PEOPLE UNITED for PRIVACY FOUNDATION

March 28, 2023

23-AP-E

Honorable Jay S. Bybee
Chair, Advisory Committee on Appellate Rules
Lloyd D. George U.S. Courthouse
333 Las Vegas Boulevard South
Las Vegas, NV 89101

Re: Rule 29 Amendments; Opposition to General Disclosure of Non-Party Donors to Amici

Dear Judge Bybee,

People United for Privacy Foundation[1] writes to express its support for the direction the Amicus Subcommittee is taking in protecting donor privacy rights with its working draft language for potential amendments to Rule 29, specifically with respect to disclosures of *non-party donors* by organizations filing amicus briefs.

While an earlier draft of proposed amendments had threatened to impose a broad disclosure requirement based solely on ownership and contribution percentage thresholds, the latest drafts appropriately follow the approach of current Rule 29 by limiting disclosure to supporters who earmark their contributions for the purpose of drafting or filing the brief.[2] The limited disclosure of non-party donors contemplated in the latest drafts strike the proper balance between the judiciary's narrow interest in knowing who is funding amicus briefs and the amici's organizational and donor privacy interests. For that reason, the most recent rule drafts are consistent with the constitutional jurisprudence on donor disclosure requirements, and we urge the Judicial Conference not to abandon its respect for personal privacy.

A. The Judiciary Has a Narrow Interest in Disclosure of Amici's Donors.

Much of the jurisprudence on donor disclosure has arisen in the context of campaign finance laws. While the campaign finance jurisprudence can be a helpful analogy to look to for certain purposes of the Rule 29 rulemaking (as explained more below), it also serves as an important reference point for distinguishing the judiciary's very narrow interest in requiring amici to disclose their donors.

Of relevance here, the Supreme Court has upheld campaign finance donor disclosure laws under the following theory:

[1] People United for Privacy Foundation (PUFPF) defends the rights of all Americans – regardless of their beliefs – to come together in support of their shared values. Nonprofit organizations perform important work in communities across the United States, and we protect the ability of nonprofit donors to support causes and exercise their First Amendment rights privately.

[2] *Compare* Memo from AMICUS Act Subcommittee (Mar. 12, 2021), reprinted in Advisory Committee on Appellate Rules Agenda Book for Mtg. of Oct. 13, 2022 (*hereinafter*, "Oct. 13, 2022 Mtg. Agenda Book") at 10 *with* Memo from Amicus Subcommittee (Sep. 15, 2022), reprinted in Oct. 13, 2022 Mtg. Agenda Book at 154 *and* Memo from Amicus Disclosure Subcommittee (Mar. 3, 2023), reprinted in Mar. 29, 2023 Mtg. Agenda Book at 163.

> disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.[3]

Voters, unlike judges, are not expected to be impartial. If, for example, a voter doesn't like the fact that a candidate is funded by donors linked to the widget industry, the campaign finance jurisprudence theorizes that donor disclosure laws allow voters to vote on the basis of that knowledge.[4]

In sharp contrast to the electoral context, the very notion that judges could decide matters on the basis of such considerations is wholly antithetical to our legal system. It is axiomatic in American law that judges are to decide matters based solely on the law and the facts of the case. Indeed, "Lady Justice" is often depicted wearing a blindfold because judges are generally supposed to be indifferent to the identities of those who appear before them.[5]

Therefore, knowing who is funding an amicus is generally irrelevant except insofar as such knowledge:

(1) "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs" by funding an additional amicus brief;[6] and

(2) "*may* help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief."[7]

Of these rationales, the first rationale is irrelevant to the issue of how Rule 29 addresses disclosure of amici's *non-party* sources of funding. To wit, Rule 29(a)(4)(E)(ii) separately addresses disclosure of funding provided to amici by *parties* in the case "that was intended to fund preparing or submitting the [amicus] brief." We take no issue with how the current rule or proposed rule changes address that issue.

