Nos. 04-104 & 04-105

IN THE

United States Supreme Court

UNITED STATES OF AMERICA,

Petitioner,

vs.

FREDDIE J. BOOKER,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

vs.

DUCAN FANFAN,

Respondent.

On Writ of Certiorari to the United States Courts of Appeals for the First and Seventh Circuits

BRIEF OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

LEWIS J. LIMAN
STEPHEN THOMAS KAISER
CLEARY, GOTTLIEB, STEEN & HAMILTON
One Liberty Plaza
New York, New York 10006
212-225-2000

ALEXANDRA A.E. SHAPIRO*
NOREEN A. KELLY-NAJAH
JENNIFER L. HERRING
LATHAM & WATKINS LLP
885 Third Avenue, Suite 1000
New York, New York 10022
212-906-1200

Counsel for Amicus Curiae

** Counsel of Record*

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant?

2. If the answer to the first question is "yes," the following question is presented: whether in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction?

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INTEREST OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 200 lawyers (many of whom are former federal prosecutors) whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] As *amicus*, the NYCDL offers the Court the perspective of very experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. The NYCDL has an interest in this case in so far as it will determine, in whole or in part, whether the federal Sentencing Guidelines will continue to bind district court judges. It also has an interest in ensuring that federal criminal defendants receive the full benefit of the protections afforded by the Sixth Amendment. We believe that it is imperative to the protection of our clients' rights, and to the establishment of a more just sentencing system, that *Apprendi* be applied to enhancements under the Guidelines.

This amicus brief addresses only the first of the two questions presented. It does not address question two because, as the government effectively concedes, if the answer to question one is "yes," then under the doctrine of statutory severability Section 3553(b) of Title 18 must be struck down in its entirety. A number of courts have so held. *See, e.g., United States v. Einstman*, 325 F. Supp. 2d

[1] The parties' letters of consent to the filing of this brief are being submitted herewith. Pursuant to Supreme Court Rule 37, *amicus curiae* states that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than the *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

373, 380 (S.D.N.Y. 2004) ("[T]he unconstitutionality of the provisions concerning the judicial fact-finding of sentencing enhancements necessarily means the entire USSG scheme falls."); *United States v. Marrero*, 325 F. Supp. 2d 453, 456-57 (S.D.N.Y. 2004) ("[I]f such sentencing enhancements are unconstitutional, the entire Sentencing Guidelines must be set aside, since the offending sections cannot meaningfully be severed from the whole.").

SUMMARY OF THE ARGUMENT

The federal Courts of Appeals are split on whether the holding of *Blakely v. Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. The Seventh and Ninth Circuits have held that the Sixth Amendment renders all judicial sentencing enhancements under the Guidelines unconstitutional, while the Fourth, Fifth, Sixth and Eleventh Circuits have concluded that *Blakely* does not compel that result. The core position taken by the government, which effectively adopts the majority opinions in the latter Circuits, is that because judicial enhancements under the Guidelines are based on agency rules, not statutes as in *Blakely,* they do not impair a defendant's jury trial rights.

This distinction without any difference evades the core constitutional principles protected by the majority in *Blakely.* The Court should not allow any effort to insulate the Guidelines from the constitutional mandates of that decision.

ARGUMENT

THE FEDERAL SENTENCING GUIDELINES FALL SQUARELY WITHIN THE HOLDING OF *BLAKELY* THAT DEFENDANTS CANNOT BE SUBJECT TO INCREASED PUNISHMENT BASED ON FACTS NEITHER ADMITTED BY THE DEFENDANT NOR FOUND BY A JURY BEYOND A REASONABLE DOUBT

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely* holds that for the purposes of *Apprendi*, "the 'statutory maximum' . . . is the maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant*." 124 S. Ct. at 2537. The fundamental question presented in the cases before the Court is whether the "statutory maximum" for federal criminal offenses is defined by the Guidelines or the United States Code for the purposes of *Blakely.* If it is the former, then under *Blakely* all judicial enhancements must fall.

Neither the government nor the Courts of Appeals that have declined to apply *Blakely* to the Guidelines have offered any principled reason for that result. Instead, their arguments are based on semantics and rigid adherence to inapposite precedent. The Sixth Amendment right to a jury trial is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely*, 124 S. Ct. at

2538-39. Where such fundamental constitutional protections are at issue, form should not be elevated over substance. But that is precisely what the government would have this Court do.

