Nos. 18-15499, 18-15502, 18-15503, 18-16376

United States Court of Appeals for the Ninth Circuit

COUNTY OF SAN MATEO, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants	No. 18-15499 No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria
CITY OF IMPERIAL BEACH, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants	No. 18-15502 No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria
COUNTY OF MARIN, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants	No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria
COUNTY OF SANTA CRUZ, *et al.*, Plaintiff-Appellees, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants	No. 18-16376 Nos. 18-cv-00450-VC; 18-cv-00458-VC; 18-cv-00732-VC Hon. Vince Chhabria

BRIEF OF AMICUS CURIAE SENATOR SHELDON WHITEHOUSE IN SUPPORT OF APPELLEES AND AFFIRMANCE

Gerson H. Smoger
SMOGER & ASSOCIATES, P.C.
13250 Branch View Ln.
Dallas, TX 75234
(972) 243-5297
(510) 531-4529
gerson@texasinjurylaw.com

Robert S. Peck
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
455 Massachusetts Ave., N.W.
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae Senator Sheldon Whitehouse certifies that he is an individual and not a corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE

Senator Sheldon Whitehouse represents the State of Rhode Island in the United States Senate. First elected to the Senate in 2006, Senator Whitehouse has actively sought comprehensive solutions to address climate change. He is a member of the Senate's Environment and Public Works Committee and author of the American Opportunity Carbon Fee Act, which would establish a fee on carbon emissions and return all revenue generated to the American people.

Senator Whitehouse has closely observed the influence of corporate lobbying and election spending in Congress, and how the fossil fuel industry has used its political and electioneering influence. The Senator regularly speaks on the Senate floor about the need to act on climate change and is the author of *Captured: The Corporate Infiltration of American Democracy*.

All parties have consented to the filing of amicus briefs. No party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund

preparing of submitting the brief, and no person other than Senator Whitehouse contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The Senator files this brief to provide context for arguments made by amicus curiae United States Chamber of Commerce (hereafter "the Chamber")[1] in support of appellants' request that

[1] This case highlights the fecklessness of the Court's disclosure rules in identifying who the real party in interest is behind an amicus brief. *See* Appendix A, Letter from Sen. Sheldon Whitehouse to Chief Justice John Roberts (Jan. 4, 2019). The Chamber manufactures no product and provides no general service. It exists as an intermediary between business interests and the public and political worlds. It is not at all transparent as to the sources of its funding. If the Chamber provides any service other than lobbying and electioneering, it masks the identity of real parties or industries in interest behind the relative anonymity of the Chamber's name. On the issue of climate change, its funding is particularly mysterious, as many companies on its board disagree with and deny accountability for the climate denial and opposition the Chamber espouses. *See* Senators Sheldon Whitehouse, Elizabeth Warren, *et al*., The U.S. Chamber of Commerce: Out of Step with the American People and its Members, available at https://www.warren.senate.gov/files/documents/2016-6-14-Chamber_of_Commerce_Report.pdf (last viewed on Jan. 26, 2019).

As astronomers divine the presence of dark bodies from their effect on the behavior of visible bodies, one can divine some unseen force driving the Chamber to a position on climate issues no member corporation will publicly espouse. The secrecy of the Chamber's funding obscures the exact explanation of this aberration. Arguably, the Chamber in this respect is sustained and controlled by fossil fuel industry funding. There is no reason that the Court, the other parties, and the country should be denied the identity of all real parties in interest behind its brief.

this Court review and reverse the lower court's order remanding this case to state court.

Contrary to the argument it puts forth in this Court, the Chamber's actions are not those of an organization in search of "thoughtful governmental policies that will have a meaningful impact on global climate change." Chamber Br. 1. They reflect a decades-long campaign of disinformation, obstruction, and political intimidation designed to prevent democratically accountable branches of government from adopting any policies that would reduce carbon pollution. The Court should assess the Chamber's arguments accordingly.

ARGUMENT

I. WHILE PROFESSING TO SUPPORT LEGISLATIVE AND EXECUTIVE ACTION ON CLIMATE CHANGE, IN LIEU OF JUDICIAL RULINGS, THE CHAMBER OF COMMERCE HAS FOUGHT ANY ACTION ON THE PROBLEM.

