No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* AMERICAN CENTER FOR LAW AND JUSTICE & EUROPEAN CENTRE FOR LAW AND JUSTICE SUPPORTING RESPONDENTS

ROGER KISKA
EUROPEAN CENTRE FOR LAW AND JUSTICE
4 QUAI KOCH
67000 STRASBOURG, FRANCE
+33 388249440

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
JAMES M. HENDERSON, SR.
COLBY M. MAY
ROBERT W. ASH
AMERICAN CENTER FOR LAW AND JUSTICE
201 MARYLAND AVE., N.E.
WASHINGTON, DC 20002
(202) 546-8890
(202) 546-9309 (FAX)

Attorneys for Amici Curiae

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TREATIES

MISCELLANEOUS

ABBREVIATIONS

GC	Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.
GC Cmt	Commentary on Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.
GPW	Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316.
GPW Cmt	Commentary on Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316.
ICRC	International Committee of the Red Cross

INTEREST OF AMICI[1]

Amicus American Center for Law and Justice (ACLJ) is a not-for-profit, public interest law firm committed to upholding the integrity of the our constitutional system of government based on separation of powers. Jay Alan Sekulow, ACLJ Chief Counsel, has argued and participated as counsel of record in numerous cases involving constitutional issues before this Court as well as lower federal and state courts. *Amicus* European Centre for Law and Justice (ECLJ) is a not-for-profit, public interest law firm specializing in international human rights law which seeks to ensure that courts interpret the terms of the Geneva Conventions as they were originally agreed to. ACLJ and ECLJ lawyers have argued numerous cases involving constitutional issues before courts throughout the United States and Europe. *Amici* are very concerned about Petitioner Hamdan's attempt to subvert the well-established authority of the Executive and Legislative Branches to deal with the exigencies of war in all their facets and to transfer such authority to the Judiciary. *Amici* urge this Court to affirm the Circuit Court's reversal of the District Court's opinion and to allow military commissions to proceed unhindered and as planned.

SUMMARY OF ARGUMENT

Because the United States is currently in a war explicitly sanctioned by the Congress and recognized as such by this

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[1] This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, *amici* ACLJ and ECLJ disclose that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Court, *see, e.g., Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and because the Congress has explicitly authorized in the Uniform Code of Military Justice (UCMJ) the use of military commissions to try certain offenses, *see Manual for Courts-Martial* I-1 (2000 ed.) (recognizing jurisdiction of military commissions); II-12 (noting that military commissions have concurrent jurisdiction with courts-martial under certain circumstances); IV-41 (noting that military commissions have concurrent jurisdiction regarding UCMJ Article 104 – Aiding the enemy); IV-44 (noting that military commissions have concurrent jurisdiction with courts-martial regarding UCMJ Article 106 – Spies); *see also* 10 U.S.C. §§ 821, 836, the President retains the right to establish military commissions to try certain categories of offenses committed by unlawful combatants.[2]

Only lawful combatants qualify for the numerous protections enumerated in the Geneva Conventions when taken captive. Petitioner does not meet the requirements of lawful belligerency under Article 4 of the GPW. Moreover, Petitioner was a belligerent in an international armed conflict and does not claim to be a United States citizen. Consequently, he does not qualify for protection under any of the 1949 Geneva Conventions. As such, as an unlawful

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[2] To be a "lawful" combatant, one must meet the following four criteria: (1) be commanded by a person responsible for his subordinates; (2) wear a fixed distinctive sign recognizable at a distance; (3) carry arms openly; and (4) operate in accordance with the laws and customs of war. Art. 4.A.(2) GPW. *A fortiori*, failure to meet any one of the four criteria renders one an "unlawful" combatant. *See, e.g.*, GPW Cmt on Art. 4.A.(2), at 56-61. This Court noted in *Ex Parte Quirin*, 317 U.S. 1 (1942), that unlawful combatants, like lawful combatants, are "subject to capture and detention, but *in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.*" *Id.* at 31 (emphasis added).

combatant, he may be tried by military commissions for his crimes.

