U.S. Senate Committee on the Judiciary
Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights
Hearing on
"An Ethical Judiciary: Transparency and Accountability for 21st Century Courts"
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To Chairman Whitehouse, Ranking Member Kennedy, and Distinguished Members of the Subcommittee:

Thank you for the opportunity to appear and speak about transparency and the judiciary today. I am Professor of Law, Political Science, and Public Policy at the University of Southern California, where I teach classes on administrative law, money in politics, and research methods. I hold a J.D. from Harvard, a M.A.L.D. from the Fletcher School at Tufts, and a Ph.D. in Political Science from U.C. Berkeley. I clerked on the U.S. Court of Appeals for the Ninth Circuit, for the late Hon. Judge John T. Noonan, Jr. In addition to my work as a professor at the USC Gould School of Law, I currently serve as a Commissioner for California's Fair Political Practices Commission and as a board member at OpenSecrets. I appear on my own behalf today, as a political scientist.

I have spent years studying the informational benefits of disclosure and the public's attitudes toward financial transparency. My research leads me to support stronger financial disclosures for amicus briefs and to worry about the effects that dark money can have on the public's trust in the judiciary. In my testimony today, I have two aims. First, I will explain the state of our knowledge about how disclosures assist decision-making. I will also comment on the options for strengthened amicus disclosures under consideration. Second, I will discuss what we know about how "dark money", or anonymous political spending, affects political trust, which is key to democratic legitimacy. To do so, I draw upon my own and others' published work in political science, economics, and law.

Disclosures help people make decisions across contexts

Amicus briefs provide information to judges, who operate on incomplete information[1] and sometimes adopt language from the amici verbatim in their opinions.[2] Because amicus briefs can hold such power in court, it is important that judges understand the true source of the arguments in those briefs. In cases where the named amicus has been paid by either a party or its affiliate, judges should know that. Under the current rule, they rarely do. The current policy does a disservice to judges and to our adversarial system of law. The disservice to judges is in denying them complete information about the sources of the arguments before them. The disservice to the adversarial system results from some parties circumventing page limits in their briefs by continuing their arguments in amicus briefs. The true sources of financial support for amicus briefs should be disclosed.

Disclosures about amicus briefs are a specific case of a general phenomenon, which is informational disclosures to consumers, voters, patients, and clients. Disclosures in those contexts have been studied for decades. Studies show that under most conditions, people tend to form different opinions and make different decisions when presented with disclosed information. In other words, we learn from disclosures.

Disclosures reduce information costs.[3] This is as true for parents choosing the safest car seats as it is for judges and their clerks ascertaining how much weight to give to arguments in an amicus brief. In the language of social science, this additional information reduces the *information asymmetry* faced by the decisionmaker, whether the decision is about a candidate, a product, a restaurant, or how much to trust an information source (e.g., a medical provider, a lender, or an amicus). Because judges are simply decisionmakers who face an informational asymmetry vis-à-vis the interests behind an amicus brief, cross-disciplinary findings on the benefits of disclosure are helpful in the context of this hearing.

When political scientists study decisionmaking, we often focus on voters. We know that voters use information about the supporters behind policies and politics to inform their votes.[4] In an important study, Arthur "Skip" Lupia found that if voters knew which of five competing ballot initiatives were supported by the insurance industry, they were more likely to cast votes that aligned with their preferences.[5] In Lupia's study, the voters already knew about the insurance industry's positions; he tested how that knowledge affected their votes. In other studies, scholars

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[1] Lee Epstein & Jack Knight, THE CHOICES JUSTICES MAKE (1998); Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, in SUPREME COURT DECISION MAKING: NEW INSTITUTIONALIST APPROACHES, 215-235 (C. Clayton & H. Gillman, eds., 1999).

[2] Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 LAW & SOC. REV. 917, 920-922 (2015); *see also* Sheldon Whitehouse, A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency, YALE L. J. FORUM 141, 145 (2021) (summarizing literature on the Supreme Court's adoption of language from amicus briefs).

