

THE ATTORNEYS GENERAL OF
MASSACHUSETTS, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, IOWA,
MAINE, MARYLAND, MINNESOTA, NEW JERSEY, NEW YORK, NORTH CAROLINA,
OREGON, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON,
AND THE DISTRICT OF COLUMBIA

July 12, 2019

The Honorable Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2107 Rayburn House Office Building
Washington, DC 20515

The Honorable Greg Walden
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
2185 Rayburn House Office Building
Washington, DC 20515

The Honorable Paul Tonko
Chairman
Subcommittee on Environment
and Climate Change
U.S. House of Representatives
2369 Rayburn House Office Building
Washington, DC 20515

The Honorable John Shimkus
Ranking Member
Subcommittee on Environment
and Climate Change
U.S. House of Representatives
2217 Rayburn House Office Building
Washington, DC 20515

Re: *H.R. 1603, the Alan Reinstein Ban Asbestos Now Act of 2019*

Dear Committee Chairman Pallone and Ranking Member Walden and
Subcommittee Chairman Tonko and Ranking Member Shimkus:

We, the undersigned Attorneys General, write in support of the “Alan Reinstein Ban Asbestos Now Act of 2019,” H.R. 1603 (the “Reinstein Bill”), introduced March 7, 2019, and referred to the Subcommittee on Environment and Climate Change on March 8, 2019, amending the Toxic Substances Control Act (“TSCA”).¹ The Reinstein Bill would prohibit the manufacture, processing, and distribution of asbestos in the U.S., effectively reinstating the ban the U.S. Environmental Protection Agency (“EPA”) adopted thirty years ago.² That ban was vacated by the Fifth Circuit Court of Appeals in 1991³—a decision widely recognized as a primary driver of Congress’s toxics reform efforts culminating in the amendments to TSCA enacted in the Frank R. Lautenberg Chemical Safety for the 21st Century Act of 2016.⁴

Our states and the District are committed to safeguarding our residents from the risks posed by asbestos, a chemical for which there is no safe level of exposure. Asbestos is a known

¹ 15 U.S.C. § 2601, et seq.

² See *Final Rule: Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions*, 54 Fed. Reg. 29,460, 29,467 (Jul. 12, 1989).

³ See *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

⁴ Pub. L. No. 114—182, 130 Stat. 448 (Jun. 22, 2016).

carcinogen and it is ubiquitous in our built environment.⁵ The potential for harm posed by asbestos is universally recognized, and addressing its risks was a priority in reforming TSCA:

Asbestos, for example, is one of the most harmful chemicals known to humankind, and it takes 15,000 lives a year. It is linked to a deadly form of lung cancer called mesothelioma. People can breathe in these fibers deep into their lungs where they cause serious damage. . . . [W]e have made asbestos a priority in this bill.⁶

Asbestos fibers released into the air and inhaled can and do cause life-threatening illnesses, including asbestosis (a serious, progressive, long-term disease of the lungs for which there is no known effective treatment), lung cancer, and mesothelioma (a rare form of cancer found in the thin membranes of the lung, chest, abdomen, and heart, that may present only many years after exposure and has no known cure). As discussed below, we strongly support the Reinstein Bill and its prohibition against the manufacture, importation, processing, and distribution in commerce of asbestos in any of its many forms (including in any mixture or article that contains asbestos)—a ban already in place in more than 60 countries around the world. We also support the bill’s requirement that EPA report to Congress on the presence of, and exposure risks to human health associated with, legacy asbestos in buildings and make recommendations to address those risks. We believe that a ban at the federal level is the appropriate governmental response to the dire risks that asbestos poses to human health, and we support Congress’ efforts to accomplish this, particularly in light of EPA’s failure to take appropriate actions to address asbestos risks since TSCA was amended in 2016.

