

[EN BANC ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017]
No. 15-1177

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PHH CORPORATION, et al.,
Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
BUREAU OF CONSUMER FINANCIAL PROTECTION

**BRIEF OF THE ATTORNEYS GENERAL OF THE STATES OF
CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE,
MARYLAND, MASSACHUSETTS, MINNESOTA, MISSISSIPPI,
NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE
ISLAND, VERMONT AND WASHINGTON, AND THE DISTRICT OF
COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT**

GEORGE JEPSEN
ATTORNEY GENERAL FOR THE
STATE OF CONNECTICUT

John Langmaid
Assistant Attorney General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Tel. (860) 808-5361
John.Langmaid@ct.gov

CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

(A) Parties and *Amici*. The parties that appeared before the Consumer Financial Protection Bureau ("CFPB") were PHH Corporation; PHH Mortgage Corporation; PHH Home Loans, LLC; Atrium Insurance Corporation; and Atrium Reinsurance Corporation. Those entities are Petitioners before this Court. The CFPB is the Respondent before this Court.

The States of Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont and Washington, and the District of Columbia, appear before this Court as *amici curiae* in support of Respondent, the CFPB.

(B) Rulings Under Review. References to the rulings at issue are correctly identified in the Brief for Petitioners.

(C) Related Cases. This case was previously before a panel of this Court. Counsel for *amici curiae* are not aware of any other related cases pending in any other court.

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INTEREST OF *AMICI CURIAE*

Amici curiae are the States of Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont and Washington, and the District of Columbia.¹ Under federal law, all States are empowered to enforce the consumer protection provisions of the Consumer Financial Protection Act (CFPA) and the regulations that the Consumer Financial Protection Bureau (CFPB) issues pursuant to the CFPA. *See* § 12 U.S.C. 5552(a)(1). The States are required to exercise their statutory responsibilities in consultation with the CFPB. *See* 12 U.S.C. § 5552(b). Additionally, the CFPB is authorized to intervene in any suit that the States bring under the CFPA. *Id.* Accordingly, as state regulatory enforcement partners of the CFPB, an existing independent federal consumer protection agency, *amici* have a strong interest in defending the constitutionality of the CFPB's structure and independence.

Amici have a strong sovereign enforcement interest in preserving the independence of the CFPB. If the *en banc* Court adopts the panel's analytical approach and conclusions, and consequently eliminates the CFPB Director's independence from presidential control, the States' consultations with the CFPB

¹ Under Fed. R. App. P. 29(a)(2) and because all *amici* are States, *amici* can file this brief without the consent of the parties.

and any decision by the CFPB to intervene in States' financial consumer protection lawsuits will necessarily be harmed. The States' consultations with the CFPB will suffer as a result of a CFPB that lacks independence from the political views of the president of the day, as compared to a CFPB that, as intended by Congress, is an expert agency led by an officer insulated from shifting political winds. Today, when the States and the CFPB make decisions on whether to cooperate on overlapping investigations, share investigative documents and materials, bring coordinated legal actions, or enter into coordinated legal settlements, those decisions are intended by Congress to be insulated from political influence. A fundamental change in the CFPA's statutory framework harms the States because it directly constrains how the States exercise their own enforcement responsibilities under the CFPA.

Second, this matter involves an issue of exceptional importance to *amici* because Congress created an independent CFPB specifically to combat the regulatory failures that led to the worst financial crisis this nation has experienced since the Great Depression. *See* The Restoring American Financial Stability Act of 2010, Senate Rept. 111-176, at 39 (finding that the financial crisis cost 8 million U.S. jobs and erased \$13 trillion in American household wealth); at 40 (finding that "[t]his devastation was made possible by a long-standing failure of our regulatory structure to keep pace with the changing financial system ..."); at 166

(finding that "it was the failure by the prudential regulators to give sufficient consideration to consumer protection that helped bring the financial system down."). These regulatory failures and the financial catastrophe that they helped to produce did not protect the millions of Americans who lost their jobs or homes during the 2008 financial crisis. An independent CFPB is necessary to properly protect American consumers including the residents of the *amici* states. A judicial imposition of a fundamental change in the CFPB's structure would undercut the States' role under the CFPA as enacted by Congress.²

² See The Creation of a Consumer Financial Protection Agency to be the Cornerstone of America's New Economic Foundation: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs, 111th Cong., 20-21, 34-36, 66-69, 86-87 (July 14, 2009), available at <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg54789/pdf/CHRG-111shrg54789.pdf>.

