provide any information.[2] Meanwhile, investigations by the media and watchdog organizations have revealed a network of groups that receive common amicus funding and often have ties to the parties in interest. These groups regularly file briefs before the Court with no disclosure of their common funding or connections to the parties. This practice of judicial lobbying through amicus influence poses ethical issues representative of today's political climate, in which dark money abounds, compromising our courts.

1. SUP. CT. R. 37(6).

2. *See, e.g.*, Brief of the Cato Institute & NFIB Small Business Legal Center as Amici Curiae in Support of Petitioners at 1 n.1, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107) ("Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than amici funded its preparation or submission.").

My House and Senate colleagues and I have proposed legislation — the Assessing Monetary Influence in the Courts of the United States (AMICUS) Act[3] — to address the problem of undisclosed judicial-branch lobbying by dark-money interests.[4] I have also engaged directly with the judiciary to encourage self-directed reforms.[5] Recently, at my urging and after a referral by the Supreme Court, the Judicial Conference Committee on Rules of Practice and Procedure created a new subcommittee to study and address amicus-disclosure rules.[6] Donor-disclosure requirements are claimed to raise constitutional questions, with opponents claiming a First Amendment associational right to anonymity[7] and representatives of the judiciary suggesting that legislative reform might infringe upon the separation of powers.[8] But these challenges are surmountable, and dark-money influence will continue to undermine our democracy absent reform.

This Essay grapples with amicus influence within the broader context of dark-money influence not only on the judiciary, but also on American politics writ large. In Part I of this Essay, I discuss the historical origins of the amicus

3. S. 1411, 116th Cong. (2019).

4. Press Release, Senator Sheldon Whitehouse, Whitehouse, Johnson Renew Effort to Strengthen Judicial Influence Rules Following Action by Federal Courts (Apr. 22, 2021), https://www.whitehouse.senate.gov/news/release/whitehouse-johnson-renew-effort-to-strengthen-judicial-influence-rules-following-action-by-federal-courts [https://perma.cc/6LA2-A34H].

5. Letter from Sheldon Whitehouse, U.S. Sen., to John G. Roberts, C.J. of the U.S. Sup. Ct., and Scott S. Harris, Clerk of the U.S. Sup. Ct. 3 (Jan. 4, 2019) [hereinafter Letter from Sheldon Whitehouse (Jan. 4, 2019)] (on file with author); *see also* Letter from Sheldon Whitehouse, U.S. Sen. & Hank Johnson, U.S. Rep., to John G. Roberts, C.J. of the U.S. Sup. Ct. & Scott S. Harris, Clerk of the U.S. Sup. Ct. 2-3 (June 18, 2019) (on file with author) (discussing the January 4, 2019, letter and making further related observations); Letter from Sheldon Whitehouse, U.S. Sen. & Hank Johnson, U.S. Rep., to John G. Roberts, C.J. of the U.S. Sup. Ct. & Scott S. Harris, Clerk of the U.S. Sup. Ct. 3 (May 13, 2020) (on file with author) (continuing the January 2, 2019, and June 18, 2019, correspondence regarding the Supreme Court's Rule 37.6 and the AMICUS Act).

6. *See* Marcia Coyle, *Tougher Amicus Disclosure Rules See Early Support from Judiciary Panel*, NAT'L L.J. (Apr. 16, 2021, 9:01 PM), https://www.law.com/nationallawjournal/2021/04/16/tougher-amicus-disclosure-rules-see-early-support-from-judiciary-panel [https://perma.cc/UU8B-CC8M].

7. Brief for Petitioner at 20, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) (Nos. 19-251, 19-255) ("The First Amendment Prohibits Compelled Donor Disclosure Unless Narrowly Tailored To An Overriding Government Interest."); *see also* Brief for the Petitioner Thomas More Law Center at 19, *Ams. for Prosperity Found.*, 141 S. Ct. 2373 (Nos. 19-251, 19-255) ("Freedom of association is closely allied to freedom of speech. . . . It enjoys a generous zone of First Amendment protection." (internal quotations and citations omitted)).

8. *See* Letter from Scott S. Harris, Clerk of the U.S. Sup. Ct., to Sheldon Whitehouse, U.S. Sen. 2 (Feb. 27, 2019) (on file with author) ("[Amicus disclosure] legislation would intrude into areas historically left to the Court.").

curiae brief and its expansion as a tool for coordinated judicial-lobbying campaigns by entrenched interests. In Part II, I review the current disclosure rules for amicus briefs and how they fail to compel genuine disclosure. In Part III, I show how those failings of disclosure do real damage to judicial fairness and weaken public faith in the courts and the foundations of our democracy. Finally, in Part IV, I lay out pathways for potential reforms that could update our disclosure regime and have a salutary effect across our legal system.

I. THE EVOLUTION OF THE AMICUS

A. The Historical Role and Recent Prevalence of Amici

Amicus curiae briefs are briefs written by nonparties to a case for the purpose of providing information, expertise, insight, or advocacy. Latin for "friend of the court," amicus briefs find their roots in Roman and British common law.[9] In those traditions, the amicus—usually but not always a lawyer in the community—was tasked with giving the court information it otherwise lacked, or rectifying "manifest error" in the court's reasoning.[10] In the days before law libraries and digital search tools, courts could turn to such a "bystander" for "oral 'Shepardizing,' the bringing up of cases not known to the judge."[11]

In the early-nineteenth century, Henry Clay, who would go on to become a Senator,[12] submitted the first amicus brief to the Supreme Court in *Green v. Biddle*, a case involving land disputes in his home state of Kentucky.[13] From the late nineteenth century through the 1930s, third-party, private-litigant, and federal- or state-government "ex officio" briefs were gradually subsumed under the amicus header.[14] By the mid-twentieth century, it became more and more common for outside organizations to intervene in support of a litigating party and to make arguments directly for the party on whose behalf the amicus brief was filed, rather than the amicus itself.[15]

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9. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 694-97 (1963).

10. *Id*. at 695.

11. *Id*.

12. David S. Heidler, *Henry Clay: American Statesman*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Henry-Clay [https://perma.cc/D2SW-BA3V].

13. *Id.*; Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823).

14. Krislov, *supra* note 9, at 696-704.

15. *See* Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae,* 49 U. RICH. L. REV. 361, 369 (2015).

Over the past century, the volume of Supreme Court amicus briefs swelled from a slow trickle to a stream, and finally to a flood. Amici filed 781 briefs in the 2014 Term,[16] a more than 800% increase from the 1950s and a 95% increase from 1995.[17] And the number of filings continues to rise. In the Court's 2019 Term, amici filed 911 briefs, a rate of about sixteen per case;[18] the recently concluded 2020 Term featured almost 940 amicus briefs filed at the merits stage.[19] Some high-profile cases even draw amici numbering in the triple digits.[20]

There has been an accompanying explosion of amicus activity at the certiorari (cert) stage, where litigants petition the Supreme Court to hear or reject a case. Between 1982 and 2014, the percentage of petitions with at least one cert-stage amicus more than doubled from 6% to 14%.[21] Why amici increasingly weigh in at this step of the process is easy to understand. The Court receives thousands of cert petitions per year but elects to hear fewer than seventy-five of those cases.[22] With such a low selection rate, persuading the Court to wade into a particular dispute is a critical first step for those seeking to steer its agenda.

Though amicus activity at the circuit-court level is more modest in scope and did not increase significantly during the first decade of the 2000s,[23] cases of constitutional or political import still draw large groups of amici. For example, *Americans for Prosperity Foundation v. Becerra*[24] (later argued at the Supreme

16. 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), https://www.arnoldporter.com/-/media/files/perspectives/publications/2015/08/record-breaking-term-for-amicus-curiae-in-suprem/files/publication/fileattachment/recordbreakingtermforamicuscuriaeinsupremecourtr.pdf [https://perma.cc/PXB3-WRQA]. For earlier decades, see generally Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 749 (2000), which notes that "the incidence of amicus curiae participation in the Supreme Court has increased dramatically over the last fifty years."

17. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 (2016).

18. Anthony J. Franze & R. Reeves Anderson, *Amicus Curiae at the Supreme Court: Last Term and the Decade in Review*, SUP. CT. BRIEF (Nov. 18, 2020), https://www.law.com/supremecourtbrief/2020/11/18/amicus-curiae-at-the-supreme-court-last-term-and-the-decade-in-review [https://perma.cc/935B-JE4Y].

19. Adam Feldman, *Amicus Briefs on the Merits for the 2020 Supreme Court Term*, JURIS LAB (June 3, 2021), https://thejurislab.com/amicus-briefs-2020 [https://perma.cc/KB5P-HRUB].

20. *See* Franze & Anderson, *supra* note 16.

21. Larsen & Devins, *supra* note 17, at 1938.

22. Deborah Beim & Kelly Rader, *Ideology, Certiorari, and the Development of Doctrine in the U.S. Courts of Appeals* 5 (Cir. Splits Project, Working Paper No. 2, 2021) ("In recent years, litigants have filed around 7000 petitions for certiorari each term, and the Court granted only about one percent of them.").

23. Anderson, *supra* note 15, at 371.

24. 919 F.3d 1177 (9th Cir. 2019).

Court as *Americans for Prosperity Foundation v. Bonta*[25]) drew dozens of amicus briefs on appeal in the United States Court of Appeals for the Ninth Circuit.[26]

The increasing prevalence of amicus briefs correlates with a rise in the Supreme Court's reliance on them. From 2008 to 2013, the Supreme Court cited amicus briefs 606 times in 417 opinions.[27] By contrast, between the 1994 and 2003 Terms, the Court's majority opinion referenced an amicus brief in only 38% of the 687 cases in which amicus briefs were filed.[28] And between the 1946 and 1955 Terms, all opinions combined—majority, concurring, and dissenting—referred to amicus briefs in only 18% of the cases with amicus filers.[29] As two scholars of the Supreme Court put it, "There is no question but that the total number of references to amici is substantial, and that the frequency of such references has been increasing over time."[30] These references within the Court's opinions often adopt language and arguments from amicus briefs.[31] The extent to which the Court's opinions directly quote amici further highlights just how impactful amicus briefs can be to the Court's decision-making.

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25. No. 19-251 (July 1, 2021).

26. Additionally, certain circuits may be greater magnets for amicus briefs than others. For instance, as of 2008, judges on the D.C. Circuit (the circuit hearing many cases involving the federal government that ultimately reach the Supreme Court) and the Ninth Circuit (the circuit most frequently overturned) estimated that they had a higher rate of cases featuring at least one amicus brief than judges on other circuits. *See* Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency and Adversarialism*, 27 REV. LITIG. 669, 689 n.75 (2008).

27. Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1778 (2014).

