

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**3M COMPANY,**

Plaintiff-Appellee,

- vs -

**LANNY DAVIS, et al.,**

Defendants-Appellants

- and -

**DISTRICT OF COLUMBIA,**

Intervenor-Appellee

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Case No.: 12-7012

District Court No.  
1:11-CV-01527 (RLW)

Consolidated with 12-7017

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**SHIRLEY SHERROD,**

Plaintiff-Appellee,

- vs -

**ANDREW BREITBART and LARRY  
O'CONNOR,**

Defendants-Appellants.

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Case No.: 11-7088

District Court No.  
1:11-CV-00477 (RJL)

**MOTION FOR LEAVE TO FILE BRIEF OF MEDIA *AMICI CURIAE***

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August 10, 2012

Under Federal Rule of Appellate Procedure 29(b) and Circuit Rule 29(b), Allbritton Communications Company, Atlantic Media, Inc., Dow Jones & Company, Inc., Gannett Co., Inc., Hearst Corporation, NBCUniversal Media, LLC, NPR, Inc., The New York Times Company, POLITICO LLC, The Reporters Committee for Freedom of the Press, The Washington Post Company (collectively “Media Amici”) respectfully move this Court for leave to file an *amici curiae* brief in support of Defendants-Appellants in *Sherrod v. Breitbart*, No. 11-7088 and *3M Company v. Davis*, No. 12-7012 (collectively the “Anti-SLAPP Act Appeals”).<sup>1</sup> Per the Court Order, the two appeals will be heard by the same panel and on the same day. *Sherrod v. Breitbart*, No. 11-7088, ECF No 1384310, July 18, 2012. No argument date has been set.

On July 26, 2012, the Court in *Sherrod v. Breitbart* issued a scheduling order specifying that the brief of *amicus curiae* for Appellants is due September 24, 2012. No date for *amicus* briefs was set in *3M v. Davis*. If leave is granted, Media Amici intend to file one brief in both Anti-SLAPP Act Appeals and respectfully request that their *amicus* brief be due September 24, 2012, in both appeals.

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<sup>1</sup> Media Amici concurrently file this motion in both *Sherrod v. Breitbart*, No. 11-7088 and *3M Company v. Davis*, No. 12-7012. Further, while classified as an intervenor-appellee in No. 12-7012 (the lead consolidated case), the District of Columbia is the appellant in its appeal in *3M Company v. Davis*, No. 12-7017. Media Amici refer to the District of Columbia as an appellant in this motion for the sake of simplicity.

Public Citizen sought leave to file an amicus “on behalf of neither party” in *Sherrod v. Breitbart* and leave was granted on February 6, 2012. No intent to file as *amicus* has been made in *3M Company v. Davis*. The Media Amici also move the Court to permit Media Amici to file a single brief in both appeals in support of appellants, separate from Public Citizen’s amicus brief in *Sherrod v. Breitbart*.

### **1. Interests of Media Amici**

Media Amici are ten leading news organizations, and a related professional association. It is expected that additional news organizations and professional associations will join the *amici* brief, if leave is granted.

Hearst Corporation is one of the nation’s largest diversified media and information companies. Its major interests include the following: ownership of 15 daily and 36 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany (N.Y.) Times Union*; hundreds of magazines around the world, including *Esquire Magazine*, *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E, History and ESPN; significant holdings in the automotive, electronic, media/pharmaceutical and financial information industries, Internet and marketing services businesses, television production, newspaper features distribution and real estate.

Hearst Communications, Inc. is indirectly owned by Hearst Corporation. Hearst Communications, Inc. and its reporter, Mark Warren, are defendants-appellees in *Farah v. Esquire Magazine, Inc.*, No. 1:11-cv-1179 (RMC), in which Judge Rosemary M. Collyer reached a favorable decision for Hearst, by applying the D.C. Anti-SLAPP Act to a diversity case in federal court and dismissing under both the Act and Federal Rule of Civil Procedure 12(b)(6). *Farah v. Esquire Magazine, Inc.*, --- F. Supp. 2d ----, 2012 WL 1970897 (D.D.C. June 4, 2012). Plaintiffs-appellants' appeal from this decision is pending in this Court. *Farah, et al. v. Esquire Magazine, Inc., et al.*, No. 12-7055 (D.C. Cir. docketed June 15, 2012). Accordingly, the outcome of these Anti-SLAPP Appeals could impact one of the grounds for decision in Hearst's favor currently on appeal.

