MITCH McCONNELL
KENTUCKY

United States Senate
REPUBLICAN LEADER

The Hon. John D. Bates
Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

September 10, 2024

Dear Judge Bates:

We write to express our strong opposition to the proposed amendments to *amicus* disclosure that the Judicial Conference has been inexplicably considering. These amendments would do nothing to strengthen confidence in the judiciary. They are based on complaints from partisan Democrats who operate under a bad-faith misunderstanding of the judicial process. It's obvious that they seek to use these disclosures to chill core protected speech and associations while bringing the judiciary into disrepute for partisan purposes. We are, frankly, shocked that these discussions have proceeded as far as they have given their obviously partisan genesis and their certain deleterious effects.

I. The First Amendment Protects the Associational and Speech Rights of Those Seeking to Weigh in on Litigation.

We are firm believers in the rights protected by the First Amendment. Defending the right to free speech has been an animating principle behind our combined more than eighty years in the U.S. Senate.[1] We have therefore been alarmed by the growing hostility to these rights. If the rights of speech and association should find their protection anywhere, it's in the courts—including in the Judicial Conference.

You shouldn't need us to explain the protections the First Amendment provides to speech and association, but this proposal compels us to do so.

[1] *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93 (2003); Letter from Senator John Thune, et al., to the Hon. Jessica Rosenworcel (June 6, 2024), https://www.thune.senate.gov/public/_cache/files/f6d3f136-5e2e-42d6-a979-6a943dd06162/16768AD893634C882D27CE35E1D5FAE5.06.06.24-letter-to-chairwoman-rosenworcel-re.-ai-and-political-ads.pdf; Glenn Thrush, *W.H. can't assuage Cornyn*, Politico (Aug. 19, 2009), https://www.politico.com/blogs/on-congress/2009/08/wh-cant-assuage-cornyn-020739.

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Under the First Amendment, "Congress shall make no law … abridging the freedom of speech."[2] This freedom of speech includes "a corresponding right to associate with others."[3] The Supreme Court recently explained that "[p]rotected association furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'"[4] As such the Court has long protected those who associate for speech purposes from compelled disclosure of those associations, subjecting any such disclosures to "exacting scrutiny."[5]

The seminal case on this score was *NAACP v. Alabama*, 357 U.S. 449 (1958). There Alabama sought to force the NAACP, a New York non-profit corporation, to disclose the identities of its agents and members to the Alabama Attorney General.[6] The Court held that they couldn't. Noting that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," Justice Harlan concluded, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[7]

The Court rightly observed that this is a rather elementary conclusion, observing, "It 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 the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved."[8] This is so because—especially as applied to the NAACP in Jim Crow Alabama—"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."[9]

Of course, in the context of election-campaign disclosure requirements, the Supreme Court has held that "exacting scrutiny" is satisfied in the context of express advocacy related directly to an election campaign. The Court, in *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam), identified three purposes justifying disclosure even at the expense of free association: (1) providing the electorate with information as to where money both comes from and is spent in order to make informed voting choices; (2) deterring actual corruption and its appearance by exposing large expenditures; and (3) providing the information needed to detect violations of the campaign-

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[2] U.S. Const. Amend. 1.
[3] *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).
[4] *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 606 (2021) (quoting *Roberts*, 468 U.S. at 622).
[5] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).
[6] *NAACP v. Alabama*, 357 U.S. 449, 451 (1958).
[7] *NAACP*, 357 U.S. at 460.
[8] *Id.* at 462.
[9] *Id.*

finance laws.[10] And even in the context of political speech courts have differentiated between advocating for issues and advocating for the election or defeat of a candidate.[11]

Obviously courts are not Congress, litigation is not an election, and an appellate docket is not a free-for-all. The justifications for campaign-finance disclosure identified in *Buckley* do not apply here.

First, voters may, indeed, have an interest in knowing who is funding electioneering efforts. Dirty tricks abound in electoral politics. Is this ad in a Republican primary secretly being funded by the Democratic Majority Leader?[12] Disclosure rules perhaps help voters navigate the hurly-burly of politics. We seriously doubt that you think such Nixonian wet works are at play on the federal appellate docket, because they aren't.

Second, campaign disclosure ostensibly deters corruption by blowing the whistle on *the recipient* of the expenditures—i.e. the candidate. Who's the corruptee in this case: the trade associations and think tanks standing as *amici*? That seems improbable. And even if it were true, who cares? The public purpose of campaign disclosures is to ferret out corruption *by elected officials*. Where's the public interest in seeing if, hypothetically, the Sierra Club has been bought off by the green-energy industry? And even if such a public interest did exist, why is it the job of the judicial bureaucracy to play-act as Woodward and Bernstein?

