COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-13303

KEN'S FOODS, INC.,
Plaintiff-Appellant,

v.

STEADFAST INSURANCE COMPANY,
Defendant-Appellee.

CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, NO. 21-1649

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

Michael S. Levine (BBO# 633248)
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
mlevine@HuntonAK.com

Nicholas D. Stellakis (BBO# 644981)
Janine A. Hanrahan (BBO# 707267)
Hunton Andrews Kurth LLP
60 State Street, Suite 2400
Boston, Massachusetts 02109
(617) 648-2800
nstellakis@HuntonAK.com
jhanrahan@HuntonAK.com

Dated: October 14, 2022

CORPORATE DISCLOSURE STATEMENT

United Policyholders ("UP") is a nonprofit, 501(c)(3) corporation founded in 1991. UP is not publicly held and does not have any public company affiliates.

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

United Policyholders submits the attached brief to address the question of whether Massachusetts courts should recognize a common law duty for insurers to cover costs incurred by a policyholder to prevent imminent covered loss.[1]

United Policyholders is uniquely qualified to address these questions because it speaks for policyholders. United Policyholders is an information resource and voice for individual and commercial insurance consumers throughout the United States. Its work is supported by grants, donations, and volunteers. It focuses on three programmatic areas: Roadmap to Recovery (disaster recovery and claim help), Roadmap to Preparedness (insurance and financial literacy; disaster preparedness), and Advocacy and Action (advancing pro-consumer laws and public policy). United Policyholders provides a consumer-oriented voice based on its institutional experience and perspective, which helps

[1] Pursuant to Massachusetts Rule of Appellate Procedure 17, United Policyholders confirms that: (1) no party's counsel authored any part of this brief; (2) no party or party's counsel contributed any money to fund preparation of submission of this brief; and (3) no person, other than UP and UP's counsel, contributed any money to prepare or submit this brief.

to fill a gap that otherwise would exist between the well-organized insurance industry on the one hand and insurance consumers on the other.

Public officials, state insurance regulators, academics, and journalists routinely seek United Policyholders' input on insurance and legal matters. United Policyholders often works with state regulators on matters related to policy sales, claims, and consumer rights. Its executive director has been appointed for twelve consecutive terms to represent consumers in the proceedings of the National Association of Insurance Commissioners ("NAIC"). United Policyholders serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department.

Since its inception in 1991, United Policyholders has filed *amicus curiae* briefs in numerous federal and state courts. It has submitted *amicus curiae* briefs in matters before this Court as well as before federal courts sitting in Massachusetts.[2] The U.S. Supreme Court and

---

[2] See, e.g., *Verveine Corp. v. Strathmore Ins. Co.*, 489 Mass. 534 (2022); *Masonic Temple Ass'n of Quincy, Inc. v. Jay Patel and Dipika, Inc.*, 489 Mass. 549 (2021); *Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343 (2017); *Auto Flat Car Crushers, Inc. v. Hanover Ins.*

— footnote cont'd —

state appellate courts have favorably cited United Policyholders' *amicus curiae* briefs.[3] These briefs are invaluable because insurers are "repeat players" in insurance coverage litigation, but policyholders are not.

For all these reasons, United Policyholders respectfully asks this Court to consider this *amicus curiae* brief.

Co., 469 Mass. 813 (2014); *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, 449 Mass. 621 (2007); *John Hancock Mut. Life Ins. Co. v. Banerji*, 447 Mass. 875 (2006); *W. All. Ins. Co. v. Gill*, 426 Mass. 115 (1997); *Clark Equip. Co. v. Mass. Insurers Insolvency Fund*, 423 Mass. 165 (1996); see also *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 36 F.4th 29 (1st Cir. 2022); *Doe v. Harvard Pilgrim Health Care, Inc.*, 974 F.3d 69 (1st Cir. 2020); *Boston Gas Co. v. Century Indem. Co.*, 588 F.3d 20 (1st Cir. 2009); *Denmark v. Liberty Life Assur. Co. of Boston*, 566 F.3d 1 (1st Cir. 2009); *Foreign Car Ctr., Inc. v. Salem Suede, Inc.*, Civ.A. No. 97-12587-REK, *sub nom. In re Salem Suede, Inc.*, 221 B.R. 586 (D. Mass. 1998).