Atlantic Media, Inc., headquartered in the District of Columbia, is a privately held, integrated media company that publishes *The Atlantic*, *National Journal* and *Government Executive*. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at federal, state and local levels. *The Atlantic* was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, WSJ.com, a news

website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine and, through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires, as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including *USA TODAY*, as well as hundreds of non-daily publications. In broadcasting, the company operates WUSA-Channel 9 in D.C. and 22 other television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

NBCUniversal Media, LLC ("NBC") is one of the world's leading media and entertainment companies in the development, production and marketing of news, entertainment and information to a global audience. Among other businesses, NBCUniversal Media, LLC owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks, including MSNBC and CNBC, and a television-

stations group consisting of owned-and-operated television stations that produce substantial amounts of local news, sports and public affairs programming. NBC owns and operates WRC-TV NBC4 in Washington, D.C. NBC News produces the “Today” show, “NBC Nightly News with Brian Williams,” “Dateline NBC” and “Meet the Press.”

NBC, along with MSNBC and Rachel Maddow, are defendants in libel actions currently pending in both D.D.C. and D.C. Superior Court. *Dean v. NBC Universal*, No. 2011 CA 006055 B (D.C. Super. Ct. filed July 27, 2011); *Dean v. NBC Universal*, No. 1:12-cv-00283-RJL (D.D.C. filed Feb. 21, 2012). In the Superior Court action, defendants moved to dismiss under both the D.C. Anti-SLAPP Act and Super. Ct. Civ. R. 12(b)(6). Three days before argument, plaintiffs filed a voluntary dismissal citing the decision in *3M Company v. Davis*, as the reason for the dismissal and refiled the identical action in federal court, pursuant to the Court’s diversity jurisdiction. Defendants moved to dismiss the federal action under both the D.C. Anti-SLAPP Act and Fed. R. Civ. P. 12(b)(6). The federal action was stayed pending resolution of the Superior Court action. *Dean v. NBC Universal*, No. 1:12-cv-00283-RJL (D.D.C. May 14, 2012) (minute order staying the case pending final resolution of the Superior Court action). Voluntary dismissal was vacated by the Superior Court; as a condition for dismissal without prejudice, plaintiffs were ordered to pay defendants’ attorneys

fees. No. 2011 CA 006055 B (Apr. 23, 2012) (Order Vacating Notice of Dismissal and Reinstating Case); *id.* (June 25, 2012) (Memorandum and Order Granting in Part Defendants' Motion for Attorneys' Fees and Denying Plaintiffs' Combined Motions for Reconsideration and Sanctions). Plaintiffs have not paid the fees, have filed a notice of appeal and sought a stay of dismissal with prejudice. No. 2011 CA 006055 B (July 17, 2012) (Notice of Appeal); *id.* (July 18, 2012) (Motion to Stay Execution on Order of June 25, 2012).

NPR, Inc., headquartered in the District of Columbia, is an award winning producer and distributor of noncommercial news programming. A privately supported, not for profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 269 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information.

The New York Times Company is a leading global multimedia media news and information company, which publishes The New York Times, the International Herald Tribune, and The Boston Globe and operates NYTimes.com, BostonGlobe.com, Boston.com, About.com and related properties.



POLITICO LLC is a nonpartisan, Washington-based news organization that produces a newspaper and website covering politics and public policy.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Washington Post Company publishes a daily and Sunday newspaper with the nation's fifth-largest print circulation, as well as a website ([washingtonpost.com](http://washingtonpost.com)) that attracts more than 17 million unique visitors per month.

WJLA-TV and NewsChannel 8, are a division of Allbritton Communications Company. Allbritton Communications Company is the parent company of entities operating ABC-affiliated television stations in the following markets: Washington, D.C.; Harrisburg, Pa.; Birmingham, Ala.; Little Rock, Ark.; Tulsa, Okla.; and Lynchburg, Va. In Washington, it operates broadcast station WJLA-TV, and the 24-hour local news service, NewsChannel 8, and the news websites [WJLA.com](http://WJLA.com) and [TBD.com](http://TBD.com). An affiliated company operates the ABC affiliate in Charleston, S.C.

## 2. Issues on Appeal

These appeals ask this Court to review the denials of motions to dismiss filed under the District of Columbia's Anti-SLAPP Act of 2010 (the "Act"), D.C. Code §§ 16-5501 – 16-5505, which permits a party to file a special motion to dismiss "any claim arising from an act in furtherance of the right of advocacy on issues of public interest . . . ." D.C. Code 16-5502(a). The central issue in these appeals and the issue Media Amici plan to address is whether the Act applies in federal court in cases invoking the Court's diversity jurisdiction. *Sherrod v. Breitbart*, No. 11-7088, ECF. No. 133967, at 1, Oct. 6, 2011; *3M Co. v. Davis*, No. 12-7012, ECF No. 1365401, at 2, Mar. 23, 2012.

