December 10, 2024

Via Electronic Submission System

Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
1 Columbus Circle, N.E.
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

RE: Constitutional and Practical Concerns with Proposed Amendments to Federal Rule of Appellate Procedure 29 (USC-RULES-AP-2024-0001).

Dear Judge Bates:

On behalf of National Taxpayers Union Foundation ("NTUF")[1] and People United for Privacy Foundation ("PUFPF"),[2] we submit these written comments to the Proposed Amendments to Federal Rule of Appellate Procedure 29.[3]

NTUF's Taxpayer Defense Center advocates for taxpayers in the courts—upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce. The Taxpayer Defense Center handles direct litigation as well as occasionally offering its expertise to federal and state tribunals as *amicus curiae*. The proposed changes to Federal Rule of Appellate Procedure 29 endanger the Taxpayer Defense Center's ability to offer its insight in complex tax and fiscal cases dealing with subtle areas of constitutional law, tax law, and policy.

[1] Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life.

[2] People United for Privacy Foundation's vision is an America where all people can freely and privately support ideas and nonprofits they believe in, so that all sides of a debate will be heard, individuals won't face retribution for supporting important causes, and all organizations maintain the ability to advance their missions because the privacy of their supporters is protected.

[3] Judicial Conference of the United States, Advisory Committees on Appellate, Bankruptcy, and Evidence Rules; Hearings of the Judicial Conference 89 Fed. Reg. 61498 (July 31, 2024). The text of the proposed amendments and the reasoning thereto are available at Comm. On R. of Practice and Proc. of the Judicial Conf. of the United States, Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure and the Federal Rules of Evidence (Aug. 2024) ("Proposed Amendments") https://www.uscourts.gov/file/78921/download.

PUFPF pursues a holistic reform strategy to advance federal solutions to codify personal privacy rights nationally. Through broad-based, durable coalitions that represent Americans of all beliefs, we teach citizens and policymakers why donor privacy is essential to public debate about the best ways forward for our country. PUFPF submitted comments to the Committee on a previous iteration of the proposed amendments to express concern about the dubious constitutionality and detrimental impact of the contemplated disclosures for *amici*.[4]

NTUF and PUFPF track the important need for donor privacy,[5] applying decades of Supreme Court protections for nonprofit groups. We write to the Committee that the Proposed Amendments fail First Amendment's "exacting scrutiny" standard. The Judicial Conference has shown neither a weighty enough interest nor that the Proposed Amendments are tailored to that interest. Therefore, the Proposed Amendments fail exacting scrutiny. NTUF requests an opportunity to present oral testimony as well.

I. The Proposed Amendments Fail Exacting Scrutiny.

Under *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021) ("*AFPF*") and other landmark cases dating back to the Civil Rights Era,[6] the Judicial Conference must show the Proposed Amendments survive "exacting scrutiny." Exacting scrutiny "requires that there be a substantial relation between the disclosure requirement and a sufficiently important governmental interest" and that "the disclosure requirement be narrowly tailored to the interest it promotes." *Id.* at 611. Any expansion of the existing disclosure framework would need to meet this high standard of judicial scrutiny. This will be even more strenuous for any proposal for public disclosure of nonprofit supporters.

The Supreme Court has long recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and that there is a "vital relationship between freedom to associate and privacy in one's associations." *NAACP*, 357 U.S. at 460-61, 462. This language recognizes two rights: (1) to engage in debate concerning public policies and issues, and (2) to effectuate that right, to associational privacy. Furthermore, freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference," such as registration

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[4] *See*, Brian Hawkins, *Keeping the Courts Open to Americans Who Prize Their Privacy*, PUFPF (April 3, 2023) https://unitedforprivacy.com/keeping-the-courts-open-to-americans-who-prize-their-privacy/.

[5] *See, e.g.*, Tyler Martinez, *Recent Minibus Keeps Key Budget Riders to Protect Donor Privacy*, NTUF (Mar. 25, 2024) https://www.ntu.org/foundation/detail/recent-minibus-keeps-key-budget-riders-to-protect-donor-privacy; Tyler Martinez, *In Defense of Private Foundations, Donor Advised Funds, and Private Giving*, NTUF (July 26, 2022) https://www.ntu.org/foundation/detail/in-defense-of-private-foundations-donor-advised-funds-and-private-giving.

