No. 22-323

IN THE

Supreme Court of the United States

OAKBROOK LAND HOLDINGS, LLC,
WILLIAM DUANE HORTON, TAX MATTERS PARTNER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

BRIEF OF GBX GROUP LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

KATHERINE SCHADLER JORDAN
Counsel of Record
ANDREW J. SPARACIA
JACOB E. DEAN
GBX GROUP LLC
2101 Superior Ave.
Cleveland, OH 44114
216-241-6689
kjordan@gbxgroup.com

Counsel for Amicus Curiae

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BRIEF OF GBX GROUP LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

GBX Group LLC ("GBX") respectfully submits this brief as *amicus curiae* in support of petitioner, Oakbrook Land Holdings, LLC.[1]

STATEMENT OF INTEREST

GBX specializes in preserving and operating historic real estate around the country. GBX partners with property owners, developers, preservation organizations, state and local governments, and the National Park Service to acquire, redevelop, and preserve historic buildings. To that end, GBX-affiliated entities frequently donate historic preservation easements on its properties to local conservancies. Since its founding in 2001, GBX has completed over 135 projects in 21 states. GBX is headquartered in Cleveland, Ohio, and its current projects are situated within the Second, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits. Many of its eased buildings are now subject to different rules based solely on geographic location. As a result, the circuit split on 26 C.F.R. 1.170A-14(g)(6) (the

[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission. Counsel for GBX provided timely notice of GBX's intent to file this brief, and all parties have consented to its filing.

"Proceeds Regulation") has direct bearing on GBX's business.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision excusing Treasury's failure to address significant comments created a circuit split regarding Treasury's ability to ignore the notice and comment requirements of the Administrative Procedure Act ("APA"). The effects of that decision go far beyond one taxpayer and have wide-ranging implications for all administrative rulemaking. Both Circuit courts focused on the application of the Proceeds Regulation to donations of open space easements, but the same regulation also applies to donations of historic preservation easements. As detailed throughout this brief, the issues arising from the Proceeds Regulation's application to historic properties are manifold. Treasury's willful blindness to those issues, and the Sixth Circuit's endorsement of Treasury's approach, risks inducing administrative agencies to flout APA requirements that are designed to ensure prudent rulemaking.

As the architect of regulations governing the deductibility of easement donations, Treasury overlooked critical differences between historic properties and natural environments when it first drafted regulations intended to govern both historic and open space easements. Historic buildings are different from nature preserves; they require constant maintenance to ensure fidelity to their past and integrity for the future, whereas natural environments eschew human intervention. Historic properties also typically require mortgage lending to fund their purchase, redevelopment, and upkeep, whereas undeveloped land is less attractive to secured lenders. To account for these distinctions, an easement protecting a historic property differs fundamentally from one that protects open space, both in terms of how it operates and what it is meant to preserve. Despite their differences, both types of easements are governed by 26 U.S.C. 170(h), and Treasury issued one set of regulations governing both historic and open space easements, including the Proceeds Regulation.

When proposed, the Proceeds Regulation was particularly poorly tailored to historic preservation easements, but Treasury then compounded its initial error by ignoring significant comments from historic preservation groups that specified acute problems with the Proceeds Regulation's application to historic properties. In defiance of the APA's requirements, Treasury ignored these comments and issued a final rule that suffers from a raft of procedural and substantive defects. The Sixth Circuit then papered over Treasury's failure by categorizing all comments touching on the Proceeds Regulation as not worthy of a response.

The adverse consequences of Treasury's defective issuance of the Proceeds Regulation—and the Sixth Circuit's decision endorsing that faulty process—are substantial. In the immediate future, the IRS's use of the flawed Proceeds Regulation as a litigating tool threatens to chill donations of conservation easements, resulting in fewer protected properties in both urban cities and the rural countryside. And in the longer term, the Sixth Circuit's interpretation of the APA's notice and comment requirements, if allowed to stand, would incentivize government agencies to provide minimal or no response to meaningful comments, thus resulting in half-baked regulations the agencies can later wield against regulated parties.

