IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STATE OF MARYLAND,	*	
Plaintiff,	*	
v.	*	
UNITED STATES OF AMERICA, *et al.*,	*	Case No.: 1:18-cv-2849-ELH
Defendants.	*	

* * * * * * * * * * * * *

PLAINTIFF'S SUPPLEMENTAL BRIEF

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PLAINTIFF'S SUPPLEMENTAL BRIEF

As the Court is aware, the District Court for the Northern District of Texas has issued an order entering partial summary judgment in favor of the plaintiffs in that case. Specifically, the Court issued a declaratory judgment that "the Individual Mandate, 26 U.S.C. § 5000A(a) [is] **UNCONSTITUTIONAL**" and that "the remaining provisions of the ACA, Pub. L. 111-148, are **INSEVERABLE** and therefore **INVALID**." Slip op. 55, ECF 35-1 (emphasis in original). The District Court in Texas has now ordered expedited briefing—to conclude on December 26—on the effect of its decision. Order to Expedite Briefing, *Texas v. United States*, No. 18-cv-167 (N.D. Tex. Dec. 18, 2018) (ECF 215).

This development substantially reinforces Maryland's standing in this case. Although the Texas court withheld injunctive relief for the time being, that appears simply to reflect the Administration's representation that it would comply with any declaratory relief.

In light of that promise, and the other evidence cited in the Complaint, Maryland has more than plausibly alleged that Defendants will continue to maintain that the ACA is unconstitutional, including in foreseeable third-party actions seeking to leverage the Texas partial judgment into injunctions, and cease enforcing critical portions (or all) of the ACA after January 1, causing multiple injuries to the State. The Texas court has further indicated its intent to move promptly to ruling on the remaining request for injunctive relief (*see* Order, *Texas v. United States*, No. 18-cv-167 (N.D. Tex. Dec. 16, 2018) (ECF 212)), a process that may be expedited if the court perceives that the Administration is not keeping its promise to abide by the declaratory judgment alone.

If doubt remains, and if the Court believes that the status of the Texas litigation is essential to Maryland's standing, the Court can and should deny the Motion to Dismiss with leave for the Defendants' to renew it at a later date. That is commonplace. The opposite course—dismissing the case—would be unsound because even if the Government represents that it intends to enforce the statute now, that could easily change in the wake of later developments in Texas, including the Texas court's response to a pending motion to clarify its order by stating that it intended the judgment to take immediate effect.[*] To the extent Defendants seek to contradict the Complaint's allegation of impending non-enforcement by pointing to evidence outside the Complaint (all of which is unsworn, ambiguous, and untested), it lacks the right to do so through its present motion to dismiss. Requiring Defendants to present the Administration's enforcement plans through competent evidence in a summary judgment (or other appropriate) motion has the practical benefit of allowing the Court to decide the relevance of the Texas litigation after the dust has settled.

The Texas decision also supports Maryland's standing to secure a preliminary injunction against Matthew Whitaker's assumption of the powers of the office of the Attorney General. The State faces a present redressable injury from Mr. Whitaker's involvement in the federal government's ongoing—or just concluded—decisionmaking on

[*] *See* Mot. for Clarification at 2, *Texas v. United States*, No. 18-cv-167 (N.D. Tex. Dec. 17, 2018) (ECF 213) (requesting clarification whether court intended declaratory judgment to take effect only after completion of appeals or immediately) (Attachment 1 to this filing).

how to respond to the Texas decision, including whether the Department of Justice will collaborate in continued enforcement of the ACA pending any appeal in that case. Although Defendants have previously tried to cast doubt on the extent of Mr. Whitaker's involvement in matters relevant to this litigation, they cannot plausibly deny that he will play a material role in the formulation of the Government's response to the Texas order, with inevitable effects on this case. That is a basis for this Court to decide the lawfulness of Mr. Whitaker's appointment, wholly apart from its determination whether the State has standing to seek relief from Defendants' impending non-enforcement of the ACA. The Court should not allow the Government to avoid a ruling on the appointment by remaining coy and ambiguous about Mr. Whitaker's involvement. It should advise the Court if he is involved. If it declines or there are remaining questions, Maryland should be entitled to take limited jurisdictional discovery on the question of Mr. Whitaker's involvement. Finally, this Court can address Mr. Whitaker's appointment through the exercise of its inherent power to supervise this litigation without first having to decide whether Maryland has standing in the underlying suit.

I. THE TEXAS DECISION REINFORCES MARYLAND'S STANDING.

A. The Texas Decision Reinforces the Plausibility of Maryland's Non-Enforcement Allegations.

The Texas decision substantially undermines Defendants' objection that the State can only speculate about whether Defendants will continue to enforce the ACA in full after January 1, 2019. Among other things, Defendants had argued that there was no way to know how the Texas court would rule or how the Administration would respond to that

decision. *See* Defs.' MTD, ECF 11-1 at 10; Defs.' Reply in Support of MTD, ECF 33 at 4-7. That argument was meritless when made, *see* Pl.'s Opp. to MTD, ECF 27 at 5-8, 17-18, but has at any rate been overtaken by events. The Texas court has now issued its declaratory judgment, stating that the entirety of the ACA is unenforceable.

