# Congress of the United States
Washington, DC 20510

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October 26, 2023

Honorable John D. Bates
Chair, Judicial Conference Committee on Rules of Practice and Procedure
U.S. District Court for the District of Columbia
333 Constitutional 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

Dear Judge Bates and Judge Bybee:

We are grateful to hear of action on our request, first referred to this body three years ago, that the federal judiciary strengthen its rules governing the disclosure of who funds amicus curiae briefs—a worsening problem as front-group amici increasingly appear in coordinated squadrons and flotillas.

The problem with current interpretations of Rule 29 of the Federal Rules of Appellate Procedure and the Supreme Court's Rule 37.6 is illustrated in *New York State Rifle & Pistol Association v. Bruen*, decided by the Supreme Court last year. The National Rifle Association (NRA) appeared as an amicus supporting the petitioners without disclosing any connections to the petitioners or other amici.[1] Investigative reporting later revealed that at least twelve *Bruen* amici had funding connections to the NRA,[2] and that the NRA funded the underlying litigation at the Supreme Court.[3]

Even what we know so far—that one organization funded the litigation, appeared as an amicus, and funded multiple other amici—merits concern, indeed merits disclosure. The director of the

1 Brief for Amicus Curiae NRA Civil Rights Defense Fund in Support of Petitioners, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).
2 Will Van Sant, *The NRA's Shadowy Supreme Court Lobbying Campaign*, Politico Mag. (Aug. 5, 2022), https://www.politico.com/interactives/2022/nra-supreme-court-gun-lobbying.
3 *N.Y. State Rifle & Pistol Ass'n v. Nigrelli*, No. 1:18-cv-134, 2023 WL 6200195, at *6 n. 8 (N.D.N.Y. Sept. 22, 2023). These records show that the NRA Institute of Legislative Action was billed for litigation costs at the Supreme Court. Tax records for the related NRA Civil Rights Defense Fund, which appeared as an amicus in *Bruen*, show that the Fund regularly reimburses the NRA Institute of Legislative Action for litigation initially paid for by the Institute. See NRA Watch, *NRA Civil Rights Defense Fund 2021 Form 990* 27-29, https://nrawatch.org/filing/nra-civil-rights-defense-fund-2021-form-990. Reporting last year shows that the Fund also provided initial litigation funding in *Bruen*. Van Sant, *supra* note 2.

NRA state affiliate credited this effort for persuading the Court to grant *certiorari*.[4] When these coordinated political projects succeed, and are later exposed, it erodes public confidence in both the process and the outcome.

Proper transparency would help root out this misconduct, by providing judges, parties and the public with much-needed information about who is actually present in the courtroom and how they connect to other parties and amici. As you pursue reforms to enhance this transparency, we offer two thoughts on pitfalls to avoid.

The operations generating these flotillas of false-front amici will obviously continue to try to obfuscate their connections. Two predictable ways are: (1) strategic structuring of donations through multiple groups to keep each under the Committee's proposed 25% gross annual revenue threshold, and (2) using intermediary groups to stymie inquiry into the ultimate source of donations.

In the first scenario, consider a group such as Marble Freedom Trust, which operates a $1.6 billion fund on behalf of Republican political operative Leonard Leo, and whose advocacy network regularly files amicus briefs in the Supreme Court. Marble Freedom Trust could structure funding to an amicus through four of Leo's groups that each fund 24.9% of the amicus, and—with minimal other outside funding—stay below the reporting level, even where Marble Freedom Trust was responsible for 99.6% of the amicus group's annual revenue. The rule should put the onus on amici to disclose such structured and coordinated funding and affiliations.

Second is what might be called the "superPAC problem." SuperPACs are obliged to disclose only their immediate, not their actual, donors. This has led to the proliferation of identity-laundering entities such as 501(c)(4) organizations. Only the intermediary is disclosed, not the true donor, defeating the purpose of the exercise.

Congress has addressed the problem of shell intermediaries in campaign and illicit finance contexts, with bills like the DISCLOSE Act and the Corporate Transparency Act, which are designed to trace an ultimate beneficial owner or donor through multiple layers of shell groups. We commend those examples to you.

4 Gun Owners Radio, *What does 'bear arms' mean? NYSRPA v Bruen*, YouTube (Jan. 29, 2022), https://www.youtube.com/watch?v=6U30tKH3J_I (at 6:11-6:20).

Again, we thank you for the progress the Judicial Conference is making to clean up the front-group amicus problem and, as Judge Patricia Millett put it, reveal the "real power behind the throne."[5] An honest and effective judicial process requires no less.

Sincerely,

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

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

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