[3] See, e.g., *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446 ¶ 53 (2021); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 234 N.J. 23, 64 (2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 629 Pa. 444, 452–53 (2014); *Julian v. Hartford Underwriters Ins. Co.*, 45 Cal. 4th 747, 760 (2005).

PRELIMINARY STATEMENT

Insurance policies are contracts. They are generally subject to ordinary principles of contract interpretation. One such principle requires the injured party to mitigate its damages. The flip side of this is that the costs the injured party incurs to mitigate its damages—costs that *reduce* the overall damages that the other party must pay—are recoverable. This principle of contract law applies equally to insurance contracts.

Ken's Foods, Inc., the policyholder in this case, suffered a loss that was undisputedly covered by the policy issued by Steadfast Insurance Co. After a "Pollution Event" (as defined in the Steadfast Policy), Steadfast paid almost $1 million in cleanup costs. But Ken's *also* incurred another $2 million in expenses to ameliorate the pollution in a way so as *not* to be forced to suspend operations. There is no dispute that, had Ken's in fact suspended operations, Steadfast would have been on the hook for far more than $2 million. By spending $2 million, Ken's saved Steadfast millions more.

The question is whether a policyholder who fulfills its responsibility to mitigate damages and prevents a far larger, *imminent*,

and undisputedly *covered* loss, may recover the costs of mitigation from its insurer. The Court should hold that there is coverage for these costs of mitigation. This does not, as Steadfast insists, require coverage for routine maintenance. The insurer's obligations are narrow and limited to the reasonable costs of mitigation only when covered loss is *imminent*. Other jurisdictions have no difficulty applying this straightforward rule, and neither will the Commonwealth. Especially in the context of environmental pollution, policyholders should be given every incentive to act quickly and decisively. A rule that requires the policyholder to incur a covered loss before being reimbursed for mitigation expenses sends exactly the wrong message.

ARGUMENT

I. Massachusetts Common Law Requires Mitigation of Damages, and Allowing Policyholders to Recover Their Costs to Prevent an Imminent Covered Loss Is Part and Parcel of the Same.

A. Parties must mitigate their damages.

Steadfast does not deny that as a matter of background common law, parties must mitigate their damages. This is true as applied to contracts (and in a wide variety of other legal contexts). And insurance policies are, at bottom, contracts subject to common-law rules of

contract interpretation. E.g., *Hakim v. Mass. Insurers' Insolvency Fund*, 424 Mass. 275, 280 (1997).

One of the background common-law principles that applies is the requirement to mitigate damages. A fundamental principle applicable to all contracts is that a plaintiff "may not recover for damages that were avoidable by the use of reasonable precautions" on plaintiff's part. *Burnham v. Mark IV Homes, Inc.*, 387 Mass. 575, 586 (1982). This common-law doctrine applies with equal force to insurance policies. *Global Invs. Agent Corp. v. Nat'l Fire Ins. Co. of Hartford*, 76 Mass. App. Ct. 812, 825 (2010). In *Global Investors*, the Appeals Court held that a policyholder claiming that its insurer improperly failed to defend was required to mitigate damages. *Id.* The court upheld the instruction that the policyholders were "under an obligation to use all reasonable efforts to minimize and lessen their damages." *Id.*

The same rule applies to insurers. *Savers Prop. & Cas. Ins. Co. v. Admiral Ins. Agency, Inc.*, 61 Mass. App. Ct. 158 (2004). There, the broker issued a binder in apparent violation of his authority. *Id.* at 159. The Appeals Court held that because the insurer knew of the broker's

breach, it had the duty to mitigate its potential damages by securing reinsurance. *Id.* at 167–68.