SUMMARY OF ARGUMENT

Congress created the CFPB to regulate financial products sold to American consumers. Congress determined that the CFPB should be insulated from shifting political pressures and therefore provided that the CFPB be an independent agency. Congress further determined that the CFPB should have at its head a single officer rather than a commission or multiple officers.

The panel acknowledged that the Supreme Court has already determined that independent agencies that enforce federal law do not offend Article II, but proceeded to distinguish the CFPB from these unquestionably constitutional independent agencies. The panel rested its conclusion on the claim that for such independent agencies, multiple officers operate as a crucial check on arbitrary decision-making and abuse of power.

The panel's claim is not the law as the Supreme Court has described it. For over eighty years, it has been the law that independent agencies do not offend Article II where the agency's officers are removable only for cause, i.e., "for inefficiency, neglect of duty, or malfeasance in office." It is settled law that for-cause removal by the President is sufficient to ensure that the President can fulfill his or her mandate under Article II to "take Care that the Laws be faithfully executed."

The U.S. Government's executive power to enforce federal law against private citizens is no trivial matter, but our separation of powers jurisprudence does not outlaw independent agencies on the basis relied upon by the panel. Our framework of government includes a plethora of checks and balances, regardless of whether an agency is headed by one person or many. Even for executive agencies with at-will appointed officers, we never rely exclusively on the President to act as a check on agency action. The U.S. Government's executive power is always checked by the constitutional rights reserved to private citizens and by long-standing administrative law and procedure.

Administrative law, including judicial review, operates as one important check on arbitrary decision-making and the abuse of power possible at any administrative agency, whether that agency is independent or executive, led by one officer or many. Like other administrative agencies, the CFPB still must hold hearings, present evidence, and make findings of fact, all of which are subject to review by the courts. Its rules and regulations are subject to public notice and comment, and may be challenged in court, regardless of who heads the agency. Congress also retains the power to change the CFPB's implementing statute if it judges the CFPB to be abusing its authority. Though administrative law or congressional power cannot excuse a structural separation of powers violation, it is long-settled that independent agencies are *not* a structural separation of powers

violation *per se*. By supplementing the traditional Article II analysis with a stand-alone "liberty interests" analysis that calls into question the constitutional validity of every independent agency—ignoring our multi-dimensional system of checks and balances—the panel found a separation of powers violation where the Supreme Court has long and emphatically stated there is none.

Fundamentally, the question of what organizational structure in a particular independent agency adequately preserves liberty interests is an inherently subjective one best left to the elected branches of government to answer. The idea advanced by Petitioners here, that more forceful regulation of our nation's financial industry poses a threat to individual liberty, is very much a subjective position. Being a single-officer agency may make it easier for the CFPB to act in some circumstances, but it is equally true that such a structure can make it easier to forestall action. Whether CFPB action or inaction promotes individual liberty in any given circumstance is properly the subject of political debate, not a question that lends itself to judicial resolution.

In light of the consumer protection mission of the CFPB and our entire system of checks and balances, it is not unreasonable for Congress to have concluded that a single independent officer on balance serves the interests of private citizens, compared to other options. The CFPB's impact upon financial product consumers and the financial services industry depends upon the decisions

of the CFPB Director by design. The CFPB Director, like many other independent agency officers, is appointed by a President to a five-year term, subject to the advice and consent of the Senate. Even if some would consider their interests relatively impaired by an independent CFPB led by a single officer versus multiple officers, that is a judgment in the province of Congress, not the courts.

ARGUMENT

Congress created the CFPB to "enforce Federal consumer financial laws consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets are fair, transparent, and competitive." 12 U.S.C. § 5511(a). At the CFPB's head, Congress placed a single officer with a five-year term. 12 U.S.C. § 5491(a). Congress also established the CFPB as an independent agency, making its officer removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). Independent agencies like the CFPB are "formally within the Executive Branch but [derive] much of their perceived value from their insulation from party politics and the President's personal fiat." *Consumer Fin. Prot. Bureau v. ITT Educ. Services, Inc.*, No. 1:14-CV-00292-SEB, 2015 WL 1013508, at *8 (S.D. Ind. Mar. 6, 2015) (appeal dismissed).

