Congress of the United States
Washington, DC 20510

February 23, 2021

Honorable John D. Bates
Chair, Judicial Conference Committee on Rules of Practice and Procedure
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Re: Funding Disclosure Requirements for *Amicus Curiae* Briefs

Dear Judge Bates,

We write you to request that the Committee on Rules of Practice and Procedure consider the establishment of a working group to address the problem of inadequate funding disclosure requirements for organizations that file *amicus curiae* briefs in the federal courts, which implicates Federal Rule of Appellate Procedure (FRAP) 29(a)(4)(e). This letter follows previous correspondence with Hon. Scott Harris, Clerk of the Supreme Court, regarding the Supreme Court's parallel Rule 37.6. We understand that Mr. Harris recently brought this correspondence to your attention, suggesting that the Committee on Rules of Practice and Procedure may wish to consider whether an amendment to Rule 29 is in order in light of our concerns.

I. Overview

FRAP 29—modeled after the Supreme Court Rule 37.6—provides that an *amicus* filer must include a statement in their brief whether "a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief," and whether "a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person" (emphasis added).[1] Mr. Harris explained in our correspondence that this rule "strikes a balance." "By requiring the disclosure of those who make a monetary contribution specifically intended for a particular *amicus* brief," Mr. Harris explained, "the rule provides information about funding directly aimed at advocating specific positions" in court. "At the same time," he continued, "it recognizes that requiring broader disclosure of an organization's membership information or general donor lists could well infringe upon the associational rights of the organization . . . ."

[1] Similarly, Supreme Court Rule 37.6 provides that "a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made such a monetary contribution to the preparation or submission of the brief."

In practice, however, this "balance"—between the public's interest in transparency and organizations' associational rights—is badly off-kilter. Thanks to these rules' narrow requirements that *amici* disclose only such funding "that was intended to fund preparing or submitting the brief," *amici* rarely if ever disclose the sources of their funding. This is apparently permissible under the rules so long as the funding was not specifically earmarked to fund "preparing or submitting the brief." In other words, the rules permit an *amicus* group not to disclose even large donations earmarked generally to fund its *amicus* practice; in fact, the rules could plausibly be construed so narrowly as to only encompass the costs of formatting, printing, and delivering the specific brief in the specific case at issue. The rules thus fail to account for the reality that "money is fungible," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 32 (2010), creating a loophole that allows an *amicus* filer, in practice, to never disclose its funders, even if those funders include a party-in-interest to the case. As we detail here, sophisticated parties, *amicus* groups, and their wealthy funders have successfully exploited this loophole to exert anonymous influence on our courts. As a result, opposing parties, the public, and courts themselves are left in the dark about who is seeking to influence judicial decision-making, compromising judicial independence and the public perception thereof.

II. The Current *Amicus* Disclosure Rules Do Not Achieve Their Intended Goals.

Amicus briefs—written by non-parties to a case for the purpose of providing information, expertise, insight, or advocacy—have increased in both volume and influence in the past decade. During the Supreme Court's 2014 term, *amici* submitted 781 amicus briefs,[2] an increase of over 800% from the 1950s and a 95% increase from 1995. From 2008 to 2013, the Supreme Court cited *amicus* briefs 606 times in 417 opinions. Supreme Court opinions also often adopt language and arguments from *amicus* briefs.[3] That increase in the volume of *amicus* filings—and the concomitant rise in high-dollar investment in *amicus* participation—reflect a growing recognition among those who seek to shape the law through the courts that the federal courts are susceptible to their influence.

The Supreme Court adopted its *amicus* funding disclosure rule in 1997 "in an effort to stop parties in a case from surreptitiously 'buying' what amounts to a second or supplemental merits brief, disguised as an amicus brief, to get around word limits."[4] Likewise, the parallel rule of federal appellate procedure—expressly modeled after the Supreme Court Rule—"serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs."[5] In 2018, the Supreme Court's public information office explained that "the Clerk's Office interprets [the Rule] to preclude an amicus from filing a brief if contributors are anonymous."[6]

It is difficult to reconcile the Court's interpretation of these rules as precluding an *amicus* from filing a brief if contributors are anonymous with the Court's practice of routinely accepting

