

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

Cause of Action,)	
)	
)	
Appellant,)	
)	Case No. 13-5335
v.)	
)	
Federal Trade Commission,)	
)	
Appellee.)	
)	

**UNOPPOSED MOTION OF DAILY CALLER FOR LEAVE TO FILE A
BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT
CAUSE OF ACTION**

The Daily Caller News Foundation (“Daily Caller”) respectfully moves this Court, pursuant to Fed. R. App. P. 29(a) and D.C. Cir. R. 29(b), for leave to participate as *amicus curiae* in the above-captioned matter for the purpose of filing a separate *amicus curiae* brief in support of Appellant Cause of Action (“COA”).

In support of its motion, Daily Caller states as follows:

1. Daily Caller is a nonprofit, 501(c)(3) organization engaged in news gathering and dissemination, including gathering news and information from COA and other nonprofit public interest groups.
2. Daily Caller sought consent from all parties to participate as *amicus curiae* in this appeal through the filing of a separate *amicus* brief.

3. Appellant COA has consented to Daily Caller's participation as *amicus curiae* in this appeal and to Daily Caller's filing of an *amicus* brief separate from that of the other *amicus*.

4. When asked for consent, counsel for Appellee Federal Trade Commission ("FTC") responded that it would take no position on this request. Accordingly, FTC does not oppose Daily Caller's participation as *amicus curiae* in this appeal and does not oppose Daily Caller's filing an *amicus* brief separate from that of the other *amicus*.

5. Daily Caller wishes to participate as *amicus curiae* by filing a separate brief to ensure that its interests—as a user of news and information generated by COA and other nonprofit public interest groups—are heard.

6. The district court's decision denying the public interest fee waiver to COA threatens the ability of COA and other nonprofit public interest groups to gather news for Daily Caller's use and dissemination.

7. Daily Caller is a frequent Freedom of Information Act ("FOIA") requester and seeks fee waivers for its requests. Therefore, it will be impacted directly by this Court's decision.

8. Daily Caller seeks leave to file a brief, bringing relevant matters to this Court's attention, concerning FOIA's public interest fee waiver provision,¹ which are not discussed or fully addressed by COA or the other *amicus*.

9. First, the district court improperly placed the burden of proof on the public interest requester.

10. Second, the district court's test failed to account for new media methods of dissemination used by nonprofits and imposed a new and unsupported hurdle of proof upon a nonprofit requester that failed to credit its use of other sources—as a middleman—to disseminate the requested information.

11. Third, by imposing the burden of proof on the requester, failing to recognize new media dissemination processes, and refusing to credit a nonprofit's dissemination capabilities as a middleman, federal agencies are given broad discretion that allows them to deny fee waivers based on the content of the speech in violation of the First Amendment.

12. The other *amicus* brief being filed by Reporters Committee for Freedom of the Press ("RCFP") is focused on the "representative of the news media" fee waiver provision² and, it is anticipated, the issues raised by Daily Caller's *amicus* brief will not be adequately addressed, if at all, by their brief.

¹ 5 U.S.C. § 552(a)(4)(A)(iii).

² 5 U.S.C. § 552(a)(4)(A)(ii)(II).

13. Pursuant to D.C. Circuit Rule 29(d), Daily Caller will include with its proposed brief a “certificate of counsel plainly stating why” a “separate brief is necessary.”

14. Daily Caller anticipates that its D.C. Circuit Rule 29(d) certification will spell out its unique interest in this matter and set forth the public policies and arguments that are distinct from the other *amicus*.

For the above reasons, Daily Caller respectfully moves this Court for leave to participate as an *amicus curiae* in this appeal and to file its brief separately from the other *amicus*, RCFP, in support of COA.

Dated: May 9, 2014

Respectfully submitted,

THE DAILY CALLER NEWS FOUNDATION

By: /s/ Victoria Toensing
Victoria Toensing
Joseph E. diGenova
Brady Toensing
diGENOVA & TOENSING, LLP
1776 K Street, N.W.; Suite 737
Washington, D.C. 20006
Telephone: 202-289-7701
Fax: 202-289-7706
Attorneys for Amicus Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**A. Parties and Amici**

All parties, intervenors, and amici appearing before the district court are listed in the brief for Appellant Cause of Action. Except for the following, all parties, intervenors, and amici appearing before this Court are also listed in the brief for Appellant Cause of Action:

The Daily Caller

B. Rulings Under Review

All rulings under review are listed in the brief for Appellant Cause of Action.

C. Related Cases

All related cases are listed in the brief for Appellant Cause of Action.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Daily Caller Foundation (“Daily Caller”) states that it is an independent, nonprofit organization incorporated under the laws of the state of Delaware. Daily Caller has not issued any shares or debt securities to the public, and it has no parent companies. It has no subsidiaries or affiliates that have issued any shares or debt securities to the public. No publicly-held company has a 10% or greater ownership interest in Daily Caller.

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Victoria Toensing