No. 19-123

IN THE

Supreme Court of the United States

SHARONELL FULTON, *et al.*,

Petitioners,

v.

CITY OF PHILADELPHIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF 32 BUSINESSES AND ORGANIZATIONS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici include companies from a wide variety of industries, including technology, banking, travel, pharmaceutical, clothing, healthcare, retail, and legal services, among others. *Amici* include 32 signatories, comprising over 525,000 employees and over $615 billion dollars in annual revenue.

Amici oppose discrimination in all of its forms, including discrimination on the basis of race, sex, disability, religion, gender identity, and sexual orientation. *Amici* support and defend public policies that protect the rights and equal treatment for their employees, their customers, and the families of both. Non-discrimination laws advance *amici*'s core values of equality, diversity, and inclusion and ensure that all are treated with dignity and respect. Central to *amici*'s commitment to these values is a respect for religious beliefs and for religious practice free from discrimination. And as numerous studies have demonstrated, conducting business in an inclusive

[1] A blanket letter of consent from Respondents to the filing of *amicus* briefs has been lodged with the Clerk. Counsel of record for Petitioners and Intervenor-Respondents consented to the filing of this *amicus* brief on behalf of Respondents. This brief is therefore submitted with the written consent of all parties pursuant to Supreme Court Rule 37.3(a). Counsel for *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution intended to fund preparation or submission of this brief. *See* Supreme Court Rule 37.6.

fashion "is good for recruitment, retention, engagement and – ultimately – the bottom line."[2]

Amici submit this brief to advise the Court of the adverse impacts that Petitioners' proposed exemptions to non-discrimination laws are likely to cause for *amici* and businesses generally.

[2] HUMAN RIGHTS CAMPAIGN, *Corporate Equality Index* 8 (2020).

SUMMARY OF THE ARGUMENT

Adopting Petitioners' broad theory of exemptions from neutral, generally applicable non-discrimination laws would disrupt *amici*'s business and undermine their core values of diversity and equality. First, non-discrimination laws are integral to *amici*'s business because they create an environment in which all employees can thrive and contribute to their workplace, thereby improving productivity and profitability. Conversely, *amici* would find it more difficult to recruit, retain, and assign employees in areas where the only government contractor in town refused to serve them or in areas in which employees perceive a greater likelihood that government contractors will avail themselves of the ability to refuse to serve them.

Second, a ruling for Petitioners would disrupt *amici*'s business by creating an unworkable array of religious exemptions to non-discrimination laws that would make commercial transactions exceedingly difficult to navigate. Petitioners invite this Court to "revisit" its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), and thereby seek to undo precedent that strikes a workable and predictable balance that respects religious exercise while applying laws and regulations consistently and fairly. Allowing broad new exemptions to non-discrimination laws would not only open the door to discrimination that would be harmful to *amici*'s business, but would also foment uncertainty in the marketplace as *amici* and other businesses would be forced to determine whether unclear exemptions to non-discrimination

laws could disrupt transactions or create unfair competitive advantages for some entities.

Third, within the government contracting context, Petitioners' theory would open the door for contractors to claim broad exemptions from valid contractual requirements. Government contracts are most effective and efficient when the government can impose generally applicable and publicized conditions on the execution of the contracts' terms. This enables businesses and religious organizations alike to bid on and compete for government contracts with a clear sense of the government's expectations and the public's needs in the provision of services. Petitioners' theory undermines this predictability. A ruling for Petitioners would complicate the bidding process as government agencies and would-be contractors could not predict which competitors for contracts would be exempt from which contractual terms. In the end, such a patchwork would likely encourage government agencies to curtail public-private partnerships altogether, increasing bureaucracy, taxpayer expense, and inefficiency.