The second rationale – which is speculative to begin with, since it is qualified by the conditional word "may" – appears to relate to disclosure of amici's *non-party* donors. Specifically, current Rule 29(a)(4)(E)(iii) requires amici to disclose non-party donors that "contributed money that was intended to fund preparing or submitting the brief." Although not explained fully in the advisory committee notes, the theory for this requirement seems to be that it "may" help assess whether an amicus believes an "issue [is] important enough" to use its preexisting general funds "to sustain the cost and effort of filing an amicus brief." In other words, if donors separately pay an amicus for preparing and submitting the brief, then the amicus may not truly believe in its own brief, but rather may be acting as a proverbial "hired gun," and judges accordingly may take the brief with a grain of salt.

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[3] *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (internal quotation marks and citations omitted).
[4] We take no position on the legal and policy merits of this theory in these comments.
[5] Office of the Curator, "Figures of Justice Information Sheet," Supreme Court of the United States. Available at: https://www.supremecourt.gov/about/figuresofjustice.pdf (May 22, 2003).
[6] Fed. R. App. P. 29 advisory comm. notes (2010).
[7] *Id.* (emphasis added).

At the same time, as the qualifier word "may" might recognize, it is equally possible that an amicus believes an issue is so important that it separately raises money to fund the brief. Therefore, even for donors who earmark their contributions to fund an amicus brief, it is unclear exactly what judges are supposed to glean from such disclosures.

B. The Judiciary Has No Interest in Disclosure of Amici's Non-Party General Donors.

As discussed above, the apparent rationale for current Rule 29's requirement that amici disclose donors who earmark their funds for amicus briefs is speculative at the outset. But even taking the speculative rationale on its face, it clearly does not apply to disclosing amici's non-party general donors – *i.e.*, donors who do not earmark their funds for preparation of an amicus brief.

The only rationale the AMICUS Act Subcommittee provided in its proposal for broader disclosure of general donors is "that a non-party could evade the current disclosure requirements and influence amicus briefs through ownership in or contributions to the amicus organization that are not earmarked for the 'preparation or submission' of a particular brief."[8] However, this theory is even more speculative than the theory for the existing requirement for amici to disclose non-party donors of *earmarked* funds. By definition, if funds given to an organization are not earmarked for any particular purpose, then the organization is free to use the funds for any lawful purpose. The notion that individuals or entities with an interest in filing an amicus brief anonymously could essentially "buy" the brief by making a general-purpose contribution to an organization is simply too far-fetched and attenuated to support a requirement that amici disclose their general donors.

C. Any Purported Benefits in Broader Donor Disclosure Are Outweighed by the Resulting Harms and Are Contrary to Donor Privacy Jurisprudence.

Not only is the rationale articulated in the prior working draft for disclosure of amici's general donors highly speculative, but the purported benefit would be outweighed by the harms.

First, a requirement to disclose an organization's general donors on an amicus brief filing would result in "junk disclosure" by creating a misleading association between donors and the brief. As one federal district court judge explained in the context of a Colorado law requiring sponsors of "electioneering communications" that reference particular candidates to identify their general donors, such disclosure "would imply that a donor supported or opposed a particular candidate, when a donor may simply value [the organization's] discussion of [] issues."[9] "This creates a 'mismatch' between the interest served . . . and the information given."[10]

Similarly, a requirement that amici broadly disclose their general donors on their court briefs would imply that a donor supported the brief when a donor may simply value the organization's other activities. In fact, under the draft rule text the AMICUS Act Subcommittee considered in 2021, amici would be required to disclose even donors that earmarked their funds for a particular purpose *other than* to fund the amicus brief at issue (*e.g.*, donations earmarked for medical research, pro bono legal representation, disaster relief, etc.) if those donors merely met the funding percentage

[8] Memo from AMICUS Act Subcommittee (Sep. 8, 2021), reprinted in Oct. 13, 2022 Mtg. Agenda Book at 177.
[9] *Lakewood Citizens Watchdog Group v. City of Lakewood*, 2021 WL 4060630 at *12 (D. Colo. 2021).
[10] *Id.* (quoting *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2386 (2021)).

threshold for disclosure.[11] Such broad disclosures serve no legitimate purpose whatsoever, much less the highly speculative purpose the Subcommittee articulated.