Further muddying the waters, the Sixth and Eleventh Circuits have now reached conflicting conclusions regarding the validity of the Proceeds Regulation, resulting in great uncertainty for taxpayers around the country. In the Sixth Circuit, a historic preservation easement on the Clemons Brothers Furniture Store in Chattanooga, located less than six miles from Tennessee's border with Georgia, is subject to the Proceeds Regulation. Across the border, an easement protecting Atlanta's Winnwood Apartments need not comply with the Proceeds Regulation by virtue of the Eleventh Circuit's ruling in *Hewitt v. Commissioner*, 21 F.4th 1336 (11th Cir. 2021). How the Proceeds Regulation applies to an easement protecting the Foundry Hotel in Asheville, North Carolina, situated a short drive from both Chattanooga and Atlanta, is anyone's guess; the Fourth Circuit has not decided the issue. The result is that taxpaying owners of easement-protected historic properties, which are in all material respects similarly situated, are nevertheless subject to different rules based solely on their geographic location.

For these reasons, GBX urges this Court to grant certiorari, reverse the decision of the Sixth Circuit and strike down the Proceeds Regulation as arbitrary and capricious under the APA.

ARGUMENT

The APA's notice and comment requirements are intended "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *International Union, United Mine Workers of America v. Mine Safety & Health Administration*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). Treasury's non-response to significant comments regarding the Proceeds Regulation's shortcomings resulted in a rule that is unworkable as applied to historic properties. Those same comments illustrate for the Court why the Proceeds Regulation is invalid for failure to comply with the APA and why the Sixth Circuit's decision upholding it is unsound and warrants review.

I. Background of Conservation Easements, the Proceeds Regulation, and the IRS's Litigating Approach.

A. *Overview of Conservation Easements.*

A conservation easement is a contractual agreement between a property owner (donor) and nonprofit organization (donee) where both parties agree to work together to preserve the subject property. In the case of an open space easement, the donor typically agrees to limit development to conserve the natural environment, whereas an owner of a historic building promises to preserve the building's historic character. This latter category frequently comes with strict interpretations of a donor's ability to alter the exterior of the building; owners of eased historic properties must adhere to stringent standards for renovation, rehabilitation, or rebuilding governed by the National Park Service.

Easements provide exceptional protection to properties against a changing world. And this is the very reason Congress codified § 170(h) over 40 years ago – to encourage such preservation. Without easements, owners have tremendous autonomy to alter their properties. Market forces may encourage development of virgin forests. Local zoning may entice owners of historic properties in urban areas to tear them down in favor of larger, newer buildings. But eased properties will always be protected while the easement is in force, even against the preferences of subsequent owners, because donee organizations have both real-property and contractual rights to ensure their protection in perpetuity.

B. *Treasury's Promulgation of the Proceeds Regulation.*

"Forever is a really long time—no less so in tax law." *Hoffman Properties II, LP v. Commissioner*, 956 F.3d 832 (6th Cir. 2020). Although conservation easements are intended to be permanent, there is a possibility (albeit remote) that an easement may be extinguished. For example, a historic building that is the subject of a historic preservation easement may be destroyed by fire, flood, hurricane, or, as happened to many buildings on Nashville's 2nd Avenue on Christmas Day 2020, a bombing. Under those circumstances, the owner and donee might later agree that continued protection of the property no longer serves the original purpose of the agreement.

In 1983, Treasury adopted the Proceeds Regulation to address the situation where a donor had received a deduction under § 170(h) in exchange for an easement donation but the easement is subsequently extinguished. Treasury required that under those circumstances, the donor and donee could extinguish the easement and divide the proceeds of any post-extinguishment sale between them.

Neither the proposed nor final Proceeds Regulation, however, contained any explication of

Treasury's rationale. As discussed below, commenters identified significant problems with Treasury's proposed rule for conservation easements generally and historic preservation easements specifically—for example, that the Proceeds Regulation might be interpreted in a way that would cause an owner of mortgaged property to owe its lender and the donee more in the aggregate than the total value of sale proceeds. But Treasury did not address those comments in adopting the final rule, nor did it incorporate any changes into the final rule's operative text to address those issues.

