# Congress of the United States

Washington, DC 20510

November 10, 2021

Honorable John D. Bates
Chair, Judicial Conference Committee on Rules of Practice and Procedure
333 Constitution Avenue, N.W.
Washington, D.C. 20001

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

Re: Improving Rule 29's *Amicus* Disclosure Requirements

Dear Judge Bates and Judge Bybee,

We write to commend the Advisory Committee on Appellate Rules and its "AMICUS Act" Subcommittee for your thoughtful and productive work thus far on the issue of *amicus* funding disclosure. The draft language considered at the Committee's October 7th meeting is an encouraging step toward ensuring effective transparency in our judiciary. Below, we suggest three changes that would improve upon the draft language's framework.

We also write to respond to the concerns raised by the U.S. Chamber of Commerce (the Chamber) in its recent letter to you.[1] Not only are these arguments misplaced, the Chamber itself is Exhibit A for why robust changes are needed to make existing rules effective and fair.

## I. The Committee Should Address the Major Shortcomings in the Judiciary's Current *Amicus* Disclosure Regime.

Our letter to Judge Bates earlier this year discussed in detail how groups have exploited flaws in the judiciary's disclosure regime to the detriment of the courts and the public.[2] Since the Chamber's letter did not address any of these issues, we briefly review them here.

[1] *See* Letter from Daryl Joseffer, Exec. Vice President & Chief Couns., U.S. Chamber of Com. Litigation Ctr., to Hon. John Bates (Oct. 6, 2021) (Chamber Letter).
[2] *See* Letter from Sen. Sheldon Whitehouse & Rep. Henry Johnson to Hon. John Bates (Feb. 23, 2021) (Congressional Letter).

Rule 29 generally requires disclosure whenever either a party (or their counsel) or a third party helps fund an *amicus* brief submitted in litigation. The stated purpose of these requirements, modeled on the Supreme Court's Rule 37.6, is to "deter counsel from using an *amicus* brief to circumvent page limits on the parties' briefs."[3] The Clerk of the Supreme Court also explained that "[b]y requiring the disclosure of those who make a monetary contribution specifically intended for a particular amicus brief, the rule provides information about funding directly aimed at advocating specific positions" in court.[4] Unfortunately, Rule 29 fails to accomplish either of these goals because parties and non-parties alike can easily circumvent it. They can do so by funding an *amicus* brief without earmarking those funds toward the specific brief; by narrowly reading the rule to cover only the funding of administrative filing costs; or whenever they are a "member" of an organizational *amicus*, such as a trade association like the Chamber. Virtually anyone—a party included—can "surreptitiously 'buy[]' what amounts to a supplemental merits brief, disguised as an *amicus* brief."[5] The current regime thus frustrates a judge's ability—in the words of Advisory Committee member and Ninth Circuit Judge Paul Watford—"to know, in a more general sense, how closely aligned is this party with the amicus so [the judge] can make a decision about how much weight to give to the brief or not."[6]

The disclosure regime also leaves hidden the connections between the ever-growing flotillas of *amicus* briefs that now inundate the courts.[7] While less data is available on *amicus* filings in circuit courts, filings in the Supreme Court have skyrocketed. The average number of *amicus* briefs filed in the Supreme Court has almost doubled since 2010, with more briefs being filed despite a shrinking caseload.[8]

Our prior letter detailed just some of the documented cases of multiple *amici*—making the same arguments in favor of the same parties—receiving substantial funding from the same sources. In at least two cases, the same foundation funded both numerous *amici* and the organizations representing the litigants the *amici* supported.

Rule 29's shortcomings prevent us from knowing the full extent to which *amici*, parties, and their funders engage in these practices, but more than a few notable instances are already well documented.[9] Recent reporting based on hacked documents indicates that the National Rifle