Further, under United States law, foreign and national security policy issues—including the capture, classification, and handling of war captives—present political decisions, the responsibility for which the Constitution assigns to the political branches. In consideration of the separation of powers doctrine, this Court and subordinate courts should tread lightly when these issues are brought before them. This is just such an instance. Therefore, *amici* urge this court to affirm the Circuit Court's reversal of the District Court's opinion and permit the military commissions to proceed apace.

ARGUMENT

At the outset, this Court should note that Petitioner is not arguing that he cannot be tried by a United States military tribunal, but instead he insists that any tribunal which tries him must use court-martial rules and procedures. *Hamdan v. Rumsfeld*, 415 F.3d 33, 42 (2005).

I. THE ATTACKS OF 9/11 ON UNITED STATES SOIL TRIGGERED A STATE OF WAR BETWEEN THE UNITED STATES AND THE *AL-QAEDA* TERRORIST ORGANIZATION.

Following *al-Qaeda*'s unprovoked attacks on the World Trade Center towers in New York, the Pentagon in Virginia, and the crash in Pennsylvania of a fourth hijacked civilian airliner, President Bush, in his role as Commander-in-Chief, took immediate action to protect the Nation. Those heinous attacks on United States soil, by themselves, triggered a state of war between the United States and *al-Qaeda* and its allies,

obliging the President, as Commander-in-Chief, to take action.[3] *See The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. ***"). Hence, a state of war existed between the United States and *al-Qaeda* immediately following the attacks of 9/11.[4]

Within days of 9/11, the Congress, agreeing with the President that the attacks constituted acts of war, enacted legislation authorizing the President to use military force to respond to the attacks. Pub. L. No. 107-40, 115 Stat. 224 (2001) ("President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11,

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[3] Just as President Roosevelt noted, regarding the Japanese attack on Pearl Harbor, that a state of war existed between the United States and the Empire of Japan *prior to* a formal Congressional declaration of war, *see* http://bcn.boulder.co.us/government/national/speeches/spch.html, so, too, did a state of war exist immediately following the 9/11 attacks upon the United States, despite a lack of Congressional action. *See also The Pedro*, 175 U.S. 354, 363 (1899) (recognizing that war with Spain began prior to an actual declaration by Congress based upon a prior declaration of the Spanish government).

[4] There is considerable evidence that a state of war with *al-Qaeda* pre-existed the 9/11 attacks. For example, in 1996, Osama bin Laden issued a rambling declaration of war against the United States, *see* http://www.mideastweb.org/osamabinladen1.htm, which was accompanied by acts of violence directed against the United States, its citizens, and its interests, such as the bombings of the Khobar Towers military barracks in Saudi Arabia, the attack on the USS Cole in Yemen, and the attacks on the United States Embassies in Kenya and Tanzania. Bin Laden's 1996 declaration was redistributed in 1998, calling on faithful Muslims to attack the United States, its citizens, and its interests worldwide. *See id.*

2001, or harbored such organizations or persons"). This Congressional action constituted a *de jure* authorization of war and ratified the President's prior actions. *See, e.g.*, *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) (holding the manner in which Congress gives its consent to engage in war to be "a discretionary matter for Congress ****"); *see also The Prize Cases*, 67 U.S. at 668; *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.); Alexander Hamilton, *The Examination, No. 1, 17 Dec. 1801*, *reprinted in 3 The Founders' Constitution* (Kurland & Lerner eds., 1987) ("when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory").

A. By Refusing to Abide by the Provisions of the Geneva Conventions, *Al-Qaeda* Has Forfeited Any Right to the Specific Protections Set Forth Therein.

Historically, with respect to armed hostilities between States, the United States, as a High Contracting Party to the Geneva Conventions, is bound by the strictures of the 1949 Conventions to observe fully and faithfully the terms of the Conventions in an armed conflict with another Party to the Conventions, Art. 2 GPW & Art. 2 GC, as well as in an armed conflict with a non-Party *which "accepts and applies" the Conventions' terms*, *id.*

Al-Qaeda, as a transnational terrorist organization, is not—and, indeed, cannot be—a High Contracting Party to the 1949 Geneva Conventions. As such, the United States is not bound to observe the terms of the 1949 Conventions *vis-a-vis al-Qaeda* and its members *absent a reciprocal observance* of the Conventions' terms by *al-Qaeda*, *id.*, something which

has not occurred and which Petitioner does not claim to have occurred. *See Hamdan*, 415 F.3d at 41 ("no one claims that *al Qaeda* has accepted and applied the provisions of the Convention").