[6] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *Talley v. California*, 362 U.S. 60 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

and disclosure requirements and the attendant sanctions for failing to disclose. *Bates*, 361 U.S. at 523; *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) (noting that the freedoms of speech and association are "delicate and vulnerable" to "[t]he threat of sanctions [which] may deter their exercise almost as potently as the actual application of sanctions").

In *NAACP v. Alabama*, the Supreme Court protected the right to privacy of association—there from disclosure of an organization's contributors—by subjecting "state action which may have the effect of curtailing the freedom to associate… to the closest scrutiny." 357 U.S. at 460–61; *see also id*. at 462 (noting that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective… restraint on freedom of association…"). Demanding donor lists should not be taken lightly, and that is why the Supreme Court has demanded that disclosure laws, such as the Proposed Amendments, survive exacting scrutiny.

Exacting scrutiny is "not a loose form of judicial review." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014). It is instead a "strict test," *Buckley*, 424 U.S. 66, requiring an analysis of the burdens imposed, and whether those burdens advance the government's stated interest because, "[i]n the First Amendment context, fit matters." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) (Roberts, C.J., controlling opinion). Such heightened review ensures that laws do not "cover[] so much speech" that they undermine "the values protected by the First Amendment." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165-66 (2002).

Here, the Committee must show that this new, detailed donor disclosure regime survives exacting scrutiny. But the memorandum for the Proposed Amendments only asserts a general interest in the information relating to who supports organizations that file *amicus* briefs and fails to show how the government's proposal is narrowly tailored to that interest. The Committee, therefore, should be wary of adopting the Proposed Amendments.

A. The Proposed Amendments Provide No Substantial Government Interest.

The Proposed Amendments aim to substantially expand the regulation and disclosure demands for filers of *amicus curiae* briefs. But aside from some conclusory statements, the Proposed Amendments have not offered a substantial government interest in the need for intrusive (and universal) donor disclosure, nor the need for that disclosure to be in the *amicus* brief. The Proposed Amendments therefore fail exacting scrutiny at the very first step.

The Supreme Court ardently protects our First Amendment rights, especially in public policy discussion. The Court has long held that "'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'" *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The Supreme Court has also recognized the need to protect the freedom of association from undue disclosure to the government and has consistently shielded organizational donors and supporters from the generalized donor disclosure found in campaign finance law.

If a law impacting core First Amendment freedoms is novel, and not merely a retread of already-approved interests and tailoring, then the government must provide concrete evidence that the new law also survives the heightened scrutiny. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377,

391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"). And the high Court has rejected "mere conjecture as adequate to carry a First Amendment burden." *Id*. at 392. Instead, the government must prove the strength of its interest. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995) ("[W]hen the Government defends a regulation on speech as a means to… prevent anticipated harms, it must do more than simply posit the existence of a disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural") (citation and punctuation omitted).

What does such a showing of substantial interest look like? Congress sought to significantly expand the disclosure regime for campaign-related speech, regulating "candidate advertisements masquerading as issue ads" that aired shortly before an election. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 132 (2002) (citation and quotation marks omitted). In campaign finance parlance, these are known as "electioneering communications" and, prior to 2002, were never regulated. Applying exacting scrutiny, that innovation required a significant showing, and the government needed to build a 100,000-page record in order to demonstrate that, at least facially, its law was appropriately tailored to a real and concrete problem. *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (three-judge court) (per curiam); *cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 332 (2010) (discussing and citing 100,000-page record amassed by dozens of litigants in *McConnell*).

This means campaign finance cases are well-trod, and the law is relatively settled on the types of interests at stake there. But when the government tries to rely upon non-political spending to demand financial disclosure, it often fails heightened scrutiny. *AFPF* is a prime example. There, the California Attorney General demanded that charitable organizations disclose to the Office the identities of their major donors (listed on Schedule B of IRS Form 990). *AFPF*, 594 U.S. at 600. The state claimed that disclosure of donors was necessary for law enforcement purposes, but not for regulation of political campaigns. *See id*. at 604–05. The *AFPF* Court recognized that much of the case law is developed by campaign finance disclosure. *Id*. at 608. But the Court did not rely on the case law of political campaigns to justify non-political donor disclosure: indeed, just the opposite. The Court took a fresh look at what was being regulated and the threat to the associational freedoms of the charities' donors in the case. *See id*. at 611–12. The Court ultimately rejected the assertion of a general law enforcement interest. *See id*. at 614–15.

