No. 19-839

In The
Supreme Court of the United States

EASTERN OREGON MINING ASSOCIATION, et al.,

Petitioners,

v.

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Oregon

BRIEF *AMICUS CURIAE* OF AMERICAN MINING RIGHTS ASSOCIATION, BOHEMIA MINE OWNERS ASSOCIATION, COEUR D'ALENE MINING DISTRICT, GALICE MINING DISTRICT, NORTHWEST MINERAL PROSPECTOR'S CLUB, PUBLIC LANDS FOR THE PEOPLE, THE NEW 49'ERS LEGAL FUND, TOM QUINTAL, WILLAMETTE VALLEY MINERS, JOSEPHINE COUNTY, AND SISKIYOU COUNTY IN SUPPORT OF PETITIONERS

PAUL J. BEARD II
FISHERBROYLES LLP
4470 W. Sunset Blvd., # 93165
Los Angeles, CA 90027
Telephone: 818-216-3988
paul.beard@fisherbroyles.com
Counsel for Amici Curiae

QUESTION PRESENTED

The Clean Water Act forbids the unpermitted "*addition* of any pollutant to navigable waters," 33 U.S.C. § 1362(2) (emphasis added). *See id.* § 1311(a). Below, the Oregon Department of Environmental Quality determined, pursuant to federally delegated power, that the Act's prohibition applies to small-scale suction dredge mining. Although such mining results in the movement of native streambed matter, it adds no material to the waters in which it is conducted. The Supreme Court of Oregon upheld the Department's assertion of Clean Water Act authority, ruling—in conflict with decisions of this Court as well as the D.C. and the Sixth Circuit Courts of Appeals—that the mere repositioning of things within a water results in the "addition" of pollutants to that water.

The question presented is:

Does the Clean Water Act regulate activities that simply move pre-existing material, such as rock, sand, and gravel, within a "navigable water"?

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IDENTITIES AND INTERESTS OF AMICI CURIAE

Amici[1] consist of a broad coalition of mining organizations, individuals, and public agencies who share a substantial interest in the fate of small-scale mining. As described in greater detail below, amici live, work, and are based in a variety of Western states where small-scale mining has had a long and storied history, including California, Oregon, Idaho, and Washington.

The issue presented in the petition has serious implications for that time-honored vocation, which is an important source of income and recreation for many Americans, and contributes to many local economies in the Western United States. Amici urge the Court to grant the petition and determine whether an overzealous and atextual interpretation of the Clean Water Act will snuff out the work and passion of "modern-day forty-niners" who "participate in the living heritage of the intrepid prospector"—and, with it, a more-than-160-year-old tradition that has helped to define the West. Petition at 4.

Miner Amici

American Mining Rights Association (CA) is a 501(c)(3) nonprofit association established in 2012

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[1] Counsel of record for all parties received timely notice of the intention to file this brief, and the parties have consented to the brief's filing.

No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

and based in Coulterville, California. With more than 10,000 dues-paying members and supporters across the country, the association was created by and for miners, for the purpose of preserving and promoting their rights to access and mine on public lands. The association regularly advocates on behalf of its members before regulatory and management agencies. Many members, including the association's founder and president, have made significant investments in suction dredge mining equipment, just to see their investments—and income sources—evaporate in the face of increasing regulatory burdens. Members have claims in Arizona, California, Colorado, Idaho, Nevada, Oregon, and Washington.

Bohemia Mine Owners Association (OR) is a 501(c)(3) nonprofit corporation organized in Cottage Grove, Oregon. Miners from the Bohemia Mining District (OR) created the association on October 17, 1903. Its mission is to advocate for mining rights and access to public lands, facilitate the exchange of information between miners and government agencies, and educate children and the general public about mining practices and environmental stewardship. The association owns eight placer claims that are used by more than 250 of its members. Those claims—and others within the Bohemia Mining District—are at serious risk, as state and federal assaults on the modern practice of suction-dredge mining make it more expensive and more difficult to commercially and profitably mine.

