No. 12-461

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF OPTOMETRISTS & OPTICIANS; LENSCRAFTERS, INC.; EYE CARE CENTERS OF AMERICA, INC.

Petitioner

v.

KAMALA D. HARRIS, in her official capacity as Attorney General of the State of California; CHARLENE ZETTEI, Director, Department Of Consumer Affairs

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL RETAIL FEDERATION AND CALIFORNIA RETAILERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

MALLORY B. DUNCAN
National Retail Federation
325 7th Street, N.W.
Suite 1100
Washington, D.C. 20004
(202) 783-7971

GENE C. SCHAERR
COUNSEL OF RECORD
GEOFFREY P. EATON
CHRISTINE M. WARING
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000
gschaerr@winston.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Did the court of appeals err in holding, contrary to the consistent rulings of this Court and other Circuits, that a state regime that reserves a valuable business opportunity to in-state businesses, and excludes out-of-state businesses that compete for the same customers in the same market, can escape meaningful scrutiny simply because the direct competitors employ different business models or are otherwise deemed by the state to be differently situated?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

The National Retail Federation ("NRF") and its members share a strong commitment to a robust national market for commerce, in which retailers of all sizes and structures may compete on a level playing field. As part of that commitment, NRF works to ensure that government regulation of commercial activity is fair, sensible, and economically justified. But unfortunately, the decision below, and others like it, threaten both those goals: In concluding that "states may legitimately distinguish between business structures in a retail market" in ways that systematically favor local businesses over regional or national ones, the Ninth Circuit—together with the Second and Fifth Circuits, which have reached a similar conclusion—has opened the door to the Balkanization of national markets, to the detriment of not only national retailers but the entire retail industry—and ultimately of all American consumers, who will be forced to endure higher prices for necessary goods and services.

That is not to say that NRF is opposed to all state and local commercial regulation. NRF seeks only to ensure that, where such regulation artificially constrains free competition among in- and out-of-state businesses, the constraint is amply supported by genuine considerations of public health and safety suffi-

---

[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici* and its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. *See* Rule 37.6.

cient to justify the resulting burden on interstate commerce. As a general matter, differential treatment based on "business structure" alone is not so justified, and should be invalidated under the dormant aspect of the Commerce Clause.

As the world's largest retail trade association and the voice of retail businesses worldwide, NRF has a substantial interest in the Court's resolution of the issue presented here. NRF's global membership includes retailers of all sizes, formats and distribution channels as well as chain restaurants and industry partners from the United States and more than 45 countries abroad. In the United States, NRF represents an industry that includes more than 3.6 million establishments and which directly and indirectly accounts for forty-two million jobs—one in four American jobs. The total gross domestic product impact of retail sales in the United States is $2.5 trillion annually, and retail sales are a daily barometer of the health of the nation's economy.

The California Retail Association ("CRA") has a similarly strong interest in this case. The CRA is a non-profit trade association, organized in 1933, that represents major retailers doing business throughout the state of California. The CRA is the only statewide trade association representing all segments of the retail industry including general merchandise, department stores, mass merchandisers, fast food restaurants, convenience stores, supermarkets and grocery stores, chain drug, and specialty retail such as auto, vision, jewelry, hardware and home stores. The CRA works on behalf of California's retail industry, which currently operates over 164,200 stores with sales in excess of $571 billion annually

and employs 2,776,000 people — nearly one fifth of California's total employment.

The CRA's members include national retailers as well as members whose only business locations are situated in the state of California. The CRA believes that consumers are best served by a competitive playing field that does not discriminate between large retailers and small, or between national and local merchants.

STATEMENT

The petition asks this Court to consider the constitutionality of a California statute and two supporting regulations that prohibit opticians and optical companies from having "any membership, proprietary interest, co-ownership, landlord-tenant relationship, or any profit-sharing arrangement" with optometrists. The effect of this regulatory regime is that licensed California optometrists are free to offer eye examinations and sell eyewear at the same location, while national optical companies with California retail locations are *not* free to make optometry services available at those same retail locations. As a result, the commercial benefits of "one-stop shopping" are effectively available to local optometrists but not to national optical chains.

