

No. 20-1029

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IN THE  
**Supreme Court of the United States**

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CITY OF AUSTIN, TEXAS,

*Petitioner,*

v.

REAGAN NATIONAL ADVERTISING OF  
AUSTIN, LLC, ET AL.,

*Respondents.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit**

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**BRIEF OF OUT OF HOME ADVERTISING  
ASSOCIATION OF AMERICA, INC., MEDIA  
RESOURCES, INC., RENFROE OUTDOOR  
ADVERTISING, DDI MEDIA, DAKOTA  
OUTDOOR ADVERTISING, AND HUGHES  
OUTDOOR MEDIA AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENTS**

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GORDON D. TODD\*  
VIRGINIA A. SEITZ  
JACQUELYN E. FRADETTE  
SAM H. ZWINGLI†  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
gtodd@sidley.com

*Counsel for Amici Curiae*

September 29, 2021

\* Counsel of Record

[Additional information listed on inside cover.]

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† Ms. Zwingli is admitted only in California and is practicing law in the District of Columbia pending admission to the D.C. bar and under the supervision of principals of the firm who are members in good standing of the D.C. bar.

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are entities participating in the out-of-home advertising industry who are interested in the safe and appropriate use of digital billboard technology.

The Out of Home Advertising Association of America, Inc. (“OAAA”) is the principal trade association representing the outdoor-advertising industry in the United States, promoting the interests of its 800-plus member companies on the national, state, and local levels. OAAA’s core mission is to lead a responsible advertising industry, committed to serving the needs of its advertisers, consumers, and communities. OAAA members publish a wide range of commercial and non-commercial speech, including commercial, political, social, and charitable messages. OAAA members have donated \$500 million in advertising space annually, including to the Advertising Council and numerous charities, as well as to the Federal Bureau of Investigation and other law-enforcement agencies and emergency-management officials. OAAA members increasingly use digital billboards to post messages in real time including reporting breaking news, law enforcement and weather-related emergency messages, amber and silver alerts, and to provide other up-to-the-minute information. OAAA has intervened or filed *amicus* briefs in numerous cases implicating outdoor advertisers’ First Amendment rights.

*Amicus* Media Resources, Inc. manufactures and sells sign products, including LED digital displays,

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<sup>1</sup> Pursuant to Supreme Court Rule 37, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici curiae* and their counsel made any monetary contribution toward the preparation and submission of this brief. Both Petitioner and Respondent consented to the filing of this brief.



throughout the United States. Media Resources, Inc. has an interest in ensuring that its products are fairly and accurately represented and discussed.

*Amici* Renfroe Outdoor Advertising, DDI Media, Dakota Outdoor Advertising, and Hughes Outdoor Media each operates out-of-home advertising displays, including static and digital billboards, in different markets across the United States. *Amici* sign companies are all, or have all been, subject to laws and regulations that restrict or prohibit the use of digital billboard technology. *Amici* sign companies are also all subject to state and local laws and regulations that extensively govern, *inter alia*, the size, spacing, location, height, illumination, and brightness of their billboards, including their digital billboards. *Amici* sign companies have an interest in ensuring that their digital billboards are fairly and accurately represented and discussed, and in being free from discriminatory and unconstitutional regulation of their constitutionally protected speech and publishing activities.

*Amici* support OAAA's mission to lead a responsible advertising industry, to observe the highest free speech standards, to respect privacy, to protect children, to support worthy public causes, to provide an effective medium, to respect the environment, and to ensure that outdoor signs are both safe and effective communications medium.

*Amici* seek to protect their rights and the rights of OAAA members generally and to promote an accurate understanding of the industry and, specifically, digital billboards. In attempting to defend the differential treatment of on-premises and off-premises digital signs, certain of Petitioner's *amici* present a distorted, inaccurate picture of the nature of digital billboards. This caricature—which dismisses billboards generally, and digital billboards specifically—as second-

class citizen speakers and publishers, ignores the existing robust regulatory framework for digital billboards, and distracts from the important legal issue presented.