Lastly, there is no FEC of the appellate bar policing a byzantine maze of criminal and civil penalties that requires data to do its job like there is in electoral politics.

In sum, under our Constitution there is a strong presumption against disclosed affiliations. In the rare case that the government has prevailed against that presumption—campaign-finance disclosure for candidate advocacy—the benefits identified by the Supreme Court don't apply in the case of *amicus* briefs. That the Advisory Committee saw fit to analogize the two reflects the judgment of a body that apparently understands neither campaigns nor judging.[13] To the contrary, *amicus* briefs are clearly more analogous to issue advocacy, where disclosure rules are unconstitutional. Regardless, any supposed benefit that could come from election-type transparency being grafted on to *amicus* briefs will be quickly overtaken by harassment of disfavored speakers. Such harassment is not merely hypothetical, as we explain below. Indeed, we cannot help but note the incongruence of this proposal with the Conference's recent, important advocacy to adopt laws that shield from disclosure its judges' personal information, as well as its

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[10] *Buckley*, 424 U.S. at 66–68.

[11] *See Bonta*, 594 U.S. at 608.

[12] *See* Joe Schoffstall, *Schumer-linked PACs spend millions to meddle in GOP primaries*, Fox News (Mar. 24, 2024), https://www.foxnews.com/politics/schumer-linked-pacs-spend-millionsmeddle-gop-primaries.

[13] Judicial Conference of the United States, Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to Federal Rules (Aug. 2024) ("Proposed Amendments") at *20 ("Disclosure requirements in connection with amicus briefs serve an important government interest in helping courts evaluate the submissions of those who seek to persuade them, in a way that is analogous to campaign finance disclosures that help voters to evaluate those who seek to persuade them.").

continued, related advocacy for increased security funding to respond to the very real threat environment faced by judges and litigants alike.[14]

Courts rightly maintain various restrictions on who can express themselves in a judicial context through procedural rules, admissions, and inherent judicial powers. The goal of those rules is not political but procedural. They exist to maintain reasonable dockets so as to promote the effectiveness of the adversary process in driving judicial decision-making. The current provisions of Rule 29, for example, prevent litigants from abusing the *amicus* process in order to evade page limits. It's about maintaining a level playing field *for the litigants*. Not so this proposal, which seeks to chill free speech and cast aspersions on federal judges.

We have little doubt that the judges of the Judicial Conference and the Justices of the Supreme Court will immediately see the violence this proposal does to the First Amendment should it reach them. But it's also clear that at each of these subsequent stages in the rulemaking process, judges will be under tremendous pressure to approve the proposed rule lest they seem "political." We would advise them that the inevitable braying of liberal political and academic voices will have it precisely backwards: following the Constitution is not political; rubber-stamping a partisan agenda item is.

If this rule is somehow enacted, we encourage affected parties to challenge it immediately in court. It will be a sorry sight to see the judiciary haled into its own courts for violating one of our most fundamental rights, but it will be necessary. And you won't be able to say that you weren't warned.

II. The Elected Officials Promoting These Reforms Seek to Intimidate and Undermine the Judiciary.

The elected officials, who spurred this rulemaking and have sponsored similar legislation in Congress, don't care about maintaining the integrity of the judiciary. The Advisory Committee does not shrink from the fact that it sprang into action upon seeing the unfriendly AMICUS Act.[15]

The fact is that the political actors pushing *amicus* disclosure are doing so to intimidate and undermine the judiciary, which is a perceived impediment to their preferred policies. This rule would give credence to their outlandish claims and be weaponized by elected officials as they seek to bully judicial officers and undermine their authority. Indeed, Senate Democrats have gone to great lengths to bully and harass members of the judiciary as well as private individuals engaged in political advocacy.[16] The Democratic theory is that the federal judiciary—and the Supreme

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[14] *See Congress Passes the Daniel Anderl Judicial Security and Privacy Act*, Judiciary News, United States Courts (December 16, 2022), https://www.uscourts.gov/news/2022/12/16/congress-passes-daniel-anderl-judicial-security-and-privacy-act (noting that "the bill was strongly endorsed by the Judicial Conference of the United States"); *see also* Dan Mangan, *1,000 federal judges seek to remove personal info from internet as threats skyrocket*, CNBC (Mar. 17, 2023), https://www.cnbc.com/2023/03/17/federal-judges-remove-personal-information-from-internet.html.

[15] Proposed Amendments at *11.