Hence, *al-Qaeda* may not claim the protections of either the GPW[5] or of the GC,[6] as this Court should so find.

B. Further, Because the Ongoing Hostilities Between the United States and *Al-Qaeda* Are of an *International* Character, Common Article 3 Does Not Apply to *Al-Qaeda* or Its Members.

Despite attempts by Petitioner and his *amici* to argue that he and other *al-Qaeda* detainees are protected by Common Article 3 of the 1949 Conventions, that is simply not the case. Common Article 3 deals with armed conflicts "not of an international character occurring in the territory of one of the High Contracting Parties ****" *See, e.g.*, Art. 3 GPW. The ICRC Commentaries on Article 3 make abundantly clear that Article 3 was aimed solely at instances of civil war and similar rebellions or insurrections directed by persons within a specific territory against the de jure government ruling over that same territory. *See generally*

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[5] In fact, there is a second, independent reason why *al-Qaeda* members are not able to avail themselves of the protections of the GPW. *Al-Qaeda* members have not met the four explicit criteria to be considered lawful combatants. *See* n.2, *supra*.

[6] The GC also does not compel a State to observe the provisions of the Convention when an adverse Party refuses to observe them. GC Cmt on Art. 4, at 19 ("There could be no question of obliging a State to observe the Convention in its dealing with an adverse Party which deliberately refused to accept its provisions."). Such is the case with *al-Qaeda*. *See Hamdan*, 415 F.3d at 41.

GPW Cmt on Art. 3, at 28-44.[7] As such, it does not apply to *al-Qaeda* and its members.

The Commentary concerning Common Article 3 begins by tracing the ICRC's historical efforts to extend protection to "victims of *civil wars and internal conflicts*, the dangers of which are sometimes even greater than those of international wars," GPW Cmt on Art. 3, at 28 (emphasis added), as well as initial ICRC successes in extending such protections during "the *civil war* at the time of the 1921 plebiscite in Upper Silesia and the *civil war* in Spain," *id.* at 29 (emphasis added).

When answering the question of what is meant by "armed conflict not of an international character," the Commentaries use the following language: "the Party in revolt against the *de jure* Government," *id.* at 36; "legal Government is obliged to have recourse to the regular military forces *against insurgents *** in possession of a part of the national territory*," *id.* (emphasis added); "civil disturbances," *id.*; "conflicts *** which are in many respects similar to an international war, but take place within the confines of a *single country*," *id.* at 37 (emphasis added); "Government

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[7] The Geneva Conventions are agreements between sovereign States. As such, it is what the States agreed to when negotiating the treaty which should carry the day when interpreting the provisions of a treaty. Further, when disagreements arise as to how to interpret a specific article, the ICRC notes the following in the Forward of each of the 1949 Conventions: "The Committee, moreover, when called upon for an opinion of a provision of an international Convention, always takes care to emphasize that *only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty*." *See, e.g.*, GPW Forward; GC Forward. Hence, the resolution of the meaning of a particular provision of the Conventions lies, not with the Judiciary, but with those responsible for foreign and defense policy in a signatory State in consultation with other signatory States.

involved in an internal conflict," *id.*; "adverse Party in revolt against the established authority," *id.*; "internal affairs of States," *id.* at 43; GC Cmt on Art. 3, at 34; and "the Red Cross has long been trying to *aid the victims of internal conflicts, the horrors of which are sometimes more terrible than those of international wars* because of the fratricidal hatred they engender," *id.* at 27 (emphasis added). The total thrust of Common Article 3 concerns civil wars and insurrections within a single State, not conflicts like the current Global War on Terrorism.[8]

In addition, the current war against *al-Qaeda* has not been confined—as Common Article 3 requires—to "the territory of one of the High Contracting Parties." *See* Art. 3 GPW. *Al-Qaeda*'s hostile activities have not occurred solely in the territory of one of the High Contracting Parties (to wit, Afghanistan), as Petitioner and some of his *amici* suggest, *see, e.g.*, Brief of the Association of the Bar of the City of New York and the Human Rights Institute of the International Bar Association as *Amici Curiae* in Support of Petitioner

