In the
United States Court of Appeals
for the Ninth Circuit

Nos. 12-35238, 12-35319

OBSIDIAN FINANCE GROUP, LLC et al.,
Plaintiffs-Appellees and Cross-Appellants,

v.

CRYSTAL COX,
Defendant-Appellant and Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
No. 3:11-cv-00057-HZ
The Hon. Marco A. Hernandez

AMICUS BRIEF OF SCOTUSBLOG.COM IN SUPPORT OF NEITHER PARTY

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AMICUS BRIEF OF SCOTUSBLOG.COM IN SUPPORT OF NEITHER PARTY[1]

I. Statement

This case has its origins in efforts by the appellant, Crystal Cox, to publicize what she claimed was corruption by appellees Kevin Padrick and Obsidian Finance Group (Mr. Padrick's company), in Mr. Padrick's role as the trustee for the bankruptcy of an Oregon real-estate company. Cox wrote these claims on a variety of purportedly law-related blogs, including one with the URL "obsidianfinancesucks.com." Cox published accusations that Kevin Padrick and Obsidian committed – among other things – "fraud against the government," Compl. ¶ 8(a); "Illegal Activity, Money Laundering, Defamation, Harassment," *id.* ¶ 8(i); "tax fraud," *id.* ¶ 8(h); and "pay[ing] off the media and politicians," *id.* ¶ 8(f). Cox also described Padrick as a "liar," *id.* ¶ 8(e), and "a THUG and a Thief hiding behind the Skirt tails of a corrupt unmonitored bankruptcy court system," *id.* ¶ 8(j), and she queried whether Padrick had "hired a hitman to kill [her]," *id.* ¶ 8(g). Cox's posts prompted this lawsuit, seeking ten million dollars in damages for Cox's allegedly "false and defamatory statements," *id.* ¶ 12(b), as well as a

[1] Pursuant to Federal Rule of Appellate Procedure 29, *amicus* states that this brief was funded solely by *amicus* and its counsel; no counsel for a party authored this brief in whole or in part, nor did any party or its counsel contribute money intended to fund the preparation or submission of this brief.

permanent injunction prohibiting Cox from "publishing further false and defamatory statements concerning plaintiffs," *id.* at 4.

Cox sought to defend herself by invoking the First Amendment. She argued that because she was a member of the "media," Obsidian could not "recover damages without proof that [Cox] was at least negligent and may not recover presumed damages absent proof of 'actual malice.'" In an order issued orally on November 28, 2011 and memorialized in a written opinion on November 30, 2011, the district court rejected that argument. Emphasizing that Cox had not cited any cases "indicating that a self-proclaimed 'investigative blogger' is considered 'media' for the purposes of applying a negligence standard in a defamation claim," the Court "decline[d] to conclude that [Cox] . . . is 'media,' triggering the negligence standard." Moreover, the Court added, Cox had "fail[ed] to bring forth any evidence suggestive of her status as a journalist," such as evidence of

> (1) . . . education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings or postings of others; or (7) contacting the other side to get both sides of a story.

"Without evidence of this nature," the court concluded, Cox "is not 'media.'" Thus, when the case went to the jury, the instructions that the jury received regarding the defamation claim did not include any requirement that Padrick and Obsidian show either negligence or actual malice on Cox's part. The jury awarded Padrick and Obsidian $2.5 million in damages.

On March 27, 2012, the district court denied Cox's motion for a new trial, in which she argued that "the jury instructions misstated the law and that the jury verdict is excessive." In the opinion that accompanied that order, the court stated that it did not mean to suggest that "a person who 'blogs' could never be considered 'media,'" or that "to be considered 'media,' one had to possess all or most of the characteristics I recited." Rather, the court reasoned, the jury instructions in this case rested on the fact that Cox had not presented any "evidence as to any single one of the characteristics which would tend to establish oneself as a member of the 'media.'" The court apparently found it unnecessary to specify how many of these characteristics a defendant would have to possess to receive the First Amendment protections the court would accord to the "media."

This appeal followed.