And, of course, the federal district court applying Massachusetts law has reached the same conclusion. *Demers Bros. Trucking v. Certain Underwriters at Lloyd's, London*, 600 F. Supp. 2d 265, 275 (D. Mass. 2009). Steadfast critiques *Demers Brothers* as not addressing "whether the common law provides a remedy for the costs of *preventing* an imminent covered loss that has not yet occurred," instead being a case "where there had *already* been a loss under the third-party coverage at issue." Steadfast Br. at 41. This is inaccurate. The specific coverage issue related to certain spools of superconductive cables that were in a warehouse that suffered a fire. *Demers Bros.*, 600 F. Supp. 2d at 274. Because of the policyholder's efforts—relocating, unwrapping, and inspecting the cables—there was no direct physical loss or damage to them from the fire-suppression efforts and the moisture in the building. *Id.* at 275. The cables suffered only cosmetic changes, insufficient to trigger coverage, which was "evidence of the success of the Insured's mitigation efforts, not an indictment of their validity." *Id.* Thus, as to the cables, *there was no loss*, just an "imminent covered loss." *Id.*

Moreover, the rule requiring mitigation of damages is not unique to contracts (or Massachusetts). It applies to wrongful-termination claims. *Black v. Sch. Comm. of Malden*, 369 Mass. 657, 661 (1976). It applies to statutory claims under anti-discrimination laws. *Haddad v. Wal-Mart Stores, Inc.*, 455 Mass. 91, 105 (2009) (G. L. c. 151B); *Denton v. Boilermakers Loc. 29*, 673 F. Supp. 37, 44 (D. Mass. 1987) (Title VII). It is a general rule. Stephen D. Riden, General Law of Damages in Massachusetts, *in* Damages, Interest, and Attorney Fees in Massachusetts Litigation § 1.4.1 (Mass. Continuing Legal Educ. 5th ed. 2022) ("Generally, the law of damages in Massachusetts requires a plaintiff to mitigate damages.").

B. Parties can recover their reasonable costs of mitigation.

Steadfast insists that the requirement that parties mitigate damages is a one-way street: *failure* to mitigate may *reduce* damages recoverable but costs incurred to successfully mitigate *never* result in a *recovery*. Steadfast Br. at 31. Once again, Steadfast is wrong.

As a general matter, expenses incurred in mitigating damages are recoverable. *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 485 (1991) (special losses incurred in reasonable effort to avoid harm

recoverable); Anthony L. DeProspo, Jr., Damages in Securities Actions, *in* Damages, Interest, and Attorney Fees in Massachusetts Litigation § 11.3.4 (Mass. Continuing Legal Educ. 5th ed. 2022) ("Generally, expenditures made in a reasonable effort to mitigate losses may be recovered."); see also *Irwin v. Degtiarov*, 85 Mass. App. Ct. 234. 237–38 (2014), quoting *Atwood v. Boston Forwarding & Transfer Co.*, 185 Mass. 577, 558–89 (1904) (holding that expenses incurred in caring for injured animal are recoverable mitigation costs).[4]

---

[4] See also *Smith v. Positive Prods*., 419 F. Supp. 2d 437, 449 (S.D.N.Y. 2005) ("Under New York law, an injured party will be allowed to recover the expenses of a proper effort [to mitigate damages] even though it proves unsuccessful." (internal quotation marks omitted)); *Jones v. William Buick, Inc.*, 785 N.E.2d 910, 913 (Ill. App. Ct. 2003) ("Reasonable expenses incurred in mitigation of a loss are properly included in an assessment of 682 A.2d 933damages."); *Campbell v. Norfolk & Dedham Mut. Fire Ins. Co.*, 682 A.2d 933, 936 (R.I. 1996) ("[A]n insurance policy does not require the total destruction of a building because to require a party to await complete destruction before losses will be covered frustrates an insured's understanding of the insurance agreement and subverts his or her duty to mitigate damages and to avoid economic waste."); *Papa v. Mississippi Farm Bureau Cas. Ins. Co.*, 573 So. 2d 761, 763–64 (Miss. 1990) (finding insurers contention that policyholder should wait until the automobile hit him before attempting to avoid "imminent danger . . . inconsistent with this Court's view that one should take steps to mitigate damages"); *Tull v. Gundersons, Inc.*, 709 P.2d 940, 946 (Colo. 1985) (holding an injured party "is entitled to compensation for expenditures made in attempting to mitigate damages"); *Kleinclaus v. Marin Realty Co.*, 211 P.2d 582,

