NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 12-7055

JOSEPH FARAH, JEROME CORSI, WORLDNETDAILY.COM and WND BOOKS,

Plaintiffs-Appellants,

v.

ESQUIRE MAGAZINE, INC., HEARST COMMUNICATIONS, INC., and MARK WARREN,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia in Case No. 1:11-CV-01179-RMC (Hon. Rosemary M. Collyer, Judge)

BRIEF OF *AMICI CURIAE* ADVANCE PUBLICATIONS, INC., AMERICAN SOCIETY OF NEWS EDITORS, ASSOCIATION OF ALTERNATIVE NEWSMEDIA, BLOOMBERG NEWS, DOW JONES & COMPANY, INC., THE E.W. SCRIPPS COMPANY, GANNETT CO., INC., MEDIA LAW RESOURCE CENTER, MPA-THE ASSOCIATION OF MAGAZINE MEDIA, NATIONAL PUBLIC RADIO, INC., THE NEW YORK TIMES COMPANY, THE RADIO TELEVISION DIGITAL NEWS ASSOCIATION, AND THE WASHINGTON POST IN SUPPORT OF APPELLEES IN FAVOR OF AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amici* hereby certify:

(A) Parties and *Amici*

Except for the *amici* submitting this brief, all parties, intervenors, and *amici* appearing in this court are listed in the briefs for Plaintiffs-Appellants and Defendants-Appellees. The Corporate Disclosure Statement for the *amici* can be found herein beginning at page ix.

(B) Rulings Under Review

References to the rulings at issue appear in the briefs for Plaintiffs-Appellants and Defendants-Appellees.

(C) Related Cases

There are no related cases.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29(c) and 26.1 of the Federal Rules of Appellate Procedure, *amici* provide the following disclosures of corporate identity:

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns many Internet sites and has interests in cable systems serving over 2.3 million subscribers. Advance Publications, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

The American Society of News Editors is a nonprofit organization founded in 1922. It has a nationwide membership of approximately 400 persons who hold positions as directing editors of daily newspapers throughout the United States and abroad. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people. The Society has no parent corporation and does not issue any stock.

The Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 128 alternative newspapers in North America, including weekly papers like *The Village Voice* and *Washington City Paper*. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach

of over 25 million readers. AAN has no parent corporation and does not issue any stock.

Bloomberg L.P. d/b/a Bloomberg News is one of the world's largest newsgathering organizations, comprised of more than 2,500 journalists around the world in more than 120 bureaus. It provides business, legal and financial news through the Bloomberg Professional Service, Bloomberg's website and Bloomberg Television. Bloomberg is a privately-held company.

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. News Corporation, a publicly traded corporation, is the ultimate parent corporation of Dow Jones. No publicly held company owns 10% or more of News Corporation's stock and Dow Jones does not have any other corporate parents, subsidiaries or affiliates that are publicly held.

The E.W. Scripps Company is a diverse, 132-year-old media enterprise with interests in newspaper publishing, online publishing, local broadcast

television stations, and licensing and syndication. The company's portfolio of locally focused media properties includes: daily and community newspapers in 14 markets; 13 broadcast TV stations; and the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service. The E.W. Scripps Company is a publicly traded corporation. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

Gannett Co., Inc. ("Gannett") 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 across the country. In broadcasting, the company operates 23 television stations in the United States. Each of Gannett's daily newspapers and television stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations. Gannett is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly owned company owns 10% or more of Gannett stock.

Media Law Resource Center ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law and policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law

conferences and meetings. MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment. MLRC has no parent corporation and issues no stock.

MPA – The Association of Magazine Media is the industry association for multi-platform magazine companies. Established in 1919, MPA represents 175 domestic magazine media companies with more than 900 titles, approximately 30 international companies and more than 100 associate members. Staffed by magazine media specialists, MPA is headquartered in New York City, with a government affairs office in Washington, DC. It has no parent company and no publicly held company owns 10 percent or more of its stock.

National Public Radio, Inc. ("NPR") is a District of Columbia non-profit membership corporation with no parent company. It produces and distributes its radio programming through, and provides trade association services to, nearly 800 public radio member stations located throughout the United States and in many U.S. territories. NPR's award-winning programs include *Morning Edition*, *All Things Considered*, and *Talk of the Nation* and serve a growing broadcast audience of over 26 million Americans weekly. NPR also distributes its broadcast

programming online, in foreign countries, through satellite, and to U.S. Military installations via the American Forces Radio and Television Service.

The New York Times Company is the owner of *The New York Times*, *The Boston Globe*, *The International Herald Tribune*, and many websites, including NYTimes.com, About.com, and Boston.com. The New York Times Company is a publicly held company that has no parent company, and no publicly held corporation owns 10% or more of its stock.

The Radio Television Digital News Association ("RTDNA"), based in Washington, D.C., is the world's largest professional organization devoted exclusively to electronic journalism. RTDNA represents local and network news directors and executives, news associates, educators and students in broadcasting, cable and other electronic media in over 30 countries. RTDNA is committed to encouraging excellence in electronic journalism, and upholding First Amendment freedoms. RTDNA does not issue stock.

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. It has no parent corporation and issues no stock.

WP Company LLC d/b/a The Washington Post publishes one of the nation's most prominent daily newspapers, as well as a website, www.washingtonpost.com, that is read by an average of more than 20 million unique visitors per month. It is a wholly-owned subsidiary of The Washington Post Company, a publicly held corporation. Berkshire Hathaway, Inc., a publicly held company, has a 10 percent or greater ownership interest in The Washington Post Company.