The **Coeur d'Alene Mining District** (ID) was established in 1983 in the Idaho Territory. The district is an unincorporated association whose members hold hundreds of active claims. Members

find their livelihood, recreation and even identity in suction dredge, placer, and hard rock mining. The district's members have multiple thousands of dollars' worth of suction dredge mining equipment lying idle due to the uncertainly and burdens of Clean Water Act regulation of their beloved vocation.

The **Galice Mining District** (OR) was organized on Skull Bar, at the confluence of Galice Creek and the Rogue River, in 1853—in what would later become Josephine County, Oregon. It was the third mining district organized in Oregon Territory and was established to protect the mining rights and properties of active miners, most of whom today still have mining claims within a few square miles of the mouth of Galice Creek. Originally, the district was considered the self-governing entity of the small mining community of Galice, and later drafted and enforced local mining regulations inside its jurisdiction, as well as performed other functions of local government in the vicinity due to its remoteness. Today, the Galice Mining District's principal aim is to promote and protect the mining rights and local mining customs of its 100-plus members, most of whom own mining claims which have historically been worked using suction dredges.

The New 49'ers Legal Fund (CA) is a 501(c)(3) nonprofit, tax-exempt organization based in Happy Camp, California. Its mission is to defend the civil and statutory rights of some 20,000 mining members, through public education and participation in litigation and other public forums.

Established in 1981, **NorthWest Mineral Prospector's Club** (WA) is a 501(c)(4) nonprofit organization from Vancouver, Washington. Its

mission is to teach members and the general public about "best practices" in small-scale gold mining and mineral recovery. The Club represents 156 members.

Public Lands for the People (CA) is a 501(c)(3) nonprofit organization founded in 1990 and based in Inyokern (Kern County), California. It is dedicated to preserving the rights of its mining members to access and use public lands. The organization is an advocate for responsible mining practices and reasonable regulation of the activity. Its members and supporters have suffered tremendous financial and other harms as the result of government overreach, including through the enforcement of the Clean Water Act.

Tom Quintal (OR) has been a suction dredge miner in Oregon for over thirty years. Now retired, Mr. Quintal has been able to provide himself supplemental income through his efforts as a suction dredge miner. An increasingly hostile regulatory environment has undermined his ability to mine on his privately owned 40-acre placer mining claim.

The Oregon-based, nonprofit **Willamette Valley Miners** was founded by five ambitious weekend miners in 1986. Today, the association totals more than 200 members, and offers mining-related outings and activities to individuals and families throughout the Willamette Valley area. Many members are retired and rely on mining as a source of supplemental income to help make ends meet. The association's mission is to preserve the rights of all miners and prospectors by encouraging small-scale mining and helping to establish a positive image of today's mineral prospectors and miners.

Public-Entity Amici

In 1851, a group of prospectors made the first discovery of gold in southern Oregon in what would become **Josephine County, Oregon**. Since then, the County has attracted professional and recreational miners from all over the world. Just as hunting and fishing are part of Native American heritage, mining is an essential part of Josephine County's unique cultural identity. Mining activity in Josephine County has supported the economy for decades. Currently, hundreds of placer mining claims are located in Josephine County. Each miner spends money on equipment, fuel, and supplies. Additionally, mining attracts tourists every year. Oregon's suction dredge ban has caused uncertainty and has discouraged investment. Many Josephine County citizens now face the possibility of losing their livelihoods and even their homes.