— footnote cont'd —

The same holds true in the insurance context. This is precisely what Judge Tauro held in *Demers Brothers*: "Absent an insurance policy provision to the contrary, the common law . . . recognizes the right of the insured to seek compensation from the insurer for the costs of mitigation." *Demers Bros.*, 600 F. Supp. 2d at 274. This is recognized not only by a good number of jurisdictions but also by an insurer-leaning treatise:

> The duty to mitigate an insured loss is often stated and discussed as such, and equally often stated and discussed in terms of whether the insured who does undertake to mitigate the loss must be reimbursed by the insurer. . . .
>
> That the insured has such a duty has been widely recognized as stemming from the common law so that the duty exists in the absence of an explicit policy provision or statutory provision imposing such a duty. A corresponding common-law right to recompense from the insurer for the cost of these efforts, at least in the absence of policy provisions otherwise, has also often been recognized even though the cost items are ones as to which there is no express policy coverage.

11A Steven Plitt et al., Couch on Insurance § 168:11 (3d ed. June 2022) (footnotes omitted); see also Ken's Foods Br. at 28–29 (collecting cases).

---

585 (Cal. Ct. App. 1949) ("The reasonable cost involved in mitigating damages is always recoverable, provided it does not exceed the damages prevented or reasonably anticipated.").

This rule makes good sense. It is consistent with existing common law and is economically efficient, and the benefits inure to both the insurer and the policyholder. As the Supreme Court of Pennsylvania has recognized:

> It would be a strange kind of argument and an equivocal type of justice which would hold that the defendant would be compelled to pay out, let us say, the sum of $100,000 if the plaintiff had not prevented what would have been inevitable, and yet not be called upon to pay the smaller sum which the plaintiff actually expended to avoid a foreseeable disaster.

Leebov v. U.S. Fidelity & Guaranty Co., 401 Pa. 477, 481 (1960).

C. This principle applies with heightened force to pollution policies.

By spending just $2 million on mitigation efforts, Ken's avoided a far, far larger loss for Steadfast, and an immeasurable loss to the Commonwealth and its citizens, by containing the pollution and preventing potentially significant environmental harm. Of course, Ken's was economically interested in avoiding the larger expenditure, but the benefits redounded to Steadfast as well.

Indeed, this Court must consider what would happen had the facts been slightly different. Ken's is solvent and a good corporate citizen, but not all policyholders will be such. Especially in the pollution context, it

is bad policy to adopt a rule that does anything other than encourage a company or individual to act quickly and decisively. A company *unlike* Ken's, perhaps one not as financially or ethically strong, should not think twice about incurring expense to mitigate a far greater loss. After all, there are no winners—not the policyholder, not the insurer, and not the environment—if a policyholder tarries in its response because it thinks it must await a covered loss before mitigation expenses will be covered.

D. This does not create a new cause of action.

Over and over again, Steadfast insists that to apply the common-law duty to mitigate in these circumstances would create a new cause of action or insert words into the policy. Steadfast Br. at 16, 24. Steadfast has it backwards.

Applying the common law to insurance contracts in these circumstances does not create a new cause of action or insert words into the policy. That is because, as shown above, the common law has *always* applied to contracts. Absent an express provision in the contract to the contrary, the common law provides the backdrop against which the parties contract. It has always been so.

In any event, Massachusetts law is replete with instances in which courts tailor common-law rules in the insurance context, usually to benefit the policyholder. These examples have a long lineage. Well before G. L. c. 176D was enacted, Massachusetts required insurers to conduct settlement negotiations in good faith, and it did so because of the tension between the policyholder's interest (settlement within policy limits) and the insurer's interest (settlement in any amount because its liability is limited). *Murach v. Mass. Bonding & Ins. Co.*, 339 Mass. 184, 186–87 (1959); see also *Chem. Applications Co. v. Home Indem. Co.*, 425 F. Supp. 777, 779 (D. Mass. 1977) (Aldrich, Circuit Judge) (citing *Murach* in finding good faith and reasonableness precluded defendant from denying liability for the policyholder's mitigation efforts). This duty requires the insurer to make the decision of whether to settle a case within policy limits or try a case as if no policy limit were applicable to the claim. *Murach*, *supra* at 187.