Second, as the AMICUS Act Subcommittee acknowledged, albeit vaguely, the requirement for amici to disclose their non-party general donors in the prior working draft "would impose a substantially greater burden on amici."[12] The "substantial[] burden" alluded to is not merely an administrative one. Rather, donor disclosure requirements impose an inherent burden on the privacy interests of organizations and their donors and could deter their willingness to file briefs. This is especially so if the organizations or briefs address controversial issues or minority viewpoints.

As the Supreme Court has recognized, "'[i]t 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 [other] forms of governmental action,'" and there is a "'vital relationship between freedom to associate and privacy in one's associations.'"[13] As lower courts have further explained, disclosure of a group's donors is especially concerning "[i]n a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others."[14] Further, "[t]he accessibility of the Internet and the rise of 'cancel culture' are major developments since *Buckley* [upheld campaign finance reporting requirements]. Cancel culture is the phenomenon of aggressively targeting individuals or groups, whose views aggressors deem unacceptable, in an effort to destroy them personally and/or professionally. Cancel culture [is] a prominent force in today's world."[15]

In recognition of the harms posed by compulsory donor disclosure, the Supreme Court has subjected such requirements to "exacting scrutiny," meaning that they must be "narrowly tailored to the government's asserted interest."[16] As discussed above, the rationale in the prior working draft's requirement for amici to indiscriminately disclose their non-party general donors was highly speculative, and therefore automatically fails narrow tailoring.[17]

The prior working draft additionally fails narrow tailoring because, even if the purported rationale were not speculative, it could be achieved in a more targeted manner. To wit, if the concern the prior working draft attempted to address was non-parties paying off an organization to file an amicus brief on the donor's behalf by making non-earmarked contributions to the organization, there would still have to be some communication of such a request from the donor to the organization. This concern, to the extent it was not speculative, should have been addressed in a more narrowly tailored manner rather than by requiring broad exposure of an organization's donors.

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[11] Specifically, the 2021 working draft would have required indiscriminate disclosure of any person that "has a 10% or greater ownership interest in the amicus curiae, or contributed 10% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief, not including amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of the business of the amicus curiae." Memo from AMICUS Act Subcommittee (Sep. 8, 2021), reprinted in Oct. 13, 2022 Mtg. Agenda Book) at 173. The working draft failed to account for or exempt donors who earmarked their funds for a purpose other than the amicus brief.

[12] Memo from AMICUS Act Subcommittee (Sep. 8, 2021), reprinted in Oct. 13, 2022 Mtg. Agenda Book) at 177.

[13] *Amer. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)) (brackets in the original).

[14] *Amer. for Prosperity v. Grewal*, Case No. 3:19-cv-14228 (D. N.J. Op. filed Oct. 2, 2019) at 42.

[15] *Wisconsin Family Action v. FEC*, Case No. 1:21-cv-01373 (E.D. Wis. Op. filed March 22, 2022) at 15.

[16] *AFP Found.*, 141 S. Ct. at 2383.

[17] *See Lederman v. U.S.*, 291 F.3d 36, 44 (D.C. Cir. 2002) ("We begin with the principles that guide our narrow tailoring analysis. First, we closely scrutinize challenged speech restrictions to determine if they indeed promote the Government's purposes *in more than a speculative way*.") (emphasis added) (internal brackets, quotation marks, and citations omitted).

D. The Most Recent Working Drafts Properly Limit Disclosure to Donors of Earmarked Funds and Follows Donor Disclosure Jurisprudence.