ARGUMENT

I. THE GENERAL APPLICATION OF NON-DISCRIMINATION LAWS IS ESSENTIAL TO *AMICI*'S BUSINESS

In addition to ensuring that their employees are treated with dignity and respect, non-discrimination policies benefit *amici*'s business. It is now firmly established within Fortune 500 companies – and considered best practices in human resources departments – that the adoption of strong diversity

and inclusion policies is essential.[3] These policies improve morale for all employees in a given business,[4] improve *amici*'s ability to recruit and retain top talent,[5] and boost profitability.[6] Companies with

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[3] For example, 93% of Fortune 500 companies surveyed by the Human Rights Campaign in 2020 provided explicit sexual orientation non-discrimination protections. *Id.* at 6. 91% of those surveyed provided explicit gender identity non-discrimination protections. *Id.*

[4] DELOITTE UNIV., *Uncovering Talent – A New Model of Inclusion* (2013) (highlighting negative effects on employees when they feel uncomfortable fully expressing their identity at work); Brad Sears & Christy Mallory, WILLIAMS INST. ON SEXUAL ORIENTATION AND GENDER IDENTITY LAW AND PUBLIC POLICY, *How LGBT-Related Workplace Policies Can Have a Positive Impact on the Corporate Bottom Line* 41-3 (Oct. 2011) ("When companies adopt LGBT-related workplace policies, the most frequently mentioned economic benefits include . . . positive employee morale and relations.").

[5] *See* Sears & Mallory, *supra* n.4 at 41-3 ("When companies adopt LGBT-related workplace policies, the most frequently mentioned economic benefits include . . . recruiting and retaining the best talent, which in turn makes the company more competitive.").

[6] *See* CREDIT SUISSE ESG RESEARCH, *LGBT: The Value of Diversity* 1 (April 2016) (finding that 270 companies with inclusive policies outperformed similarly situated companies); U.S. SENATE JOINT ECONOMIC COMMITTEE, *The Economic Consequences of Discrimination Based on Sexual Orientation and Gender Identity* 2 (Nov. 2013) (finding that businesses that engage in discrimination experience lower productivity and profits); M.V. Lee Badgett, et al., WILLIAMS INST., *The Business Impact of LGBT-Supportive Workplace Policies* 23 (May 2013) (finding that companies with strong non-discrimination policies correlated with better stock performance than companies in the same industry without such protections over the same period of

(Continued …)

diverse and welcoming workplace environments are more likely to be creative, innovative, and receptive to novel ideas and methods.[7]

But corporate non-discrimination policies, while necessary, can only go so far. Non-discrimination *laws* are critical to ensuring that *amici*'s employees do not face discrimination in their daily lives. In addition to protecting *amici*'s employees, non-discrimination laws boost innovation and growth across the country.[8] A 2016 study by

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time); Sylvia Ann Hewlett, et al., CTR. FOR TALENT INNOVATION, *Innovation, Diversity, and Market Growth* 6 (2013) (finding "a robust correlation between highly innovative, diverse companies and market growth"); LEVEL PLAYING FIELD INST., *The Cost of Employee Turnover Due Solely to Unfairness in the Workplace* 4 (2007) (estimating American businesses lose upwards of $64 billion annually losing and replacing workers who leave due to discrimination).

[7] *See* Feng Li & Venky Nagar, MANAGEMENT SCIENCE, *Diversity and Performance* (2013); Sylvia Ann Hewlett, et al., HARV. BUS. REV., *How Diversity Can Drive Innovation* (Dec. 2013) ("[D]iversity unlocks innovation by creating an environment where 'outside the box' ideas are heard."); Hewlett, et al., *supra* n.6 at 4 ("[A]n inherently diverse workforce can be a potent source of innovation, as diverse individuals are better attuned to the unmet needs of consumers or clients like themselves."); FORBES INSIGHTS, *Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce* 19 (2011) ("And the best way to ensure the development of new ideas is through a diverse and inclusive workforce.").