### INTRODUCTION AND SUMMARY OF ARGUMENT

*Amici* agree that federal, state, and local governments have valid interests in regulating billboards and support reasonable, factually supported regulation. This case, however, regards regulations adopted without any justifying findings, that allow the unrestricted use of digital signs by on-premises interests—themselves mostly commercial—but forbid digital off-premises billboards.

Some of Petitioner’s *amici* aggressively and inaccurately disparage off-premises digital billboards as unsightly and unsafe. As an initial matter, they seem to ignore that on-premises digital signs would be subject to these same critiques, underscoring how underinclusive their regulation actually is. But more importantly their critiques are also wrong, presenting a grossly inaccurate picture of off-premises digital billboards.

In actuality, off premises digital billboards are extensively regulated by federal, state, and local governments and by the outdoor advertising industry itself to ensure their safe operation. All facets of digital billboards are regulated—their physical structure, spacing, illumination, “dwell time” on a particular image, and prohibitions on moving parts or video. Government and industry regulation allows communities to prevent the installation of unsafe, distracting digital billboards—indeed, safety and aesthetic considerations are hard-wired into the permitting process of virtually all jurisdictions.

Multiple studies and their supporting data reveal that this regulation has been effective; as regulated, off-premises digital billboards are neither distracting nor unsafe. The attack on digital technology is unwarranted and fails to illuminate the issue presented here; it is instead designed to cultivate misunderstanding of and bias against outdoor signs.

Billboards are venerable platforms for speech; they “have played a prominent role throughout American history, rallying support for political and social causes.” *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion). This Court has repeatedly held that the regulation of speech instrumentalities, including billboards, requires heightened scrutiny. *Id.* at 528 n.7 (Brennan, J., concurring in the judgment). As such, the government bears the burden of demonstrating both the existence of a government interest and the “fit” between the interest protected and the burden that the law places on speakers and publishers of speech. See, e.g., *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000). Incremental regulation of digital billboard speech should be treated no differently.

## ARGUMENT

### **OFF-PREMISES DIGITAL BILLBOARDS DO NOT PRESENT UNIQUE SAFETY OR AESTHETIC CONCERNS.**

Several of Petitioner’s *amici* lace their arguments with harsh and unsubstantiated assertions regarding digital billboards. These arguments are premised on the unsupported and incorrect assumption that off-premises digital billboards are distracting or unsafe, and seek to foster bias against digital billboards. These arguments ignore the comprehensive regulation of off-

premises digital billboards and paint a distorted, inaccurate picture of digital signage and traffic safety.

For example, the National League of Cities (“NLC”) argues that “[d]igital billboards pose a risk to public safety” and undermine community aesthetics. See NLC Br. at 19, 21-23, 26; see also *id.* at 27-28 (characterizing digital billboards as a “substantive evil”). And the American Planning Association (“APA”) contends that digital billboards “make[] it difficult for drivers to find driveways, businesses, and other locations,” and that, “[a]s more signs utilize electronic lighting technologies, bright signs may temporarily blind drivers to objects in or adjacent to roadways.” APA Br. 13-14 & fig. 6. The APA offers dramatic visual images of cluttered landscapes and blinding signs to stoke anti-sign ire.

The foregoing mischaracterize the physical and legal characteristics of digital billboards. As detailed below, these critiques ignore the extensive regulatory framework that fully addresses safety and aesthetic concerns for digital billboards, and studies and traffic safety data demonstrate that these regulations are effective. The exaggerated nature of the attack on off-premises digital billboards is nowhere better underscored than in the APA brief. The images of distractingly cluttered landscapes it offers all involve indisputably *on-premises*, not off-premises, signs. See APA Br. 11, 16, 18, 20. And the blinding billboard image presented in its Figure 6, labeled “Photo credit: Arizona Capitol Times,” *id.* at 14, is in fact uncredited on that newspaper’s website and appears to be a mocked-up image available for copying from a Serbian website called urozunic. See <https://bit.ly/3kLDMCE>. That

time-lapse image bears no relationship to how digital billboards appear in the real world.<sup>2</sup>

**A. Digital Billboards Are Subject To Extensive Government And Industry Regulation.**

Billboards, including digital billboards, are comprehensively regulated by federal, state, and local law.