[3] Hadfield Gillian K., Robert Howse, Michael J. Trebilcock, *Information-Based Principles for Rethinking Consumer Protection Policy*, 21 J. OF CONS. POL'Y, 131-169 (1998).

[4] Abby K. Wood, *Learning from Campaign Finance Information*, 70 EMORY L. J. 1091, 1101-1116 (2021).

[5] Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 64, 72 (1994). *See also* Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, *in* CITIZEN COMPETENCE & DEMOCRATIC INSTITUTIONS 147, 149 (Stephen L. Elkins & Karol Edward Soltan eds., 1999).

provide the disclosures to the voters, so that they can test whether the disclosure itself affects voter behavior. The answer is almost always "yes". Several studies of campaign finance disclosures establish that voters react differently to political advertisements when they learn about the financing behind them. Dowling & Wichowsky showed subjects a political advertisement attacking a state senate candidate. An outside group ran the ad, and the ad included the on-ad disclosure (sometimes called a "disclaimer") required by the Federal Election Commission. The researchers followed the ad with disclosure information presented in one of three formats. One treatment listed the top five contributors, one provided a news story about outside groups becoming involved in state politics, and another emphasized that the outside group was allowed by law to not disclose its contributors. Disclosure – particularly the news story about anonymity and the list of the top five contributors – mitigated the effects of the attack ad. Subjects who learned about the funding behind the ad were more favorable to the attacked candidate than those who viewed only the ad. An implication is that anonymity, when exposed as such, can help voters to appropriately weight a message.[6] This is evidence that respondents weighted the message differently when they knew its source, or when they knew that the group behind the ad did not disclose its donors. By extension, we would expect judges and justices to weigh amicus arguments differently if they learned more about the financing behind the briefs or that the amicus hides its donors.

On-ad disclosures, or "disclaimers", have consistently been shown to affect voter perceptions. Dowling & Wichowsky showed subjects an attack ad and manipulated whether subjects saw no disclaimer or a disclaimer saying the ad was run by the attacked candidate's opponent (the ad's beneficiary), a party, or an outside group. Without any disclaimer, subjects' perceptions of the beneficiary were favorable, on net; the attack ad hurt the attacked candidate. By contrast, subjects who saw the party and outside group disclaimers felt much less positive about the ad's beneficiary. In other words, disclosure of the ad sponsor mitigated the effects of attack ads.[7]

The findings from these on-ad disclosure studies are relevant to placement of the amicus financial disclosure. The way information is presented to decisionmakers matters. Not only will parties subject to disclosures lobby against regulation, but once regulated, the same parties may try to bury the information in "difficult-to-decipher" statements.[8] One part of successful choice architecture is presenting the information simply, a strategy known as "targeted transparency."[9] In the context of amicus briefs, the takeaway from the targeted transparency studies is that the funder information should be presented simply and in the same format across briefs, so that the readers can quickly and easily identify it.

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[6] Conor M. Dowling & Amber Wichowsky, *Does It Matter Who's Behind the Curtain? Anonymity in Political Advertising and the Effects of Campaign Finance Disclosure*, 41 AM. POL. RSCH. 965, 976–77 (2013).

[7] Unsurprisingly, the effects were observed only among co-partisans of the attacked candidate.

[8] Hadfield, et al., supra note 3, at 143.

[9] Archon Fung, Mary Graham & David Weil, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY (2007) (reviewing studies of restaurant grades, hospital patient safety disclosures, and nutrition labels).

The policy choice between disclosing earmarked amicus funding, general funding, and party membership in amicus briefs

The current rule on amicus financial disclosure is Supreme Court Rule 37.6 and its nearly identical appellate-level companion, Federal Rule of Appellate Procedure 29(a)(4)(E). The rule requires disclosure of funding that was intended to fund the "preparation or submission of the brief," and amici only disclose money *earmarked* for the amicus brief. As a result, these disclosures are far rarer than they should be. The lack of disclosure deprives judges of information and allows well-resourced and well-connected parties to have "supplemental merits briefs" via amici, undermining our adversarial system.[10] It also deprives the public of knowledge about who is trying to shape our constitutional law. The current rule serves neither the adversarial system, the court, nor the public.