The Committee has thus far made no similar showing on why the Rule 29 disclosures should go from minimal certifications that the *parties to the case* have not interfered to on-page detailed donor disclosure of the organization writing the *amicus* brief. Far from the 100,000-page record in *McConnell*, the Proposed Amendments offer one paragraph of speculation and conclusory assertion that "the identity of an amicus does matter, at least in some cases, to some judges." Proposed Amendments at 20. Further, the Proposed Amendments assert that "members of the public can use the disclosures to monitor the courts" and thus assert a "governmental interest in appropriate accountability and public confidence of the courts." *Id*. Taking each in turn, the asserted government interest here is simply not weighty.

First, the identity of the *amicus* is not the same as the identity of the *amicus* organization's donors. Already, Federal Rule of Appellate Procedure 29(a)(4)(D) requires "a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file."

The existing Rule further requires detailed statements on whether a party's counsel authored the brief (in whole or in part), whether a party or party's counsel paid for the preparing and submitting of the brief, and whether any other person contributed money for the specific *amicus* brief. FRAP 29(a)(4)(E). These provisions require *amici* to disclose who they are, what their interest is, and whether they are proxies for a party or someone else. Thus, the information the Proposed Amendments seek already exist in the law.

Second, mere passing curiosity from the public is not a substantial interest in disclosure. People want to know all sorts of things about the government,[7] but public interest does not automatically withstand First Amendment scrutiny. With civil society groups, the government often asserts that the public often wants to know the funding of such organizations, though that is somewhat in doubt in the academic literature. *See, e.g.*, DAVID M. PRIMO AND JEFFERY D. MILYO, CAMPAIGN FINANCE AND AMERICAN DEMOCRACY WHAT THE PUBLIC REALLY THINKS AND WHY IT MATTERS 5 (U. Chicago P. 2020) (academic examination where authors conducted intensive public surveys on campaign finance disclosure and concluded "public opinion simply does not offer a strong foundation for expanding campaign finance regulations: the argument that reform will improve trust in government or public perceptions of democracy does not hold up in the data"). Even if that were true, the focus on protecting the integrity of the courts should be, and must be, on the conduct of the judges themselves, not making private groups prove they have no nefarious motives.

Relatedly, the Proposed Amendments will mislead rather than enlighten the public. "Junk disclosure" is produced when the government demands more than the names of people who give to influence a specific case (the current Rule 29) to include those who give to nonprofits that perform a variety of functions (the proposed changes to Rule 29). Divorcing the disclosure from any actual intent that the money be used to influence a specific court case implies agreement where there may be none. This is compounded when a donation is given far in advance of any decision by a nonprofit to write an *amicus* brief or when a donor may oppose the nonprofit's specific speech. For example, a donor may give to the American Civil Liberties Union because of the history of the ACLU in fighting speech restrictions, but that cannot infer that the donor necessarily agrees with all the stances of the organization—on things like national security, reproductive/life issues, and other areas in the ACLU's large portfolio.

Finally, the threats to civil society groups for taking controversial positions on matters of public concern are real. In *AFPF*, the trial court found credible evidence of threats and harassment for the organization, including death threats to the CEO. *AFPF*, 594 U.S. at 604. Employees at the left-leaning New York Civil Liberties Union and center-right Goldwater Institute faced threats and harassment at their workplaces—and at their homes—due to their organizations' positions. *See*

[7] For example, questions from the public were so pervasive on the assassination of President John F. Kennedy that Congress passed a specific statute to deal with records requests on the topic. *See, e.g.*, U.S. Dept. of Justice Office of Information Policy, "FOIA Update: Agencies Implement New JFK Statute" Website[7] (Jan. 1, 1993) (discussing the President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, 106 Stat. 3443 (Oct. 26, 1992) *codified at* 44 U.S.C. § 2107 note. This same codification also houses disclosure for "Unidentified Anomalous Phenomena Records." 44 U.S.C. § 2107 note. But neither could necessarily justify disclosure of the private financial affairs of Americans to the rest of the public.

Donna Lieberman and Irum Taqi, "Testimony of Donna Lieberman and Irum Taqi on Behalf of the New York Civil Liberties Union Before the New York City Council Committee on Governmental Operations Regarding Int. 502-b, in Relation to the Contents of a Lobbyist's Statement of Registration," New York Civil Liberties Union (Apr. 11, 2007);[8] Tracie Sharp and Darcy Olsen, "Beware of Anti-Speech Ballot Measures," *The Wall Street Journal* (Sept. 22, 2016).[9] The list can go on, but all of the examples point to the same conclusion: in our current volatile political atmosphere, disclosure carries real danger to supporters of organizations speaking on hot-button issues. If the private information of donors to nonprofit groups were forcibly reported to the judiciary, these citizens would similarly be at risk.