28. Ryan J. Owens & Lee Epstein, *Amici Curiae During the Rehnquist Years*, 89 JUDICATURE 127, 130 (2005).

29. Kearney & Merrill, *supra* note 16, at 757.

30. *Id.*

31. Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 L. & SOC. INQUIRY 955, 961 (2007); Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *Me Too?: An Investigation of Repetition in U.S. Supreme Court Amicus Curiae Briefs*, 97 JUDICATURE 228, 228-29, 234 (2014) (arguing, using data from plagiarism-detection software, that amicus briefs "influence judicial behavior" by "provid[ing] judges with novel information that would otherwise not be available to them," and by being "more interested with the broader policy implications of a decision" than parties' briefs); *see also* Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y REV. 917, 920, 922 (2015) (finding, using "computer assisted content analysis techniques," that amicus briefs "affect[] the substance" of opinions and that Justices "seldom adopt information from amicus briefs into their opinions for the purpose of criticizing that information").

B. The Modern Amicus Machine

The sharp increase in the volume of amicus filings reflects a growing recognition of a basic truth: the amicus brief is now a powerful lobbying tool for interest groups. Indeed, most of the explosion of amicus activity comes from briefs that are more from a "friend of a party" than a friend of the Court. These briefs advance the amicus's own interests or, for member organizations, the interests of their members.[32] In the case of briefs funded by dark money, the briefs advance the interests of a hidden presence that is unknown to the parties, the Court, and the public.

As an avenue of influence, the amicus brief is disproportionately available to well-connected political forces with money and the motivation to use it. Litigants now see lining up a robust slate of amici as an essential component of litigating before appellate courts.[33] But doing so requires insider knowledge and significant resources. Many major cases now have an "amicus wrangler" or an "amicus whisperer"—usually a lawyer connected to the party-in-interest—who coordinates and vets prospective amici and their arguments before they file.[34] Litigants routinely seek out former Supreme Court clerks and other members of the Supreme Court "elite" to serve as counsel for amici. At the cert stage, these connected lawyers can improve the chances of the Court viewing the case as "certworthy."[35] At any stage, seasoned members of the Supreme Court Bar add credibility to the amicus briefs. As the late Justice Ginsburg candidly admitted in a 2008 interview:

> [C]lerks often divide the amicus briefs into three piles: those that should be skipped entirely; those that should be skimmed; those that should be read in full. If the attorney submitting the amicus brief has significant experience before the Court, it would be more likely that their brief would be placed in a higher priority pile.[36]

These highly orchestrated amicus efforts often have a specific strategic purpose: a flotilla of substantively similar amicus briefs can create the appearance of

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32. Anderson, *supra* note 15, at 378-80.

33. Larsen & Devins, *supra* note 17, at 1920 (quoting Paul M. Smith, *The Sometimes Troubled Relationship Between Courts and Their "Friends*,*"* 24 LITIG. 24, 25 (1998)).

34. *Id.* at 1919-26.

35. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1528 (2008).

36. *See* Simard, *supra* note 26, at 688.

broad support for a particular position, even if a party to the litigation has engineered the filing process for briefs on its side.

This carefully managed process can confer unfair advantages to a litigant. As former Seventh Circuit Judge Posner explained as early as 1997, the positions of amici briefs in many cases dovetail so closely that they "in effect merely extend[] the length of the litigant's brief."[37] Therefore, to Judge Posner, such briefs "are an abuse."[38] Sharing Judge Posner's concerns, the Advisory Committee on the Federal Rules of Appellate Procedure imposed a shorter length for circuit-court amicus briefs the following year, noting in its comments that each amicus brief "is supplemental"[39] and "should treat only matter not adequately addressed by a party."[40]

C. *The Amicus Machine in Action:* Americans for Prosperity Foundation v. Bonta

Americans for Prosperity Foundation v. Bonta provides a recent and extreme example of the "flotilla" phenomenon. Plaintiff Americans for Prosperity Foundation (AFPF), the 501(c)(3) arm of the Koch network's right-wing 501(c)(4) political-advocacy group Americans for Prosperity, objected to a California state regulation that required 501(c)(4) nonprofits to confidentially disclose their largest donors.[41] The nonprofits had to provide the state Attorney General with a copy of their IRS Form 990 Schedule B — information the organizations must already, of course, provide to the IRS.[42] The case proceeded through the federal courts with little fanfare or media attention. But at the Supreme Court cert stage, a veritable armada of amici supporting AFPF barraged the Court, urging it to grant cert.

This was a highly coordinated effort made possible only by the money and connections of the Koch political enterprise. At least fifty-five of the cert-stage

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37. Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997).

38. *Id.*

39. FED R. APP. P. 29 advisory committee's note to 1998 amendment, subdivision d.

40. *Id.*

41. Ams. for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049 (C.D. Cal. 2016).

42. *Schedule B (Form 990, 990-EZ, or 990-PF) (2020)*, INTERNAL REVENUE SERV. 5, https://www.irs.gov/pub/irs-pdf/f990ezb.pdf [https://perma.cc/7N74-8UEF] ("Organizations described in section 501(c)(3) and section 527 are . . . required to report the names and addresses of their contributors on Schedule B.").

amici in support of the petitioner[43] had taken money either from the Koch political network or from a Koch-linked[44] anonymous account at DonorsTrust, an administrator of "donor-advised" funds that has been described as "the dark-money ATM of the right."[45] Subsequently, at the merits stage, at least forty-five filers[46] had apparent financial ties to the Koch network and/or DonorsTrust. Additionally, the Center for Media and Democracy found that eleven prominent

43. Namely: American Center for Law and Justice, Buckeye Institute, Cato Institute, Center for Arizona Policy, Center for Constitutional Jurisprudence (Claremont Institute), Chamber of Commerce of the United States of America, Christian Civic League of Maine, Citizens United, Citizens United Foundation, Committee for Justice, Delaware Family Policy Council, Family Foundation of Kentucky, Family Foundation of Virginia, Family Policy Alliance, Family Policy Alliance of Georgia, Family Policy Alliance of Idaho, Family Policy Alliance of Kansas, Family Policy Alliance of New Jersey, Family Policy Alliance of New Mexico, Family Policy Alliance of North Dakota, Family Policy Alliance of Wyoming, Family Policy Institute of Washington, Foundation for Michigan Freedom, Gun Owners Foundation, Gun Owners of America, Hawaii Family Forum, Independent Women's Forum, Indiana Family Institute, Institute for Free Speech, Institute for Justice, Judicial Watch, Leadership Institute, Liberty Justice Center, Massachusetts Family Institute, Minnesota Family Council, Montana Family Foundation, National Association of Manufacturers, National Right to Work Commission, National Right to Work Legal Defense Fund, Nebraska Family Alliance, New Civil Liberties Alliance, New Hampshire Cornerstone Policy Research Action, New Yorker's Family Research Foundation, Pacific Legal Foundation, Pacific Research Institute, People United for Privacy Foundation, Proposition 8 Legal Defense Fund, Public Integrity Alliance, Public Interest Legal Foundation, South Dakota Family Heritage Alliance, Texas Public Policy Foundation, The Presidential Coalition, U.S. Chamber of Commerce Foundation, West Virginia Family Foundation, and Wisconsin Family Council, Inc. *See generally Center for Media and Democracy*, SOURCEWATCH, https://www.sourcewatch.org [https://perma.cc/BL5Z-8MUP] (tracking corporations' public-relations campaigns, including corporate front groups and public-relations operations). For additional lists of donors, see *DonorsTrust*, DESMOG, https://www.desmog.com/who-donors-trust [https://perma.cc/4QJ7-PE72], which provides a catalogue of recipients of DonorsTrust funding, from an environmentalist group tracking the funding sources of climate-change denial); and CONSERVATIVE TRANSPARENCY, http://conservativetransparency.org [https://perma.cc/TT3H-HZ6V], which offers a searchable database of reported contributions to right-wing nonprofit groups, collected from known donors' IRS Form 990 submissions and other sources.

44. JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 372 (2017) ("[P]rivate foundations accounted for the . . . million[s] pooled by DonorsTrust . . . . Many were the same billionaires and multimillionaires who formed the Koch network.").

45. Andy Kroll, *Exposed: The Dark-Money ATM of the Conservative Movement*, MOTHER JONES (Feb. 5, 2013), https://www.motherjones.com/politics/2013/02/donors-trust-donor-capital-fund-dark-money-koch-bradley-devos [https://perma.cc/8SEH-5D9V]; Alex Kotch, *Conservative Foundations Finance Push to Kill the CFPB*, PRWATCH (Feb. 13, 2020), https://prwatch.org/news/2020/02/13540/conservative-foundations-finance-push-kill-cfpb [https://perma.cc/3RBH-BQYB].

46. Namely: American Center for Law and Justice, American Legislative Exchange Council, Americans United for Life, Atlantic Legal Foundation, Becket Fund for Religious Liberty,

right-wing groups gave close to $222 million to sixty-nine of the organizations filing amicus briefs in support of AFPF.[47]

It is difficult—if not impossible—to credibly argue that such amici are independent of the plaintiff, because AFPF *is itself* a central political organization of the Koch network.[48] Yet none of these groups disclosed their financial ties to the plaintiff. Why would they? The Court does not require them to. As I discuss in greater detail in Part II below, existing rules, as currently interpreted by the courts, require only disclosure of funds earmarked specifically for the preparation and submission of a *particular* brief—a level of specificity that donors almost never reach, even when funding the entire amicus practice of a legal nonprofit.

The lack of disclosure obscured the fact that the amicus armada in *AFPF*—one of the largest ever assembled—featured far more plaintiff- and donor-network-tied amici than even some of the highest-profile cases involving right-wing donor interests. Consider, for instance, *National Federation of Independent Businesses v. Sebelius* (*NFIB*), the first major constitutional challenge to the Affordable Care Act (ACA).[49] In *NFIB*, anonymized right-wing donors hostile to the ACA pumped over $2 million into the litigation effort.[50] However, trailing the

Buckeye Institute, Cato Institute, Center for Constitutional Jurisprudence, Center for Equal Opportunity, Chamber of Commerce of the United States of America, Citizens United, Citizens United Foundation, Concerned Women for America, Family Foundation, Foundation for Michigan Freedom, Freedom Foundation, Goldwater Institute, Gun Owners Foundation, Gun Owners of America, Illinois Family Institute, Independent Women's Law Center, Institute for Free Speech, Institute for Justice, James Madison Center for Free Speech, Judicial Watch, Inc., Leadership Institute, Liberty Justice Center, National Association of Manufacturers, National Legal Foundation, National Right to Work Committee, National Right to Work Legal Defense Foundation, National Taxpayers Union Foundation, New Civil Liberties Alliance, Pacific Justice Institute, Pacific Legal Foundation, Pacific Research Institute, People United for Privacy Foundation, Proposition 8 Legal Defense Fund, Public Interest Legal Foundation, Rio Grande Foundation, Southeastern Legal Foundation, Thomas More Society, U.S. Chamber of Commerce Foundation, Young Americans for Liberty, and Young America's Foundation. *See supra* note 43.

47. David Armiak, *Major Right-Wing Funders Push Supreme Court Case Against Donor Disclosure*, PRWATCH (Apr. 26, 2021, 10:45 AM), https://www.prwatch.org/news/2021/04/13714/major-right-wing-funders-push-supreme-court-case-against-donor-disclosure [https://perma.cc/9C6D-BUX5].