Although the Texas court did not immediately order the federal government to cease enforcement of the ACA, that does not undermine Maryland's standing—the court appears to have withheld injunctive relief because the Government represented that it was unnecessary, given the presumption that the Government would comply with the declaration. Slip op. 12; s*ee also* Am. Compl., ECF 8 ¶ 10 (describing Administration's representations to Texas court); Pl.'s Opp. to MTD 2. In particular, Deputy Assistant Attorney General Shumate told the Texas court:

> MR. SHUMATE: . . . . We think a declaratory judgment would be sufficient relief against the Government, and the Court wouldn't need to enter any type of judgment.
>
> THE COURT: And why is that?
>
> MR. SHUMATE: I think it's the Florida district court in the original ACA case only entered a declaratory judgment. The Court wouldn't need to enter an injunction. I think courts have said a *declaratory judgment against the government is ordinarily sufficient relief; it operates in a similar manner as an injunction*.
>
> THE COURT: Because you're presumed to comply with –
>
> MR. SHUMATE: The government is presumed to comply with the law, and the Court will then have a definitive interpretation of the statute that would advise the public about their legal obligations.
>
> THE COURT: Thank you.

Tr. Hearing on Mot. for Prelim. Inj. at 103-04, *Texas v. United States*, No. 18-cv-167 (N.D. Tex. Sept. 5, 2018) (emphasis added). The Defendants' reference to the Florida litigation was significant, and the Texas District Court would have recognized it as such. In that original ACA case, the court held that the declaratory judgment immediately bound the federal government to stop enforcing the statute. *See Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1307, 1316 (N.D. Fla. 2011) ("For the defendants to suggest that they were entitled (or that in the weeks after my order was issued they thought they might be entitled) to basically ignore my declaratory judgment until 'after appellate review is exhausted' is unsupported in the law."). In limiting its order to declaratory relief, it appears the Texas court specifically relied on the Government's representation that an injunction was unnecessary in light of the precedent of that prior ACA litigation. *See* slip op. 12.

It is therefore entirely plausible—at the very least—for Maryland to allege that the Administration will keep its word to the Texas court and abide by the declaration that the statute is invalid and unenforceable. If the Administration does so, there can be no genuine question that Maryland will be injured. As the State pointed out in its opposition, and Defendants did not contest, Maryland is entitled to millions of dollars in direct payments each year under provisions of the statute the Texas court has now ruled invalid and that the United States would stop making the payments if it did not enforce the statute. *See* Am. Compl. ¶ 5; Pl.'s Opp. to MTD 9.

Even if the Administration complies with the Texas judgment only with respect to the unenforceability of the provisions regarding pre-existing conditions, those actions

would directly injure Maryland in multiple ways, as described in the State's opposition. Pl.'s Opp. to MTD 9-16. Defendants have responded by arguing that Maryland can avoid some of those injuries by enforcing the ACA itself, at its own expense. Defs.' Reply in Support of MTD 8-9. The State has explained why that argument fails on its own terms. Pl.'s Opp. to MTD 10-11. But the Texas decision now makes even more important Defendants' refusal to say whether the Administration would permit Maryland to continue that enforcement role if the State attempted to enforce provisions of the statute now held invalid by the Texas court, including provisions Defendants themselves have told Congress they believe to be unenforceable. *See id.* at 11 n.5; Defs.' Reply in Support of MTD 8-9 (failing to address question).

The Administration also has given no answer as to how Maryland is supposed to avoid the injuries caused by disruption in markets it does not regulate, such as those of other States and ERISA plans. That silence is particularly damning because the Administration's support for the Texas court's invalidation of central ACA protections could well embolden insurers to defy the statute's expansive protections for those with pre-existing conditions, knowing that Defendants will not defend the statute's validity or attempt their own enforcement efforts, making it more likely the State will have to expend resources attempting to enforce the ACA on its own or enacting replacement protections.

B. Defendants Cannot Contradict the Complaint with Extra-Record Evidence on a Motion to Dismiss.

In their briefing, and as previewed in the recent status conference with the Court, Defendants have attempted to rebut the reasonable inferences drawn from the factual

allegations of the Complaint by pointing to informal statements made by various administration officials outside the context of this litigation. But as Maryland noted in its opposition, if Defendants wish the Court to decide their motion on the basis of evidence outside the Complaint, they were required to submit that evidence in competent form (*i.e.*, through declarations, rather than press releases) and ask this Court to resolve the factual disputes through the proper adversarial process. *See* Pl.'s Opp. to MTD 5 n.2. Because Defendants have forgone that opportunity, and because the Complaint plausibly alleges that Defendants will cease enforcement, including in light of the decision the Texas court has since rendered, the Court should simply deny the present motion to dismiss.

