

Congress of the United States
Washington, DC 20510

June 18, 2019

The Honorable John G. Roberts, Jr.
Chief Justice
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543-0001

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

Dear Chief Justice Roberts and Mr. Harris:

We have continued to follow with interest the Court’s application of Supreme Court Rule 37.6, which requires that *amici curiae* “identify every person other than the *amicus curiae*, its members, or its counsel” who made “a monetary contribution intended to fund the preparation or submission of the brief.” Today, we write to request further information about the Court’s apparently inconsistent application of this rule in recent filings. We remain concerned about the Court’s selective application of its donor disclosure rules, particularly when wealthy, anonymous donor interests invest so heavily in efforts to influence the federal judiciary.

On January 4, 2019, Senator Whitehouse sent a letter to the Chief Justice and the Clerk of the Court seeking comment on proposed legislation to enhance reporting requirements under Rule 37.6.¹ The letter – as yet unanswered – was prompted in part by the Court’s decision to reject an *amicus* submission made by the U.S. Alcohol Policy Alliance for failure to comply with Rule 37.6, as the brief was crowdfunded through small-dollar donations on the website GoFundMe, a few of which were made anonymously. That letter observed that the Court’s decision to reject this brief was inconsistent with its failure to reject briefs from frequent filers like the United States Chamber of Commerce, whose funders are anonymous. We have subsequently introduced legislation, the AMICUS Act, which we believe would bring greater transparency and consistency to these disclosures.²

We have observed what appears to be another failing of the rule and its enforcement in recent filings by the Becket Fund for Religious Liberty (Becket Fund). The Court has accepted *amicus curiae* briefs filed by the Becket Fund in the merits stages of three cases currently pending before

¹ Letter from Sheldon Whitehouse, United States Senator, Rhode Island, to John G. Roberts, Jr., Chief Justice, Supreme Court of the United States, and Scott S. Harris, Clerk of the Court, Supreme Court of the United States (Jan. 4, 2019).

² Assessing Monetary Influence in the Courts of the United States Act, S. 1411, 116th Cong. (2019).

the Court: *Gundy v. United States*; *Knick v. Township of Scott, Pennsylvania*; and *The American Legion v. American Humanist Association*. In all three briefs, the Becket Fund has included a nearly identical Rule 37.6 disclosure: “No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief” (emphasis added). Significantly, the Becket Fund fails to indicate, as is required by Rule 37.6, whether any: “person other than the *amicus curiae*, its members, or its counsel,” (emphasis added), made a donation intended to fund the preparation or submission of the brief – a clause that other *amici* routinely include in their Rule 37.6 disclosures and that the Becket Fund has itself included in previous *amicus* submissions.³

The Becket Fund has filed dozens of *amicus* briefs in this Court in recent years, so it should be presumed to know how to comply with the Court’s rules. The omission suggests that some other, undisclosed person or persons may have funded its *amicus* submissions. The Becket Fund’s known donors include the Chiaroscuro Foundation⁴ and the Lynde and Harry Bradley Foundation,⁵ both of which fund numerous other groups that regularly file briefs before this Court. These filings are made without any disclosure to the Court of the donors. Other Becket Fund donors are effectively completely anonymous: between 2015 and 2017, the Becket Fund received at least \$330,100 from the donor-advised fund DonorsTrust,⁶ an entity that masks donor identities. The Federalist Society’s Leonard Leo, whom *The Washington Post* recently revealed to have funneled \$250 million in anonymous dark money toward the selection and confirmation of judges (including at least two members of this Court),⁷ sits on the Becket Fund’s board of directors. The Becket Fund’s failure to certify that no one has contributed to the funding of its *amicus* briefs, combined with the organization’s opaque funding, appears to raise the same concern that led the Court to reject the U.S. Alcohol Policy Alliance’s crowdfunded brief.

As we continue to develop legislation on this topic, it would be useful to have additional information on the Court’s interpretation and enforcement of its rule.