48. Alexander Hertel-Fernandez, Caroline Tervo & Theda Skocpol, *How the Koch Brothers Built the Most Powerful Rightwing Group You've Never Heard Of*, GUARDIAN (Sept. 26, 2018, 3:01 PM EST), https://www.theguardian.com/us-news/2018/sep/26/koch-brothers-americans-for-prosperity-rightwing-political-group [https://perma.cc/U4HZ-8ZSN].

49. 567 U.S. 516 (2012).

50. Paul Blumenthal, *NFIB Received Huge Koch Brothers-Linked Contribution in 2011*, HUFFPOST (Sept. 17, 2013, 6:03 PM EST), https://www.huffpost.com/entry/nfib-koch-brothers_n_3943225 [https://perma.cc/T8RE-T454]; *see also* Chris Frates, *Koch Bros.-Backed Group Gave Millions to Small Business Lobby*, CNN (Nov. 21, 2013, 8:05 PM EST), https://www.cnn.com

flotilla in *AFPF*, only four groups filed at the cert stage and only seven groups tied to that same funding network weighed in at the merits stage.[51] *Janus v. American Federation of State, County & Municipal Employees, Council 31*,[52] the right-wing attack on union agency-shop fees, and *Seila Law v. Consumer Financial Protection Bureau*,[53] a Federalist Society-inspired assault on the "administrative state," each featured groups of only about a dozen commonly funded amici.[54]

Why was the amicus flotilla in *AFPF* so large, outpacing those in cases involving national, high-stakes issues such as labor organizing and healthcare? Simply put, because the stakes for the donors behind *AFPF* could not have been higher. Indeed, the issue in *AFPF* was an existential one for the amicus machine: in deciding nonprofit donors' alleged right to anonymity, the Court would directly impact the ability of dark-money donors to continue shaping judicial outcomes. In effect, the amicus briefs argued for a constitutional right to anonymous dark-money spending in our democracy. The size of the *AFPF* flotilla also functioned as a signaling device: it told the ideologically aligned members of the Court that a "correct" outcome in this case was more urgent than it might otherwise have seemed from the narrow question presented. And many amicus briefs asked the Court to go well beyond the narrow confines of the case.[55]

/2013/11/21/politics/small-business-big-donor/index.html [https://perma.cc/X9VA-LDYG] (reporting that the NFIB and its affiliated groups received $2.5 million from a Koch brothers-backed conservative advocacy group).

51. Namely: American Civil Rights Union, Chamber of Commerce of the United States of America, American Center for Law and Justice, Competitive Enterprise Institute, Family Research Council, Texas Public Policy Foundation, and Cato Institute. Other briefs, such as the brief amici curiae for "Economists," featured some individuals employed by groups of this sort as signatories.

52. 138 S. Ct. 2448 (2018).

53. 140 S. Ct. 2183 (2020).

54. Namely: Claremont Institute, Pacific Legal Foundation, Southeastern Legal Foundation, National Federation of Independent Business (NFIB) Small Business Legal Center, Washington Legal Foundation, Cato Institute, Landmark Legal Foundation, New Civil Liberties Alliance, Buckeye Institute, Center for the Rule of Law, Competitive Enterprise Institute (CEI), The 60 Plus Association, and Chamber of Commerce of the United States of America. *See* Brief of Amici Curiae U.S. Senators Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirono in Support of Court-Appointed Amicus Curiae at 1a-6a, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (No. 19-7).

55. *See, e.g.,* Br. of American Legislative Exchange Council as Amici Curiae in Support of Petitioners (Mar 1, 2021), at 14 ("The Court should take the present opportunity to instruct the lower courts that the associational right to privacy is an important right in all cases, compelled disclosure is per se harm, and it is always the government's burden to justify infringement of that right.") and 19-20 ("[T]he Court should . . . restore a high bar for courts to uphold government invasions of associational privacy in all contexts. One way to do that . . . would be for the Court to clarify that "exacting scrutiny" and "strict scrutiny" require the government to

Sure enough, Chief Justice Roberts's ruling in favor of the Koch network—a 6-3 decision with all Republican-appointed Justices in the majority—cast doubt on the constitutionality of disclosure requirements of *any* kind, turbocharging the kind of secretive influence through which the Koch operation and its allies already dominate the public sphere.[56]

Significantly, many of the donors behind these amici lobbied for the confirmation of the Justices hearing the case. For instance, Americans for Prosperity, the 501(c)(4) group directly affiliated with the plaintiff Foundation, spent "millions" of dollars on a "Full Scale Campaign" to confirm Justice Barrett to the bench while AFPF's cert petition was pending before the Court.[57] Yet, in spite of all this lobbying on her behalf by an affiliate of one of the parties, Justice Barrett rebuffed calls for her recusal in this matter by me and others—a recusal seemingly required under the Court's own due-process precedent[58]—and heard the case anyway.[59]

D. Amicus Briefs and Dark-Money Influence on the Courts

Amicus briefs play an important role in the appellate process. Indeed, I have filed many myself.[60] Interested parties should be able to use amicus briefs to advance their view of the law or their conception of the public interest or to educate

satisfy the same proof requirements."); Br. of the Legacy Foundation as Amici Curiae in Support of Petitioners (Mar 1, 2021), at 25 (because of the risks of "disclosure in the age of the Internet," "the scrutiny applied to disclosure statutes must be higher"); Br. of the Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Petitioners (Mar 1, 2021), at 16-19 ("The Court should . . . clarify that *NAACP v. Alabama* applies whenever associational privacy is threatened").

56. *See generally* Mayer, *supra* note 43 (revealing a conservative plutocracy, including the Koch brothers, drowning out its adversaries in the political sphere through its massive amount of wealth).

57. *AFP Mounts Full Scale Campaign to Confirm Judge Amy Coney Barrett*, AMS. PROSPERITY (Sept. 26, 2020), https://americansforprosperity.org/afp-mounts-full-scale-campaign-to-confirm-judge-amy-coneybarrett [https://perma.cc/3VVM-357H].

58. *See* Caperton v. Massey Coal Co., 556 U.S. 868, 876-90 (2009).

59. *See* Letter from Sheldon Whitehouse, U.S. Sen., Richard Blumenthal, U.S. Sen. & Hank Johnson, U.S. Rep., to Amy Coney Barrett, J. of the U.S. Sup. Ct. (Apr. 16, 2021), https://www.whitehouse.senate.gov/imo/media/doc/210416_Letter%20to%20Justice%20Barrett.pdf [https://perma.cc/AZU3-SJKS] (indicating Justice Barrett did not respond to this letter). Americans for Prosperity (AFP) also invested heavily in confirmation campaigns for Justices Gorsuch and Kavanaugh, though before Americans for Prosperity Foundation's (AFPF's) case was pending before the Court—a fact relevant to the due-process recusal analysis under *Caperton v. Massey Coal Co*.

60. At the Supreme Court: Brief of United States Senators Sheldon Whitehouse and John McCain as Amici Curiae in Support of Respondents, Am. Tradition P'Ship, Inc. v. Bullock, 132 S. Ct.

a court with their specialized expertise. But the emergence of coordinated, secretly funded amicus campaigns like the effort in *AFPF* reflects a troubling avenue of special-interest influence within the courts, obscuring from both the public and the Court who is really in the courthouse presenting arguments and how a favorable ruling might benefit them. As the First Circuit emphasized in the immediate aftermath of the *AFPF* decision, "there is plainly an informational interest served" by laws requiring identification of a speaker's donors, as

2490 (2012) (No. 11-1179); Brief of Current United States Senators Sheldon Whitehouse, Lindsey O. Graham, Ted Cruz, and Christopher A. Coons as Amici Curiae in Support of Respondents, Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016) (No. 14-770); Brief of Amici Curiae United States Senators Sheldon Whitehouse and Lindsey Graham in Support of Petitioners, Jesner v. Arab Bank, 138 S. Ct. 1386 (2018) (No. 16-499); Brief of Senators John McCain and Sheldon Whitehouse in Support of Appellees, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161); Brief of Senators Sheldon Whitehouse and Richard Blumenthal as Amici Curiae in Support of Respondents, Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466); Brief of Amicus Curiae Senator Sheldon Whitehouse in Support of Respondent, New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019) (No. 17-340); Brief of Amicus Curiae Senator Sheldon Whitehouse in Support of Respondent, Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (No. 18-15); Brief of Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin, and Kirsten Gillibrand as Amici Curiae in Support of Respondents, N.Y. State Pistol & Rifle Ass'n v. City of New York, New York, 139 S. Ct. 939 (2019) (No. 18-280); Brief of Amicus Curiae Senator Sheldon Whitehouse in Support of Appellees, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (No. 18-422); Brief of Amici Curiae U.S. Senators Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirono in Support of Court-Appointed Amicus Curiae, *supra* note 54; Brief for Amicus Curiae Senator Sheldon Whitehouse in Support of Respondent, United States of America, Kelly v. United States, 140 S. Ct. 1565 (2020) (No. 18-1059); Brief of Amici Curiae Senators Whitehouse, Cardin, Blumenthal, Warren, Markey, and Van Hollen in Support of Respondent, BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532 (2021) (No. 19-1189); Brief of United States Senators as Amici Curiae in Support of Petitioners, Lieu v. Fed. Elections Comm'n, 141 S. Ct. 814 (2020) (No. 19-1398); Brief of Senators Sheldon Whitehouse, Jeff Merkley, Richard Blumenthal, Cory Booker, and Alex Padilla in Support of Respondents, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107); Brief of U.S. Senators as Amici Curiae in Support of Respondent, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) (No. 19-251). In lower courts: Brief of Senators Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirono as Amici Curiae in Support of Appellants' Petition for Hearing En Banc, Lieu v. Fed. Election Comm'n, 1:16-cv-02201-EGS, 2019 WL 5394632 (D.C. Cir. Oct. 3, 2019) (No. 19-5072); Brief of Amicus Curiae Senators Sheldon Whitehouse and Edward J. Markey in Support of Appellees and Affirmance, Mayor of Baltimore v. BP, 952 F.3d 452 (4th Cir.) (2020) (No. 19-1644); Brief of Amici Curiae Senators Sheldon Whitehouse, Jack Reed, and Edward Markey in Support of Appellees and Affirmance, Rhode Island v. Shell Oil Prods. Co., 979 F.3d 50 (1st Cir.) (2020) (No. 19-1818); Brief for U.S. Senators Sheldon Whitehouse, Jeff Merkley, Kirsten Gillibrand, Brian Schatz, and Edward J. Markey, as Amici Curiae Supporting the State and Municipal Petitioners, Public Health and Environmental Petitioners, Power Company Petitioners, and Clean Energy Trade Association Petitioners, Am. Lung Ass'n v. Env't Prot. Agency, 985 F.3d 914 (D.C. Cir. 2021) (No. 19-1187).

"[c]itizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin." [61]

The negative effects that these new amicus campaigns have on our democracy are twofold. The wealthy few fund the campaigns, excluding the majority of Americans from the process and exacerbating preexisting countermajoritarian and inequality concerns. And without a mechanism for disclosure, the general public currently does not, and cannot, know how judicial reasoning is influenced by masked private actors.

