No. 21-1538

In the Supreme Court of the United States

CLEVELAND COUNTY, NORTH CAROLINA, AKA CLEVELAND COUNTY EMERGENCY MEDICAL SERVICES,
Petitioner,

v.

SARA B. CONNER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

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

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

AMANDA KELLAR KARRAS
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
51 Monroe Street, Suite 404
Rockville, MD 20850
(202) 466-5424
akarras@imla.org

HEIDI K. WILBUR
Counsel of Record
FOX ROTHSCHILD LLP
1225 17th Street, Suite 2200
Denver, CO 80202
(303) 383-7668
HWilbur@foxrothschild.com

KIP D. NELSON
PATRICK M. KANE
FOX ROTHSCHILD LLP
230 N. Elm Street, Suite 1200
Greensboro, NC 27401
(336) 378-5200
KNelson@foxrothschild.com
PKane@foxrothschild.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

INTEREST OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") is a non-profit, non-partisan professional organization comprised of more than 2,500 members. The membership is composed of local government entities, including cities, counties, and subdivisions thereof (as represented by their chief legal officers), state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and state supreme and appellate courts.

This case is of significant concern to the nearly 40,000 local governments nationwide, as a clear split in the lower courts has developed on an important issue of federal law implicating local governmental employers. Public employees in Syracuse, New York

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for the parties received a notice of IMLA's intention to file an *amicus curiae* brief at least 10 days prior to the deadline to file the brief and consented to the filing.

may not bring overtime gap-time claims against their employers under the Fair Labor Standards Act ("FLSA"), while employees working for Montgomery County, Maryland and Glendale, Arizona may do so under the exact same circumstances and the exact same federal law. Even more problematic, public employers in the 34 states and the District of Columbia that are not covered by the circuit split are left in limbo without any degree of certainty as to whether overtime gap-time claims are cognizable under the FLSA—making forecasts and budgets for possible litigation in this area akin to throwing darts at a dartboard. Petitioner ably demonstrates in its petition why this Court should grant certiorari, and IMLA supports petitioner's arguments in full. IMLA writes separately to address the negative impact that the Fourth Circuit's opinion will have on local governmental employers, underscoring the need for this Court's intervention.

SUMMARY OF ARGUMENT

The decision below, along with the Ninth Circuit's opinion in *Donovan v. Crisostomo*, 689 F.2d 869 (9th Cir. 1982), significantly hinders municipal governments' ability to carry out important governmental functions such as police, fire, and emergency services. The Fourth and Ninth Circuits have held that the FLSA authorizes employees to file overtime gap-time claims (seeking non-overtime wages owed under an employment agreement) for weeks when the employee has worked overtime. By doing so, these Circuits directly split from the Second Circuit's contrary holding and create a new, atextual right of

action under the FLSA that imposes significant burdens on local governments.

This outcome is particularly problematic for local governmental employers, who already must strike a difficult balance in ensuring adequate and flexible coverage of emergency service providers under significant budgetary constraints. Local governments are an easy target for gap-time lawsuits because emergency personnel compensation agreements typically provide for flexibility in scheduling, which in turn may cause disagreements and confusion over what non-overtime work is covered. The Fourth and Ninth Circuits have exacerbated the problem by transforming a state-law contract dispute into an FLSA collective action with the attendant potential for liquidated damages and attorney fees, while also implicating important federalism concerns. Local governments have a strong interest in having state-law claims, involving entirely localized employment disputes, adjudicated in state court, rather than having them converted to federal claims through vague, extra-textual readings of a federal statute. The decisions of the Fourth and Ninth Circuits also reduce local governments' ability to utilize flexible scheduling for emergency personnel, which has long been recognized as a source of concern when applying the FLSA to local governments.

If overtime gap-time claims are allowed to proceed under the FLSA, it will constitute a major expansion of federal jurisdiction into an area that is best resolved by state employment and contract claims. The Fourth Circuit's decision—not based on any statutory

authority—has deepened an existing split of authority that has already caused substantial uncertainty to local governmental employers. The petition for a writ of certiorari should be granted to clarify the scope of the FLSA and resolve the split.