The most recent working drafts for the Rule 29 amendments abandon the prior draft's broad disclosure requirement and returns to the rule's current approach by limiting disclosure of amici's non-party donors to those who have earmarked their contributions for the brief. Specifically, the most recent draft reads:

> (d) [alternative a] **Disclosing a Relationship Between the Amicus and a Nonparty.** An amicus brief must name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $1000 intended to fund (or intended as compensation for) preparing, drafting, or submitting the brief.
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> (d) [alternative b] **Disclosing a Relationship Between the Amicus and a Nonparty.** An amicus brief must name any person—other than the amicus, its members, or its counsel—who contributed or pledged to contribute money intended to fund (or intended as compensation for) preparing, drafting, or submitting the brief.[18]

This is consistent with how the judiciary has addressed the earmarking issue in cases involving campaign finance "independent expenditure" and "electioneering communication" reporting requirements.[19] Courts have upheld such reporting requirements where:

- the law's "scope is sufficiently tailored to require disclosure *only of funds earmarked for the financing of such ads*;"[20]
- an organization "'need only disclose those donors who have *specifically earmarked* their contributions *for electioneering purposes*;'"[21]
- organizations need only report "contributions [that] were solicited or *earmarked* for a particular candidate, ballot issue, or petition for nomination;"[22] and
- organizations "must disclose only those donors whose contributions are *earmarked* for political purposes and are tied to a[n] election. *Absent such an earmark* and tie, the donor need not be disclosed."[23]

In the most recent working draft, Alternative A adds a $1,000 disclosure threshold. Alternative B follows the current rule by omitting any monetary threshold for disclosure. We strongly support adding a threshold to the rule. As a matter of common sense, whatever the rationale is for

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[18] Memo from Amicus Disclosure Subcommittee (Mar. 3, 2023), reprinted in Mar. 29, 2023 Mtg. Agenda Book at 171; *see also* Memo from Amicus Subcommittee (Sep. 15, 2022), reprinted in Oct. 13, 2022 Mtg. Agenda Book at 154.

[19] As explained above, the campaign finance jurisprudence is distinguishable insofar as the governmental interests for disclosure of campaign donors do not apply to amicus briefs. However, the "exacting scrutiny" analysis and donor privacy doctrine apply with equal force here.

[20] *Independence Institute v. Williams*, 812 F.3d 787, 789 (10th Cir. 2016) (emphasis added).

[21] *Lakewood Citizens Watchdog Group*, 2021 WL 4060630 at *12 (quoting *Independence Institute*, 812 F.3d at 797-98) (emphasis added).

[22] *National Association for Gun Rights v. Mangan*, 933 F.3d 1102, 1117 (9th Cir. 2019) (emphasis added).

[23] *Wisconsin Family Action*, Case No. 1:21-cv-01373 at 21 (emphasis added) (internal citation omitted).

requiring amici to disclose certain donors, the judiciary has a negligible interest in knowing about donors who give an insignificant amount, even if such funds are earmarked to fund an amicus brief.

However, we suggest that even a $1,000 threshold is too low. Such an amount often pays for only one to two hours of an attorney's billable time and is insufficient to make a dent in the typical costs of preparing an amicus brief. The Amicus Subcommittee should consider adopting a higher threshold, such as $10,000 or greater, and provide that the threshold be adjusted periodically for inflation.

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The Supreme Court has long recognized that organizations and their donors have a constitutional right to associational privacy. Organizations that have valuable insights to share with a court in a proceeding should not be forced to shed that right at the courthouse door when they file amicus briefs. This is especially so because the judiciary's interest in knowing the identities of amicis' donors is exceptionally narrow. Therefore, Rule 29's requirement that amici disclose their non-party donors should be commensurately and narrowly tailored to the disclosure interest so as to not unduly impinge on the organizations' and donors' privacy interest.

The most recent working drafts of the rule amendments demonstrate that the Amicus Subcommittee is moving in the right direction in accordance with these principles, and we urge any final rule to maintain a strong consideration and respect for privacy interests.

Sincerely,

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