I. INDEPENDENT AGENCIES DO NOT UNCONSTITUTIONALLY INFRINGE ON THE PRESIDENT'S REMOVAL AUTHORITY.

The Supreme Court has long held that independent agencies, whose officers are removable only for 'good cause,' rather than 'at will,' do not offend Article II of the Constitution by impermissibly limiting the President's removal power. *See Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Specifically, the *Humphrey's Executor* Court determined that, with respect to the officers of agencies like the FTC that require independence to execute their "quasi-legislative and quasi-judicial" roles, the President's authority to remove need not be absolute, as the Court had earlier proclaimed for "purely executive" agencies in *Myers v. United States*, 272 U.S. 52 (1926). *Id.* at 627-29. Given that "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will," *id.* at 629, there can be no structural separation of powers violation where the appointed officers of independent agencies are removable only for cause—"for inefficiency, neglect of duty, or malfeasance in office," *id.* at 620 (*quoting* 15 U.S.C. § 41) if independent agencies are to exist at all.

The Court later clarified that Congress may not legislate itself a role in the removal of executive officers beyond its established powers of impeachment and conviction. *Bowsher v. Synar*, 478 U.S. 714 (1986). Soon after *Bowsher*, the Supreme Court, in a 7-1 decision, made clear that *Humphrey's Executor* was still

good law where Congress identified a need for independence but made no attempt to claim for itself a role in the removal of appointed officers. *Morrison v. Olson*, 487 U.S. 654, 689-90 (1988). ("The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II.") So long as Congress does not usurp for itself the President's removal power, Congress may determine that an officer's independence is necessary, and limit the President's removal of that officer to good cause in order to sustain that necessary independence. If the officer "may be terminated for 'good cause,' the Executive . . . retains ample authority to assure that the [officer] is competently performing his or her statutory responsibilities." *Id.* at 692. Article II requires no more.

Indeed, in *Morrison*, the independent officer at issue was a single officer, an independent counsel within the Department of Justice. Yet the Court did not treat as relevant to its analysis whether that officer needed to share authority with other officers to act as a substitute for a presidential check on that officer's decisions.

Additionally, in exercising judicial review over Congressional acts courts must begin with the presumption of constitutionality. *United States v. Morrison*, 529 U.S. 598, 607 (2000); *see Brown v. Maryland*, 25 U.S. 419, 436 (1827). The

principle of prudential judicial deference is among our most venerable. Chief Justice Marshall wrote that a court should declare legislation unconstitutional only if "[t]he opposition between the constitution and the law [is] such that the judge feels a clear and strong conviction of their incompatibility with each other."

Fletcher v. Peck, 10 U.S. 87, 128 (1810). Where Congress has acted, as it did through the CFPA, a challenge to the constitutionality of its enactments cannot rest solely on the absence of prior court decisions sanctioning the alternative chosen by Congress; rather, the burden is on the challengers to demonstrate that legislation violates some principle grounded in the Constitution.

II. THE PANEL OPINION WENT BEYOND THE PROPER ANALYTICAL FRAMEWORK ESTABLISHED BY THE SUPREME COURT

The panel distinguished the CFPB from the FTC considered in *Humphrey's Executor* by noting that the CFPB has a single officer rather than multiple officers. It also distinguished *Morrison*, by opining that the CFPB has a broader scope of authority than an independent counsel. But those cases nevertheless reveal the relevant analytical framework for assessing Article II challenges to the implementing statutes of independent agencies like the CFPB. In the panel's view, the distinctions justified consideration of how a single officer wielding the CFPB's power threatens individual liberty, even though the earlier cases failed to apply that test in their removal powers analysis.

The United States, in its December 22, 2016 Response to the Petition for Rehearing En Banc, and the Respondent, in its November 18, 2016 Petition for Rehearing En Banc, explained how the panel's focus on the impact on individual liberty as a freestanding basis for finding a separation of powers violation goes beyond, and therefore contravenes, the analytical framework the Supreme Court has heretofore applied. Doc. 1652666, 1646917. *Amici* endorse that understanding of constitutional law, and will not repeat it here.

Under the controlling evaluative framework in the Supreme Court's jurisprudence, it is plain that first, Congress did not assign itself removal power. That power remains with the President and can be applied for legitimate, non-political reasons. Second, Congress did not undermine the President's duty to ensure the faithful execution of the law by vesting the CFPB's authority in a single officer who can be removed for cause and can be replaced or reappointed every five years.

Even the panel acknowledged that the CFPB's single-officer structure passes muster under this test. The panel found that, comparatively, "there is no meaningful difference in responsiveness and accountability to the President," Op. 56, and that it was "perhaps true" that "the single-Director structure is unlikely to give Congress any greater influence over the CFPB than Congress possesses over a multi-member independent agency." Op. 55.