STATEMENT OF THE INTERESTS OF *AMICI*

Amici are media organizations that create and disseminate expressive speech, including news and other print, broadcast and Internet-based content. They include media companies, organizations of newspapers and broadcasters, and groups representing editors and journalists. Pursuant to Fed. R. App. P. 29, this brief is submitted together with a motion for leave to file it. No counsel for any party authored any part of this brief or contributed funds intended for the preparation of this brief.

SUMMARY OF ARGUMENT

At the core of this action is political speech about whether President Obama is constitutionally qualified to serve as President. Recognizing that speech about matters of public interest has increasingly been subject to lawsuits designed to punish and chill speakers, the District of Columbia passed the Anti-SLAPP Statute of 2010. *See* D.C. Code § 16-5501 *et seq.* (the "Act"). Under the Act, claims arising out of such speech must be dismissed unless a plaintiff can demonstrate a likelihood of prevailing on the merits. Because the Act provides substantive limitations on claims arising out of speech on matters of public interest, and can exist side by side with Federal Rules of Civil Procedure 12, 41(b) and 56, it applies in federal court under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny. Indeed, although plaintiffs and a lone decision from a district court

contend otherwise, the vast majority of courts – including every federal appellate court to address the issue – has so found. Because, as plaintiffs concede, the District of Columbia could have "simply granted a defendant an immunity [from SLAPPs] similar to existing qualified or absolute immunities," Plaintiffs-Appellants' Brief ("Pls.' Br.") at 19, it can also limit causes of action challenging expressive conduct to instances where a plaintiff can make a threshold showing of merit.

This case presents the perfect example of plaintiffs using litigation as their "weapon of choice" to silence or punish critics. Although plaintiffs' contemporaneous statements illustrate that they understood the satirical nature of the commentary at issue, they have nevertheless initiated a lawsuit seeking $120 million, and characterized plainly political commentary as "commercial" speech, essentially seeking to attack through litigation those who disagree with them. The prospect that plaintiffs could circumvent a statute designed to protect that commentary, simply by proceeding in federal court, is contrary to the *Erie* jurisprudence of both the Supreme Court and this Court. The judgment of the District Court, including its holding that the Act is a substantive protection of D.C. law applicable in federal court, should be affirmed.

ARGUMENT

I. THE ACT PROVIDES BROAD SUBSTANTIVE PROTECTIONS TO SPEECH ON ISSUES OF PUBLIC INTEREST.

In 2010, following the lead of almost thirty states, the District of Columbia enacted its Anti-SLAPP statute. Under the Act's plain terms, once a party

> filing a special motion to dismiss . . . makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion *shall be granted* unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code § 16-5502 (emphasis added). The Act further provides that, "[i]f the special motion to dismiss is granted, dismissal shall be with prejudice." *Id.* In other words, defendants bear the burden of showing only that plaintiffs' claims arise from the type of advocacy protected by the Act. If so, then the Act *requires* that the complaint be dismissed *with prejudice*. The only exception to the protection thus conferred is where a plaintiff meets the heavy burden imposed by the Act of proving that he is *likely* to succeed on the merits of his claims.

The Act's legislative history confirms that the Act is designed to put an end to lawsuits such as this one aimed at stifling speech about matters of public concern:

> Such lawsuits, often referred to as strategic lawsuits against public participation – or SLAPPs – have been increasingly utilized over the past two decades as a

> means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights.

Committee Report, Council of the District of Columbia, Comm. on Pub. Safety & the Judiciary (Nov. 18, 2010) ("Comm. Rep.") at 1 (attached as Addendum to Defendants-Appellants' Brief); *see also id.* at 4 (Act "[f]ollows the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions"). To combat this phenomenon, the Act "incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." *Id.* at 1. It would be difficult to find a more compelling example of a "SLAPP" suit than this case, in which the plaintiffs unabashedly seek to "muzzle speech" with the goal of "punishing and preventing opposing points of view." *See id.* at 4 (purpose of statute is to put a swift end to lawsuits in which "*litigation itself* is the plaintiff's weapon of choice") (emphasis in original).[1]

[1] Plaintiffs erroneously contend that the Act is inapplicable here because they are not exercising an "economic advantage" over powerless defendants with the intent and effect of actually chilling speech. Pls.' Br. at 26 (citing *Blumenthal v. Drudge*, 2001 WL 587860 (D.D.C. Feb. 13, 2001)). But the Act's text plainly applies to "any written or oral statement" regardless of the speaker. D.C. Code § 16-5501. Moreover, *Blumenthal*'s statement that California's anti-SLAPP statute

Whether the Act's substantive protections apply in federal court is of critical importance to *Amici* and the flow of information and commentary to the public. Anti-SLAPP statutes around the country have allowed the media to avoid protracted litigation for reporting or commenting on issues of public concern. For example:

- Here in D.C., Daniel Snyder, owner of the Washington Redskins, dropped his lawsuit against the *Washington City Paper* and its sports columnist after they filed an anti-SLAPP motion under the new law. Mr. Snyder had claimed that the newspaper defamed him in a column called "The Cranky Redskins Fan's Guide to Dan Snyder." *See* Paul Fahri, *Redskins Owner Daniel Snyder Drops Suit Against Washington City Paper*, WASH. POST, Sept. 10, 2011.

