NO. 13-0882

IN THE SUPREME COURT OF TEXAS

Service Employees International Union Local 5, Dan Schlademan, and Susan Strubbe,
Petitioners,

v.

Professional Janitorial Service of Houston, Inc.,
Respondent.

On Petition for Review from the First Court of Appeals
Houston, Texas

Amicus Curiae Brief in Support of Petitioners by SCOTUSblog Delaware, Inc. (SCOTUSblog), Don Cruse (Supreme Court of Texas Blog), Howard J. Bashman (How Appealing), Glenn H. Reynolds (Instapundit), and Steven F. Hayward, John H. Hinderaker, and Scott W. Johnson (Power Line)

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IDENTITY OF PARTIES AND COUNSEL

The Petition for Review correctly identifies the parties and their counsel.

The *amici curiae* on whose behalf this brief is filed are SCOTUSblog Delaware, Inc., Don Cruse, Howard J. Bashman, Glenn H. Reynolds, Steven F. Hayward, John H. Hinderaker, and Scott W. Johnson.

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INTEREST OF *AMICI CURIAE*

SCOTUSblog Delaware, Inc. operates SCOTUSblog, a Web site devoted to comprehensive coverage of the Supreme Court of the United States. In 2013, SCOTUSblog won the Peabody Award, the National Press Club Award, and the Sigma Delta Chi (Society of Professional Journalists) Award. SCOTUSblog is published by lawyers.

Don Cruse is a lawyer who authors the Supreme Court of Texas Blog, providing opinion summaries, practice notes, and coverage of Texas judicial elections. The blog also tracks judicial voting patterns and the status of each petition filed in the Court.

Howard J. Bashman is a lawyer who authors How Appealing, a prominent blog devoted to appellate litigation.

Glenn H. Reynolds is a law professor who authors Instapundit, a popular legal and political news blog founded in 2001.

John Hinderaker, Scott Johnson, and Steven Hayward are two lawyers and a professor who are proprietors and three of the four co-authors of Power Line, a Web site that has published daily news and commentary since 2002. Power Line has broken nationally significant

news stories, such as the fact that the documents featured in a 2004 Dan Rather *60 Minutes* story about then-President Bush were forgeries.

The *amici* bloggers share a common interest as distributors of information and opinion whose primary line of business is something other than such distribution. *Amici*'s blogs are read throughout the country, including in Texas. The Supreme Court of Texas Blog is focused on Texas, and the others sometimes comment on events or cases in Texas. As a result, *amici* might in the future be sued in Texas courts, so their rights are cast in doubt by the Texas courts' varied approaches to determining who is considered a member of the electronic media. And beyond this, *amici* believe that their perspectives as publishers who are not primarily in the business of publishing can be helpful in analyzing the rights of other such publishers, including ones that operate primarily in Texas.

No fees were paid in connection with the preparation of this brief.

SUMMARY OF THE ARGUMENT

The SEIU's Internet publications (which get over 120,000 visits per month) are part of a long history of publications put out by people or groups that are also in some other line of business. In the late 1800s, magazines published by labor unions were common. In the early 1900s, the NAACP's *The Crisis* was a leading magazine focused on civil rights. Today, the NRA's *American Rifleman* and the Sierra Club's *Sierra* magazines are likewise published by organizations that are primarily advocacy groups, like the SEIU.

Many leading Internet publications fit the same mold. They may include prominent blogs such as Instapundit, which is published by a law professor and averages over 400,000 pageviews each day, and Power Line, which is published by three lawyers and a professor and averages about 200,000 pageviews each day. They also include more narrowly focused but still highly regarded blogs such as the Supreme Court of Texas Blog, How Appealing, and SCOTUSblog, which are all sidelines for their publishers, who are lawyers by profession.

Some of these publications aim at objectivity, while some (similar to many mainstream magazines, such as *The Nation* and *National Review*)

are deliberately publications of opinion. Some are put out by individuals, and some by organizations. Many are published by people with no background in professional journalism. All are not the primary business of their publishers, but all are important sources of news, opinion, and analysis. There is no justification for treating them worse than similar publications that happen to be published by people who have backgrounds in professional journalism, or happen to be their publishers' primary line of business.