In its brief, the Chamber explains that it "believes that the global climate is changing, and that human activities contribute to those changes," and that "businesses must be part of any productive

conversation on how to address global climate change." Chamber Br. 1. It then makes the following claim:

> If there are to be thoughtful governmental policies that will have a meaningful impact on global climate change, then under our system of government those policies should come from Congress and the Executive Branch, and not through the courts or ad hoc efforts from state and local officials.

Id. at 1-2.

This statement bears no resemblance to the Chamber's actual position on climate change. In fact, the Chamber has a long and blemished record of opposition to "thoughtful governmental policies that will have a meaningful impact on global climate change," whether those policies come from Congress or the executive branch. As a United States Senator since 2007, I have had a front row seat from which to observe the Chamber's remorseless efforts to thwart any climate action in Washington.

Take federal legislation. In 2007, the Chamber opposed bipartisan cap and trade legislation.[2] In 2009, the Chamber was

[2] *See*, *e.g.*, "Wake Up to Climate Change Legislation" attack ad, U.S. Chamber of Commerce (Nov. 9, 2007), available at https://www.youtube.com/watch?v=XevRKc82soI (last viewed on Jan. 24, 2019).

one of the leading interest groups lobbying against the Waxman-Markey cap and trade legislation.[3] Since the failure of Waxman-Markey, the Chamber's allies in Congress have refused to hold hearings on, mark up, debate, or vote on any legislation proposing a policy framework for economy-wide reductions in carbon pollution.

After securing legislative inaction, the Chamber focused its efforts on defeating regulatory actions by the executive branch to limit carbon pollution. In 2010, the Chamber sued the Environmental Protection Agency (EPA), seeking to overturn its finding that greenhouse gas emissions endanger the public health and welfare.[4] Beginning in 2014, the Chamber convened fossil fuel

---

[3] *See*, *e.g.*, Letter Opposing H.R. 2454, the "American Clean Energy and Security Act of 2009," U.S. Chamber of Commerce (June 24, 2009), available at https://www.uschamber.com/letter/letter-opposing-hr-2454-american-clean-energy-and-security-act-2009 (last viewed on Jan. 24, 2019). Of particular note is the Chamber's threat to consider votes on this legislation in its "How They Voted" scorecard, which may in turn influence election spending decisions.

[4] *Chamber of Commerce v. EPA*, Petition for Review (Feb. 12, 2010), Case No. 10-1030 (D.C. Cir.), available at https://www.chamberlitigation.com/sites/default/files/cases/files/2010/Chamber%20of%20Commerce%20v.%20EPA%20%28Endanger

industry lobbyists, lawyers, and political strategists to plot legal strategies for opposing future regulatory actions to limit carbon pollution[5] In 2015, the Chamber led a coalition of trade associations suing to block EPA's proposed Clean Power Plan to reduce carbon emissions in the electric power sector.[6] In 2017, the Chamber funded a study critical of the Paris Agreement,[7] a study which President Trump cited in his justification for withdrawing from the agreement.[8] This study was thoroughly debunked by independent

---

ment%20Rule%29%20%28Petition%20for%20Review%29.pdf (last viewed on Jan. 24, 2019).

[5] Coral Davenport and Julie Hirschfeld Davis, "Move to Fight Obama's Climate Plan Started Early," N.Y. TIMES (Aug. 3, 2015), available at https://www.nytimes.com/2015/08/04/us/obama-unveils-plan-to-sharply-limit-greenhouse-gas-emissions.html.

[6] *Chamber of Commerce v. EPA*, Petition for Review (Oct. 23, 2015), Case No. 15-1382 (D.C. Cir.), available at https://www.chamberlitigation.com/sites/default/files/U.S.%20Chamber%2C%20et%20al.%20v.%20EPA%20%28ESPS%29%20--%20Petition%20for%20Review.pdf (last viewed on Jan. 24, 2019).

[7] Impacts of Greenhouse Gas Regulations on the Industrial Sector, NERA Economic Consulting (Mar. 2017), available at http://www.globalenergyinstitute.org/sites/default/files/NERA%20Final%20Report%202.pdf (last viewed on Jan. 24, 2019).