Congressional Action Is Warranted Given EPA’s Actions Since The Revision of TSCA

The protections afforded by the Reinstein Bill are necessary now because EPA clearly has demonstrated that it is unable and unwilling to use its authority under TSCA to address the unreasonable risks of injury to health and the environment posed by asbestos. The EPA’s refusal to take appropriate action is evidenced by the following examples of EPA’s decision-making.

EPA Has Excluded Exposures to Legacy Asbestos From its Asbestos Risk Evaluation

Many of the undersigned Attorneys General submitted comments for their respective states (“Problem Formulation Comments”)⁷ identifying deficiencies in EPA’s *Problem*

⁵ See *Occupational Safety and Health Administration Safety and Health Topics: Asbestos*, available at <https://www.osha.gov/SLTC/asbestos/>.

⁶ Sen. Barbara Boxer speaking in support of H.R. 2576, the Frank R. Lautenberg Chemical Safety for the 21st Century Act, 114th Congress, Second Session, 162 Cong. Rec. S3511 (Jun. 7, 2016).

⁷ Comments of the Attorneys General of Massachusetts, California, Hawaii, Maine, Maryland, New Jersey, New York, Oregon, Vermont, Washington, and the District of Columbia, submitted electronically to Charlotte Bertrand, Acting Principal Deputy Assistant Administrator, EPA Office of Chemical Safety and Pollution Prevention, in EPA-HQ-OPPT-2016-0736 (Asbestos), *Re: Notice of Availability on Problem Formulations for the Risk Evaluations to be Conducted Under the Toxic Substances Control Act for Asbestos, 1-Bromopropane, 1,4 Dioxane, Carbon*

Formulation of the Risk Evaluation for Asbestos (“Asbestos Problem Formulation”).⁸ Among other infirmities, the Asbestos Problem Formulation presents a woefully incomplete and inadequate array of conditions of use for asbestos risk evaluation. This approach contradicts TSCA’s plain language and Congress’ intent that EPA’s risk evaluations assess each chemical in its entirety, based on all identifiable conditions of use, including ongoing and legacy uses such as the ubiquitous continued use of asbestos.

The vast majority of asbestos in the U.S. exists as legacy material—asbestos currently in place in buildings and on pipes and equipment, vehicles, underground, and elsewhere. The amount of new asbestos introduced into the U.S., according to EPA’s Asbestos Problem Formulation,⁹ pales in comparison to the amount of such legacy asbestos. While approximately 300 metric tons, or 661,387 pounds, of asbestos was imported into the U.S. in 2017,¹⁰ approximately 11,598 metric tons, or 25,568,292 pounds, of asbestos containing materials was disposed as solid waste or otherwise released in the U.S. in 2015.¹¹ Legacy use materials continue to present extremely significant exposure risks, both in the asbestos abatement process and as a result of environmental releases from the disturbance of legacy materials that are not subject to the abatement process. For example, the cutting and beveling of asbestos cement pipe leads to extremely high airborne concentrations of asbestos fibers, which puts workers at risk.¹² Asbestos in buildings subject to natural disaster—i.e., earthquake, hurricane, fire—also becomes friable putting those nearby, including first responders, at risk.¹³

Thus, any reasonable construction of “conditions of use” as contemplated by TSCA includes legacy uses and disposal of asbestos. Certain populations may be chronically exposed to asbestos through legacy uses and associated disposal. Without considering all such exposure pathways, EPA is poised to underestimate the cumulative risk associated with the ongoing

Tetrachloride, Cyclic Aliphatic Bromide Cluster, also known as HBCD, Methylene Chloride, N-Methylpyrrolidone (NMP), Pigment Violet 29, Tetrachloroethylene, also known as Perchloroethylene, and Trichloroethylene (TCE) and General Guiding Principles to Apply Systematic Review in TSCA Risk Evaluations (83 Fed. Reg. 26,998 (Jun. 11, 2018)), Aug. 3, 2018, available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2016-0736-0146>. By electronic filing in the EPA docket HQ-OPPT-2016-0736 (Asbestos), the Attorney General of Rhode Island joined the comments (Aug. 15, 2018).