This point is no mere technicality. If the Administration has decided it will continue to enforce the ACA in full, despite its representations to the Texas court, Maryland and this Court are entitled to know the details of that decision, presented through competent evidence subject to testing through the normal adversarial process. That process is important because the details matter. For example, it would be important to know whether the Administration would continue to allow States, like Maryland, to enforce provisions (like the pre-existing conditions protections) the Administration believes to be unenforceable, as the Texas court has held, and what the Administration would do if third parties challenge such enforcement using the Administration's own arguments.

Moreover, a simple statement of the Administration's present enforcement plans would be insufficient. Any such statement may be premised on the uncertain assumption that the Texas court did not intend for its declaration to take effect until appeals have been exhausted. The intervenor defendants in that litigation have requested clarification on this

score. If the court follows the precedent from the original ACA litigation that the Administration cited to that court, the Administration may well decide to comply with the decision starting January 1.

Applying the normal procedural rules governing a motion to dismiss thus has very real practical benefits. It would allow the Court to consider the relevance of the Texas litigation after the Texas court has ruled on the pending motion for clarification, and likely after any stay motions have been resolved (by the district court or on appeal).

In any event, the present uncertainty over the Administration's enforcement plans itself will cause Maryland harm, forcing the State to expend resources to plan, during the annual budget-setting process that is currently ongoing, and the upcoming legislative session, for the very real possibility that Defendants will refuse to enforce the statute. *See* Pl.'s Opp. to MTD 15-16; *see also, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-55 (2010) (where there was a "reasonable probability" that plaintiffs would be injured by Government's failure to regulate third parties, expense of measures taken to mitigate that potential harm created an injury-in-fact); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581-82 (1985) (suit seeking declaration regarding arbitration scheme's constitutionality found ripe where the plaintiff "suffers the continuing uncertainty and expense of depending for compensation on a process whose authority is undermined because its constitutionality is in question"); *EQT Prod. Co. v. Wender*, 870 F.3d 322, 330-31 (4th Cir. 2017) (plaintiff had standing to seek declaration regarding whether ordinance validly applied to its storage of wastewater because if the provision applied, plaintiff would be required to alter its operations "and such a change would impose

additional costs," which was "enough to give rise to an Article III injury in fact"). Particularly given the lead time necessary to implement responsive measures, the State has a critical need for declaratory relief in the near term.

II. RECENT DEVELOPMENTS ALSO ADD SUPPORT TO MARYLAND'S REQUEST FOR A PRELIMINARY INJUNCTION AGAINST MATTHEW WHITAKER.

The ruling of the Texas court also substantially strengthens Maryland's argument that it may seek—and the Court should issue—an Order prohibiting Matthew Whitaker from participating in the proceedings—including with respect to the determination whether the United States will enforce the ACA. Importantly, these events also make clear that Maryland's standing to raise this challenge is independent of its standing to seek relief from Defendants' impending non-enforcement of the ACA.

There is no dispute that the Government is presently required to decide how to respond to the Texas court decision, including whether to continue enforcing the ACA (and if so, what parts and in what jurisdictions), whether to appeal the decision, and what position to take with respect to any appeal undertaken by others. Those decisions will indisputably affect Maryland's interests. And there should be no dispute that Mr. Whitaker has been (or will be) involved in those decisions. It is implausible that the Acting Attorney General would not personally play a role in deciding how the United States will respond to the Texas court's ruling that the ACA in its entirety is unconstitutional—a decision that goes beyond the Department of Justice's view that substantial portions need be struck. As the Government asserted during the teleconference with the Court on December 17, 2018, "a lot of vetting" is going on and the U.S. Government has "to work through" how to

respond to the Texas court's ruling, in coordination with all relevant agencies. Going forward, Mr. Whitaker will be involved in advising the President on the obligations of the United States in the wake of the Texas court's declaratory judgment and participate in policymaking in light of the Department of Justice's own role in enforcing the statute. *See* 42 U.S.C. § 300gg-22(b)(2)(F)(i). *Contra* Defs.' Reply in Support of MTD 6 (asserting that it has no such role). That decision on how the United States will proceed will inevitably be made in consultation with the White House and, possibly, with the Departments of Health and Human Services and Labor, and the Internal Revenue Service. Such cabinet-level decisions are not delegated entirely to subordinates. Even if they are, that is itself a concrete decision by Mr. Whitaker, whereas a properly appointed Acting Attorney General easily could determine to be involved personally.

If Defendants wish to make a factual dispute over Mr. Whitaker's involvement, which goes directly to the State's standing to enjoin him, they cannot remain ambiguous or silent. They should straightforwardly advise the Court of his involvement. Of note, in proceedings on Mr. Whitaker's appointment in the District Court for the District of Columbia, Defendants last night advised the Court that Mr. Whitaker was recused in an attempt to defeat the plaintiff's claim. *See* Defs.' Status Report at 2, *Michaels v. Whitaker*, No. 18-cv-2906 (D.D.C. Dec. 17, 2018) (ECF 21). There is thus no basis for Defendants to withhold that information in this case—using it as a sword in one proceeding and a shield here. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) (when "issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues"); *e.g.*, *Am. Humanist Ass'n v. Greenville Cty. Sch. Dist.*, 652 F. App'x 224, 230

(4th Cir. 2016) ("On remand, the court should conduct jurisdictional discovery to determine whether AHA currently maintains standing to pursue this claim . . . ."). Importantly, and contrary to the Defendants' assumption, this Court's authority to address Mr. Whitaker's appointment is not dependent on an antecedent determination that the Plaintiff has Article III standing to bring its underlying claims relating to enforcement of the ACA.

