No. 17-834

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

RAMIRO GARCIA, DONALDO MORALES, AND GUADALUPE OCHOA-LARA,

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

DARYL JOSEFFER
JONATHAN URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

KATHLEEN M. SULLIVAN
Counsel of Record
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Ave., 22nd Floor
New York, NY 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com

Attorneys for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.[1]

This is such a case. The Chamber's membership includes businesses that are subject in varying degrees to a wide range of federal regulatory schemes that contain provisions expressly preempting state and local laws. As a result, the Chamber is well suited to offer a broader perspective on preemption and keenly interested in ensuring that the regulatory environment in which its members operate is a consistent one.

Although the Chamber takes no position on the ultimate merits of this case, it has a particular interest in the "presumption against preemption" that members of this Court have sometimes invoked. By

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no one other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of this brief.

making it more difficult for Congress to enact and the federal government to enforce nationwide regulatory schemes, such a presumption, if applied even to express preemption clauses, threatens to breed patchwork legal regimes that would burden the ability of multistate businesses to operate efficiently and effectively. The Chamber accordingly submits this brief to urge the Court, whatever the outcome in this case, to reject application of any presumption against preemption where, as here, a statute contains an express preemption provision.

INTRODUCTION AND SUMMARY OF ARGUMENT

The presumption against preemption should be rejected as a canon of construction where the applicable statute includes an express preemption provision. The text and history of the Supremacy Clause refute any notion that the Framers intended the courts to operate under any presumption against preemption: Federal law is to control "*notwithstanding*" anything to the contrary in state law, and Congress's enactments should not be given less (or more) preemptive effect than their words would permit under ordinary principles of statutory interpretation. Employing a narrowing interpretive presumption in preemption cases makes it more difficult for Congress to achieve its specific legislative ends, and encourages the development of conflicting state regulatory regimes that burden businesses and other multistate actors. And the presumption cannot be justified on federalism grounds, for the express text and clear purpose of the Supremacy Clause allow Congress to execute its constitutional authority without special concern about federalism. Where Congress

has stated an intention to so exercise its authority, it should be taken at its word.

ARGUMENT

I. THE COURT SHOULD MAKE CLEAR THAT ANY PRESUMPTION AGAINST PREEMPTION IS INAPPLICABLE IN INTERPRETING AN EXPRESS PREEMPTION PROVISION

In recent Terms, this Court has repeatedly confirmed that any presumption against preemption does not apply to the interpretation of express preemption clauses. For example, in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016), the Court stated that, where a federal "statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Id.* at 1946 (quoting *Chamber of Commerce of the United States of America v. Whiting*, 563 U.S. 582, 594 (2011)). Although *Puerto Rico* and other recent decisions of this Court should have settled this question, a circuit split has subsequently emerged on whether their holding—that express preemption clauses should be read according to their terms without any narrowing presumption—should itself be read according to its terms or should be narrowly construed. As a result, the Court should take this opportunity to confirm that its decisions mean what they say.

A. This Court had sometimes, in interpreting the preemptive force of federal statutes, employed a presumption that Congress does not intend to dis-

place state laws. *See*, *e.g.*, *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992). The Court's decisions in recent Terms, however, have cast considerable doubt upon any such presumption against preemption, and have ultimately rejected its application to express preemption clauses. For instance, in *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011), the plurality rejected application of the presumption to an issue of conflict preemption, explaining that the Supremacy Clause is a *non obstante* provision by virtue of which "federal law should be understood to impliedly repeal conflicting state law," meaning that "a court need look no further than the ordinary meaning of federal law, and should not distort federal law to accommodate conflicting state law" through application of any presumption, *id.* at 623 (plurality opinion) (internal brackets and quotation marks omitted).

Even if a majority of the Court has not yet categorically rejected the presumption against preemption in implied preemption cases, the Court has now concluded repeatedly that any such presumption does not apply in *express* preemption cases. As Justice Thomas has noted, the Court's reliance on the presumption "has waned in the express pre-emption context," *Altria Grp., Inc. v. Good*, 555 U.S. 70, 99 (2008) (Thomas, J., dissenting) (collecting cases).