⁸ *Problem Formulation of the Risk Evaluation for Asbestos*, May 2018, available at:

https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf.

⁹ *Id.* at pp. 21–22.

¹⁰ *Id.* at p. 22.

¹¹ *Id.* at p. 28.

¹² Kumagi S. et al. 1993. “Estimation of Asbestos Exposure Among Workers Repairing Asbestos Cement Pipes Used for Conduits.” *Japan Journal of Industrial Health*, 178-87; Noble W.M. et al. 1977. *Asbestos Exposures During the Cutting and Machining of Asbestos Cement Pipe*. Report prepared for the A/C Pipe Producers Association. Berkeley, CA: Equitable Environmental Health, Inc.

¹³ EPA Guidance for Catastrophic Emergency Situations Involving Asbestos (2009) available at:

<https://www.epa.gov/sites/production/files/documents/guidance-catastrophic-emergency-asbestos-200912.pdf> (last accessed June 18, 2019); EPA “Dealing with Debris and Damaged Buildings” available at:

<https://www.epa.gov/natural-disasters/dealing-debris-and-damaged-buildings#f> (last accessed June 18, 2019).

manufacturing, processing, and distribution of asbestos in the U.S. Nonetheless, EPA has excluded legacy uses and disposal of asbestos from its risk evaluation under Section 6.

EPA's failure to consider legacy uses of asbestos in its risk evaluation process, and the agency's failure to otherwise identify properly the conditions of use for asbestos, mean EPA will not consider the risks from, among others, aging asbestos-containing tiles, adhesives, and piping in millions of homes, commercial buildings, and in underground infrastructure nationwide.¹⁴ Because EPA has decided to ignore the health risks from exposure to legacy uses, the states support the Reinstein Bill's efforts to compel agency action to study and effectively address these risks.

EPA Has Decided to Rely on Incomplete Information For Its Asbestos Risk Evaluation

Robust reporting on the importation and use of asbestos in the U.S. is necessary both for EPA to satisfy its obligations under TSCA to ensure that asbestos does not present an unreasonable risk of injury to health or the environment and for states and the public to have access to information necessary for them to evaluate such risks.¹⁵ As the states noted in the Problem Formulation Comments, and which many of them reiterated in a TSCA Section 21(a)¹⁶ petition submitted to EPA under TSCA Section 8(a)¹⁷ (the "AGs' Asbestos Reporting Petition"),¹⁸ EPA has arbitrarily failed to pursue all reasonably available information about asbestos for its risk evaluations.

The AGs' Asbestos Reporting Petition asks EPA to initiate a rulemaking under TSCA Section 8(a)¹⁹ to issue a new asbestos reporting rule to address those infirmities in asbestos

¹⁴ Legacy uses of asbestos excluded from the scope of the risk evaluation include: asbestos arc chutes; asbestos packings; asbestos pipeline wrap; asbestos protective clothing; asbestos separators in fuel cells and batteries; asbestos-cement flat sheet; asbestos-cement pipe and fittings; asbestos-cement shingles; asbestos-reinforced plastics; automatic transmission friction components; beater-add gaskets; clutch facings; corrugated asbestos-cement sheet; extruded sealant tape; filler for acetylene cylinders; high-grade electrical paper; millboard; missile liner; roofing felt; and vinyl-asbestos floor tile. See Scope of the Risk Evaluation for Asbestos, Jun. 2017, pp. 24-25, available at: https://www.epa.gov/sites/production/files/2017-06/documents/asbestos_scope_06-22-17.pdf.

¹⁵ 15 U.S.C. § 2605(a).

¹⁶ *Id.* § 2620(a).

¹⁷ *Id.* § 2607(a).