The only purported justification for this discriminatory scheme is California's expressed concern that permitting optical companies to co-locate with licensed optometrists might result in undue pressure on the optometrist from the optical company with which she or he is associated. But the evidence indicates that licensed optometrists who also sell eyewear are if anything more vulnerable to financial pressures

than they would be if co-located with an optical company.

The district court struck down the challenged regulatory regime on the ground that it had the purpose and effect of discriminating against interstate commerce. Finding as fact that optical companies and licensed optometrists who sell eyewear compete in the same business, for the same customers, in the same way, the district court concluded that California's regime improperly discriminates against interstate commerce by providing a competitive advantage—the ability to offer one-stop shopping—to local optometrists at the expense of the national optical chains with which those local optometrists compete, and that the state could not justify that discrimination.

The Ninth Circuit reversed, concluding that licensed California optometrists and optical companies are not "similarly situated," such that differential treatment of them cannot constitute discrimination. In reaching that conclusion, the Ninth Circuit joined two other Circuits in relying on this Court's decision in *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), for the proposition that a state may permissibly discriminate against out-of-state commerce on the basis of "business structure," even where the affected firms are in direct competition for the same customers in the same market.

REASONS FOR GRANTING THE WRIT

As we demonstrate in Part I, the Ninth Circuit's decision paves the way for the Balkanization of national retail markets of all kinds, thereby seriously undermining this vital sector of our Nation's econo-

my. That result would of course have to be tolerated if the decision were consistent with Commerce Clause and this Court's decisions construing that important provision of our national charter. But as we demonstrate in Part II, the Ninth Circuit's decision is not only in conflict with decisions in other circuits, it rests on a flat misunderstanding of this Court's decision in *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978).

I. The Ninth Circuit's Conclusion That States May Discriminate Against Out-Of-State Retailers On The Basis of "Business Structure" Threatens To Balkanize The National Retail Marketplace, To The Detriment Of A Vital Economic Sector.

Retail business is the vital artery of the national economy—the principal connection between producers of goods and services and the consumers whose daily purchasing decisions constitute the world's largest and most dynamic economic marketplace. An effectively functioning retail sector is the mechanism that links industrial supply to consumer demand, enabling markets to operate efficiently and—in turn—ensuring the optimal allocation of resources.

Unfortunately, as we now show, national retailers are not only a critical part of the retail economy, but they are also inherently vulnerable to state-level protectionism. And the Ninth Circuit's decision not only sanctions one egregious example of such protectionism, it also paves the way to widespread, blatant discrimination against national retailers generally.

A. National Retailers Are A Critical Part Of The Retail Economy, And Are Inherently Vulnerable To State-Level Protectionism.

Given the key role of retail businesses in a healthy market, it should come as no surprise that retail business is a large and growing part of the national economy. As of 2011, the retail sector accounted directly or indirectly for 42 million American jobs—or one in four of all the jobs in the United States.[1] Retail business also contributes nearly 18% of the entire U.S. gross national product--$2.5 *trillion* every year.[2]

That $2.5 trillion annual contribution to the U.S. economy is generated by retail operations of all shapes and sizes, from local dollar stores to regional supermarket chains to national superstores like Wal-Mart. And within those broad categories, retailers operate in myriad ways to serve their customers, selling their goods and services through sole proprietorships, subsidiaries, franchisees, licensees, and co-ops. They use every imaginable sales channel, including bricks-and-mortar stores, catalogs, telephony, and the internet.

In a properly functioning market, all those business structures and distribution channels should be given equal opportunity to succeed or fail based on their value to consumers. Laws, regulations, and tax structures that artificially favor one structure or channel over another act to skew the marketplace,

---

1 PricewaterhouseCoopers, The Economic Impact of the U.S. Retail Industry at 9, Table 5 (2011)

2 Ibid.

diverting resources from their highest and best use and ultimately raise prices to consumers, reducing the strength and vitality of the economy.