Anonymously 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. [62] As a strategy, it is not very different from "regulatory capture," a well-documented phenomenon in administrative spaces. [63] Courts can equally be targeted, as became very apparent during the Trump Administration. By its own words, the Trump Administration "insourced" [64] its judicial selection process to a single, well-funded outside group, the Federalist Society, which former President Trump acknowledged "picked" his judges. [65] A majority of the Court's sitting Justices are active mem-

61. Gaspee Project v. Mederos, No. 20-1944, slip op. at 8-9 (1st Cir. Sept. 14, 2021) (quoting Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 57 (1st Cir. 2011)).

62. *See* DEBBIE STABENOW, CHUCK SCHUMER & SHELDON WHITEHOUSE, DEMOCRATIC POL'Y & COMMC'NS COMM., CAPTURED COURTS: THE GOP'S BIG MONEY ASSAULT ON THE CONSTITUTION, OUR INDEPENDENT JUDICIARY, AND THE RULE OF LAW (May 2020), https://www.democrats.senate.gov/imo/media/doc/Courts%20Report%20-%20FINAL.pdf [https://perma.cc/D9AB-NWE6].

63. *See, e.g.*, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 1-11 (Daniel Carpenter & David A. Moss eds., 2013).

64. *2017 National Lawyers Convention, White House Counsel McGahn*, C-SPAN, at 40:50 (Nov. 17, 2017), https://www.c-span.org/video/?437462-8/2017-national-lawyers-convention-white-house-counsel-mcgahn [https://perma.cc/CH4N-HLH8] ("Our opponents . . . frequently claim the President has outsourced his selection of judges, that is completely false. I have been a member of the Federalist Society since law school. Still am. So, frankly, it seems like it's been insourced.").

65. Ian Millhiser, *Trump Says He Will Delegate Judicial Selection to the Conservative Federalist Society*, THINKPROGRESS (June 15, 2016), https://archive.thinkprogress.org/trump-says-he-will-delegate-judicial-selection-to-the-conservative-federalist-society-26f622b10c49 [https://perma.cc/L8GD-HGRT].

bers of the Federalist Society, which receives an enormous amount of anonymous donations each year.[66] Although it officially claims to take no policy positions, the Federalist Society serves as a "political epistemic network,"[67] promoting doctrines that advance right-wing political goals, bringing formerly fringe theories into the mainstream of legal thought,[68] and giving potential judicial nominees opportunities to "audition" for future vacancies.[69]

It is odd that a private group should acquire such power; it is still odder that this power should have no guardrails. But that is the point. Players at the center of this insourced judicial-selection operation concurrently raised multimillion-dollar anonymous donations for the Federalist Society.[70] Related fundraising hauls went to political advertisements to support confirmation of Trump nominees. Federalist Society board cochair and former Executive Vice President Leonard Leo coordinated a donor network that took in over $400 million in dark money between 2014 and 2018 to pursue judicial confirmation activities.[71] A major player in this network, the Judicial Crisis Network (JCN), spent tens of millions of dollars on campaigns to confirm Justices Gorsuch, Kavanaugh, and Barrett, taking in enormous donations from an anonymous source each filing year from 2015 through 2018.[72] These donations may all have come from the same

66. *See* DESMOG, *supra* note 43 (tracking over $29 million in anonymized donations to the Federalist Society from 2002 to 2018); *see also Annual Report*, FEDERALIST SOC'Y 48 (2019), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/Or88zuHZXja1DgYNqb-NeDtHby6RnGbDpdKy4vmLY.pdf [https://perma.cc/PD5H-W7EY] (showing that sixteen anonymous donors each gave $100,000 or more in the most recent year on record).

67. AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 13 (2015).

68. *Id.* at 16-22.

69. Richard Wolf, *Supreme Court Wannabes Audition in Scalia's Shadow*, USA TODAY (Nov. 20, 2016, 1:44 PM), https://www.usatoday.com/story/news/politics/2016/11/20/supreme-court-trump-judges-federalist-society/94087912 [https://perma.cc/LJ89-3CQ7] (describing the Federalist Society National Lawyers Convention).

70. Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts [https://perma.cc/U7AG-YUCK].

71. *What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary: Hearing Before the Subcomm. on Fed. Cts., Oversight, Agency Action, and Fed. Rights*, 117th Cong. 6 (2021) (statement of Lisa Graves, President, Center for Media and Democracy) (citing O'Harrow & Boburg, *supra* note 70).

72. Margaret Sessa-Hawkins & Andrew Perez, *Dark Money Group Received Massive Donation in Fight Against Obama's Supreme Court Nominee*, MAPLIGHT (Oct. 24, 2017), https://maplight.org/story/dark-money-group-received-massive-donation-in-fight-against-obamas-supreme-court-nominee [https://perma.cc/2J2X-HZ2M] (noting that the Judicial Crisis Network (JCN) — a group closely linked to the Federalist Society — received $17.9 million from a single, anonymous donor between 2015 and 2016, and then spent $7 million to

donor.[73] Whoever the donor was, he or she was able to get their hand-selected judges confirmed for life to the federal bench. Consider this Stage One of two.

In Stage Two, these same forces use dark money to fund dozens of so-called "public interest" litigation boutiques, such as Pacific Legal Foundation (PLF).[74] These groups scour the country for sympathetic and willing "plaintiffs of convenience" to bring litigation that advances their constitutional theories and ideological and political goals, even in the absence of a genuine "case or controversy."[75] When these groups fail to find outside plaintiffs, they can just bring the suits themselves, as in *AFPF*.

Nominal plaintiffs can do very well. The nominal plaintiff in the first constitutional challenge to the Affordable Care Act, the NFIB, had never received a contribution in excess of $21,000 through 2009, the year before they brought the suit.[76] From 2010 through 2012, the years in which NFIB was the nominal

block President Obama's Supreme Court pick, Merrick Garland, and another $10 million to secure Justice Gorsuch's confirmation); Anna Massoglia & Andrew Perez, *Secretive Conservative Legal Group Funded by $17 Million Mystery Donor Before Kavanaugh Fight*, OPENSECRETS (May 17, 2019), https://www.opensecrets.org/news/2019/05/dark-money-group-funded-by-17million-mystery-donor-before-kavanaugh [https://perma.cc/F38S-C2XG] (noting that JCN received another $17 million donation from an anonymous donor between 2017 and 2018, and then spent $10 million to secure the confirmation of Justice Kavanaugh); *see also* Judicial Crisis Network, Return of Organization Exempt from Income Tax (Form 990) (July 14, 2020), https://www.scribd.com/document/469403824/Judicial-Crisis-Network-990-2018-2019 [https://perma.cc/XR38-U4YS] (reporting a $15,881,000 donation to JCN from a single donor).

73. *See* Graves, *supra* note 71, at 6-7.

74. Founded with the encouragement of then-California Governor Ronald Reagan, Pacific Legal Foundation (PLF) was the first industry-funded, business-first "public interest" legal nonprofit of its type. PLF's first board chairman was a fossil-fuel executive motivated by "apoplectic" fury against environmental lawsuits, and its first offices were housed within the California Chamber of Commerce, whose president at the time was another oil executive defending against environmental litigation. PLF specializes in attacking government efforts to preserve clean air, coastal environments, and protected wetlands, and it has served as the template for dozens of similar right-wing legal nonprofits, such as Southeastern Legal Foundation and Washington Legal Foundation. *See* JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION 57 (2016); Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1459-78 (1984).

75. I recently filed a brief in one such Supreme Court case, documenting how PLF bent over backwards to lose the case in the lower courts, foregoing available relief so as to eliminate potential "vehicle" problems that might foreclose a friendly Supreme Court's review of PLF's extreme per se Takings Clause theory. Brief of Senators Sheldon Whitehouse, Jeff Merkley, Richard Blumenthal, Cory Booker, and Alex Padilla, in Support of Respondents at 3-12, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107).

76. Heidi Przybyla & Jonathan D. Salant, *One Donor Gave One-Third of Pro-Republican Group's Funds*, BLOOMBERG (Apr. 17, 2012), https://www.bloomberg.com/news/articles/2012-04-17/one-donor-gave-one-third-of-republican-super-pac-s-funds [https://perma.cc/LRN2-UJRM].

plaintiff, dark money flowed into it; the group received millions of dollars in donations from a limited group of wealthy donors,[77] including an anonymized $1.15 million in 2010 from DonorsTrust,[78] $500,000 in 2011 from the Koch network-linked group Free Enterprise America,[79] $1.5 million in 2012 from the Koch-backed Freedom Partners,[80] and $3.7 million in 2012 from Crossroads GPS, the group of long-time Republican strategist Karl Rove.[81]

Many of these litigants intentionally *lose* their cases in lower courts — a glaring departure from the ordinary course of litigation. For example, the plaintiffs in *Friedrichs v. California Teachers Association*, barely hiding that their lawsuit was a weapon for overturning decades-old labor precedents,[82] directly asked the courts to rule *against* them so that they could expeditiously take their claims to the Supreme Court.[83] In *Cedar Point Nursery v. Hassid*, plaintiffs recruited by PLF rushed to lose at every stage of lower-court litigation, without showing any tangible injury, foregoing claims that, in a real case or controversy, could have secured them adequate relief.[84] They did so to push PLF's extreme constitutional

77. *See* Democratic Pol'y & Commc'ns Comm., *What's at Stake: Health Care and Reproductive Rights*, SENATE DEMOCRATS 5-7, 12-13 (Sept. 2020), https://www.democrats.senate.gov/imo/media/doc/FINAL%20DPCC%20Captured%20Courts%20Health%20Care%20and%20Reproductive%20Rights%20Report.pdf [https://perma.cc/XV66-JMGY].

78. Donors Trust Inc., Return of Organization Exempt from Income Tax (Form 990) 65 (Nov. 14, 2010), https://www.documentcloud.org/documents/435251-donors-trust-c3.html [https://perma.cc/FU6B-SCPC].

79. Blumenthal, *supra* note 50.

80. Frates, *supra* note 50.

81. Donovan Slack, *Crossroads GPS Gave $3.7 Million to Plaintiff in Health Care Suit*, POLITICO (Apr. 13, 2012, 7:11 PM EDT), https://www.politico.com/blogs/politico44/2012/04/crossroads-gps-gave-37-million-to-plaintiff-in-health-care-suit-120501 [https://perma.cc/EF7C-L75G].

82. *See* Lisa Graves, *Snapshot of Secret Funding of Amicus Briefs Tied to Leonard Leo–Federalist Society Leader, Promoter of Amy Barrett*, TRUE N. RSCH. (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 [https://perma.cc/X42A-BVSR]; *see also* 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 [https://perma.cc/E9J9-4ZXD] (describing how undisclosed funder interests, such as the State Policy Network and the Bradley Foundation, brought *Friedrichs* hoping to "kneecap the unions of public-sector workers . . . in a single blow").

83. Plaintiffs' Notice of Motion, Motion for Judgment on the Pleadings, and Memorandum of Points & Authorities in Support of Motion for Judgment on the Pleadings at 11, Friedrichs v. Cal. Tchrs. Ass'n, No. 8:13-cv-00676-JST-CW (C.D. Cal. July 9, 2013).

