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Certiorari to the Court of Appeals, 20CA0298
District Court, City and County of Denver, 19CV31940

Petitioners:
KILLMER, LANE & NEWMAN, LLP; MARI NEWMAN; and TOWARDS JUSTICE,

v.

Respondents:
BKP, INC.; ELLA BLISS BEAUTY BAR LLC, ELLA BLISS BEAUTY BAR-2 LLC; and ELLA BLISS BEAUTY BAR-3 LLC.

Attorneys for Amici Curiae Colo. Press Ass'n, et al.

Matthew A. Simonsen, No. 53757
Daniel D. Williams, No. 38445
HUTCHINSON BLACK AND COOK, LLC
921 Walnut Street, Suite 200
Boulder, CO 80302
(303) 442-6514
matt.simonsen@hbcboulder.com
dan.williams@hbcboulder.com

Edward T. Ramey, No. 6748
TIERNEY LAWRENCE STILES LLC
225 E. 16th Avenue, Suite 350
Denver, CO 80203
(303) 949-7676
eramey@TLS.legal

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Supreme Court Case No. 21SC930

BRIEF OF *AMICI CURIAE* NEWS MEDIA ORGANIZATIONS AND ACLU OF COLORADO IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief contains 3989 words.

s/ Matthew Simonsen
Matthew Simonsen

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Colorado Press Association, Colorado Broadcasters Association, Colorado Freedom of Information Coalition, and Gannett Co., Inc. (collectively, the "Amici Media"), as detailed in the accompanying Motion for Leave, are trade associations, advocacy organizations, and a mass media company that together represent all facets of news media. Also joining in this brief is the American Civil Liberties Union Foundation of Colorado ("ACLU of Colorado"), which is a leading advocacy organization in Colorado for civil liberties issues, protecting the First Amendment rights of both those who consume news and those who publish news throughout the state. Collectively, the Amici Media and their members include over 100 print and online news organizations and more than 250 broadcasters that report news in Colorado, as well as more than 250 additional newspapers throughout the country.

The news media fulfill a fundamental role—one that is enshrined in the First Amendment—of keeping the public apprised of government operations and public affairs, including newsworthy court proceedings. *See, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("[T]he function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."); *see also* U.S. CONST. amend. I (protecting the rights of "the press"). Critically, in fulfilling this role, the media rely heavily on

communications initiated and information volunteered by lawyers seeking to publicize their cases.

Consequently, although the media generally have little direct interest in the exact contours of protections for class action lawyers, they have a considerable interest at stake in this case. The court of appeals' narrowing of the common law litigation privilege, if upheld, will widely chill lawyers' publicity efforts in any case alleging widespread injury to a group, no matter how large, of victims who may ultimately be deemed "ascertainable." This would harm not just the lawyers who pursue these cases, but also the media that depends on those lawyers' publicity efforts to keep the public informed and by extension, the general public itself.

Accordingly, the Amici Media and ACLU of Colorado seek to address the additional constitutional interests of the media and the public that are at stake here, which were overlooked in the court of appeals' analysis. As set forth below, these interests weigh against this Court's adoption of the "ascertainability" exception and further tilt the scales in favor of reversal.

ARGUMENT

I. THE "ASCERTAINABILITY" EXCEPTION UNREASONABLY INTERFERES WITH THE RIGHTS OF THE MEDIA AND THE PUBLIC TO RECEIVE ACCURATE, TRUTHFUL, AND NEWSWORTHY INFORMATION ABOUT MATTERS PENDING IN OUR COURTS.