II. Interest of *Amicus*

SCOTUSblog.com (short for "Supreme Court of the United States Blog") was founded in October 2002 by two Washington, D.C., attorneys, Tom Goldstein

and Amy Howe. At the time, the blog's primary purpose was to promote the pair's law practice, which focused on the U.S. Supreme Court. Thus, some of the blog's earliest posts had no intrinsic news value, but instead simply listed and described – or even promoted – the firm's pending cases, *see, e.g.*, Tom Goldstein, *Distractions*, SCOTUSblog, Oct. 10, 2002, *available at* http://goo.gl/t45JB (listing pending cases); Tom Goldstein, *Clinic Filing*, SCOTUSblog, Apr. 3, 2004, *available at* http://goo.gl/qg3xa (reporting on filing by firm of recent petition for certiorari). Although the blog proved largely unhelpful as a business development tool, its focus evolved to providing a public service by making the Court and its docket more accessible to a broad audience. Over time, the blog expanded its coverage to include virtually all cases pending before the Court, from the point at which a petition for certiorari is filed (and often before) through the grant or denial of certiorari, briefing on the merits, oral argument, and decision.

Ten years after its inception, the blog now employs three people on a near-full-time basis; two others contribute substantial portions of their time. One of those full-time employees is Lyle Denniston, a veteran journalist who has covered the Supreme Court for over fifty years. However, the remaining staff and contributors are not journalists; instead, they are overwhelmingly lawyers with a practice before or interest in the Court, law professors, law students, and two recent college graduates.

In the ten years of its existence, the blog has become a widely respected and utilized source for coverage of the Supreme Court. As the nation waited for the Court's historic decision in the challenge to the Affordable Care Act, for example, the blog served as a news source for the White House, Sarah Kliff, *For SCOTUSblog, one goal: 'Beat everybody' and break news of health care ruling*, Wash. Post, June 27, 2012, *available at* http://goo.gl/7Va9w, and was also "a mainstay for Washington reporters, legislators and lobbyists anxiously awaiting a verdict," *id*. The blog's role in disseminating news and analysis regarding the Court's decision on health care can be seen in its readership that day: at one point shortly after ten o'clock, as the Court issued its opinion in the health care cases, there were 866,000 people following the SCOTUSblog "live blog," a feature that allows readers to view live commentary typed by the blog's staff without having to refresh their browsers. The blog recorded over five million page views that day, from approximately 1.7 million unique readers.

More generally, the blog and its staff are regularly cited in major media publications such as *The New York Times* and *The Washington Post*. *See, e.g.*, Adam Liptak, *In Supreme Court Term, Striking Unity on Major Cases*, N.Y. Times, June 30, 2012, at A1 (citing SCOTUSblog's "comprehensive statistics about the court"); Robert Barnes, *After Supreme Court term, line between 'liberal' and 'conservative' is blurrier*, Wash. Post, June 30, 2012 (also citing statistics);

Adam Liptak, *Justices' Cerebral Combativeness on Display*, N.Y. Times, Apr. 2, 2012, at A3 (quoting SCOTUSblog publisher Tom Goldstein). The blog's contributors appear regularly on both television shows – including CNN, NBC, and The PBS News Hour – and radio. Indeed, the blog is now sufficiently well-known for its coverage of the Supreme Court that guest contributors (and their public relations staff) regularly cite their contributions to the blog as evidence of their expertise. *See, e.g.*, Email from Diana Lee of BerlinRosen Public Affairs, Oct. 5, 2012, attached as Exh. A (promoting attorney for media interviews on oral argument in *Fisher v. University of Texas at Austin*, and noting that attorney had "written about the Fisher case in SCOTUSblog and writes frequently for the Huffington Post, Politico, and the American Constitution Society blog").

In recent years, the blog has received various awards for its coverage. In 2010, for example, the blog was a recipient of the American Bar Association's Silver Gavel Award, which is intended to "honor exemplary work in media . . . that fosters the American public's understanding of law."[2] *See* American Bar Ass'n, *2012 Silver Gavel Awards*, *available at* http://www.americanbar.org/groups/public_education/initiatives_awards/silver_gavel_2012.html. Other recipients of the Silver Gavel that year were an article in *The New Yorker*, a series in the *Lincoln Journal Star*

[2] Because the ABA participates in matters before the Court, the blog's application for the Silver Gavel Award did not include the work of Lyle Denniston.

newspaper, and news stories on ABC News Primetime and National Public Radio. In October 2012, the American Judges Association awarded the blog the American Gavel Award for National Distinguished Reporting about the Judiciary for its coverage of the Supreme Court. That award was established in 2009 to "recognize the highest standards of reporting about courts and the justice system." *See* American Judges Association, *Press Release: SCOTUSblog Receives American Gavel Award from American Judges Association*, Oct. 10, 2012, *available at* http://aja.ncsc.dni.us/pdfs/News%20Release%202012%20Gavel%20award.pdf.