Massachusetts follows the "in for one, in for all" rule, requiring an insurer to defend all counts against the policyholder, even those with claims not covered by the policy. *Mt. Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343, 351 (2017). Massachusetts also requires insurers to

provide independent counsel to the policyholder when the insurer defends under a reservation of rights. *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 406–07 (2003). This right derives from the courts' recognition that a conflict of interest may arise between an insurer and the policyholder when the insurer defends subject to a reservation of rights. *OneBeacon Am. Ins. Co. v. Celanese Corp.*, 92 Mass. App. Ct. 382, 388–89 (2017).[5]

These rules are settled Massachusetts law, but Steadfast would ask that they be discarded and the cases abrogated because they "add words" to the policy. The rules add no words. They simply construe the policy against background common-law principles.

[5] Not all the rules benefit policyholders. The known-loss doctrine "precludes coverage when the insured knows in advance of the policy's effective date that a specific loss has already happened or is substantially certain to happen." *U.S. Liability Ins. Co. v. Selman*, 70 F.3d 684, 690 (1st Cir. 1995); *SCA Servs., Inc. v. Transportation Ins. Co.*, 419 Mass. 528, 532–33 (1995); *Arch Specialty Ins. Co. v. Colony Ins. Co.*, 2022 WL 773891, at *18 (D. Mass. Mar. 14, 2022). The doctrine continues to exist in its common-law formulation even where insurers have not codified it in their contracts. See *Selman*, 70 F.3d at 690.

II. Steadfast's Parade of Horribles Is Misguided.

As every insurer does, Steadfast forecasts the end of insurance if this Court decides against it. This is overdone.

The rule is limited. It does not require unbounded coverage of routine maintenance. It requires coverage of imminent covered loss. 4 Philip L. Bruner & Patrick J. O'Connor, Jr., Construction Law § 11:238 (July 2022) ("Smoke detectors save lives and building sprinkler systems prevent property loss, but installing a fire suppression system in your home as prevention against fire loss is not, of course, a covered expense under your liability policy."). The threat must be sufficiently imminent and real. *Id.* & n.1 (citing cases). Massachusetts courts are well-versed in the concept of imminence. See, e.g., *In re G.P.*, 473 Mass. 112, 128 (2015), *abrogated on other grounds*, *In re Minor*, 484 Mass. 295 (2020) (interpreting "imminent" in the context of "likelihood of harm"); *Commonwealth v. Sueiras*, 72 Mass. App. Ct. 439, 443 (2008) (discussing exigent circumstance of "imminent loss of evidence").

III. Steadfast Misleads When It Says that Coverage Was Available in the Marketplace.

Steadfast asserts that coverage for the costs of preventing a covered loss "was available in the marketplace, but Ken's Foods did not

purchase it from Steadfast or any other insurer." Steadfast Br. 15. This is, at best, misleading.

The Steadfast Policy here is a pollution policy. See JAI/024 (Z Choice Pollution Liability Declarations). Pollution policies are necessary precisely because damages from the release of pollutants are *excluded* from coverage in general-liability and commercial-property policies.[6] The policy forms that Steadfast relies on fall are not pollution policies but a commercial property form and a businessowner's property form. JAII/051; JAII/060. Those forms were not available for insertion into Ken's Foods' pollution policy, and they *exclude* losses from pollution.[7] See JAII/077.[8] Steadfast is disingenuous to say differently.[9]

---

[6] NAIC, Center for Insurance Policy and Research, "Environmental Insurance," *available at* https://content.naic.org/cipr-topics/environmental-insurance.

[7] "Pollution" is only a covered loss if the pollution *itself* is caused by a covered loss. JAII/066, 077.