84. Brief of Senators Sheldon Whitehouse, Jeff Merkley, Richard Blumenthal, Cory Booker, and Alex Padilla, in Support of Respondents, *supra* note 75, at 3-7.

theory directly to the Supreme Court's doorstep.[85] The Court's indulgence of this behavior creates a "fast lane" for judicial-policy victories via cases lacking the most basic features of real litigation, such as a firm factual record, a concrete injury, and an attempt to win one's case at trial.

When not deployed as nominal plaintiffs, or as counsel to nominal plaintiffs, these same dark-money interests are orchestrated into judicial-lobbying campaigns using arrays of amicus briefs, fueled by massive anonymous donations and often with common donors behind multiple briefs.[86] Given that the interest groups participating in the "amicus machine" are some of the same ones that pushed through judicial nominations, they're not just "friends of the court"—in many cases, they are quite literally friends of the judges they have put on the Court.

Donors have reaped enormous returns on their investments. As I have documented, the Roberts Court has handed down over eighty partisan Republican 5-4 decisions[87] that benefit an easily identifiable Republican Party-donor interest.[88] These include decisions that remove constraints on anonymous giving (e.g., *Citizens United v. FEC*,[89] *Americans for Prosperity Foundation v. Bonta*[90]), as well as decisions that weaken the power of countervailing institutions like labor unions (e.g., *Janus v. American Federation of State, City & Municipal Employees,*

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85. *See id.* at 3 ("Petitioners here suffered no tangible injury. As the district court acknowledged, they 'fail[ed] to allege facts in their pleadings that suggest that the Access Regulation has had any negative economic impact on them *at all*.' . . . Petitioners never sought to prove otherwise." (citations omitted)).

86. *See* Graves, *supra* note 71.

87. I define "partisan Republican decisions" as those in which the majority was formed without the vote of any Democratic-appointed Justice.

88. For seventy-three decisions from Chief Justice Roberts's swearing-in through the Court's 2017 Term, see Sen. Sheldon Whitehouse, *A Right-Wing Rout: What the 'Roberts Five' Decisions Tell Us About the Integrity of Today's Supreme Court*, AM. CONST. SOC., at A1-A14 (Apr. 4, 2019), https://www.acslaw.org/wp-content/uploads/2019/04/Captured-Court-Whitehouse-IB-Final.pdf [https://perma.cc/4K63-GDQ4]. More recent decisions expanding this partisan 5-4 streak to eighty include *Nielsen v. Preap*, 139 S. Ct. 954 (2019); *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019); *Lamps Plus Inc. v. Varela,* 139 S. Ct. 1407 (2019); *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019); *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019); *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019); and *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

89. 558 U.S. 310 (2010).

90. No. 19-251 (U.S. July 21, 2021).

Council 31[91]), regulatory agencies (e.g., *Seila Law v. Consumer Financial Protection Bureau*[92]), and the civil jury (e.g., *Epic Systems Corp. v. Lewis*[93]).

The effects of this litigation strategy on our democracy are frightening: the courts are becoming an arena for enacting policies by judicial decree that are too unpopular to pass through democratically elected legislatures. These coordinated efforts warp the judiciary toward anonymous, ultrawealthy donor interests, all without the public ever learning about the role of dark-money interests in shaping the law. The Supreme Court was already, by its nature, an avenue for countermajoritarian ideas and policies to prosper. But as Barry Friedman explains, especially when the Court is acting during a period of judicial supremacy — as it arguably is now — the countermajoritarian aspect of the institution will flourish.[94] Alongside those concerns, the emergence of the dark-money amicus machine increases the probability that the Court's rulings will run counter to the will of the American people (i.e., counter to democracy), and instead for the benefit of the hidden interests that had a secret hand in putting Justices on the Court and then filed masked amicus briefs.

II. EXISTING DISCLOSURE RULES AND THEIR SHORTCOMINGS

The troubling rise of influence campaigns by anonymous special interests flows directly from weak disclosure rules for amici curiae in federal appellate courts and the Supreme Court. In this Part, I lay out the existing rules, examine how they are applied, describe their deficiencies, and highlight the many ways that parties and donors exploit them to achieve unfair and even improper advantages and outcomes.

Supreme Court Rule 37.6 requires amicus filers to "indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the *preparation or submission of the brief*."[95] Further, the Rule requires the brief to "identify every person or entity, other than the amicus curiae, its members, or its counsel, who made such a monetary contribution to the *preparation or submission of the brief*."[96] Federal Rule of Appellate Procedure (FRAP) 29(a)(4)(E) — modeled after Supreme

91. 138 S. Ct. 2448 (2018).

92. 140 S. Ct. 2183 (2020).

93. 138 S. Ct. 1612 (2018).

94. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 340-41 (1998).

95. SUP. CT. R. 37.6 (emphasis added).

96. *Id.*

Court Rule 37.6 — imposes the same requirements for amicus briefs filed in the U.S. Courts of Appeals.[97]

The Court adopted its amicus-funding-disclosure rule in 1997 "in an effort to stop parties in a case from surreptitiously 'buying' what amounts to a second or supplemental merits brief, disguised as an amicus brief, to get around word limits."[98] The parallel FRAP Rule ostensibly "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs."[99] In 2018, the Supreme Court's Public Information Office explained that "the Clerk's Office interprets [the Rule] to preclude an amicus from filing a brief if contributors are anonymous."[100]

Yet despite their aspirations, these rules, as interpreted by the courts, have a fundamental flaw that special interests readily exploit. On their face, they bar amicus briefs paid for by anonymous contributors. But in practice, federal courts routinely accept amicus briefs filed by anonymously funded special-interest groups. To the extent the rules were devised to preclude amici from filing "supplemental merits briefs" on behalf of parties, or briefs whose financial backers are anonymous, they simply do not achieve those goals.

Under the rule that amici disclose funding "that was intended to fund *preparing or submitting the brief*,"[101] amici rarely, if ever, disclose the sources of funding that allow them to operate. In fact, an amicus group can avoid disclosing even large donations earmarked to fund its amicus practice. This is because the Court accepts a reading of the rules so narrow as to encompass only the costs of

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97. FED. R. APP. P. 29(a)(4)(E). The Rule requires amicus filers to include a statement in their brief disclosing whether "a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief." *Id.* The Rule also requires briefs to identify whether "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, [to] identif[y] each such person." *Id.*

98. *Supreme Court Rule Crimps Crowd-Funded Amicus Briefs*, LAW.COM (Dec. 10, 2018, 2:53 PM), https://www.law.com/nationallawjournal/2018/12/10/supreme-court-rule-crimps-crowd-funded-amicus-briefs [https://perma.cc/6XM4-HLCT].

99. FED R. APP. P. 29(C)(5) advisory committee's note to 2010 amendment.

100. LAW.COM, *supra* note 98.

101. FED R. APP. P. 29(C)(5), *supra* note 99 (emphasis added).

formatting, printing, and delivering the specific brief in the specific case at issue.[102] This reading ignores the reality that "money is fungible,"[103] allowing an amicus filer to avoid disclosure altogether, even if its funders include a party in interest to the case. If a party in interest gives an amicus filer a million dollars and approves the filed brief, and the brief is designed to benefit that donor, none of this needs be disclosed if the filing entity has a few thousand dollars on hand to pay for printing, binding, and service.

A review of amicus practice before the Supreme Court shows that parties to litigation, as well as large donors who fund impact litigation with the goal of shaping law and public policy, exploit this loophole to exert anonymous influence on the courts. As a result, many amicus briefs effectively skirt page limits on the parties' briefs or advance boundary-pushing arguments on behalf of anonymous donors' long-term interests. Opposing parties, the public, and courts themselves are left in the dark as to who is seeking to influence judicial outcomes. Ordinarily, parties can appear in court masked in anonymity only in very special types of appeals.[104] Not so for amici curiae.

This phenomenon takes various forms: parties directly funding amici, donors funding amici and litigants in the same case, donors anonymously orchestrating amicus projects, and member-organization amici that do not disclose their members. Below, I explore each form of funding in turn.

A. Parties Directly Funding Amici

The narrow demands of Rule 37.6 and FRAP 29 essentially allow litigating parties to purchase supplemental merits briefs disguised as amicus briefs.

One recent high-profile Supreme Court case illustrates this problem. In *Google LLC v. Oracle America Inc.*, the Internet Accountability Project (IAP), a 501(c)(4) "social welfare" organization that does not disclose its funders (and is

102. *See* Letter from Scott S. Harris, Clerk of the U.S. Sup. Ct., to Sheldon Whitehouse, U.S. Sen., *supra* note 8 (stating that Rule 37.6 compels only "the disclosure of those who make a monetary contribution specifically intended for a particular *amicus* brief," to make clear "whether a particular donor might be directly underwriting the cost of a brief"); Letter from Sheldon Whitehouse, U.S. Sen., and Henry C. Johnson, Jr., U.S. Rep., to John D. Bates, Chair, Jud. Conf. Comm. on Rules of Prac. and Proc. 2 (Feb. 23, 2021) https://www.whitehouse.senate.gov/imo/media/doc/210223_Letter%20to%20Committee%20on%20Rules%20of%20Practice%20and%20Procedure.pdf [https://perma.cc/2UMG-Z4DA].

103. Holder v. Humanitarian L. Project, 561 U.S. 1, 31 (2010).

104. Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992).

run by a political operative with close ties to Justices Gorsuch and Kavanaugh),[105] filed an amicus brief supporting Oracle's position, explaining that it wanted to "ensure that Google respects the copyrights of Oracle and other innovators."[106] *Bloomberg* subsequently reported that Oracle had itself donated between $25,000 and $99,999 to IAP in 2019 as "just one part of an aggressive, and sometimes secretive, battle Oracle has been waging against its biggest rivals," including Google.[107] The report also documented donations from Google to at least ten groups that filed briefs in support of Google's position.[108]

The Court's amicus-funding-disclosure rule did not require the IAP to disclose any of these donations—so long as they were not specifically earmarked for the "preparation or submission of the brief."[109] Indeed, several of the party-funded amici in *Google v. Oracle* did not disclose that they had been funded by a party to the case.[110] IAP, for example, misleadingly—if compliantly—attested that "none of the parties or their counsel, nor any other person or entity other than amicus or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief."[111] Nevertheless, at least four of these amicus filers (but not IAP) voluntarily reported the financial support they had received from one of the parties in the case out of, in the words of one amicus, "an abundance of caution and for the sake of transparency."[112] These voluntary

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105. *About Us*, INTERNET ACCOUNTABILITY PROJECT, https://theiap.org/about [https://perma.cc/H8GL-LD5H] (stating that Mike Davis, founder and President of the Internet Accountability Project (IAP), "oversaw the floor votes for . . . the confirmation[] of Justice Brett Kavanaugh" and "led the outside support team for Justice Gorsuch's successful confirmation to the Supreme Court").

106. Brief for Internet Accountability Project as Amicus Curiae in Support of Respondent at 1, Google LLC v. Oracle Am., Inc., No. 18-956 (U.S. Apr. 5, 2021).