In the decision below, by considering only the *lawyers*' interest in speaking publicly about their cases, "the court posed the wrong question." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978). "The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests." *Id.* (concluding proper question was not whether "corporations have First Amendment rights," but whether the law at issue "abridge[d] expression that the First Amendment was meant to protect"); *see, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (relying on potential speakers' and public's interests in concluding newspaper's First Amendment privilege encompasses paid advertisements).[1]

[1] Although the litigation privilege is derived from the common law of England, its modern American scope should also be informed by consideration of the First Amendment interests at stake. Indeed, the absence of a constitutional privilege does not eliminate the need to otherwise carefully weigh the constitutional interests implicated. *Cf., e.g.*, *Herbert v. Lando*, 441 U.S. 153, 180 (1979) (Powell, J., concurring) ("I join the Court's opinion on my understanding that in heeding [the same], the District Court *must* ensure that the values protected by the First Amendment, though entitled to no constitutional privilege in a case of this kind, are weighed carefully in striking a proper balance.") (emphasis added).

The First Amendment protects not only the interests of speakers, such as the lawyers here, but also the media's and the public's interests in *receiving* newsworthy information about matters of public concern. Part I.A, *infra*. Further, the media plays a special, constitutionally recognized role in keeping the public informed about court proceedings and other government functions, Part I.B, *infra*, and the importance of that role is paramount in cases alleging widespread harms, such as class actions, Part I.C, *infra*. Yet the "ascertainability" exception will chill the lawyers' publicity efforts upon which the media depends to keep the public apprised of these important cases. Part I.D, *infra*.

For these reasons, along with many others identified by Petitioners and fellow amici, this Court should reject this unworkable exception to the litigation privilege and, accordingly, reverse.

A. As willing listeners, the media and the public have a constitutionally protected interest in receiving newsworthy information about matters of public concern.

The First Amendment protects not only the rights of speakers, but also the rights of those who would willingly receive the information they impart. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("[T]he protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both."); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (recognizing it is "well established that the

Constitution protects the right to receive information and ideas"); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."). After all, "[t]he dissemination of ideas can accomplish nothing if otherwise willing [readers, viewers and listeners] are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

In fact, the public's interest in the free flow and receipt of information has been held to justify protections of individual speakers whose speech would otherwise be unjustifiably chilled or limited. *See, e.g.*, *Sullivan*, 376 U.S. at 266 ("Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas . . . . The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'") (citations omitted); *see also Bellotti*, 435 U.S. at 783 ("A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the *societal interest* in the 'free flow of commercial information.'")

(emphasis added) (citation omitted). For instance, in *Smith v. California*, the Court struck down an ordinance imposing strict liability for a bookseller's sale of obscene material because the ordinance would ultimately restrict the *public's* access to reading materials:

> For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. . . . The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.

361 U.S. 147, 153-54 (1959) (footnote omitted); *accord Sullivan*, 376 U.S. at 278-79 (quoting *Smith*, 361 U.S. at 153-54; then concluding that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship'").

Further, the kind of speech at issue here—attorneys' statements to the press about pending class actions—is undoubtedly of concern to the public whether or not a putative class is ascertainable. "The operations of the courts and the judicial conduct of judges are matters of utmost public concern," *Landmark Commc'ns v. Virginia*, 435 U.S. 829, 839 (1978), and attorneys, as officers of the court, are the

most knowledgeable and credible sources of information, able to explain to the public what is transpiring in the judicial system, *see, e.g., Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991) ("Because lawyers have special access to information through discovery and client communications, their . . . statements are likely to be received [by the public] as especially authoritative."). The case at bar highlights this importance—the public, including both service industry laborers and consumers of those services, have a right to know when cases are filed in our courts addressing possible worker exploitation in their communities that is generally hidden from public view. And the public's right to receive information on matters of public concern is more strongly protected by article II section 10 of the Colorado Constitution than by the First Amendment. *See, e.g.*, *Tattered Cover v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002) ("[B]ecause our state constitution provides more expansive protection of speech rights than provided by the First Amendment, it follows that the right to purchase books anonymously is afforded even greater respect under our Colorado Constitution than under the United States Constitution."). As this Court has declared, "[a] free self-governing people needs full information concerning the activities of its government . . . ." *Cole v. State*, 673 P.2d 345, 350 (Colo. 1983).