[8] Glenn Kessler and Michelle Ye Hee Lee, "Fact-checking President Trump's claims on the Paris climate change deal," WASH. POST

climate experts.[9] Also in 2017, the Chamber spearheaded a lobbying campaign in support of a Congressional Review Act resolution to repeal a Department of Interior rule limiting methane emissions from oil and gas facilities on public lands.[10]

The Chamber also wields its influence through electoral politics. Since the decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), permitting outside groups to spend unlimited sums on electioneering activities, the Chamber has directly spent approximately $150 million[11] on congressional races, more than

---

(Jun. 1, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/06/01/fact-checking-president-trumps-claims-on-the-paris-climate-change-deal/?utm_term=.42bce20e6fcd.

[9] *See*, *e.g.*, Kevin Steinberger and Amanda Levin, "Chamber Inflates Costs, Ignores Benefits of Climate Action," Natural Resources Defense Council (Mar. 22, 2017), available at https://www.nrdc.org/experts/kevin-steinberger/chamber-inflates-costs-ignores-benefits-climate-action (last viewed on Jan. 24, 2019).

[10] *See*, *e.g.* Key Vote Alert, U.S. Chamber of Commerce (May 9, 2017), available at https://www.uschamber.com/sites/default/files/5.9.17-_key_vote_letter_to_senate_supporting_h.j._res._36_cra_resolution_repealing_blm_methane_rule.pdf (viewed on Jan. 24, 2019).

[11] U.S. Chamber of Commerce Outside Spending by Year, Center For Responsive Politics, https://www.opensecrets.org/outsidespending/detail.php?cmte=US

any other trade association.[12] Many of the attack ads the Chamber funds target candidates for their willingness to support policies to limit carbon pollution.[13] Almost no candidate benefiting from the Chamber's outside spending has supported any meaningful climate legislation.

The political power of the Chamber is not only measured by what the Chamber actually spends in each electoral cycle, but by what it threatens to spend. The ability to spend unlimited money in politics necessarily imparts the ability to threaten to spend

---

+Chamber+of+Commerce&cycle=2018 (last viewed on Jan. 24, 2019).

[12] The Chamber goes through extraordinary lengths to keep its membership anonymous and, as a trade association organized under section 501(c)(6) of the Internal Revenue Code, it is not otherwise obligated to disclose this information. As a result, the corporations that fund this political spending are unknown.

[13] *See*, *e.g.*, "Run, Jimmy" attack ad against Katie McGinty, 2016 candidate for U.S. Senate from Pennsylvania, available at https://player.vimeo.com/video/208379329 (last viewed on Jan. 24, 2019); Nancy Madsen, "U.S. Chamber of Commerce says Tim Kaine supported higher energy costs for families," Politifact Virginia (Aug. 21, 2012), available at https://www.politifact.com/virginia/statements/2012/aug/21/us-chamber-commerce/us-chamber-commerce-says-tim-kaine-supported-highe/.

unlimited amounts. Such threats provide several advantages to the influencer: they are effective; they can be kept secret; and you don't actually have to spend the money. At the beginning of almost every election cycle, the Chamber threatens to spend far more than it actually spends, a warning to any moderate Republican who fears a well-funded primary challenger.[14] It is no coincidence that bipartisan activity on climate change came to an end in Congress immediately after the *Citizens United* decision unleashed these powers.

The Chamber's actions are not those of an organization in search of "thoughtful governmental policies that will have a meaningful impact on global climate change." Chamber Br. 1. They reflect a decades-long campaign of disinformation, obstruction, and political intimidation designed to prevent democratically

[14] *See*, *e.g.*, Carol Leonnig, "Corporate donors fuel Chamber of Commerce's political power," WASH. POST (Oct. 19, 2012), available at https://www.washingtonpost.com/politics/decision2012/corporate-donors-fuel-chamber-of-commerces-political-power/2012/10/18/96ad666a-1943-11e2-bd10-5ff056538b7c_story.html?utm_term=.2798acebd23f.

accountable branches of government from adopting any policies that would reduce carbon pollution.[15] The Court should assess the Chamber's arguments accordingly.