Indeed, the most closely analogous Texas statute defining "medium"—the journalist-privilege statute—makes clear that "medium" is a broad term, encompassing, among other things, "a newspaper, magazine or periodical, . . . that disseminates news or information to the public by any means, including . . . electronic; and . . . other means, known or unknown, that are accessible to the public." Tex. Civ. Prac. & Rem. Code § 22.021(2). And a solid body of precedent from other state and federal courts and the Federal Election Commission makes clear that "medium," "magazine," and "periodical" include Web sites used for communication of news or information (including opinion) to the public,

such as SCOTUSblog, the Supreme Court of Texas Blog, How Appealing, Instapundit, Power Line, and the SEIU site involved in this case.

Unfortunately, the court of appeals in this case drew an unjustified and ill-defined line between some such publishers and other publishers. Moreover, two other courts of appeals dealing with very similar issues drew lines that are different still, creating a conflict among the courts. Plaintiffs, defendants, and lower courts are now faced with a double source of uncertainty: it is not clear which of the courts' rules applies, and each of the rules is itself vague.

This vagueness undermines the purposes of both the general prohibition on interlocutory appeals and the exception offered by Texas Civil Practice and Remedies Code § 51.014(a)(6). The general bar on interlocutory appeals is aimed at making litigation more efficient by preventing unnecessary delays. Section 51.014(a)(6) creates an exception to that general bar—for lawsuits against the "print or electronic media"—to allow expeditious resolution of claims that may otherwise unduly chill constitutionally protected speech, thus diminishing the deterrent effect of unfounded lawsuits on speakers. But each of those purposes

can be achieved only if the scope of the "print or electronic media" exception is clear.

As it stands now, the uncertainty in the scope of the exception will lead defendants to often file interlocutory appeals, which, even if they are rejected on the grounds that the defendant is not in the "print or electronic" media, will delay litigation. And the uncertainty will lead publishers—especially publishers who lack the deep pockets of the major newspapers and broadcasters—to be chilled in the exercise of their free speech rights, since they will lack the assurance of prompt appellate review that the Legislature aimed to provide them.

ARGUMENT

I. Many Important Publications Are Written by People Who Do Not Have Publishing as Their Primary Business.

Many publications of opinion come from groups not primarily in the publishing business, including advocacy groups, religious bodies, and community organizations. Labor unions, for example, published many newspapers and magazines in the late 1800s and early 1900s.[1] Indeed,

[1] Karla Kelling Sclater, *The Labor and Radical Press 1820 – the Present*, Labor Press Project, http://depts.washington.edu/labhist/laborpress/Kelling.shtml (last visited Oct. 23, 2013); Martin M. Perline,

Eugene V. Debs, a prominent early 1900s Socialist Party presidential candidate, started his political career as the editor of one such magazine.[2] Likewise, in 1910 the NAACP—recognizing that spreading its message to the public was an important aspect of its political role—began to publish the magazine *The Crisis*, which became a leading voice for civil rights.[3] Today, magazines and newspapers such as the NRA's *American Rifleman*, the Sierra Club's *Sierra*, the Knights of Columbus' *Columbia*, the United Methodist Church's *Newscope*, the Roman Catholic Diocese of Oakland's *The Catholic Voice*, and the Southern Christian Leadership Conference's *SCLC Magazine* follow this tradition.

Naturally, the advocacy organizations that published (or still publish) print magazines have likewise begun to publish in the much more cost-effective medium of the Internet. The NAACP, for example, now spreads its words through its Web site and the online version of *The*

The Trade Union Press: An Historical Analysis, 10 Labor Hist. 107 (1969), *available at* http://www.tandfonline.com/doi/abs/10.1080/00236566908584071#.UoETEnCsh8E.

[2] J. Robert Constantine, *Eugene V. Debs: An American Paradox*, Monthly Labor Review (Aug. 1991), *available at* http://www.bls.gov/opub/mlr/1991/08/art4full.pdf.

[3] *About Us*, The Crisis, http://www.thecrisismagazine.com/about.html (last visited Oct. 28, 2013).