- A California federal district court granted an anti-SLAPP motion to dismiss a case arising out of a report about abuse of Iraqi prisoners. *See Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136 (S.D. Cal. 2005). *See also, e.g.*, *Thomas v. L.A. Times Comm'cns, LLC*, 189 F. Supp. 2d 1005 (C.D. Cal. 2002) (granting anti-SLAPP motion to dismiss defamation claim against *Los Angeles Times* over its alleged suggestion

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applied only to suits "brought by large private interests to deter common citizens from exercising their political or legal right," 2001 WL 587860, at *3, was *dicta* relying on *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 449-50 (Cal. Ct. App. 1994), a decision subsequently disapproved by the California Supreme Court on this very point, *see Equilon Enters. v. Consumer Cause, Inc.*, 52 P.3d 685, 694 (Cal. 2002). Courts now uniformly apply anti-SLAPP statutes to all speakers, including large corporations, whose free speech rights are at risk. *See, e.g.*, *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003) (courts routinely entertain anti-SLAPP motions from defendants "despite the fact that they were neither small nor championing individual interests") (citing examples including DuPont, Merck, a television station, and a software company); *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1111 (W.D. Wash. 2010) ("That defendant may be considered a powerful business entity . . . is of no import under the modern framework of the statute").

that plaintiff lied in his book about being a war hero), *aff'd*, 45 F. App'x 801 (9th Cir. 2002).

- A Louisiana federal district court granted an anti-SLAPP motion filed by *The New York Times* and its writer over a lengthy article in the *Times* magazine intended to "consider questions raised by disasters like how limited resources should be divided amongst patients and what is the line between comfort care and mercy killing." *Armington v. Fink*, 2010 WL 743524, at *5 (E.D. La. Feb. 24, 2010).

- An Oregon federal district court found that Oregon's anti-SLAPP statute protected a website against claims for defamation and intentional infliction of emotional distress based on the website's commentary that plaintiff was "anti-Israel." *See Card v. Pipes*, 398 F. Supp. 2d 1126 (D. Or. 2004).

- A Washington federal district court granted an anti-SLAPP motion to dismiss claims arising from commentary "about the contemporary healthcare crisis in America." *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1108 (W.D. Wash. 2010).

If these statutes were applicable only in state court, plaintiffs would be able to use litigation as their "weapon of choice" simply by filing their action in federal court. Were that the law, significant reporting and commentary would be open to protracted and expensive litigation, no doubt chilling significantly reports on controversial subjects where the interest in informing the public is at its zenith. At bottom, *Erie* and its progeny are designed to prevent such forum shopping, as the Court below properly recognized.

II. THE ACT APPLIES IN FEDERAL COURT.

A. Plaintiffs Ignore the Overwhelming Authority Applying SLAPP Statutes in Federal Court.

The Court below properly held that the Act confers a substantive protection under District of Columbia tort law and therefore applies in federal court. *See Farah v. Esquire Magazine*, 863 F. Supp. 2d 29, 36 & n.10 (D.D.C. 2012). In reaching that conclusion, the district court conducted a detailed analysis of the statute and its legislative history, noting that the Act "intentionally follows 'the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaged in protected actions.'" *Id.* at 36 (quoting Comm. Rep. at 4). The Court below also found "persuasive" decisions of the First, Fifth and Ninth Circuits treating anti-SLAPP statutes as substantive protections of state law, and applied the Act, concluding that "[i]t was certainly the intent of the D.C. Council and the effect of the law . . . to have substantive consequences." 863 F. Supp. 2d at 36 n.10.

Other district courts within this Circuit have similarly concluded that the Act is substantive. For example, in *Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 85 (D.D.C.), *appeal docketed*, No. 11-7088 (D.C. Cir. Aug. 29, 2012), Judge Leon found that "the legislative history make[s] clear that [the Act] is substantive." As the Court further explained, "the statutory text" also "supports the conclusion that the statute is substantive." *Id.* at 85 n.4. For example, the Act "shifts the burden of

proof to the plaintiff to show her claims are likely to succeed," and "'it is long settled that the allocation of [the] burden of proof is substantive in nature and controlled by state law.'" *Id.* (quoting *Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010)). He also noted that the Act provides for an award of "attorneys' fees and costs to the prevailing party" and that "such statutory provisions are substantive in nature." *Id.* Although Judge Leon's primary focus in *Sherrod* was whether the Act was a procedural statute that would apply retroactively under D.C. law, 843 F. Supp. 2d at 84-85, he concluded that the Act is substantive both for retroactivity purposes and under *Erie* and noted that, if the statute were procedural for retroactivity purposes, *Erie* would bar its application in federal court. *Id.* at 85 (citing *Erie*, 304 U.S. 64). *See also Diwan v. EMP Global LLC*, 841 F. Supp. 2d 246, 248 n.1 (D.D.C.) (adjudicating but denying motion under the Act because non-moving parties "are likely to succeed on the merits"), *appeal dismissed*, 2012 WL 556277 (D.C. Cir. Feb. 6, 2012).

For their part, plaintiffs erroneously describe the state of the law, contending that a "majority of courts . . . hold Anti-SLAPP statutes to be procedural in nature and therefore, not applicable in federal court proceedings." Pls.' Br. at 20; *see also id.* at 21 (same). In fact, the vast majority of courts, including every federal appellate court to address the issue, have analyzed state anti-SLAPP statutes and concluded that they are substantive protections of state law applicable in federal

court.[2] Ignoring this substantial body of authority, plaintiffs' argument is premised almost exclusively on *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 108 (D.D.C. 2012), *appeal dismissed*, 2012 WL 5897085 (D.C. Cir. Oct. 19, 2012). There, Judge Wilkins analyzed the D.C. Act under *Erie* and *Hanna v. Plumer*, 380 U.S. 460 (1965), and their progeny, including *Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 130 S. Ct. 1431 (2010), to conclude that the Act conflicts with Federal Rules 12, 41 and 56 and is therefore inapplicable in federal court. As explained below, however, that lone decision and plaintiffs' arguments which follow from it do not withstand reasonable scrutiny.