[8] Jon Miller & Lucy Parker, *Open for Business: The Economic and Business Case for Global LGB&T Inclusion* 28 (2015) ("Researchers have found a close correlation between economic development and LGB&T inclusion."); Lauren Box, Note, *It's Not Personal, It's Just Business: The Economic Impact*

(Continued …)

Management Science, for example, found that businesses headquartered in states that passed workplace non-discrimination laws experienced an 8% increase in the number of patents and an 11% increase in the number of patent citations, relative to businesses in states without such protections.[9] As the state of Florida was weighing enactment of stronger non-discrimination laws, an independent study projected that the protections could create more than 35,000 new jobs and generate nearly $5.5 billion in economic output within the state over the next ten years.[10]

Non-discrimination laws are most effective when they are clear and consistently applied across all communities and in all circumstances.[11] For

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of LGBT Legislation, 48 IND. L. REV. 995, 995-96 (2015) ("While LGBT inclusiveness is not the only factor contributing to a state's economic vitality, it plays a key role in helping states progress in the economic development race.").

[9] *See* Huasheng Gao & Wei Zhang, MANAGEMENT SCIENCE, *Employment Nondiscrimination Acts and Corporate Innovation* (2016).

[10] *See* FLORIDA THINKSPOT, *Florida's Competitiveness for Talent Supply: Projecting the Economic Impact of Tolerance* 2 (Sept. 2016) ("By enacting employee non-discrimination legislation and boosting its attractiveness to skilled and innovative labor by expanding personal freedom, Florida can boost its total economic output by $5.46 billion over the next 10 years linked to the creation of 35,759 new jobs.").

[11] *See* CTR. FOR AM. PROGRESS, *A State-by-State Examination of Nondiscrimination Laws and Policies* 2 (June 2012) (describing how nondiscrimination laws that "vary from state to state" can be "confusing for workers" and businesses).

example, uniformity in application of non-discrimination laws allows *amici* to recruit and retain top talent nationwide. Businesses consider the strength of local non-discrimination laws in making decisions on where to locate business operations,[12] and when non-discrimination laws are clear and consistent, businesses are able to hire the most talented employees and serve the most customers. But even when a business is located in a jurisdiction with strong non-discrimination laws, a lack of uniformity can still erode certainty. Many employees for *amici* travel across state lines to meet with clients or colleagues,[13] and some may work in one state but live in another. Some employees may live or work in areas where there are only a few providers of a particular public service, such as foster care services or veterans' services. If the only available service provider turns away an employee on the basis of a religious exemption, there would be no other way for that employee to obtain that public service. Current or prospective employees may also be reluctant to relocate or to accept positions in locations in which they perceive that government-funded service

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[12] *See* HUMAN RIGHTS CAMPAIGN, *Municipal Equality Index* 6 (2019) ("[B]usinesses actively take into account local laws and policies when making decisions about cities in which to headquarter, relocate, or expand."); *see also* CNBC, *'Bathroom Bill' to Cost North Carolina $3.76 Billion* (Mar. 27, 2017) (describing companies' decisions to decline to open facilities or host events in North Carolina after passage of law rolling back non-discrimination protections).

[13] *See* U.S. TRAVEL ASS'N, *U.S. Travel Answer Sheet* (March 2020) ("U.S. residents logged 464.4 million person-trips for business purposes in 2019.").

providers are more likely to avail themselves of an ability to discriminate in the provision of public services. Because travel and relocation are often necessary parts of *amici*'s business, it is important that their employees have equal access to public services throughout the country.

Broad exemptions to non-discrimination laws can even open the door to discrimination against people *on the basis of their religious beliefs*. In South Carolina, for example, an exemption granted by the South Carolina Department of Social Services and the U.S. Department of Health and Human Services permits Miracle Hill Ministries, one of the state's largest foster care agencies, to reject any foster care applicants that are not evangelical Christians, denying applicants of other faith traditions the opportunity to serve as foster care parents.[14] Thus, the exemption permits Miracle Hill to discriminate against certain religions.[15] This is not a theoretical concern, as non-evangelical prospective foster applicants have already been denied, including a Jewish couple who described their denial as "humiliating" and a Unitarian Universalist couple who found the experience "hurtful and insulting."[16]

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[14] *See* Order, *Rogers v. Dep't of Health & Human Servs.*, No. 6:19-cv-01567 TMC (D.S.C. May 8, 2020) (ECF 81).