With no substantial interest shown, at least on this record, and the practical issues with the new language, we suggest that the Committee not adopt the Proposed Amendments. Neither the public, nor the courts, nor the *amicus* community benefit from such broad disclosure rules. More importantly, as currently drafted and justified, the Proposed Amendments do not survive exacting scrutiny analysis.

B. The Proposed Amendments are not Properly Tailored.

To suggest the proposed language is constitutionally sound, the Proposed Amendments rely on the campaign finance cases decided after *AFPF*. Proposed Amendments 17–19. Campaign finance cases are some of the most common challenges to donor disclosure. But just because campaign finance is held to be narrowly tailored disclosure does not mean that other intrusive disclosure regimes are so properly tailored. *See, e.g.*, *AFPF*, 594 U.S. at 608 (recognizing "exacting scrutiny is not unique to electoral disclosure regimes" and therefore "[r]egardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny").

As the Supreme Court observed in *Buckley*, laws regulating speech must be drafted with precision, otherwise they force speakers to "hedge and trim" their preferred message. *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Thus, to "pass First Amendment scrutiny," the government must show the regulation is "tailored" to the government's "stated interests" for that regulation of core First Amendment activity. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002). Just because post-*AFPF* cases centered on campaign finance disclosures does not automatically mean that the tailoring analysis for donor disclosure for those who write *amicus* briefs is also constitutional.

The Supreme Court has repeatedly held that "First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *cf. Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468–469 (2007) ("*WRTL II*") (Roberts, C.J., controlling op.) (quoting same); In re *Primus*, 436 U.S. 412, 432–33 (1978) (quoting same); *Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (quoting same); *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 604 (1967) (quoting same). In *Rankin v. McPherson*, the Supreme Court held that discussion of public policy must also be protected with this same "breathing space." 483 U.S. 378, 387 (1987) ("'Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the

[8] *Available at:* http://www.nyclu.org/content/contents-of-lobbyists-statement-of-registration.
[9] *Available at*: http://www.wsj.com/articles/beware-of-anti-speech-ballot-measures-1474586180.

implementation of it must be similarly protected'") (quoting *Bond v. Floyd*, 385 U.S. 116, 136 (1966)). *Amicus* briefs feature discussion of public affairs that need such breathing space.

That is because "'[t]he freedom of speech … guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.'" *WRTL II*, 551 U.S. at 469 (Roberts, C.J.) (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978)) (ellipsis in *WRTL II*, brackets added). These principles reflect the "'national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Buckley*, 424 U.S. at 14 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Therefore, "under exacting scrutiny, a commitment to free speech requires governments to 'employ not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" *Wash. Post v. McManus*, 944 F.3d 506, 521 (4th Cir. 2019) (quoting *McCutcheon*, 572 U.S. at 218, and *Bd. Of Trs. Of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)) (internal brackets omitted).

The Supreme Court's tailoring analysis for campaign finance cases in *Buckley* was straightforward: organizations with the "major purpose" of supporting or opposing political candidates are also subject to campaign finance disclosure. *Buckley*, 424 U.S. at 79. Thus, candidate committees, political committees, and issue committees are all focused on engaging in electoral politics. Generalized donor disclosure makes sense in the context of such organizations with "the major purpose" of politics because donors *intend* their funds to be used for political purposes. The IRS would put such organizations in the § 527 category.

But if an organization is *neither* controlled by a candidate *nor* has as its "major purpose" speech targeting electoral outcomes, then disclosure is appropriate only for activity that is "unambiguously campaign related." *Id*. at 81. That is, when (1) the organization makes "contributions earmarked for political purposes... and (2) when [an organization] make[s] expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id*. at 80 (emphasis added).[10] Such limited disclosure is appropriate because it involves "spending that is unambiguously related" to electoral outcomes. *Id*. at 80. *Buckley* held that comprehensive disclosure can be required of groups only insofar as those groups exist to engage in unambiguously campaign related speech. *Id*. at 81.