II. THE ISSUES RAISED IN THESE LAWSUITS ARE JUSTICIABLE AND NOT POLITICAL QUESTIONS.

The Chamber's legal strategy here is an extension of its political one. While its primary focus is convincing this Court that the issues raised by the plaintiffs-appellees should be addressed in

---

[15] The predicament of the falsity of the climate denial position (now well documented in peer-reviewed academic research) is best illustrated by the major oil companies whose CEOs now publicly purport to acknowledge the reality and severity of their product's harmful effects on our planet and claim to support a market-based carbon price (some even provide slight — by industry standards — support to a not-yet-operational 501(c)(4) organization supporting a carbon price), but at the same time the industry's entire extant (and formidable) political and electioneering apparatus (including, we believe, the Chamber, though the Chamber's non-transparency obscures a true answer) remains remorselessly dedicated to opposing any meaningful legislative solution, including a price on carbon. These groups include the Chamber, the National Association of Manufacturers, the American Petroleum Institute, Americans for Prosperity, and an armada of others that collectively dominate political spending in America. *See*, *e.g.*, Robert Brulle, "The climate lobby: a sectoral analysis of lobbying spending on climate change in the USA, 2000 to 2016," *Climatic Change*, vol. 149, issue 3-4, pgs. 289 – 303, available at https://link.springer.com/article/10.1007%2Fs10584-018-2241-z.

federal court, the Chamber's brief hints at the inevitable argument to come: "claims related to the causes and effects of climate change" "present political questions that cannot be resolved by the courts." Chamber Br. 15.

Actually, they don't present political questions. They present factual claims that courts are expert at resolving. They present questions of harm and liability that courts are expert at resolving. They require the winnowing of fact from fiction and fraud, where courts have both expertise and the ability to impose consequences for fiction and fraud. Court-required discovery helps winnow facts from industry-funded, poll-tested fictions shopped in legislative arenas.[16] Finally, courts and juries have a storied equalizing role: they are established to provide a forum where even politically mighty interests must stand equal before the law with those they

[16] The potential for bias exists in any industry-funded research, and courts understand that such research should not be relied upon in litigation. *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 (2008) ("Because this research was funded in part by Exxon, we decline to rely on it.").

have harmed.[17] Politically mighty organizations prefer more favorable fields, where their political might settles the question. The Chamber would clearly love to neuter the judicial branch of government on these questions.

History reveals a long battle between powerful influencers who want to bring government to their heel, at whatever cost to the public, and a public that needs its own interests protected but has not arrayed the political might of the big influencers.[18] Courts have

---

[17] Unique in the constitutional constellation, the jury is designed not just to protect the individual against government, but also to protect the individual against other "more powerful and wealthy citizens." 3 William Blackstone, COMMENTARIES ON THE COMMON LAW OF ENGLAND *381 (1992 reprint) (1765). Juries are not obliged to respect political power or proprieties, just to do justice in the case before them. 1 Alexis De Tocqueville, DEMOCRACY IN AMERICA 314 (Arthur Goldhammer trans., Penguin Putnam Inc. 2004) (1838) ("The jury system as it is understood in America seems to me a consequence of the dogma of popular sovereignty just as direct and just as extreme as universal suffrage. Both are equally powerful means of ensuring that the majority reigns.").

[18] *See, e.g.*, Theodore Roosevelt, *New Nationalism Speech* (1910) ("[T]he United States must effectively control the mighty commercial forces[.] . . . The absence of an 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, PHILOSOPHICAL WORKS OF DAVID HUME 290 (1854) ("Where the riches are in a few hands, these

an important role in this contest as the branch of government theoretically less responsive to political might.[19] It should come as no surprise that the mightiest of political influencers would like to steer all questions that are of importance to them to the arenas where their political might holds greatest sway. But that's not how the Founders set our government up. There is no doctrine of "too big to adjudicate" or "too important to the politically mighty to

---

must enjoy all the power and will readily conspire to lay the whole burden on the poor, and oppress them still farther, to the discouragement of all industry."); Andrew Jackson, 1832 Veto Message Regarding the Bank of the United States (July 10, 1832) (transcript available in the Yale Law School library) ("It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purpose . . . 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 the Government."); Niccolo Machiavelli, THE PRINCE IX (1532) ("[O]ne cannot by fair dealing, and without injury to others, satisfy the nobles, but you can satisfy the people, for their object is more righteous than that of the nobles, the latter wishing to oppress, whilst the former only desire not to be oppressed.").