A. The Federal Sentencing Guidelines Define "Statutory Maxima" For Federal Crimes For The Purposes Of *Blakely* And *Apprendi*

The government's primary basis for distinguishing *Blakely* is its argument that the "statutory maximum" sentence for purposes of *Blakely* is the sentence set by Congress in Title 18 of the United States Code, rather than the sentence required by section 3553(b) and application of the Guidelines. *See* Brief for Petitioner United States ("Pet'r Br.") at 14, 20 (stating that the Guidelines do not establish statutory maxima). The Fourth, Fifth, Sixth and Eleventh Circuits as well as Judge Easterbrook's dissent in *Booker* all adopted this theory in their opinions. *See United States v. Hammoud*, No. 03-4253, 2004 WL 2005622, at **25-28 (4th Cir. Sept. 8, 2002) (*en banc*); *United States v. Pineiro*, 377 F.3d 464, 473 (5th Cir. 2004); *United States v. Koch*, No. 02-6278, 2004 WL 1899930, at *5 (6th Cir. Aug. 26, 2004) (*en banc*); *United States v. Reese*, No. 03-13117, 2004 WL 1946076, at *4 (11th Cir. Sept. 2, 2004); *United States v. Booker*, 375 F.3d 508, 518-21 (7th Cir. 2004) (Easterbrook, J., dissenting). This argument rests on three faulty premises: (1) because the Guidelines are regulations promulgated by the Sentencing Commission, rather than statutes enacted by Congress, the Sixth Amendment analysis in *Blakely* does not apply; (2) there are constitutionally significant differences between the Washington scheme and the Guidelines; and (3) the Guidelines do

nothing more than what judges historically did under indeterminate sentencing schemes and therefore, because indeterminate schemes are constitutional, the Guidelines are constitutional.

1. The Touchstone Of The Sixth Amendment Analysis In *Blakely* Is The Preservation Of The Jury As The Fact-Finder For All Facts Relevant To Punishment; That The Federal Sentencing Guidelines Are Administratively Promulgated Is Irrelevant

Judge Easterbrook, in dissent in *Booker*, was the first to opine that *Blakely* does not apply to the Guidelines because, unlike the Washington enhancements at issue in *Blakely* that are prescribed by statute, the Guidelines are neither statutes nor their functional equivalent. Two Circuits and numerous district courts have rejected that reasoning. *See Booker*, 375 F.3d at 511; *United States v. Ameline*, 376 F.3d 967, 974 (9th Cir. 2004).[2] However, four Circuits have accepted it, and the government argues it here. *Hammoud*, 2004 WL 2005622, at **25-28; *Pineiro*,

[2] *See also, e.g., United States v. Mueffelman*, 327 F. Supp. 2d 79 (D. Mass. 2004); *United States v. King*, 328 F. Supp. 2d 1276 (M.D. Fla. 2004); *United States v. Einstman*, 325 F. Supp. 2d 373 (S.D.N.Y. 2004); *United States v. Leach*, 325 F. Supp. 2d 557 (E.D. Pa. 2004); *United States v. Croxford*, 324 F. Supp. 2d 1255, 1256-58 (D. Utah 2004); *United States v. Montgomery*, 324 F. Supp. 2d 1266, 1267-68, 1271 (D. Utah 2004); *United States v. Lamoreaux*, No. 03-00399-01/02-CR-W, 2004 WL 1557283, at *1 (W.D. Mo. July 7, 2004); *United States v. Toro*, No. 3:02CR362PCD, 2004 WL 1553602 (D. Conn. July 6, 2004); *United States v. Medas*, 323 F. Supp. 2d 436, 436 (E.D.N.Y. 2004); *United States v. Shamblin*, 323 F. Supp. 2d 757, 766-67 (S.D. W.Va. 2004); *United States v. Gonzalez*, No. 03 CR. 41 (DAB), 2004 WL 1444872, at *2 (S.D.N.Y. June 28, 2004).

377 F.3d at 470; *Koch*, 2004 WL 1899930, at *5; *Reese*, 2004 WL 1946076, at *2; Pet'r Br. at 14, 20. Under this theory, the maxima and minima defined in Title 18 are the *Apprendi*-relevant maxima, and the Guidelines are merely rules through which "judges and executive officials . . . take part in determining how much of the statutory maximum the defendant serves in prison." *Booker*, 375 F.3d at 520 (Easterbrook, J., dissenting); *see also id.* at 519 ("*Booker* has been convicted of 'cocaine distribution in the first degree' and the jury's verdict authorizes life imprisonment. What happens after that is unrelated to the sixth amendment.") (Easterbrook, J., dissenting). By focusing on purported distinctions between statutes and rules for the purposes of the Sixth Amendment, Judge Easterbrook and the relevant Circuit Courts miss the point of *Blakely*.