[16] *See, e.g.,* Press Release, Senators Unveil New Captured Courts Report Exposing the Judicial Crisis Network's Central Role in a Scheme to Capture and Control the Supreme Court, Senator Sheldon Whitehouse, https://www.whitehouse.senate.gov/news/release/senators-unveil-new-captured-courts-report-exposing-the-judicial-

Court in particular—has been the target of a longstanding "scheme" by private interests to take it over for their personal benefit. In short, the Supreme Court doesn't issue originalist rulings because it's majority originalist; it does so because "right-wing special interests" have "captured" it. Of course, what good is having six Justices in your pocket if you can't make sure they know how you want them to rule? That's where the *amicus* briefs come in: these "special interests" organize "flotillas" of briefs to signal to the corrupt Justices how they should rule.[17] Like chalk marks on a mailbox or a misplaced rock, these *amicus* briefs supposedly inform the right-wing sleeper agents at the Supreme Court what to do. Or so these theorists would have us believe.

The reality is that this is not how litigation works. You know it's not how litigation works.[18] Judges read the briefs, they listen to arguments, they do their research, and they rule by applying the law to the facts using their best judgment. Different judges can reach different conclusions based on the same law and facts because people aren't widgets and the law isn't a computer algorithm. Judicial philosophy informs judgment across multiple levels and it affects results. Sometimes we like these results and sometimes we don't. Win or lose, we know that judges are operating in good faith by their best lights, not at the secret instruction of the petrochemical industry, on one hand, or George Soros, on the other. By even countenancing this preposterous proposal, you are giving credence to claims you know to be false about how judges do their jobs.

The goal here is not to help the courts but to undermine the courts. Don't take our word for it: Democrats are up front about what they're doing. In a recent anti-Second Amendment *amicus* brief prominent Senate Democrats said: "The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.'"[19] The current Senate Majority Leader went to the steps of the Supreme Court and ominously intoned, "I want to tell you, Gorsuch; I want to tell you, Kavanaugh: You have released the whirlwind and you will pay the price. You won't know what hit you if you go forward with these awful decisions."[20] In a highly unusual written response, Chief Justice Roberts said, "Justices know that criticism comes with the territory, but threatening statements of this sort

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crisis-networks-central-role-in-a-scheme-to-capture-and-control-the-supreme-court/. *See also* Sheldon Whitehouse & Jennifer Mueller, The Scheme (2022) *and* The Scheme 33: The Undoing of the Modern Regulatory State, Senator Sheldon Whitehouse, https://www.whitehouse.senate.gov/news/speeches/the-scheme-33-the-undoing-of-the-modern-regulatory-state/.

[17] Scheme Speech 9: Amicus Flotillas, Senator Sheldon Whitehouse, https://www.whitehouse.senate.gov/news/speeches/scheme-speech-9-amicus-flotillas/.

[18] The Advisory Committee says otherwise: "But the identity of an amicus does matter, at least in some cases, to some judges." Proposed Amendments at *20. If Judge Bybee and his colleagues believe this, they should name names.

[19] Br. of Senator Sheldon Whitehouse et al., *N.Y. State Rifle & Pistol Association., Inc., v. New York*, No. 18-280 (2020), https://www.whitehouse.senate.gov/wp-content/uploads/imo/media/doc/New%20York%20Rifle%20&%20Pistol%20Association%20v.%20New%20York%20(Whitehouse%20amicus%20FINAL).pdf.

[20] Editorial, *Sen. Chuck Schumer's threatening rhetoric to Supreme Court justices crosses a line*, USA Today (Mar. 5, 2020), https://www.usatoday.com/story/opinion/todaysdebate/2020/03/05/chuck-schumer-threatening-rhetoric-gorsuch-kavanaugh-crosses-line-editorials-debates/4964578002/.

from the highest levels of government are not only inappropriate, they are dangerous."[21] And what happened after Justice Kavanaugh indeed went forward with a decision that liberals didn't like? A man who said he was upset about a leaked Supreme Court decision allegedly traveled to Justice Kavanaugh's Maryland home intending to assassinate Justice Kavanaugh.[22] The man was arrested near Justice Kavanaugh's residence with a pistol, ammunition, a crow bar, a hammer, zip ties, and duct tape.[23]

These efforts to attack and undermine the courts are not restricted to elected Democrats. There's a whole media cottage industry dedicated to attacking Judge Matt Kacsmaryk in the Northern District of Texas for ruling in ways that liberals don't like.[24] Fifth Circuit Judge Jim Ho has been getting his turn in the barrel, too.[25] There was even a concerted effort to paint as corrupt Judges Don Willett of the Fifth Circuit[26] and Cam Barker of the Eastern District of Texas[27] (are you noticing a pattern?) due to non-material, attenuated holdings sleuthed from their financial

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[21] Pete Williams, *In rare rebuke, Chief Justice Roberts slams Schumer for 'threatening' comments*, NBC News (March 4, 2020), https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-schumer-threatening-comments-n1150036.

