No. 20-659

IN THE

# Supreme Court of the United States

LARRY THOMPSON,

*Petitioner*,

v.

POLICE OFFICER PAGIEL CLARK, SHIELD #28472,

*Respondent*.

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

## BRIEF OF *AMICUS CURIAE* LAW ENFORCEMENT ACTION PARTNERSHIP IN SUPPORT OF PETITIONER

MATTHEW D. SLATER
*Counsel of Record*
ALEXIS COLLINS
HANI BASHOUR
JACK H.L. WHITELEY
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2112 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 974-1930
mslater@cgsh.com

## QUESTION PRESENTED

A plaintiff must await favorable termination of criminal proceedings before bringing a Section 1983 action alleging unreasonable seizure pursuant to legal process. Because the plaintiff must also adequately plead and ultimately prove that the defendant engaged in deliberate misconduct, should this Court reject the Second Circuit's rule that the plaintiff show that the criminal proceeding against him has "ended in a manner that affirmatively indicates his innocence," *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018), which focuses on the prosecutor's intent, and instead require only that the proceedings "formally ended in a manner not inconsistent with his innocence," *Laskar v. Hurd*, 972 F.3d 1278, 1293 (11th Cir. 2020), which allows the case to turn on the defendant's actions, and thereby provide a necessary tool for public accountability for deliberate misconduct?

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## BRIEF OF *AMICUS CURIAE* LAW ENFORCEMENT ACTION PARTNERSHIP IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE* [1]

*Amicus curiae* the Law Enforcement Action Partnership (LEAP) is a 501(c)(3) nonprofit composed of police, prosecutors, judges, corrections officials, and other criminal justice professionals calling for drug policy and criminal justice reforms that will make communities safer by focusing law enforcement resources on the greatest threats to public safety, promoting alternatives to arrest and incarceration, addressing the root causes of crime, and working toward healing police community relations. *Amicus curiae's* members are current and former law enforcement professionals with decades of experience in developing and advocating for best practices in the field. *Amicus curiae's* members are frequently called upon to give advice to the Congress and in other public forums on police practices and public safety. Through their leadership roles, they are acutely aware of the importance of public trust

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[1] This brief is filed with the written consent of the respondent through a universal letter of consent on file with the Clerk, and with the consent of petitioner, who received timely notice and has consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund this brief's preparation or submission.

in the police for law enforcement officers to be able to safely and effectively fulfill their responsibilities. *Amicus curiae* is concerned that the rule articulated by the Second Circuit stands as an unnecessary and artificial impediment to holding accountable officers who engage in deliberate acts of fabricating charges or evidence, which in turn undermines public trust in law enforcement. Because the rule is unnecessary and would impede effective policing, we urge the Court to reject it.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Effective law enforcement is dependent on the trust of the communities in which law enforcement officers work. Engendering such trust requires hard work, both through affirmative engagement and dialogue, and through officers meeting high standards of performance. When a law enforcement officer engages in deliberate misconduct, it tears at that essential fabric of trust and undermines effective law enforcement. The pernicious effect is magnified when there is no effective avenue to hold the officer accountable for deliberate misconduct.

Deliberate misconduct is at the heart of a fabricated evidence claim, which is the subject before the Court. For such a claim to proceed, the plaintiff must first plead with particularity facts that if proven would demonstrate that an officer engaged in an act of deliberate misconduct such as falsifying evidence, and must similarly withstand a defense of qualified immunity, which likewise

requires a showing that the officer engaged in a deliberate violation of law. When such allegations are proven at trial, a civil judgment is an important —and often the only viable—form of accountability, which is essential to public trust.

The Second Circuit's rule stands as an artificial and unnecessary impediment to accountability in such cases. It ignores the evidence of unlawful conduct that the plaintiff is required to bring forward, and instead focuses on a prosecutor's intent lying behind the dismissal of the prior criminal case against the plaintiff, which is tangential to whether the plaintiff can make good on the allegations of seizure pursuant to legal process where charges were terminated favorably and not inconsistently with the plaintiff's innocence.