To increase the information available to the judges and the public, other alternatives are on the table. One proposal is to require disclosure of large funders to the organization regardless of earmarks. Another is to require disclosure of whether a party is a member of the amicus organization. A third could be to include a disclosure that "the donors to the amicus's organization are not disclosed publicly."

The tradeoffs in disclosing large funders and disclosing whether a party is a member of the organization have been presented by the Judicial Conference Committee on Rules of Practice and Procedure. The main judicial benefit is, of course, that judges will know more about who is making the argument in the amicus brief, which will help resolve the informational asymmetry they currently face vis-à-vis some amici. Judges are sophisticated enough to understand that not all funders are deeply tied to a specific argument, and not all parties who are members of large organizations have enough control of the organization to influence what they say in an amicus brief. But where the amicus is an alter ego of a party (an "affiliate"), judges should have that information and proceed accordingly. The public will also benefit from this transparency.

The Judicial Conference Committee is concerned that disclosure could threaten funders' and parties' freedom of association. My own research into the supposed "chilling effects" from disclosure suggest that the concern is likely overblown as an empirical matter and that disclosure may actually have a "thawing effect."[11] Nevertheless, if an amicus believes their funders require anonymity, or if a party believes that its membership in an amicus should be anonymous, our courts

[10] Moreover, the Supreme Court "Clerk's Office interprets [the Rule] to preclude an amicus from filing a brief if contributors are anonymous." *See* Letter from Sen. Sheldon Whitehouse & Rep. Henry Johnson to Hon. John Bates (Feb. 23, 2021). Senator Whitehouse has catalogued the ways that amici and parties overlap in the shadows in Whitehouse 2021, supra n.2, at 160-165.

[11] See Abby K. Wood & Douglas M. Spencer, *In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns*, 15 ELECTION L.J. 302, 305 n.20 (2016) (observing no chilling effect and a possible thawing effect from disclosure under some specifications); Abby K. Wood, Christopher S. Elmendorf, Douglas M. Spencer, & Nicholas G. Napolio, Mind the (Participation) Gap: Vouchers, Voting, and Visibility, American Politics Research (2022), https://doi.org/10.1177/1532673X211067256 (observing no chilling effect and a possible thawing effect of being locally politically extreme in a full disclosure campaign finance system; effect was driven by increased donations among voters who were more conservative than their neighborhoods. We studied this because one group that the Supreme Court has thought would be susceptible to chilling is political extremists, but we observed the opposite); Abby K. Wood & Michael D. Gilbert, *Disclosure can encourage Political Speech*, THE HILL (Oct. 21, 2016), https://thehill.com/blogs/pundits-blog/campaign/302152-disclosure-can-encourage-political-speech.

are perfectly capable of devising a system to judge when to grant anonymity by allowing case-by-case exemptions from a mandatory disclosure rule. Of course, the standard for such an exemption should be high, and in the interest of transparency and complete information, exemptions should be granted only rarely. A shy donor's risk of embarrassment or discomfort should not suffice to override the court's, and the public's, overwhelming interest in transparency.

While I support disclosure of the actual funders and party membership in the amicus, findings from my own and others' research suggest a third option may offer a somewhat modest improvement over the status quo. That third option is "disclosure disclaimers," or having the amicus disclose whether its funders are anonymous, even if it does not disclose funder names. Dowling and Wichowsky's "anonymity" condition as described above suggests that decisionmakers find messages less credible when told that the source of the information is anonymous.[12] In my own work on disclosure disclaimers, respondents who learned from a "nonpartisan transparency advocacy group" about campaign finance transparency were 9.5 percentage points less likely to vote for a candidate supported by non-disclosing groups and were 5 percentage points more likely to vote for the more transparent candidate, for a net effect of almost 15 percentage points. I replicated the findings, adding other information about the candidates, including policy preferences, campaign finance compliance information, and information about the candidates' fundraising successes and professional backgrounds, among other characteristics. Even in the face of the additional information, respondents were more likely to select a candidate that discouraged dark money groups from supporting the campaign than one who received dark money support.[13] These findings are translatable to the amicus context. Judges reading an amicus brief that they are told is funded by anonymous sources would probably discount the credibility of the brief's source, in the same way our survey respondents discounted the credibility of a political advertisement or chose the candidate who did not have dark money support.