Media Amici may briefly address whether interlocutory appeal from denial of an Anti-SLAPP motion is appropriate and whether the Act violates the Home Rule Act, in so far as these issues overlap with the central issue on appeal of the applicability of the Act in diversity actions. But Media Amici will not address whether the Act applies retroactively or the merits of the underlying cases.

## 3. Media Amici Would Benefit the Court by Providing Practical Examples of How Anti-SLAPP Statutes Apply in Federal Court as Substantive Protections of the Media's First Amendment Rights

Media Amici will argue that the District of Columbia Anti-SLAPP Act applies in federal court to diversity actions. Media Amici closely monitor and are often subject to meritless defamation and other state-law claims in federal court

that target their exercise of the constitutional right to disseminate information about important issues of public interest. Left unchecked, these lawsuits exploit the legal process to punish political commentary and chill the free flow of information. In many jurisdictions that have enacted anti-SLAPP statutes to curb this abuse, Media Amici rely on these statutes in federal court.

More specifically, two of the Media Amici have been recently subject to local suits in D.C. Superior and D.C. federal court and have invoked the D.C. Anti-SLAPP Act. The Act and federal rules acted in concert in *Farah v. Esquire Magazine, Inc.*, in which the D.C. District Court applied the D.C. Anti-SLAPP Act to a libel claim, and granted dismissal under both the Act and Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Farah v. Esquire Magazine, Inc.*, --- F. Supp. 2d ----, 2012 WL 1970897 (D.D.C. June 4, 2012) (Collyer, J.), *appeal pending*, No. 12-7055 (D.C. Cir. docketed June 15, 2012). A pending libel claim against another of the Media Amici has already been directly affected by one of the cases on appeal, *3M Company v. Davis*. The plaintiffs dismissed their libel claim filed in D.C. Superior Court brought against NBC Universal defendants on the eve of argument of a motion under the D.C. Anti-SLAPP Act and re-filed the identical action in federal district court, citing *3M Company v. Davis* as the reason. *Dean v. NBC Universal*, No. 1:12-cv-00283-RJL, ECF No. 5-1 (D.D.C. filed Feb. 21, 2012) (plaintiffs' notice of voluntary dismissal in D.C. Superior Court states: "The

Complaint has been refiled in the U.S. District Court for the District of Columbia due to the Court's recent decision in *3M v. Davis*, No. 11-cv-1527 (RLW)(D.D.C.)”).

Media Amici can therefore bring substantial experience to bear on the issues presented here – not simply in terms of legal expertise, but also in terms of describing the practical impact of anti-SLAPP statutes around the country. Indeed, in the federal cases in which Media Amici have been involved, anti-SLAPP statutes supplement the procedural mechanisms of Rules 12 and 56 of the Federal Rules of Civil Procedure by overlaying substantive protections onto state-law claims to safeguard free speech. Media Amici respectfully submit that their views and experience will aid this Court in considering this appeal.

#### **4. Media Amici Request Leave to File a Separate Brief**

Media Amici also request leave to file a separate brief because their arguments and parties supported differ from those the Court will hear from other *amici curiae*, rendering a joint brief impracticable. Circuit Rule 29(d). Public Citizen sought to file as *amicus* “on behalf of neither party” in one of the two appeals (*Sherrod v. Breitbart*) and the Court granted leave on February 6, 2012 in that appeal. Counsel for the Media Amici have consulted with counsel for Public Citizen. Media Amici's arguments described above, will focus more on the Media Amici's interest and experience involving the D.C. Anti-SLAPP Act and

analogous laws in federal courts. As described in its Motion for Leave, Public Citizen's *amicus* brief will argue that the Anti-SLAPP Act is akin to the doctrine of qualified immunity, and that by analogy, the limitations that the Anti-SLAPP Act creates on adjudicating state-law claims should apply in cases invoking federal courts' diversity jurisdiction. Further, Public Citizen will file as *amicus* in support of neither party and in only one appeal, while Media Amici will support appellants in both appeals. For these reasons, a common brief is impracticable.

Should the Media Amici or their undersigned counsel become aware of other potential *amici* participants, undersigned counsel will consult with them and, to the extent practicable, endeavor to file jointly with such *amici*.

## **5. Briefing Schedule**

Appellants' briefs in both appeals are due in both cases September 7, 2012, and the brief for *amicus curiae* for Appellants is due September 24, 2012 in *Sherrod v. Breitbart*. No. 11-7088, ECF No. 1385885, July 26, 2012; ECF No. 1385886, July 26, 2012. No other potential *amicus curiae* has previously sought to file in *3M Company v. Davis*, so no due date has been ordered for such briefs. Absent the Court's order, Media Amici's brief in *3M Company v. Davis* would be due seven days after appellants' briefs, before *amicus curiae* briefs in *Sherrod v. Breitbart*. Fed. R. App. P. 29(e).