Crisis, and unions such as the SEIU have traded in the much more expensive print format for Web sites such as the one involved in this case. Similarly, the U.S. Chamber of Commerce advances its perspective through FreeEnterprise.com, publishing stories and opinion pieces from "free enterprise advocates, entrepreneurs, business leaders, and policy shapers."[4] And the National Right to Work Legal Defense Foundation reports and comments on issues related to alleged union abuses on its Freedom@Work blog.[5]

The cost-effectiveness of the Internet has also made it possible for other organizations and even individuals to take up online publishing. Some of the leading publications related to public policy and law, for example, are published by lawyers or law professors. Thus, Instapundit, a popular law and politics blog providing links and commentary by *amicus* Professor Glenn Reynolds, averages 13 million page views by

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[4] *About Us*, FreeEnterprise.com, http://www.freeenterprise.com/content/about-us (last visited Oct. 23, 2013).

[5] Freedom@Work: News and Views from National Right to Work, http://www.nrtw.org/blog (last visited Oct. 24, 2013).

about 4.5 million unique visitors per month.[6] Likewise, *amici*'s Power Line blog features commentary by three attorneys and a professor on election news, criminal law, legislation, and other public policy issues, and averages around 6 million page views per month, with more than 10 million per month during election season.[7]

And while this tradition—the tradition of publications by people and groups that are not primarily in the publishing business—has long included publications of opinion, it has also included publications that focus more on straight news. Leading legal blogs, such as *amici*'s How Appealing, SCOTUSblog, and Supreme Court of Texas Blog are examples of that.

All of these are rightly seen as entities within the "print or electronic media." That the publishers' primary business is political advocacy, lawyering, or scholarship and teaching does not make their publications less valuable.

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[6] *About*, Instapundit, http://pjmedia.com/instapundit/about/ (last visited Oct. 28, 2013).

[7] Power Line, http://www.powerlineblog.com (last visited Oct. 24, 2013).

Likewise, it should not matter whether the publishers have "journalistic background [and] experience," *Serv. Emps. Int'l Union Local 5 v. Prof'l Janitorial Serv. of Houston, Inc.*, No. 01-12-00660-CV, 2013 WL 5229764, at *7 (Tex. App.—Houston [1st Dist.] Sept. 17, 2013). People whose prior jobs involved professional journalism have no monopoly on informing the public. If an activist, labor organizer, lawyer, or academic has something to add to the debate, that speech should be evaluated on its merits, not based on the author's résumé.

Nor should it matter whether the readership is vast (as with Instapundit) or more modest (as with How Appealing). And it certainly should not matter whether the speaker "aims to incite action or to sway public opinion," *id.* at *9, as the NAACP, NRA, the Sierra Club, National Right to Work, Power Line, and Instapundit do. Such an opinion-focused, advocacy character has long been the hallmark of magazines such as *The Nation*, *The New Republic*, and *The National Review*, yet it is clear that those magazines qualify as members of the "media."

The SEIU Web site, then, is part of a long history of advocacy publications by groups and individuals who are not primarily in the publish-

ing business. And it should enjoy the same legal protections as those other publications have long enjoyed.

II. Texas Law Already Defines "Medium" to Include Publications Such as the SEIU's Web Site.

Indeed, the SEIU's Web site is covered under the Legislature's definition of "medium." The journalist-privilege statute expressly defines "medium" and does so broadly, encompassing, among other things, "a newspaper, magazine or periodical, . . . that disseminates news or information to the public by any means, including . . . electronic; and . . . other means, known or unknown, that are accessible to the public." Tex. Civ. Prac. & Rem. Code § 22.021(3). As this Court has long recognized, the plain meaning of an undefined term can be inferred from how similar terms are used in other statutes.[8] And, as many decisions have held, the terms "electronic," "magazine[s]," and "periodical[s]" include

[8] *See Brown v. Darden*, 50 S.W.2d 261, 263 (Tex. 1932); *Texas Bank & Trust Co. v. Austin*, 280 S.W. 161, 162 (Tex. 1926). When discerning the meaning of a term in a statute, a court must presume that the Legislature acted "with full knowledge of the existing condition of the law," including how terms were used in similar portions of the Texas Code. *Allen Sales & Servicenter, Inc. v. Ryan*, 525 S.W.2d 863, 866 (Tex. 1975).