National retail chains represent a substantial portion of the retail economy, one uniquely well-suited to serve the national market. In 2011, the top ten national retailers had more than $843 billion in sales, a number equivalent to the gross national product of the Netherlands[3] Those same ten retailers operated 31,000 stores in the United States.[4] The largest U.S. retailer, Wal-Mart, alone employs 1.4 million Americans.[5]

National companies are only one part of the highly diverse retail landscape, but as the numbers show, it is vital to the national economy. With their broad geographic reach and sophisticated supply-chain management capabilities, national retailers are uniquely adapted to serving the needs of 300 million American consumers who make up the vast national marketplace.

But the same characteristics that give such companies the ability effectively to serve national markets make them uniquely vulnerable to efforts by

---

[3] Compare STORES Media, "2012 Top 100 Retailers" (available at http://www.stores.org/2012/Top-100-Retailers) (last visited November 5, 2012) with Central Intelligence Agency, The World Factbook 2011 (available at https://www.cia.gov/library/publications/the-world-factbook/geos/nl.html) (last visited November 6, 2012).

[4] Ibid.

[5] Wal-Mart Stores, Inc., Annual Report (Form 10-K) at 11 (Mar. 27, 2012).

state and local competitors to erect barriers that impair or eliminate that ability. By definition, national retailers' businesses are diffused across multiple jurisdictions—in the case of the largest companies, across all fifty states. That geographic diffusion means that such companies are subject to regulation in many jurisdictions where their own presence is relatively small, and is opposed by entrenched local interests with greater political, cultural, and social influence. Such opposition can be very effective in creating regulatory programs that are designed to, and do in fact, discriminate in favor of local competitors.

The Founding Fathers were keenly aware of the dangers posed by state protectionism. As Alexander Hamilton's wrote in Federalist 22: "The interfering and unneighborly regulations of some States . . . if not restrained by a national control, would be multiplied and extended, till they become . . . injurious impediments to the intercourse between the different parts of the Confederacy."[6] The law challenged here presents just such an "injurious impediment" to national commerce.

B. The Ninth Circuit's Interpretation Of *Exxon* To Permit Discrimination On The Basis Of "Business Structure" Opens The Door To Widespread Regulation Disfavoring National Retailers.

Such provincial discrimination, of course, is precisely what the Commerce Clause exists to prevent. As this Court has explained, the "fundamental objec-

---

[6] The Federalist No. 22 (Alexander Hamilton)

tive" of the dormant aspect of that Clause is "preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Gen. Motors Corp.* v. *Tracy*, 519 U.S. 278, 299 (1997). Any application of the Commerce Clause that facilitates the creation of such "preferential advantages" is a perversion of 200 years of reasoned principle and precedent.

But that is exactly what the Ninth Circuit's decision (and similar decisions by the Second and Fifth Circuits) threatens to do. By interpreting this Court's decision in *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978) to allow "states [to] legitimately distinguish between business structures in a retail market," and then rely on such distinctions to justify discriminatory treatment of out-of-state commerce, the Ninth Circuit has opened a substantial loophole in the law's commitment to national markets. *Nat'l Ass'n of Optometrists & Opticians* v. *Brown*, 567 F.3d 521, 527 (9th Cir. 2009). Left to stand, the decision below is an invitation to the States to enact protectionist legislation–or even administrative regulation—designed to favor local retailers over national retailers, and to rely on the differences in "business structure" between such firms to justify the discrimination.

For example, once a State is free to determine that a national automobile manufacturer and a local automobile dealer, both seeking to sell similar automobiles to customers in that State, are not "similarly situated" for purposes of the dormant Commerce Clause inquiry, that State is free to enact legislation that systematically discriminates against national firms and the interstate commerce on which their

business is based. And this is not a merely hypothetical example: this scenario has already been presented to the Fifth Circuit, which—like the Ninth Circuit here—relied on *Exxon* to uphold the discriminatory regulation. See *Ford Motor Co.* v. *Texas Dept. of Transp.*, 264 F.3d 493 (5th Cir. 2001).