To take a few examples, in *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), the Court did not mention the presumption in holding that the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act expressly preempted the plaintiff's state-law claims—even though the dissent invoked the presumption, *id.* at 334 (Ginsburg, J., dissenting).

Similarly, in *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011), the majority opinion invoked only "the traditional tools of statutory interpretation," *id.* at 243, in concluding that the express preemption provision of the National Childhood Vaccine Injury Act barred state-law design-defect claims against vaccine manufacturers—again despite the dissent's invocation of the presumption against preemption, *id.* at 267 n.15 (Sotomayor, J., dissenting). Other decisions have likewise interpreted express preemption provisions without reliance upon the presumption against preemption.[2]

More recently, the Court has rejected application of the presumption against preemption in express-preemption challenges explicitly rather than by negative implication. For example, in *Puerto Rico*, 136 S. Ct. 1938, the Court stated that, where a federal "statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption

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[2] *See, e.g.*, *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013) (unanimously interpreting text of Federal Aviation Administration Authorization Act as not preempting state-law causes of action without mentioning presumption); *Chamber of Commerce of the United States of America v. Whiting*, 563 U.S. 582 (2011) (interpreting Immigration Reform and Control Act's express preemption provision as not preempting state use of licensing laws to prevent employment of unauthorized aliens without mentioning presumption); *Cuomo v. The Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 534 (2009) (explicitly declining to "invoke[] the presumption against pre-emption" in interpreting the scope of the Comptroller of the Currency's authority under express preemption clause of National Bank Act).

but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Id.* at 1946 (quoting *Whiting*, 563 U.S. at 594). Similarly, in *Gobeille v. Liberty Mutual Insurance Co.*, 136 S. Ct. 936 (2016), the Court held certain Vermont health-care reporting requirements invalid under ERISA's express preemption clause, explaining that the scope of ERISA preemption rests on normal tools of statutory construction, without reference to any presumption that preemptive language should be read narrowly, *id.* at 943. Instead, noting that "'[p]re-emption claims turn on Congress's intent,'" *id.* at 946 (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)), the Court concluded that "any presumption against pre-emption, whatever its force in other instances, cannot validate a state law that enters a fundamental area of ERISA regulation and thereby counters the federal purpose in the way this state law does," *id.*

And in *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190 (2017), the Court overturned a Missouri Supreme Court decision that had applied the presumption against preemption to the express preemption provision of the Federal Employees Health Benefits Act (FEHBA), 5 U.S.C. § 8902(m)(1). The Missouri Supreme Court had held that FEHBA did not preempt that State's bar on enforcement of subrogation and reimbursement provisions in insurance contracts. *See Coventry*, 137 S. Ct. at 1194, 1196. This Court reversed. Although the Court in an earlier decision had referred to two "plausible" interpretations of the FEHBA preemption provision,

in *Coventry* the Court determined that only *one* reading of the statute (that advanced by the petitioner and the United States) "best comports with § 8902(m)(1)'s text, context, and purpose." *Id.* at 1197. Rejecting the respondent's invocation of a presumption against preemption, the Court ruled that "the statute alone resolves this dispute," *id.* at 1198 n.3, and that therefore no interpretive canons (either a presumption against preemption or *Chevron* deference) were necessary to the outcome. *See id.* at 1197-98.

B. Some lower courts have missed the message. For example, in the pending petition in *American Eagle Express, Inc. v. Bedoya*, No. 18-1382, the petitioner has expressly asked the Court to decide "[w]hether the presumption against preemption applies in the context of a statutory express preemption clause where the claims at issue involve areas historically regulated by the States." Pet. for Writ of Cert., No. 18-1382. In seeking review of that question, the petitioner in *American Eagle* identifies a line of Third Circuit decisions holding that the presumption against preemption continues to apply (even in express-preemption cases) with respect to claims "that invoke the historic police powers of the States." *Id.* at 38 (quoting *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 & n.9 (3d Cir. 2018), and citing *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131 n.5 (3d Cir. 2018) and *Bedoya v. Am. Eagle Express Inc.*, 914 F.3d 812 (3d Cir. 2019)); *see also Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 n.1 (4th Cir. 2018) (noting this Court's "somewhat varying pronouncements on presumptions in express preemption cases" and that "[t]he circuits

also may not be in full accord"). Other lower courts have correctly rejected the Third Circuit's approach, instead relying on *Puerto Rico* to conclude that no presumption ever applies in the express-preemption context. *See, e.g.*, *Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017) ("In determining the meaning of an express pre-emption provision, we apply no presumption against preemption" (citing *Puerto Rico*, 136 S. Ct. at 1946)); *Eaglemed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017) (similar); *Atay v. County of Maui*, 842 F.3d 688, 699 (9th Cir. 2016) (similar).