[19] The courts have long recognized this truism. *See Chisholm v. Georgia*, 2 U.S. (2 Dall. 419, 479 (1793) (The Constitution "places all our citizens on an equal footing, and enables each and every one of them to obtain justice without any danger of being overborne by the weight and number of their opponents.").

adjudicate." The politically mighty have enough advantages without the Court conferring such a benefit upon them.

There may come a time in this litigation when this Court is faced squarely with questions of justiciability. At that time, Senator Whitehouse expects to provide more extensive context for assessing whether or not legal claims made by any appellant-defendant or supporting amici are consistent with actions they take before the other branches of government. For present purposes, and for the foregoing reasons, Senator Whitehouse respectfully suggests that any legal arguments or factual assertions the Chamber makes about the merits, justiciability, and the proper role of the federal courts vis-à-vis other courts or other branches of government be treated with the scrutiny deserving of assertions made a by self-interested party with a long history belying its arguments.

CONCLUSION

For the foregoing reasons, amicus curiae Senator Sheldon Whitehouse respectfully requests that the Court take into context that those raising questions about the propriety of judicial action here, supposedly in favor of legislative or executive action, similarly

oppose action by the other branches of government, so that their pleas should be understood as rent-seeking, self-interested pleas to complete inaction, and that the courts are well-equipped to adjudicate these matters and enter an order consistent with the positions expressed herein.

January 29, 2019

Respectfully submitted,

Robert S. Peck
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
455 Massachusetts Ave., N.W.
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

Gerson H. Smoger
SMOGER & ASSOCIATES, P.C.
13250 Branch View Ln.
Dallas, TX 75234
(972) 243-5297
(510) 531-4529
gerson@texasinjurylaw.com

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically field with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 29, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Robert S. Peck

Robert S. Peck

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(g), I certify that:

This brief complies with Rule 29(a)(5)'s type-volume limitation because it contains 2,856 words (as determined by the Microsoft Word 365 word-processing system used to prepare the brief), excluding the parts the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32 (a)(6)'s type-style requirements because it has been prepared in a proportionately spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

/s/ Robert S. Peck

Robert S. Peck

APPENDIX A

SHELDON WHITEHOUSE
RHODE ISLAND

COMMITTEES:
BUDGET
ENVIRONMENT AND PUBLIC WORKS
FINANCE
JUDICIARY

United States Senate
WASHINGTON, DC 20510-3905

http://whitehouse.senate.gov
(202) 224-2921
TTY (202) 224-7746

170 WESTMINSTER STREET, SUITE 200
PROVIDENCE, RI 02903
(401) 453-5294

January 4, 2019

The Honorable John G. Roberts
Chief Justice
Supreme Court of the United States
One First St. NE
Washington, D.C. 20543-0001

The Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
One First St. NE
Washington, D.C. 20543-0001

Dear Chief Justice Roberts and Mr. Harris:

I have followed with interest recent reports about the Court's invocation of Supreme Court Rule 37.6, which states that briefs presented to the Court on behalf of *amici curiae* "shall identify every person other than the *amicus curiae*, its members, or its counsel, who made [a] monetary contribution" "to fund the preparation or submission of the brief." According to these reports, the Court recently rejected an *amicus* submission made by the U.S. Alcohol Policy Alliance for its failure to comply with Rule 37.6, since its brief failed to disclose the names of each of the group's donors, many of whom had contributed to the brief through the "crowdfunding" website GoFundMe.[1] As a result, *amicus* was forced to return donations from individuals who wished to remain anonymous, and re-file its brief, disclosing the names of individuals who had supported the GoFundMe campaign. Donations to the brief ranged from $25-$500.

In a statement to *The National Law Journal*, the Court's public information office said: "The Clerk's Office interprets this language [of Rule 37.6] to preclude an amicus from filing a brief if contributors are anonymous." It is difficult, however, to reconcile that interpretation with the Court's practice of routinely accepting *amicus curiae* briefs from special interest groups that fail to disclose their donors. For example, as I recently brought to the Court's attention,[2] in the orchestrated challenge to union agency shop fees first initiated in *Friedrichs v. California Teachers Association*, one organization, the Lynde and Harry Bradley Foundation, not only bankrolled the nonprofit law firm bringing the case, but also donated to eleven different organizations that filed *amicus curiae* briefs supporting the plaintiffs. Surely, if Rule 37.6 were operating to its intended effect, the Court would have required disclosure of that funding. Yet