Nothing in any of the *Blakely* opinions suggests that the Court's holding or any of its reasoning was based on the fact that the enhancement permitted by the Washington sentencing scheme was in the form of a statute rather than an agency's authorized rules. The Court's holding is based exclusively on the Sixth Amendment principle that "a judge's authority to sentence [must] derive[ ] wholly from the jury's verdict." *Blakely*, 124 S. Ct. at 2539. As Judge Posner correctly emphasized, in promulgating the Guidelines, the "[Sentencing] Commission is exercising power delegated to it by Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution . . . , neither, it seems plain, can a regulatory agency." *Booker*, 375 F.3d. at 511. Whether a sentencing enhancement is based on a statute or a binding rule delegated by a legislature is entirely irrelevant to the Sixth Amendment right at issue in these cases.

Even if this distinction were valid, ultimately it is a statute (and not the Guidelines themselves) that mandates application of the Guidelines. Section 3553(b) of Title 18, passed as part of the Sentencing Reform Act of 1984 (the "Act" or the "Reform Act"), requires the court to impose a sentence within the standard guidelines range unless the court finds that there exist circumstances in the case not adequately considered in establishing the sentencing range. In that event—and only in that event—the statute permits a higher sentence. Accordingly, that the Guidelines themselves were promulgated by an agency exercising delegated authority is a red herring. Congress itself has made the Guidelines "binding on federal courts," *Stinson v. United States*, 508 U.S. 36, 42 (1993), and the Reform Act "*require[s]* the sentencing judge to make findings of fact." *Booker*, 375 F.3d at 511. Moreover, the Sentencing Commission's proposed guidelines must be submitted to Congress and do not take effect for a period of 180 days, during which Congress may modify or reject them. 28 U.S.C. § 994(p) (2003). As the government's brief acknowledges, even after the Guidelines take effect, Congress can revoke or amend them at any time. Pet'r Br. at 24-25. It has exercised these powers, rejecting proposed guidelines and directing the Commission to review and amend the Guidelines. *See id.* Finally, of course, Congress has enacted Guidelines itself, most recently last year in the PROTECT Act. *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 668-69, 671-73 (2003).

2. The Washington State Sentencing Scheme At Issue In *Blakely* Is Constitutionally Indistinguishable From The Federal Sentencing Guidelines

The government also argues that there are constitutionally significant differences between the Washington state system and the federal Sentencing Guidelines beyond the regulation versus statute distinction. This argument elevates form over substance. At bottom, the schemes are *substantively* indistinguishable for purposes of constitutional analysis. Both the Washington state and federal schemes require judges to impose higher sentences based on facts that were neither admitted by the defendant nor found by a jury beyond a reasonable doubt—the fundamental Sixth Amendment concern in *Blakely*.

Moreover, from the perspective of the defendant whose rights are at stake it does not matter whether the source of a rule is a legislature or an administrative body exercising legislative authority, or even whether the legislature has placed that administrative body formally in the judiciary branch.[3] What matters is whether the defendant will be able to make arguments for a particular sentence based on a range of factors including the offense and characteristics of the offender or whether the court will be bound to make a sentencing determination based on facts not found by the jury.

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[3] Indeed, it is questionable whether the Sentencing Commission can still be treated as part of the judiciary. In 2003 Congress eliminated the requirement that federal judges sit on the Commission. *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 650, 676 (2003).

a. The Federal Sentencing Guidelines Require Sentences Based On Judicial Findings Of Fact By A Preponderance Of The Evidence

The Act requires federal courts to impose a sentence in accordance with the Sentencing Guidelines unless "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b)(1). The Guidelines permit a court to start with the facts admitted by the defendant or found by the jury in determining the base offense level. For certain offenses, however, the Guidelines provide more than one possible base offense level and direct judges to choose among them based on specific conduct found by the judge by a preponderance of the evidence.[4]

The judge must increase the offense level for certain crimes on the basis of "Specific Offense Characteristics."[5] Sentencing judges must also apply "Cross References" that may drastically increase the base offense level for a crime

[4] *See, e.g.*, USSG § 2D1.1(a) (describing base offenses for drug crimes, which in many cases may vary with the type and quantity of drugs involved in the offense); *see also id*., Commentary Application Note 12 ("Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. . . .").