These decisions illustrate that *Puerto Rico*'s apparently clear language has not yet settled the question whether a presumption against preemption applies when a court interprets an express preemption statute. So does this one, as Judge Biles (dissenting below) would have relied on the presumption to tip the scales against the majority position. Pet. App. 45. As a result, this case presents an excellent opportunity to erase this evidently lingering uncertainty by holding the presumption inapplicable.

Amicus expressly takes no position on how the Court should ultimately resolve the particular statutory-interpretation question presented in this case. The point is only that this is the kind of case in which the presumption against preemption (if extant) might conceivably be invoked as a basis for interpreting the express preemption provision of the statute at issue. This case therefore presents the Court with a clear opportunity to provide valuable guidance and certainty to future courts and litigants by stating plainly that *Puerto Rico*'s rejection of the presumption was not merely dicta, but is good law in

all express-preemption cases. The Court should hold that *whenever* a federal statute contains an express preemption clause, courts should "not invoke any presumption against pre-emption," but should instead determine the scope of preemption by "focus[ing] on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." 136 S. Ct. at 1946 (internal quotation marks omitted).

II. THE TEXT AND HISTORY OF THE SUPREMACY CLAUSE, AS WELL AS OUR CONSTITUTIONAL STRUCTURE, SHOW THERE IS NO BASIS FOR A PRESUMPTION AGAINST PREEMPTION

Beyond the *stare decisis* value of the Court's holding in *Puerto Rico,* the Court's approach in that case is the correct one.

A. Most significantly, the no-presumption approach best comports with the text and history of the Supremacy Clause's provision that, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," "the Laws of the United States … shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. As a plurality of this Court explained in *PLIVA*, the "any Thing" clause "is a *non obstante* provision," employed "to specify the degree to which a new statute was meant to repeal older, potentially conflicting statutes in the same field." 564 U.S. at 621-22 (plurality op.) (citing Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 234, 238-42, 252-53 (2000)).

In the case of the Supremacy Clause, the *non obstante* language extends to "*any* Thing" in state law,

demonstrating that the Framers intended the Supremacy Clause to have the effect of *entirely* overcoming the traditional presumption against implied repeals (the historical antecedent to a presumption against preemption). The authors of the Constitution "did not want courts distorting the new law to accommodate the old." *Id.* at 622 (citing Nelson, *supra,* at 240-42). To the contrary, the Clause's historical purpose was "to remedy one of the chief defects in the Articles of Confederation by instructing courts to resolve state-federal conflicts in favor of federal law." David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 402 (2004). A principle that courts should favor an unnatural statutory construction just to avoid invalidating state laws runs contrary to this purpose. And it is thus unsurprising that there is no historical "support … for the conclusion that the [F]ramers intended any … presumption to be read into [the Supremacy Clause]." Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. Davis L. Rev. 1, 30 (2001). Instead, the Framers would have regarded the Clause as rejecting any "general presumption that federal law does not contradict state law." Nelson, *supra*, at 293. After all, the Clause was "designed precisely to eliminate any residual presumption" against implied repeals of state law in the face of federal law. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 Sup. Ct. Rev. 175, 184.

The Supremacy Clause is thus best read to instruct courts facing preemption questions to employ ordinary tools of statutory construction: In most cases they should "look no further than 'the ordinary meanin[g]' of federal law" and "should not distort

federal law to accommodate conflicting state law." *PLIVA*, 564 U.S. at 623 (plurality op.) (quoting *Wyeth v. Levine*, 555 U.S. 555, 588 (2009) (Thomas, J., concurring in judgment)).