[2] 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).
[3] 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).
[4] *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.
[5] Committee notes on the 2010 Amendment to the Federal Rules of Appellate Procedure.
[6] *Id.*

amicus curiae briefs from special-interest groups that fail to disclose their donors. To the extent the rules were devised to preclude *amici* from filing "supplemental merits briefs" on behalf of parties, or if their financial backers are anonymous, they are not achieving those goals. A review of *amicus* practice before the Supreme Court illustrates how parties to litigation—as well as large donors who fund and develop "impact litigation" with the goal of shaping law and public policy through the courts—use *amicus* briefs to get around page limits on the parties' briefs, advance boundary-pushing arguments on behalf of the donors' long-term interests, and do so under a cloak of anonymity. This can take any of several forms.

a. Parties Directly Funding *Amici*

The narrow demands of Rule 37.6 and FRAP 29—requiring disclosure of only those donations that were given "to fund preparing or submitting the brief"—allow parties to litigation to do precisely what the rules were intended to prevent, i.e., surreptitiously buy what amounts to a supplemental merits brief, disguised as an *amicus* brief. One recent high-profile Supreme Court case illustrates this problem. In *Google LLC. v. Oracle America Inc.* (No. 18-956), the Internet Accountability Project (IAP)—a 501(c)(4) "social welfare" organization that does not disclose its funders—filed an *amicus* brief supporting Oracle's position, telling the Court that it wanted to "ensure that Google respects the copyrights of Oracle and other innovators." *Bloomberg* subsequently reported that Oracle had itself donated between $25,000 and $99,999 to IAP in 2019 as "just one part of an aggressive, and sometimes secretive, battle Oracle has been waging against its biggest rivals," including Google.[7] The report further documented donations from Google to at least ten groups that filed briefs in support of its position.

The Court's *amicus* funding disclosure rule did not require that any of these donations—assuming they were not specifically earmarked for the "preparation or submission of the brief"—be disclosed to the Court. And indeed, the majority of these party-funded *amici* did not disclose that they had been funded by a party to the case.[8] IAP, for example, misleadingly (yet compliantly) attested that "none of the parties or their counsel, nor any other person or entity other than amicus or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief." Nevertheless, at least four of these *amicus* filers—but not IAP—voluntarily reported the financial support they had received from one of the parties in the case, in the words of one *amicus*, "[i]n an abundance of caution and for the sake of transparency."[9] These voluntary disclosures suggest that some attorneys believe their ethical obligations required

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[7] Naomi Nix and Joe Light, *Oracle Reveals Funding of Dark Money Group Fighting Big Tech*, BLOOMBERG (Feb. 25, 2020), https://www.bloomberg.com/news/articles/2020-02-25/oracle-reveals-it-s-funding-dark-money-group-fighting-big-tech.

[8] *See*, e.g., *Google LLC. v. Oracle America Inc.* (No. 18-956), Brief of Internet Accountability Project, at n.1

[9] *See* Brief of *Amicus Curiae* Electronic Frontier Foundation in Support of Petitioner; *see also* Brief of *Amici Curiae* Python Software Foundation et al. fn. 1 ("Counsel for amici curiae was previously engaged to advise Google in connection with this matter earlier in its history, and represents Google in other matters[.]"); Brief of *Amici Curiae* Center for Democracy and Technology et al. fn. I ("Counsel for amici curiae was previously engaged to advise Google in connection with this matter earlier in its history, and represents Google in other matters, but Google has had no involvement with the preparation of this brief."); Brief of *Amici Curiae* Computer and Communication Industry Association and Internet Association et al. fn. 2 ("Google is a CCIA member, and Oracle and Sun Microsystems were formerly members of CCIA, but none of these parties took any part in the preparation of this brief . . . Google is a member of IA. As noted above, Google took no part in the preparation of this brief.").

a greater degree of disclosure than the Supreme Court requires. Plenty of others, however, have been content to conceal these suspicious financial arrangements, which the Court's Rule permits.

b. Donors Funding *Amici* and Litigants in the Same Case, and Donors Anonymously Orchestrating *Amicus* "Projects"