¹⁸ *Petition of the Commonwealths of Massachusetts and Pennsylvania, the States of California, Connecticut, Hawaii, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia under Section 21(a) of TSCA, 15 U.S.C. § 2620(a), for EPA to Issue an Asbestos Reporting Rule to Require Reporting under TSCA Section 8(a), 15 U.S.C. § 2607(a), of Information Necessary for EPA to Administer TSCA as to the Manufacture (including Importation), Processing, Distribution in Commerce, Use, and Disposal of Asbestos*, Jan. 31, 2019, available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2019-0038-0003>. EPA denied the petition and published in the Federal Register its reasons for the denial (84 Fed. Reg. 20062 (May 8, 2019)), available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2019-0038-0001>. The appeal of the denial of the petition is pending in the U.S. District Court for the Northern District of California, *State of California, et al. v. United States Environmental Protection Agency, et al.*, 4:19-cv-03807-KAW.

¹⁹ 15 U.S.C. § 2607(a).

reporting under EPA's Chemical Data Reporting rule ("CDR"), 40 C.F.R. Part 711. A new reporting rule is needed to ensure that data as to the importation and use of asbestos and asbestos-containing products in the U.S., and possible avenues for exposures, that are necessary for EPA to administer TSCA are adequately reported to EPA.²⁰

Instead, the CDR exempts imported raw asbestos as a "naturally occurring substance,"²¹ and exempts asbestos as an impurity²² and as a chemical substance imported as part of an article.²³ Moreover, the CDR applies to those who manufacture asbestos, but not those who process asbestos.²⁴ These limitations deprive the agency of crucial information regarding asbestos exposure pathways necessary for the agency to fulfill its statutory mandate to prevent unreasonable risks of injury. The limitations also hamper states' ability to design and implement programs necessary to protect the public's health from this highly toxic chemical.

Thus, in addition to evaluating an insufficiently limited number of conditions of use of asbestos, which excludes the most pervasive exposure pathways to legacy asbestos, EPA is evaluating asbestos risk without information crucial to its ability to conduct a TSCA-compliant risk evaluation. Instead, EPA will rely on information that it acknowledges presents an incomplete picture of the potential exposures.²⁵ As a result of these decisions, the states cannot expect that EPA's regulatory response to asbestos will be remotely sufficient. Consequently, we support Congress taking action to ban asbestos with the Reinstein Bill.

The Asbestos SNUR Opens The Door To New Uses

²⁰ On September 25, 2018, the Asbestos Disease Awareness Organization (ADAO), American Public Health Association, Center for Environmental Health, Environmental Working Group, Environmental Health Strategy Center, and Safer Chemicals Healthy Families, submitted their *Petition Under TSCA Section 21 to Require Reporting on Asbestos Manufacture, Importation and Use under TSCA Section 8(a)* (NGO Petition, available at <https://www.epa.gov/sites/production/files/2018-10/documents/adao-asbestos-cdr-petition-all.pdf>), seeking similar relief, which petition many of the undersigned Attorneys General supported. EPA denied the petition and published in the Federal Register its reasons for the denial (84 Fed. Reg. 3396 (Feb. 12, 2019)), available at <https://www.govinfo.gov/content/pkg/FR-2019-02-12/pdf/2019-01533.pdf>. The appeal of the denial of the NGO petition is pending in the U.S. District Court for the Northern District of California, *Asbestos Disease Awareness Organization, et al. v. Wheeler*, 3:19-cv-00871-EMC.

²¹ See 40 C.F.R. § 711.6(a)(3); see also Letter from Jeffrey T. Morris, Ph.D., Director, EPA Office of Pollution Prevention and Toxics to Rebecca J. Rentz, Esq., Senior Environmental Counsel, Occidental Petroleum Corp. (Jul. 28, 2017), confirming EPA's interpretation of NOCS exemption as applying to the importation of asbestos, attached to the *Petition under TSCA Section 21 to Require Reporting on Asbestos Manufacture, Importation and Use under TSCA Section 8(a)* (Sept. 25, 2018) of the Asbestos Disease Awareness Organization, et al., available at <http://www.asbestosdiseaseawareness.org/wp-content/uploads/2018/09/ADAO-Asbestos-CDR-petition-all.pdf>.