While the Supreme Court upheld certain disclosure outside the major purpose framework in *Citizens United*, 558 U.S. at 369, it addressed only a narrow form of disclosure. The Court merely upheld the disclosure of a federal electioneering communication report, which disclosed the *entity making the expenditure* and the purpose of the expenditure. 52 U.S.C. §§ 30104(f)(2)(A) through (D). Donor disclosure in the context of what *Citizens United* approved was based only on donors who earmarked their funds for electioneering communications about political candidates. *Id*. And this entire disclosure regime's tailoring was justified by a 100,000-page record.

[10] The *Buckley* Court narrowly defined "expressly advocate" to encompass only "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Id*. at 80 n.108 (incorporating by reference *id*. at 44 n.52).

Exacting scrutiny rejects mere conjecture that a law is properly tailored. Furthermore, just because campaign finance laws are narrowly tailored does not mean other disclosure laws are properly tailored. In *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, the *en banc* Eighth Circuit struck down a law requiring independent expenditure funds to have "virtually identical regulatory burdens" to those imposed on political committees. 692 F.3d 864, 872 (8th Cir. 2012) (en banc). In that case, "Minnesota ha[d], in effect, substantially extended the reach of [political committee]-like regulation to *all* associations that *ever* make independent expenditures." *Id*. (emphasis in original). Minnesota's regulations included having to file periodic reports, even if the fund no longer engaged in political activity. *Id*. at 873 ("Perhaps most onerous is the ongoing reporting requirement. Once initiated, the requirement is potentially perpetual regardless of whether the association ever again makes an independent expenditure."). Ultimately, the *Swanson* court required "the major purpose" test to ensure that only political organizations face that burden—and not organizations that lack such a major purpose. *Id*. at 877.

Nor is the *en banc* Eighth Circuit an outlier. The decisions of other federal courts implementing this standard underscore that the informational interest extends only to "spending that is unambiguously campaign related." *Buckley*, 424 U.S. at 80–81. For example, in *Wisconsin Right to Life, Inc. v. Barland*, the Seventh Circuit stated that "[t]o protect against an unconstitutional chill on issue advocacy by independent speakers, *Buckley* held that campaign-finance regulation must be precise, clear, and may only extend to speech that is 'unambiguously related to the campaign of *a particular federal candidate*.'" 751 F.3d 804, 811 (7th Cir. 2014) (quoting *Buckley*, 424 U.S. at 80) (emphasis added). The Fourth Circuit also used *Buckley*'s unambiguously campaign related standard in finding North Carolina's "political committee" definition overbroad and vague. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 290 (4th Cir. 2008). And, in the words of the Tenth Circuit, "[i]n *Buckley*, the Court held that the reporting and disclosure requirements… survived 'exacting scrutiny' so long as they were construed to reach only that speech which is 'unambiguously campaigned related.'" *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010) (citing *Buckley*, 424 U.S. at 79–81). The *en banc* Fifth Circuit also agrees that disclosure must be tied to unambiguously campaign related activity. *Republican Nat'l Comm. v. Fed. Election Comm'n (*In re *Anh Cao)*, 619 F.3d 410, 418 (5th Cir. 2010) (en banc) ("*Buckley* does not permit non-campaign-related speech to be regulated.").

Here the Committee, if it promulgated these Proposed Amendments, would need to show there is a "substantial relation between the disclosure requirement and a sufficiently important governmental interest" and "the disclosure requirement be narrowly tailored to the interest it promotes." *AFPF*, 594 U.S. at 611. The Committee could not rely only on campaign finance cases because directly giving money to a politician is materially different than merely supporting an organization that later may lend its expertise to the judiciary in a formal *amicus curiae* brief. The latter is far more attenuated than the fears of *quid pro quo* direct contributions to members of Congress or the President. The Proposed Amendments fail exacting scrutiny.

II. There are no Alternative Channels for *Amicus* Arguments.

The Proposed Amendments assert that direct prohibitions or indirect chilling of speech is not at issue here because they "do not prevent anyone from speaking out…about how a court should decide a case," and then listed alternatives such as books, articles, podcasts, blogs, advertisements, and social media. Proposed Amendments at 20. But "it cannot be assumed that

'alternative channels' are available." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981). Only *amicus* briefs bring to the court's attention an organization's analysis for a particular case to be decided.

Metromedia is illustrative, because it dealt with restrictions on billboards. The Supreme Court held that "'[a]lthough in theory sellers remain free to employ a number of different alternatives, in practice [certain products are] not marketed through leaflets, sound trucks, demonstrations, or the like.'" *Id*. (quoting *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 (1977)). That is because "[t]he options to which sellers realistically are relegated... involved more cost and less autonomy" than their preferred method. *Id*. (quoting *Linmark*).