Siskiyou County, California is a political subdivision of the State of California, and is a rural county whose citizens rely extensively on the responsible and proper utilization of the County's natural resources. Approximately sixty percent (60%) of Siskiyou County's 2.5-million-acre land base lies within federal forestlands. Mining has played an important role in Siskiyou County's history and economy, including suction dredge mining. In 2009, suction dredge mining was banned throughout California as a result of California Fish and Game Code section 5653.1(b). This has had a major impact on miners throughout California, who no longer have the ability to exercise rights granted to them by the United States. The County continues to seek support from state and federal partners to make regulatory

changes that would bring suction dredge mining back to its rural economy. Further, the County has a significant interest in ensuring that federal laws, such as the Clean Water Act, are interpreted and applied in a reasonable and fair manner that does not create undue regulatory obstacles for rural miners.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Clean Water Act prohibits "the discharge of any pollutant by any person" without a permit. 33 U.S.C. § 1311(a). A "discharge of any pollutant" is defined as "any ***addition*** of any pollutant to navigable waters [i.e., jurisdictional waters] from any point source." *Id.* § 1362(12) (emphasis added). The petition presents a clean federal question of national importance that touches the lives and livelihoods of Americans across the country whose work involves activities in jurisdictional waters under the Clean Water Act: Does the mere movement of pre-existing material within a federally regulable water constitute the "addition" of a pollutant therein?

Amici are among those with a significant stake in the answer to that question. They are miners and counties in areas of the country with a long history of small-scale mining—which, today, is carried out by the modern and environmentally sound means of suction dredging. As explained below, that method adds nothing (let alone pollutants) to the water in which the activity is conducted, but nevertheless has been deemed by the Oregon Supreme Court subject to the Clean Water Act's prohibition against adding pollutants to jurisdictional waters. Others whose livelihoods are at risk by such a broad-sweeping interpretation of the Act include farmers and ranchers

whose activities often involve the mere movement of soil. Unless the issue presented in the petition is resolved, Amici and others will continue to face uncertain—if not prohibitively burdensome and costly—regulation under the Act.

Besides being of national importance to Americans across a variety of jurisdictions and sectors of the economy, the federal question presented in this case has starkly split the lower courts. The Oregon Supreme Court, as well as the Ninth and Eleventh Circuit Courts of Appeals, have held that the "mere movement" of pre-existing material in jurisdictional waters constitutes an "addition of [a] pollutant" under the Clean Water Act. Those courts are at odds with this Court, as well as the D.C. and Sixth Circuit Courts of Appeal. The Court has rightly acknowledged the problems inherent in the interpretation and enforcement of the Act, to the detriment of the due-process and property rights of the regulated public. This is an opportunity to resolve a clear-cut disagreement among the courts about the reach of the term "addition"—a *sine qua non* of federal regulation of waters under the Act. *United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816-17 (2016) (Kennedy, Thomas, Alito, JJ., concurring) ("[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern," and the Act "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."); *Sackett v. Envtl. Protection Agency*, 566 U.S. 120, 132 (2012) (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear," and enforcement of that statute can "put the property rights of ordinary Americans entirely at the mercy of

Environmental Protection Agency (EPA) employees . . . . In a Nation that values due process, not to mention private property, such treatment is unthinkable.").

For these reasons, and the reasons provided in the petition, the petition should be granted.

ARGUMENT

I. The Question Presented in the Petition Is of National Importance

Suction dredge mining is a type of "placer mining," which involves the mining of streambed deposits for minerals.[2] As the Oregon Supreme Court in this case described it, "suction dredge mining involves using a small motorized pump mounted on a boat to 'vacuum up' water and sediment from stream and river beds." Appendix A-3. "The water and sediment are passed over a sluice tray, which separates out heavier metals, such as gold, and the remaining material is then discharged into the water." *Id.* The process adds nothing back into the water that was not already there.[3] Suction dredge mining emerged as the main form of small-scale,

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[2] *See* https://en.wikipedia.org/wiki/Placer_mining.