III. Argument

SCOTUSblog takes no position on the merits of this particular dispute. Instead, it files this brief to illustrate for the Court how a "blog" that provides a useful public service and that ought to receive the protections of the First Amendment can face potential liability, yet not be able to satisfy most of the criteria identified by the district court.

A. SCOTUSblog Could Be Subject To Allegations Of Libel And Defamation Like Those Asserted In This Case.

Although posts on SCOTUSblog are rarely as strongly worded as those at issue in this case, it is nonetheless often critical, in a way that could very well offend the targets of that criticism. Thus, for example, Marty Lederman – who in

the past has been a frequent contributor to the blog – once criticized stories in *The New York Times* and *The Washington Post* about Justice Alito's hiring of a law clerk as "a 'Sun Rises in the East This Morning' sort of story." *See* Marty Lederman, *Must Be A* Very *Slow News Cycle*, SCOTUSblog, Feb. 19, 2006, *available at* http://www.scotusblog.com/2006/02/must-be-a-very-slow-news-cycle/. And on March 13, 2008, Lederman characterizes several items in a column by Robert Novak on the Bush Administration's position in *District of Columbia v. Heller*, the gun rights case, as "deeply *im*plausible." *See* Marty Lederman, *Novak, Clement, Cheney, and the Gun Case*, SCOTUSblog, Mar. 13, 2008, *available at* http://www.scotusblog.com/2008/03/novak-clement-cheney-and-the-gun-case/.

Other regular contributors to the blog have used similarly unfavorable language. On December 7, 2011, for example, Columbia University law professor Ronald Mann, who covers many of the cases involving intellectual property, securities, and bankruptcy for the blog, posted an analysis of the oral argument in *Caraco Pharmaceutical Laboratories v. Novo Nordisk*, a case that arose from efforts by a generic drug manufacturer to sell a drug for a use that has been approved by the Food and Drug Administration but was not covered by the patent for the drug. Professor Mann's discussion of the oral argument contained an unflattering description of the lawyer who argued on behalf of Novo Nordisk. *See* Ronald Mann, *Argument recap: Justices fully engaged in generic/branded*

pharma case, SCOTUSblog, Dec. 7, 2011, *available at* http://www.scotusblog.com/2011/12/argument-recap-justices-fully-engaged-in-latest-genericbranded-pharma-case/.

And John Elwood, the author of the blog's "Relist watch" feature, which highlights the cases relisted for reconsideration at a subsequent Conference of the Justices, regularly employs humor that its targets may not find at all funny: for example, in the May 23, 2012 installment of "Relist watch," Elwood describes one petitioner has having been "convicted of debit card abuse for teasing a Discover Card about being a loser." *See* John Elwood, *Relist watch*, SCOTUSblog, May 23, 2012, *available at* http://www.scotusblog.com/2012/05/relist-and-hold-watch-20/. A few months earlier, Elwood had reported on a case arising out of the Florida Supreme Court – which, he felt "compelled to note, wags sometimes call SCOFLA." *See* John Elwood, *Relist watch*, SCOTUSblog, Mar. 20, 2012, *available at* http://www.scotusblog.com/2012/03/relist-and-hold-watch-14/.

The publisher and co-founder of the blog, Tom Goldstein, has also authored some sharply critical posts. For example, shortly after the oral arguments in the challenge to the Affordable Care Act, the Republican National Committee released an advertisement that relied on (doctored) audiotapes from the oral arguments to contend that the Act was sufficiently flawed that even the

government's top lawyer could not defend it. Goldstein characterized the advertisement as "the single most classless and misleading thing I've ever seen related to the Court," adding that "[it] is as if the RNC decided to take an incredibly serious and successful argument that has the change to produce a pathbreaking legal victory for a conservative interpretation of the Constitution, drag it through the mud, and vomit on it." *See* Tom Goldstein, *The RNC shoots itself in the mouth*, SCOTUSblog, Mar. 29, 2012, *available at* http://www.scotusblog.com/2012/03/the-rnc-shoots-itself-in-the-mouth/.