Under the Highway Beautification Act, the federal highway funding apportioned to a State may be reduced ten percent if the State does not maintain “effective control of the erection and maintenance ... of outdoor advertising signs, displays, and devices” in areas adjacent to federal interstate and primary highways. 23 U.S.C. § 131(b). States maintain “effective control, by, *inter alia*, entering into agreements with the Federal Highway Administration (“FHWA”) that establish standards for the “size, lighting and spacing” of off-premises signs adjoining federal interstate and primary highways in the State. *Id.* § 131(d). Those standards are required to be “consistent with customary use.” *Id.* States must also devise laws, regulations, and procedures to implement their agreements with the FHWA, which are submitted to the FHWA for review and approval. 23 C.F.R. § 750.705(j). Every State-FHWA agreement contains a prohibition against signs that contain “flashing,” “intermittent,” or “moving” lights. See, e.g., *Scenic Am., Inc. v. U.S. Dep’t of Transp.*, 836 F.3d 42, 47 (D.C. Cir. 2016).

In guidance issued in 2007, the FHWA addressed the development of digital billboards. It concluded that

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<sup>2</sup> As the solid bar of light from multiple car headlights demonstrates, to this extent this was ever a real photograph, it was a time-lapse image, which by its nature captures light over an extended period of time and exaggerates the light sources.

digital billboards do not categorically violate the prohibition against “intermittent,” “flashing,” or “moving” lights “if found to be [operated] consistent with [the State’s agreement with the FHWA] and with acceptable and approved State regulations, policies and procedures.” FHWA, Memorandum, *Guidance on Off-Premise Changeable Message Signs* (Sept. 25, 2007) (hereinafter “2007 Guidance”). That Guidance also stated that in reviewing State regulations of digital billboards, the agency would consider “all relevant information, including but not limited to duration of message, transition time, brightness, spacing, and location, to ensure that” state regulations are consistent with their agreements with the FHWA and “that there are adequate standards to address safety for the motoring public.” *Id.* The Guidance identified “certain ranges of acceptability that have been adopted in those States that do allow [digital billboards]” for use in reviewing other States’ proposals. *Id.*

In addition to federal and state regulation related to interstates and primary roads, as the APA explains, “states and local governments regulate signs to address practical problems.” APA Br. 9. “Sign codes therefore regulate height, size, spacing, location, copy area, and letter sizing among other components to ensure that signs serve their purposes.” *Id.* at 10. Such codes “focus on sign design—including lighting, lettering, coloration, height, and materials—as well as scenic view protection, historic preservation, reducing visual clutter, and preventing blight from abandoned or deteriorating signs.” *Id.* at 15; see also NLC Br. at 3 (explaining that local governments regulate digital billboards to address “public safety and local aesthetics”).

Finally, the out-of-home advertising industry itself actively promotes the safe and attractive use of this

valuable medium for displaying protected speech. See OAAA, *OAAA Code of Industry Principles*, <https://bit.ly/3ieNJqx> (last visited Sept. 27, 2021); OAAA, *Explanation of OAAA Recommended Brightness Guidelines* (Apr. 2017), <https://bit.ly/39HD6aV>.

Forty-five of the forty-six states with billboards and thousands of communities have taken steps to permit and regulate digital billboards. OAAA, *State Changeable Message Chart*, <https://bit.ly/3oeiIqy>. And local regulations, principally sign codes, including rigorous permitting processes for signs, do not allow the installation of distracting or unsafe digital billboards. See, e.g., Cal. Bus. & Prof. Code § 5408(b) (“Advertising displays may not ... cause beams or rays of light ... to cause glare or to impair the vision of any driver, or to interfere with any driver’s operation of a motor vehicle.”); 2-2000-2601 Del. Admin. Code § 15.4.1.2 (“Signs ... which are of such intensity or brilliance as to cause glare or to impair the vision of a driver of any motor vehicle, or which otherwise interferes with any driver’s operation of a motor vehicle are prohibited.”); Fla. Stat. § 479.11(5)(a) (“No sign shall be erected, used, operated, or maintained ... in such a manner so as to cause glare or to impair the vision of motorists or otherwise distract motorists so as to interfere with the motorists’ ability to safely operate their vehicles.”).