C. *IRS's Use of the Proceeds Regulation in Litigation.*

Following Treasury's failure to address comments on the Proceeds Regulation – either by explaining the final rule or changing the proposed regulatory text – national organizations like the Land Trust Alliance ("LTA") and the National Trust for Historic Preservation ("National Trust") drafted model easement deeds which were widely adopted by preservation groups and property owners. The National Trust's model deeds from 1996 and 2005 and various model conservation easement deeds compiled by the LTA contained appellant's "improvements carveout", presumably because those organizations did not see a conflict with the text of the Proceeds Regulation. *See, e.g.*, ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT

HANDBOOK (2d ed. 2005).[2] Despite auditing taxpayers with easement deeds that mirrored appellant's for decades, the IRS never publicly articulated its disagreement with extinguishment clauses in those deeds, and it even blessed a clause similar to appellant's in a Private Letter Ruling. *See* Priv. Ltr. Rul. 200836014.

In recent years, however, the IRS has identified donations under § 170(h) as being particularly susceptible to abuse through overvaluation. *See, e.g.*, IR-2005-19 (Feb. 28, 2005). As part of its efforts to curb purported abuse, the IRS has adopted a litigating strategy that aims to avoid fact- and resource-intensive valuation inquiries by asserting technical deficiencies with the requirements of § 170(h) and its attendant regulations, particularly the Proceeds Regulation. To that end, since at least 2010, the IRS has begun using the deeply flawed Proceeds Regulation as a litigating tool to disallow deductions claimed by taxpayers who donated conservation easements on natural lands and historic preservation easements on historic properties. Alongside other novel legal interpretations, the IRS's use of the Proceeds Regulation to disqualify easement deductions has given rise to hundreds, if not

[2] Commentary to the sample extinguishment clauses notes the intentional insertion of the improvements carveout: "[t]he Treasury Regulations make no specific allowance for appreciation in value due to improvements, although an allocation [of value to the owner for improvements] is certainly called for as a matter of basic fairness." *Id.* at 464.

thousands, of tax controversies, including the tax-deficiency litigation at issue in this case.

II. Treasury violated the APA by not responding to comments highlighting critical differences between historic and open space easements.

The question presented by appellants—whether Treasury violated the APA by failing to respond to public comments—is acutely important in the historic preservation setting. Both the proposed and final regulations display a fundamental misunderstanding of historic properties, and Treasury's disregard of comments highlighting those issues resulted in a deeply flawed rule that flagrantly violates the APA's notice and comment requirements.

Principally, despite adopting a regulation that applies across the board to conservation easements, Treasury failed to confront the fact that easements protecting historic buildings differ in critical ways from those that protect the natural environment. Owners of historic properties, like owners of non-historic commercial and residential real estate, typically finance the purchase, rehabilitation, and maintenance of their buildings with traditional loans secured by mortgages. Conversely, lending plays a much less prominent role in the acquisition and preservation of unimproved land.[3] Additionally, unlike land conservation, historic preservation easements necessarily entail two components: (1) a restriction on or donation of the development rights surrounding the building, and (2) a restriction on changes that can be made to the exterior of the building.[4] The Tax Court recognized these differences long ago in *Dorsey v. Commissioner*, T.C. Memo. 1990-242: "A façade easement is different from an open space easement. In the former, the right to control the exterior of a building is involved while the latter involves no such right."

Congress put easements for the preservation of historic properties in its own category in § 170(h)(4)(A)(iv), following three categories of open space easements.[5] But when Treasury issued

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[3] Undeveloped land typically has little to no cash flow, making the project riskier from a lender's perspective. An open space easement, which by definition forecloses or severely limits development, exacerbates this issue. As a result, even taxpayers who are able to obtain financing on raw land may be unable to obtain the mortgage subordination required by 26 C.F.R. 1.170A-14(g)(2). The Proceeds Regulation is also problematic if an open space easement permits improvements (as is present in appellant's easement deed), to the extent the owner ever wishes to finance those improvements through a mortgage.