[15] *See* GREENVILLE NEWS, *Greenville Couple Sues Trump Administration and SC Governor over Foster-Care Practice* (May 30, 2019).

[16] *See* WASH. POST, *A Christian Ministry Won't Change Its Christians-Only Criteria for Foster-Care Parents. Is that Okay with Trump?* (Jan. 6, 2019); *see also* GREENVILLE NEWS,

(Continued …)

Petitioners' proposed exemptions here thus pose the same threat to religious tolerance and other non-discrimination protections, the effects of which would harm *amici* and their employees in their daily lives.

These negative impacts are not limited to the present case or Miracle Hill. LGBTQ foster applicants have seen their applications denied in Texas and Michigan, among other places.[17] And broad exemptions to non-discrimination laws would extend beyond the foster care context and into other areas where religious organizations provide social services. Under Petitioners' theory, an emergency shelter could refuse entry to a person wearing a head covering, or a day care could refuse to admit a child of a single parent. Scenarios like these would negatively impact *amici*'s employees and their families, and by extension also harm *amici*'s business, particularly in states where no alternative government contractor is available or where multiple government contractors would choose to deny services based upon characteristics of the person seeking services rather than qualifications or eligibility.

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supra n.15 ("Faith is a part of our family life, so it is hurtful and insulting to us that Miracle Hill's religious view of what a family must look like deprives foster children of a nurturing, supportive home.").

[17] *See Marouf v. Azar*, 391 F. Supp. 3d 23 (D.D.C. 2019) (involving denial of foster application to same-sex couple wishing to become foster parents for unaccompanied refugee child); *see also Buck v. Gordon*, 429 F. Supp. 3d 447 (W.D. Mich. 2019) (involving ability of organization to reject same-sex foster and adoption applicants on religious grounds).

Amici's employees, as stakeholders in their respective local communities, thrive and contribute to the overall success of their employers when they are free of discriminatory treatment that undermines their dignity. Keeping non-discrimination laws like those adopted by the City of Philadelphia in place benefits not only LGBTQ foster applicants, but also leading American businesses like *amici*. Broad exemptions to these laws, however, diminish protections from all kinds of discrimination, and *amici* and their employees would be further harmed as the effects of such discrimination would be felt more broadly.

II. BROAD NEW EXEMPTIONS TO NON-DISCRIMINATION LAWS WOULD CREATE CONFUSION AND UNCERTAINTY FOR BUSINESSES NATIONWIDE

Petitioners seek to upend a framework that has provided predictability and certainty to *amici* and other businesses operating in complex and interdependent marketplaces. A cornerstone of non-discrimination law is the principle that neutral laws of general applicability apply equally to everyone. *See Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990). Petitioners ask this Court to revisit, and ultimately invalidate, *Smith*. Pet. Br. at 37-52. Thus, the implications of Petitioners' broad claimed exemptions from non-discrimination laws would reverberate far beyond the current matter. Petitioners would dismantle a system that has provided all market participants – businesses, consumers, and even the government itself – with the certainty that all are required to abide

by neutral and generally applicable law, regardless of religious conviction. *See Smith*, 494 U.S. at 879.

This framework, which Petitioners cast aside as unworkable, is anything but. This framework has in fact provided valuable stability to *amici*'s business. *Amici* are able to enter into transactions and conduct business knowing that laws (including non-discrimination laws) will apply equally to all parties, ensuring smooth operations along the supply chain, from manufacturing to reaching customers. *Amici* benefit from clear legal rules and guidelines, which facilitate certainty and predictability in commercial transactions.[18]

For example, clear and consistent rules mean that a consumer product manufacturer can distribute products widely and to a large range of retailers without worrying that a specific retailer may claim an exemption from selling products to certain people and harming the manufacturer's business, brand, and profits. Placing all businesses on a level playing field, without exemptions, provides business owners with stability and clarity about how to comply with the law and what to expect from third parties.