First, Mr. Whitaker's involvement in the federal Government's decisionmaking regarding whether to continue to enforce the ACA after the Texas decision independently creates the kind of injury courts have found sufficient to establish standing in cases like *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000). *See, e.g.*, *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017); *Ironridge Glob. IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1317 (N.D. Ga. 2015); *Duka v. SEC*, 2015 WL 5547463, at *21 (S.D.N.Y. Sept. 17, 2015). Indeed, a plaintiff need not show that an unlawful official made any particular decision at all. In *Landry*, the D.C. Circuit found that even the *recommendation* of an unconstitutional official—not a decision—was enough to "taint the ultimate judgment" of the ultimate constitutional decisionmaker, even though that recommendation was subject to de novo review by a proper officer higher up the chain. *Landry*, 204 F.3d at 1132. There was a superior (and lawful) authority that decided the issue on *de novo* review, so the unconstitutional actor functionally did not have authority over the plaintiff at all. Yet the court still found that the plaintiff had standing to bring the claim. *Id.* Here, of course, the order of authority is reversed—Mr. Whitaker *is* the ultimate decisionmaker, so Plaintiff's injury is even more direct. *Cf. id.* at 1331 ("clear causal link to a party's harm" not required

to establish standing for Appointments Clause challenge; rather, injury may be "radically attenuated").

Second, the Court unquestionably has the authority to act under its inherent authority over the proceedings before it. Pl.'s Reply in Support of Mot. for PI, ECF 31 at 2-3. Notably, the Government has stressed a court's inherent authority in the proceedings in the District Court for the District of Columbia. The United States' determination of its position is directly related to the proceedings in this Court—as is clear from the Defendants' attorneys' representation that they need that determination to conclude before advising the Court of their position.

Finally, Plaintiff wishes to bring the Court's attention to the arguments made in the *Michaels* litigation. The plaintiff in that case elaborated on the challenge under the Supreme Court's decision in *United States v. Eaton*, 169 U.S. 331 (1898), explaining that Mr. Whitaker is serving as a "principal officer" because he does not ever fill in for the Attorney General on a temporary basis as a subordinate. The short discussion of that issue from the briefing in that case is attached, so that the Court may consider the point. *See* Attachment 2.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss. Moreover, the Court should grant Maryland's motion for preliminary injunction against Mr. Whitaker. In the alternative, the Court should exercise its authority over these proceedings to prohibit Mr. Whitaker from any involvement in the case and to substitute Rod J. Rosenstein as defendant.

Dated: December 18, 2018

Respectfully submitted,

THE STATE OF MARYLAND

By: /s/ Kevin K. Russell

BRIAN E. FROSH
Attorney General of Maryland

JULIA DOYLE BERNHARDT (BAR NO. 25300)
jbernhardt@oag.state.md.us
STEVEN M. SULLIVAN (BAR NO. 24930)
ssullivan@oag.state.md.us
SARAH W. RICE (BAR NO. 29113)
srice@oag.state.md.us
KIMBERLY S. CAMMARATA (BAR NO. 11997)
kcammarata@oag.state.md.us
Assistant Attorneys General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6325 (phone)
(410) 576-6955 (fax)

THOMAS C. GOLDSTEIN (BAR NO. 13618)
TGoldstein@goldsteinrussell.com
KEVIN K. RUSSELL (BAR NO. 20712)
KRussell@goldsteinrussell.com
SARAH E. HARRINGTON (BAR NO. 20701)
Sharrington@golsteinrussell.com
TEJINDER SINGH (BAR NO. 17888)
TSingh@goldsteinrussell.com
DANIEL WOOFTER (BAR NO. 20474)
dhwoofter@goldsteinrussell.com
Goldstein & Russell, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636 (phone)
(866) 574-2033 (fax)

Attorneys for the State of Maryland

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

TEXAS, WISCONSIN, ALABAMA, ARKANSAS, ARIZONA, FLORIDA, GEORGIA, INDIANA, KANSAS, LOUISIANA, PAUL LePAGE, Governor of Maine, Governor Phil Bryant of the State of MISSISSIPPI, MISSOURI, NEBRASKA, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, NEILL HURLEY, and JOHN NANTZ, Plaintiffs, v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALEX AZAR, in his Official Capacity as SECRETARY OF HEALTH AND HUMAN SERVICES, UNITED STATES INTERNAL REVENUE SERVICE, and DAVID J. KAUTTER, in his Official Capacity as Acting COMMISSIONER OF INTERNAL REVENUE, Defendants.	Civil Action No. 4:18-cv-00167-O
CALIFORNIA, CONNECTICUT, DISTRICT OF COLUMBIA, DELAWARE, HAWAII, ILLINOIS, KENTUCKY, MASSACHUSETTS, MINNESOTA by and through its Department of Commerce, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, and WASHINGTON, Intervenor-Defendants.	