So too here. What matters is where best to show the detailed legal arguments to the court. No one really believes that a judge will be swayed by a good social media post about a case. Indeed, the Model Code of Judicial Conduct 2.9(A) instructs that judges should not "consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending matter." The ABA has further counseled against independent judicial research on the Internet (which would include social media). *See, generally*, ABA Formal Op. 478: Independent Factual Research by Judges Via the Internet (Dec. 9, 2017).[11] And the practicalities of the Internet are absurd: surely the Committee does not wish organizations to target social media and advertising directly to judges to try to sway their votes on cases. To the extent that the Proposed Amendments hope that alternative channels can give information on facts or mixed questions of law and facts, that counsels that the Internet is not good enough for an *amicus* to get their information properly before the court.

Nor is a book or law review article on an emerging case practical at all since the time between writing the long-form piece and publication will very likely stretch beyond the court's time writing the opinion in the case. While some issues percolate for years in legal academia, the material is written for general audiences, not how to apply the law to a specific case. Even then, new issues often arise on interlocutory appeals of grants or denials of preliminary injunctions and other fast-track procedural postures. It blinks reality to think a book or law review article can be written and published in time, or that a court will look to either in deciding the case at hand.

Amicus briefs bridge the gap between deep thinking about the trends in the law or detailed subject matter expertise with the case-specific recommendations needed by judges to resolve the controversy at hand. NTUF, as a tax and fiscal policy focused organization, deals with this all the time. NTUF has lent it expertise in cases ranging from the Mandatory Repatriation Tax of the Tax Cuts and Jobs Act to the Economic Substance Doctrine to how to allocate income and deductions among large multinational corporations. *See, e.g.* Br. of NTUF as *Amicus Curiae* in Support of Neither Party, *Moore v. United States* (U.S. No. 22-800, Sept. 6, 2023);[12] *Amicus Curiae* Br. of NTUF in Support of Appellant Liberty Global, Inc. and Reversal (10th Cir. No. 23-1410, May 7,

[11] *Available at*: https://www.abajournal.com/images/main_images/FO_478_FINAL_12_07_17.pdf.
[12] *Available at*: https://www.supremecourt.gov/DocketPDF/22/22-800/279088/20230907135608976_NTUF%20Amicus%20-%20Moore%20v%20United%20States%20for%20filing.pdf.

2024);[13] *Amicus Curiae* Br. of NTUF in Support of Appellant 3M Company and Subsidiaries and Reversal (8th Cir. No. 23-3772, Feb. 14, 2024).[14] There is real value in having courts hear tax policy experts on arcane and complex areas of tax law. But the only way to be heard for sure is to file a brief as *amicus curiae*. NTUF, however, will protect the privacy of its donors and therefore may not be able to continue to help courts suss out complex matters if the Proposed Amendments take effect.

Regardless, the Committee should remember that it is the *government's burden* to prove its law is narrowly tailored and that the state has no alternative than to regulate speech. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 797 (3rd ed. 2006) ("The government's burden when there is an infringement of a fundamental right is to prove that no other alternative, less intrusive of the right, can work."). Requiring all potential *amici* prove that every other channel does not work is misplacing the burden—to the advantage of those in power. The First Amendment, and the well-established doctrines on heightened scrutiny, exist to make the government prove the need for regulation, not the citizen's need for freedom.

III. NTUF Requests to Present Oral Testimony.

The Proposed Amendments trigger complex First Amendment analysis under decades of Supreme Court and Circuit Courts of Appeal precedent. They also implicate areas of sensitive public policy and possible unintended consequences. Oral testimony from National Taxpayers Union Foundation therefore may be helpful to the Committee. Therefore, we request the chance to present oral testimony on either January 10, 2025, February 14, 2025, or any other date the Committee so chooses.

* * *

Thank you for considering our comments. We look forward to answering any questions and working with you and your staff on these significant rule changes.

Respectfully submitted,

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[13] *Available at*: https://www.ntu.org/library/doclib/2024/05/NTUF-Amicus-Liberty-Global-Inc-v-United-States-AS-FILED.pdf.
[14] *Available at*: https://www.ntu.org/library/doclib/2024/02/NTUF-Amicus-Brief-3M-v-CIR.pdf.