[3] Some environmentalists contend that the modern practice of suction dredge mining may cause significant environmental harm, including to fish. Amici miners disagree, pointing to the absence of sufficient scientific research establishing a connection between suction dredge mining and such environmental effects. Regardless of the merits of either side's view, that debate does not bear on the question before the Court. Brittany M. Skelton, *Note & Comment: To Dredge, or Not To Dredge*, *That Is the Issue*, 38 Whittier L. Rev. 291, 291 (2017) ("There is much debate on whether or not suction dredge mining is harmful to the environment."). The question is whether a federal statute—the Clean Water Act—reaches activities that do not add pollutants to regulable waters.

nonindustrial mining in the 1950s, growing in popularity because of its cost-effective and efficient method of recovering minerals from underwater streambed sediments. California Department of Fish and Game, "Draft Subsequent Environmental Impact Report for Suction Dredge Permitting Program," Chapter 3, at 3-1 (February 2011).[4]

Small-scale mining has long been a cherished tradition of the Western United States. For example, the State of Oregon has codified the importance of small-scale mining to the economic and social fabric of its communities. The State's Legislative Assembly found and declared that "small scale mining and recreational mining" are "important parts of the heritage of the State of Oregon" and "[p]rovide economic benefits to the state and local communities." Or. Rev. Stats. § 517.123. A comprehensive study of placer mining's economic impacts in Alaska reaffirmed the significant role of that activity in providing employment in and generating tourism to the State. McDowell Group, *The Economic Impacts of Placer Mining in Alaska* at 4 (2014) ("This form of mining has a rich history in Alaska, and the image of a goldpanner is iconic in Alaska's culture," occurring "in all corners of Alaska" and ranging "from small family affairs to larger corporate undertakings.").[5] "[T]he total economic impact of recreational mining in Alaska likely exceeds several million dollars, including payments to private owners and spending on transportation, accommodations, food, services and

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[4] *Available at* https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27392&inline.

[5] *Available at* http://www.alaskaminers.org/placer-mines.

supplies." *Id.* at 14. And before suction dredge mining was banned in California in 2009, one researcher concluded that "without a doubt . . . suction dredge miners contribute[d] significant wealth to the economy of California," conservatively estimated at around $75 million in 2008 alone (the last year suction dredge mining was legal in the State). Rachel Dunn, et al., *The Economic Impact of Suction Dredging in California*, 79 Prospecting & Mining J. 1 (2009).[6]

The continued viability of small-scale mining, represented largely by suction dredge mining, turns on whether the "mere movement" rule adopted by the Oregon Supreme Court and other courts will stand. Consider the plight of Amicus Tom Quintal, whose experience mirrors that of other small-scale miners. Before the section 402 permit requirement was imposed, his 40-acre placer mining claim was valued at $30,000. Now, thanks to the exorbitant fees and restrictions that section 402 permitting involves, that same claim has very little market value. Imposing a section 402 permit—if lawful (which it is not)—has caused Mr. Quintal to lose an important asset and severely limited the supplemental retirement income he can generate. The same can be said of so many other members of Amici organizations, whose supplemental income sources have been curtailed or even extinguished by the "mere movement" rule adopted by the Oregon Supreme Court and other federal circuit courts.

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[6] *Available at* https://westernminingalliance.org/wp_content/uploads/2014/01/The_Economic_Impact_of_Suction_Dredging_in_California_REVISED_2011.pdf.

The two Amicus counties can attest to the harm that suction-dredge miners in their jurisdictions have suffered. Josephine County, Oregon, benefits significantly from the economic activity that small-scale mining generates, including in the form of tourism. Josephine County has expressed serious concerns about the uncertainty and financial loss to its citizens resulting from prohibitive regulation of suction-dredge mining. So, too, has Siskiyou County, California, where suction-dredge mining is banned. The County's rural miners have seen their lives turned upside down from that ban. Should regulated suction-dredge mining return to California, it would be important to ensure that section 402 of the Act is not read to impose additional—and unnecessary—burdens on an already overregulated activity. Adam Gerber, Casenote, Borden Ranch Partnership v. U.S. Army Corps of Engineers: *A Barge in a Bucket? May Isolated Wetlands Be Considered "Navigable Waters" Under the CWA?,* 15 Vill. Envtl. L.J. 415, 433 (2004) (noting that the "mere movement" rule—if allowed to stand—could impose severe regulatory burdens"); 33 U.S.C. § 1319(c) (imposing criminal liability for violation of the Act); 40 C.F.R. § 19.4, Table 1 (establishing civil penalties of up to $37,500 per day for violation of the Act).