[4] The first element restricts construction around the building, whereas the second dictates the particular exterior changes a building owner may make—for example, by requiring that new bricks be color-matched to old bricks or specifying the style of windowpanes.

[5] The first three categories of "conservation purpose" in § 170(h)(4)(A) relate to "land areas", "relatively natural

proposed regulations for donations of qualified real property interests under § 170(h), it overlooked the critical differences between historic preservation easements and conservation easements protecting the natural environment.

To be sure, just as the proposed regulations were mainly oriented toward open space easements, so too were the majority of the comments directed at those regulations. The Land Trust Exchange, in submitting a synthesis of submitted comments, noted that "[m]ost of the comments received are from open space programs." Joint Appendix, Vol. 4 at 682, *Oakbrook Land Holdings, LLC v. Commissioner*, No. 20-2117 (6th Cir. Jan. 29, 2021) ("Sixth Cir. JA Vol. 4"). Indeed, the Tax Court acknowledged in its majority opinion that Treasury was "chiefly concerned" with open space easements. Pet. App. 78a. However, multiple organizations submitted comments highlighting issues with the Proceeds Regulation as applied to historic preservation easements. The Philadelphia Historic Preservation Corporation ("PHPC") submitted two letters addressing that context, first on July 21, 1983 (the "July Letter") and again on August 31, 1983 (the "August Letter"). Sixth Cir. JA Vol. 4 at 764, 674. In the August Letter, PHPC explicitly called attention to the fact that "the regulations are oriented towards open space conservation easements and do not adequately

habitat[s]", and "open space", whereas the fourth relates to "historically important land area or * * * certified historic structure[s]".

address the issues that concern qualified conservation easements on structures." Sixth Cir. JA Vol. 4 at 674. The Landmarks Preservation Council of Illinois ("LPCI") also submitted a comment identifying significant problems with the proposed Proceeds Regulation. Pet. App. 241a.

Treasury did not respond to any of the comments. It greeted *all* comments touching on the Proceeds Regulation—those that analyzed it in the context of open space easements as well as those that focused on historic preservation easements—with silence.

Despite Treasury's failure to set forth its own rationale for the Proceeds Regulation or to address concerns that commenters raised, the Sixth Circuit imputed reasoning to Treasury based on the court of appeals' own survey of the statutory scheme and its legislative history. The court posited that the Proceeds Regulation was intended to protect a conservation easement's purpose in perpetuity. Faced with Treasury's deafening silence on the policy considerations raised by each critical comment, the Sixth Circuit proceeded to judge the significance of the received comments based on the court's own view of the comments' merit. Pet. App. 24a (concluding that "Treasury was not obliged to respond" to a "concern" raised in LPCI's comment because it was "wrong").

The Sixth Circuit's singular focus on perpetuity, in turn, led it to ignore comments that underscored the Proceeds Regulation's paradoxical effect as applied to historic preservation easements. And by discounting or disregarding those comments, the court failed to appreciate that the Proceeds Regulation undercuts the long-term protection of historic properties. The resulting judicial endorsement of administrative carelessness threatens the APA's bedrock principles for rulemaking.

III. Treasury's APA failure resulted in a fundamentally flawed regulation that undermines § 170(h)'s statutory incentive.

This cascade of failures—Treasury's initial ignorance of historic preservation issues, followed by its nonresponse to relevant comments and the Sixth Circuit's diminution of significant comments—has created a chaotic situation for owners of historic properties located in different circuits. Had Treasury complied with the APA and considered the relevant comments submitted by environmental conservation and historic preservation groups, Treasury might have crafted a better rule for both open space and historic preservation easements. After all, one of the main points of the APA is "afford[] the agency a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Services*, 139 S.Ct. 1804, 1816 (2019). But it did not, and the Proceeds Regulation should be invalidated as a direct result of this violation.