ARGUMENT

I. The split in the lower courts on the viability of overtime gap-time claims is creating widespread confusion over the scope of the FLSA.

The substantive text of the FLSA requires employers to do only two things: 1) pay a minimum wage and 2) pay overtime wages. 29 U.S.C. §§ 206, 207; *see also Moreau v. Klevenhagen*, 508 U.S. 22, 25 (1993) ("Congress enacted the FLSA in 1938 to establish nationwide minimum wage and maximum hours standards."); *Monahan v. Cnty. of Chesterfield*, 95 F.3d 1263, 1267 (4th Cir. 1996) ("The substantive sections of the FLSA, narrowly focusing on minimum wage rates and maximum work hours, bear out its limited purposes.") (quoting *Lyon v. Whisman*, 45 F.3d 758, 764 (3d Cir. 1995)). The issue presented in the petition concerns claims that "fall between these two provisions of the FLSA," generally known as "gap-time" claims. App. 13a. A gap-time dispute arises when employees seek to recover wages for "time that is not [directly] covered by the [FLSA's] overtime provisions because it does not exceed the overtime limit, and to time that is not covered by the [FLSA's] minimum wage provisions because . . . the employees are still being paid a minimum wage when their salaries are averaged across their actual time worked." *Davis v. Abington Mem'l*

Hosp., 765 F.3d 236, 243 (3d Cir. 2014) (quoting *Adair v. City of Kirkland*, 185 F.3d 1055, 1062 n.6 (9th Cir. 1999)). For example, in a typical gap-time claim, an employee might allege that she was paid for all overtime and may have received wages exceeding minimum wage, but her employer did not pay the contracted rate for hours she worked before hitting the overtime threshold.

As the decision below acknowledges, the FLSA itself does not contain a provision that governs claims for unpaid gap time. App. 13a. The FLSA "simply does not consider or afford a recovery for gap-time hours." *Lundy v. Cath. Health Sys. of Long Island Inc.*, 711 F.3d 106, 116 (2d Cir. 2013).

Despite this statutory silence on *any* form of gap-time claims, there is nonetheless a split in the lower courts as to whether the FLSA provides a remedy for a *subset* of gap-time claims: overtime gap-time claims. Courts have recognized "two types of gap time—pure gap time and overtime gap time." App. 14a. Both types of claims seek a remedy for unpaid straight time, but the type of gap time at issue turns on whether the employee worked overtime in a particular week. "In pure gap time claims, the employee seeks to recover for unpaid straight time in a week in which they worked no overtime. In overtime gap time claims, the employee seeks to recover unpaid straight time for a week in which they *did* work overtime." *Id.*

Courts have been "united in rejecting pure gap time claims under the FLSA," holding that "there is no cause of action under the FLSA for pure gap time when there is no evidence of a minimum wage or maximum hour

violation by the employer." *Id*. (citing *Monahan*, 95 F.3d at 1280); *see also Nakahata v. N.Y.-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 201 (2d Cir. 2013) ("[T]he FLSA is unavailing where wages do not fall below the statutory minimum and hours do not rise above the overtime threshold."). Courts' reasoning for rejecting pure gap-time claims has generally been based on the FLSA's textual silence on the issue. For example, the Third Circuit explained that pure gap-time claims "are not cognizable under the FLSA, which requires payment of minimum wages and overtime wages only." *Davis*, 765 F.3d at 244. Likewise, the Fourth Circuit described the prospect of a pure gap-time claim as "a major expansion of federal jurisdiction in an area that is more appropriate for state court adjudication under state employment and contract law." *Monahan*, 95 F.3d at 1267.

Despite this uniform rejection of "pure" gap-time claims, and despite the acknowledgement by the Fourth Circuit of the federalism concerns that would arise in recognizing those claims, some courts have decided that the FLSA's complete silence on the issue is not dispositive when it comes to overtime gap-time claims. App. 14a ("The FLSA does not include language about overtime gap time, but that does not end our inquiry.") In the decision below, the Fourth Circuit joined the Ninth Circuit in usurping Congress' role in writing legislation by concluding that the FLSA should allow employees to seek unpaid straight-time wages for weeks in which they work overtime. App. 25a; *Donovan*, 689 F.2d at 876.

