NO. 20-601

In the Supreme Court of the United States

DANIEL CAMERON, ATTORNEY GENERAL, ON BEHALF OF THE COMMONWEALTH OF KENTUCKY,

Petitioner,

v.

EMW WOMEN'S SURGICAL CENTER, P.S.C., ON BEHALF OF ITSELF, ITS STAFF, AND ITS PATIENTS, ET AL.,

Respondents.

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

BRIEF OF AMICI CURIAE PHILIP E. BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES IN SUPPORT OF PETITIONER

David H. Thompson
Counsel of Record
Peter A. Patterson
Nicole J. Moss
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

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Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amicus Philip E. Berger is the President Pro Tempore of the North Carolina Senate and Amicus Timothy K. Moore is the Speaker of the North Carolina House of Representatives. North Carolina law provides that Amici "as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute." N.C. GEN. STAT. § 1-72.2(b). Despite this clear grant of authority, the en banc Fourth Circuit, by a 9–6 vote, recently affirmed a district court decision applying a strong presumption that state election officials are adequate representatives of the State's interest in defending litigation challenging the State's voter ID law and denying Amici's right to intervene in the litigation. *See N.C. State Conf. of NAACP v. Berger*, __ F.3d __, 2021 WL 2307483 (4th Cir. June 7, 2021) (en banc). Amici plan soon to file a petition for certiorari seeking review of the Fourth Circuit's decision, which implicates a circuit split in how courts approach motions by state-designated agents to intervene alongside other state officials in litigation challenging state laws. The Sixth Circuit decision under review also concerns the authority of a

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[1] Pursuant to SUP. CT. R. 37.3(a), amici certify that all parties have consented to the filing of this brief. Pursuant to SUP. CT. R. 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel made such a monetary contribution.

state-designated agent to intervene in litigation, and Amici have an interest in ensuring that this Court appropriately protects the right of such agents to intervene in litigation.

SUMMARY OF ARGUMENT

The question presented in this case is whether a state attorney general vested with the power to defend state law should be permitted to intervene after a federal court of appeals invalidates a state statute when no other state actor will defend the law. As Attorney General Cameron has ably explained, the answer to that question is yes, and the Sixth Circuit was wrong to conclude otherwise.

Although the Sixth Circuit erred in denying Attorney General Cameron's motion to intervene on timeliness grounds, there is at least one aspect of the Sixth Circuit's decision that this Court should not disturb: the underlying assumption that there would have been no presumption against Attorney General Cameron intervening in the case before the Secretary of Kentucky's Cabinet for Health and Family Services stopped defending Kentucky HB 454. Indeed, a State's authority "to designate agents to represent it in federal court," *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019), means that it would be error to presume that a state-designated agent has no right to intervene simply because another state official already is in the case. The Sixth Circuit accordingly applied no such presumption in holding that the Attorney General of Ohio had a right to intervene on behalf of the State and its General Assembly in a case in which the Ohio Secretary of State—represented by the Attorney General—already

was a party and was defending the challenged state law. *See Northeast Ohio Coalition for Homeless & Service Employees Intern. Local Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006).

While the Sixth Circuit rightly has held that there is no presumption against the right of a state-designated agent to intervene when another state official is in a case, the same unfortunately is not true of the Fourth and Seventh Circuits. Those courts erroneously impose strong presumptions against allowing intervention in such circumstances, even when state law demonstrates that the State itself deems the existing parties inadequate to represent the State's interests fully. *See Berger*, 2021 WL 2307483, at *14 (en banc); *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019).

Amici recently were on the losing end of the Fourth Circuit's case law on this subject, with the en banc court by a 9–6 vote affirming a district court decision denying intervention in a case challenging North Carolina's voter ID law. It did so despite North Carolina law making Amici necessary to the defense of the State's interests, the defendant election officials indicating in parallel state-court litigation that they had a primary purpose simply of determining what law would apply, and the implacable opposition to voter ID of the Governor who controls those election officials—opposition that led him shortly after taking office to oppose this Court's review of a Fourth Circuit decision invalidating North Carolina's prior voter ID law, *see North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 1399 (2017) (Statement of Roberts, C.J.,

respecting denial of certiorari), and to file an amicus brief in the Fourth Circuit supporting plaintiffs' attack on the State's current voter ID law, *see* Brief of Governor Roy Cooper as Amicus Curiae Supporting Plaintiffs-Appellees and Affirmance, *N.C. State Conf. of NAACP v. Raymond*, 2020 WL 4201325 (4th Cir. July 20, 2020).