[22] Mara Cramer, *Armed Man Traveled to Justice Kavanaugh's Home to Kill Him, Officials Say*, N.Y. Times, (June 8, 2022), https://www.nytimes.com/2022/06/08/us/brett-kavanaugh-threat-arrest.html.

[23] *California Man Facing Federal Charges in Maryland for Attempted Murder of a United States Judge*, United States Attorney's Office, District of Maryland, (June 8, 2022) https://www.justice.gov/usao-md/pr/california-man-facing-federal-charges-maryland-attempted-murder-united-states-judge.

[24] *See, e.g.*, Ruth Marcus, *Thanks to the Supreme Court, a federal judge in Texas is making foreign policy decisions*, Wash. Post (Aug. 25, 2021), https://www.washingtonpost.com/opinions/2021/08/25/supreme-court-matthew-kacsmaryk-remain-in-mexico-policy/; Melissa Quinn, *Meet the federal judge set to rule in a case that could disrupt access to the abortion pill*, CBS News (Mar. 2, 2023), https://www.cbsnews.com/news/matthew-kacsmaryk-medication-abortion-mifepristone-abortion-pill-judge-texas/; Nate Raymond, *Texas judge in abortion pill lawsuit often rules for conservatives*, Reuters (Apr. 10, 2023), https://www.reuters.com/world/us/texas-judge-abortion-pill-lawsuit-often-rules-conservatives-2023-04-08/; Charlie Savage & Pam Belluck, *Judge's Ruling Against Abortion Pill Is Filled With Activists' Language*, N.Y. Times (Apr. 11, 2023), https://www.nytimes.com/2023/04/11/us/abortion-pill-ruling.html; *Hear what judge who suspended abortion pill said in undisclosed radio interviews*, CNN, https://www.cnn.com/videos/politics/2023/04/20/federal-judge-kacsmaryk-fails-to-disclose-interviews-nomination-kfile-lead-vpx.cnn; Casey Tolan & Isabelle Chapman, *Details about multimillion-dollar stock holding concealed in abortion pill judge's financial disclosures*, CNN (Apr. 21, 2023), https://www.cnn.com/2023/04/21/politics/judge-kacsmaryk-financial-holdings-abortion-pill/index.html; Matt Ford, *A Right-Wing Judge Aims to Undo Free Speech, One Drag Show at a Time*, The New Republic (Sept. 26, 2023), https://newrepublic.com/article/175748/right-wing-judge-aims-undo-free-speech-one-drag-show-time.

[25] Ian Millhiser, *The edgelord of the federal judiciary*, Vox (Aug. 26, 2023), https://www.vox.com/scotus/23841718/edgelord-federal-judiciary-james-ho-fifth-circuit-abortion-guns; James Larock, *The Worst Trump Judge In America Is James Ho*, Balls and Strikes (June 15, 2023), https://ballsandstrikes.org/legal-culture/the-worst-trump-judge-in-america-is-james-ho/; Ansev Demirhan & Evan Vorpahl, *Judge James Ho's Connections to the Anti-Abortion Movement*, Ms. (Oct. 5, 2023), https://msmagazine.com/2023/10/05/judge-james-ho-abortion/; Amanda Yen, *Wife of Judge on Mifepristone Case Was Paid by Anti-Abortion Group*, The Daily Beast (Mar. 25, 2024), https://www.thedailybeast.com/wife-of-james-ho-judge-on-mifepristone-case-was-paid-by-anti-abortion-group; Joe Patrice, *Judge James Jo Delivers Tour De Force In Disingenuous Bulls*t*, Above the Law (Apr. 18, 2024), https://abovethelaw.com/2024/04/judge-ho-conservative-forum-shopping/.

[26] *Watchdog: Conflicted 5th Circuit Judge Must Recuse in U.S. Chamber Lawsuit Against CFPB Credit Card Rule*, Accountable.Us (Apr. 9, 2024), https://accountable.us/watchdog-conflicted-5th-circuit-judge-must-recuse-in-u-s-chamber-lawsuit-against-cfpb-credit-card-rule/.