[2] *See Godin v. Schencks*, 629 F.3d 79, 91-92 (1st Cir. 2010) (Maine statute); *Chandok v. Klessig*, 632 F.3d 803 (2d Cir. 2011) (if satisfied, New York statute would apply); *Brown v. Wimberly*, 477 F. App'x 214, 216 (5th Cir. 2012) (Fifth Circuit "has adopted the use of the [anti-SLAPP] statute in federal court") (Louisiana statute); *Eklund v. City of Seattle Mun. Ct.*, 410 F. App'x 14 (9th Cir. 2010) (Washington statute); *Gardner v. Martino*, 563 F.3d 981, 991 (9th Cir. 2009) (Oregon statute); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-73 (9th Cir. 1999) (California statute); *Tennenbaum v. Ariz. City Sanitary Dist.*, 799 F. Supp. 2d 1083 (D. Ariz. 2011) (Arizona statute); *Buckley v. DIRECTV, Inc.*, 276 F. Supp. 2d 1271 (N.D. Ga. 2003) (Georgia statute); *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797 (N.D. Ill. 2011) (Illinois statute); *Containment Techs. Grp. Inc. v. Am. Soc. of Health Sys. Pharmacists*, 2009 WL 838549 (S.D. Ind. Mar. 26, 2009) (Indiana statute); *Russell v. Krowne*, 2010 WL 2765268 (D. Md. July 12, 2010) (Maryland statute); *Balestra-Leigh v. Balestra*, 2010 WL 4280424 (D. Nev. Oct. 19, 2010), *aff'd on other grounds*, 471 F. App'x 636 (9th Cir. 2012) (Nevada statute); *Bible & Gospel Trust v. Twinam*, 2008 WL 5245644 (D. Vt. Dec. 12, 2008) (Vermont statute).

B. *Erie* and Governing Authority

1. The *Erie* Analysis

The "broad command of *Erie*" is that "federal courts sitting in diversity . . . apply state substantive law and federal procedural law." *Hanna*, 380 U.S. at 465; *see also Burke v. Air Serv Int'l*, 685 F.3d 1102, 1107 (D.C. Cir. 2012) (same). The first question is whether a federal rule "answers the question in dispute," *Shady Grove*, 130 S. Ct. at 1437 (Scalia, J.), or whether "the scope of the federal rule is sufficiently broad to control the issue before the court, thereby leaving *no room* for the operation of seemingly conflicting state law," *id.* at 1451 (Stevens, J.) (citation and internal quotation marks omitted).

Where the federal rule and state statute can both "exist side by side" with "each controlling its own intended sphere of coverage without conflict," *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9, 752 (1980), there is no "direct collision" and a "federal court can simultaneously apply both the federal standard . . . and the District rule," *Burke*, 685 F.3d at 1108. In such circumstances, the federal rule "does not preempt the state rule," and the court then proceeds to the next step in the *Erie* analysis. *Burke*, 685 F.3d at 1108 (citation omitted). Specifically, the court evaluates whether the failure to apply state law would frustrate the "twin aims" of *Erie*: "discouragement of forum-shopping and avoidance of inequitable

administration of the laws." *Hanna*, 380 U.S. at 468; *see also Burke*, 685 F.3d at 1108 (same, quoting *Hanna*).

Where there is a direct collision, however, the court must analyze whether "application of the federal rule 'represents a valid exercise' of the 'rulemaking authority [under] the Rules Enabling Act,'" bearing in mind the statutory "mandate that federal rules 'shall not abridge, enlarge or modify any substantive right'" under state law. *Shady Grove*, 130 S. Ct. at 1451 (Stevens, J.) (citing 28 U.S.C. § 2072); *see also Burke*, 685 F.3d at 1108 (same). This "second step of the inquiry may well bleed back into the first" if a federal rule would curtail a state substantive right because the court must also then "consider whether the rule can reasonably be interpreted to avoid that impermissible result." *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J.). "A federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Id.*

2. Governing Supreme Court Authority

A long line of Supreme Court authority has concluded that federal rules do not directly collide with or displace substantive state laws – even where the state statutes are much less substantive than the Act. *See, e.g.*, *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) (Fed. R. Civ. P. 8(c), governing affirmative defenses, did not

alter state created burdens of proof in diversity cases); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 531-33 (1949) (Fed. R. Civ. P. 3, which provides that a "civil action is commenced by filing a complaint with the court," did not prohibit application of state law that tied commencement of an action to service for purposes of tolling statute of limitations); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555-56 (1949) (then Fed. R. Civ. P. 23, which set forth requirements for initiating a derivative action in federal court, did not collide with state law requiring plaintiffs to post bond as security for costs); *Walker*, 446 U.S. at 749-52 (reiterating that Fed. R. Civ. P. 3 does not conflict with state rules governing time when action commences for purposes of tolling limitations period); *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 551-54 (1991) (Fed. R. Civ. P. 11 does not conflict with state malicious prosecution laws); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 422 (1996) (then Fed. R. Civ. P. 59(a), which set forth standard for granting new trial, including for excessive jury verdict, did not preclude application of state law applying more rigorous standard); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) (Fed. R. Civ. P. 41(b), which provides that involuntary dismissal operates as adjudication on merits, did not prohibit plaintiff, whose case had been dismissed under California statute of limitations, from bringing new case under Maryland's longer limitations period). These authorities confirm that the Supreme Court is

routinely willing to allow federal rules and state statutes to coexist where they do not directly collide.