To be sure, the media's and public's right to receive or access information is not absolute; however, any government interference with willing speakers' ability

to engage willing listeners requires adequate justification. *See Lamont*, 381 U.S. at 307; *In re Marriage of Newell*, 192 P.3d 529, 536 (Colo. App. 2008) ("A ruling that 'effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another' is 'unacceptable if less restrictive alternatives would be at least as effective.'" (quoting *Reno v. ACLU*, 521 U.S. 844, 874 (1997))); *see also Globe Newspaper Co. v. Superior Ct*., 457 U.S. 596, 606 (1982) ("Although the right of access to criminal trials is of constitutional stature, it is not absolute. But the circumstances under which the press and public can be barred from a criminal trial are *limited*; the State's justification in denying access *must be a weighty one*.") (emphasis added) (citations omitted). Moreover, there is no collision of competing *constitutional* rights here. *Cf., e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980) (opinion of Burger, C.J., joined by White and Stevens, JJ.) (noting prior cases involving "conflicts between publicity and a [criminal] defendant's right to a fair trial," and that "problems presented by this [conflict] are almost as old as the Republic") (second alteration in original) (citation omitted).

Thus, absent a sufficient overriding interest in suppressing the speech at issue here, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Bellotti*, 435 U.S. 765,

783 (1978); *see also Sullivan*, 376 U.S. at 277 (subjecting speech to possible tort liability amounts to governmental action).

B. The media play an essential role—one enshrined in First Amendment jurisprudence—in keeping the public informed about governmental operations, including court proceedings.

News media play a critical role in keeping the public apprised of government proceedings and public affairs. *See, e.g.*, *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs."); Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975) ("The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches. . . . This formidable check on official power was what the British Crown had feared—and what the American Founders decided to risk."). As the Supreme Court has recognized,

> in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government . . . .

Cox Broad., 420 U.S. at 491-92; *accord Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) ("An informed public depends on accurate and effective reporting by the news media. . . . For most citizens the prospect of

personal familiarity with newsworthy events is hopelessly unrealistic."). Consequently, "as an agent of the public at large," the media "is the means by which the people receive the free flow of information and ideas essential to effective self-government." *Saxbe*, 417 U.S. at 863.

The media's "special and constitutionally recognized role of . . . informing and educating the public," *Bellotti*, 435 U.S. at 781, is particularly well-established as to pending litigation. *See Landmark Commc'ns*, 435 U.S. at 838 n.11 ("The interdependence of the press and the judiciary has frequently been acknowledged."). As the Supreme Court has acknowledged, "[w]ith respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broad.*, 420 U.S. at 492. "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." *Richmond Newspapers*, 448 U.S. at 573.

"This 'contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire . . . justice system.'" *Id.* (first alteration in original) (citation omitted); *see Globe Newspaper Co.*, 457 U.S. at 604-05 (because "a major purpose of the First Amendment was to protect the free

discussion of governmental affairs," the right of public access to information about judicial proceedings "serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government").

Specifically, the media enhances the function of the judicial system by: (1) educating the public concerning the role and operation of the judicial system and instilling confidence where warranted; (2) enhancing competence and accountability of participants in the system; and (3) instilling public awareness of system proceedings and causing witnesses and victims of wrongdoing to come forward. *E.g.*, *Globe Newspaper Co.*, 457 U.S. at 606. These benefits, while not unique to criminal cases, have been especially well articulated in that context:

> [T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny . . . enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the [parties] and to society as a whole. Moreover, public access . . . fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access . . . permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.

Id. (footnotes omitted). To that end, the "justice system exists in a larger context of a government ultimately of the people, who wish to be informed about the happenings in the . . . justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system. The way most of them acquire that information is from the media." *Gentile*, 501 U.S. at 1070.

Accordingly, enabling a free flow of information to the press regarding judicial proceedings promotes multiple societal aims and aids in courts' truth-seeking function. *See Globe Newspaper Co.*, 457 U.S. at 604-06; *Richmond Newspapers*, 448 U.S. at 573; *Gentile*, 501 U.S. at 1070.

C. The media's role of informing the public is particularly vital in class action, mass tort, and other litigation involving widespread harm.