INTERVENOR-DEFENDANTS' (1) MOTION FOR EXPEDITED CONSIDERATION, (2) CLARIFICATION OR STAY, AND (3) ENTRY OF PARTIAL FINAL JUDGMENT UNDER RULE 54(b) OR CERTIFICATION UNDER 28 U.S.C. § 1292(b)

The Intervenor-Defendants the States of California, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia respectfully move this Court for:

(1) Expedited consideration of this Motion because the Defendant States and the public will be irreparably injured absent an immediate clarification or stay.

(2) An order clarifying that the December 14, 2018 Order (ECF No. 211) does not relieve the parties to this litigation—or any other State, entity, or individual—of their rights and obligations under the Patient Protection and Affordable Care Act (ACA) until appellate review is complete; or, in the alternative, an order staying the effect of the December 14, 2018 Order (ECF No. 211) pending appeal; and

(3) An order directing the entry of a partial final judgment under Federal Rule of Civil Procedure 54(b), in accordance with the terms of the Court's December 14, 2018 Order, or, in the alternative, an order certifying the Court's December 14, 2018 Order (ECF No. 211) for interlocutory appeal under 28 U.S.C. § 1292(b).

The Defendant States specifically request that the Court expedite consideration of the Motion and issue a ruling by December 21, 2018, in order to avoid extraordinary disruption prior to January 1, 2019, the date upon which this Court has held the entirety of the Patient Protection and Affordable Care Act becomes unconstitutional. Moreover, it is in the interest of the parties and the nation to efficiently and expeditiously achieve appellate resolution of the important legal questions presented in this case.

In support of this motion, the Defendant States rely on their accompanying Brief. A proposed order is attached.

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Dated: December 17, 2018

Respectfully submitted,

Xavier Becerra
Attorney General of California
Julie Weng-Gutierrez
Senior Assistant Attorney General
Kathleen Boergers
Supervising Deputy Attorney General

/s/ Neli N. Palma

Neli N. Palma
Nimrod P. Elias
Deputy Attorneys General
California State Bar No. 203374
California State Bar No. 251634
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7522
Fax: (916) 322-8288
E-mail: Neli.Palma@doj.ca.gov
Attorneys for Intervenors-Defendants

GEORGE JEPSEN
Attorney General of Connecticut
JOSEPH RUBIN
Associate Attorney General
Attorneys for Intervenor-Defendant the State of Connecticut

MATTHEW P. DENN
Attorney General of Delaware
ILONA KIRSHON
Deputy State Solicitor
JESSICA M. WILLEY
DAVID J. LYONS
Deputy Attorneys General
Attorneys for Intervenor-Defendant the State of Delaware

RUSSELL A. SUZUKI
Attorney General of Hawaii
ANDREA A. SUZUKI
Deputy Attorney General
ROBERT T. NAKATSUJI
Deputy Solicitor General
Attorneys for Intervenor-Defendant the State of Hawaii

LISA MADIGAN
Attorney General of Illinois
David F. Buysse
Deputy Chief, Public Interest Division
Anna P. Crane
Public Interest Counsel
Matthew V. Chimienti
Assistant Attorney General, Special Litigation Bureau
Attorneys for Intervenor-Defendant the State of Illinois

ANDY BESHEAR
Attorney General of Kentucky
LA TASHA BUCKNER
Executive Director, Office of Civil and Environmental Law
S. TRAVIS MAYO
TAYLOR PAYNE
Assistant Attorneys General
Attorneys for Intervenor-Defendant the Commonwealth of Kentucky

MAURA HEALEY
Attorney General of Massachusetts
STEPHEN P. VOGEL
Assistant Attorney General
Attorneys for Intervenor-Defendant the Commonwealth of Massachusetts

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota
SCOTT IKEDA
Assistant Attorney General
Attorneys for Intervenor-Defendant the State of Minnesota by and through its Department of Commerce

GURBIR S. GREWAL
Attorney General of New Jersey
JEREMY M. FEIGENBAUM
Assistant Attorney General
ANGELA JUNEAU BEZER
Deputy Attorney General
Attorneys for Intervenor-Defendant the State of New Jersey

BARBARA D. UNDERWOOD
Acting Attorney General of New York
STEVEN C. WU
Deputy Solicitor General
LISA LANDAU
Bureau Chief, Health Care Bureau
ELIZABETH CHESLER
Assistant Attorney General, Health Care Bureau
Attorneys for Intervenor-Defendant the State of New York