In *Shady Grove*, the Court's most recent decision in this area, the Court reached the unremarkable conclusion that Federal Rule of Civil Procedure 23, which sets forth the conditions under which a "'class action may be maintained,'" supplanted a state rule providing that certain claims "'may *not* be maintained as a class action,'" because they "answer the same question." 130 S. Ct. at 1437-38 (Scalia, J.). The Court also found no issue under the Rules Enabling Act because the state statute's limitation on class actions was principally procedural, including because it did not affect the substantive rights of the class plaintiffs who could still assert individual claims in state court, even if they were prohibited from bringing them as a federal class action. *Id.* at 1457-60 (Stevens, J.).

Although Justice Scalia announced the judgment of the Court in *Shady Grove*, he marshaled five votes only with respect to Parts I and II-A of his opinion. Justice Stevens concurred in part and concurred in the judgment, and his more narrow opinion, displaying an added sensitivity to state interests, garnered five votes with respect to the balance of the analysis. *See Shady Grove*, 130 S. Ct. at 1463 n.2 (Ginsburg, J., dissenting) ("a majority of this Court, it bears emphasis, agrees that Federal Rules should be read with moderation in diversity suits to accommodate important state concerns"). Subsequent courts have generally

concluded that "'Justice Stevens' concurrence is the controlling opinion by which interpreting courts are bound,'" *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 415 (S.D.N.Y. 2011) (citing cases); *see also Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 983 n.6 (10th Cir. 2010) (same), *cert. denied*, 132 S. Ct. 95 (2011), or at a minimum that it controls everything other than Parts I and II-A of Justice Scalia's opinion, *see 3M*, 842 F. Supp. 2d at 95 n.7.[3] In *Burke*, this Court found it unnecessary to parse the nuanced distinctions between the *Shady Grove* opinions, instead relying on them interchangeably as part of the long line of Supreme Court authority applying state statutes in federal court. *See Burke*, 685 F.3d at 1107-08 (invoking Justice Stevens' "sufficiently broad to control the issue"

[3] Despite this, both plaintiffs and Judge Wilkins in *3M* rely on portions of Justice Scalia's opinion that are plainly not controlling, thereby calling into question their conclusions. *See, e.g.*, Pls.' Br. at 18-19 & *3M*, 842 F. Supp. 2d at 110 ("federal rule is valid so long as it 'really regulates procedure'") (quoting *Shady Grove*, 130 S. Ct. at 1442 (Scalia, J., Part II-B)). The *3M* Court also erroneously treated Justice Stevens' statement of the first step in the analysis – "whether the scope of the federal rule is sufficiently broad to control the issue before the court, thereby leaving no room for the operation of seemingly conflicting state law" – as merely Justice Stevens' invention, finding itself bound to apply instead "the Supreme Court's unanimous opinions in cases such as *Walker* and *Burlington Northern*," and asserting that Justice Stevens' opinion "did not (and could not) overrule those cases." 842 F. Supp. 2d at 95 n.7. But in quoting Justice Stevens' test – and noting only that "internal quotation marks [were] omitted" – the *3M* Court failed to acknowledge that Justice Stevens' language had been lifted virtually verbatim from the very decisions *3M* purported to honor. *See Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987) ("The initial step is to determine whether [the federal rule] is 'sufficiently broad' to cause a 'direct collision' with the state law . . . thereby leaving no room for the operation of that law.") (quoting *Walker*, 446 U.S. at 749-50).

formulation); *id.* at 1108 (invoking Justice Scalia's "answer the question in dispute" formulation); *see also Godin*, 629 F.3d at 88 (relying on both Justice Scalia's and Justice Stevens' opinions to find anti-SLAPP statute applies in federal court).

C. Under the *Erie* Analysis, the Act Applies in Federal Court.

1. The Act Does Not Directly Collide with Rules 12 and 56.

Plaintiffs contend that the Act's "burden-shifting framework" – which "imposes the burden on the plaintiff[s] to demonstrate that their claims are likely to succeed" – renders it "procedural in nature" and in conflict with Federal Rules of Civil Procedure 12 and 56. Pls.' Br. at 20-21; *see also id.* at 19-20 (asserting that "burden-shifting directly conflicts with FRCP 12(b)(6)") (citation omitted). However, virtually every federal court – including every federal appellate court – to have considered the question has recognized that similar anti-SLAPP statutes can exist side by side with Rules 12 and 56.

As the Ninth Circuit held in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), California's anti-SLAPP statute – which, like the D.C. Act, requires a plaintiff to demonstrate a "probability that [he] will prevail," Cal. Civ. Proc. Code § 425.16(b)(1) – "'can exist side by side'" with the Federal Rules, "'each controlling its own intended sphere of coverage without conflict.'" 190 F.3d at 972 (citation omitted). The court

explained that a defendant "may bring" an anti-SLAPP motion in federal court and, "[i]f unsuccessful, the litigant remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment." *Id.* Thus, the court "fail[ed] to see how the prior application of the anti-SLAPP provisions will directly interfere with the operation of" Rules 12 or 56 since there were no "federal interests that would be undermined by application of the anti-SLAPP provisions" and "California ha[d] articulated the important, substantive state interests furthered by the" statute. *Id.* at 972-73. *See also Batzel v. Smith*, 333 F.3d 1018, 1025-26 (9th Cir. 2003) ("Because California law recognizes the protection of the anti-SLAPP statute as a substantive immunity from suit, this Court, sitting in diversity, will do so as well"); *Hilton v. Hallmark Cards*, 599 F.3d 895, 900 n.2 (9th Cir. 2010) ("Applying the familiar framework of [*Erie*] and its progeny, we have long held that the anti-SLAPP statute applies to state law claims that federal courts hear pursuant to their diversity jurisdiction.") (citation omitted). Thus, the Ninth Circuit similarly upheld application in federal court of Oregon's anti-SLAPP statute, which also requires a plaintiff to establish a "probability that [she] will prevail on the claim." *See Gardner v. Martino*, 563 F.3d 981, 986 (9th Cir. 2009); *see also Northon v. Rule*, 637 F.3d 937, 938-39 (9th Cir. 2011) (awarding attorneys' fees under Oregon statute because "[t]he entitlement to fees and costs enhances the anti-SLAPP law's protection of the state's 'important, substantive' interests") (citation omitted);