II. This Court's Dormant Commerce Clause Decisions Do Not Countenance The Kind Of "Business Structure"-Based Discrimination Permitted By The Ninth, Second, And Fifth Circuits.

Indeed, a total of three Courts of Appeals—the Second, Fifth, and Ninth—have now relied on this Court's decision in *Exxon* to uphold regulations that discriminate against out-of-state commerce on the basis of "business structure." But the decisions of those Courts of Appeals all grossly misread the *Exxon* decision, conflating two distinct elements of the Court's dormant Commerce Clause analysis to produce a result utterly at odds with both *Exxon* itself and this Court's long-established Commerce Clause doctrine.

A. This Court's Decision In *Exxon* Does Not Support Differential Treatment Based On "Business Structure."

In *Exxon*, the Court reviewed a Maryland statute that prohibited producers or refiners of petroleum products from operating retail service stations in the state. The statute's origins began with the petroleum shortage of 1973. During the shortage, there were complaints that allocation of gasoline was not equitable among the Maryland stations. In response to these complaints, the Governor of Maryland ordered

a market study, which found that stations operated by producers or refiners of petroleum received preferential treatment during the shortage. The purpose of the statute was "to correct the inequities" in gasoline distribution by preventing producers and refiners from having a direct stake in the retail market of gasoline. The refiners and producers who operated retail markets in Maryland filed suit claiming (among other things) that the statute violated the Commerce Clause.

The Court considered the Commerce Clause challenge under its established two-step analysis, in which it first determines whether the state law discriminates against out-of-state entities. *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-51 (1977). Second, the Court determines whether the law places an undue burden on interstate commerce. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Applying that analysis in *Exxon*, the Court held that the Maryland statute did not violate the Commerce Clause because there was neither discrimination nor a burden on interstate commerce.

The Court first found that the statute did not discriminate against interstate commerce, for two reasons: *first*, because the law applied equally to in-state and out-of-state entities, and *second*, because all the affected gasoline suppliers were interstate, as Maryland did not produce any of its own gasoline. *Exxon*, 437 U.S. at 125. The Court found that a state discriminates against interstate commerce when it prevents interstate dealers from competing directly with local dealers or it distinguishes between in-state and out-of-state companies in the retail market. *Id.* at

126. Here there was no prevention of competition between in- and out-of-state dealers because all dealers were on a level footing with each other—no one was allowed to vertically integrate. Nor was a distinction made between in- and out-of-state companies, because there were no in-state refiners or producers of petroleum in Maryland.

As a contrasting example, the Court cited *Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333 (1977). The Court explained that *Hunt* demonstrated that when in-state dealers are given a competitive advantage against out-of-state dealers of the same product, there is discrimination. *Ibid.* In *Exxon*, however, there were no in-state producers or refiners operating retail stores that would receive a competitive advantage by the removal of out-of-state retailers. *Ibid.*

Finding no discrimination, the Court went on to consider whether the Maryland statute imposed an impermissible burden on interstate commerce. *Exxon*, 437 U.S. at 127. In concluding that there was no such burden, the Court emphasized that the burden analysis properly focuses not on whether there is a burden on the particular "structure or method of operation in a retail market," but on whether there is a burden on interstate commerce itself. *Ibid.*

Viewed against this background, as we now show, it is apparent that the decision below—like similar decisions in the Second and Fifth Circuits—seriously misreads *Exxon*.

1. The Ninth Circuit's analysis improperly conflates the *Exxon* Court's "burden" analysis with its "discrimination" analysis.