*Illumination.* Virtually all sign codes address the permissible level of illumination for off-premises digital billboards. *E.g.*, 10A N.C. Admin. Code 29C.1106(2) (“Billboards or advertising structures may be illuminated, provided no flashing or intermittent illumination shall be used and such illumination confined to the area of the sign to avoid glare or reflection into any portion of a street or other property.”); 2-2000-2601 Del. Admin. Code § 15.4.1.1 (“Signs may be illuminated, subject to the following restrictions: ... [s]igns

which contain, include, or are illuminated by any flashing, intermittent, or moving light or lights are prohibited ...."); Or. Admin. R. 734-060-0007(3)(a)(C) ("The digital billboard must operate at an intensity level of not more than 0.3 foot-candles over ambient light as measured by the distance to the sign depending upon its size."); 045.0003.16 Wyo. Code R. § 4 (restricting billboard usage based on increases in ambient light). Illumination is carefully controlled; the technology used to implement digital billboards modulates their brightness so that it is lawful and appropriate for the circumstances. In addition, OAAA has developed recommended brightness guidelines based on recommendations reported by lighting expert Dr. Ian Lewin of Lighting Sciences, Inc., using the industry standard of the Illuminating Engineering Society of North America, publication TM-11-00. See OAAA, *OAAA Recommended Digital Brightness Guidelines*, <https://bit.ly/3orHCDh>. In addition to brightness guidelines, OAAA guidelines instruct that a digital billboard must be able automatically to adjust as ambient light levels change. See OAAA, *Outdoor Lighting and Dark Skies: An OAAA Issue Brief* (Nov. 2016), <https://bit.ly/3m2WCnZ>.

*Dwell Time.* Some of Petitioner's *amici* breathlessly report that digital billboards may rapidly and distractingly change images. But off-premises digital billboards follow regulatory and industry dwell time standards crafted to ensure safety—a driver will generally experience no more than one transition while moving past a digital billboard. And the transition itself occurs near-instantaneously. See *supra* at 7 (describing FHWA requirements for dwell time). More than 40 States regulate the duration of time between message changes mandating interludes of between 4



and 10 seconds for off-premises digital billboards. See OAAA, *State Changeable Message Chart*, *supra*.

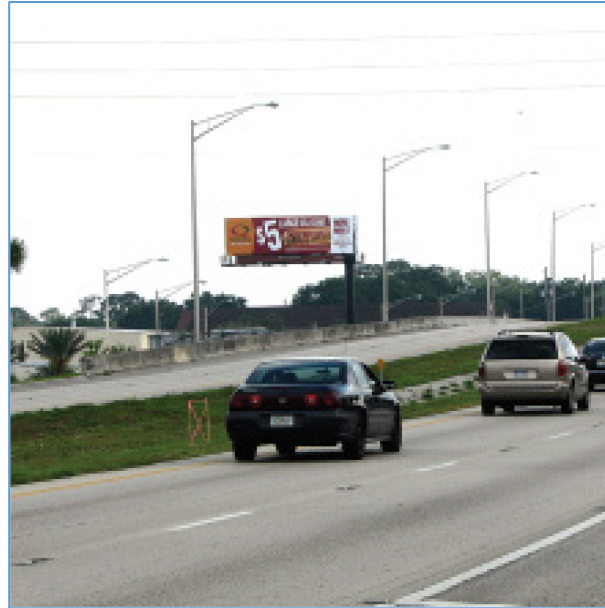
*Moving Parts and Video.* Federal regulations prohibit off-premises billboards with moving parts or video on federal highways and primary roads. See *Scenic Am.*, 836 F.3d at 45. Most states do likewise on state highways. Indeed, local sign codes generally prohibit moving parts and motion video, with notable exceptions such as Times Square and Washington, D.C.'s Chinatown pertaining directly to the unique nature of these limited venues. See also *supra* at 8-9.

