

AMERICAN CIVIL LIBERTIES UNION

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June 1, 2007

William K. Suter
Clerk of the Court
Attn: Rules Committee
Supreme Court of the United States
Washington, D.C. 20543

Dear General Suter:

We are writing on behalf of the American Civil Liberties Union (ACLU) and Public Citizen Litigation Group (PCLG) to express two concerns about the proposed revisions to this Court's Rules.

The ACLU is a nonprofit and nonpartisan organization with more than 550,000 members nationwide that was founded in 1920 to promote civil liberties in the United States. In support of that mission, the ACLU regularly submits *amicus curiae* briefs to the Court in important civil liberties cases. In the current Supreme Court Term, for example, the ACLU has submitted 14 *amicus curiae* briefs on issues involving reproductive rights, student assignment policies, federal sentencing practices, search and seizure, establishment clause standing, free speech, and the death penalty, among others.

PCLG is a nonprofit public-interest law firm located in Washington, D.C. It is a division of Public Citizen, a nonprofit advocacy organization with approximately 100,000 members nationwide. Since its founding in 1972, PCLG has litigated for the public interest in cases concerning federal health and safety regulation, consumer rights, access to the civil justice system, Freedom of Information and other open government matters, separation of powers, and the First Amendment. PCLG frequently submits *amicus curiae* briefs on issues relating to its mission, including seven during the current Supreme Court Term.

Under the current rules, every *amicus curiae* brief must state whether counsel for a party has authored the brief in whole or in part, and whether any person or entity has made a monetary contribution to the brief other than the *amicus curiae*, its members, or its counsel. The proposed revision to Rule 37.6 would require, in addition, a statement indicating whether any party or counsel for any party is a member of the *amicus curiae*.

Like many other advocacy organizations, the ACLU and Public Citizen have long taken the position that their membership is confidential, and the Court has recognized the importance of preserving a right to anonymous speech and association in a long line of cases, including *NAACP v. Alabama*, 357 U.S. 449 (1958), and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). That right should not be sacrificed based on the implausible assumption that the positions of *amicus curiae* will be affected by the fact that a party or, more likely, the counsel for a party, is one of more than a half million members of the ACLU and pays a basic membership fee that can be as little as \$5.00 per year, or is one of Public Citizen's approximately 100,000 members.

Individual members of the ACLU and Public Citizen may choose not to disclose their membership publicly for a variety of personal and professional reasons. Public disclosure of their private membership should not be the price of bringing or litigating a case in the Supreme Court. The purpose of the current rule, as we understand it, is to ensure that neither the parties nor their counsel exercise undue influence over the content of an *amicus curiae* brief. Unfortunately, the overbroad language of the proposed rule jeopardizes important constitutional rights while doing little to advance that ultimate goal, at least in the case of mass membership nonprofit organizations like the ACLU and Public Citizen, for which the Supreme Court has recognized that "litigation is not [only] a technique of resolving private differences" but also a "form of political association." *NAACP v. Button*, 371 U.S. 415 (1963).

The proposed amendments also adopt mandatory electronic filing requirements, but we are concerned about reports that the Court does not intend to make these filings publicly available on its website. The Court has recognized the public's presumptive right under the common law to "inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978). In addition, many of the federal courts of appeals have recognized a First Amendment interest in public access to court filings. Although the public availability of filings at the courthouse may minimally satisfy these requirements, many members of the public with an interest in a case are unlikely to travel to the courthouse to view the paper versions of the Court's records. Reporters based in distant cities, for example, may not have easy access to the courthouse in Washington, D.C. Lawyers and pro se litigants in other cities also have an interest in using electronic filings as a model when crafting their own arguments or to gauge the bases for decisions in other cases. Moreover, remote electronic access is extremely useful for academics, and electronic records exponentially increase the research value of these filings because they make it possible to search for particular terms of interest.

We recognize that many Supreme Court briefs are also available on third-party websites, but these sites are not complete and are not always updated in a timely manner. The Court in recent years has made strides in public openness by making oral argument transcripts immediately available from its website at no cost. A logical extension of this

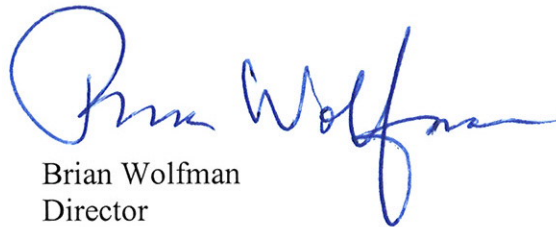
step is to provide links to electronic versions of filings by parties and *amici curiae* from the Court's online docket.

We therefore respectfully request that the Committee reconsider the proposed revision to Rule 37.6 and either delete it entirely or, at a minimum, narrow its focus to target more precisely the problem of undue influence that the Committee is presumably trying to address. We also urge the Court to take this opportunity to enhance open access by providing electronic versions of filings to the public.

Respectfully submitted,

A handwritten signature in blue ink that reads "Steven R. Shapiro". The signature is fluid and cursive, with a small "SR" monogram at the end.

Steven R. Shapiro
National Legal Director
American Civil Liberties Union

A handwritten signature in blue ink that reads "Brian Wolfman". The signature is cursive and stylized, with a large initial "B".

Brian Wolfman
Director
Public Citizen Litigation Group