In contrast, the Second Circuit has rejected this notion, holding that the FLSA does not provide for overtime gap-time claims. *Lundy*, 711 F.3d at 116. The Fifth Circuit has not addressed the issue, but district courts within that Circuit have split on the availability of overtime gap-time claims—adding even further confusion to this area of the law. *See Banks v. First Student Mgmt. LLC*, 237 F. Supp. 3d 397, 403 (E.D. La. 2017) (citing examples of the split within the Fifth Circuit). Similarly, the Sixth Circuit has not weighed in on the question, but its district courts have adopted *Lundy*'s approach and found that "claims for gap time are not cognizable under the FLSA, regardless of whether Plaintiffs seek compensation for pure gap time or overtime gap time." *Athan v. U.S. Steel*, 364 F. Supp. 3d 748, 755 (E.D. Mich. 2019).

Because this case exemplifies the deepening confusion and conflict on the question of whether the FLSA provides a remedy for straight time owed for a week in which an employee works overtime, the Court should grant the petition for a writ of certiorari.

II. The decision below creates significant costs and administrative challenges for local governments.

There are nearly 40,000 local governments in the United States, including counties, municipalities, and townships. Gap-time claims are particularly prevalent against these local governmental employers; therefore, the viability of overtime gap-time claims is of great importance to the *amicus curiae* and its members.

Local government entities must balance FLSA compliance with budgetary constraints and the need to ensure adequate and flexible coverage of emergency service providers who do not work standard, 40-hour workweeks. *See, e.g.*, *Monahan*, 95 F.3d at 1276–78 (police); *Conzo v. City of N.Y.*, 667 F. Supp. 2d 279, 281–82 (S.D.N.Y. 2009) (paramedics); *Koelker v. Mayor & City Council of Cumberland*, 599 F. Supp. 2d 624, 627–28 (D. Md. 2009) (firefighters). As a result of these competing interests, local government entities often establish compensation plans that provide for flexibility in scheduling and predictability in pay while remaining within the FLSA's framework for minimum wage and maximum hours. *See Monahan*, 95 F.3d at 1278 ("Payment plans that comply with the FLSA, but yet are designed with the flexibility inherent to the law enforcement exemption to explicitly avoid the incurment of overtime hours are not unlawful."). Unfortunately, overtime gap-time claims often arise from disagreement about the terms of these flexible compensation plans.

For example, the law enforcement officers in *Monahan* worked a 24-day cycle with an overtime threshold of 147 hours per cycle. *Id.* at 1265. The county typically scheduled the officers to work between 135 and 144 hours per cycle. *Id*. at 1265–66. The county gave the officers an annual salary, paid biweekly, and used the annual salary to calculate an hourly rate that would govern overtime for any hours worked beyond the 147-hour threshold. *Id*. at 1266. The county also paid the officers overtime for various special activities such as extra shifts and court appearances, *even if the officers did not reach the overtime threshold* during the

pay cycles when such activities occurred. *Id*. The *Monahan* gap-time issue turned on whether the annual salary was intended to cover all non-overtime hours worked. The officers claimed that "because the County regularly scheduled them for 135 hours per cycle, instead of the 147 maximum allowed, their salary only compensated them for those 135 hours and that they [were] therefore due the gap compensation [for the non-overtime work performed between 135 and 147 hours] when overtime hours were worked." *Id*. at 1276.