In recent years, thanks to the work of investigative reporters, we have seen how many high-profile, politically charged cases are financed directly by ideological foundations. Often, the same foundations that fund the litigation also exploit the courts' lenient *amicus* funding disclosure rules to anonymously fund armadas of *amicus* briefs that support their preferred outcomes. For example, in the orchestrated challenge to union agency shop fees first initiated in *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016), one organization, the Lynde and Harry Bradley Foundation—a conservative foundation that has long sought to weaken labor rights, including by financing impact litigation—bankrolled not only the nonprofit law firm bringing the case, but also eleven different organizations that filed *amicus curiae* briefs supporting the plaintiffs.[10] Surely if the disclosure Rule were operating to its intended effect, the Court would have required disclosure of that funding. Yet none of those *amicus* filers disclosed the Bradley Foundation (or any other source) as a source of its funding for the brief under Rule 37.6, and none of those briefs was rejected by the Court for lack of such disclosure.

The Bradley Foundation's coordinated, undisclosed funding of the litigants and *amici* in *Friedrichs* was not a one-off. In *Janus v. AFSCME*, the follow-up to *Friedrichs*, investigative reporters found that the Bradley Foundation again funded both groups representing the plaintiffs, as well as 12 groups that filed *amicus* briefs.[11] Similarly, the two groups representing the *Janus* plaintiffs, plus 13 *amicus* filers, all received funding from an organization named Donors Trust (or its sister organization Donors Capital Fund), a so-called "donor advised fund" that has been described as "the dark-money ATM of the right."[12] None of this common funding was disclosed to the Court. Thus, the current disclosure rules permit wealthy donors like the Bradley Foundation to finance litigants and law firms to bring ideologically motivated cases while simultaneously funding upwards of a dozen *amicus* briefs supporting those cases, circumventing Court limits on the parties' briefs and creating the false impression of broad popular support for the donors' preferred position.

In an *amicus* brief in *Seila Law LLC v. Consumer Financial Protection Bureau* (No. 19-7), Senators documented how thirteen *amici* aligned with Petitioner received financial support from the same entities that fund the Federalist Society.[13] That brief also detailed how the Federalist Society had long promoted the "unitary executive" legal theory advanced by Petitioner and ultimately adopted by the Court—a theory that redounds to the financial benefit of Federalist Society funders. The Center for Media and Democracy subsequently found that "16 right-wing foundations," including the Bradley Foundation and Donors Trust, "have donated a total of

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[10] *See* 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.

[11] Mary Bottari, *Behind* Janus*: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2018), https://inthesetimes.com/features/janus_supreme_court_unions_investigation.html.

[12] *Id*.

[13] Brief of *Amici Curiae* U.S. Senators Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirono, Appendix A.

nearly $69 million to 11 groups that filed amicus briefs in favor of scrapping the CFPB."[14] None of this information was required to be disclosed to the Court under its current Rule.

Recently published documents reveal how influential donors like the Bradley Foundation use tax-exempt money to coordinate *amicus* "projects" to influence court results through legal networks such as the Federalist Society, as presumably occurred in *Seila Law*. In 2015, a representative of the Bradley Foundation emailed Leonard Leo, then Executive Vice President of the Federalist Society, to ask if there was "a 501(c)(3) nonprofit to which Bradley could direct any support of the two Supreme Court *amicus* projects other than Donors Trust," the identity-laundering "donor-advised fund" described above.[15] Leo replied: "Yes, Judicial Education Project could take and allocate." In turn, Judicial Education Project—a 501(c)(3) tax-exempt organization that does not disclose its donors—submitted a grant proposal to Bradley seeking $200,000 to coordinate and develop *amicus* briefs in two politically charged (yet completely unrelated) cases: the aforementioned *Friedrichs*, and *King v. Burwell*, 576 U.S. 988 (2015), a challenge to the Affordable Care Act. The Bradley Foundation estimated that "each of the two *amicus*-brief efforts costs approximately $250,000, for a total of $500,000," and the Bradley staff recommended a $150,000 grant to JEP to support this work. The Bradley staffer explained the strategy behind this investment as follows:

> At this highest of legal levels, it is often very important to orchestrate high-caliber amicus efforts that showcase respected high-profile parties who are represented by the very best lawyers with strong ties to the Court. Such is the case here, with *King* and *Friedrichs*, even given Bradley's previous philanthropic investments in the actual, underlying legal actions.[16]