JOSHUA H. STEIN
Attorney General of North Carolina
SRIPRIYA NARASIMHAN
Deputy General Counsel
Attorneys for Intervenor-Defendant the State of North Carolina

ELLEN F. ROSENBLUM
Attorney General of Oregon
HENRY KANTOR
Special Counsel to the Attorney General
SCOTT KAPLAN
Assistant Attorney General
Attorneys for Intervenor-Defendant the State of Oregon

PETER KILMARTIN
Attorney General of Rhode Island
MICHAEL W. FIELD
Assistant Attorney General
MARIA R. LENZ
Special Assistant Attorney General
Attorneys for Intervenor-Defendant the State of Rhode Island

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
BENJAMIN D. BATTLES
Solicitor General
Attorneys for Intervenor-Defendant the State of Vermont

MARK R. HERRING
Attorney General of Virginia
TOBY J. HEYTENS
Solicitor General
MATTHEW R. MCGUIRE
Deputy Solicitor General
Attorneys for Intervenor-Defendant the Commonwealth of Virginia

ROBERT W. FERGUSON
Attorney General of Washington
JEFFREY G. RUPERT
Chief, Complex Litigation Division
JEFFREY T. SPRUNG
Assistant Attorney General
Attorneys for Intervenor-Defendant the State of Washington

KARL A. RACINE
Attorney General for the District of Columbia
ROBYN R. BENDER
Deputy Attorney General
VALERIE M. NANNERY
Assistant Attorney General
Attorneys for Intervenor-Defendant the District of Columbia

CERTIFICATE OF CONFERENCE

Counsel for movants conferred by telephone call on December 17, 2018, with counsel to Federal Defendants and counsel to Plaintiffs regarding the relief sought in this motion. The parties represented that they are still assessing the Court's Order and cannot yet take a position on the relief that is being requested.

/s/ *Neli N. Palma*

CERTIFICATE OF SERVICE

On December 17, 2018, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5 (b)(2).

/s/ *Ashley Harrison*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

*

*

BARRY MICHAELS,

*

Plaintiff,

v.

*

MATTHEW G. WHITAKER, IN HIS OFFICIAL CAPACITY,

Case No. 18-cv-2906

*

Defendant.

*

*

* * * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

non-confirmed employees rather than the Senate-confirmed officials designated by Congress.[1] In fact, the President's appointment of Mr. Whitaker violated the Constitution's Appointments Clause. At the very least, the appointment raises significant constitutional doubt that can be avoided by holding that the appointment was not authorized by the Vacancies Act.

I. The President's Appointment of Matthew Whitaker Violated the Appointments Clause.

A. The Appointments Clause Requires That the Senate Confirm an Officer Who Exercises the Authority of a Principal Officer And (1) Is Not a Subordinate or (2) Was Not Appointed In Response to "Temporary and Special Conditions."

The requirement of the Appointments Clause that the Senate confirm a principal officer is essential to the separation of powers. *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991). In particular, "Advice and Consent . . . . serves both to curb Executive abuses of the appointment power and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond v. United States*, 520 U.S. 651, 659-60 (1997) (quoting *The Federalist No. 76*, at 386-87, internal citations omitted). Particularly prescient to these events, "[t]he 'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag*, 501 U.S. at 883 (quoting G. Wood, *The Creation of the American Republic 1776-1787*, at 79 (1969)).

The Supreme Court addressed the circumstances in which a government official is a "principal officer" in *Edmond*. There, the Court held that members of the Coast Guard Court of

[1] *See, e.g.*, 10 U.S.C. § 132(b) (automatic succession by Deputy Secretary of Defense); 10 U.S.C. § 154(d) (Vice Chairman of Joint Chiefs of Staff); 50 U.S.C. § 3026(a) (Principal Deputy Director of National Intelligence).

Criminal Appeals were "inferior," not "principal" officers. It reasoned: "Whether one is an 'inferior' officer depends on whether he has a superior," *id.* at 662, explaining:

> [I]n the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.

Id. at 663. The Court explained that its holding was supported by "the views of the first Congress," which created the second-in-command position of "Chief Clerk" to the Secretaries of State and War. The Chief Clerk exercised significant authority within those departments but was designated as an "inferior officer" who reported directly to, and was removable by, the Secretary. *Id.* at 663-64.

The Court in *Edmond* identified *United States v. Eaton*, 169 U.S. 331 (1898), as a case in which an official was not a "principal officer" requiring confirmation. *Eaton* upheld the position of "vice consul"— a designated State Department employee stationed in an overseas mission. *Id.* at 337. Congress defined the vice consul's responsibilities as temporarily performing the responsibilities of the consul-general while the latter was sick or absent, or until a replacement arrived if the consul-general died. The vice consul had two principal officers as superiors. His actions were subject to reversal when the Senate-confirmed consul-general returned to service, or by the replacement official if the consul-general died. The vice consul also reported to, and was subject to replacement by, the Secretary of State. *Id.* at 339.