Because they offer less precise information, "disclosure disclaimers" for amicus briefs are a second-best policy option. Such a policy would affect the weight that judges give the amicus arguments, but it would still allow parties and their affiliates to coordinate an end run around page limits in the parties' briefs – undermining our adversarial system – and would provide less information to the decisionmakers and public than actual funder disclosure. Nevertheless, we know from our research that these "disclosure disclaimers" can provide useful information to decisionmakers, even if it is not the *most* useful information.

Dark money, distrust, and democratic legitimacy

The public prefers political spending to be disclosed. This matters for trust and democratic legitimacy of the courts.

In 2015, I asked a nationally representative sample of 2000 voting aged adults their opinions about common features of political campaigns: campaign fundraising, amount of support

[12] Dowling & Wichowsky 2013, supra n. 6, at 976–77.

[13] Abby K. Wood, *Voters Use Campaign Finance Transparency Information*, POLIT. BEHAV. (2022), https://doi.org/10.1007/s11109-022-09776-4.

from outside groups, the amount of information the campaign discloses about its sources of funding, and the candidate's persuasiveness in public, professional background, and grasp of the issues. Their responses are summarized in Figure 1. More than 60% of respondents said that campaign finance transparency ("disclosure", the third bar from the left) is important or very important. Of the 2000 respondents, 710 (35.5%) rated campaign finance disclosure as equal to or more important than *all other items ranked*. The public places great importance on a candidate's transparency. This public attitude toward transparency would almost certainly apply to judicial confirmations.

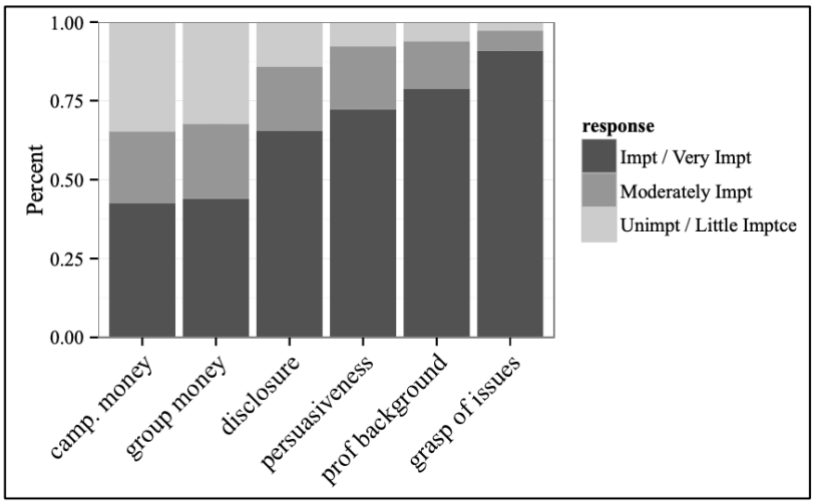

Figure 1. Percent of 2000 respondents who responded "Important" or "Very Important"; "Moderately Important"; or "Unimportant" or "Of Little Importance" to the question "When you think about the strength of a candidate for elected office, how important to you are the following considerations?" Source: CCES 2015.