Eklund v. City of Seattle Mun. Ct., 410 F. App'x 14, 14 (9th Cir. 2010) (same for Washington anti-SLAPP statute which "grants immunity" for expression covered by act).

Similarly, applying *Shady Grove*, the First Circuit explained that the "similarities between [Maine's anti-SLAPP statute] and Rules 12 and 56 as mechanisms to efficiently dispose [of] meritless claims before trial occurs does not resolve the issue." *Godin*, 629 F.3d at 89 n.16.[4] Rather, "Federal Rules 12(b)(6) and 56 are addressed to different (but related) subject-matters," and do not "attempt[] to answer the same question" as the anti-SLAPP act. *Id.* at 88. Unlike the federal rules, the First Circuit recognized, an anti-SLAPP statute provides a substantive limitation on state law where "the claims in question rest on the defendant's protected petitioning conduct" and "the plaintiff cannot meet the special rules . . . created to protect such petitioning activity against lawsuits." *Id.* at 89. Because the anti-SLAPP statute is "'so intertwined with a state right or

[4] The Maine statute requires a plaintiff to demonstrate that "'the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party.'" *Godin*, 629 F.3d at 82 (quoting Me. Rev. Stat. tit. 14, § 556). Although plaintiffs cite three federal district court decisions from Massachusetts – *see* Pls.' Br. at 20-21 (citing *South Middlesex Opportunity Council v. Town of Framingham*, 2008 WL 4595369 (D. Mass. Sept. 30, 2008); *Turkowitz v. Town of Provincetown*, 2010 WL 5583119 (D. Mass. Dec. 1, 2010); *The Saint Consulting Grp., Inc. v. Litz*, 2010 WL 2836792 (D. Mass. July 19, 2010)) – these cases have been effectively overruled by the First Circuit's contrary decision in *Godin*.

remedy that it functions to define the scope of the state-created right,' it cannot be displaced by Rule 12(b)(6) or Rule 56." *Id.* (citation omitted).[5] *See also Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 170 (5th Cir. 2009) (Louisiana statute, requiring plaintiff to show "probability of success on the claim," provides substantive immunity applicable in federal court); *Chandok v. Klessig*, 632 F.3d 803, 812 (2d Cir. 2011) (if satisfied, New York statute would apply).

The actual experience of courts around the country confirms that anti-SLAPP statutes can and do exist side by side with Rules 12 and 56. *See, e.g.*, *3M*, 842 F. Supp. 2d at 111-20 (denying anti-SLAPP motion but granting Rule 12(b)(6) motion); *Farah*, 863 F. Supp. 2d at 36-40 (dismissing claims under both D.C. Act *and* Rule 12(b)(6)); *Card v. Pipes*, 398 F. Supp. 2d at 1136-37 (granting motions under both Oregon statute and Rule 12(b)(6)); *Four Navy Seals v. Associated*

[5] Noting that the allocation of the burden of proof and the provision for attorney's fees are typically substantive features of state law applied in diversity actions, the *Godin* court also relied on the fact that Maine, like the District of Columbia, "itself has general procedural rules which are the equivalents of" Rules 12(b)(6) and 56. 629 F.3d at 88-89. This "further supports the view that Maine has not created a substitute to the Federal Rules, but instead has created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities." *Id.* Thus, "there is no indication that Rules . . . 12 and 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims." *Id.* (citation omitted); *see also, e.g.*, *G. Heilman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 651 (7th Cir. 1989) (en banc) ("The Supreme Court has acknowledged that the provisions of the Federal Rules of Civil Procedure are not intended to be the exclusive authority for actions to be taken by district courts.") (citation omitted).

Press, 413 F. Supp. 2d at 1140, 1149-50 (same under California statute and Rule 12(b)(6)); *Armington v. Fink*, 2010 WL 743524, at *3 n.2 (Louisiana anti-SLAPP statute "does not directly collide with Rule 56. Rule 56 summary judgment remains available to the parties."). As the Ninth Circuit explained in *Hilton*:

> [A]n anti-SLAPP motion requires the court to ask, first, whether the suit arises from the defendant's protected conduct and, second, whether the plaintiff has shown a probability of success on the merits. If the first question is answered in the negative, then the motion must fail, even if the plaintiff stated no cognizable claim. Of course, if a plaintiff stated no cognizable claim, then the defendant would be entitled to dismissal under Rule 12(b)(6). Thus, a Rule 12(b)(6) motion to dismiss may succeed where an anti-SLAPP motion to strike would not.
>
> The converse is also true. The second stage of the anti-SLAPP inquiry . . . is similar to the one courts make on summary judgment, though not identical. Thus, if a plaintiff has stated a legal claim but has no facts to support it, a defendant could prevail on an anti-SLAPP motion, though he would not have been able to win a motion to dismiss.

