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OPINION

No Friend-of-the-Court Senator

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Sheldon Whitehouse is back, so hide the Constitution. The Rhode Island Senator was last spotted examining high school yearbooks to keep Brett Kavanaugh off the Supreme Court. Now the Democrat is trying to muzzle Americans trying to influence the High Court via legal arguments.

In a Jan. 4 letter to Chief Justice John Roberts, the Senator chided the Court for accepting amicus—friend of the court—briefs from "special interest groups that fail to disclose their donors." He calls out the U.S. Chamber of Commerce, as well as think tanks and policy shops that receive money from right-of-center foundations. Mr. Whitehouse claims these "repeat-player" filers are unduly influencing the Court, even as they hide their "deep-pocketed corporate contributors."

This is a familiar stand for Mr. Whitehouse, who has long tried to silence his political opponents. He gets double discredit in this case for threatening a separate-but-equal branch of government over its business. Mr. Whitehouse charges in his letter that the Court's failure to adopt his demands means "a legislative solution may be in order"—namely, his bill requiring "disclosure of contributions over a certain threshold" to groups that file amicus briefs.

As the Senator knows, the Supreme Court has a rule—37.6—that governs amicus filings. It requires that amicus briefs "indicate whether counsel for a party" involved in the litigation "authored" or "made a monetary contribution" to the preparation of the brief. In this spirit it further requires disclosure of "every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution."

The Court adopted the rule in 1997 to deter the central parties in a case from secretly buying amicus briefs that support their position. It imposes strict page limits on the briefs the central parties can file, so the rule also guards against litigants using amici to obtain additional space for their arguments.

In December the High Court rejected an amicus from the U.S. Alcohol Policy Alliance, which had solicited donations via the crowd-funding site GoFundMe to finance a specific brief. The Court had no means of knowing whether those anonymous donors were parties to the litigation.

Mr. Whitehouse wants to go much further and force amicus filers to disclose all of their donors. His disclosure demands would target everyone from the U.S. Chamber and Cato Institute, to the ACLU and Brennan Center, all of which depend on outside donations for their overall operations. The groups decide how to spend those donations, whether for education programs or filing amicus briefs. The groups aren't required by law to disclose their funders, and Mr.

Whitehouse offers no evidence that they are secretly filing briefs on behalf of specific donors or parties to litigation.

Mr. Whitehouse knows his legislation is going nowhere in the current Senate. But he's hoping Chief Justice Roberts will be worried enough by the attack that the Court will bend to the disclosure demands.

Regarding disclosure, Mr. Whitehouse could start with his own amicus filings. In January 2018, Mr. Whitehouse and Connecticut Sen. Richard Blumenthal filed a brief urging the Court to uphold the forced collection of union dues in Janus v. Afscme. Their brief complained about the number of free-market amicus filers in the case that hadn't disclosed funding from the Bradley Foundation. Yet nowhere in Mr. Whitehouse's brief does he disclose that the counsel of record for the plaintiffs in Janus was one of his campaign contributors.

Mr. Whitehouse's brief in support of petitioners in Arab Bank vs. Jesner in 2016 fails to note that the petitioners were represented by Motley Rice, the plaintiffs firm whose lawyers are among Mr. Whitehouse's largest campaign donors.

In January Mr. Whitehouse filed an amicus with the Ninth Circuit Court of Appeals supporting plaintiffs who want climate-change lawsuits filed by California localities to be heard in state (not federal) court. Mr. Whitehouse did not disclose that he has received donations from two parties in the litigation. The Senator's office did not respond to requests for comment.

Scholars debate whether and how much amicus briefs influence judicial rulings, and no doubt many are read by clerks rather than Justices. But briefs often turn up overlooked precedents, or inform on key facts. The Justices must find them of some use because they sometimes cite amici in oral arguments and opinions. Justice Ruth Bader Ginsburg cited an ACLU amicus brief last week in her opinion for a unanimous Court in Timbs v. Indiana.

Mr. Whitehouse is ginning up this fuss now because he wants to discredit the Roberts Court as somehow politically corrupt. Look for more such phony campaigns now that the Supreme Court is no longer a safe redoubt for progressive policy-making. The Justices should ignore his threats and find a case to hear in which they can apply the First Amendment to better protect political donors from disclosure and the harassment by Rhode Island Senators.