Distrust is tied to the public's dislike of dark money. In studies from the electoral context, research shows that when voters learn about the presence of dark money support for a campaign, their trust in the candidate declines.[14] Many of the studies cited above asked respondents in both the treatment (disclosure) and control (no disclosure) conditions how much they trusted the candidates they were asked to evaluate. Consistently, across research teams, experimental designs, and years, respondents learning about anonymous political spending on behalf of a candidate report having lower trust in the candidates under consideration.[15]

In a project similar to those described above, Travis Ridout and coauthors showed subjects an attack ad with six treatment variations. The authors found that disclaimers by outside groups,

[14] *Id*., *see also* Dowling & Wichowsky 2013, supra n. 6, at 985 (strictly speaking, Dowling and Wichowsky evaluated "credibility", which they relate to trust by saying that credible sources are "those who possess expertise and can be trusted to give an unbiased opinion").

[15] Wood 2022, *supra* n. 13 (discussing experiments run in 2015 and 2019); Dowling & Wichowsky 2013, supra n. 6, at 976–77; Travis N. Ridout, Michael M. Franz & Erika Franklin Fowler, *Sponsorship, Disclosure and Donors: Limiting the Impact of Outside Group Ads*, 68 POL. RSCH. Q. 154, 161 (2015) (noting that the news story about large, anonymous donors had the lowest ratings for trustworthiness and credibility, but that they research team cannot say which was the more significant contributor to the low trust).

including those mentioning that the sponsor was funded by small donors, were perceived as most credible and trustworthy. A news story discussing large and anonymous donors was particularly detrimental to credibility and trustworthiness, though the research cannot distinguish between the effects of donor size and their anonymity on reducing trust. Any amount of disclosure via news stories, or disclaimers that went above and beyond the current regulatory requirements, helped mitigate the effects of the attack ads in terms of voter opinion. An informational benefit from disclosure is evident here, and it is related to teaching decisionmakers which groups are not trustworthy or credible (a negative effect), rather than teaching voters about attractive features of group funding (a positive effect).[16]

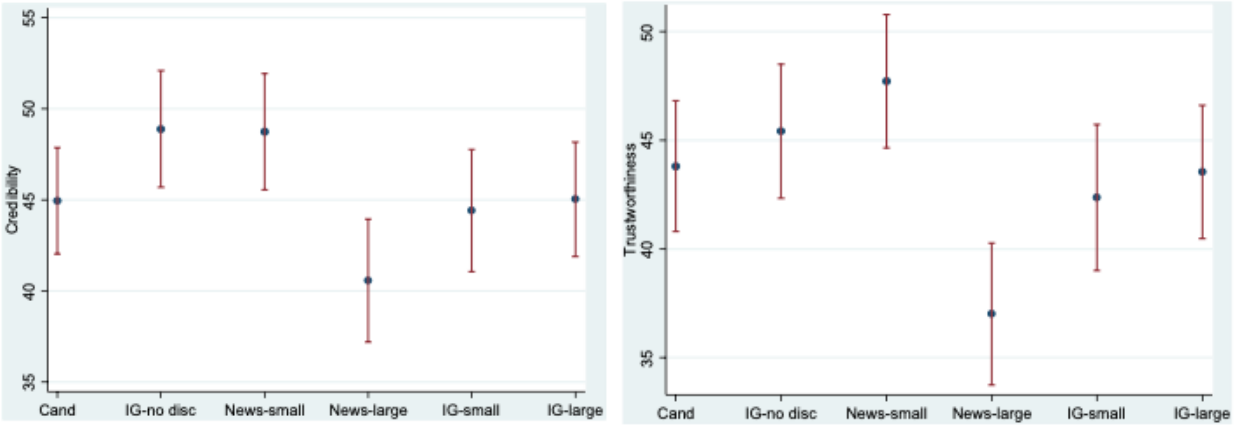

Figure 2. Credibility (left) and Trustworthiness (right) results in Ridout, et al's treatment conditions, using the standard FEC disclaimer to attribute the message to a candidate ("Cand.") or nondisclosing outside group ("IG-no disc"), or variations on it ("IG-small" about 800,000 small donations to the group, and "IG-large", giving the top 4 donors to the group), and two news stories about the group's ad, saying the group has small ("News-small") or large and anonymous donors ("News-large").[17] The "News-large" category, which has the lowest credibility and trustworthiness, is the dark money condition.