599 F.3d at 901-02. Thus, applying anti-SLAPP statutes in federal court presents no discernible conflict with Rules 12 or 56.[6]

[6] Plaintiff alludes to the *3M* opinion's long discussion of the 1946 advisory committee notes to Rule 12 and decisions from the 1940s addressing the allocation of cases between Rules 12 and 56. *See* Pls.' Br. at 17. But neither addresses the application of state law protections in federal court under *Erie* nor states that those rules preclude invocation of such state protections. Moreover, they could not in any event alter the statutory imperative of the Rules Enabling Act that federal rules be interpreted so as to "not abridge, enlarge or modify any substantive right" under state law. 28 U.S.C. § 2072(b).

2. The Act Does Not Directly Collide with Rule 41(b).

Because plaintiffs rely almost exclusively on the *3M* ruling, *Amici* also address that decision's conclusion – not otherwise discussed by plaintiffs – that the Act improperly strips a federal court of the discretion it otherwise has under Rules 12(b) and 41 because it mandates dismissal with prejudice. In fact, Rule 12(b) is silent on this issue and Rule 41(b) "sets forth nothing more than a default rule for determining the import of a dismissal" which might otherwise be ambiguous. *Semtek*, 531 U.S. at 503. As Judge Friendly explained in *Sack v. Low*, 478 F.2d 360, 364 (2d Cir. 1973), the provision in Rule 41(b) "permitting a judge to specify that dismissal is without prejudice would seem to have been designed for cases in which the judge has discretion whether to dismiss, *e.g.*, for want of prosecution, where his decision might be affected by determination whether dismissal should be with or without prejudice, not for cases which he must dismiss as a matter of law." *See also Weissinger v. United States*, 423 F.2d 795, 798 (5th Cir. 1970) (en banc) ("Rule 41(b) . . . could not be plainer. It establishes a procedure for construing the general and ambiguous dismissal order, one which does not say whether it is with or without prejudice.").

Numerous courts have therefore concluded that state laws mandating dismissal with prejudice must be enforced in diversity actions. *See, e.g.*, *Weasel v. St. Alexius Med. Ctr.*, 230 F.3d 348, 351, 353 (8th Cir. 2000) (Under North Dakota

expert affidavit statute, "designed to minimize frivolous claims" by mandating dismissal with prejudice, district court "*had to dismiss* the case"; otherwise "it would render the mandatory dismissal language . . . useless.") (citing N.D. Cent. Code § 28-01-46) (emphasis in original); *Chamberlain v. Giampapa*, 210 F.3d 154, 162-63 (3d Cir. 2000) (affirming dismissal with prejudice, as required by New Jersey affidavit of merit statute and state law interpreting it); *Ellingson v. Walgreen Co.*, 78 F. Supp. 2d 965, 969 (D. Minn. 1999) ("failure to comply with Minnesota's expert affidavit requirements mandated dismissal with prejudice") (citing Minn. Stat. § 145.682); *Williams v. United States*, 754 F. Supp. 2d 942, 954 (W.D. Tenn. 2010) (dismissal with prejudice mandated by similar Tennessee statute) (citing Tenn. Code Ann. § 29-26-122). *Cf. Orian v. Fed'n Int'l des Droits de L'Homme*, 2012 WL 994643, at *1 (C.D. Cal. Mar. 22, 2012) (voluntary dismissal by motion under Fed. R. Civ. P. 41(a), which requires court order on terms that the court considers proper, could "not automatically escape the mandatory attorneys' fees and costs due to a prevailing defendant on an anti-SLAPP motion"). In short, there is simply no conflict with Rule 41(b) in applying a state statute mandating dismissal with prejudice.[7]

[7] In passing, plaintiffs also appear to contend that the provision of the Act staying discovery conflicts with the federal rules. *See, e.g.*, Pls.' Br. at 21, 28. But both the Act and the federal rules permit discovery where needed to respond effectively to an otherwise dispositive motion. *See, e.g.*, D.C. Code § 16-5502(c)(2) (allowing "targeted discovery" if needed "to defeat the motion"); Fed.

3. The Act Confers Substantive Rights and Remedies.

Because "federal rules 'shall not abridge, enlarge or modify any substantive right'" under state law, the court must "consider whether the rule can reasonably be interpreted to avoid that impermissible result," particularly where the federal rule "would displace a state law that is . . . so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Shady Grove*, 130 S. Ct. at 1451-52 (Stevens, J.) (quoting 28 U.S.C. § 2072). In this regard, plaintiffs characterize the Act as "'a summary dismissal procedure that the Defendants . . . seek to clothe in the costume of the substantive right of immunity'" and then assert that "'this is largely a masquerade.'" Pls.' Br. at 19 (citation omitted).[8] This contention simply ignores the stated purpose of the statute and the interpretation of it and similar statutes by the overwhelming majority of courts.

R. Civ. P. 56(d) (allowing discovery if needed to "present facts essential to justify its opposition"). Plaintiffs fail to explain how limiting discovery to protect defendants' expressive activities collides with the federal rules given that courts routinely do so in cases challenging speech for similar reasons. *See, e.g.*, *Herbert v. Lando*, 441 U.S. 153, 178-79 (1979) (Powell, J., concurring) ("district court has a duty to consider First Amendment interests" when supervising discovery in defamation actions); *United States v. Microsoft Corp.*, 165 F.3d 952, 959-60 (D.C. Cir. 1999) (The "good cause standard of Rule 26(c) comports with the First Amendment not fortuitously but precisely because it takes into account all relevant interests, including those protected by the First Amendment.").