Medici Amici intend to file a single brief in both appeals. To provide uniform deadlines in two cases that will be heard by the same panel on the same day, and to promote efficiency, Media Amici respectfully request that its brief be due September 24, 2012 in both appeals.

## **6. The Parties' Positions on This Motion**

Counsel for Appellant-Defendant Larry O'Connor in *Sherrod v. Breitbart* have consented to the filing of a brief by Media Amici.<sup>2</sup> Counsel for Appellee-Plaintiff in *Sherrod v. Breitbart* have not consented to the Media Amici filing. Counsel for Appellants-Defendants Lanny Davis, Lanny J. Davis & Associates, PLLC, and Davis-Block LLC in *3M Company v. Davis* have consented to the filing of a brief by Media Amici. Further, counsel for the Appellee-Plaintiff in *3M Company v. Davis* does not consent. Counsel for Intervenor-Appellant in *3M Company v. Davis* the District of Columbia have consented to filing the *amici* brief.

## **CONCLUSION**

The Media Amici respectfully request that the Court grant them (1) leave to file one brief as *amici curiae* in support of Defendants-Appellants in both *Sherrod v. Breitbart*, No. 11-7088, and *3M Company v. Davis*, No. 12-7012; (2) that the

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<sup>2</sup> The estate of the late Andrew Breitbart has not been substituted yet in the appeal. Counsel for Media Amici have consulted with counsel for the late Mr. Breitbart, who informed counsel for Media Amici that counsel is not in a position to consent or take a position on this motion.

brief be separate from other *amici*; and, (3) that the brief be due in both appeals on September 24, 2012.

August 10, 2012

Respectfully submitted,

By:           /s/ Laura R. Handman          

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## CORPORATE DISCLOSURE STATEMENT

Under Circuit Rule 29(b), Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, and Circuit Rule 26.1, undersigned counsel for *amici curiae* certify that, to the best of our knowledge and belief:

Atlantic Media, Inc. is a privately held, integrated media company, and no publicly held corporation owns 10% or more of its stock.

News Corporation, a publicly held company, is the indirect parent corporation of Dow Jones & Company, Inc. (“Dow Jones”), and Ruby Newco LLC, a subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. No publicly held company owns 10% or more of Dow Jones’ stock.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company holds 10% or more of its stock.

Hearst Corporation is a diversified, privately held media company. No publicly held company owns 10% or more of its stock.

NBCUniversal Media LLC is indirectly owned 51% by Comcast Corporation and 49% by General Electric Company, which are both publicly traded. Neither Comcast Corporation nor General Electric Company has a parent company, and no other publicly held company owns 10% or more of their stock.



The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

NPR, Inc. has no parent company and does not issue stock.

POLITICO LLC is a wholly owned subsidiary of privately held Capitol News Company, LLC.

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

WP Company LLC d/b/a *The Washington Post* is a wholly owned subsidiary of The Washington Post Co., a publicly held corporation. Berkshire Hathaway, Inc., a publicly held company, has a 10% or greater ownership interest in The Washington Post Co.

WJLA-TV and NewsChannel 8, is a division of Allbritton Communications Company. Allbritton Communications Company is an indirect, wholly owned subsidiary of privately held Perpetual Corporation and is the parent company of entities operating ABC-affiliated stations in the following markets: Washington; Harrisburg, Pa.; Birmingham, Ala.; Little Rock, Ark.; Tulsa, Okla.; and Lynchburg, Va.



## CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

**Parties and Amici.** All parties and amici appearing before the district court and this Court are listed in Appellants Lanny Davis, *et al.* and Appellants Andrew Breitbart and Larry O'Connor's Certificates as to Parties, Rulings, and Related Cases. In addition to the potential *amici curiae* filing today, Public Citizen, Inc. is *amicus curiae*.

**Rulings Under Review.** The issues that are to be raised in this appeal are those set forth in the Appellants Lanny Davis, *et al.* and Appellants Andrew Breitbart and Larry O'Connor's Statements of Issues.

**Related Cases.** Counsel for the Media Amici is unaware of any other related cases pending before this or any other Court.

**CERTIFICATE OF SERVICE**

I hereby certify that service of the foregoing will be made electronically via CM/ECF system upon the following counsels of record this 10th day of August, 2012, with one copy served by U.S. mail, first class, postage prepaid:

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