As the foregoing summary demonstrates, and contrary to the Ninth Circuit's apparent premise, the *Exxon* Court did not even reach the "similarly situated" issue. Having concluded that the challenged statute was nondiscriminatory, the Court had no occasion to determine whether the affected in-state and out-of-state companies were "similarly situated"—and certainly offered no suggestion that competitor firms with different "business structures" were not similarly situated for Commerce Clause purposes. That proposition—for which the Ninth Circuit below relies to justify "business structure"-based discrimination—was neither presented to, nor considered by, the *Exxon* Court.

The only discussion of "business structure" in *Exxon* occurs in the Court's burden analysis, which has no relation to the "similarly situated" question. The appellants in *Exxon* had argued that even if it was not discriminatory, the Maryland statute "impermissibly burdens interstate commerce," because it would result in "at least three refiners [ ] stop[ping] selling in Maryland," would "deprive the consumer of certain special services," and would "change the market structure by weakening [ ] independent refiners." *Id.* at 127. It was in response to this argument that the Court observed that it could not accept "appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operations in a retail market." *Ibid.* Viewed in context, the Court's observation is little more than a logical consequence

of the unremarkable proposition that (as the Court noted in the next sentence) "the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127-28.

The Ninth Circuit's conflation of the *Exxon* Court's burden analysis with its discrimination analysis makes little sense. Merely undertaking the burden analysis presupposes that the challenged statute is nondiscriminatory; and where a statute does not discriminate against out-of-state firms, there is no need to consider whether those firms are "similarly situated" to in-state firms. The Ninth Circuit's entire approach to the "business structure" issue is thus a legal non sequitur.

2. The Second and Fifth Circuits similarly conflate the "discrimination" and "burden" inquiries in relying on *Exxon* to justify "business structure"-based discrimination.

Troublingly, it is not only the Ninth Circuit that has conflated this analysis. Two other circuits and a district court have mistakenly applied the "business structure" language to the discrimination analysis, allowing states to discriminate based on whether a business operates as a national retail chain.

Specifically, in *Brown & Williamson Tobacco Corp.* v. *Pataki*, 320 F.3d 200 (2d Cir. 2003), the court considered a dormant Commerce Clause challenge to a New York law that prohibited the shipment of cigarettes directly to New York customers by common carrier, but allowed in-state bricks-and-mortar stores to delivery up to four cartons using their own delivery

service. *Brown & Williamson Tobacco,* 320 F.3d at 205. The district court had found the statute unconstitutional, concluding that it effectively eliminated out-of-state direct sales retailers from the market and thus discriminated against interstate commerce. *Ibid.* The Second Circuit reversed. Without acknowledging that *Exxon* did not address whether discrimination could be justified by differences in "business structure," the Second Circuit relied on *Exxon's* burden analysis to do precisely that, holding the New York statute's discrimination against out-of-state firms was justified because those firms, unlike the favored local firms, lacked bricks-and-mortar locations within the state and so were not "similarly situated." *Id.* at 213.

The Fifth Circuit also incorrectly relied on *Exxon* to uphold a Texas statute that prohibited car manufacturers from selling their used cars online to citizens in the state, but allowed non-manufacturer local dealers to do so. *Ford Motor Co.,* 264 F.3d at 500. The Fifth Circuit mistakenly called Exxon a "principal case" in determining what can be categorized as "similarly situated." *Ibid.* at 500. Additionally, the Fifth Circuit stated that discrimination based on business structure is *acceptable,* finding that the Texas statute could be upheld because it discriminated "on the basis of Ford's status as an automobile manufacturer." *Id.* at 502.

Finally, the Eastern District of California has used *Exxon* (as well as the decision challenged here) to discriminate based on business structure as well. In *Wal-Mart Stores, Inc.* v. *City of Turlock,* 483 F.Supp.2d 987 (E.D. Cal. 2006), the district court found that a city was able to discriminate against

out-of-state discount superstores simply because the business structure of such stores differed from that of its local competitors. *Id.* at 1012. In support of its conclusion, the district court cited *Exxon's* burden analysis.