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[3] Fed. R. App. P. 29 advisory comm. notes.
[4] Letter from Scott S. Harris, Clerk, U.S. Sup. Ct., to Sen. Sheldon Whitehouse 1 (Feb. 27, 2019) (Harris Letter).
[5] Congressional Letter, *supra* note 2, at 2 (citing *Supreme Court Rule Puts a Crimp in Crowd-Funded Amicus Briefs*, Law.com (Dec. 10, 2018), https://www.yahoo.com/now/supreme-court-rule-puts-crimp-075351473.html?guccounter=1).
[6] Mike Scarcella, *Judiciary Panel Weighs Expanding Disclosure Rule for Amicus Filers*, Reuters (Oct. 8, 2021), https://www.reuters.com/legal/litigation/judiciary-panel-weighs-expanding-disclosure-rule-amicus-filers-2021-10-08/.
[7] The Supreme Court has asked the Committee to consider changes to Rule 29 "in light of the similarity of" Rule 29 to Supreme Court Rule 37.6 and to "provide helpful guidance on whether an amendment to Supreme Court Rule 37.6 would be appropriate." Accordingly, the Committee should consider the amicus practices at both the Circuit Court and Supreme Court levels in order to provide this guidance.
[8] Anthony J. Franze & R. Reeves Anderson, *Amicus Curiae at the Supreme Court: Last Term and the Decade in Review*, Nat'l L. J., Nov. 18, 2020, at 4, https://www.arnoldporter.com/-/media/files/perspectives/publications/2020/11/*amicuscuriae*-at-the-supreme-court.pdf.
[9] *See* Congressional Letter, *supra* note 2, at 3-6.

Association (NRA) paid an attorney to write *amicus* briefs on behalf of the NRA's New York State affiliate and litigation partner in cases before the Supreme Court in 2019 and earlier this year.[10] The attorney did not disclose this connection in either instance, and it is not clear whether Rule 37.6 required him to do so.

As Judge Watford's comment underscores, the current *amicus* practice undermines judges' ability to place the arguments before them in their proper context, such as whether a legal argument or factual contention is widely agreed upon. Courts' increasing reliance on *amicus* briefs, including taking note of the number of briefs filed in support of a position, makes these concerns all the more worrisome.[11] These rules must be updated to meet the transparency challenges and public concerns facing the courts today. The public and our judges should not have to rely on Russian hackers to ensure fairness and transparency in our courtrooms.

## II. The Draft Language Would Be Improved By Expanding the Covered *Amicus* Funders and Applying New Rules Across the Board.

The Subcommittee's draft language would be a major step toward solving these problems and bringing more transparency to our courtrooms. Under the draft language, parties who fund briefs could no longer circumvent disclosure rules through unduly narrow readings of Rule 29 or by the simple fact of the party's membership in the *amicus curiae*. The draft language's new ownership interest and gross annual revenue thresholds would ensure that transparency is expanded beyond direct funding of a particular brief. These thresholds also satisfy the Committee's preference for a clear, administrable rule. We offer three suggestions for further strengthening Rule 29: applying new rules to both non-party and party-donors, strengthening the rule to ensure it uncovers all the most substantial *amicus* funders, and eliminating membership exceptions.

### a. Changes to Rule 29 Should Apply to Non-Party Donors as Well as Party Donors.

We strongly encourage the Committee to recommend that any new disclosure rules be applied to party and non-party *amicus* donors alike.[12] A rule that reveals only parties' funding of *amici* would leave hidden the web of financial connections that tie together many *amici*, and which often tie the *amici* to the party.

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[10] Will Van Sant, *The NRA Paid a Gun Rights Activist to File SCOTUS Briefs. He Didn't Disclose it to the Court.*, The Trace (Nov. 3, 2021), https://www.thetrace.org/2021/11/scotus-nra-foundation-david-kopel-nysrpa-v-bruen-documents/.

[11] 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 Hammer, *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"); Paul M. Collins, Jr. & Wendy L. Martinek, *Judges and Friends: The Influence of Amici Curiae on U.S. Court of Appeals Judges*, 43 Am. Politics Rsch. 255 (2015).

[12] In that spirit, we have taken to heart the subcommittee's feedback on our AMICUS Act's repeat-filer requirement, which made the bill's disclosure requirements applicable only to those amici who filed three or more briefs in a year. To ensure a rule that treats all parties equally, the bill we intend to introduce this Congress will remove this requirement.

Contrary to the Chamber's view, the government's interest in uncovering these connections is more than sufficient to justify such a rule. When these connections are left undisclosed, judges are unable to draw proper inferences about an *amicus*'s motivations or the representativeness of its position in the marketplace of ideas. The Subcommittee correctly recognized that the Supreme Court's recent decision in *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (*AFPF*), acknowledged the importance of these types of considerations.[13] 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 "[c]itizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin."[14] This information may also be relevant to recusal decisions. As the Supreme Court affirmed, the state has a "vital" interest in "maintain[ing] the integrity of the judiciary and the rule of law," as well as guarding against threats to "public confidence in the fairness and integrity of the nation's . . . judges." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009) (citation omitted). These interests are directly implicated by the *amicus* disclosure issues at hand. The appearance that the wealthiest interests can misleadingly convince a judge to give more weight and credibility to their arguments by funding a plethora of *amicus* briefs threatens to undermine the public's faith that our courts will provide fair, impartial justice.