*Amicus curiae* takes no position on whether Petitioner would or should succeed on his claim—that would have been for decision at trial had the trial court not dismissed on the basis of the "affirmative indications of innocence" rule. But barring claims of deliberate unlawful conduct by police officers based on the prosecutor's intent rather than on the underlying conduct will leave victims of misconduct without redress and will feed a narrative that police officers are not accountable for their misconduct, which will undermine public trust in law enforcement. At the same time, because of other pleading requirements applicable to a claim for seizure pursuant to legal process, the Second Circuit's rule is not needed to protect police officers from frivolous claims of misconduct.

Because the Second Circuit's rule is not necessary and will adversely affect the work of law enforcement, *amicus curiae* urges the Court to vacate the judgment and reverse on the standard applicable to determining whether the prior criminal charge was terminated favorably.

## ARGUMENT

### I. ENSURING PUBLIC TRUST IS ESSENTIAL FOR POLICE TO DO THEIR JOBS EFFECTIVELY

Police departments cannot function without public trust and legitimacy. Policing is difficult and dangerous, and "we need—we depend upon—the cooperation of the citizens we protect." *Oversight Hearing on Police Practices, Before the H. Comm. On the Judiciary*, 116th Cong. (2019) (statement of Patrick Yoes, National President of the Fraternal Order of Police). The cooperation of citizens, in turn, depends upon their trust in law enforcement:

> There is considerable evidence that when people regard the particular agents of the legal system whom they personally encounter as acting in a way they perceive to be fair and guided by motives that they infer to be trustworthy, they are more willing to defer to their directives and decisions.

Tom R. Tyler and Yuen J. Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* 7 (2002) ("Tyler and Huo"). According to researchers, "although the threat of punishment is

always in the background when dealing with legal authorities, most people accept their decisions, not only, or even primarily, because they fear them but because they view their actions as reasonable and appropriate." *Id.* at 213 (internal citations omitted). Conversely, a "loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime." U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 80 (2015) (citations omitted). "Officers can only police safely and effectively if they maintain the trust and cooperation of the communities within which they work . . . ." Statement of Interest of the United States, at 10, *Floyd v. City of New York,* 959 F.Supp.2d 540 (S.D.N.Y. 2013) (No. 1:08-cv-01034).

Citizens who trust and respect their local police are also "more likely to obey the law" in the first place, which "gives the police greater flexibility to concentrate their resources on serious crime and disorder hot spots, on repeat offenders, and on other strategies for making significant improvements in public safety." Tom Tyler, Police Executive Research Forum, U.S. Dep't of Justice, Bureau of Justice Assistance, *Legitimacy and Procedural Justice: A New Element of Police Leadership* 8 (Craig Fischer, ed.) (2014) ("*Legitimacy and Procedural Justice*"). Moreover, research indicates that public support for increases to police funding is "primarily linked to judgments about how the police treat[] people, not to whether they [are] effective in controlling crime." Tyler and Huo, 183 (discussing the results of a 1997 study of 346 Oakland, California residents living in

high-crime areas). For all these reasons, "[b]eing viewed as fair and just is critical to successful policing in a democracy. When the police are perceived as unfair in their enforcement, it will undermine their effectiveness." Institute on Race and Justice, Northeastern University, U.S. Dep't of Justice, Office of Community Oriented Policing Servs. *COPS Evaluation Brief No. 1: Promoting Cooperative Strategies to Reduce Racial Profiling* 21 (2008) ("Institute on Race and Justice").

Law enforcement professionals understand this intimately. "Because the effectiveness of police operations often depends at least in part on the public's willingness to provide information to and otherwise help the police, police leaders increasingly are seeing legitimacy and procedural justice as necessary conditions of success . . . ." *Legitimacy and Procedural Justice* 2. Similarly, in a survey of more than 8,000 police officers, 65 percent agreed that "it is very useful for departments to require officers to show respect, concern and fairness when dealing with the public." Rich Morin et al., Pew Research Ctr., *Behind the Badge* 72 (2017). Unfortunately, however, 72 percent of surveyed officers did *not* agree that "officers who consistently do a poor job are held accountable." *Id.* at 40.