107. Naomi Nix & Joe Light, *Oracle Reveals Funding of Dark Money Group Fighting Big Tech*, BLOOMBERG (Feb. 25, 2020, 5:07 PM), https://www.bloomberglaw.com/bloomberglawnews/tech-and-telecom-law/X9QFR12K000000 [https://perma.cc/GE5T-QDAH].

108. *Id.*

109. SUP. CT. R. 37.6.

110. *See, e.g.*, Brief for Internet Accountability Project as Amicus Curiae Supporting Respondent, *supra* note 106, at 1 n.1; *see also* Nix & Light, *supra* note 107 (discussing the undisclosed funding of amici briefs by parties to the case).

111. *Id.*

112. *See* Brief for Electronic Frontier Foundation as Amicus Curiae Supporting Petitioner at 1 n.1, *Google LLC*, No. 18-956 (U.S. Apr. 5, 2021); *see also* Brief for Python Software Foundation et al. as Amici Curiae Supporting Petitioner at 1 n.1, *Google LLC*, No. 18-956 (U.S. Apr. 5, 2021) ("Counsel for amici curiae was previously engaged to advise Google in connection with this matter earlier in its history, and represents Google in other matters . . . ."); Brief for Center for Democracy and Technology et al. as Amici Curiae Supporting Petitioner at 1 n.1, *Google LLC*, No. 18-956 (U.S. Apr. 5, 2021) ("Counsel for amici curiae was previously engaged to

disclosures suggest that some attorneys believe their ethical obligations required a greater degree of disclosure than the Supreme Court requires. Plenty of others, however, have been content to conceal suspicious financial arrangements, which the present reading of the Court's rule permits.

B. Donors Funding Amici and Litigants in the Same Case

Thanks to the work of investigative reporters, in recent years we have been able to observe the rise in high-profile, politically charged cases that are financed directly by ideological foundations.[113] Often the same foundations that fund the litigation also exploit the courts' lenient amicus-funding-disclosure rules to anonymously fund flotillas of amicus briefs that support their preferred outcomes.

For example, in the orchestrated challenge to union agency-shop fees first initiated in *Friedrichs v. California Teachers Association*,[114] one organization bankrolled not only the nonprofit law firm bringing the case, but also eleven different organizations that filed amicus briefs supporting the plaintiffs.[115] That organization was the Lynde and Harry Bradley Foundation—a conservative organization that has long sought to weaken labor rights, including by financing impact litigation.[116] If the disclosure rule were operating to its intended effect, the Court and parties would have been made aware of that funding. Yet none of those amicus filers disclosed the Bradley Foundation as a source of its funding for the brief under Rule 37.6, and none of those briefs were rejected by the Court for lack of disclosure.

The Bradley Foundation's coordinated and undisclosed funding of the litigants and amici in *Friedrichs* was not a one-off. In *Janus v. AFSCME*, the follow-up to *Friedrichs*, investigative reporters found that the Bradley Foundation again

advise Google in connection with this matter earlier in its history, and represents Google in other matters, but Google has had no involvement with the preparation of this brief."); Brief for Computer and Communication Industry Association and Internet Association et al. as Amici Curiae Supporting Petitioner at 1-2 nn.2-3, *Google LLC*, No. 18-956 (U.S. Apr. 5, 2021) ("Google is a CCIA member, and Oracle and Sun Microsystems were formerly members of CCIA, but none of these parties took any part in the preparation of this brief. . . . Google is a member of IA. As noted above, Google took no part in the preparation of this brief.").

113. *See, e.g.*, Bottari, *supra* note 82 (describing foundation funding behind *Friedrichs* and *Janus*).

114. 136 S. Ct. 1083 (2016).

115. *See* 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, 138 S. Ct. 2448 (2018) (No. 16-1466).

116. Bottari, *supra* note 82; *see also* Section II.C *infra* (showing how a representative of the Bradley Foundation organized the anonymous funding of amicus briefs in two politically charged cases).

funded both of the two groups representing the plaintiffs, as well as a dozen groups that filed amicus briefs.[117] Similarly, the two groups representing the *Janus* plaintiffs, plus thirteen amicus filers, all received funding from Donors Trust, mentioned above.[118] None of this common funding was disclosed to the Court.

Finally, in *Seila Law LLC v. Consumer Financial Protection Bureau*, eleven amici aligned with the petitioner Seila Law received financial support from the same entities, which also fund the Federalist Society.[119] The Center for Media and Democracy subsequently found that "16 right-wing foundations," including the Bradley Foundation and DonorsTrust, "have donated a total of nearly $69 million to 11 groups that filed amicus briefs in favor of scrapping the CFPB."[120] None of this information was disclosed to the Court under its current reading of the Rule.

C. Donors Anonymously Orchestrating Amicus "Projects"

Recently released documents reveal how donors like the Bradley Foundation use tax-exempt money to coordinate amicus "projects," in which they influence court results by funding an array of groups in the same legal network as the Federalist Society, as presumably occurred in *Seila Law*.[121] In 2015, a representative of the Bradley Foundation emailed Leonard Leo, then Executive Vice President of the Federalist Society, to ask if there was "a 501(c)(3) nonprofit to which Bradley could direct any support of the two Supreme Court amicus projects other than Donors Trust."[122] Leo replied, "Yes, Judicial Education Project could take and allocate."[123] In turn, Judicial Education Project (JEP), a 501(c)(3) tax-exempt organization that does not disclose its donors, submitted a grant proposal to Bradley seeking $200,000 to coordinate and develop amicus briefs in two politically charged (but otherwise completely unrelated) cases: the aforementioned

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117. Bottari, *supra* note 82.

118. *Id*.

119. Brief of Amici Curiae U.S. Senators Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirono in Support of Court-Appointed Amicus Curiae, *supra* note 54, at 1a.

120. Kotch, *supra* note 45.

121. *See* Graves, *supra* note 71.

122. Email from Michael Hartmann, Rep., Bradley Found., to Leonard Leo, Exec. Vice President, Federalist Soc'y (Dec. 16, 2014), https://www.documentcloud.org/documents/7223998-2014-Bradley-Leonard-Leo-Neil-Corkery-Carrie.html [https://perma.cc/LX7F-J76D].

123. Email from Leonard Leo, Exec. Vice President, Federalist Soc'y, to Michael Hartmann, Rep., Bradley Found. (Dec. 16, 2014), https://www.documentcloud.org/documents/7223998-2014-Bradley-Leonard-Leo-Neil-Corkery-Carrie.html [https://perma.cc/LX7F-J76D].

Friedrichs and *King v. Burwell*,[124] a challenge to the Affordable Care Act. The Bradley Foundation estimated that "each of the two amicus-brief efforts costs approximately $250,000, for a total of $500,000," and the Bradley staff recommended a $150,000 grant be given to JEP to support this work.[125] The Bradley staffer explained the strategy behind this investment as follows:

> At this highest of legal levels, it is often very important to orchestrate high-caliber amicus efforts that showcase respected high-profile parties who are represented by the very best lawyers with strong ties to the Court. Such is the case here, with *King* and *Friedrichs*, *even given Bradley's previous philanthropic investments in the actual, underlying legal actions*.[126]

In *King* and *Friedrichs*, none of the amici supporting the Bradley-funded litigants disclosed their Bradley Foundation funding under Rule 37.6 — or any of their funding sources for that matter. This nondisclosure resulted from interpreting the Rule narrowly to require disclosure only of funds intended to cover the costs of formatting, printing, and delivering the briefs.[127]

D. Member-Organization Amici that Do Not Disclose Their Members

Another loophole impeding transparency in the amicus-funding-disclosure regime is that it exempts from disclosure any contributions by an amicus filer's own members.[128] This enables parties to litigation to secretly fund amicus briefs in support of their position by funneling money through organizations of which they are members.

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124. 576 U.S. 473 (2015).

125. Subcomm. on Fed. Cts., Oversight, Agency Action & Fed. Rts., *Answers to Senator Whitehouse's Questions for the Hearing What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary*, SENATE COMM. ON JUDICIARY (2021), https://www.judiciary.senate.gov/imo/media/doc/Graves%20QFR's%20Final.pdf [https://perma.cc/APK4-WJZP] (appendix); *see also* Graves, *supra* note 71 (describing the Bradley Foundation's role as part of an anonymous network of huge donors and operatives using a flotilla of amici briefs to reverse major precedents).

126. Graves, *supra* note 71 (quoting Bradley Foundation staffer) (emphasis added).

127. Letter from Whitehouse and Johnson, *supra* note 102.

128. *See* FED. R. APP. P. 29(a)(4)(E)(iii) ("An amicus brief . . . must include . . . a statement that indicates whether . . . a person — other than the amicus curiae, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief . . . .").

For example, the Court's most prolific amicus filer, the Chamber of Commerce,[129] routinely submits influential amicus briefs in Supreme Court litigation.[130] The Chamber has affirmed under Supreme Court Rule 37.6 that "no person other than amicus, its members, or its counsel made a monetary contribution to its preparation or submission."[131] However, the Chamber does not disclose its members to the public,[132] making it impossible to determine who influences the positions the Chamber takes in litigation. As a result, its disclosure is meaningless, and deep-pocketed corporate contributors to the Chamber's amicus activity can enjoy, behind complete anonymity, the fruits of its unparalleled win rate at the Court—ten out of the twelve cases in which it participated last Term.[133]

III. IMPLICATIONS FOR JUDICIAL TRANSPARENCY AND ACCOUNTABILITY

After years of hyper-politicized judicial confirmation battles and Supreme Court decisions of enormous political import consistently made along partisan lines, signs point to eroding public trust in the independence of our courts. Americans' confidence in the Court has fallen by 10% since 2002.[134] Last month,

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129. *See* Adam Feldman, *The Most Effective Friends of the Court*, EMPIRICAL SCOTUS (May 11, 2016), https://www.empiricalscotus.com/the-most-effective-friends-of-the-court [https://perma.cc/ZGJ2-GYRF] (showing that from Chief Justice Roberts's swearing-in to spring 2016, the U.S. Chamber of Commerce filed 373 amicus briefs, and the next most prolific filer submitted 258).

130. It is also among the most effective. During Chief Justice Roberts's tenure, the Supreme Court has ruled in line with the Chamber's legal position seventy percent of the time. *See Corporations and the Supreme Court*, CONST. ACCOUNTABILITY CTR., https://www.theusconstitution.org/series/chamber-study [https://perma.cc/Z8NZ-GVQT].

131. *See, e.g.*, Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Respondents in No. 16-307 at 1 n.1, Epic Sys. v. Lewis, 138 S. Ct. 1612 (2018) (Nos. 16-285, 16-300, 16-307).

132. Dan Dudis, *Why the US Chamber of Commerce Is Fighting Transparency*, HILL (Apr. 6. 2016, 6:30 AM EDT), https://thehill.com/blogs/pundits-blog/finance/275301-why-the-us-chamber-of-commerce-is-fighting-transparency [https://perma.cc/8LGS-ZDQV].