By seeking to create a seemingly limitless set of exemptions to neutral and generally applicable non-discrimination laws, Petitioners invite this Court to overturn this entire system of certainty and predictability for *amici* in the marketplace. Adding to

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[18] *See* William D. Hawkland, *The Uniform Commercial Code and the Civil Codes*, 56 LA. L. REV. 231, 247 (1995) ("The commercial community has made a modest demand on the law to give it good rules that will operate evenly and with a fair degree of predictability.").

the drastic erosion of certainty, Petitioners do not appear to propose a new framework, stating only that a standard should be "true to the text, history, and tradition" of the First Amendment without explaining what that means. Pet. Br. at 50. With regard to which exemptions would be appropriate, Petitioners only insist that there be "broad protection." *Id.*

Such an expansive and ill-defined standard for balancing religious freedom with non-discrimination laws would be extremely burdensome for *amici*, as each business would be forced to determine which exemptions may apply to which other parties in potential transactions. In other words, adopting Petitioners' view would involve broad exemptions that are difficult for governments to administer and for businesses to anticipate. Just as vague, unworkable rules are hard for the federal courts to apply,[19] laws with myriad, unpredictable exemptions make commerce exceedingly difficult to navigate.

Neutral, generally applicable non-discrimination laws undiluted by fluid exemptions provide clarity to *amici*, governments, and religious organizations. Upsetting this balance by allowing the broad exemptions Petitioners propose would eliminate this clarity and have a deleterious impact on *amici*'s business operations and profits, and will impose substantial costs on businesses going forward. And, of course, broadening exemptions to non-discrimination laws could only increase actual

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[19] *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985) (rejecting "as unsound in principle and unworkable in practice" a rule based on vague, undefined terms because such a rule would lead to inconsistent results).

discrimination, further causing harm to *amici*, their employees, and the economy at large.

III. PETITIONERS' THEORY COULD HAVE BROAD NEGATIVE IMPACTS ON THE GOVERNMENT CONTRACTING SECTOR, TO THE DETRIMENT OF *AMICI* AND TAXPAYERS

Many businesses, including some *amici*, often contract with the government or use services provided under government contracts. These businesses would be harmed by Petitioners' proposed broad exemptions to requirements in the contracting process. This Court has recognized that the government may place conditions on how government funds are spent, and that "[a]s a general matter, if a party objects to a condition on the receipt of [government] funding, its recourse is to decline the funds." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 570 U.S. 205, 213-214 (2013). If the conditions are "designed to ensure that the limits of the [government] program are observed" and that "public funds [are] spent for the purposes for which they were authorized," they will be upheld even if the recipient's First Amendment rights may be affected. *Rust v. Sullivan*, 500 U.S. 173, 193, 196 (1991). These principles are particularly compelling in the context of government contracting, where the receipt of government funds is explicitly conditioned on compliance with the terms of the contract. If an entity that has voluntarily applied for a government contract can unilaterally declare that it need not comply with all of its terms, it would greatly impair government contracting in general.

This issue is not limited to compliance with non-discrimination laws, but could also apply to other contractual requirements or conditions of funding. For example, a company might seek a broad exemption concerning *when* a contract is performed. In the technology context, the government regularly contracts for services, such as cloud computing, that require continuous connectivity and rapid repairs twenty-four hours a day, seven days a week. Under Petitioners' theory, a company could be awarded such a contract, but then subsequently and unilaterally stipulate that it will only perform services for *six* days a week, not including the day it observes as a holy day. Depending on the nature of the contract, such an exemption could be significant: a network or other vital system might become entirely unavailable at a critical moment for public services. As another example, a company or organization might be awarded a government contract but then place certain conditions on *how* its products or services can be used. For example, a contractor providing cloud computing services might also insist that its servers cannot be used to host material it finds objectionable. Petitioners' position here would leave the outcome of all of these scenarios in doubt.