Viable avenues of accountability for police misconduct are important to ensure public trust. "A significant factor in [public] mistrust is that police conduct is infrequently reviewed, and as a result, police officers and police departments are not held accountable for abuses." Jonathan M. Smith,

*Closing the Gap Between What Is Lawful and What Is Right in Police Use of Force Jurisprudence By Making Police Departments More Democratic Institutions*, 21 Mich. J. Race & L. 315, 317 (2015). "The ultimate goal in police accountability is to strengthen trust and legitimacy between law enforcement and the community." *Oversight Hearing on Police Practices, Before the H. Comm. On the Judiciary*, 116th Cong. (2019) (statement of Gina Hawkins, National Treasurer of the National Organization of Black Law Enforcement Executives (NOBLE) and Chief of Police for the Fayetteville, North Carolina Police Department). "It will be difficult for law enforcement to address systemic challenges without a sustained commitment to accountability." *Hearing on Police Use of Force and Community Relations Before the S. Comm. on the Judiciary,* 116th Cong. (2020) (statement of Art Acevedo, President of the Major Cities Chiefs Association, Chief of Miami Police Department, Former Chief of Houston and Austin, Texas Police Departments) ("Acevedo Testimony").

"Given the potency of negative experiences, the police cannot rely on a majority of positive interactions to overcome the few negative interactions." Institute on Race and Justice at 21. Instead, abusive police officers must be held accountable—and aggrieved members of the public must see them be held accountable.

"Community trust and cooperation are essential to effective policing. . . . Accountability and transparency are critical to building public trust and

legitimacy." U.S. Dep't of Justice, Office of the Inspector General, *Top Management and Performance Challenges Facing the Department of Justice* 1 (2020) (listing "strengthening public confidence in law enforcement" among the Justice Department's "top management and performance challenges" for 2021). Without viable avenues of accountability for police misconduct, police cannot sustain the public trust they need to do their jobs.

## II. THE SECOND CIRCUIT'S "AFFIRMATIVE INDICATIONS OF INNOCENCE" REQUIREMENT IS AN UNNECESSARY IMPEDIMENT TO A NECESSARY AVENUE OF ACCOUNTABILITY

The "affirmative indications of innocence" requirement is an artificial impediment to claims that, by definition, adequately allege deliberate police misconduct. The rule is decisive only in cases that meet that standard; if not, they could be dismissed on the basis of pleading deficiencies or other doctrines such as qualified immunity. As a result, the Second Circuit's rule is not needed to protect police officers who have acted in good faith, and instead serves to prevent a needed avenue of accountability to redress claims of egregious misconduct.

### A. The Requirement Is Not Necessary to Protect Good Faith Police Conduct

The favorable termination requirement makes a difference only in cases in which the complaint includes well-pleaded factual allegations of

deliberate wrongful conduct that clears the qualified immunity threshold.

First, like any civil claim, Fourth Amendment allegations must offer "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Claims for seizures pursuant to legal process that do not pass this test are properly dismissed on that basis. Fed. R. Civ. P. 12(b)(6). The Second Circuit's rule thus makes a difference only where claims of misconduct are well pleaded.

Next, Section 1983 claimants must allege facts that are not subject to qualified immunity, which has been said to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Moreover, a claim for seizure pursuant to legal process requires allegations of intentional or reckless wrongful conduct to state a claim. *See, e.g.*, *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 916 (2017) ("Manuel's complaint alleged that the City violated his Fourth Amendment rights . . . by arresting him at the roadside without any reason . . . and . . . 'by detaining him in police custody' for almost seven weeks based entirely on made-up evidence."); *McDonough v. Smith*, 139 S. Ct. 2149, 2153–54 (2019) ("McDonough's complaint alleges that Smith then set about scapegoating McDonough . . . Smith allegedly fabricated evidence in order to inculpate him.").