In short, this Court's *Exxon* decision lies at the heart of all the federal decisions relying on "business structure" as a justification for state laws and regulations that discriminate against national retail businesses.[7]

B. This Court's Dormant Commerce Clause Decisions Demonstrate That "Business Structure" Is Not Among The Permissible Grounds For Discrimination Against Out-Of-State Commerce.

As we have already demonstrated, and contrary to the conclusions of the Ninth, Second, and Fifth Circuits, *Exxon* cannot plausibly be read to support discrimination against national retail chains based on "business structure." Further investigation of this Court's dormant Commerce Clause decisions confirms that the conclusion reached by the Second, Fifth, and Ninth Circuits has no basis in – and indeed is contrary to—this Court's other decisions.

---

[7] For examples of cases which have correctly applied *Exxon's* analysis, see, e.g., *Cachia* v. *Islamorada*, 542 F.3d 839 (11th Cir. 2008); *Island Silver & Spice, Inc.* v. *Islamorada*, 542 F.3d 844 (11th Cir. 2008); *Family Winemakers of Cal.* v. *Jenkins*, 592 F.3d 1 (1st Cir. 2010); *Walgreen Co.* v. *Rullan*, 405 F.3d 50 (1st Cir. 2005); *Gov't Suppliers Consolidating Servs., Inc.* v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992); *Globe Glass & Mirror Co.* v. *Brown*, 917 F. Supp. 447 (E.D. La. 1996); *Div. of Alcoholic Beverages & Tobacco* v. *McKesson Corp*, 524 So. 2d. 1000 (Fla. 1988).

As this Court has explained in *Tracy*, "any notion of discrimination assumes a comparison of substantially similar entities." *Tracy*, 519 U.S. at 298. Crucially, the question of "substantial similarity" does not arise in a vacuum: The key consideration is not whether two entities are similarly situated in some abstract way, but whether they are "similarly situated *for constitutional purposes*." *Id.* at 299. (emphasis added). And the relevant "constitutional purpose" of the Commerce Clause—indeed, its "fundamental objective"—is "preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Ibid.*

The key question in determining "similar situation," then, is whether the favored in-state firms and the disfavored out-of-state firms are competing in the same commercial market. It is for this reason that (for example) a waste flow control ordinance that gives preferential treatment to a private, commercial waste disposal facility at the expense of its out-of-state competitors is "discriminatory" for purposes of the dormant Commerce Clause, while a similar ordinance that favors a *public* waste disposal facility acting in the interest of public health and safety is not. Compare *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 389-90 (1994) (striking down local ordinance), *with United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007) (upholding local ordinance). See also, e.g., *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Res.*, 504 U.S. 353, 361 (1992) (striking down statute because it protected "local waste producers . . . from competition from out-of-state waste producers"); *Dean Milk Co.* v. *Madison*,

340 U.S. 349, 354 (1951) (striking down statute as discriminatory because it "protect[ed] a major local industry against competition from without the State").

In light of the constitutional purpose of the dormant Commerce Clause inquiry, an analysis that permits discrimination on the basis of "business structure"—a factor irrelevant to the core question of market competition—stands that inquiry on its head. It permits precisely the kind of protectionist legislation that the dormant Commerce Clause doctrine has for centuries prohibited.

The Court should grant the petition for a writ of certiorari to take up this issue and resolve the schism among the Second, Fifth, and Ninth Circuits, on the one hand, and the First, Seventh, and Eleventh Circuits on the other. Given the Commerce Clause's unquestioned commitment to the creation of a single, national market, it would be ironic to allow different Courts of Appeals to interpret that provision in a way that produces such strikingly variable results.

CONCLUSION

The Court should grant review of the decision below on its merits, and reverse.

Respectfully submitted.

MALLORY B. DUNCAN
National Retail Federation
325 7th Street, N.W.
Suite 1100
Washington, D.C. 20004
(202) 783-7971

GENE C. SCHAERR
COUNSEL OF RECORD
GEOFFREY P. EATON
CHRISTINE M. WARING
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000
gschaerr@winston.com

NOVEMBER 2012