[1] Tony Mauro, *Supreme Court Rule Crimps Crowd-Funded Amicus Briefs*, The National Law Journal (Dec. 10, 2018).
[2] Brief for Senators Sheldon Whitehouse and Richard Blumenthal as Amici Curiae in Support of Respondents, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S.Ct. 2448 (2018), at 16-17.

none of those *amicus* filers disclosed the Bradley Foundation (or any other source) as the source of its funding for the brief under Rule 37.6, and none of those briefs was rejected by the Court for such lack of disclosure.

The rule's transparency aims are also undercut by its own terms, which exempt disclosure by member-funded *amici*. The U.S. Chamber of Commerce, for example, routinely files influential amicus briefs in Supreme Court litigation, including in cases where its members are parties in interest. The Chamber can comply with Rule 37.6 simply by affirming that "no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission."[3] But the Chamber takes pains to conceal the identity of its membership, having an official policy "not to distribute or make public information about our members."[4] As a result, its Rule 37.6 disclosure is effectively meaningless, and the deep-pocketed corporate contributors to the Chamber's *amicus* activity can enjoy the fruits of its unparalleled Supreme Court win rate – 9-1 in cases in which it participated last term – in complete anonymity. That the Court allows this type of concealment by the Chamber as a matter of course, while forcing anonymous $25 donors to return their contributions, is a perverse result indeed.

The Court's disparate treatment of the crowdfunded, small-dollar-backed brief filed by the U.S. Alcohol Policy Alliance and the well-heeled, repeat-player *amici* who routinely flood the Court with anonymously funded briefs is troubling, and telling. It reflects an elemental tension in a democracy between two classes of citizens. One is an influencer class that occupies itself with favor-seeking from government, and therefore desires rules of engagement that make government more and more amenable to its influence. The second class is the general population, which has an abiding institutional interest in a government with the capacity to resist that special interest influence. This is a centuries-old tension.[5] When the Court establishes and applies rules designed to promote transparency and integrity, it should not overlook this latter abiding interest.

---

[3] *See, e.g.*, Brief for the Chamber of Commerce of the United States as Amicus Curiae, *Epic Systems v. Lewis*, 138 S.Ct. 1612 (2018), at n.1 (emphasis added).

[4] Chamber of Commerce of the United States, Frequently Asked Questions, https://www.uschamber.com/about/about-the-us-chamber/frequently-asked-questions.

[5] *See* Theodore Roosevelt, *New Nationalism Speech* (1910) ("[T]he United States must effectively control the mighty commercial forces[.] . . . The absence of an 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, PHILOSOPHICAL WORKS OF DAVID HUME 290 (1854) ("Where the riches are in a few hands, these must enjoy all the power and will readily conspire to lay the whole burden on the poor, and oppress them still farther, to the discouragement of all industry."); Andrew Jackson, 1832 Veto Message Regarding the Bank of the United States (July 10, 1832) (transcript available in the Yale Law School library) ("It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purpose . . . 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 the Government."); NICCOLO MACHIAVELLI, THE PRINCE IX (1532) ("[O]ne cannot by fair dealing, and without injury to others, satisfy the nobles, but you can satisfy the people, for their object is more righteous than that of the nobles, the latter wishing to oppress, whilst the former only desire not to be oppressed.").

The number of *amicus* briefs the Court receives has increased by almost 100% since 1995.[6] That increase – and the concomitant rise in high-dollar investment in *amicus* participation – reflects a growing recognition among the influencer class that the Supreme Court, like any policymaking body, is susceptible to its influence. Rule 37.6 recognizes, and the Court's recent rejection of the brief filed by the U.S. Alcohol Policy Alliance reinforces, that Americans deserve to know who is behind these judicial lobbying efforts. If that rule, by its terms or by its enforcement, operates to prohibit contributions by only small-dollar donors and not wealthy and corporate interests, it is failing to meet that objective. I hope you agree that state of affairs presents a threat to the Court's reputation as neutral arbiter of laws, which I know you value and strive to protect.