Web sites that periodically convey the publisher's opinion or news analysis.

For example, in *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Ct. App. 2006), the California Court of Appeals held that a Web site published by a computer enthusiast qualified as "a newspaper, magazine, or other periodical publication" for purposes of the state journalist's privilege. *Id.* at 101. The court made clear that such a Web site was a "periodical publication" and even bore a "far closer resemblance to traditional print media than do television and radio." *Id.* at 101-02. Moreover, the court found that the Web site qualified as a periodical in spite of the fact that its content was focused on a narrow topic (Apple electronics), that its staff had very little editorial supervision, and that the court was willing to assume that "petitioners merely reprinted 'verbatim copies' of Apple's internal information while exercising 'no oversight at all.'" *See id.* at 97. And nothing in the decision suggests that it mattered whether the Web site was its authors' primary business rather than just a sideline, or whether the authors had backgrounds in professional journalism.

Similarly, in Advisory Opinion 2005-16 (Nov. 18, 2005), 2005 WL 3143734, the Federal Election Commission determined that a Web site cofounded by a former U.S. Senator, the Senator's former chief of staff, and a computer consultant qualified for the federal campaign finance law exception for "newspaper[s], magazine[s], or other periodical publication[s]," 2 U.S.C. § 431(9)(B)(i). That the Web site provided information to readers through the site's commentary on other news stories, and through some original reporting, sufficed to make it "the online equivalent of a newspaper, magazine, or other periodical publication." Adv. Op. 2005-16, 2005 WL 3143734, at *4. And again the decision did not inquire into whether the Web site was its operators' primary business, or whether its founders had a professional journalism background.

Likewise, *United States ex rel. Green v. Service Contract Education & Training Trust Fund*, 843 F. Supp. 2d 20, 23 (D.D.C. 2012), held that a union Web site constituted "news media" for the purposes of the federal False Claims Act. *Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, 907 A.2d 855, 863 (Md. Ct. Spec. App. 2006), held that an online financial e-mail service that gave information about publicly traded companies was a "periodical" for purposes of the state's news media privilege. And

Judicial Watch, Inc. v. U.S. Department of Justice, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000), held that a non-profit public interest law firm that maintained a Web site where it mostly posted press releases constituted a member of the "media" within the meaning of the Freedom of Information Act.

To be sure, legislatures can sometimes give special extra rights to professional journalists; but when they do so, that is clear from the statutory language. The Texas Legislature in fact did define "journalist" for purposes of the journalist-shield privilege as limited to paid journalists or paid researchers. Tex. Civ. Prac. & Rem. Code § 22.021(2). But the Legislature did *not* impose any such limitation on the definition of "medium" in the very same statute, nor did it include any such limitation on "medium" in § 51.014(a)(6). And this makes sense, precisely because so many important "print or electronic media" have long been publications that are not run by professional journalists. There is no basis for reading into the statute a professional-journalist requirement that the Legislature chose not to include.

III. Texas Courts of Appeals Are Split on When an Internet Speaker Is a Member of the "Electronic Media."

Three Texas courts of appeals have now had the opportunity to determine how the term "electronic media" applies to online publishers, and they have approached the matter in sharply different ways. Indeed, under the approaches taken by the two courts to previously consider the issue, this case would likely have been decided differently.

The decision below adopted the "primary business" test, under which "a person who communicates online qualifies as a 'member of the electronic media' when the person's primary business is reporting the news." *Serv. Emps. Int'l Union Local 5 v. Prof'l Janitorial Serv. of Houston, Inc.*, No. 01-12-00660-CV, 2013 WL 5229764, at *7 (Tex. App.—Houston [1st Dist.] Sept. 17, 2013). Underscoring the unpredictability of this test, the court acknowledged that it "may be difficult to ascertain a person's or entity's primary business," and concluded that the decision must be based on:

(1) "the goods and services offered by the Internet author and the sources of the Internet author's revenue,"

(2) "the Internet author's journalistic background, experience, and independence,"

(3) "the extent to which the Internet author has an established presence or reputation in traditional media,"

(4) the "range of reporting" (inquiring into the "breadth of [the site's] coverage"), including whether stories were selected for their "newsworthiness," and

(5) "the size, nature, and diversity of the readership."