As *Monahan* exemplifies, local government entities become subject to gap-time claims when there is disagreement about straight time owed under a contract or compensation plan. Because these compensation plans often apply to entire categories of employees within a local government (such as when there is a collective bargaining agreement), uncertainty about gap-time pay issues can trigger large-scale collective action cases against these local governments. The uncertainty in the law subjects these governmental employers (and their tax-paying citizens) to enormous costs when they are forced to litigate gap-time claims on a collective basis. *See, e.g.*, *Newton v. Schwarzenegger*, No. C 09-5887 VRW, 2011 WL 13261986, at *1 (N.D. Cal. Jan. 14, 2011) (involving a gap-time suit by more than 11,000 correctional officers against California); *Conzo*, 667 F. Supp. 2d at 281 (involving a class of nearly 1,500 paramedics and EMTs). Further, these governmental employers face these costly class-wide federal lawsuits even though their conduct did not violate, or even implicate, the FLSA's minimum-wage and overtime rules. *See Newton*, 2011 WL 13261986, at *3–4 (holding that a

furlough program and its resulting decrease in the rate paid for straight time was a salary reduction but not a violation of the FLSA); *Conzo*, 667 F. Supp. 2d at 287 (holding that the plaintiffs could not state a gap-time claim because a collective bargaining agreement compensated employees for all non-overtime hours).

With nearly 40,000 local governments in the United States, the vast majority of which having responsibility for hiring and paying critical emergency service providers who work non-traditional schedules, gap-time issues pose a major threat of liability and uncertainty to municipal employers and their budgets. Decisions like the Fourth Circuit opinion below transform what should be a contract dispute into an FLSA collective action, bringing with it the risk of liquidated damages and attorney fees that would not otherwise be at issue. *See* 29 U.S.C. § 216. With potential classes of thousands of employees seeking liquidated damages, a single case could easily cost millions of dollars. Unlike the federal government that may operate at a deficit, local governments are usually required by state law to balance their budgets. Liquidated damage awards from FLSA litigation can be crippling, particularly for smaller local governments that operate on fixed budgets.

Additionally, because gap-time cases are, at bottom, contract disputes, to avoid collective-action cases local governmental employers will have to schedule and pay employees based on overly broad interpretations of their own contracts. *See, e.g.*, *Monahan*, 95 F.3d at 1276 (noting the absurdity of the plaintiffs' claim, which would not exist if the county had instead

scheduled the officers to work the maximum 147 hours per cycle instead of scheduling them to work less hours per cycle). The inconsistent treatment of pure gap-time and overtime gap-time claims also creates administrative complications for local governments that will need to choose between vacillating interpretations and applications of employment agreements depending on whether a particular employee has worked any overtime in a particular week.

Moreover, the decision below significantly reduces the ability of local governmental employers to utilize flexible scheduling models for their employees. This issue is of particular importance because these local governments seek to provide their citizens with sufficient coverage by emergency services personnel like law enforcement, firefighters, and paramedics. As the *Monahan* court recognized, if gap-time claims are broadly permitted, "any time a government employer, attempting to balance budgetary constraints with FLSA compliance, adjusts or reduces the hours its police officers work in a given pay cycle, the employer would face an FLSA straight time claim." 95 F.3d at 1276. The decision below also lays the groundwork for plaintiffs to assert FLSA gap-time claims whenever budgetary constraints force a government employer to make difficult overall compensation reductions. *See* App. 23a (opining that a gap-time claim can exist whenever there is an underpayment of the straight-time wages that have been promised to an employee). Local governments are already attractive targets for litigation; allowing these claims will make those local governments facing budget cuts—the ones who can

least afford to wear this litigation bullseye—even more attractive targets. This, in turn, will put further strain on local governments' ability to carry out some of their most important governmental functions.

This outcome is not the design of the FLSA. As demonstrated by legislative history and judicial precedent, each branch of the federal government has recognized the burden that the FLSA places on local governmental employers' ability to carry out important governmental functions. *See Moreau*, 508 U.S. at 25–28 (describing efforts to ameliorate concerns about the FLSA's burdens on public employers). Indeed, the FLSA did not apply to public-sector employees at all until Congress passed a series of amendments that subjected states and local governments to the FLSA's requirements. At first, the statute applied on only a limited basis (Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 831 (1966)), but its application was subsequently broadened (Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(1)-(2), 88 Stat. 58-59 (1974)). *See Christensen v. Harris Cnty.*, 529 U.S. 576, 578–79 (2000). Following the 1974 amendments, however, this Court held that Congress did not have the power to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." *Nat'l League of Cities v. Usery*, 426 U.S. 833, 851–52 (1976) (limiting application of the FLSA to States and political subdivisions). In 1985, this Court revisited and overturned its decision in *National League of Cities*, and the FLSA again became fully applicable to local governmental employers. *Garcia v. San Antonio Metro.*

Transit Auth., 469 U.S. 528, 556–57 (1985). But even in *Garcia*, the Court acknowledged that the "States occupy a special and specific position in our constitutional system." *Id.* at 556.