Dark money damages political trust. What's more, the trust results in existing studies may under-state the effects we would observe if we evaluated trust in judges, case outcomes or the judiciary in the presence of undisclosed spending in support of judicial confirmation or during litigation. Recall that voters electing legislators – the context of our prior experiments – can hold an incumbent accountable by voting them out of office in the next election. By contrast, voters are almost totally powerless to remove judges. Therefore, the loss of trust we observe from undisclosed financing in the electoral context may be less severe than the loss of trust that would

[16] Ridout et al., *supra* n. 15 at 155 (2015).

[17] *Id.* at 158, 161, 165 (2015) ("The large donor condition contained the following text: 'There have been a number of ads in the race for the senate seat. One ad was sponsored by the Center for American Democracy. According to the group and state campaign finance records, the Center was newly formed in 2010 and is primarily funded by wealthy donors, including other non-profit groups. Many of these non-profits do not themselves disclose their donor base, leaving voters with very little knowledge as to what interests are behind the group's larger agenda. Critics have argued that the group is merely a front for larger special interests.'") This condition is much more elaborate than a simple on-brief disclosure that we might anticipate in the amicus context, though it is similar to the way the media writes about so-called "dark money".

occur if voters were informed of the undisclosed financing in the judicial confirmation process and amicus briefs.

As undisclosed political spending reduces trust, the public's attitudes about the court's legitimacy can suffer. Public trust in the independence and legitimacy of the courts is crucial for our "least dangerous branch" to continue to enjoy compliance among the population.[18] "Trust in government can be thought of as an aspect of legitimacy or as influential to the conferral of legitimacy, which, in Max Weber's definition, endows authorities with the moral foundation for obedience."[19]

Conclusion

Justice Brandeis famously said that "sunlight is the best disinfectant."[20] Almost a century later, Justice Scalia wrote, "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." He also said that our society should not engage in political speech "hidden from public scrutiny and protected from the accountability of criticism."[21] Disclosure to decisionmakers – whether judges, consumers, or voters – helps reduce informational asymmetries between the decisionmaker and the entity that wants something from them – whether favorable decision, money, or power. By keeping the public in the dark about funding around judicial confirmations, dark money undermines trust in the judiciary. Moreover, the current "earmarks only" policy on amicus brief financial disclosures maintains the informational asymmetry between judges and parties, depriving judges of information they need to make well-informed decisions. The public may lose trust in our judicial system as more of these undisclosed relationships between parties and amici or litigants and judges are brought to light. It is better for our democracy and our judiciary to require disclosure of the financing behind judicial confirmation and litigation.

[18] This was understood by the founders and remains true today. For a somewhat dated but nonetheless helpful overview of the courts' legitimacy and empirical studies of it, please see James L. Gibson and Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, ANNU. REV. LAW SOC. SCI. 2014. 10:201–19. Recent studies on perception of the court's legitimacy tied to nomination contests find that the politicized process has damaged the court's legitimacy more than the rosier picture presented by Gibson and Nelson in 2014, though I leave it to scholars of judicial politics to parse the findings in the more recent literature.

[19] Jack Citrin & Laura Stoker, *Political Trust in a Cynical Age*, 21 ANN. REV. POL. SCI., 49, 50 (2018), citing Tom R. Tyler & Jonathan Jackson, *Future challenges in the study of legitimacy and criminal justice,* in Legitimacy and Criminal Justice: An International Exploration (Justice Tankebe & Allison Liebling, eds., 2013) (aspect of legitimacy) and Mike Hough, Jonathan Jackson, Ben Bradford, Andy Myhill, and Paul Quinton, *Procedural justice, trust, and institutional legitimacy*, POLICING 203-210 (2010) (influential to the conferral of legitimacy). Max Weber defined legitimacy in several writings, including Max Weber, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (1964).

[20] Brandeis referred to sunlight for private actors, like companies, disclosing information about their activities to inform the public. *See* Louis Brandeis, OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT (1913).

[21] Doe v. Reed, 561 U.S. 186, 228 (2010) (Scalia, J., concurring in the judgment).