In the *King* and *Friedrichs* cases, none of the *amici* supporting the Bradley-funded litigants' positions disclosed their Bradley Foundation funding, or any of their funding sources for that matter, pursuant to Rule 37.6. While this nondisclosure arguably violated the Rule, it also arguably did not, if one interprets the Rule narrowly to require disclosure of only such funds intended to cover the costs of formatting, printing, and delivering the briefs. In any event, this example illustrates why a broader and more demanding disclosure rule is necessary.

c. Member-funded *Amici* Who Do Not Disclose Their Members

The *amicus* funding disclosure regime's transparency aims are also undercut by its own terms, which specifically exempt from disclosure any contributions by an *amicus*-filer's members. See FRAP 29(a)(4)(E)(iii) ("An amicus brief . . . must include . . . a statement that indicates whether a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief."). This again

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[14] Alex Kotch, *Conservative Foundations Finance Push to Kill the CFPB,* THE CENTER FOR MEDIA AND DEMOCRACY (Feb. 13, 2020).
[15] Lisa Graves, *Snapshot of Secret Funding of Amicus Briefs Tied to Leonard Leo–Federalist Society Leader, Promoter of Amy Barrett*, TRUE NORTH RESEARCH (Oct. 9, 2020), https://truenorthresearch.org/2020/10/snapshot-of-secret-funding-of-amicus-briefs-tied-to-leonard-leo-federalist-society-leader-promoter-amy-coney-barrett/.
[16] *Id*. (emphasis added).

leaves open the possibility that parties to litigation can secretly fund *amicus* briefs in support of their position by funneling money to organizations of which they are members.

For example, the U.S. Chamber of Commerce—by far the Court's most prolific *amicus* filer[17]—routinely submits influential *amicus* briefs in Supreme Court litigation. The Chamber has complied with Supreme Court Rule 37.6 by affirming that "no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission."[18] However, the Chamber does not disclose its members to the public,[19] so there is no way to know who is influencing the positions the Chamber takes in litigation. As a result, its disclosure is effectively meaningless, and the deep-pocketed corporate contributors to the Chamber's *amicus* activity can enjoy, in complete anonymity, the fruits of its unparalleled Supreme Court win rate—9-1 in cases in which it participated last term. The Chamber makes similar disclosures in briefs it files in the circuit courts.[20]

We are sensitive to claims that required disclosure of membership lists may implicate associational and/or speech rights, such as those at issue in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), in which the Supreme Court refused to allow compelled disclosure of the identities of NAACP members who faced significant threats to their physical safety during the civil rights era. But granting sweeping anonymity protections to *all* member organizations, including business networks like the U.S. Chamber of Commerce whose corporate members face no serious threat of reprisal for the public expression of their views, simply does not follow. Indeed, "applying *NAACP v. Alabama*'s holding in a formally symmetrical manner to the relatively powerful . . . without regard to context may undermine rather than affirm the values underlying that decision."[21]

d. The *Amicus* Funding Disclosure Regime Creates Absurd Results, Unfairly Favoring Sophisticated Repeat-Players.

As we have documented here, wealthy and sophisticated repeat players have exploited the Supreme Court's ineffective *amicus* funding disclosure regime to develop what amounts to a massive, anonymous judicial lobbying program. They similarly exploit the lower appellate courts' Rule, where orchestrated *amicus* projects are arguably even more influential.

One rare example of the Supreme Court actually *enforcing* its Rule 37.6 illustrates the absurd results created by this regime, demonstrating how it systematically favors well-heeled insiders over the average citizen who wishes to make his or her voice heard. In 2018, the

[17] Adam Feldman, *The Most Effective Friends of the Court*, EMPIRICAL SCOTUS (May 11, 2016), https://empiricalscotus.com/2016/05/11/the-most-effective-friends-of-the-court/.
[18] *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).
[19] Dan Dudis, *Why the US Chamber of Commerce is fighting transparency*, THE HILL (April 6. 2016), https://thehill.com/blogs/pundits-blog/finance/275301-why-the-us-chamber-of-commerce-is-fighting-transparency.
[20] *See, e.g.*, Brief Amicus Curiae of the Chamber of Commerce of the United States of America, *Crossroads Grassroots Policy Strategies v. Federal Elections Commission*, Case No. 18-5261, D.C. Circuit (filed on Mar. 18, 2019) at n.1, https://www.fec.gov/resources/cms-content/documents/cgps_185261_uscc_amicus.pdf.
[21] Dale E. Ho, NAACP v. Alabama and False Symmetry in the Disclosure Debate, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405 (2012).