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[8] The ICRC had been advocating protection for victims of civil wars for many years prior to the 1949 adoption of Common Article 3. In fact, the ICRC was hoping that, by including Common Article 3, everyone would enjoy some sort of protection during armed hostilities. GC Cmt on Art. 3, at 28, 36. Universal protection was not achieved, however, because no one could anticipate every eventuality. In fact, just as experience during the Second World War revealed gaps in previous conventions, *see, e.g.*, GC Introduction, at 6 ("At the end of the Second World War *** the time had obviously come to revise the Geneva Conventions once more and extend them *in light of experience*." (emphasis added)), so, too, has the Global War on Terrorism revealed continuing gaps in the 1949 Conventions, such as the failure to anticipate the advent of transnational non-State actors capable of initiating and conducting armed hostilities across the globe. This situation has presented President Bush with unforeseen and unpredictable challenges with which the present Conventions do not adequately deal.

[Geneva – Common Art. 3] at 2, 7, but rather in the United States (attacks of 9/11), in Yemen (attack on the USS Cole), in Saudi Arabia (bombing of the Khobar Towers military barracks), and in Kenya and Tanzania (bombings of United States Embassies), to name but a few other countries. As such, Petitioner's claims that the ongoing hostilities are *not* of an international character are simply wrong and should be rejected by this Court.

II. THE PRESIDENT, AS COMMANDER-IN-CHIEF, BEARS OVERALL RESPONSIBILITY FOR MILITARY OPERATIONS DURING WARTIME, AND SEPARATION OF POWERS COUNSELS THAT THE JUDICIARY SHOULD REFRAIN FROM SECOND-GUESSING SUCH DECISIONS.

The President, as Commander-in-Chief, is charged with responsibility for prosecuting the ongoing war on terrorism. Furthermore, this Court has noted as "obvious and unarguable" that there is no governmental interest more compelling than security of the Nation. *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)); *accord Cole v. Young*, 351 U.S. 536, 546 (1956). Part and parcel of any resort to war is the issue of what to do with the enemy combatants who may fall into the hands of the U.S. armed forces. The outcome is a political question which implicates a whole host of matters, such as, how to ensure that such persons are no longer able to take up arms against U.S. forces or harm their captors, how to ensure that perpetrators of war crimes are properly identified and punished, how to ensure that information of intelligence value is timely obtained, and so forth.

Enemy belligerents are detained, not based on probable cause or other important domestic constitutional principles,

but because of their armed belligerency, capture, and continuing threat to American interests. Moreover, there is an additional dynamic with *al-Qaeda* captives—their willingness to be suicidally aggressive. This makes them especially dangerous because they may kill without compunction or hesitation. As such, the President is faced with a heretofore unknown and extremely grave situation, and it is his responsibility—*and his alone*—to formulate and implement policies to protect and defend the United States. It falls to the President to orchestrate national policy and to balance benefits and risks. *He both needs and deserves the latitude to develop such policies without undue interference by the Judiciary which, in any case, lacks the competence to deal with such situations.*[9]

The prosecution of a war involves both foreign policy and national security issues which generally fall outside the realm of judicial competence.

> [I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibilities and have long been held to belong in the domain of political

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[9] A number of Petitioner's *amici* improperly posit policy, not legal, arguments for this Court's consideration in this matter. *See, e.g.*, Brief *Amicus Curiae* of the Yemeni National Organization for Defending Rights and Freedoms, In Support of Petitioner (arguing that the leadership of the United States is essential to advance democracy, human rights, and the rule of law in the Middle East and concluding that current United States policy is hindering that advance); Brief of *Amici Curiae* Madeleine K. Albright and 21 Former Senior U.S. Diplomats in Support of Petitioner Salim Ahmed Hamdan (arguing that current policy undermines efforts to promote rule of law overseas). Even if true, such decisions are policy decisions entrusted to the political branches, not to the Judiciary.

power not subject to judicial intrusion or inquiry."

People's Mojahedin Org. of Iran v. United States Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)). The same is true for military decisions. *See, e.g.*, *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (noting the wide discretion given the political branches in dealing with war issues and recognizing that courts should not substitute their judgment for that of the political branches).

