

No. 13-3148

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

INTERCON SOLUTIONS, INC.,
Plaintiff-Appellee,

v.

BASEL ACTION NETWORK AND JAMES PUCKETT,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Case No. 12-CV-6814 (Hon. Virginia M. Kendall)

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* ADVANCE
PUBLICATIONS, INC., ALLIED DAILY NEWSPAPERS OF WASHINGTON,
AMERICAN SOCIETY OF NEWS EDITORS, ASSOCIATION OF ALTERNATIVE
NEWSMEDIA, THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
BLOOMBERG L.P., CABLE NEWS NETWORK, INC., DOW JONES &
COMPANY, INC., THE E.W. SCRIPPS COMPANY, HEARST CORPORATION,
THE MCCLATCHY COMPANY, MEDIA LAW RESOURCE CENTER, THE
NATIONAL PRESS CLUB, NATIONAL PRESS PHOTOGRAPHERS
ASSOCIATION, NATIONAL PUBLIC RADIO, INC., NEWS CORPORATION,
NEWSPAPER ASSOCIATION OF AMERICA, ONLINE NEWS ASSOCIATION,
PRO PUBLICA, INC., RADIO TELEVISION DIGITAL NEWS ASSOCIATION,
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SEATTLE
TIMES COMPANY, SOCIETY OF PROFESSIONAL JOURNALISTS, TIME
INC., TRIBUNE COMPANY, THE WASHINGTON NEWSPAPER PUBLISHERS
ASSOCIATION, AND THE WASHINGTON POST
IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL**

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The Reporters Committee for Freedom of the Press, *SLAPP Stick: Fighting frivolous lawsuits against journalists* (2011) (available at <http://www.rcfp.org/slapp-stick-fighting-frivolous-lawsuits-against-journalists>)..... 4

Pursuant to Fed. R. App. P. 29(b), Advance Publications, Inc., Allied Daily Newspapers of Washington, American Society of News Editors, Association of Alternative Newsmedia, The Association of American Publishers, Inc., Bloomberg L.P., Cable News Network, Inc., Dow Jones & Company, Inc., The E.W. Scripps Company, Hearst Corporation, The McClatchy Company, Media Law Resource Center, National Press Photographers Association, National Press Club, National Public Radio, News Corporation, Newspaper Association of America, Online News Association, Pro Publica, Inc., Radio Television Digital News Association, Reporters Committee for Freedom of the Press, Seattle Times Company, Society of Professional Journalists, Time Inc., Tribune Company, The Washington Newspaper Publishers Association, and The Washington Post, respectfully ask this Court for leave to file the concurrently submitted *amici curiae* brief. Defendants-Appellants have consented to the filing of *amici's* brief. Plaintiff-Appellee has not.

ARGUMENT

Amici are among the nation's leading media and related professional organizations. They or their members gather and disseminate news and other information nationwide and are frequent defendants in Strategic Lawsuits Against Public Participation ("SLAPPs"). They include Seattle Times Company, publisher of the most widely circulated newspaper in the State of Washington and two groups that drafted and lobbied for the passage of the Washington anti-SLAPP statute, and which represent the vast majority of Washington newsgatherers; the publisher of the Chicago Tribune; and major broadcasters

in the Chicago area. *Amici* are uniquely poised to offer this Court guidance on the central issue in this case: the applicability of the Washington anti-SLAPP law in federal court.

In a trilogy of cases, this Court has emphasized the careful scrutiny it applies to motions for leave to file an *amicus* brief. *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542 (7th Cir. 2003); *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615 (7th Cir. 2000); *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062 (7th Cir. 1997). But it has made equally clear that the filing of an *amicus curiae* brief is a “matter of judicial grace,” and that it grants such motions “when the *amicus* has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do.” *Nat'l Org. for Women*, 223 F.3d at 616-17. The central query is “whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.” *Voices for Choices*, 339 F.3d at 545.

Mindful of this guidance, *amici*’s proposed brief does *not* duplicate the parties’ briefs or otherwise argue the merits of the claims in this matter. It instead focuses on the larger question of whether Washington’s anti-SLAPP statute applies in federal court. In this respect, *amici* offer at least two unique perspectives.

First, they offer expertise regarding RCW 4.24.525. *Amicus* Seattle Times Company publishes the most widely circulated newspaper in the State of Washington. *Amici* Allied Daily Newspapers and the Washington Newspaper

Publishers Association, along with *amici's* counsel, drafted and lobbied for the enactment of the anti-SLAPP statute at the core of this case, RCW 4.24.525. Together, their membership comprises the overwhelming majority of newsgatherers in the State of Washington. *Amici* thus offer a distinct perspective on the law of the state with the most direct and significant interest in this case—the result of the plaintiff's decision to sue a Seattle defendant in Illinois federal court—including the statute's history, purpose, and effect.