Amici plan to seek this Court's review to resolve the split in the circuits over how to analyze attempted intervention by state-authorized agents when other state officials are in a case. They file this brief to inform the Court of this issue and to ensure this case is resolved with the knowledge that it soon will be presented to the Court.

ARGUMENT

I. Rule 24 of the Federal Rules of Civil Procedure governs intervention in district court, and its principles inform intervention in appellate courts. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of America AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Rule 24(a) provides that, "On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Rule 24 thus guarantees a right to intervene to parties who timely seek to protect an interest that may be impaired by the action and that is not adequately represented by the existing parties.

In this case, the Sixth Circuit erroneously held that Attorney General Cameron did not act quickly enough when he sought to intervene mere days after the Secretary of Kentucky's Cabinet for Health and Family Services, Eric Friedlander, informed him that he would not seek further review of a decision affirming a permanent injunction against enforcement of a Kentucky law regulating abortion, HB 454. *See* JA 236–37. A necessary premise of that holding must be that it would not have been presumptively improper for Attorney General Cameron to intervene before the Secretary made known his plans to discontinue defense of the State law he was charged with implementing and enforcing. That is because if Secretary Friedlander's presence presumptively would have defeated any attempt by Attorney General Cameron to intervene, there would be no conceivable basis for asserting that Attorney General Cameron's attempt to intervene only after Secretary Friedlander discontinued his defense came too late.

As Attorney General Cameron explains in his brief, the Sixth Circuit's holding that he did not act in a timely manner, and therefore that Kentucky must suffer the permanent injunction of one of its laws based on the litigation decisions of a single State official, both disrespects the Commonwealth's sovereign interest in the validity of its statutes and is contrary to normal intervention principles. But in correcting this error, the Court should be careful not to give any impression that there would have been a presumption against Attorney General Cameron intervening had he sooner sought to enter the case as a party. The Rule 24 factors, interpreted in

conjunction with this Court's precedent and the sovereign authority of the States to designate agents to represent their interests in federal court, foreclose any such presumption.

Interest in the Litigation. When a state statute is challenged in litigation, the litigation implicates a profound interest: that of a State and its people in the validity of state law. "A State clearly has a legitimate interest in the continued enforceability of its laws." *Maine v. Taylor*, 477 U.S. 131, 137 (1986). Indeed, Justices of this Court repeatedly have stated that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

Because states are incorporeal entities that cannot speak for themselves, "a State must be able to designate agents to represent it in federal court." *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013). And because "a State defines itself as a sovereign" in part through "the character of those who exercise government authority," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), a federal court has no basis to second-guess a State's choices in determining which of its agents are authorized to defend its interests in court. These principles are illustrated in cases involving the standing of state legislative officials, in which this Court has "recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to

represent the State's interests." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1987). Accordingly, in *Karcher v. May*, 484 U.S. 72 (1987), this Court held that New Jersey legislative officials had standing on behalf of the legislature to defend the validity of state law because "the New Jersey Legislature had authority under state law to represent the State's interests." *Id.* at 82. And in *Virginia House of Delegates v. Bethune-Hill*, the Court applied the same principles to determine that the Virginia House of Delegates *lacked* standing to defend state law because the State had not "designated the House to represent its interests." 139 S. Ct. at 1951.

While *Karcher* and *Virginia House of Delegates* are standing decisions, there is no reason not to extend them and the principles underlying them to the intervention context. It would be strange indeed to hold that a state-designated agent has standing to assert the State's interest in defense of state law but nevertheless does not have the requisite interest to intervene under Rule 24. It therefore follows that when state law authorizes a state agent to defend state law in litigation, that state agent has the requisite interest in the litigation to be eligible for intervention.

Potential for Impairment. Analysis of this factor is straightforward. If a federal court enjoins enforcement of a state statute, the State's—and its designated agent's—interest in the continued enforcement of that statute is impaired and impeded entirely.

Adequacy of Representation. This Court's decision in *Trbovich v. United Mine Workers of Am.*, 404 U.S.