Further recognizing the FLSA's unique challenges for local governmental employers, Congress passed the Fair Labor Standards Amendments of 1985, Pub. L. No. 99–150, 99 Stat. 787 (1985). *See Moreau*, 508 U.S. at 25–26. The 1985 Amendments "reflect a desire to apply the FLSA to state and local government employers while at the same time making some of its requirements less burdensome given their unique situation." *Misewicz v. City of Memphis*, 771 F.3d 332, 338–39 (6th Cir. 2014). Following the 1985 Amendments, the Department of Labor promulgated regulations to further ease the burden on local governmental employers by providing them greater flexibility in FLSA compliance than might be available to private employers. *Id.* at 339 (citing 29 C.F.R. § 553 (Application of the Fair Labor Standards Act to Employees of State and Local Governments)); Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2012-01 (Jan. 16, 1987) (to be codified at 29 C.F.R. § 553). For example, the regulations include partial overtime pay exemptions for fire protection and law enforcement personnel, as well as instructions for calculating overtime for such employees in a manner more compatible with their unique work schedules. 29 C.F.R. §§ 553.200 to 553.233.

In summary, the recognition of overtime gap-time claims will transform garden-variety contract claims

that belong in state court into FLSA collective-action claims that impose significant burdens and costs on local governmental employers. These employers will be faced with increased payroll, administrative, and legal costs, increased liability exposure, and increased uncertainty, along with decreased flexibility in scheduling emergency personnel. Congress designed the FLSA to help local governments avoid these very same issues. The writ of certiorari should be granted to provide guidance to already overburdened local governmental employers.

III. This case implicates important federalism questions.

According to its plain text, the FLSA only provides for recovery of two types of wages: minimum wage and overtime pay. *See* 29 U.S.C. §§ 201-19; *Lundy*, 711 F.3d at 116; *Monahan*, 95 F.3d at 1267. As widely acknowledged by courts that have considered the issue (including courts that have recognized overtime gap-time claims), "gap time" is time that is *not covered* by the FLSA's overtime and minimum-wage provisions. App. 13a; *Davis*, 765 F.3d at 243; *Adair*, 185 F.3d at 1062 n.6. By recognizing a claim for overtime gap-time wages, the Fourth and Ninth Circuits created a new private right of action under the FLSA.

These claims sound in contract. Yet, breach-of-contract claims are typically the domain of state courts and state law. Courts recognizing overtime gap-time claims have made breach of an employment agreement (express or implied) an essential element of an FLSA claim, thus injecting serious federalism concerns into the equation. The decision below illustrates this point

in announcing the following standard for a sufficiently pled overtime gap-time violation: 1) the employee worked overtime in at least one week; and 2) the employee was not paid all straight-time wages due under the employment agreement or applicable statute. *See* App. 25a. The Fourth Circuit clarified that the second element asks whether "*all* the straight time compensation" has been paid pursuant to the relevant employment agreement, thus requiring the court to gain "a foundational understanding of the terms of the employment agreement." App. 26a. By turning a state-law breach-of-contract claim into a federal class action, when the text of the FLSA is silent on that issue, the Fourth and Ninth Circuits have doubly trampled on states' rights by allowing these claims to be brought in federal court instead of state court and allowing states' political subdivisions to be sued for double and treble damages without any clear congressional intent for such a result.