*Physical Parts and Structures.* All sign codes regulate the size, spacing, height, sight reviews, and more of signage. Virtually all enforce these codes through a demanding permitting process under which the detailed location, structure, and operational characteristics of each sign is individually assessed.

Most off premises digital billboards look similar to their static counterparts. For example, the following two photographs depict a static billboard (“Save 6¢ or More”) and the digital billboard (“Parris RV”) that replaced it in the same location.



And the following two photographs similarly provide a wider angle view of a static billboard and the digital billboard that replaced it at 3300 Southside and Beach, in Jacksonville, Florida.



The digital sign, may also be viewed online via Google Street View.<sup>3</sup>

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<sup>3</sup> See <https://bit.ly/3m1iala>.

Federal, state, and local governments address their interests in traffic safety and aesthetics through extensive regulation. Issues effectively addressed through regulation do not provide a basis for any and all further regulation that unduly burdens speech and publishing rights without truly advancing any significant government interest.

### **B. Digital Billboards Are Not Distracting Or Unsafe.**

The OAAA estimates that there are approximately 10,000 digital billboards along U.S. roadways. OAAA, *Number of Out of Home Displays* (2020), <https://bit.ly/3F06hEv>. The data generated from these signs belie the insinuation that they cause traffic accidents; the evidence instead shows that industry design and regulation have been effective in allowing billboards to evolve while addressing safety and local aesthetic concerns.

Traffic safety experts have studied the relationship between billboards and traffic accidents since the 1950s, and have not found evidence that billboards are linked to traffic accidents. A study by the Virginia Tech Transportation Institute (“VTTI”) found no measurable evidence of billboards causing changes in driver behavior with respect to visual behavior, speed maintenance, or lane keeping. See Suzanne E. Lee et al., Ctr. for Crash Causation & Hum. Factors, Va. Tech Transp. Inst., *Driving Performance in the Presence and Absence of Billboards* (2004). A subsequent study found digital billboards to be “safety-neutral,” observing that the typical glance in the direction of a digital billboard was less than one second, which the VTTI report explains, is well within the broadly accepted standard for safe driving. Suzanne E. Lee et al., Ctr. for Auto. Safety Rsch., Va. Tech Transp. Inst., *Driving Performance and Digital Billboards* 6, 10 (Mar. 22,

2007), <https://bit.ly/39K7elX>; see also N.Y. State Dep't of Transp., *A Crash Analysis and Discussion of Off-Premise Commercial Electronic Variable Message Signs (CEVMS) Along New York State Interstate Highways 2* (Oct. 2008), <https://bit.ly/3oe6UEM> (“[T]here is no empirical evidence at this time to indicate that a [digital billboard] in.”).

With respect to digital billboards specifically, in 2007, as noted above, the FHWA reaffirmed that states have the authority to permit digital billboards along highways, as long as the signs do not flash, scroll or feature full motion video. See *2007 Guidance*. And in 2013, the FHWA released the findings of multi-year research on drivers' behavior in proximity to digital billboards. See FHWA, U.S. Dep't of Transp., FHWA-HEP-11-014, *Driver Visual Behavior in the Presence of Commercial Electronic Variable Message Signs (CEVMS)* (Sept. 2012), <https://bit.ly/3F2K4Wk>. Using eye-tracking technology it found that digital billboards do not distract drivers, and found no connection between digital billboards and accidents. See *id.*; see also Keith Laing, *DOT Study Finds Digital Billboards Don't Distract Drivers*, *The Hill* (Jan. 7, 2014), <https://bit.ly/2WlwwnA>. Industry-funded research likewise concludes that digital billboards are not related to accidents,<sup>4</sup> and, importantly, state and local authorities