528 (1972), forecloses any presumption that a State's interest in the validity of its statutes is adequately represented by an existing party when State law grants another agent the authority to represent the State's interest in federal court. In *Trbovich*, the U.S. Secretary of Labor filed an action under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") to set aside an election of union officers. The LMRDA gave the Secretary of Labor exclusive authority to challenge union elections in court and "prohibit[ed] union members from initiating a private suit to set aside an election." *Id.* at 531. Despite this vesting of exclusive authority in the Secretary, the Court did not apply any presumption against the union member who sought to intervene in *Trbovich*. To the contrary, the Court held that Rule 24's requirement that a proposed intervenor's interest not be adequately represented by an existing party "is satisfied if the applicant shows that representation of his interest *may be* inadequate; and the burden of making that showing should be treated as *minimal*." *Id*. n.10 (emphases added, quotation marks omitted). And applying that standard, this Court held that "there [was] sufficient doubt about the adequacy of representation to warrant intervention" because the Secretary of Labor served two functions—serving as the union member's "lawyer" and advancing the broader public interest in "free and democratic union elections"—that "may not always dictate precisely the same approach to the conduct of the litigation." *Id*. at 538–39.

Any presumption against intervention by a State-designated agent in defense of state law is fundamentally incompatible with *Trbovich*. As

explained, in *Trbovich* federal law vested the Secretary of Labor with the exclusive authority to challenge union elections in federal court under the LMRDA. In a constitutional challenge to a state statute, by contrast, under *Ex parte Young* the state officials named as defendants in federal court generally will be executive branch officials charged with implementing the challenged statute. If the exclusive litigating authority in *Trbovich* did not give rise to a presumption of adequate representation, the happenstance that an official is charged with implementing a challenged statute cannot give rise to such a presumption. Furthermore, this Court in *Trbovich* reasoned that the distinct roles played by the Secretary of Labor could introduce competing considerations into the Secretary's approach to the conduct of litigation. The same is true for state officials responsible both for implementing a state law and defending it in court. The responsibility to implement a statute and the responsibility to defend its validity "may not always dictate precisely the same approach to the conduct of . . . litigation." *Id.* at 539. Indeed, execution of the law and defense of a challenged law are different acts that implicate different interests. In addition, the state executive branch officials who typically are sued in federal court may face distinct political pressures or incentives that could affect their approach to the conduct of litigation in a way different than the pressures or incentives faced by a different agent of the State, such as a representative of the legislative branch. It is no surprise that disputes about intervention by state-designated agents often arise in cases involving controversial topics such as abortion or voting laws. Just as in *Trbovich*, the people of a State—the

ultimate client when a state law is being challenged—"may have a valid complaint about the performance of" the official responsible for implementing a law who must function as "[their] lawyer" in litigation challenging it. *Id*. It follows that there cannot be any presumption that such an official adequately represents the interests of a State when another state-designated agent seeks to intervene. Indeed, under this Court's precedents establishing that "states have great deference in deciding who represents their interests," *Berger*, 2021 WL 2307483, at *26 (Quattlebaum, J., dissenting), if there is going to be a presumption in this context at all it should be *against* adequate representation and *in favor* of intervention by an agent a State deems necessary to the defense of its statutes.

II. While in the decision below the Sixth Circuit failed properly to apply intervention law on timeliness and to account for the Commonwealth of Kentucky's sovereign interest in the defense of its laws, in the past the Sixth Circuit has been more faithful to this Court's precedents by following *Trbovich* and not applying a presumption against a state-designated agent's attempt to intervene in a lawsuit challenging state law. In *Northeast Ohio Coalition for the Homeless*, 467 F.3d 999 (6th Cir. 2006), plaintiff organizations sued the Ohio Secretary of State in federal court seeking an injunction against Ohio voter ID provisions the Secretary was responsible for implementing. The Secretary of State, represented by the Ohio Attorney General's Office, unsuccessfully opposed the plaintiffs' motion for a temporary restraining order. While the Secretary continued to oppose the plaintiffs' preliminary

injunction motion after entry of the TRO, *see* Defendant J. Kenneth Blackwell's Memorandum in Opposition to Preliminary Injunction, *Northeast Ohio Coalition for the Homeless v. Blackwell*, No. 06-cv-00896 (S.D. Ohio Oct. 31, 2006), ECF No. 29, he did not wish to appeal the TRO. The Ohio Attorney General therefore moved to intervene "on behalf of the State of Ohio and the General Assembly, who wish[ed] to participate in arguing the constitutionality of the statutes at issue." *Northeast Ohio Coalition for the Homeless*, 467 F.3d at 1006. The district court denied intervention, and the Attorney General appealed.