[8] See also https://www.propertyinsurancecoveragelaw.com/files/2018/09/CP.10.30.10.12.pdf (Commercial Property Form CP 10 30 10 12 at 4, § B.2.*l*).

[9] Neither of the two cases Steadfast cites involved pollution policies. See *Verrill Farms, LLC v. Farm Family Cas. Ins. Co.*, 86 Mass. App. Ct. 577, 579 (business owners specialty property coverage); *Interstate Gourmet Coffee Roasters, Inc. v. Travelers Indemn. Co.*, No. 17-cv-10959, 2018 WL 3733937, at *1 (D. Mass. Aug. 6, 2018) (commercial insurance policy).

Steadfast's argument is striking for another reason. Insurers have objected strongly—and successfully—when policyholders have argued the principle of negative implication, pointing to the absence of an express, available exclusion as an indication that no such exclusion was intended. E.g., *Verveine Corp. v. Strathmore Ins. Co.*, 489 Mass. 534, 546 (2022) (absence of virus exclusion did not indicate there was coverage for COVID-19 related losses). Steadfast now unashamedly argues in the other direction, urging a negative implication from the absence of an express coverage grant. "[N]o such negative implication can or should be drawn." *Verveine*, 489 Mass. at 546. At least where the insurer, like Steadfast here, did not expressly say differently in its policy, background common-law rules require it to pay for the reasonable costs of preventing imminent covered loss.

CONCLUSION

For all these reasons, this Court should hold that Massachusetts recognizes a common-law duty of an insurer to reimburse its policyholder for reasonable costs incurred to prevent imminent covered loss.

Respectfully submitted,

/s/ Nicholas D. Stellakis

Michael S. Levine (BBO# 633248)
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 200037
(202) 955-1500
mlevine@HuntonAK.com

Nicholas D. Stellakis (BBO# 644981)
Janine A. Hanrahan (BBO# 707267)
Hunton Andrews Kurth LLP
60 State Street, Suite 2400
Boston, Massachusetts 02109
(617) 648-2800
nstellakis@HuntonAK.com
jhanrahan@HuntonAK.com

Counsel for Amicus Curiae

Dated: October 14, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limit of Mass. R. App. P. 20(a)(3) because, excluding parts of the document exempted by Mass. R. App. P. 20(a)(3)(f), this document contains 2,476 words, as determined using the word-count feature of Microsoft Word for Microsoft 365 MSO (Version 2202 Build 16.0.14931.20718) 32-bit. Additionally, this brief complies with the typeface requirements of Mass. R. App. P. 20(a)(2) and the type-style requirements of Mass. R. App. P. 20(a)(4) because this document has been prepared using a proportionally spaced font, 14-point Century Schoolbook.

Dated: October 14, 2022

/*s*/ Nicholas D. Stellakis
Counsel for Amicus Curiae

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

KEN'S FOODS, INC.,
Plaintiff-Appellant
v. No. SJC-13303

STEADFAST INSURANCE COMPANY,
Defendant-Appellee

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

Certificate of Service

Pursuant to Rule 13(e) of the Massachusetts Rules of Appellate Procedure, I certify that on October 14, 2022, I served this brief by email and Electronic Filing System upon

Lawrence G. Green
Gregory S. Paonessa
BURNS & LEVINSON LLP
125 High Street
Boston, MA 02110
lgreen@burnslev.com
gpaonessa@burnslev.com
Attorneys for Plaintiff-Appellant

Mark W. Shaughnessy
Jeffrey E. Dolan
Boyle | Shaughnessy Law PC
25 Braintree Hill Office Park, Ste. 201
Braintree, MA 02184
MShaughnessy@boyleshaughnessy.com
JDolan@boyleshaughnessy.com
Attorneys for Defendant-Appellee

/s/ Nicholas D. Stellakis
Nicholas D. Stellakis (BBO# 644981)
Hunton Andrews Kurth LLP
60 State Street, Suite 2400
Boston, Massachusetts 02109
(617) 648-2800
nstellakis@HuntonAK.com

Counsel for Amicus Curiae