The Constitution commits the issues raised in this matter to the political branches of government. *See, e.g.*, U.S. Const. art. I, § 8, cls. 11-16 (granting Congress the power to declare war and to provide for, organize, maintain, and govern the military); U.S. Const. art. II, § 1, cl. 1 (conferring on the President the "executive power"); U.S. Const. art. II, § 2, cl. 1 (providing that the President shall be the Commander-in-Chief of the armed forces); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (the Constitution commits the conduct of foreign affairs to the executive and legislative branches); *The Prize Cases*, 67 U.S. at 670 (when the President is acting as Commander-in-Chief, courts must recognize that it is the President who "determine[s] what degree of force the crisis demands"); *Haig*, 453 U.S. at 307 (concluding that foreign policy and national security overlap and "cannot neatly be compartmentalized").

This Court "has repeatedly recognized that the President is the nation's 'guiding organ in the conduct of our foreign affairs,' in whom the Constitution vests 'vast powers in relation to the outside world.'" *Made in the USA Found. v. United States*, 242 F.3d 1300, 1313 (11th Cir. 2001) (quoting *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948), and citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988))

("recognizing 'the generally accepted view that foreign policy is the province and responsibility of the Executive'") (citation omitted); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation**** 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'") (quoting 6 *Annals of Congress* 613 (1816)).

The President also has broad authority as Commander-in-Chief. As this Court noted in *Hirabayashi*,

> [t]he war power of the national government is "the power to wage war successfully." *** It extends to every matter and activity so related to war as substantially to affect its conduct and progress**** It embraces every phase of the national defense **** Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the means of resisting it**** *Where *** the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.*

320 U.S. at 93 (internal citations omitted; emphasis added).

* * *

The President and his advisors have determined that *al-Qaeda* detainees are not covered by any of the 1949 Geneva Conventions, including Common Article 3. That is a political decision, which does no injustice to either the specific terms of the Conventions or their history (as indicated in the various Convention Commentaries published by the ICRC). As such, since the President's interpretation is one of a number of reasonable interpretations and, hence, not clearly erroneous, this Court and all subordinate United States courts should defer to the President's interpretation and allow the military commissions to proceed.[10]

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[10] This does not leave a detainee's rights unprotected. The 1949 Geneva Conventions themselves expect the interests of detainees to be protected by the designated Protecting Power, not by direct access to the courts of the Detaining Power. *See, e.g.*, GC Cmt on Art. 8, at 78-79 (where the role of a Protecting Power is described as follows: "A protected person does not, therefore, merely have rights; he is also provided *the means of ensuring that they are respected* [to wit, from the context, the Protecting Power]." (emphasis added)). Moreover, this makes abundant sense. Given the number of Axis prisoners of war detained in various countries (including the United States) during the Second World War, *no rational State would have agreed to any formula that would have allowed each of them individually to challenge the legal basis for his detention in the domestic courts of the Detaining Power.* The United States detained over four hundred twenty-five thousand Axis prisoners of war in camps throughout the United States in WWII. *See* http://uboat.net/men/pow/pow_in_america_stats.htm. Hence, it is unreasonable to assume that any United States Administration would have knowingly agreed to such a scheme, arguments of Petitioner and his *amici* notwithstanding. The current Administration's arguments for limiting access to United States courts by the Guantanamo detainees accurately reflect that belief and understanding.

CONCLUSION

In light of the foregoing, *Amici Curiae* American Center for Law and Justice and European Centre for Law and Justice respectfully urge this Court to affirm the decision of the United States Court of Appeals for the District of Columbia Circuit which reversed the lower court's decision and to direct that the Military Commissions established by President Bush be allowed to proceed as originally planned.

February 23, 2006

Respectfully submitted,

ROGER KISKA
EUROPEAN CENTRE FOR
LAW AND JUSTICE
4 QUAI KOCH
67000 STRASBOURG,
FRANCE
+33 388249440

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
JAMES M. HENDERSON, SR.
COLBY M. MAY
ROBERT W. ASH
AMERICAN CENTER FOR
LAW AND JUSTICE
201 MARYLAND AVE., N.E.
WASHINGTON, DC 20002
(202) 546-8890
(202) 546-9309 (FAX)

Attorneys for Amici Curiae