[5] *See, e.g.*, USSG § 2D1.1(b) (increasing offense level for possession of firearms, importing or exporting of controlled substances, distributing drugs in prison, and the importation or manufacture of methamphetamine), § 2B1.1 (increasing offense level for fraud, theft and other property offenses based upon amount of money lost), and § 2J1.2(b) (increasing base offense level for various circumstances involved in obstruction of justice offenses).

on the basis of a judicially determined fact such as the existence of a specific motive.[6] Further, the Guidelines may require the judge to raise the base offense level on the basis of findings "related to victim, role, and obstruction of justice."[7] All increases in sentence above the base offense level are made by the sentencing judge's findings of fact by a preponderance of the evidence.

The "Relevant Conduct" provisions in the Guidelines also violate *Blakely*'s holding that the Sixth Amendment protects defendants from having a court usurp the jury's role as fact finder and ensures defendants' rights to a beyond a reasonable doubt standard. The Guidelines require that defendants' sentences be increased based on conduct judges deem criminal by a preponderance of the evidence, even though it was not charged in the indictment or the defendant was acquitted of such conduct. Under Section 1B1.3(a) a court must consider all "Relevant Conduct" when sentencing a defendant. USSG § 1B1.3(a). "Relevant conduct" includes all acts by the defendant (and, in the case of charged or uncharged "jointly undertaken criminal activity", all "reasonably foreseeable acts and omissions of others in furtherance of" such activity) that a judge finds to have occurred "during . . . , in preparation for . . . , or in the course of attempting to avoid detection or responsibility for" the offense of conviction.

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[6] *See, e.g.*, USSG § 2H3.1(c) (raising base offense level for eavesdropping offense to that for another crime if defendant's motive involved intent to commit the latter crime).

[7] USSG § 1B1.1(c), detailed in Chapter Three of the Guidelines, which need not be incorporated in the offense of conviction and may be made by a judge. *See, e.g.*, USSG § 3C1.1 (Obstructing or Impeding the Administration of Justice); *id.* Commentary Application Note 1.

USSG § 1B1.3(a); *id.* Commentary Background ("Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range."). Thus, even where a jury has acquitted a defendant of a crime, a sentencing judge must impose a sentence as if the defendant was convicted of that crime if the court finds that conduct to be "relevant conduct." *United States v. Watts*, 519 U.S. 148 (1997). Similarly, under Section 3C1.1, a court is required to enhance a defendant's sentence where *it* finds by a preponderance of the evidence that the defendant committed perjury or more generally obstructed justice during the course of the trial. USSG § 3C1.1. Even though the predicate acts for an obstruction enhancement, such as perjury, are themselves crimes, under the Guidelines they need not be found by a jury beyond a reasonable doubt when considered in the context of sentencing. The Court suggested that this type of enhancement was unconstitutional in *Blakely* itself. *See Blakely*, 124 S. Ct. at 2540 n.11 ("Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt (as it has been for centuries . . .), is unclear.").

Thus, in many circumstances, the Guidelines direct a court to enhance or upwardly adjust a defendant's sentence based upon its own substantive fact-findings, regardless of whether those facts were charged in the indictment or submitted to the jury (or even if the jury rejected the findings). In that regard, they are contrary to the Sixth Amendment.

b. For Purposes Of *Blakely*, The Federal Sentencing Guidelines And The Washington State Sentencing Scheme Are Virtually Identical

The government claims that the Washington scheme and the federal Sentencing Guidelines are constitutionally distinct. It points out that the state system at issue in *Blakely* sets different *statutory* penalties for the basic offense and aggravated versions of the offense (*e.g.*, kidnapping, kidnapping with a firearm, and kidnapping with a firearm and deliberate cruelty). Pet'r Br. at 27. According to the government, unlike the Washington scheme, under the Guidelines "multiple factors . . . influence the sentence imposed under a single statutory maximum." *Id.* at 29. This is a distinction without a difference. As demonstrated above, that the state sentences are imposed pursuant to statute rather than regulation is irrelevant for purposes of *Blakely*. Moreover, that the Sentencing Guidelines require *more* judicial fact finding than the state system makes the Guidelines more vulnerable to constitutional attack, not less. Finally, and perhaps most importantly, the two schemes serve the same purpose in virtually the same manner and therefore are constitutionally indistinguishable.

Both the Washington state sentencing scheme and the Guidelines begin with a base level offense (the "standard range" in the state system) and then permit adjustments or departures based on judicial fact-finding. Both systems calculate a binding sentencing range by reference to the defendant's criminal history and the offense of conviction. *Compare* Wash. Rev. Code Ann. §9.94A.510 (West 1981) (table) (giving relevant axes as "Seriousness Level" and "Offender Score") *with* USSG §5A (Sentencing Table)

(giving relevant axes as "Offense Level" and "Criminal History Category"); USSG §§1B1.1-.2 (calculating Offense Level by reference to offense of conviction); Wash. Rev. Code Ann. §9.94A.520 (West 1981) ("The offense seriousness level is determined by the offense of conviction.").