Indeed, the congressional choice of a single officer to lead the CFPB is at least as effective in ensuring a Presidential check on unrestrained power as appointment of multiple officers is for an agency such as the FTC. Removal of the CFPB Director ensures a leadership change at the agency. After a single removal or the expiration of the CFPB Director's five-year term, a current President may appoint a new officer to his liking, with the advice and consent of the Senate. Thus, a single-officer structure would appear to *enhance* Presidential control of the CFPB, not undermine it.

By contrast, good cause removal of multiple officers diminishes the Presidential check on unrestrained power because the current President's appointment of one commission officer may not shift control of the commission as a whole. Therefore, the single-officer structure in the CFPA is even less problematic from a separation-of-powers perspective than the multiple-officer independent agencies, like the FTC, expressly ruled constitutional in *Humphrey's Executor*. Accordingly, requiring independent agencies to have multiple officers with the ability to check each other seems to be an odd way to support the President's Article II powers.

Vesting the CFPB's power in a single officer, therefore, simply is not a "structural separation of powers violation." The panel, however, proceeded under

the assumption that it is, and took the opportunity to engage in a comparison of agency design untethered from Supreme Court jurisprudence. This was error.

III. THE CFPB'S LEADERSHIP STRUCTURE IS A REASONABLE CONGRESSIONAL CHOICE THE COURTS SHOULD RESPECT.

In addition to applying the wrong legal test, the panel also misapplied its own test, making dubious and unwarranted claims exaggerating the ability of the CFPB—to the extent it is controlled by a single officer—to act arbitrarily, impulsively, unilaterally, broadly and imperiously. In doing so, the panel constructed a straw man, and then held it to a standard that is not the law. Based upon *amici's* experiences, the CFPB, under the control of the CFPB Director, is a well-functioning consumer protection agency, responsive to the public, with appropriate authority to act within its statutory mandate to regulate financial products for consumer safety. In the past five years, the CFPB's investigations and enforcement actions against banks and other lenders have returned nearly \$12 billion to over 29 million consumers who were subject to abusive, deceptive or predatory practices. *See* consumerfinance.gov. The 29 million American consumers directly benefiting from the CFPB's enforcement actions would likely view the CFPB as promoting their interests. Indeed, Congress created the CFPB to provide private citizens with an effective regulator for financial products and so far it has achieved that goal; the CFPB has handled over 1.1 million complaints and obtained timely replies for 97% of them. *Id.*

The CFPB's Director may be responsible for final decisions, but that does not make the Director an unchecked autocrat. The CFPB's regulations are subject to the same rule-making procedures—including public comment and judicial review—as other agencies, and its enforcement actions are subject to the same administrative procedures and—importantly—judicial review procedures as other agencies. The CFPB Director may be removed by the President for good cause, and is subject to congressional impeachment. These are the familiar checks and balances that apply to the decisions—and appointed officers—of all independent agencies.

The public comment process ensures that citizens have a role in the work of the CFPB that is far more direct than occurs through their quadrennial election of the President who appoints, among hundreds of other executive officers, the CFPB Director. *See* consumerfinance.gov/policy-compliance/notice-opportunities-comment/. The CFPB is required to request public comment on a wide variety of topics. These requests include proposed rules, requests for information, and Paperwork Reduction Act notices that give the public an opportunity to comment on certain planned or existing reporting, record keeping, and disclosure requirements. As of this date, the CFPB is seeking public comment on six matters, and has an archive of two hundred notices and public comments available on its website. *Id.*

Moreover, the CFPB shares CFPA enforcement authority with the States, our federal system's "laboratories of democracy" in Justice Brandeis' familiar formulation. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See 12 U.S.C. § 5552(c) (directing the CFPB to coordinate regulatory actions with state attorneys general). The diversity of expert and political opinion among the fifty States surely approximates and likely exceeds the diversity of opinion among multiple commission officers.