In order to vindicate each of these substantial interests, disclosure reforms should target only individuals who, by way of their direct investment in a brief, or considerable investment in an *amicus* organization, are most likely to be interested in, have a say in, and agree with an *amicus*'s positions. Such reforms would strike an appropriate balance between the government's transparency interests and the First Amendment rights that might be implicated. These changes would advance the underlying aims of the First Amendment. Numerous federal judges have complained in recent years that "too many *amicus* briefs do not even pretend to offer value and instead merely repeat . . . a party's position" and "serve only as a show of hands on what interest groups are rooting for what outcome."[15] Thus, to the extent these changes would help courts and the public assess duplicative arguments from essentially the same entities, the changes would enhance—not "discourage[]"—"this nation's vibrant public discourse."[16]

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[13] Memorandum from AMICUS Act Subcomm. to Advisory Comm. on Appellate Rules 14, n.3 (Sept. 8, 2021) (AMICUS Memorandum).

[14] *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)).

[15] *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (Scudder, J., in chambers). *See also Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 518 (7th Cir. 2004) ("Courts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed."); *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., in chambers) ("[I]t is very rare for an *amicus curiae* brief to do more than repeat in somewhat different language the arguments in the brief of the party whom the *amicus* is supporting."); *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers) ("The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made by the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse.").

[16] Chamber Letter, *supra* note 1, at 6.

### b. **Changes to Rule 29 Should Ensure that It Adequately Uncovers The Most Substantial *Amicus* Funders.**

In this same vein, any changes recommended by the Committee should be thorough enough to uncover all relevant individuals and organizations that have committed substantial funds to *amici* and their briefs. The draft language's ownership and revenue thresholds would, to a great extent, further this goal by exposing an *amicus*'s most significant funders. However, as the Subcommittee noted, any funding threshold will inevitably be somewhat arbitrary because it is impossible to craft a bright-line rule that will apply perfectly to every scenario. Thus, the Committee should seriously consider additional amendments that would serve these same purposes but that could also act as a "backstop" to the ownership and revenue thresholds.

One possible amendment would be the inclusion of an additional contribution threshold rule tied to a specific dollar amount, such as our AMICUS Act's $100,000 contribution threshold. This bright-line provision would be easily administrable and fulfill the same "backstop" role that the Subcommittee's draft standard was intended to serve. This provision would be especially useful when applied to organizations with many members, like the Chamber, wherein no one donor may meet 10% ownership or revenue thresholds but whose contributions may nonetheless be significant enough to influence or direct the organization's briefs.

### c. **Rule 29 Should Not Contain a Membership Exception.**

Finally, the Committee should remove Rule 29's "membership" exception. As already mentioned, Rule 29 does not require *amici* to disclose any *amicus* "members" that funded the *amicus* brief, even if a member is a party or counsel to the litigation at issue. Commendably, the Subcommittee's draft language would address this loophole by requiring *amici* to identify members who funded the *amicus* brief if they are parties or counsel. However, the draft language would still shield from disclosure all other *amicus* members who fund specific briefs, and members who would otherwise be disclosed under the proposed new ownership and revenue thresholds.

To truly ensure that Rule 29 effectively discloses those who substantially fund a brief, these exceptions must be removed. The government's interests are no less substantial when the funder of an *amicus* or a specific brief happens to be a "member" of that *amicus*, and concerns about impinging First Amendment rights are overstated. The Court and the Chamber are apparently concerned that without a membership exception, "a strict reading of the rule might require" the disclosure of "member lists or lists of general donors to the organization."[17] Absent every member of an *amicus* earmarking their funding for a specific brief, it is difficult to imagine such a scenario. The judiciary could craft a rule that strikes a more appropriate balance by eliminating the membership exception, and, if necessary, clarifying that the rule does not generally require disclosure of entire membership or donor lists. Any member who was substantially involved in the preparation, funding or approval of the brief should be identified.

At minimum, the exception for members who directly fund a particular brief should be eliminated—regardless of whether the member is a party or counsel. For those worried about a

[17] Scott Letter, *supra* note 4, at 1-2.

means-ends analysis or "implicit[ly] attribut[ing] . . . views that may not be held by every single member,"[18] these concerns are entirely nonexistent when focused only on a member's deliberate funding of a specific brief.