The vice consul was not a Senate-confirmed officer. The Supreme Court in *Eaton* therefore considered two questions. First, the issue addressed in *Edmond*: Was the "vice consul" a "principal officer" rather than a mere subordinate? Second, in any event, does the Constitution categorically require confirmation whenever even a subordinate exercises the powers of the principal? The Court held that the answer to both questions was "no," such that the vice consul need not be

confirmed. It reasoned that (1) the vice consul was a "subordinate" position; and (2) confirmation was not required because the vice consul exercised the powers of the principal officer only for a "limited time" in response to "temporary and special conditions." 169 U.S. at 343-44; *see also id.* at 343 (a "principal officer" "does not embrace a subordinate *and* temporary officer like that of vice-consul *as defined* in the statute" (emphases added)).

First, the Court held that the vice consul was "a mere subordinate official." 169 U.S. at 344. The Court looked to the job requirements: "The manifest purpose of Congress in classifying and defining the grades of consular offices, in the statute to which we have referred, was to so limit the period of duty to be performed by the vice-consuls and thereby to deprive them of the character of consuls in the broader and more permanent sense of the word." *Id.* at 343. The vice-consul's principal responsibility was to serve only during the consul-general's absence, and the consul-general could of course reverse any decision of the vice-consul on his return, as could the Secretary of State at any time. Vice consuls were accordingly "subordinate officers who were to represent the principals in case of absence." *Id.* at 336; *see also id.* ("subordinate and temporary officer" who would "exercise such authority" of the principal "when the lawful occasion for the performance of the duty arose").

The vice consul was thus merely a previously designated person who could be "called upon to discharge the duties" of the consul-general in an exigency. 169 U.S. at 340. Indeed, the State Department rejected Eaton's use of the title "acting consul-general," specifying that he was instead the "vice-consul-general" temporarily exercising the authority of the consul-general. *Id.* at 333.

Second, the Supreme Court separately addressed whether even a subordinate becomes *ipso facto* a principal officer merely by exercising the principal's authority. *See* 169 U.S. at 333 (addressing "[t]he claim that Congress was without power to vest in the President the appointment

of a subordinate officer, to be charged with the duty of temporarily performing the functions of the consular office"). The Court held that performance of the principal's responsibilities did not always require confirmation. It reasoned that a subordinate must be able to perform the functions of a principal officer in limited circumstances, because otherwise it would be impossible for the government to perform its statutorily assigned responsibilities:

> Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.

Id.

The temporary and special conditions that limited when the vice consul would perform the consul-general's duties were plain from the governing statute. "The manifest object of the provision was to prevent the continued performance of consular duties from being interrupted by any temporary cause, such as absence, sickness or even during an interregnum caused by death and before an incumbent could be appointed." 169 U.S. at 339; *see also id.* (Congress secured "an unbroken performance of consular duties by creating the necessary machinery to have within reach one qualified to perform them, free from any vicissitude which might befall" the consul-general.). The position was necessary "to guard against [the] contingency" that the "public interest must inevitably suffer in consequence of the closing of the consular office." *Id.* at 342. "This was secured by the designation in advance of a subordinate and temporary official who, in the event of happening of the foregoing conditions, would be present to discharge the duties." *Id.* at 339.

B. The President's Appointment of Matthew Whitaker Violated the Appointments Clause.

The Government's argument that Mr. Whitaker's appointment is constitutional requires this Court to collapse the holding of *Eaton* (and *Edmond* as well) into a single question: Is the

appointment "temporary"? By that, the Government means: Will the officer be replaced some day? But that of course makes the Appointments Clause effectively a dead letter, because it permits the President to make *any* appointment without Senate confirmation in any circumstances, including when the President creates the vacancy. The President need only intone that the appointment is "temporary," in the sense that the official will eventually be replaced—even many months later. Indeed, that official could be replaced by *another* "temporary" official. That is not hyperbole. The Opinion of the Office of Legal Counsel approving Mr. Whitaker's appointment asserts that the *only* requirement of the Appointments Clause is that the President formally designate the official's service as "temporary." *See* Memorandum for Emmet T. Flood, Counsel to the President, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, *Re: Designating an Acting Attorney General* at 15 (Nov. 14, 2018) (*2018 OLC Opinion*), *attached to* [fill in].

The officials that can serve as Acting Attorney General under the Supreme Court's decisions in *Edmond* and *Eaton* are those specified by Congress under the AG Act: the Deputy Attorney General; and if the Deputy cannot serve, the Associate Attorney General and other designated officials. Even if those officers were not confirmed by the Senate, they would be "subordinates" because Congress designed their job so that they report to the Attorney General. Further, the offices of those officials are classified and defined to perform the duties of the Attorney General only in response to temporary and special conditions—generally the Attorney General's sickness or absence. In every circumstance, their service is necessary for the "unbroken" performance of the Attorney General's responsibilities. Indeed, the Senate confirmed them in the knowledge that they would be called upon if the Attorney General was unavailable.