This would harm *amici* because religious and non-religious entities sometimes compete for government contracts and funding. In certain circumstances, Petitioners' theory of exemptions could put other, non-exempt entities at a competitive disadvantage. For example, if the hypothetical cloud computing services provider did not have to pay wages or perform services for one day out of the week, it would enjoy material cost savings (approximately 14%) over a contractor that could not claim a similar

exemption. If the government were not able to pay the contractor less for exercising an exemption, the contractor could either underbid its competitors or enjoy a greater profit margin, in either case obtaining a significant advantage over other bidders. In any circumstance where full compliance with contractual terms or other conditions of funding would impose costs on prospective contractors, being able to obtain an exemption from those requirements could give an applicant an unfair edge.

In addition to the impact of unfair competition, businesses like *amici* benefit from clarity and consistency, and would be harmed by the uncertainty created by an expansion of exemptions in the area of government contracting. All stages of government contracting involve significant investment of time and resources for all parties, and unpredictability would thus cause significant disruption.[20] Applicants would face an uncertain competitive landscape, as they would have to account for the possibility that not all other applicants would be bidding on the same terms or subject to the same requirements. This unclear and uneven playing field would further complicate the

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[20] *See, e.g.*, Arnie Bruce Mason, *Implied-in-Fact Contracts Under the Federal Acquisition Regulation: Why* Pacord *Got It Wrong*, 41 WM. & MARY L. REV. 709, 723 (2000) ("Predictability in government contracts should be the paramount goal of all parties involved. The government puts billions of dollars annually into government contracting, and such a burden cannot be taken lightly.").

already complex and time-consuming process of securing government contracts or funding.[21]

Government agencies would also face increased administrative burdens when dealing with claimed exemptions, as they would have to determine which provisions of even standard government contracts would or would not apply, whether the claimed exemption was a valid one, how such an exemption would impact performance under the contract or other governmental interests, and whether refusal to grant the exemption could subject the agency to a costly appeal or even liability.[22] For example, if the government awarded the hypothetical cloud computing contract to a different firm, it might then face an immediate appeal by the losing entity. This would harm government entities and *amici* alike, and could result in a reduction in the overall level of public-private partnerships. Taxpayers and the government would be harmed because certain services could become more expensive or less efficient, and in some instances might be discontinued altogether. Businesses would also be harmed because they would face greater burdens when applying for government contracts, making those contracts less

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[21] *See id.* at 724 ("The idea of uniformity in regulations was conceived to make contracting with the government a far less frustrating ordeal.").

[22] *See, e.g.*, *Smith*, 494 U.S. at 888 ("Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.").

appealing, or they might lose out on those opportunities altogether.

CONCLUSION

Non-discrimination laws ensure the fair and equal treatment of all people and the orderly flow of goods and services in the marketplace. Adopting Petitioners' broad and ill-defined exemptions to neutral, generally applicable laws will not only result in more harmful discrimination, it will disrupt *amici*'s ability to operate efficiently, promote profitability, and maintain their diverse and inclusive workplaces.

Respectfully Submitted,

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August 20, 2020

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APPENDIX

The businesses and organizations that join this brief are (in alphabetical order):

1. Airbnb, Inc.
2. Amalgamated Bank
3. American Airlines Group*
4. Apple
5. Atlassian, Inc.
6. BBVA USA*
7. Biogen Inc.
8. Braze, Inc.
9. Bristol Myers Squibb*
10. Cummins Inc.
11. Evolent Health
12. GlaxoSmithKline LLC
13. Google LLC*
14. HP Inc.

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* Denotes *amici* represented solely by Taylor & Cohen LLP. All other *amici* are represented solely by Steptoe & Johnson LLP.

15. Ingram Micro Inc.
16. Levi Strauss & Co.
17. Macy's, Inc.
18. New York Life
19. NIKE
20. Nixon Peabody LLP
21. PayPal, Inc.
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