On appeal, the plaintiffs argued that the Attorney General was required to "overcome [a] presumption of adequate representation" due to the Secretary of State's presence in the case, *id.* at 1008, but the Sixth Circuit rejected the argument. Instead, consistent with *Trbovich*, it held that the Attorney General's "burden with respect to establishing that [the State's] interest is not adequately protected by the existing party to the action is a minimal one; it is sufficient to prove that representation *may* be inadequate." *Id.* (emphasis in original). And it held that the Attorney General met this minimal burden because "the Secretary's primary interest is in ensuring the smooth administration of the election, while the State and the General Assembly have an independent interest in defending the validity of Ohio laws and ensuring those laws are enforced." *Id*. The court accordingly reversed the district court's decision denying intervention.

The Fourth and the Seventh Circuits, in contrast to the Sixth, have erred by creating robust presumptions against state-designated agents

intervening when another state official is defending a case. In *Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013), the Fourth Circuit held that a private party seeking to intervene alongside a government defendant sharing the same ultimate objective must make a "very strong showing" of inadequacy to overcome a presumption of adequate representation. *Id.* at 351. And then in *Berger*, 2021 WL 2307483, the en banc court, by a 9–6 vote, extended the *Stuart* presumption to situations in which state-designated agents seek to intervene alongside other state officials. *Id.* at *14. The Seventh Circuit has adopted an even stricter test, requiring state-designated agents seeking to intervene beside other state officials in defense of state law to make "a concrete showing of . . . bad faith or gross negligence before permitting intervention." *Kaul*, 942 F.3d at 801.

The practical consequences of the Fourth and Seventh Circuit's erroneous approaches are illumined by comparing *Northeast Ohio Coalition for the Homeless*, described above, in which the Sixth Circuit held that Ohio's Attorney General was entitled to intervene on behalf of the State and its General Assembly, and *Berger*, in which the Fourth Circuit affirmed the denial of Amici's motion to intervene. *Berger*, like *Northeast Ohio Coalition for the Homeless*, involves a challenge to a state voter ID law brought against the state election officials responsible for administering the law (the members of the North Carolina State Board of Elections). The North Carolina State Board of Elections, like the Secretary of State in *Northeast Ohio Coalition for the Homeless*, has made clear (in parallel state court litigation) that it has "a primary objective . . . to expediently obtain

clear guidance on what law, if any, will need to be enforced." Joint Appendix Volume II at JA589, *N.C. State Conf. of NAACP v. Berger*, No. 19-2273 (4th Cir. Jan. 13, 2020), ECF No. 32-2. And Amici, like the Ohio Attorney General in *Northeast Ohio Coalition for the Homeless*, are "designate[d] . . . to represent [the State's] interests." *Berger*, 2021 WL 2307483, at *22 (Niemeyer, J., dissenting). Indeed, North Carolina law clearly "envisions a role for the General Assembly when a state statute is under challenge." *Id.* at *20 (Wilkinson, J., dissenting). "Whenever the validity or constitutionality of an act of the General Assembly . . . is the subject of an action in any . . . federal court," North Carolina law provides, "the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties." N.C. GEN. STAT. § 120-32.6(b). Amici, therefore, "as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute." *Id.* § 1-72.2(b).

To be sure, unlike the Ohio Secretary of State, the North Carolina State Board of Elections Defendants did not resist appealing an adverse interlocutory order. But the Ohio Secretary of State's resistance to appeal was not essential to the Sixth Circuit's decision. As the Sixth Circuit made clear, "the difference of opinion regarding whether to appeal the TRO [was] merely illustrative of the underlying divergent interests of the Secretary and the State." *Northeast Ohio Coalition for the Homeless*, 467 F.3d at 1008. And the North Carolina State Board of

Elections and Amici have the same underlying divergent interests—the interests in administering the law and defending its continued validity and enforceability, respectively.

For the reasons explained above, it is the Sixth Circuit's approach, and not the Fourth's or the Seventh's, that is consistent with Rule 24, this Court's precedent, and the sovereign authority of States to designate agents to defend their interests in court. The Fourth Circuit's and Seventh's Circuit's approaches, furthermore, promote acrimony and discord between state officials in federal court. That is because rather than looking to objective factors such as differences in function that could lead to different approaches to litigation, and rather than requiring only a minimal showing to justify intervention, the Fourth and Seventh Circuits look to factors such as "adversity of interest, collusion or nonfeasance," *Berger*, 2021 WL 2307483, at *28, or "bad faith or gross negligence," *Kaul*, 942 F.3d at 804, and impose a strong presumption against intervention. State-designated agents seeking to intervene in the Fourth and Seventh Circuits thus are presented with the unappealing prospect of attacking the motives or competence of their fellow state officials when seeking to intervene alongside them. Federal courts should avoid intervention standards that create incentives for state officials to attack one another in federal court.