133. Elizabeth B. Wydra & Brian R. Frazelle, *QUICK TAKE: The Chamber of Commerce at the Supreme Court: 2020-2021*, CONST. ACCOUNTABILITY CTR. (July 1, 2021), https://www.theusconstitution.org/blog/quick-take-the-chamber-of-commerce-at-the-supreme-court-2020-2021 [https://perma.cc/H69W-TPVS] ("In business cases decided this term, the Court adopted the position advocated by the U.S. Chamber of Commerce more than 83% of the time (10 of 12 decided cases).").

134. Amelia Thomson-DeVeaux, *Why the Supreme Court's Reputation Is at Stake*, FIVETHIRTYEIGHT (Oct. 12, 2020, 6:00 AM), https://fivethirtyeight.com/features/why-the-supreme-courts-reputation-is-at-stake [https://perma.cc/W35W-EEA3] (citing *Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx [https://perma.cc/92G5-8VVT]).

a Grinnell College National Poll found that 62% of Americans believe Supreme Court decisions are "based more on the political leanings of justices than the Constitution and the law."[135] This fall, polling showed public support of the Court's job performance at a record low, with just 37% approving of the Court's performance to 49% disapproving; this was "the worst job approval since Quinnipiac University began asking the question in 2004" and a steep drop from 52% approval in July 2020.[136] Reflecting this growing unease about the Court, President Biden's Executive Order establishing the Presidential Commission on the Supreme Court put the present day among "periods in the Nation's history when the Supreme Court's role and the nominations and advice-and-consent process were subject to critical assessment and prompted proposals for reform."[137] Meanwhile, a groundswell has emerged within the academy and the halls of Congress calling for ambitious court reforms ranging from term limits for federal judges,[138] to expanding the size of the Supreme Court,[139] to stripping its jurisdiction.[140]

Whatever the merits of such structural reforms and external constraints, transparency and accountability are uncontroversial and vital values that would aid in restoring and maintaining the public's trust in the courts, particularly in the Supreme Court. It should not fall to members of Congress and investigative journalists to scrutinize court dockets and IRS forms to expose conflicts of interest. It is untenable to leave those conflicts—whether actual or perceived—hidden, thereby undermining the independence and transparency of the judiciary's work.

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135. *62% of Americans Say Politics, Not Law, Drives Supreme Court Decisions*, GRINNELL COLL. (Oct. 20, 2021), https://www.grinnell.edu/news/62-americans-say-politics-not-law-drives-supreme-court-decisions [https://perma.cc/PL57-YE7U].

136. *Nearly 7 in 10 Say Recent Rise in COVID-19 Deaths Was Preventable, Quinnipiac University National Poll Finds; Job Approval for Supreme Court Drops to All-Time Low*, QUINNIPIAC UNIV. POLL (Sept. 15, 2021), https://poll.qu.edu/poll-release?releaseid=3820 [https://perma.cc/B3W3-GDRC].

137. Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 9, 2021).

138. *See, e.g.*, Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. (2020) (establishing "staggered, 18-year terms for Supreme Court Justices"); *see also* Steven G. Calabresi, *Give Justices Term Limits*, N.Y. TIMES (Oct. 27, 2020), https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html#calabresi [https://perma.cc/6NKB-7PFT] (supporting creating "a single, 18-year term for each" Justice).

139. *See, e.g.*, Judiciary Act of 2021, S. 1141, 117th Cong. (2021) (increasing the number of Supreme Court Justices to thirteen). I am not a cosponsor of this bill.

140. Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1778-79 (2020).

Yet that is precisely the state of play. All but completely unchecked outside the advice-and-consent process, the judiciary remains by far the least transparent and least accountable branch. The Justices have famously refused to bind themselves to a code of ethics applicable to all other federal judges.[141] They limit media and public access to their proceedings.[142] Their official papers and records are kept entirely private, with even posthumous publication subject to their personal discretion.[143] The Justices are exempted from the insider-trading and reporting requirements of the STOCK Act, and commonly fail to recuse themselves from cases despite owning shares of interested parties.[144] The Court's annual financial disclosures are opaque, with Justices neglecting to disclose all-expenses-paid trips and other emoluments, using a seemingly unique "personal

141. *See* CHIEF JUSTICE JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3-4 (2011) ("The Code of Conduct, by its express terms, applies only to lower federal court judges. That reflects a fundamental difference between the Supreme Court and the other federal courts."); *see also* M. Margaret McKeown, *Politics and Judicial Ethics: A Historical Perspective*, 131 YALE L.J.F. 190, 197-98 (2021) (noting that the Justices are not bound by the Code of Conduct).

142. The Court first made audio of oral argument available online to the general public last year, as its building was closed due to the COVID-19 pandemic. The Supreme Court has now announced that it will continue live streaming audio, and that the livestream will now be directly accessible through its own website. Robert Barnes, *Supreme Court for First Time to Hold Arguments Via Teleconference Next Month*, WASH. POST (Apr. 13, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-for-first-time-to-hold-arguments-via-teleconference-next-month/2020/04/13/f7e325d0-7d8d-11ea-a3ee-13e1ae0a3571_story.html [https://perma.cc/27G7-KSNH]; Press Release, Sup. Ct. of the U.S. (Sept. 29, 2021), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-29-21 [https://perma.cc/7DYM-HWTL].

143. *See* Ronald Collins, *Accessing the Papers of Supreme Court Justices: Online & Other Resources*, SCOTUSBLOG (Aug. 22, 2013), https://www.scotusblog.com/2013/08/accessing-the-papers-of-supreme-court-justices-online-other-resources [https://perma.cc/S6NH-W8HR] (noting that individual Justices bequeath their papers to different institutions, with differing levels of public or scholarly access (in one extreme example, a "donor agreement" keeps the Warren E. Burger papers "closed to researchers until 2026")); *see also* Neil A. Lewis, *Chief Justice Assails Library of Congress Release of Marshall Papers*, N.Y. TIMES (May 26, 1993), https://www.nytimes.com/1993/05/26/us/chief-justice-assails-library-on-release-of-marshall-papers.html [https://perma.cc/83LX-7PKU] (quoting Chief Justice Rehnquist saying, "I speak for a majority of the active Justices of the Court . . . we are both surprised and disappointed by the library's decision to give unrestricted public access to Justice Thurgood Marshall's papers").

144. *A STOCK Act for the Third Branch*, FIX CT. (Aug. 28, 2020), https://fixthecourt.com/2020/08/stock-act-third-branch [https://perma.cc/NT6D-GVTV] ("[T]he judiciary was mostly left out of the 2012 STOCK Act and the 2013 revision. The Supreme Court was left out completely.").

hospitality" exemption to the Ethics in Government Act's disclosure requirements.[145]

The judiciary's failure to police the flood of anonymous judicial filings contributes to a culture of opacity and unaccountability, which has rightly left the public jaded. As I have documented here, wealthy and sophisticated repeat players exploit the Court's ineffective amicus-funding-disclosure regime to develop what amounts to a massive, anonymous judicial-lobbying program that leaves the Court, the parties, and the public in the dark. They have created a procedural fast lane for their issues that the Court then indulges. They exploit the lower appellate courts' rule, where amicus briefs of any kind are less common, and orchestrate amicus projects to influence outcomes.

One rare example of the Court actually enforcing its Rule 37.6 illustrates the absurd results created by the current disclosure regime. In 2018, the Court rejected an amicus submission by the U.S. Alcohol Policy Alliance for its failure to comply with Rule 37.6. The Court deemed the brief noncompliant because it neglected to disclose the names of each of the group's donors, many of whom contributed through the small-dollar crowdfunding website GoFundMe.[146] The Alliance was forced to return donations from individuals who wished to remain anonymous and refile its brief, disclosing the names of individuals who had supported the campaign. The organization had raised small-dollar gifts ranging from $25 to $500.[147]

The Court's disparate treatments of the crowdfunded, small-dollar-backed brief filed by the U.S. Alcohol Policy Alliance and the wealthy, repeat-player amici who routinely file anonymously funded briefs is both troubling and telling. It reflects an elemental tension in a democracy between two classes of citi-

145. At the time of his death in February 2016, Justice Scalia—who took at least 258 expenses-paid trips from 2004 to 2014—was staying for free "among high-ranking members of an exclusive fraternity for hunters" at a lodge owned by a businessman whose company had recently had a matter before the Supreme Court. It is unlikely the public would ever have learned that fact, but for his passing. *See* Eric Lipton, *Scalia Took Dozens of Trips Funded by Private Sponsors*, N.Y. TIMES (Feb. 26, 2016), https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html [https://perma.cc/Y7PS-STHF]; Amy Brittain & Sari Horwitz, *Justice Scalia Spent His Last Hours with Members of This Secretive Society of Elite Hunters*, WASH. POST (Feb. 24, 2016), https://www.washingtonpost.com/world/national-security/justice-scalia-spent-his-last-hours-with-members-of-this-secretive-society-of-elite-hunters/2016/02/24/1d77af38-db20-11e5-891a-4ed04f4213e8_story.html [https://perma.cc/SV3D-HLLG]; *see also* McKeown, *supra* note 141, at 208-09 (observing the increasing international travel of the Justices).

146. LAW.COM, *supra* note 98.

147. U.S. Alcohol Policy Alliance, Inc., *Protect States' Options on Alcohol*, GOFUNDME, https://www.gofundme.com/f/protect-state-options-on-alcohol [https://perma.cc/J2JQ-LPSL]; Letter from Sheldon Whitehouse (Jan. 4, 2019), *supra* note 5, at 1.

zens. One is an influencer class that occupies itself with favor-seeking from government, and therefore desires rules of engagement that make the government more and more amenable to its influence. The other class is the general public, which has an abiding institutional concern in the government's capacity to resist that special-interest influence. This is a centuries-old tension.[148] When courts establish and apply rules designed to promote transparency and integrity, they should not worsen this imbalance.

Ironically, the Court's application of its own Rule is what has posed the most significant threat to associational and speech interests. By applying Rule 37.6 to require small-donor disclosure for an amicus brief funded through GoFundMe, the Court directly chilled the ability of individuals to band together on an ad hoc basis to support a legal position of importance to them. A rule that forces disclosure of these donors, but not the large and anonymous corporate funders of sophisticated repeat-players like the Chamber of Commerce, does not "strike[] a balance" at all.[149]

IV. PATHWAYS FOR REFORM

Reforming amicus-disclosure rules is essential for our democracy and for the integrity of judicial proceedings, and it is long overdue. In this Part, I outline two potential pathways for reform. One involves the judicial branch taking action of its own accord; the other requires Congress to pass legislation addressing this issue.

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148. *See* Theodore Roosevelt, New Nationalism Speech (Aug. 31, 1910) ("[T]he United States must effectively control the mighty commercial forces . . . . The absence of 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, POLITICAL ESSAYS 102 (Knud Haakonssen ed., Cambridge Univ. Press 1994) ("[W]here the riches are in a few hands, these must enjoy all the power, and will readily conspire to lay the whole burthen on the poor, and oppress them still further, to the discouragement of all industry."); President Andrew Jackson, Veto Message on the United States Bank (July 10, 1832) ("It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes . . . 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 their government."); NICCOLO MACHIAVELLI, THE PRINCE 34 (Quentin Skinner & Russell Price eds., Cambridge Univ. Press 2019) (1532) ("[T]he nobles cannot be satisfied if a ruler acts honourably, without injuring others. But the people can be thus satisfied, because their aims are more honourable than those of the nobles: for the latter want only to oppress and the former only to avoid being oppressed.").