The claim must therefore be supported by factual allegations evincing intentional or patently evident illegality. *See, e.g.*, *Coggins v. Buonora*, 776 F.3d 108, 114 (2d Cir. 2015) ("[T]he alleged falsification of evidence and the related conspiracy, if true, constitute a violation of clearly established law, and no objectively reasonable public official could have thought otherwise."); *Halsey v. Pfeiffer*, 750 F.3d 273, 295 (3d Cir. 2014) ("Analogous precedent should have informed appellees or any reasonable state actor that, by fabricating evidence for use in a criminal prosecution, a state actor would violate a defendant's constitutional rights."); *Livers v. Schenck*, 700 F.3d 340, 354 (8th Cir. 2012) ("It was clearly established by 2006 that the Fourteenth Amendment's guarantee of due process is violated by the manufacture of false evidence in order to falsely formulate a pretense of probable cause.") (citations omitted); *Wilkins v. DeReyes*, 528 F.3d 790, 805 (10th Cir. 2008) ("If the officers intentionally coerced false statements . . . the law clearly prohibited the use of those statements to seek warrants for Plaintiffs' arrests."); *Washington v. Wilmore*, 407 F.3d 274, 283 (4th Cir. 2005) (The "constitutional right not to be deprived of liberty as a result of the fabrication of evidence by an investigating officer . . . was clearly established in 1983, when the events relevant to this litigation took place."); *Devereaux v. Abbey*, 263 F.3d 1070, 1074–75 (9th Cir. 2001) ("[T]here is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government."); *Limone v. Condon*, 372 F.3d 39, 44–45 (1st Cir. 2004) ("[I]f any concept

is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit.").

Thus, the Second Circuit's rule makes a difference only in cases where the plaintiff can otherwise meet these heightened standards to establish deliberate misconduct. But instead of focusing on the defendant's conduct, the Second Circuit's rule typically looks to ascertain the intent of the prosecutor in dismissing charges. And as demonstrated in this case, that may be a difficult exercise and, considering that most dismissals are unexplained, will frequently be inconclusive. Brief of Current and Former Prosecutors as *Amici Curiae* on Petition for Writ of Certiorari, at 10-11. As petitioner notes, the exercise is made more complicated by the absence of any objective standards for "indications of innocence"; and the prosecutor's subjective intent, even if it can be discerned, surely cannot be dispositive on that point.[2]

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[2] *See* Brief of Current and Former Prosecutors as *Amici Curiae* on Petition for Writ of Certiorari, at 6-11. It might, in theory, be useful if prosecutors were required to state on the record if charges were dismissed because of unlawful police conduct or actual innocence, but we know of no constitutional basis on which the Court could require such a statement, and there are a host of practical and institutional reasons that make it rare for such statements to be made. It is hard to imagine that an individual prosecutor would be authorized to make such a statement unilaterally, which means that already strained

As a result, the Second Circuit's rule unnecessarily protects just those officers who are alleged—with specificity—to have intentionally or recklessly violated well-established constitutional rights. It thus serves as an artificial barrier to accountability for deliberate wrongful conduct.

### B. The Rule Is Applied To Immunize Alleged Acts of Deliberate Wrongful Conduct

Experience under the affirmative indications of innocence requirement demonstrates that the rule serves to immunize deliberate wrongful conduct. The kinds of misconduct at issue in these cases frequently fall within two categories, of which the following cases are examples.

Personal Retaliatory Acts by Government Officials

- Plaintiff alleged that his wife, who was romantically involved with a police officer, made a false police report that led to plaintiff's arrest. Then, while plaintiff was awaiting a hearing on pending charges, both his wife and her police officer paramour falsely stated that the plaintiff had threatened them, leading to further charges. While these charges were pending, the wife's paramour stopped the plaintiff's car and issued him three separate traffic tickets. The criminal charges and traffic tickets were later dismissed.