Two months earlier, Goldstein authored a post that disparaged coverage by major media organizations of the Court's decision in *United States v. Jones*, in which the Court held that the surreptitious attachment of a GPS tracking device to the car of a suspected drug dealer, and the subsequent monitoring of that device, constitutes a "search" for purposes of the Fourth Amendment. Specifically, Goldstein described that coverage as "bad," "leav[ing] a misleading impression of the decision," "wrong," and "a significant failure across the board." *See* Tom Goldstein, Jones *confounds the press*, SCOTUSblog, Jan. 25, 2012, *available at* http://www.scotusblog.com/2012/01/jones-confounds-the-press/. And in his analysis of the oral argument in *Lawrence v. Texas*, 539 U.S. 558 (2003), Goldstein reported that the district attorney who represented the state had given "what may have been the worst argument in a truly important case in the past

decade." *See* Tom Goldstein, *Lawrence Oral Argument Report – I do not like thee Dr. Fell*, SCOTUSblog, Mar. 26, 2003, *available at* http://goo.gl/l3Gt9; *see also id.* (indicating that, "in reality, Justice Scalia argued the case on behalf of Texas" and adding that the district attorney "was so awful that he made Smith (who, as noted above, was excellent) look even better by comparison and his arguments were sufficiently offensive and lacking in nuance that he left the impression that only the truest bigot could vote to sustain such a statute").

Finally, the blog's reporter, Lyle Denniston, rarely minces words. In a recent preview of the oral argument in *Lozman v. City of Riviera Beach*, in which the Court is considering whether a floating houseboat qualifies as a "vessel" for purposes of federal maritime law, Denniston described the petitioner in the case, Fane Lozman, as "quite cantankerous," adding that Lozman's dispute with the city was, "perhaps, something that 'Judge Judy' could easily handle." Lyle Denniston, *Argument preview: Defining a houseboat – a house or a boat?*, SCOTUSblog, Sept. 28, 2012, *available at* http://www.scotusblog.com/?p=152810. Denniston's unflattering description of Lozman and his case was repeated beyond the blog in *The Palm Beach Post*, which also described the blog as "an authority on Supreme Court cases." *See* Laura Green, *Supreme Court weighs whether activist Lozman's houseboat in Riviera Beach was a vessel*, Palm Beach Post, Oct. 1, 2012, *available*

at http://www.palmbeachpost.com/news/news/supreme-court-weighs-whether-houseboat-in-riviera-/nSQrP/.

Denniston's report on an oral argument in November 2011 was even more critical; in a post entitled "Disaster at the lectern," Denniston indicated that an assistant district attorney "repeatedly found ways to botch virtually every point" in her oral argument. Lyle Denniston, *Argument recap: Disaster at the lectern*, SCOTUSblog, Nov. 8, 2011, *available at* http://www.scotusblog.com/?p=131456. A few paragraphs later, he then suggested that, "[a]t that point, it seemed that nothing more could embarrass the New Orleans prosecutor." *Id.*

It is not difficult to imagine, given the high-profile and hot-button issues that are often before the Court and featured on the blog – this Term, for example, the Court is likely to decide not only the future of affirmative action but also the constitutionality of laws relating to same-sex marriage – a scenario in which these and other posts could lead to allegations of defamation and libel. The prospect that the blog could face lawsuits like the one at issue here, causing the blog to incur high legal costs to defend against a lawsuit and, if found liable, substantial money damages, will certainly have a chilling effect on the content of our posts. And that chilling effect will in turn result in less complete coverage of the events that transpire at one of the country's least understood, but most consequential, institutions: the Supreme Court of the United States.

B. SCOTUSblog Could Not Satisfy Several Of The Criteria Articulated By The District Court.

The question presented by this case creates significant concerns for SCOTUSblog, because of the prospect that it too could face lawsuits like the one filed by Obsidian in this case. Specifically, like Cox, the blog and its staff could not make several of the showings outlined by the district court in this case, leaving it vulnerable to an adverse decision in a defamation case.

First and foremost, with the exception of our reporter Lyle Denniston, none of the regular contributors to the blog have any training in journalism: Tom Goldstein and Amy Howe, for example, have undergraduate degrees in political science and law degrees, while Kali Borkoski and Max Mallory – the blog's manager and deputy manager – are recent college graduates with undergraduate degrees in philosophy and history, respectively. However, even some journalists have suggested that having lawyers cover the Court may benefit, rather detract from, the coverage: earlier this year, for example, Jennifer Rubin argued in her column for *The Washington Post* that "SCOTUSblog [is] smarter than CNN on the Supreme Court" because "[t]here are real appellate lawyers with no ax to grind at the former." Jennifer Rubin, *Romney's plight: Bad media coverage, bad communication*, Wash. Post, Aug. 2, 2012, *available at* http://goo.gl/Ou52V.