1. Do the Becket Fund’s disclosures satisfy Rule 37.6? If they do, how does the Court interpret the rule’s requirement to “identify every person other than the *amicus curiae*, its

³ See, e.g., Brief of Becket Fund for Religious Liberty as *Amicus Curiae* Supporting Petitioners, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (No. 16-111); Brief of Becket Fund for Religious Liberty as *Amicus Curiae* Supporting Petitioners; *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017) (No. 16-74); Brief of Becket Fund for Religious Liberty as *Amicus Curiae* Supporting Respondent, *Matal v. Tam*, 137 S. Ct. 1744 (2017) (No. 15-1293); Brief of Becket Fund for Religious Liberty as *Amicus Curiae* Supporting Petitioner, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (No. 15-577).

⁴ *Religious Liberty Grants*, CHIAROSCURO FOUNDATION, <http://www.chiaroscurofnd.org/religious-liberty-grants> (last visited June 18, 2019).

⁵ THE LYNDE AND HARRY BRADLEY FOUNDATION, 2016 ANNUAL REPORT 16 (2016),

<https://cdn2.hubspot.net/hubfs/4152914/Annual%20Report/2016%20Annual%20Report.pdf>.

⁶ See I.R.S. Form 990 of Donors Trust, Inc. (Nov. 15, 2018), <https://www.documentcloud.org/documents/5668558-DonorsTrust-2017-990.html>; I.R.S. Form 990 of Donors Trust, Inc. (Nov. 15, 2017), <https://www.documentcloud.org/documents/4415326-DonorsTrust-2016-990.html>; I.R.S. Form 990 of Donors Trust, Inc. (Nov. 14, 2016), <https://www.documentcloud.org/documents/4415329-DonorsTrust-2015-990.html>.

⁷ Robert O’Harrow Jr. & Shawn Boburg, *A Conservative Activist’s Behind-the-Scenes Campaign to Remake the Nation’s Courts*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/?utm_term=.89a9ea1f3d49.

members, or its counsel, who made . . . a monetary contribution”? If they do not, what steps have been or will be taken to address the Becket Fund’s failure to comply with the rule?

2. What system does the Court have in place for monitoring *amicus* compliance with Rule 37.6?
3. During the Chief Justice’s tenure, how many *amicus* briefs has the Court rejected for failing to comply with Rule 37.6?
4. In explaining the Court’s decision to reject the U.S. Alcohol Policy Alliance’s brief, the Court’s public information office said: “The Clerk’s office interprets th[e] language [of Rule 37.6] to preclude an *amicus* from filing a brief if contributors are anonymous.”⁸ How is that interpretation consistent with the Court’s routine acceptance of *amicus* briefs submitted by the Becket Fund, the U.S. Chamber of Commerce, and multiple other groups that receive anonymous funding from identity-masking entities like DonorsTrust and/or fail to disclose their own membership and funding?

Please respond to this letter by August 15, 2019. You may direct future correspondence to Alex Aronson, Senior Counsel to Senator Whitehouse (alex_aronson@judiciary-dem.senate.gov), and Jacqui Kappler, Legislative Director to Representative Johnson (Jacqui.Kappler@mail.house.gov).

Sincerely,



Sheldon Whitehouse
United States Senator



Henry C. “Hank” Johnson
United States Representative

cc: Hon. Clarence Thomas
Hon. Ruth Bader Ginsburg
Hon. Stephen G. Breyer
Hon. Samuel A. Alito, Jr.
Hon. Sonia Sotomayor
Hon. Elena Kagan
Hon. Neil M. Gorsuch
Hon. Brett M. Kavanaugh

⁸ Tony Mauro, *Supreme Court Rule Crimps Crowd-Funded Amicus Briefs*, NAT’L L.J. (Dec. 10, 2018, 2:53 PM), <https://www.law.com/nationallawjournal/2018/12/10/supreme-court-rule-crimps-crowd-funded-amicus-briefs/>.