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prosecutorial resources would need to be burdened by additional layers of administration and bureaucracy to review proposed dispositions. And the practical realities of police-prosecutor relations may make such a process fraught.

Plaintiff's claim alleging fabricated evidence was dismissed on the basis of the affirmative indications of innocence rule. *Lanning v. City of Glens Falls*, 908 F.3d 19, 23 (2d Cir. 2018).

- Plaintiff, a train conductor, alleged that he had sought help from transit police officers in dealing with a rowdy customer. He claimed that the officers told him they could not help, and that he replied that they were "useless." Plaintiff alleged that the officers responded by tackling, handcuffing, and arresting him. He spent a day in jail, and was charged with a variety of offenses. The district attorney later dismissed the charges without stating the reasons. The court granted summary judgment on plaintiff's Section 1983 claim because the plaintiff could not "demonstrate favorable termination of the criminal proceedings." *Moran v. MTA Metro-North R.R. Co.*, No. 19 CIV. 3079 (AT), 2021 WL 1226771, at *5 (S.D.N.Y. Mar. 31, 2021).

Fabricating or Withholding Evidence

- Plaintiff, a corrections officer, alleged that his elderly father had assigned him a power of attorney, only to later revoke it. Police officers obtained a search warrant of the plaintiff's property based on an affidavit in which they falsely averred that he had foisted the power-of-attorney documents on his unwitting father, even though they knew that this was false, and omitted other facts that they knew were true. Plaintiff was not allowed to proceed with his

claim because of the affirmative indications of innocence rule. *Jordan v. Town of Waldoboro*, 943 F.3d 532, 541 (1st Cir. 2019).

- Plaintiff alleged that undercover officers wrongfully accused him of soliciting prostitution. He alleged that after he declined the offer of an officer posing as a prostitute, he was dragged out of his vehicle, arrested, and charged with solicitation on the basis of a false police report. The prosecution moved to dismiss the case against him on the day of trial, without stating a reason. Although the district court later concluded that he had "pleaded a colorable Fourth Amendment violation," it dismissed his case because he could not show that "the termination of the criminal case tended to show [his] innocence." *Mehari v. District of Columbia*, 268 F. Supp. 3d 73, 82-83 (D.D.C. 2017).

## III. THE SECOND CIRCUIT'S RULE MAKES IT HARDER FOR POLICE DEPARTMENTS TO DO THEIR JOBS

The Second Circuit's rule needlessly shuts off avenues of accountability for deliberate police misconduct by foreclosing legal-process seizure claims notwithstanding plaintiffs' allegations about how and why the charges against them came to be brought, and even if the dismissal of criminal charges was consistent with the plaintiffs' innocence, if there were insufficient "indications of innocence" accompanying the dismissal. This

diminishes public trust in law enforcement and makes police officers' jobs more difficult.

There are no other procedures or avenues of redress that could realistically mitigate the harm caused by the Second Circuit's rule. Regrettably, internal disciplinary procedures are not an adequate alternative for achieving accountability and public trust. Procedural requirements and complications make it difficult to punish misconduct, and can shield disclosure of the reasons for discipline even when it is levied. As a result, even when officers are terminated for egregious misconduct, they can often find new jobs in other departments that are unaware of their histories, because their disciplinary records are shielded under state law.[3] Police departments thus continue to encounter "the issue of officers who have been terminated with cause only to get rehired by another department." Acevedo Testimony at 6. Such individuals "have exhibited troubling patterns of behavior that clearly do not meet the high standards of our profession, and too often engage in further misconduct at their new department. They