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<sup>4</sup> Tantala Associates Consulting Engineers undertook a series of studies of the relationship between digital billboards and traffic safety in the following areas: Cuyahoga County, OH (2007, 2009), Rochester, MN (2009), Albuquerque, NM (2010), Reading, PA (2010), Richmond, VA (2010). Each analyzed crash data before and after deployment of digital billboards, and concluded that accident data does not show a statistical relationship between vehicular accidents and billboards and that the number and rate of accidents did not increase after the installation of digital bill-

that have reviewed accident data have reached the same conclusion.<sup>5</sup>

Independent experts say that traffic fatalities and accidents are caused by factors other than billboards. More than half of U.S. highway fatalities are the result of deficient roadway conditions, an even more lethal factor than drunk driving, speeding, or non-use of seatbelts, according to a 2009 study. See Ted R. Miller & Eduard Zaloshnja, *On a Crash Course: The Dangers and Health Costs of Deficient Roadways*, Pac. Inst. for Rsch. & Evaluation (Apr. 2009), <https://bit.ly/3kL8eg9>.

*Amici* State of Florida et al. report in a footnote that in 2018 some 400,000 people were injured in crashes involving a “distracted driver.” Fla. Br. 6 n.2. The Centers for Disease Control and Prevention (“CDC”) website that *amici* States cite, see *id.*, mentions neither billboards nor signs generally as a cause of distraction, but instead, unsurprisingly, focuses on texting and

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boards. See Michael W. Tantala & Albert M. Tantala, *An Examination of the Relationship Between Digital Billboards and Traffic Safety in Reading, Pennsylvania Using Empirical Bayes Analyses*, Inst. Transp. Eng’rs, 2011 ITE Technical Conference (Apr. 2011), <https://bit.ly/3o90Yg9>; Michael W. Tantala et al., *An Examination of the Relationship Between Advertising Signs and Traffic Safety*, 84th Transp. Rsch. Bd. Ann. Conf. Proc., TRB Paper 05-0876 (2005), <https://bit.ly/3EXUPsX>.

<sup>5</sup> See, e.g., James R. Barrett, Regul. & Compliance Manager, Va. Dep’t of Transp. (Sept. 24, 2007) (“Our study has turned up no accidents reported to local police in the vicinity of the digital signs we’ve been monitoring.”) (quote available at <https://bit.ly/3igOwHj>); Letter from Dipak M. Patel, Deputy State Highway Eng’r, S.C. Dep’t of Transp., to W. Scott Shockley, Gen. Manager, Lamar Outdoor Advert. (Sept. 6, 2007), <https://bit.ly/3ufjapv> (“[T]he attached study based on the period of review [six months after the installation of digital billboards] does not highlight a problem with the digital billboards. Also, as of August 28, 2007, the South Carolina Department of Transportation (SCDOT) has not received any complaints in regard to the digital billboards.”).

emailing while driving, see Nat'l Ctr. for Injury Prevention & Control, CDC, *Distracted Driving*, <https://bit.ly/3zMuWc4> (last reviewed Mar. 2, 2021). The CDC does, interestingly, link the National Highway Traffic Safety Administration's campaign to combat distracted driving, which includes posting off-premises billboards to discourage texting-while-driving. See *id.*; see also *Billboards Feature Anti-Texting Safety Message*, PRNewswire (Nov. 23, 2011), <https://prn.to/3m1hJr2>.

In sum, digital billboards, like all billboards, are extensively regulated at the federal, state, and local levels. This regulation addresses legitimate traffic safety and aesthetic concerns. These issues should not be used as an excuse to treat billboard speakers and publishers as second-class citizens under the First Amendment and to support unproven and unsupported distinctions among billboard speakers and publishers that do not advance significant government interests.

**CONCLUSION**

Regulation of digital billboard speech must take into account the full record, properly developed by the regulating governmental entity, not simply speculation and mischaracterization of the sort offered by Petitioner's *amici*.

Respectfully submitted,

GORDON D. TODD\*  
VIRGINIA A. SEITZ  
JACQUELYN E. FRADETTE  
SAM H. ZWINGLI†  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
gtodd@sidley.com

*Counsel for Amici Curiae*

September 29, 2021

\* Counsel of Record

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† Ms. Zwingli is admitted only in California and is practicing law in the District of Columbia pending admission to the D.C. bar and under the supervision of principals of the firm who are members in good standing of the D.C. bar.