In relevant part, LPCI expressed its opposition to the Proceeds Regulation because of the way it would impact a property owner's mortgage obligations. LPCI pointed out that an obligation from a donor or subsequent owner to pay a donee post-extinguishment proceeds "places the donor at risk for an amount of money for which he may not be compensated by the disposition of the proceeds of the sale." Pet. App. 241a. LPCI elaborated that the Proceeds Regulation's method of allocating proceeds first to the donee could put the owner of the property at risk of insufficient proceeds to satisfy "the claims of others, such as lenders". *Id.*

LPCI's comment can be articulated with a simple example. Assume Donor purchases a historic building for $500,000 and donates an easement that has the effect of diminishing the property's fair market value by 20%. Donor receives a $100,000 deduction in exchange for the reduction of fair market value to $400,000. The property appreciates in value, and Donor subsequently sells the building to New Owner for $1 million. New Owner's purchase is financed by $100,000 in cash and a mortgage of $900,000. Subsequently, a casualty event destroys the structure, and New Owner and Donee agree to extinguish the easement. Insurance proceeds yield $1 million, of which $200,000 is allocable to the Donee under the Proceeds Regulation. New Owner still owes the mortgagee $900,000, which the remainder of the proceeds—$800,000—is insufficient to cover. Moreover, New Owner never received the benefit of the original $100,000 deduction, which accrued entirely to Donor.

Treasury did not address LPCI's comment, and the Sixth Circuit excused that failure because it misread the comment in two crucial respects. First, it characterized LPCI's comment as "speculative", Pet. App. 24a, but there is nothing speculative about the role that lenders play in commercial and residential real estate. Almost every building in the United States will at some point in time require financing for acquisition or renovation; historic properties are no different. Second, LPCI's comment asked Treasury to consider proceeds allocable to the donee in the context of a building owner's *total obligations*, including obligations to lenders, but the Sixth Circuit erroneously interpreted LPCI's comment as applicable only to the *total proceeds* (concluding that "the donor could never owe to the donee more than what the extinguishment proceeds are"). Pet. App. 24a. Since the Proceeds Regulation created a new obligation, it is not only conceivable but probable that a historic property owner will be left with insufficient post-extinguishment proceeds to compensate both the donee organization and secured creditors.

The Sixth Circuit's exclusionary focus on the statute's perpetuity requirement is especially problematic in light of historic properties' need for secured financing. Section 170(h) was enacted to encourage taxpayers to donate valuable property rights (including easements) to charitable organizations to ensure that natural resources and historic properties are protected in perpetuity. In return, the Code provides a tax deduction as incentive to make such contributions. This statutory incentive is severely curtailed if owners of historic properties cannot reliably obtain loans for expenditures necessary to ensure the properties' long-term survival. In short, lending is inextricably intertwined with protecting a building's historic character in perpetuity, and the Sixth Circuit's relegation of LPCI's comment was clear error. Thus, Treasury erred by ignoring the critical role that mortgage lending plays in the purchase, rehabilitation, and upkeep of historic buildings, and the Sixth Circuit compounded this failure by misinterpreting and diminishing the significance of the LPCI comment.

The Proceeds Regulation's interaction with lending on historic buildings—or, for that matter, on post-easement improvements on open space—leads to a bizarre result. An owner who has given away part of his property must then give away more in the event of an extinguishment, even when that requirement puts him at risk of not being able to pay loans that funded the acquisition, renovation, or upkeep of the protected property. Owners of eligible properties may choose not to incur this obligation and instead leave their properties unprotected. Several commenters, including LPCI, identified the Proceeds Regulation's deterrent effect, but Treasury ignored them, and the Sixth Circuit cast aside any potential for disincentivizing donations by reasoning that Congress intended to only allow "deductions to those instances in which the perpetuity requirement can be satisfied". Pet. App. 28a. But protecting historic buildings in perpetuity requires financing, and the

Proceeds Regulation proves perfectly contradictory to this point.