B. The approach taken in *Puerto Rico* and by the *PLIVA* plurality, moreover, appropriately respects the separation of powers. As this Court has frequently stated, "the ultimate touchstone in every pre-emption case" is Congressional intent. *Wyeth*, 555 U.S. at 565 (quoting *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996)). And as with every statute, the language selected by Congress "necessarily contains the best evidence" of Congressional intent. *Whiting*, 563 U.S. at 594; *accord, e.g.*, *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991). By focusing on the words enacted by Congress, guided where necessary by normal statutory-construction tools, courts avoid imposing artificial barriers to the accomplishment of Congress's aims. In contrast, a judicially-created presumption against preemption artificially restrains Congress's power, "risk[ing] … illegitimate expansion of the judicial function" through unintended narrowing of Congressional intent. Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2092 (2000).

A presumption against preemption also risks upsetting the federal-state balance established by the Constitution. Where Congress foresees conflict with state law, it faces a Hobson's choice between two undesirable options if constrained by such a presumption. It might try to enumerate every kind of law that it wishes to preempt. But this creates an absurd situation in which a "statute that says *anything* about pre-emption must say *everything*; and it must

do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power." *Cipollone*, 505 U.S. at 548 (Scalia, J., concurring in judgment in part and dissenting in part). Such a patchwork of specific preemption clauses, moreover, would "disrupt the constitutional division of power between federal and state governments" by unduly enabling states to find and exploit loopholes in federal statutory schemes. *See* Dinh, *supra*, at 2092.

Alternatively, Congress could enact sweeping preemptive language creating exclusive federal authority over an entire field, leaving the States no authority to regulate whatsoever. But that too may frustrate Congress's objective, which may be limited to preempting regulation only in discrete parts of the broader regulatory field, leaving other subjects to the States. A presumption against preemption makes it more difficult to draw fine lines, limiting Congress's ability to achieve its aims while respecting traditional areas of state regulation.

The way to avoid this Hobson's choice is to disavow an extra-constitutional presumption against preemption, and instead to employ, in express-preemption cases as in others, the ordinary tools of statutory construction—text, context, structure, history, purpose—to discern Congress's preemptive intent.

C. The presumption against preemption cannot be justified in express-preemption cases by putative respect for "principles of federalism and respect for state sovereignty." *Cipollone*, 505 U.S. at 533 (Blackmun, J., concurring in part and dissenting in

part). Concerns about protecting the federal system enacted by the Constitution are fully answered by the Supremacy Clause itself. A central part of the Framers' scheme was to permit Congress, acting within the scope of its powers, to override state law where necessary to the national interest. *See, e.g.*, Sloss, *supra*, at 401-02. It thus does not matter how "compelling" a State's interest is in regulating in an area preempted by Congress: "under the Supremacy Clause, from which our pre-emption doctrine is derived, *any* state law"—even one "clearly within a State's acknowledged power, which interferes with or is contrary to federal law"—"must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (internal quotation marks omitted). Where Congress has the power to regulate, the forum for addressing federalism questions such as the "wisdom of national regulation" and the "balance between regulatory uniformity and policy innovations" is the Capitol, not the courthouse. *See* Dinh, *supra*, at 2092. Maintaining a presumption against Congress's exercise of its constitutional authority alters rather than protects the federal scheme.

The Supremacy Clause also answers objections rooted in state sovereignty, for it expressly provides that the States' regulatory authority is subordinate to federal power. And, as discussed, a presumption against preemption upsets the federal-state balance, both by restricting the ways in which Congress can seek to address nationwide problems and by encouraging the federal government to adopt overbroad schemes in order to prevent state intrusion.

Neither federalism nor state sovereignty is harmed by a rule under which Congress's words are

given their ordinary meaning in the express-preemption context. And where Congress has expressly determined that the best course is to override state regulatory authority, application of a presumption against preemption will undesirably encourage the development of a patchwork of state regulations to fill "holes" purportedly left by Congress in its statutory scheme. To avoid that outcome, this Court should explicitly reaffirm in this case, whatever its resolution of the merits of the express-preemption dispute, that the rule in *Puerto Rico* applies in all express-preemption cases.