Supreme Court rejected an *amicus* submission made by the U.S. Alcohol Policy Alliance for its failure to comply with Rule 37.6, because its brief failed to disclose the names of each of the group's donors, many of whom had contributed to the brief through the small-dollar "crowdfunding" website GoFundMe.[22] 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.

The Court's disparate treatment of the crowdfunded, small-dollar-backed brief filed by the U.S. Alcohol Policy Alliance and the wealthy, repeat-player *amici* who routinely file anonymously funded briefs is 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.[23] When courts establish and apply rules designed to promote transparency and integrity, they should not overlook this latter abiding interest.

Ironically, the Court's application of its own Rule is what has posed the most significant threat to associational and speech interests. By applying Rule 37.6 to require small donor disclosure for an *amicus* brief funded through GoFundMe, the Court directly chilled the ability of individuals to band together on an *ad hoc* basis to support a legal position of importance to them.[24] A rule that forces disclosure of these donors, but not the large and anonymous corporate funders of sophisticated repeat-players like the United States Chamber of Commerce, does not "strike[] a balance" at all.[25]

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[22] Tony Mauro, *Supreme Court Rule Crimps Crowd-Funded Amicus Briefs*, THE NATIONAL LAW JOURNAL (Dec. 10, 2018).

[23] *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.").

[24] *See* Letter from Sen. Sheldon Whitehouse to C.J. John Roberts and Scott S. Harris, Clerk, U.S. Supreme Court (Jan. 4, 2019); *see also* Tony Mauro, *Supreme Court Rule Crimps Crowd-Funded Amicus Briefs*, THE NATIONAL LAW JOURNAL (Dec. 10, 2018).

[25] Letter from Scott S. Harris, Clerk, U.S. Supreme Court, to Sen. Sheldon Whitehouse (Feb. 27, 2019).

III. Recommendations

As noted in our correspondence with Mr. Harris, we believe a legislative solution may be in order to ensure much-needed transparency around judicial lobbying, and to put all *amicus* funders on an equal playing field. While we disagree with Mr. Harris's suggestion that legislation along these lines would improperly "intrude into areas historically left to the Court" or implicate separation-of-powers concerns, we agree it would be salutary for the judicial branch to address these issues on its own.

There are better ways to structure a disclosure rule to achieve the public interest in transparency while protecting the associational interests of those who risk real danger of physical harm or other demonstrable injury as a result of funding organizations that file *amicus* briefs. Our AMICUS (Assessing Monetary Influence in the Courts of the United States) Act, for example, would require funding disclosure by only repeat *amicus* filers—defined as those who file three or more *amicus* briefs in the Supreme Court or the federal courts of appeals during a calendar year. The bill also narrowly targets only high-dollar funders of *amicus* filers, requiring disclosure of only those who contributed three percent or more of the *amicus* group's gross annual revenue, or over $100,000. We have attached a copy of the bill text and offer it merely as one possible approach the judiciary might take to adopting a rule that strikes a better balance between these competing interests.

We appreciate the Committee's attention to this issue and hope it will take these concerns seriously. It should not fall to members of Congress and investigative journalists to scrutinize court dockets and IRS forms to expose conflicts of interest that, left hidden, could undermine the legitimacy of the judiciary's work. More than ever before, the judiciary should be vigilant about this threat, as political actors seeking to shape American law and public policy increasingly turn to the courts to achieve those goals, through multi-million dollar judicial confirmation campaigns, sophisticated *amicus* "projects," and the like. As Justice Scalia wrote: "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously . . . and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave."[26] We fully agree.

Sincerely,

Sheldon Whitehouse
United States Senator

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

[26] *Doe v. Reed*, 561 U.S. 186 (2010) (Scalia, J., concurring).

I. Appendix

a. AMICUS Act