The officials designated by the AG Act are thus the equivalent of the vice-consul in *Eaton*. But according to the Government, the Supreme Court in that case would equally have upheld an order of the President firing a consul-general and replacing him indefinitely with an *ad hoc*, hand-picked official—for example, the President's personal acquaintance, the consul-general's personal secretary. That is not a reasonable reading of the decision, because it renders all of the Supreme Court's reasoning meaningless.

For the reasons that follow, the Government's argument that the Appointments Clause equally permits the President to appoint Mr. Whitaker lack merit.

1. Mr. Whitaker Is Serving as a Principal Officer, Not a Subordinate.

Under the Appointments Clause, a principal officer is one who has no "superior"—the officer's work is not "directed and supervised at some level by" a principal officer. *Edmond*, 520 U.S. at 651. The inquiry is: How did Congress "classif[y] and define[]" the position? *Eaton*, 169 U.S. at 343. In *Edmond*, the civilian judges of the military court of criminal appeals were not principal officers because their work was overseen by the Judge Advocate General and, in turn, the Secretary of Transportation. *Id.* at 664. In *Eaton*, the vice consul was overseen by the consul-general and (even if the consul-general had died) the Secretary of State. 169 U.S. at 339. Indeed, the Secretary of State took care to ensure that such an official held himself out as the "vice consul-general," not the "acting consul-general." *Id.* at 333.

No part of Matthew Whitaker's position as Acting Attorney General was "classif[ied] and defin[ed]," *Eaton*, 169 U.S. at 343, to ever involve any oversight by any principal officer. He reports directly to the President, and only to the President. There never will be a day in which any principal officer can tell him what to do, or remove him if he refuses.

There is in fact no substantive difference between what Mr. Whitaker does every day in his position and what a permanent Senate-confirmed Attorney General will do. Mr. Whitaker

exercises all of the powers of the Attorney General and bears all of that office's responsibilities. He is never exercising those powers on behalf of some other Senate-confirmed official, in anticipation of that official's return. He is no longer serving as Chief of Staff, but rather has named a replacement.

The fact that Mr. Whitaker will *never* be supervised is a critical distinction. If Mr. Whitaker is not a "principal officer," then *no* non-confirmed person exercising all the powers of a principal officer ever is, if they serve for less than the maximum period under the Vacancies Act. To be sure, even those officials who serve as Acting Attorney General under the AG Act may not be supervised by a principal official during a vacancy. But their *jobs* are defined so as to always remain subject to that supervision. The Senate also confirmed those officers in an expectation that they might perform the Attorney General's functions. Further, they continue to hold their other, subordinate positions. For example, the Deputy Attorney General remains in that position while serving as Acting Attorney General; no other official takes on the Deputy's role.

2. Even If Mr. Whitaker Is an "Inferior Officer," His Performance of the Attorney General's Responsibilities Was Not Necessitated by "Temporary and Special Conditions."

The Government argues that it is sufficient under the Appointments Clause that Mr. Whitaker merely serve "temporarily." But even putting to the side that he is not a subordinate, *see* Part I-A-1, *supra*, the Supreme Court in *Eaton* held that it was *not* sufficient that the appointee's service be "for a limited time." 169 U.S. at 343. It concluded that the Appointments Clause requires the confirmation of an otherwise subordinate officer whose job responsibilities were not limited to "the performance of the duty of the superior for a limited time *and under special and temporary conditions*. *Id.* (emphasis added). In *Eaton* itself, the vice consul served during the consul-general's absence, sickness or death. The Supreme Court recognized that Congress found

it was necessary to designate a vice consul in advance to provide for the "unbroken" operations of the consul. *Id.*

The Government's argument that the appointee's service need only be "temporary" also bears no relationship to the Supreme Court's reasoning in *Eaton*. There, the Court refused to read the Constitution in a way that would make it impossible to ever delegate the responsibilities of a principal officer. Approving every nominally "temporary" appointment goes vastly further and makes the Appointments Clause essentially meaningless.

The Government notably does not even argue that Mr. Whitaker's position is a response to any special condition. He never was designated to serve—by either Congress or the President—when the Attorney General was sick or absent. Rather, the President affirmatively forced out the Attorney General. He did so after significant planning. Further, given the availability of the officials designated by Congress in the AG Act, it was not necessary to appoint anyone else to ensure the Department's unbroken operations. To the contrary, the President "broke" the predetermined line of succession.

Indeed, the President claims the authority to name as Acting Attorney General any GS-15 or above in the Department of Justice (more than 6,000 lawyers) or any Senate-confirmed official from *any* department (of which there are more than 1,200). Mr. Whitaker was the Attorney General's chief of staff. Traditionally, that position involves no substantive portfolio or direct line of authority over the Department's more than 110,000 employees.[2]

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[2] It is also relevant—but not decisive—that the vice consul in *Eaton* and the Senate-confirmed officials identified by the AG Act are designated in advance. Mr. Whitaker was not. That characteristic makes it much less likely that the President can evade the Appointments Clause by appointing an *ad hoc* official to serve his own particular needs in the moment, rather than the interests of the Department as a whole.