Class action lawsuits are of even greater importance to the media and the public. Class action lawsuits are inherently newsworthy, as the wrongs they seek to redress must be widespread. Indeed, by definition, a class action must involve a common injury to a class "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); C.R.C.P. 23(a)(1).

Moreover, "the class action provides for the private enforcement of laws that are aimed at protecting the public." John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1419 (2003); *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 185-86 & n.8 (1974) (Douglas, J., dissenting in part) ("The class action is one of the few legal remedies the small claimant has against those who command the status quo."). Thus, the media's public education role is all the more important with respect to the public-protection laws that class actions seek to enforce.

Yet here, the court of appeals took an exceedingly narrow view of the value of news coverage of class actions. The central premise of its analysis is that ascertainability of a class eliminates the class counsel's "need to educate potential class members through the press." *BKP, Inc. v. Killmer, Lane & Newman, LLP*, 2021 COA 144, ¶ 45; *see also id.* at ¶¶ 39, 42-43. Even if this were true (*contra.* OB, pp. 15-21), it ignores that ascertainability is wholly irrelevant to the media's and the public's First Amendment interests in the speech at issue. A class action is no less newsworthy or important to the public simply because all possible members of the class may ultimately be identified.

D. To effectively fulfill its role, the media needs the attorney speech that will be chilled by the ascertainability exception.

The media's coverage of important cases pending in Colorado courts depends heavily on press conferences, press releases, and other attorney-initiated efforts to publicize those cases, particularly as newsroom resources dwindle. Few, if any, media outlets have the staffing needed to constantly scour and evaluate court filings for potentially newsworthy cases, especially not in state and local courts. Indeed, in the past two decades, the volume of court filings has increased[2]

[2] *See Federal Judicial Caseload Statistics 2021*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021 (last visited Feb. 22, 2023) (total civil case filings in federal district courts have increased 61.8 percent since 2012).

while newsroom resources have steadily declined.[3] Further, with no guidance from the parties' lawyers, a lay newsperson cannot always discern and distill the most salient facts from cold court filings alone—such as the 137-paragraph federal class action complaint here—let alone do so in all areas of law and for all types of cases. Accordingly, the media depends, now more than ever, on the publicity efforts of lawyers, who are best poised to highlight the newsworthy facts and demonstrate why their cases are of particular interest to the public.[4]

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[3] Mason Walker, *U.S. newsroom employment has fallen 26% since 2008*, PEW RSCH. CTR. (July 13, 2021), https://www.pewresearch.org/?p=304666 (analyzing Bureau of Labor Statistics data reflecting 26 percent reduction in total newsroom employment across the "five industries that produce news: newspaper, radio, broadcast television, cable, and . . . digital news publishers[]").

[4] The key role of attorneys' press statements, as well as the media's dependence thereon, is well-illustrated by actual media coverage of class action and other widespread injury lawsuits. *See, e.g.*, Matt Masterson, *Lawsuit Alleges DCFS Has Left Children Jailed Despite Orders For Their Release*, WTTW NEWS (Jan. 19, 2023), https://news.wttw.com/2023/01/19/lawsuit-alleges-dcfs-has-left-children-jailed-despite-orders-their-release ("'Every child who's been in DCFS custody has had some trauma in their life at some point in time,' Russell Ainsworth, an attorney with Loevy & Lovey, which filed the suit, said during a press conference Thursday. 'These are our most vulnerable children. DCFS has known about this problem for years, but refuses to do anything about it.'"); Emeline Posner, *Algonquin Apartments tenants sue Mac Properties over power failure and three-week building closure*, HYDE PARK HERALD (Jan. 19, 2023), https://www.hpherald.com/article_623fdcf6-9853-11ed-b382-7764c9b14132.html ("At a Thursday, Jan. 19 press conference, tenants reported receiving little explanation and no alternate accommodations from Mac on the first night of the failure. That night, several tenants have alleged they were forced to find their own accommodations; some slept in their cars."). The class members in the referenced lawsuits are readily ascertainable, and the court of appeals' ruling, if affirmed, would therefore chill such coverage that is vital to the public at large.