Treasury's nonresponse to the LPCI comment is, by itself, justification for the Court to invalidate the Proceeds Regulation. However, other commenters also voiced concerns over the Proceeds Regulation in the context of historic preservation. PHPC, in both its July and August Letters, flagged serious issues with the application of the Proceeds Regulation to easements on historic properties. In its July Letter, PHPC called attention to the multiple elements present in historic preservation easements that the Tax Court later recognized in *Dorsey*. Sixth Cir. JA Vol. 4 at 764. PHPC articulated two situations which could result in partial extinguishment. In the first, "the historic structure is destroyed, [but] the size, bulk, height and other limitations governing any replacement structure may remain". *Id*. PHPC rightly pointed out that in this situation, the different elements of the historic preservation easement needed to be considered in any allocation of proceeds.[6]

[6] For example, if an easement relinquished the development rights above and around a historic building to a donee and restricted the owner's ability to alter the façade, a total destruction of the building would not affect the donee's ownership of the development rights. In this situation, an allocation of post-extinguishment proceeds should be based only on the donee's percentage ownership in the building and not a blended percentage that takes into account the intact development rights. A blended percentage would further exacerbate the lending issues identified by LPCI; by including compensation for a non-destroyed property interest, a mixed

Id. Second, PHPC posited a casualty event affecting only one façade of a building with multiple valuable façades; in this situation, a strict proportional allocation "could serve to diminish the pool of funds necessary to restore the remaining portions of this historic structure". Sixth Cir. JA Vol. 4 at 764-765.

In either situation described by PHPC, a blunt application of the Proceeds Regulation to a historic preservation easement would undermine the conservation purpose the statute was designed to promote—protection of historic buildings. By ignoring PHPC's comment, Treasury circumvented the APA's requirements to consider input from affected parties. The resulting rule is not only poorly tailored to the prescribed task of protecting historic properties; instead, it undercuts the statute's preservation goals.

The Sixth Circuit may have concluded that Treasury's failure to consider these comments was not relevant because appellant's easement did not involve a historic structure. However, the comments discussed above "'challenge[d] a fundamental premise' underlying the proposed agency decision", *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019), namely that the Proceeds Regulation was appropriately tailored to donations of historic preservation easements. Put simply, a straightforward application of the Proceeds

percentage would *always* increase the proceeds allocable to the donee, which would also still own the development rights.

Regulation would undermine the perpetual protections granted by a historic preservation easement by failing to recognize the issues that arise in the event of a partial extinguishment. LPCI's and PHPC's comments were significant and merited a response from Treasury. Far from acknowledging the issues they raised, Treasury greeted those comments with silence and therefore "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Treasury's initial lack of attention to the differences between easements covering open space and those protecting historic structures, coupled with its subsequent failure to respond to substantive points raised by historic preservation organizations, renders the Proceeds Regulation arbitrary and capricious. 5 U.S.C. 706(2)(A). It is undisputed that Treasury did not respond to the points raised by LPCI, PHPC and *every other commenter* that voiced concern over the Proceeds Regulation. "Where the agency has failed to provide even a minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 212 (2016).

CONCLUSION

The Sixth Circuit's decision undercuts the APA's rulemaking requirements, invites agencies to ignore significant comments and creates an untenable circuit split. Treasury's inaction, and the Sixth

Circuit's blessing of that inaction, carries implications far beyond the immediate issue. If allowed to stand, the Sixth Circuit's decision risks inducing agencies to ignore relevant comments, craft ambiguous regulations, and then advance a problematic, "convenient litigating position." *Bowen v. Georgetown University Hosp.* 488 U.S. 204, 213 (1988). Moreover, the uncertainty introduced by the circuit split results in inconsistent taxpayer treatment. The Court should grant certiorari, reverse the decision of the Sixth Circuit and invalidate the Proceeds Regulation for failure to comply with the APA's notice-and-comment requirements.

Respectfully submitted,

KATHERINE SCHADLER JORDAN
Counsel of Record
ANDREW J. SPARACIA
JACOB E. DEAN
GBX GROUP LLC
2101 Superior Ave.
Cleveland, OH 44114
216-241-6689
kjordan@gbxgroup.com

Counsel for Amicus Curiae

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