D. In a series of recent decisions, the Third Circuit has ruled that, notwithstanding *Puerto Rico*'s broad and unequivocal language, the presumption against preemption continues to apply in express-preemption cases that involve "'the historic police powers of the States.'" *Shuker*, 885 F.3d at 771 (quoting *Lohr*, 518 U.S. at 485); *see Lupian*, 905 F.3d at 131 n.5; *Bedoya*, 914 F.3d at 818 (both similar). *Amicus* respectfully submits that this analysis is wrong, and should be rejected.

Most obviously, nothing in *Puerto Rico* limits the reach of the relevant holding to the bankruptcy context, nor does it supply a basis to conclude that the Court abrogated the presumption against preemption only in cases that do not involve "historic police powers." Instead, the Court wrote broadly that, "because the statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" 136 S. Ct. at 1946 (quoting *Whiting,* 563 U.S. at 594, and cit-

ing *Gobeille,* 136 S. Ct. at 946). The holding rests on the principle that congressional text is supreme, and that the courts should effectuate it as written. And nothing about that principle is affected by the type of state regulation that is being displaced.

To the contrary, this Court's decision in *Lohr*, on which the Third Circuit relied in *Shuker* and its progeny, was clear in distinguishing "*two* [separate] presumptions about the nature of pre-emption," 518 U.S. at 485 (emphasis added): *first*, the then-prevailing presumption that federal legislation does not supersede a State's exercise of its "historic police powers"; and *second*, the presumption that a statute's preemptive reach is determined by Congress's purpose as reflected in the text, context, and structure of its enactment. *Id.* at 485-86. As discussed above, the second "presumption" (really, an acknowledgment that the ordinary tools of interpretation apply to a preemption provision) is now preeminent. Those tools have now supplanted the first presumption (the one against preemption), which has been undermined by doctrinal development and scholarly research. Indeed, this Court has in recent years repeatedly declined to apply the presumption even in cases that involved traditional state police-power regulation.[3]

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[3] *See, e.g.*, *Bruesewitz*, 562 U.S. 223 (omitting to apply presumption in determining extent to which federal law preempted state vaccine regulations); *id.* at 267 n.15 (Sotomayor, J., dissenting) (noting "the long history of state regulation of vaccines"); *Riegel*, 552 U.S. 312 (omitting to apply presumption in determining extent to which federal law preempted state health and safety

Moreover, any attempt to apply a different rule in the context of the States' historic police powers "is not only unworkable but is also inconsistent with established principles of federalism." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985). Because the States had vast police powers before the ratification of the Constitution, nearly any law can be characterized as relating to them—depending on the level of generality with which it is stated. For example, regulation of the federal government's nuclear arsenal was not a traditional state power, but such regulation would aim to protect the citizenry, which was a traditional state power. The phrase "police power" was "long abandoned as a mere tautology" precisely because "[i]t is difficult to identify any state law that has come before us" that could not be characterized as relating to the States' historic police powers to protect health, safety, and welfare. *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 365-66 (2008) (Kennedy, J., dissenting); *see also United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 369 (2007) (Alito, J., dissenting). In short, any exception to standard interpretive principles based on historic police powers would either swallow the rule or rely on unworkable and arbitrary distinctions.

Even more important, for the reasons set forth above, the better construction of the Supremacy Clause, and the best way to respect and preserve both the separation of powers and the principles of

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regulations); *id.* at 334 (Ginsburg, J., dissenting) (noting "traditional 'primacy of state regulation of matters of health and safety'" (quoting *Lohr,* 518 U.S. at 485)).

federalism, is to complete the Court's abandonment of the presumption against preemption in the express-preemption context and to allow Congress to draft and to implement preemptive legislation just as it does with other enactments. Congress should be trusted to write laws that displace areas of traditional state regulation only to the extent that Congress intends such displacement. It should not be made to jump through additional hoops in order to accomplish that end.

CONCLUSION

The Court should hold that no presumption against preemption applies where Congress has enacted an express preemption provision.

Respectfully submitted,

Daryl Joseffer
Jonathan Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Kathleen M. Sullivan
Counsel of Record
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Ave., Fl. 22
New York, NY 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com

Attorneys for Amicus Curiae

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