Pursuant to this authority, between 2013 and 2015, the CFPB coordinated with Connecticut and 46 other states and the District of Columbia to investigate and resolve allegations that Chase Bank USA N.A. and Chase Bankcard Services, Inc. (Chase) engaged in unfair, misleading and deceptive business practices in connection with its consumer credit card debt collection business. Chase ultimately agreed to pay \$50 million in consumer restitution, \$136 million to the states and CFPB, and halt collection actions on 528,000 consumers nationwide. Press Release of AG Jepsen, July 8, 2015, <http://www.ct.gov/ag/cwp/view.asp?A=2341&Q=568030&pp=12&n=1>. In another example of CFPB coordination, all fifty states, the District of Columbia and the CFPB and Federal Communications Commission (FCC) investigated claims that wireless telephone provides Sprint and Verizon billed consumers for premium text message subscription services that they had not signed up for or otherwise agreed to. The

coordinating regulators were able to reach a \$158 million global settlement to provide refunds for affected consumers and payments to the regulators. Press Release of AG Jepsen and Commissioner of Consumer Protection Jonathan Harris of May 12, 2015, <http://www.ct.gov/ag/cwp/view.asp?Q=565736&A=2341>. The independence of the CFPB and its Director from political influence is critical to the success of such regulatory efforts.

As the States' CFPA enforcement authority demonstrates, Congress has not, as claimed by the panel, vested a single individual with the sole authority to enforce U.S. consumer protection law. Op. 24. Rather, Congress has vested that authority in a CFPB Director and over fifty State attorneys general, none of whom is appointed by the President, none of whom can be removed from office by the President, and none of whom may only bring enforcement actions only upon achieving the consensus of a commission or board. States across the country have exercised this authority to bring civil actions for violations of the CFPA, including violation of prohibitions on usurious and otherwise illegal lending practices, *Commonwealth of Pennsylvania v. Think Fin., Inc.*, E.D.Pa No. 2:14-CV-07139, violations of two sections of the CFPA, 12 U.S.C. §§ 5565 and 5538, and the CFPB's "Regulation O" the Mortgage Assistance Relief Services Rule, 12 C.F.R. Part 1015, *Office of the Attorney Gen. v. Berger Law Group, P.A.*, M.D.Fl, Tampa Division, No. 8:14-CV-1825-T-30MAP, violation of provisions governing for-

profit secondary schools, *Illinois v. Alta Colleges, Inc.*, N.D.Ill, Eastern Division, No. 14 C 3786, and violation of the CFPB's Regulation Z, 12 C.F.R. Part 1026. *King v. HSBC Bank Nevada, N.A.*, N.M., No. 13-CV-504 RHS/KBM.

The vesting of federal enforcement authority in individual officers of the States, who by definition are not subject to the check of presidential removal power or the check of a board of multiple officers, is not an innovation of the CFPA. State attorneys general exercise concurrent federal enforcement power with the Federal Trade Commission, as they may bring federal antitrust suits on behalf of individuals residing within their states ("parens patriae" suits), or on behalf of the state as a purchaser. *See* 15 U.S.C. § 15c(a)(1). There is, accordingly, historical precedent for a single officer constitutionally enforcing federal law without the check of at-will service to the President or the substitute check of an appointed board.

In addition to reliance upon the expertise of the Director, its career civil servants, the States, public comments and consumer complaints, the CFPB also benefits from the expertise of other outside groups. Pursuant to the CFPA, the CFPB has convened four independent groups for formal input on everything from consumer engagement, to policy development, to research – a Consumer Advisory Group (12 U.S.C. § 5494), an Academic Research Council (12 U.S.C. § 5493(b)(1)), a Community Bank Advisory Group, and a Credit Union Advisory

Council. *See* consumerfinance.gov/about-us/advisory-groups/. In a similar effort to solicit input from experts, the CFPB has twice hosted a research conference with the goal of connecting the core community of researchers and policymakers with the best research being conducted across a wide range of disciplines and approaches that can inform the topic of consumer finance. *See* consumerfinance.gov/data-research/cfpb-research-conference/.

Another check on the CFPB is through the Financial Stability Oversight Council (FSOC), which may veto CFPB regulations under appropriate circumstances. *See* 12 U.S.C. § 5513. While it may be difficult to imagine (Op. 26) how a CFPB consumer protection regulation could ever put at risk the safety and soundness of the banking system or the stability of the financial system, FSOC's veto remains an important check on the CFPB's exercise of power in a manner that seriously undermines the public interest.

Finally, no observer could claim that appointment and confirmation of the CFPB Director has proceeded in a politically unresponsive vacuum. In fact, one is hard-pressed to recall an instance where the appointment and confirmation of an officer in a multi-officer independent agency has generated equivalent political interest. President Obama's first nominee, then-professor Elizabeth Warren, now-Senator Warren, was not confirmed by the Senate. Further, Congress could not have expected the single officer structure to permanently deliver the CFPB's power

to one political party; Presidents of each party will, over time, nominate the CFPB Director.