[27] David Dayen, *Judge Hearing Noncompete Cases Holds Stock in Companies That Use Noncompetes* (May 9, 2024), https://prospect.org/justice/2024-05-09-judge-barker-noncompete-cases-stocks-conflict/

disclosures. Unlike when the media decried it as a threat to democracy when the previous president attacked judges he perceived as opponents, the media now happily pass the ammunition because it's "conservative" judges being attacked.

This proposal will only provide more grist for the mill of attacking judges who stand up to powerful cultural forces.

III. The Other Goal and Certain Result of These Reforms Will Be the Harassment of Private Parties in a Concerted Effort to Chill Speech and Association.

Recent years have seen an explosion of harassment against people whose political activities are disclosed.

Prominent Democrats attack their opponents' donors, like when the late Senator Harry Reid attacked the Koch Brothers[28] or when President Obama said one of Mitt Romney's donors was "betting against America" and had a "less-than-reputable" record.[29] A center-right legislative reform organization's donors were famously harassed into stopping their donations.[30] Chick-Fil-A was even forced to stop donating to the Salvation Army and the Fellowship of Christian Athletes following a proverbial "fifteen minutes of hate."[31] And the harassment endured by supporters of California's Proposition 8 is too extensive to list beyond the high-profile dismissals[32] and "cancellations"[33] it spawned.

Even liberals understand the danger proposed by disclosure. When one anti-court activist group accidentally sent its donor list to a center-right media outlet, its president complained, "I have only two foundations that give me money, and if their names become public, they're never going to talk to me again...."[34] Indeed.

One would have to be naïve to think that once these donors are "outed" for funding *amicus* briefs in cases protecting minority constitutional rights, the machinery of punishment from the dominant culture will not spring into action against them. The contemporary push for disclosure shares the same illiberal impulses that it had in 1950s Alabama.

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[28] Dana Milbank, *Harry Reid has a Koch problem*, Washington Post (Apr. 30, 2014), https://www.washingtonpost.com/opinions/dana-milbank-harry-reid-has-a-koch-problem/2014/04/30/49c5e406-d0af-11e3-9e25-188ebe1fa93bstory.html.

[29] Kimberly A. Strassel, *The President Has a List*, Wall St. J. (Apr. 26, 2012), https://www.wsj.com/articles/SB10001424052702304723304577368280604524916.

[30] Editorial, *Shutting Down ALEC*, Wall St. J. (Apr. 18, 2012), https://www.wsj.com/articles/SB10001424052702304432704577347763603932288.

[31] Justin Kirkland, *Chick-fil-A Will No Longer Act as a Shield for Hateful People*, Esquire (Nov. 19, 2019), https://www.esquire.com/food-drink/food/a29836910/chick-fil-a-donation-lgbtq-announcement-backlash/.

[32] Jon Swaine, *Mozilla CEO Brendan Eich resigns in wake of backlash to Prop 8*, The Guardian (Apr. 3, 2014), https://www.theguardian.com/technology/2014/apr/03/mozilla-ceo-brendan-eich-resigns-prop-8.

[33] Hunter Baker, *The Vilification of Orson Scott Card*, hunterbaker.wordpress.com (Nov. 2, 2013), https://hunterbaker.wordpress.com/2013/11/02/the-villification-of-orson-scott-card/.

[34] Gabe Kaminsky, *Supreme Court 'transparency' charity director panics over IRS donor leak: 'I just f***ed up'*, Washington Examiner (May 17, 2023), https://www.washingtonexaminer.com/news/2201699/supreme-court-transparency-charity-director-panics-over-irs-donor-leak-i-just-fed-up/.

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It's unfortunate that the Judicial Conference's committees have decided to spend five years dancing a jig to a nakedly partisan tune. While we understand the impulse in a non-political body like the Judicial Conference to humor bad-faith political actors by indulging their complaints, doing so only incentivizes further partisan harassment. Worse still, when you go beyond indulgence to acquiescence you open up your committee to consistent, open lobbying and nuisance. If an elected official has nowhere near the votes to pass his judicial-reform legislation—but he can get it from the judiciary if he complains—his colleagues and allies would be remiss not to start complaining, too. When you reward a child's whining with treats, you can expect a lot more whining. It's human nature and basic politics.

Perhaps the Judicial Conference will need to adopt rules requiring disclosure requirements for the inevitable flotillas of public-and-private-sector harassers, cajolers, and lobbyists who will be seeking future "reforms" from its committees now that they know they can get their way.

Scrap this ill-begotten, quasi-legislative proposal and focus on issues that actually matter to the courts of appeals.

Sincerely,

Mitch McConnell, U.S. Senator

John Cornyn, U.S. Senator

John Thune, U.S. Senator