Other courts recognizing overtime gap-time claims have also adopted breach of contract as an element of the federal claim. In *Monahan*, to determine whether the officers had a claim for straight time under the FLSA, the court explained that it "must first determine the terms of the employment agreement" to analyze whether the "employees have been properly compensated by salary for all non-overtime hours in accordance with the employment terms to which they have either expressly or impliedly agreed." 95 F.3d at 1272; *see also Conzo*, 667 F. Supp. 2d at 287 (describing the first step as "determining whether plaintiffs' employment contract compensates them for all non-overtime hours"); 29 C.F.R. § 778.322 (providing a

calculation for salary based on "the understanding of the parties").

The decision below describes overtime gap-time claims as a "species of overtime violation." But its link to the FLSA's overtime requirements is tenuous at best, relying entirely on an administrative opinion that is untethered to the plain text of the FLSA. App. 21a; *see also* Pet. at 21–22. While courts have unanimously held that a pure gap-time claim is not cognizable and would be a "major expansion of federal jurisdiction," if an employee works a single minute of overtime in any week, that employee suddenly has a viable federal claim for overtime gap time even though the same "major expansion of federal jurisdiction" is at play. *See Monahan*, 95 F.3d at 1267, 1280; *see also Spencer v. First Student Mgmt. LLC*, No. 15 C 9069, 2016 WL 693252, at *2 (N.D. Ill. Feb. 22, 2016) ("Contrary to the Department of Labor's interpretation of the law . . . I cannot accept the idea that the FLSA implicitly provides a third private right of action—the recovery of straight time pay that exceeds the minimum wage—*only* when a worker's hours exceed the statutory threshold for overtime pay."). A single minute of overtime is a slim reed on which to premise the creation of an entirely new FLSA right of action. The decision below does not explain how this arbitrary distinction is supported by the language of the FLSA. Nor could it, as the FLSA does not contain any provision supporting *any* type of gap-time claim. *See Espenscheid v. DirectSat USA, LLC*, No. 09-CV-625-BBC, 2011 WL 10069108, at *12–14 (W.D. Wis. Apr. 11, 2011) (describing concerns about recognizing gap-time claims under any circumstance).

The Fourth and Ninth Circuits' use of the FLSA to resolve gap-time claims is an unwarranted expansion of the FLSA into the domain of state courts, which are "better positioned" to address the issues of contract interpretation and determination of straight-time compensation. *See, e.g.*, *Koelker*, 599 F. Supp. 2d at 635 n.11 (criticizing *Monahan*); *Lundy*, 711 F.3d at 116 n.8 (citing *Koelker*'s criticism of *Monahan*). Even the *Monahan* court acknowledged that a dispute about the number of hours for which an employee's salary was intended to compensate "is not cognizable under the FLSA, but instead should be pursued under state contract law." 95 F.3d at 1279–80.

Although the decision below expresses concern that a failure to recognize overtime gap-time claims would encourage employers to use "creative" means to reduce overtime, ample remedies to address such concerns already exist through state laws for breach of contract and wage theft. As many other courts have noted, any potential gap in the FLSA's coverage can be adequately and fully redressed by the remedies afforded by state law. *See, e.g.*, *Hensley v. First Student Mgmt., LLC*, No. CV 15-3811, 2016 WL 1259968, at *4 (D.N.J. Mar. 31, 2016). A contrary holding does a disservice to state courts and their abilities to protect employees' contractual rights. Rather than rewriting the FLSA to include a new right of action, this Court should grant certiorari and hold that overtime gap-time claims are the province of state law.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

AMANDA KELLAR KARRAS
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
51 Monroe Street, Suite 404
Rockville, MD 20850
(202) 466-5424
akarras@imla.org

HEIDI K. WILBUR
Counsel of Record
FOX ROTHSCHILD LLP
1225 17th Street, Suite 2200
Denver, CO 80202
(303) 383-7668
HWilbur@foxrothschild.com

KIP D. NELSON
PATRICK M. KANE
FOX ROTHSCHILD LLP
230 N. Elm Street, Suite 1200
Greensboro, NC 27401
(336) 378-5200
KNelson@foxrothschild.com
PKane@foxrothschild.com

Counsel for Amicus Curiae