The political decision to create a financial product consumer safety agency, the determination that the agency must be independent to be effective, and the choice to vest that agency's authority in a single, presidentially-appointed officer with a five-year term, came through the ordinary legislative process. The CFPA enjoys the presumption of constitutionality. The courts should regard with skepticism any attempts to curtail long standing Supreme Court precedent upholding the constitutionality of independent agencies. With the core issue in removal powers doctrine clear and the CFPB Director's powers in proper context, Petitioners' attempt to evade the analytic framework of *Humphrey's Executor* and *Morrison* should fail.

CONCLUSION

For these reasons, this Court should hold the structure of the Consumer Financial Protection Bureau is constitutional.

Dated: March 31, 2017

Respectfully submitted,

GEORGE JEPSEN
ATTORNEY GENERAL

BY: /s/ John Langmaid
John Langmaid
Assistant Attorney General
Matthew Budzik
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5270

MATTHEW DENN
ATTORNEY GENERAL OF
DELAWARE
820 N. French St.
Wilmington, DE 19801
Tel: (302) 577-8400

DOUGLAS S. CHIN
ATTORNEY GENERAL OF
HAWAII
425 Queen Street
Honolulu, HI 96813
Tel: (808) 586-1500

LISA MADIGAN
ATTORNEY GENERAL OF
ILLINOIS
100 West Randolph Street, 12th Floor
Chicago, IL 60601
Tel: (312) 814-3000

TOM MILLER
ATTORNEY GENERAL OF IOWA
Hoover State Office Building
1305 E. Walnut Street
Des Moines, IA 50319
Tel: (515) 281-5164

JANET T. MILLS
ATTORNEY GENERAL OF MAINE
6 State House Station
Augusta, ME 04333
Tel: (207) 626-8800

BRIAN E. FROSH
ATTORNEY GENERAL OF
MARYLAND
200 Saint Paul Place
Baltimore, MD 21202
Tel: (410) 576-6300

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS
One Ashburton Place
Boston, MA 02108-1518
Tel: (617) 727-2200

LORI SWANSON
ATTORNEY GENERAL OF
MINNESOTA
102 State Capitol
75 Rev. Dr. Martin Luther King Jr.
Blvd.
St. Paul, MN 55155
Tel: (651) 757-1459

JIM HOOD
ATTORNEY GENERAL OF
MISSISSIPPI
550 High Street, Suite 1200
Jackson, MS 39201
Tel: (601)-359-3680

HECTOR H. BALDERAS
ATTORNEY GENERAL OF NEW
MEXICO
408 Galisteo St.
Santa Fe, NM 87501
Tel: (505) 490-4060

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL OF NEW
YORK
120 Broadway, 25th Floor
New York, NY 10271-0332
Tel: (212) 416-8020

JOSH STEIN
ATTORNEY GENERAL OF
NORTH CAROLINA
9001 Mail Service Center
Raleigh, NC 27699-9001
Tel: (919) 716-6400

ELLEN F. ROSENBLUM
ATTORNEY GENERAL OF
OREGON
1162 Court St. N.E.
Salem, OR 97301
Tel: (503) 378-4400

PETER F. KILMARTIN
ATTORNEY GENERAL OF
RHODE ISLAND
150 South Main Street
Providence, RI 02903
Tel: (401) 274-4400

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL OF
VERMONT
109 State Street
Montpelier, VT 05609-1001
Tel: (802) 828-3171

ROBERT W. FERGUSON
ATTORNEY GENERAL OF
WASHINGTON
1125 Washington St SE
PO Box 40100
Olympia, WA 98504-0100
Tel: (360) 753-6200

KARL A. RACINE
ATTORNEY GENERAL FOR THE
DISTRICT OF COLUMBIA
441 4th Street, NW
Washington, DC 20001
Tel: (202) 727-3400

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/s/ John Langmaid

Attorney for George Jepsen

Attorney General of State of Connecticut

Dated: March 31, 2017

CERTIFICATION OF SERVICE

I hereby certify that on this 30th day of March, 2017, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and will be served via the CM/ECF system. I further certify, pursuant to the Court's Order, that thirty (30) paper copies of the brief will be hand delivered to the Clerk on March 31, 2017.

/s/ John Langmaid
John Langmaid
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5361
Fax: (860) 808-5385
Email: john.langmaid@ct.gov