Both systems permit the judge to impose a sentence above the "standard range" based upon certain judicial findings by a preponderance of the evidence. Under the Washington system, a judge must add as many as five years to the standard sentencing range if the defendant is convicted of a felony eligible for a firearm enhancement and the judge finds that the defendant possessed a firearm during the commission of the felony. Wash. Rev. Code Ann. §9.94A.533(3) (West 1981). Under the Sentencing Reform Act, a judge may also add many years to a sentence if, but only if, the court (and the court alone) finds the existence of an aggravating circumstance. 18 U.S.C. §3553(b).

Likewise, the federal Sentencing Guidelines instruct a judge to increase the "Offense Level" if she finds certain "specific offense characteristics," such as the fact that a defendant brandished or discharged a firearm. *See, e.g.*, USSG §2A2.2 (adding 3 points to base offense level for aggravated assault if defendant brandished a firearm); USSG §2D1.1(b) (increasing offense level for possession of firearms, importing or exporting of controlled substances, distributing drugs in prison, and the importation or manufacture of methamphetamine); §2B1.1 (increasing offense level for fraud, theft and other property offenses based upon amount of money lost); §2J1.2(b) (increasing base offense level for various circumstances involved in obstruction of justice offenses).

In sum, under both the Washington statute and the Reform Act a court is permitted to impose a longer sentence based on facts it finds by a preponderance of the evidence. This was the fundamental concern underlying the Court's decision in *Blakely*. It is also the reason why the federal Sentencing Guidelines violate *Blakely*.

3. That Indeterminate Sentencing Schemes Are Constitutional Does Not Mean That The Federal Guidelines As Currently Applied Are Constitutional

The government also argues that *Blakely* does not apply to the Federal Sentencing Guidelines because the Sentencing Commission does nothing more than what sentencing judges historically did under the old indeterminate scheme. Pet'r Br. at 22. This argument misses the mark. As set forth above, and as practitioners experience every day in court, the Guidelines do far more than what sentencing judges did under the indeterminate system. The Guidelines are a legislatively mandated set of rules that are binding by federal statute and that specify which facts courts may consider and what the sentencing consequences of those facts will be. As a result, in certain circumstances, unless and until a court finds specific facts by a preponderance of the evidence, a defendant cannot be subject to a higher sentence than that specified in the Guidelines. As Judge Posner emphasized in *Booker*: "[T]here is a difference between allowing a sentencing judge to consider a range of factors that may include facts that he informally finds [as occurred under the indeterminate system] . . . and commanding him to make fact findings and base the sentence (within a narrow band) on them." 375 F.3d at 512. That difference of course, is "whether the defendant has a legal

right to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." *Blakely*, 124 S. Ct. at 2540.[8]

As this Court made clear in *Blakely*, determinate schemes may be constitutional, so long as they are implemented in a way that respects the Sixth Amendment. 124 S. Ct. at 2540. The state determinate scheme in *Blakely* did not meet that minimum constitutional requirement. The federal determinate system cannot be held to a lesser standard.[9]

[8] That the Guidelines allow for appellate review of sentences further underscores the point because, under the former indeterminate sentencing regime, there was no legal basis for appealing a sentence at or below the statutory maximum.

[9] Moreover, a decision that Section 3553(b) of the Sentencing Reform Act is unconstitutional and that therefore the guidelines may not be applied in a binding manner would not necessarily jeopardize the other reforms made by the Sentencing Reform Act, including the establishment of the Sentencing Commission itself and the requirement that the sentencing judge consider the guidelines in passing sentence. 18 U.S.C. § 3553(a).

CONCLUSION

Amicus respectfully submits that the rationale and holding of *Blakely* apply to the United States Sentencing Guidelines. Any sentence imposed under Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant therefore violates the Sixth Amendment.

Respectfully submitted,

NEW YORK COUNCIL OF DEFENSE LAWYERS

ALEXANDRA A.E. SHAPIRO*
NOREEN A. KELLY-NAJAH
JENNIFER L. HERRING
LATHAM & WATKINS LLP
885 Third Avenue, Suite 1000
New York, New York 10022
212-906-1200

LEWIS J. LIMAN
STEPHEN THOMAS KAISER
CLEARY, GOTTLIEB, STEEN & HAMILTON
One Liberty Plaza
New York, New York 10006
212-225-2000

Counsel for Amicus Curiae
New York Council of Defense Lawyers

** Counsel of Record*

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