III. There is an additional factor not present in *Northeast Ohio Coalition for the Homeless* that puts "extra icing on a cake already frosted," *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021), in support

of intervention in *Berger*. That is the role of North Carolina Governor Roy Cooper. While Governor Cooper is no longer a defendant in *Berger* (he successfully moved to dismiss the claims against him as an improper defendant, *see N.C. State Conf. of NAACP v. Cooper*, 397 F. Supp.3d 786, 802 (M.D.N.C. 2019)), he has constitutional authority to control the State Board of Elections, *see Cooper v. Berger*, 809 S.E.2d 98, 111–12 (N.C. 2018). He accordingly appoints the Board's members, who serve at his pleasure. *See* N.C. GEN. STAT. §§ 163-19(b), 163-28; *Cooper*, 809 S.E.2d at 114 (declaring structure of prior State Board unconstitutional in part because of the Governor's "circumscribed removal authority").

Governor Cooper is an implacable foe of voter ID. Shortly after his election as Governor, the State's then-new (and now current) Attorney General moved to dismiss a petition for certiorari on behalf of the Governor and others seeking review of a Fourth Circuit decision enjoining the State's prior voter ID law. *See North Carolina*, 137 S. Ct. at 1399 (Statement of Roberts, C.J., respecting denial of certiorari). This Court denied the petition after considerable procedural wrangling, prompting the Chief Justice to comment that "it is important to recall our frequent admonition that the denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Id.* at 1400 (cleaned up).

The citizens of North Carolina subsequently amended their constitution to require voter ID, *see* N.C. CONST. art. VI, § 3(2), and the General Assembly enacted the State's current voter ID law, SB 824, to implement the amendment. SB 824 contains several

provisions that "go out of their way to make its impact as burden-free as possible" and is "more protective of the right to vote than other states' voter-ID laws that courts have approved." *N.C. State Conf. of NAACP v. Raymond*, 981 F.3d 295, 309–10 (4th Cir. 2020) (cleaned up). The General Assembly was forced to enact this generous law over Governor Cooper's veto, and in his veto message Governor Cooper made an accusation that the law—which had an African American Democrat as one of three primary sponsors—had "sinister and cynical origins" and was "designed to suppress the rights of minority, poor and elderly voters." Governor Cooper Vetoes Voter ID Bill, Signs Two Additional Bills Into Law (Dec. 14, 2018), https://bit.ly/3wzqWL3. Governor Cooper doubled down in an amicus brief he filed in support of *plaintiffs* in the Fourth Circuit (after, as explained above, getting himself dismissed as a defendant in district court), arguing that the preliminary injunction entered in the case "should be made permanent, and that this unconstitutional law should never go into effect." Br. of Governor Roy Cooper as Amicus Curiae Supporting Pls-Appellees and Affirmance, 2020 WL 4201325, at *3. The Fourth Circuit, which allowed Amici to intervene in the preliminary injunction appeal, rejected the Governor's argument and unanimously held that the district court had abused its discretion in enjoining SB 824. *See Raymond*, 981 F.3d at 311. While Governor Cooper has allowed the State Board of Elections to defend SB 824 to date, given his past actions and his expressed views on the law, there is no guarantee that he will continue to do so or that he will permit the State Board to seek review in this Court if necessary.

Governor Cooper's role is an additional reason why Amici are entitled to intervene.

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In the decision under review in this case, the Sixth Circuit essentially held that Attorney General Cameron waited too long to intervene because he did not seek to become a party until immediately after the named defendant stopped defending state law. In *Berger*, by contrast, the Fourth Circuit essentially held that Amici's motion to intervene was premature because the named defendants had not yet stopped defending state law. While the results of these decisions cannot be reconciled, they share the common underlying flaws of refusing to accord proper respect to the sovereign interests of States in defending their statutes and in failing properly to apply the law of intervention. This Court should reverse the Sixth Circuit's decision below, and it should do so in a way that does not prejudice Amici's forthcoming petition for review of the Fourth Circuit's decision in *Berger*.

CONCLUSION

For the foregoing reasons, the question presented should be answered in the affirmative, and the decision below should be reversed.

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Respectfully submitted,

David H. Thompson
Counsel of Record
Peter A. Patterson
Nicole J. Moss
COOPER & KIRK, PLLC
1523 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Counsel for Amici Curiae