## III. No One Has Benefitted More from Disclosure Loopholes than the Chamber of Commerce.

The Chamber of Commerce opposes these proposed rules changes because it uses the loopholes in the current regime to obscure its members' influence on the courts. Because the Chamber does not disclose its members, courts are blind to the Chamber's connections to parties and other *amici*. However, investigative reporting has revealed some of the companies who comprise the Chamber's vast membership.[19] Over the past two years, the Chamber filed *amicus* briefs supporting several of these companies at both the circuit court and Supreme Court levels, but it did not disclose these relationships in any of these briefs.[20] Under the current rules, it would not need to disclose that information even if the member companies directly funded, wrote, approved, or even requested the brief.

The Chamber also staunchly disputes our characterization of massive, anonymous *amicus* efforts as "judicial lobbying." Since 2010 alone, the Chamber's Institute for Legal Reform (ILR) has spent almost $270 million on lobbying efforts,[21] and for decades has been considered "Washington's Biggest Lobbyist."[22] During this same time, few, if any, organizations have been

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[18] Chamber Letter, *supra* note 1, at 3.

[19] Dan Dudis, *The Chamber of Secrets*, Public Citizen, Sept. 13, 2017, *available at* https://chamberofcommercewatch.org/wp-content/uploads/2017/09/Chamber_of_Secrets_members_report.pdf (listing known Chamber members).

[20] Brief of the Chamber of Com. et al. as *Amici Curiae* Supporting Petitioners, *Johnson & Johnson v. Fitch*, No. 21-348 (*petition for cert. filed* Aug. 30, 2021); Brief of the Chamber of Com. et al., *Monsanto Co. v. Hardeman*, No. 21-241 (*petition for cert. filed* Aug. 16, 2021); Brief of the Chamber of Com. as *Amici Curiae* in Support of Petitioners, *AbbVie Inc. v. FTC*, No. 20-1293 (*petition for cert. denied* Jun 21, 2021); Brief of the Chamber of Com. as *Amicus Curiae* in Support of Petitioners, *Chevron Corp. v. City of Oakland*, No. 20-1089 (*petition for cert. denied* Jun 14, 2021); Brief for *Amici Curiae* Chamber of Com. et al., *Facebook Inc. v. Duguid*, 592 U.S. __ (2021) (No. 19-511); Brief for *Amici curiae* the Chamber of Com. et al., *Bank of America Corp. v. City of Miami*, 140 S. Ct. 1259 (2020) (No. 19-675); Brief for *Amici Curiae* the Chamber of Com. et al., *Wells Fargo & Co. v. City of Miami*, 140 S. Ct. 1259 (2020) (No. 19-688); Brief for the Nat'l Ass'n of Mfrs. et al., *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768 (2020) (No. 18-1116); Brief of the Chamber of Com. and the Pharm. Rsch. and Mfrs. of America as *Amici Curiae* in Support of Defendant-Appellant/Cross-Appellee, *Hardeman v. Monsanto Co.*, 997 F.3d 941 (2021) (No. 19-16636, -16708); Brief for the Chamber of Com. as *Amicus Curiae* in Support of Appellees, *FTC v. AbbVie Inc.*, 976 F.3d 327 (2020) (Nos. 18-2621, 18-2748, 18-2758); Brief of *Amicus Curiae* Chamber of Com. in Support of Appellees' Petition for Rehearing En Banc, *City of Oakland v. BP*, 969 F.3d 895 (2020) (No. 18-16663); Motion of Chamber of Com. for Leave to File an *Amicus Curiae* Brief Supporting Appellee, *Duguid v. Facebook Inc.*, 926 F.3d 1146 (2019) (No. 17-15320); Brief of the Chamber of Com. as *Amicus Curiae* Supporting Appellees' Petition for Rehearing En Banc, *City of Miami v. Bank of America*, 923 F.3d 1260 (2019) (No. 14-14543); Brief of the Chamber of Com. as *Amicus Curiae* Supporting Appellees' Petition for Rehearing En Banc, *City of Miami v. Wells Fargo Bank & Co.*, 923 F.3d 1260 (2019) (No. 14-14544).

[21] *Client Profile: US Chamber of Commerce*, https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2010&id=D000019798.