The ascertainability exception chills those publicity efforts in many of the cases that matter most to the public. As Petitioners and other amici set forth in detail, how ascertainable a class will be is often extremely difficult for lawyers and courts to anticipate in the earliest stages of most class action and mass tort cases. (*E.g.*, OB, pp. 24-28.) Critically, only a small fraction of these widespread-injury cases will definitively have an unascertainable class at the outset; the majority of cases will remain potentially susceptible to the ascertainability exception during the early stages when lawyers are most incentivized, and therefore most likely, to engage in publicity efforts to promote and develop their cases. In turn, without confidence that their actions will be shielded by the litigation privilege, lawyers can be expected to discontinue the early publicity-gathering efforts upon which the media depends, out of fear of personal financial consequences and almost-certain reprisal litigation. *See Sullivan*, 376 U.S. at 279 ("Allowance of the defense of truth . . . does not mean that only false speech will be deterred."); *Lamont*, 381 U.S. at 309 (Brennan, J., concurring) ("[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."); *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.").

The ascertainability exception serves only a modest purpose—expanding the already existing remedies available to certain class-action defendants—yet it sweeps up a myriad of valuable speech in the process. It reserves certainty that the litigation privilege will apply for only the infrequent cases where a class is definitely unascertainable; for the rest, the uncertainty deters all but the most brazen lawyers from speaking to the press about their cases. While this is hardly tenable for class action lawyers, the media and the public too will pay the price. *See, e.g.*, *Smith*, 361 U.S. at 153 ("The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public . . . .").

CONCLUSION

By chilling a host of legitimate speech that allows the media to keep the public informed on matters of significant public concern, the ascertainability exception, which serves only a modest aim, impermissibly "limit[s] the stock of information from which members of the public may draw." *Bellotti*, 435 U.S. at 783; *see Smith*, 361 U.S. at 153-54. Vital news coverage of some of the most important court cases—those involving widespread injuries—will inevitably be lost if the proposed carveout for "ascertainability" is adopted by this Court. In addition to the lawyers' own protected interests, the media's and the public's constitutionally safeguarded interests in those lawyers' speech further militate against this exception. Accordingly, this Court should reverse.

Dated: February 22, 2023

Respectfully submitted,

s/ Matthew Simonsen
Matthew A. Simonsen, No. 53757
Daniel D. Williams, No. 38445
HUTCHINSON BLACK AND COOK, LLC
921 Walnut Street, Suite 200
Boulder, CO 80302
(303) 442-6514
matt.simonsen@hbcboulder.com
dan.williams@hbcboulder.com

Edward T. Ramey, No. 6748
TIERNEY LAWRENCE STILES LLC
225 E. 16th Avenue, Suite 350
Denver, CO 80203
(303) 949-7676
eramey@TLS.legal

Attorneys for Amici Curiae News Media Organizations and ACLU of Colorado

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2023, a true and correct copy of the foregoing **BRIEF OF *AMICI CURIAE* NEWS MEDIA ORGANIZATIONS AND ACLU OF COLORADO IN SUPPORT OF PETITIONERS** was electronically filed and served via Colorado Courts E-Filing on the following counsel of record:

Reza D. Rismani
Kathleen M. Byrne
TREECE ALFREY MUSAT P.C.
Thomas Kelley
KILLMER, LANE & NEWMAN, LLP
Counsel for Petitioners Killmer, Lane & Newman, LLP, and Mari Newman

Brian D. Gonzales
LAW OFFICES OF BRIAN D. GONZALES, PLLC
Brian M. Feldman
HARTER SECREST & EMERY LLP
Counsel for Petitioner Towards Justice

Raymond M. Deeny
Brooke A. Colaizzi
Heather Fox Vickles
John T. Melcon
SHERMAN & HOWARD LLC
Counsel for Respondents

Amy F. Robertson
FOX & ROBERTSON, PC
Counsel for Amici Curiae Impact Fund, et al.

s/ Matthew Simonsen