Id. at *7-*8.

Applying these factors, the court determined that SEIU was not entitled to the protection of § 51.014(a)(6). *See id.* at *8-*10. The court found it insufficient that SEIU published articles on issues of public concern, "reached more than 4,000 people daily" (which amounts to more than 120,000 visits per month), and had a communications department with editors overseeing the work of individual staffers, some of whom had a background in journalism. *Id.* Instead, the court determined that SEIU was outside § 51.014(a)(6) because (1) SEIU does not attempt to generate revenue through its publications, (2) it "strives to generate news rather than report the news," (3) it aims to "sway public opinion through its Web sites" (though that of course is also the function of many well-established magazines), and (4) there was apparently no-one

"with substantial journalistic experience control[ling] or . . . substantially involved in the editorial process." *Id.*

On the other hand, the Second Court of Appeals adopted what one might call a "resemblance to traditional media" approach, under which § 51.014(a)(6) applies

> when [a] person's communication, under circumstances relating to the character and text of the communication itself, its editorial process, its volume of dissemination, the communicator's extrinsic notoriety unconnected to the communication, the communicator's compensation for or professional relationship to making the communication, and other relevant circumstances as the facts may dictate, would otherwise qualify as a communication covered by that section through more traditional electronic or print media.

Kaufman v. Islamic Soc'y of Arlington, 291 S.W.3d 130, 142 (Tex. App.—Fort Worth 2009, pet. denied). This test does *not* require that the publication be the speaker's "primary business."

SEIU might well have qualified under the "resemblance to traditional media" test. The "character and text of [SEIU's] communication" is no different from what "traditional . . . media" such as magazines of opinion routinely publish. The "editorial process" involved the sort of staff authorship coupled with editor review that is characteristic of "traditional . . . media." The "volume of dissemination" was comparable to that of many small town newspapers or some less prominent

magazines. The SEIU certainly enjoys a good deal of "notoriety." And while the SEIU is not compensated by readers for its communications, it certainly has a "professional relationship" to the communication, and the employees in its communications department are professionally compensated for writing the reports posted on SEIU's Web site.

The Twelfth Court of Appeals in *Hotze v. Miller*, 361 S.W.3d 707, 711-12 (Tex. App.—Tyler 2012, pet. denied), did not articulate a test for the statute, but its approach is also inconsistent with the "primary business" test adopted by the decision below. Hotze was a physician, and though the court stressed that he had been a "political writer" for thirty years, *id.* at 712, the court did not inquire whether most or even a large fraction of his income came from journalism as opposed to medicine, or whether most of his time was occupied by publishing.

Moreover, though the Twelfth Court of Appeals cited *Kaufman* approvingly, it did not apply the Second Court of Appeals' multifactor test from *Kaufman*. *Id.* It never inquired into Hotze's editing process, the volume of his readership, or the revenue generated from his communications. *Id.* Notably, some of the publications at issue were put up by Hotze on his own Web site, not distributed through any

traditional media entity. *Id.* at 711. It thus seems likely that the SEIU (which likewise has published opinion on labor-related policy topics for many decades) would have prevailed under the approach used in *Hotze* as well as under the approach used in *Kaufman*.

As is evident from this conflict, litigants and courts outside the First, Second, and Twelfth districts cannot anticipate which of these contradictory tests will govern their case. Moreover, the tests are themselves subjective and imprecise, casting litigants and courts further into a sea of uncertainty.

Yet this is an area where clarity is vital. If interlocutory appeals are clearly allowed, then publishers' free speech rights will be protected, and the chilling effect caused by meritless litigation will be diminished. If interlocutory appeals are clearly disallowed, then at least litigation will proceed more expeditiously.