149. Letter from Scott S. Harris, *supra* note 8, at 1.

A. Internal Judicial Reform

I have previously called on the Court and on the Judicial Conference's Committee on Rules of Practice and Procedure to reform its amicus-disclosure regime to address the problems discussed above.[150] The judiciary created its current disclosure rule and can adjust it as needed. Indeed, it has before. The Supreme Court, "irritated" in large part by increasing amicus participation by civil-rights groups, made significant rule changes to restrict the number of amici in the late 1940s, and then made the rules more permissive again in the mid-1950s.[151] More recently, the Court amended Rule 37.6 in 2007 (ten years after its creation), adding in its explanatory notes that disclosure was vital "both in considering questions of recusal and in assessing the credibility to be attached to the views submitted by the amicus."[152] Though that revision was manifestly not effective, it shows that the judiciary recognizes the important public interest in transparency, and suggests that more tightening is not out of the question.

This year, at my urging and after a referral by the Supreme Court,[153] the Judicial Conference Committee on Rules of Practice and Procedure created a new subcommittee to study and address this issue of amicus anonymity. Early returns appear promising. The subcommittee's preliminary report concluded that "[t]he extent to which amicus briefs are controlled by, or represent the views of, undisclosed persons or entities, and the steps that might be appropriate to further greater transparency, are important and complex issues that deserve further investigation and consideration."[154] The subcommittee also recognized that "parties may enjoy more influence over amicus briefs than the current disclosure regime reveals," and that the existing disclosure provisions "may need to be revised."[155] I look forward to seeing how the full committee will act on the subcommittee's report.

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150. Letter from Sheldon Whitehouse, U.S. Sen. & Hank Johnson, U.S. Rep., to John D. Bates, Chair, Jud. Conf. Comm. on Rules Prac. & Proc. (Feb. 23, 2021), https://www.whitehouse.senate.gov/imo/media/doc/210223_Letter%20to%20Committee%20on%20Rules%20of%20Practice%20and%20Procedure.pdf [https://perma.cc/26F5-R775].

151. Anderson, *supra* note 23, at 369; Krislov, *supra* note 9, at 718-20.

152. Larsen & Devins, *supra* note 17, at 1914 (citing Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, SUPREME COURT PRACTICE 518 n.174 (10th ed. 2013)) ("The language came from an August 6, 2007 memorandum from the Clerk's Office at the Supreme Court.").

153. Coyle, *supra* note 6.

154. Memorandum from the AMICUS Act Subcomm. to the Advisory Comm. on the Fed. Rules of App. Proc. 7 (Mar. 12, 2021), https://s3.documentcloud.org/documents/20618053/amicus-act.pdf [https://perma.cc/R2EF-3HFR].

155. *Id.* at 7.

B. Legislative Reform

While I recognize the prospect of the judicial branch cleaning up this mess on its own, a legislative solution is necessary if it does not. We must ensure transparency around judicial lobbying and put all amicus funders on an equal playing field.

I have proposed one such solution: the Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act).[156] The bill narrowly targets only high-dollar funders of amicus filers, requiring disclosure of only those who contributed three percent or more of the amicus group's gross annual revenue, or over $100,000.[157]

Greater transparency will likely have salutary effects on Supreme Court and appellate-court practice. When amicus filers can no longer hide their true interests, judges and Justices might be more wary of arguments that seem facially neutral, but are actually self-serving. It would also have a salutary effect on anonymous money groups across the entire political and legal sphere, presenting interested parties and advocacy groups with a choice: be honest about the interests you represent or take your advocacy elsewhere. We customarily demand this in American courtrooms.[158]

I am hopeful that both my Democratic and Republican colleagues in the Senate will join me in support of the AMICUS Act. However, if history is any indication, some will continue to stand in opposition to increased transparency within the monetary-disclosure sphere. As a recent example, one of my Senate colleagues, Minority Leader Mitch McConnell, filed an amicus brief in support of Americans for Prosperity in *AFPF v. Bonta*. In his brief, Senator McConnell argued not only that the Court should create a new constitutional right to dark-money nonprofit spending (an invitation it readily accepted in *AFPF*), but that the Supreme Court "frankly, ought to revisit its *campaign finance* disclosure precedents," thereby endorsing the prospect of constitutional protection for dark-money spending in elections—[159] a chilling thought, indeed.

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156. S. 1411, 116th Cong. (2019).

157. *Id.* at § 1660(b)(1) ("Any covered amicus that files an amicus brief in the Supreme Court of the United States or a court of appeals of the United States shall list in the amicus brief the name of any person who—(A) contributed to the preparation or submission of the amicus brief; (B) contributed not less than 3 percent of the gross annual revenue of the covered amicus for the previous calendar year if the covered amicus is not an individual; or (C) contributed more than $100,000 to the covered amicus in the previous year.").

158. *See* MODEL RULES OF PRO. CONDUCT r. 1.7, 3.3 (AM. BAR ASS'N 1983),

159. Brief of Senator Mitch McConnell as Amicus Curiae in Support of Petitioners, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) (Nos. 19-251, 19-255) (emphasis added).

C. Overcoming Constitutional Challenges

Even if passed into law, my AMICUS Act, or any similar reforms self-imposed by the courts, may run into the buzzsaw of the right wing's heavily organized and — yes — anonymously funded effort to secure constitutional protection for dark-money political spending.[160] Critics of compelled disclosure claim that it violates First Amendment associational or speech rights, such as those at issue in *NAACP v. Alabama ex rel. Patterson*.[161] In *NAACP*, the Supreme Court refused to allow compelled disclosure of the identities of NAACP members in the Deep South who faced significant threats to their physical safety during the Civil Rights Era.[162] In *AFPF v. Bonta*, as I discussed in Part I above, the Court's Republican-appointed majority presumptively extended the *NAACP* protections to all membership organizations, even those that experience no significant threats or burdens whatsoever.

Take the business network of the Chamber of Commerce, whose corporate members face no serious threat of reprisal for the public expression of their views, but which is capable of extracting significant benefits for its members via anonymous amicus lobbying. As one scholar has written, "applying *NAACP v. Alabama*'s holding in a formally symmetrical manner to the relatively powerful . . . without regard to context may undermine rather than affirm the values underlying that decision."[163]

The balance between the public's interest in transparency and organizations' associational rights was already badly off-kilter in favor of dark money and anonymity. There is simply no public-safety comparison between Black citizens and civil-rights activists in the Jim Crow South, under the active abuse of a state government that often operated arm-in-arm with the Ku Klux Klan, and today's elite, wealthy interests. But in *AFPF*, the "Supreme Court that dark money

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160. *Bonta*, 141 S. Ct. at 2385 (ruling that California's disclosure requirement for nonprofits is "facially unconstitutional").

161. 357 U.S. 449 (1958). Incidentally, this very question was at issue in the *AFPF* case discussed above.

162. *Id.* at 462-63 ("Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. *Under these circumstances*, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate . . . ." (emphasis added)).

163. Dale E. Ho, NAACP v. Alabama *and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 441-42 (2012).

built"[164] made that exact false equivalence the law of the land.[165] Indeed, in private correspondence offering feedback on my AMICUS Act, the Court has already suggested that "requiring broader disclosure of an organization's membership information or general donor lists could well infringe upon the associational rights of the organization," citing *NAACP* for that proposition.[166]

However, the more relevant cases are those disfavoring anonymity in judicial proceedings. As a general rule, parties "should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity. The risk that a plaintiff may suffer some embarrassment is not enough."[167] The same rationale applies to amici. In *United States v. Microsoft Corp.*, the Court found that a lower court erred in granting the "'rare dispensation' of anonymity against the world" when it allowed an amicus to file a brief anonymously, concluding that "the court has 'a judicial duty to inquire into the circumstances of particular cases to determine whether the dispensation is warranted.'"[168] That same rationale should apply to organizational funders, who possess the leverage to "control[] the arguments advanced by others."[169]

In our correspondence, the Court has also foreshadowed its willingness to invalidate my proposed legislation as violating the separation of powers, noting that "this legislation would intrude into areas historically left to the Court."[170] I reject that suggestion. Congressional authority over federal courts, including the regulation of judicial processes, has long been accepted as expansive. While Congress has historically delegated much of its rulemaking authority directly to the

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164. Senator Sheldon Whitehouse, Speech on the Floor of the United States Senate on The Scheme 4: A New Constitutional Right to Dark Money (July 13, 2021), https://www.whitehouse.senate.gov/news/speeches/the-scheme-4-a-new-constitutional-right-for-dark-money [https://perma.cc/7XHT-D7W3].

165. *Bonta*, 141 S. Ct. at 2382 ("We have also noted that '[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action.' *NAACP v. Alabama* involved this chilling effect in its starkest form." (quoting *NAACP*, 357 U.S. at 462)); *id.* at 2383 ("Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny."); *id.* at 2388 ("Exacting scrutiny is triggered by 'state action which *may* have the effect of curtailing the freedom to associate,' and by the '*possible* deterrent effect' of disclosure." (quoting *NAACP*, 357 U.S. at 460-61 (emphasis added))).

166. Letter from Scott S. Harris, *supra* note 8, at 1.

167. Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992).

168. 56 F.3d 1448, 1464 (D.C. Cir. 1995).

169. Letter from Scott S. Harris, *supra* note 8, at 1.

170. *Id.* at 2.

courts, where Congress has deemed it appropriate, it has by statute rejected or amended proposed rules, delayed the effective dates of proposed rules, or drafted and enacted court rules itself.[171]

CONCLUSION

Amicus curiae briefs, an increasingly influential part of our legal system, have become the lobbying tool of choice for right-wing dark-money interests, who can coordinate systematized armadas of commonly funded briefs to push for their preferred political outcomes. The amicus machine usually goes undetected due to a disclosure regime that flatly fails to show the courts and parties (and the public) the sources of that coordinated common funding. This coterie of funders takes advantage of that secrecy to press its interests by bringing cases to Justices that they themselves helped get onto the Court. The Court's pattern of partisan decisions is hard to explain statistically. In conjunction with the broader dark-money project of capturing the courts, the outcomes are bad for democracy, tilting our system ever further towards the interests of a wealthy few.

The judiciary must awaken to the wealthy few's ongoing scheme to influence the Court through anonymously funded amicus briefs. Either our judicial system confronts this scheme and strengthens its countermeasures, or legislation will have to address the problem. Justice Scalia once wrote:

> Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously . . . hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.[172]

On this point, Justice Scalia and I are in rare agreement.

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171. *See, e.g.*, Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WIS. L. REV. 993, 1030-31.

172. Doe v. Reed, 561 U.S. 186, 228 (2010) (Scalia, J., concurring).