I believe a legislative solution may be in order to put all *amicus* funders on an equal playing field. To that end, in the near future, I intend to introduce the Assessing Monetary Influence in the Courts of the United States Act of 2019, which would require disclosure of contributions over a certain threshold to repeat-player *amici* in the Supreme Court of the United States and the lower federal courts of appeals. I have attached a copy of the bill text and would welcome the benefit of your feedback or any additional information about Rule 37.6 and its enforcement that you believe may be relevant to this legislative effort.

Sincerely,

Sheldon Whitehouse
United States Senator

[6] 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); Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 Law & Soc. Inquiry 955, 961 (2007).

116TH CONGRESS
1ST SESSION

S. _____

To amend title 28, United States Code, to require certain disclosures related to amicus activities.

IN THE SENATE OF THE UNITED STATES

Mr. WHITEHOUSE introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend title 28, United States Code, to require certain disclosures related to amicus activities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the [“_____ Act of _____”.]

SEC. 2. DISCLOSURES RELATED TO AMICUS ACTIVITIES.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Disclosures related to amicus activities

"(a) DEFINITION.—In this section, the term 'covered amicus' means any person, including any affiliate of the person, that files not fewer than 3 total amicus briefs in any calendar year in the Supreme Court of the United States and the courts of appeals of the United States.

"(b) DISCLOSURE.—

"(1) IN GENERAL.—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; or

"(B) contributed not less than 5 percent of the gross annual revenue of the amicus filer if the amicus filer is not an individual

"(2) EXCEPTIONS.—The requirements of this subsection shall not apply to amounts received by the amicus filer in commercial transactions in the ordinary course of any trade or business conducted by the amicus filer or in the form of investments (other than investments by the principal shareholder in a limited liability corporation) in an organization if the amounts are unrelated to the amicus filing activities of the amicus filer.

"(c) REGISTRATION.—

"(1) IN GENERAL.—Each covered amicus shall register as a covered amicus in any court in which the covered amicus files an amicus brief.

"(2) CONTENTS.—The registration described in paragraph (1) shall include—

"(A) the name, address, business telephone number, and principal place of business of the registrant;

"(B) a general description of the business or activities of the registrant;

"(C) the name, address, and principal place of business of any person described in subsection (b)(1);

"(D) a statement of the general issue areas in which the registrant expects to engage in amicus activities; and

"(E) to the extent practicable, specific issues that have, as of the date of the registration, already been addressed or are likely to be addressed in the amicus activities of the registrant.

"(3) DEADLINE.—Each amicus shall submit to the applicable courts the registration required under this subsection not later than—

"(A) 45 days after the date on which the amicus becomes a covered amicus; and

"(B) [January 1] of the calendar year after the calendar year in which the amicus was a covered amicus.

"(d) AUDIT.—The Comptroller General of the United States shall conduct an annual audit to ensure compliance with this section.

"(e) PUBLICLY AVAILABLE LISTS.—The clerk of the Supreme Court and each clerk of a court of appeals of the United States shall periodically update the website of the applicable court with the information described in subsection (c)(2).

"(f) PROHIBITION ON PROVISION OF GIFTS OR TRAVEL BY COVERED AMICI TO JUDGES AND JUSTICES.—No covered amicus may make a gift or provide travel to a judge of a court of appeals of the United States or an associate justice or Chief Justice of the Supreme Court of the United States.

"(g) CIVIL FINES.—Whoever knowingly fails to comply with any provision of this section shall, upon proof of such knowing violation by a preponderance of the evidence, be subject to a civil fine of not more than $200,000, depending on the extent and gravity of the violation.

"(h) RULES OF CONSTRUCTION.—

"(1) CONSTITUTIONAL RIGHTS.—Nothing in this section shall be construed to prohibit or interfere with—

"(A) the right to petition the Government for the redress of grievances;

"(B) the right to express a personal opinion; or

"(C) the right of association, protected by the First Amendment to the Constitution of the United States.

"(2) PROHIBITION OF ACTIVITIES.—Nothing in this section shall be construed to prohibit, or to authorize any court to prohibit, amicus activities by any person or entity, regardless of whether such person or entity is in compliance with the requirements of this section.

"(i) SEVERABILITY.—If any provision of this section, or the application thereof, is held invalid, the validity of the remainder of this section and the application of such provision to other persons and circumstances shall not be affected thereby.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"1660. Disclosures related to amicus activities.".