Vagueness, though, offers the worst of both worlds. In the absence of a clear rule, defendants will have an incentive to file interlocutory appeals in the hope that their appeals will be allowed, thus delaying litigation even in instances where an appeal is rejected. But prior to litigation, many defendants will not have the assurance that

§ 51.014(a)(6) is aimed at providing, because they cannot be confident in their ability to receive the prompt resolution of libel suits that the Legislature intended.

IV. The "Primary Business" Test Disadvantages Non-Corporate Media Speakers in a Way That Frustrates the Purpose of § 51.014(a)(6).

The purpose of § 51.014(a)(6) is "to save the time and expense of a trial on the merits when the media may be entitled to a constitutional or statutory privilege." *Grant v. Wood*, 916 S.W.2d 42, 46 (Tex. App.—Houston [1st Dist.] 1995, no writ); *see also Kaufman*, 291 S.W.3d at 142. The "primary business" test set forth by the decision below frustrates this purpose because it discriminates in favor of large corporate media enterprises.

Companies that have publishing as their "primary business" are often well-funded and carry libel insurance that can help pay litigation expenses. Moreover, precisely because publishing is their primary business, such companies are more likely to aggressively defend lawsuits that are triggered by their daily occupation.

But individuals who publish as a sideline to their day jobs, or small nonprofits that publish as an adjunct to their main ideological missions,

are more likely to have shallower pockets and lack libel insurance. Moreover, because publishing is a secondary occupation for them, they may be less inclined to spend their life savings (or their donors' contributions) defending libel cases at trial. Knowing this, these smaller speakers may be less willing to publish hard-hitting stories that risk drawing the ire of well-funded plaintiffs, even if the speakers are confident that they would be vindicated after a long and expensive trial. These speakers thus need § 51.014(a)(6) protection most—yet the decision below would deny them that protection.

These dangers are particularly palpable in an age where the corporate media is rapidly consolidating, and as a result there are ever fewer distinct voices in the "traditional media." One advantage of the Internet is that it is not limited to corporations and professional journalists that have publishing as their "primary business"; it opens up publishing to a vast range of other sources.

Recent years offer many examples of the value of these new sources. Consider the Summer 2009 Iranian protests: while CNN and other cable news outlets were slow to pick up the story, "Twitter and YouTube carried a stream of reports, pictures and film from Iran's streets."

Twitter 1, CNN 0, Economist (Jun. 18, 2009), http://www.economist.com/node/13856224.

Similarly, during the 2008 presidential campaign, it was a blogger who broke the story that Barack Obama had told a private fundraising party in San Francisco that small-town voters bitter over their economic circumstances "cling to guns or religion or antipathy to people who aren't like them"—a quote that generated enormous controversy. Katharine Q. Seelye, *Blogger Is Surprised by Uproar Over Obama Story, but Not Bitter*, N.Y. Times (Apr. 14, 2008), http://www.nytimes.com/2008/04/14/us/politics/14web-seelye.html.

Likewise, when Senator Trent Lott stated his approval of Strom Thurmond's 1948 presidential candidacy—in which Thurmond ran on the Dixiecrat pro-segregation ticket—at Thurmond's 100th birthday party in 2002, the mainstream media was largely silent. *See* Oliver Burkeman, *Bloggers Catch What Washington Post Missed*, Guardian (Dec. 20, 2002, 7:37 PM), http://www.theguardian.com/technology/2002/dec/21/internetnews.usnews. But many blogs insisted he should be forced to resign as Majority Leader, and were ultimately successful. *See id.*

The decision below strips such innovative publications of their § 51.014(a)(6) protection, allowing only the established, professional media the benefit of an interlocutory appeal. Such disparate treatment is contrary to § 51.014(a)(6)'s purpose, which is to provide relief from unmeritorious libel suits to speakers who convey news, news analysis, and opinion—with no requirement that those speakers publish as their "primary business."

CONCLUSION

For the foregoing reasons, *amici* request that this Court grant the petition for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2) because it contains 4,181 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ J. Campbell Barker
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CERTIFICATE OF SERVICE

As required by Texas Rule of Appellate Procedure 6.3 and 9.5(b), (d), and (e), I certify that, on November 12, 2013, I have served this document on all counsel listed below, via the Court's electronic-filing system:

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