Second, *amici* or their members routinely face meritless defamation and other state-law claims in federal court that target their exercise of the constitutional right to disseminate information about issues of public interest. Left unchecked, these lawsuits exploit the legal process to punish commentary and chill the free flow of information. In the many jurisdictions that have enacted anti-SLAPP statutes to curb this abuse, *amici* have relied on these statutes in federal court. *See, e.g., Thomas v. L.A. Times Commc'ns LLC*, 189 F. Supp. 2d 1005 (C.D. Cal. 2002), *aff'd*, 45 F. App'x 801 (9th Cir. 2002) (granting anti-SLAPP motion by affiliate of *amicus* Tribune Company to dismiss claims arising out of a *Los Angeles Times* article); *Armington v. Fink*, 2010 WL 743524 (E.D. La. Feb. 24, 2010) (granting anti-SLAPP motion by *amicus* Pro Publica, Inc., to dismiss claims arising out of Pulitzer Prize-winning article about alleged euthanasia of hospital patients during Hurricane Katrina). *Amici* closely monitor legal developments that affect the ability to gather and disseminate

information, including jurisprudence concerning state anti-SLAPP legislation.¹ Finally, *amici* are particularly concerned about the district court's tacit repudiation of the bedrock principle that federal summary judgment procedures are compatible with substantive law requiring proof of convincing clarity, upon which they (and other parties) heavily rely. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The proposed brief, drawing on this vast experience, provides a big-picture view of the issues at stake.

Also of critical importance, *amici* will be "materially affected" by the decision in this case, both as controlling precedent in this Circuit and persuasive authority beyond its borders. *See Voices for Choices*, 339 F.3d at 545. For this reason, appellate courts regularly accept *amicus* briefs from news organizations and media trade and advocacy groups, including many of the *amici*, when the applicability or constitutionality of a state anti-SLAPP law is at issue. *See, e.g.*, Brief of *Amici Curiae* Advance Publications, Inc. et al. in Support of Appellees and in Favor of Affirmance, *Farah v. Esquire Magazine, Inc.*, 736 F.3d 528 (D.C. Cir. 2013) (No. 12-7055); Brief of *Amici Curiae* Media Organizations in Support of Defendants-Appellants and Reversal, *Sherrod v. Breitbart*, 720 F.3d 932 (D.C. Cir. 2013) (No. 11-7088); Brief of *Amicus Curiae* The Reporters Committee for Freedom of the Press in Support of Defendants-

¹ Recently, *amicus* The Reporters Committee for Freedom of the Press published a state-by-state guide detailing each jurisdiction's anti-SLAPP law. The guide outlined, in part, the type of petition or free-speech activities qualifying for protection under each state's particular legislation, the procedural mechanisms and evidentiary standards required to obtain early dismissal, and the availability of expedited review. The Reporters Committee for Freedom of the Press, *SLAPP Stick: Fighting frivolous lawsuits against journalists* (2011), available at <http://www.rcfp.org/slapp-stick-fighting-frivolous-lawsuits-against-journalists>.

Appellants Urging Affirmance, *Castello v. City of Seattle*, No. 10-36181 (9th Cir. Sept. 16, 2011).

To be sure, this Court has received *amicus* briefs from *amici*, and from other media organizations in other cases involving important speech-related issues. Affiliates of *amicus* Tribune Company filed an *amicus* brief on First Amendment issues in *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993). In the widely cited *Commodity Trend Service, Inc. v. Commodity Futures Trading Commission*, 149 F.3d 679 (7th Cir. 1998), this Court granted a motion to file an *amicus* brief, joined by *amicus* Reporters Committee for Freedom of the Press. In *Hosty v. Carter*, 325 F.3d 945 (7th Cir. 2003), this Court cited with approval an *amicus* brief on First Amendment issues (submitted, *inter alia*, by *amici* Reporters Committee, Society of Professional Journalists, and American Society of News Editors) and accepted oral argument by counsel for *amici*. See also, e.g., *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (brief submitted by, *inter alia*, *amici* Reporters Committee and American Society of News Editors, discussing impact of statute criminalizing recording of conversations on First Amendment-protected activities); *Chicago Trib. Co. v. Bd. of Trs. of Univ. of Ill.*, 680 F.3d 1001 (7th Cir. 2012) (brief submitted by major news organizations and trade groups, including multiple *amici*, urging court to apply student privacy statute in limited fashion so as not to hamper access to important public records); *Hammer v. Aschcroft*, 570 F.3d 798 (7th Cir. 2009) (brief submitted by, *inter alia*, *amici* Reporters Committee and American Society

of News Editors, urging court to find unconstitutional prison policy that banned media from conducting in-person interviews with death-row inmates).

In short, *amici* provide precisely the type of unique viewpoint that, as in prior free speech-related cases, will aid this Court in deciding this appeal, and they have a significant stake in its outcome. They therefore respectfully ask the Court to accept the proposed brief.

January 10, 2014

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 10, 2014, I electronically filed the foregoing (i) Motion for Leave to File Brief of *Amici Curiae* in Support of Defendants-Appellants and Reversal and (ii) Brief of *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system on the following counsel:

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