Finally, Amici represent, not just small-scale mining, but other vocations whose work involves mere movement of material in jurisdictional waters. Farmers and ranchers, too, already are the targets of Clean Water Act regulation simply for plowing or "deep ripping" their lands—without adding *anything*, let alone pollutants, to jurisdictional wetlands. *Borden Ranch P'ship v. United States Army Corps of Eng'rs*, 261 F.3d 810, 819 (9th Cir. 2001). *Borden*

Ranch drew a strong dissent from Judge Gould, who aptly explained the problem with the majority's interpretation:

> The problem of interpretation here arises because Congress prohibited the discharge or addition of any pollutant to navigable waters from any point source. It did not literally prohibit any conduct by farmers or ranchers that changes the hydrological character of their land. The majority opinion, motivated perhaps by the purposes of the statute, makes new law by concluding that a plow is a point source and that deep ripping includes discharge of pollutants into protected waters. The policy decision involved here should be made by Congress, which has the ability to study and the power to make such fine distinctions.

Id. at 821 (Gould., J. dissenting); *see also id.* at 819 (Gould, J. dissenting) (explaining that, in his considered view, "the return of soil in place after deep plowing is not a 'discharge of a pollutant'").

In summary, the petition presents a federal question of significance to a broad cross-section of Americans across the country engaged in different vocations that implicate activities in jurisdictional waters. The Court's resolution of the question would have far-reaching effects.

II. The Question Presented in the Petition Has Created a Split Among the Courts

The petition effectively illustrates how a conflict among the lower courts exists on the question

whether the mere movement of pre-existing material in a jurisdictional water constitutes an "addition of [a] pollutant" under the Clean Water Act. Amici wish to address the Oregon Supreme Court's misguided effort to reconcile the "mere movement" rule it with this Court's decisions in *Los Angeles County Flood Control District v. Natural Resources Defense Council*, 568 U.S. 78 (2013), and *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). Contrary to the Oregon Supreme Court's conclusion, the adoption of the "mere movement" rule is in direct and irreconcilable conflict with both decisions.

In *Los Angeles County* and *Miccosukee*, this Court adopted the dictionary's "common understanding of the meaning of the word 'add,'" *Los Angeles County*, 568 U.S. at 82, and held that "no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body." *Id.*; *Miccosukee*, 541 U.S. at 109-10. Significantly, the Court cited the apt metaphor used in an earlier Second Circuit Court of Appeals decision:

> If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle). In requiring a permit for such a "discharge," the EPA might as easily require a permit for Niagara Falls.

Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 492 (2d Cir. 2001) (quoted

in *Los Angeles County*, 568 U.S. at 82-83, and *Miccosukee*, 54 U.S. at 109-10).

Notably, this Court's decisions in *Los Angeles County* and *Miccosukee*, as well as the Second Circuit's decision in *Catskill*, turn on the fact that the plain meaning of the term "addition" is clear and unambiguous. *Los Angeles County*, 568 U.S. at 82 (applying the dictionary definition of "addition"—and no more—to derive the term's plain meaning); *Miccosukee*, 541 U.S. at 109-10 (adopting the "plain meaning" approach in *Catskill*); *Catskill*, 273 F.3d at 493-94 (rejecting recourse to legislative history or the Clean Water Act's "broad purposes" to define "addition," because the term has a "plain meaning" and is not "sufficiently ambiguous" to justify recourse to extra-textual aids). Finding no ambiguity in the term, the courts had no reason—or legal justification—for deferring to the agency's creative and boundary-pushing interpretations of "addition." As this Court has stated, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984); *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) ("[T]he Court need not resort to *Chevron* deference, as some lower courts have done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand."); Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Addition" Element of the Clean Water Act Offense*, 44 Envtl. L. Rep. News & Analysis 10770, 10792 (2014) ("Although the Second Circuit did not explicitly employ the two-step *Chevron* deference test to EPA's water transfer rule, it left no doubt how it

would have decided the case under *Chevron*. With regard to the first step, whether the statute is ambiguous, the court in *Catskill I* held the statute's plain meaning was clear.").