[22] Brody Mullins & Alex Leary, *Washington's Biggest Lobbyist, the U.S. Chamber of Commerce, Gets Shut Out*, Wall St. J. (May 2, 2019), https://www.wsj.com/articles/washingtons-biggest-lobbyist-the-u-s-chamber-of-commerce-gets-shut-out-11556812302.

as relentless in their *amicus* practice as the Chamber, which filed over one hundred more *amicus* briefs than any other organization at the Supreme Court from 2005 to 2016.[23] Often, these parallel efforts have advocated for the same goals. For example, it is difficult to see a difference between the Chamber's hostility to the Consumer Financial Protection Bureau (CFPB) outside the courtroom and its hostility to the agency in its *amicus* briefs. The Chamber spent $2 million on advertisements, created a "Stop the CFP[B]" website, and coordinated a "grassroots outreach" campaign in opposition to the CFPB's creation.[24] Once the CFPB was established, the Chamber dedicated itself to undermining and opposing it at every step.[25] When it was unable to achieve its ideal results through legislative lobbying, the Chamber turned to the courts. In *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), the Chamber filed an *amicus* brief supporting the petitioners who challenged the constitutionality of the agency's structure and who asked the Court to invalidate the entire CFPB.[26] The Chamber ignores these connections by adopting a strained view of "lobbying," but it is impossible to see the Chamber as engaged in anything but a multifaceted campaign to achieve its desired results in every possible forum.

This critique is not to suggest that organizations may not simultaneously lobby their elected officials and advance arguments in the courtroom. That is their right. But the Committee should be clear-eyed about the lines the Chamber attempts to draw between its different roles as advocates, as well as the context of its opposition to improving Rule 29. The judiciary should guard jealously against the incursion of raw, dark-money politics into its dockets. And it should not require less disclosure than is required for raw legislative lobbying.

## IV. Conclusion

A final word on lawyers: in our view, lawyers who are engaged in deliberate subterfuge to obscure from courts, parties, and the public the true party in interest whose arguments they are presenting are doing a grave disservice to the judicial branch and to their profession. This may seem like fun and games to lawyers engaged in this masquerade, but it degrades the transparency and integrity of judicial proceedings, weakens citizens' ability to discern what is really going on in our popular democracy, and risks bringing grave discredit on the judicial system whenever

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[23] 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/.

[24] Brody Mullins, *Chamber Ad Campaign Targets Consumer Agency*, Wall St. J. (Sept. 8, 2009), https://www.wsj.com/articles/SB125236911298191113. *See also* Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 Harv. L. Rev. 352, 358 (2020); Press Release, U.S. Chamber of Com., *U.S. Chamber Intensifies Campaign for Bipartisan Financial Regulatory Reform* (Mar. 25, 2010), https://www.uschamber.com/press-release/us-chamber-intensifies-campaign-bipartisan-financial-regulatory-reform.

[25] *See, e.g.*, Sean Hackbarth, *Out of Control: CFPB Renovation Costs Balloon Nearly 400%*, U.S. Chamber Com. (July 2, 2014), https://www.uschamber.com/above-the-fold/out-control-cfpb-renovation-costs-balloon-nearly-400; Gary Rivlin & Susan Antilla, *No Protection for Protectors*, The Intercept (Nov. 18, 2017), https://theintercept.com/2017/11/18/wall-street-wants-to-kill-the-agency-protecting-americans-from-financial-scams/; Jared Bennett, *Who Is Killing the CFPB's Arbitration Rule?*, Ctr. Pub. Integrity (July 28, 2017), https://publicintegrity.org/inequality-poverty-opportunity/who-is-killing-the-cfpbs-arbitration-rule/.

[26] Brief of the Chamber of Com. as *Amicus Curiae* in Support of Petitioner, *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020) (No. 17-56324); Reply Brief for the Petitioner, *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020) (No. 17-56324).

these subterfuges are ultimately disclosed, by Russian hackers or otherwise. The judiciary has an obligation to clean this up.

For the foregoing reasons, the Committee should not "wait for . . . guidance" in the form of more litigation on disclosure and the First Amendment.[27] The Committee should instead be guided by the warnings of James Madison:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.[28]

In order to meet these challenges, the Committee and Subcommittee should work to ensure that Rule 29 is updated to accommodate *amici*'s First Amendment rights while also sufficiently achieving the public's interest in transparency. At a time when faith in our institutions is lacking, it is critical that the judiciary demonstrate that it is capable of meeting challenges that threaten to undermine the public's faith in it. We thank you again for the serious attention you have devoted to this concern.

Sincerely,

Sheldon Whitehouse
United States Senator

Henry C. "Hank" Johnson, Jr.
Member of Congress

[27] Chamber Letter, *supra* note 1, at 1, 6.
[28] Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *The Writings of James Madison* (Gaillard Hunt ed.).