SCOTUSblog would also be unable to show that it has "credentials or proof of affiliation with any recognized news entity." The Supreme Court and Senate Press Gallery have refused to grant the blog a press credential. *See* Mallary Jean Tenore, *Why it's so hard for SCOTUSblog to get Supreme Court press credentials*, Poynter, July 11, 2012, *available at* http://goo.gl/I22RQ. The blog's inability to obtain a Supreme Court press credential for the blog stems from the fact that the Court provides permanent press credentials only to journalists with White House or congressional credentials. Permanent White House credentials can be obtained only by journalists with congressional credentials. And the blog's efforts to obtain congressional credentials have been rebuffed: the director of the Senate Press Gallery, which issues the press credentials, has indicated that under the current credentialing criteria – which were last updated in 2002 – "if a practicing lawyer applied to us, there is almost no way they would be credentialed." *See* Tenore, *supra*.

Although he has covered the Court for over fifty-four years, the past eight of which have been spent working almost exclusively for the blog, reporter Lyle Denniston does not have a Supreme Court press credential through the blog; instead, he has a Supreme Court credential based on his work for WBUR, a Boston-area public radio station for which he occasionally also files reports.

The blog would also be unable to meet the third and fourth criteria outlined by the district court, as it does not as a general rule do any fact-checking, nor does it have a policy of maintaining notes of conversations, interviews, or research. As an initial matter, the blog rarely engages in "investigative" journalism. Instead, most of its content is derived from the briefs filed in the Supreme Court, the oral arguments in cases on the merits, and the decisions that result from those briefs and oral argument. Moreover, although the blog's editing process sometimes identifies substantive errors in the posts that go up on the blog, the blog relies primarily on the expertise of its contributors not only to summarize, analyze, and provide their impressions of the briefs, oral arguments, and decisions, but also to do so accurately and fairly, without the need for fact-checking or detailed notes.

To be sure, the blog and its staff would be able to make a few of the showings – specifically, the fifth, sixth, and seventh ones – outlined by the district court in this case. First, to the extent that the blog's authors rely on confidential sources for their posts, they do adhere to principles of confidentiality when requested to do so by those sources. Second, with the exception of the blog's daily "round-up" of news related to the Supreme Court, the blog prides itself on creating its own original content – an "individual product . . . rather than assembling the writings and postings of others." Third and finally, although the blog does not have a firm policy requiring its authors to always "contact[] the 'other side' to get

both sides of a story" – instead using its own judgment about whether such consultations are necessary on a case-by-case basis – it does have a policy of not accepting commentary or advocacy posts by one side unless it is also able to post views from the other side of the issue. However, even though the blog might be able to make these showings in a lawsuit, its ability to do so provides it with scant comfort in light of the district court's failure to specify how many of these characteristics a defendant would have to possess to receive the First Amendment protections the court would afford to the "media."

CONCLUSION

SCOTUSblog respectfully asks this Court to make clear that non-traditional news sources, such as blogs, that provide a useful public service by gathering, analyzing, and disseminating information are entitled to the same First Amendment protections as traditional news media even if they cannot make most of the showings outlined by the district court in this case.

Respectfully submitted,

/s/

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EXHIBIT A: EMAIL FROM DIANA LEE OF BERLINROSEN PUBLIC AFFAIRS TO AMY HOWE OF SCOTUSBLOG

Good morning:

As the Supreme Court prepares to hear oral arguments for one of the most important cases of the session, Fisher v. University of Texas, next Wednesday, October 10, Inimai Chettiar of the Brennan Center for Justice is available for interviews. The case challenges the university's race-conscious admissions policy, and many believe the Court is ready to reevaluate – and possibly end – affirmative action as we know it.

Inimai Chettiar is the Director of the Justice Program at the Brennan Center for Justice at NYU School of Law. In an amicus brief to the Court, Ms. Chettiar argues that diversity enhances the educational experience of students of all races and urges the Court to uphold past precedent on this issue. A diverse student population prepares students to be future leaders in the workplace and cultivates the skills necessary to participate in our multi-racial democracy. Expanding educational opportunity also helps break the vicious cycle of poverty and crime that plagues urban communities of color, Chettiar argues.

Ms. Chettiar has written about the Fisher case in SCOTUSblog and writes frequently for the Huffington Post, Politico, and the American Constitution Society blog.

To arrange an interview, please contact Madeline Friedman at madeline.friedman@nyu.edu or 646-292-8357.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3630 words, exclusive of the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Thomas C. Goldstein

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October 17, 2012