The Oregon Supreme Court tried to distinguish this case from *Los Angeles County* and *Miccosukee*. A-9—A-10. With little explanation, the court concluded that suction dredge mining "does more than 'merely transfer[]' polluted water from one part of the same water body to another." Appendix A-10. Relying on an older Ninth Circuit Court of Appeals case, *Rybacheck v. U.S. EPA*, 904 F.2d 1276 (9th Cir. 1990), the supreme court concluded that the agency "reasonably could find that suction dredge mining adds suspended solids to the water and can 'remobilize' heavy metals that otherwise would have remained undisturbed and relatively inactive in sediment of stream and river beds." A-10.

There are two flaws in the supreme court's attempt to avoid a conflict with *Los Angeles County* and *Miccosukee*. First, the supreme court departed from the fundamental premise of *Los Angeles County* and *Miccosukee*: The plain meaning of "addition" is clear and unambiguous—and "that is the end of the matter," so that no consideration of or deference to an agency's interpretation is warranted. By implicitly assuming the ambiguity of the term "addition," the Oregon Supreme Court's decision parts ways with *Los Angeles County* and *Miccosukee*. For the same reason, *Rybacheck*—the 1990 decision of the Ninth Circuit that informed the Oregon Supreme Court's analysis and pre-dates this Court's more recent treatment of the "addition" issue—is flawed. Having wrongly assumed the term "addition" to be ambiguous, the

Ninth Circuit showed "great deference to the interpretation given the statute" by the Environmental Protection Agency. *Rybacheck*, 904 F.2d at 1285-86 (quoting *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980)). This Court's later decisions in *Los Angeles County* and *Miccosukee* establish that the plain meaning of "addition" is ***unambiguous***—and can be applied based on the "common understanding" of the word as defined in the dictionary.

Second, the distinction upon which the supreme court sought to avoid conflict with this Court's decisions is wrong on the merits. Consistent with the plain meaning of "addition," and this Court's precedents, the relevant inquiry is whether a point source "increase[s]"—"in number, size, or importance"—pollutants into a jurisdictional water. *Los Angeles County*, 568 U.S. at 82 (quoting Webster's Third New International Dictionary). The issue is a change in the ***quantity*** of pollutants. The issue is not a change in a particular pollutant's location (e.g., suspended versus resting) or qualitative state (e.g., active versus inactive). Had the Congress wanted to make relevant to the inquiry something other than an quantifiable increase in pollutants, it easily could have used more precise language. *Levin v. United States*, 568 U.S. 503, 504 (2013) ("Had Congress wanted to adopt the Government's counterfactual interpretation, it could have used more precise language . . . .").

The lower court's decision conflicts with this Court's decisions in *Los Angeles County* and *Miccosukee*. For that reason, and the reasons stated in the petition, the conflict merits review.

CONCLUSION

Amici and similarly situated Americans have much riding on this case—and so much to lose, if the Court does not review the question presented and resolve deep-seated doubts about the limits of the Clean Water Act's "notoriously unclear" reach. *Sackett*, 566 U.S. at 132 (Alito, J., concurring). The Court should grant the petition.

DATED: February 2020.

Respectfully submitted,

PAUL J. BEARD II
Counsel of Record
FISHERBROYLES LLP
4470 W. Sunset Blvd.
Suite 93165
Los Angeles, CA 90027
818-216-3988
paul.beard@fisherbroyles.com

Counsel for Amici Curiae