[8] In addressing this issue, plaintiffs improperly rely on Part II-B of Justice Scalia's opinion in *Shady Grove*. *See, e.g.*, Pls.' Br. at 18-19 (citing *Shady Grove*, 130 S. Ct. at 1442 (Scalia, J., Part II-B)), which is not controlling under any interpretation of that decision, *see* note 3 *supra*.

See Comm. Rep. at 1 (Act "incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view"); *id.* at 4 (Act "provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense [with] litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest"); *id.* (Act "[f]ollow[s] the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions").[9]

There is no question that the District of Columbia could simply abolish the tort of defamation or, as plaintiffs concede, could have "simply granted a defendant an immunity [from SLAPPs], similar to existing qualified or absolute immunities." Pls.' Br. at 19. It can therefore also choose a less extreme course: limiting causes of action challenging expressive conduct to instances where a plaintiff can make a threshold showing of merit. *See Godin*, 629 F.3d at 91 (federal rules do not "preclude additional mechanisms meant to curtail rights-dampening litigation through the modification of pleading standards"); *Milam v.*

[9] *See also, e.g.*, *Batzel*, 333 F.3d at 1025-26 (California statute provides "a substantive immunity from suit"); *Eklund*, 410 F. App'x at 14 (Washington statute "grants immunity"); *Godin*, 629 F.3d at 85 (Maine statute designed "'to protect speakers from the trial itself rather than merely from liability'") (citation omitted); *Henry*, 566 F.3d at 181 (Louisiana statute "embodies a legislative determination that parties should be immune from certain abusive tort claims that have the purpose or effect of imperiling First Amendment rights").

State Farm Mut. Auto. Ins. Co., 972 F.2d 166, 170 (7th Cir. 1992) (Posner, J.) ("where a state in furtherance of its substantive policy makes it more difficult to prove a particular type of state-law claim," rule "will be given effect in a diversity suit as an expression of state substantive policy"). Indeed, state statutes requiring a similar threshold showing as a condition of maintaining an action, and that reflect a policy judgment of that state about the balance between authorizing tort claims and protecting other interests, are routinely enforced by federal courts in diversity actions.[10] Because, in addressing the *Erie* question, the Court is obliged to apply federal rules in a manner that does not abridge state law substantive rights and remedies, so as not to violate the Rules Enabling Act, the Act can and should be applied in federal court.

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[10] *See, e.g.*, *In re Suprema Specialties, Inc.*, 285 F. App'x 782, 784 (2d Cir. 2008) (enforcing New Jersey affidavit of merit statute in federal court and rejecting challenge under *Erie* that statute "does not apply because it conflicts with the Federal Rules of Civil Procedure") (applying N.J. Stat. Ann. 2A:53A-26, requiring plaintiff in professional malpractice action to submit threshold affidavit showing "a reasonable probability that the care, skill or knowledge provided fell below acceptable professional or occupational standards or treatment practices"); *Chamberlain*, 210 F.3d at 161 (affidavit of merit statutes are considered "substantive state law"); *In re Zyprexa Prods. Liab. Litig.*, 2011 WL 5563524, at *3-4 (E.D.N.Y. Nov. 15, 2011) (rejecting challenge under *Erie* to enforcement of Ohio law requiring affidavit of merit as condition "to establish the adequacy of the complaint," and noting that a "number of the United States Courts of Appeals have concluded that similar state-law affidavit requirements are substantive, rather than procedural, under *Erie*") (citations omitted); *Buckley v. Deloitte & Touche USA LLP*, 2007 WL 1491403, at *14 (S.D.N.Y. May 22, 2007) (Pennsylvania Rule of Civil Procedure requiring affidavit of merit applied in New York federal court).

4. *Erie*'s Twin Aims Are Served by Application of the Act.

Applying the Act also serves the "twin aims of the *Erie* rule: discouragement of forum shopping and an inequitable administration of the laws." *Godin*, 629 F.3d at 91 (citations omitted); *see also Burke*, 685 F.3d at 1108. Because the statute "substantively alters" claims arising from advocacy on a matter of public interest "by shifting the burden to the plaintiff," thereby "altering the showing the plaintiff must make," and by allowing "courts to award attorney's fees to prevailing defendants," not applying the statute in federal court would "result in an inequitable administration of justice between" state court and federal court. *Godin*, 629 F.3d at 91-92. Likewise, "the incentives for forum shopping would be strong: electing to bring state-law claims in federal as opposed to state court would allow a plaintiff to avoid [the statute's] burden-shifting framework . . . and circumvent any liability for a defendant's fees and costs." *Id.* at 92; *see also Newsham*, 190 F.3d at 973 ("Plainly, if the [California] anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the Anti-SLAPP statute would find considerable disadvantage in a federal proceeding."). "Such an outcome would directly contravene *Erie*'s aims." *Godin*, 629 F.3d at 92.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Dated: February 19, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)

This brief complies with the type-volume limitation of Federal Rules of Civil Procedure 29(d) and 32(a)(7)(B) because it contains 6,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: February 19, 2013

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United States Court of Appeals
for the District of Columbia Circuit
Farah v Esquire Magazine, Inc., No. 12-7055

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

On **February 19, 2013,** Counsel for Amici Curiae authorized me to electronically file the foregoing **Brief of Amici Curiae Advanced Publications, Inc. *et al.*** with the Clerk of Court using the CM/ECF System, which will serve, via e-mail notice of such filing, to any of the following counsel registered as CM/ECF users:

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A courtesy copy has also been mailed to the above listed counsel on this date.

Eight paper copies have been filed with the Court on the same date via Express Mail.

February 19, 2013

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