[3] It is often relatively easy for offending officers to find jobs with new departments that are unaware of their histories. *See* Ben Grunwald and John Rappaport, *The Wandering Officer*, 129 Yale L.J. 1676, 1771 (2020) ("In any given year over the last three decades, an average of roughly 1,100 full-time law-enforcement officers in Florida walk the streets having been fired in the past, and almost 800 having been fired for misconduct, not counting the many who were fired and reinstated in arbitration."). This is because "many states and local jurisdictions have laws that shield disciplinary records and misconduct complaints lodged against an officer." Acevedo Testimony at 6.

undermine efforts to build trust with the public and frequently overshadow the outstanding work of good officers across our nation." *Id.*[4]

Civil trials, in contrast, result in a public accounting and record on which subsequent employers could rely. *See* Acevedo Testimony at 6 ("[M]ore transparency . . . [in] hiring. . . will benefit each department and is a critical component of community trust and confidence."). Allowing serious charges of seizure pursuant to legal process to proceed in the courts thus not only allows for redress, but reduces the risk that an officer who commits serious misconduct will be hired by another police force.

Criminal prosecutions are also not an adequate alternative. Prosecution is not necessarily appropriate to redress fabricated evidence and in any event is rare. *See, e.g.*, Steven Puro, *Federal Responsibility for Police Accountability through*

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[4] Policing is harmed each time officers offend again. *See, e.g.*, CBS News, *Push to Keep "Gypsy Cops" With Questionable Pasts Off the Streets* (Sept. 27, 2016), https://www.cbsnews.com/news/gypsy-cops-with-questionable-pasts-hired-by-different-departments-lack-of-oversight-police/. The presence of a serial offender on the force may lead to the dismissal of convictions, diminishing the hard work of good-faith officers in the process. *See, e.g.*, Tom Jackman, *Fairfax Seeks to Dismiss 400 Convictions in Cases Brought by One Officer*, Wash. Post (April 16, 2021), https://www.washingtonpost.com/dc-md-va/2021/04/16/convictions-dismiss-jonathan-freitag-fairfax/ ("Troubled officers leaving one department and then turning up at another has been cited by justice reform advocates as a problem with policing.").

*Criminal Prosecution*, 22 St. Louis U. Pub. L. Rev. 95, 102 (2003) ("Successful federal criminal prosecution against individual officers is difficult to accomplish."). Possible reasons include that "[p]rosecutors have no effective mechanism to report police perjury and misconduct" and that "[p]rosecution of excessive use of force by police officers and other misconduct occurs only when there are referrals from police departments." Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 Va. J. Soc. Pol'y & L. 305, 311-313 (2001). Whatever the reasons may be, the rarity of prosecutions diminishes their efficacy as an aid to police departments in dealing with offending officers.

Civil court cases are thus an important tool for accountability and can help to deter egregious misconduct. Requiring "affirmative indications of innocence" for such claims would establish an artificial barrier to meritorious lawsuits for seizures pursuant to legal process and undermine public accountability and the trust it engenders.

To be clear, *amicus curiae* takes no position on whether petitioner can satisfy his burden of proof on his Fourth Amendment claim. Rather, *amicus curiae* urges the Court to allow the claim to be adjudicated on the strength of its facts, of course premised on a favorable disposition of the underlying criminal charges, and not on the artificial and elusive standard of whether that disposition was accompanied by "affirmative indications of innocence." If a claim for seizure

pursuant to legal process is adequately supported factually, it should be allowed to proceed so long as the disposition of the underlying charges was not inconsistent with the plaintiff's being innocent of those charges.

## CONCLUSION

For the foregoing reasons, the Court should vacate the judgment and reverse the Second Circuit on the standard for determining favorable disposition of the criminal charge underlying a claim for seizure pursuant to legal process.

Respectfully submitted,

MATTHEW D. SLATER
*Counsel of Record*
ALEXIS COLLINS
HANI BASHOUR
JACK H.L. WHITELEY
CLEARY GOTTLIEB STEEN
& HAMILTON LLP
2112 Pennsylvania
Avenue, NW
Washington, DC 20037
(202) 974-1930
mslater@cgsh.com

*Counsel for* Amicus Curiae

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