²² See 40 C.F.R. §§ 711.10(c), 711.5, and 720.30(h)(1).

²³ See *id.* §§ 711.10(b) and 710.3.

²⁴ See *id.* § 711.3 (processing not included in definition of "manufacture"); *id.* § 711.8.

²⁵ In the Problem Formulations, among other things, EPA stated that "[i]t is important to note that the import volumes of products containing asbestos is [sic] unknown." (Problem Formulation of the Risk Evaluation for Asbestos, p. 22.)

The states' support for the long-overdue protections afforded by the Reinstein Bill is intensified by EPA's recently published TSCA Section 5²⁶ Significant New Use Rule *Restrictions on Discontinued Uses of Asbestos* (the "Asbestos SNUR").²⁷ Although EPA framed its action as closing the loophole through which discontinued, but not prohibited, uses of asbestos could lawfully return to the market without notice to the agency, the Asbestos SNUR nonetheless provides a mechanism for EPA to allow the future use of asbestos notwithstanding the agency's longstanding conclusion that there is no safe level of exposure to asbestos and that banning asbestos is necessary to prevent unreasonable risk of injury to health or the environment.²⁸

As Chairman Pallone recently stated:

[The Asbestos SNUR] does nothing to restrict ongoing uses of asbestos; instead it provides a pathway to market for uses that had previously been phased out, such as in floor tiles and insulation The EPA should be protecting Americans from this toxic substance, not inviting manufacturers to revive its use in our homes.²⁹

These concerns are echoed by Rebecca L. Reindel, MS, MPH, Senior Safety and Health Specialist for the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), in the AFL-CIO's testimony before this Committee strongly supporting the Reinstein Bill:

Through this SNUR mechanism, EPA would be notified when raw asbestos and asbestos-containing articles manufactured or processed in other countries are imported into the U.S., or when asbestos-containing materials are produced here in the U.S. and that EPA could allow these uses. *The very issuance of this rule is a declaration by the agency that some uses of asbestos are safe, as well as an indication the agency refuses to use its authority to ban this dangerous substance.*³⁰

²⁶ 15 U.S.C. § 2604.

²⁷ 84 Fed. Reg. 17345 (Apr. 25, 2019).

²⁸ See *Final Rule: Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions*, 54 Fed. Reg. 29,460, 29,467 (Jul. 12, 1989).

²⁹ Statement of House Committee on Energy & Commerce Chairman Frank Pallone, Jr., "Pallone on EPA's New Rule Regulating Asbestos," Press Release (April 17, 2019), available at <https://energycommerce.house.gov/newsroom/press-releases/pallone-on-epa-s-new-rule-regulating-asbestos>.

³⁰ Submitted testimony of Rebecca L. Reindel, MS, MPH, Senior Safety and Health Specialist, AFL-CIO, Before the House Committee on Energy and Commerce's Subcommittee on Environment and Climate Change, *Ban Asbestos Now: Taking Action to Save Lives and Livelihoods*, Legislative Hearing on H.R. 1603—Alan Reinstein Ban Asbestos Now Act of 2019, May 8, 2019 (emphasis supplied), available at https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_05.08.19_Reindel.pdf.

Indeed, because EPA has opened the door to future “new” uses of asbestos through the Asbestos SNUR³¹ and failed to engage in a meaningful robust risk evaluation for the deadly substance (both by failing properly to identify the conditions of use for asbestos and by failing to require adequate reporting for asbestos to ensure that the agency has the information it needs to conduct a TSCA-compliant risk evaluation of asbestos), EPA is supporting the perception that there is a future for the commercial use of asbestos in the U.S.³² Such an approach is particularly egregious given the chemical has been banned by more than 60 countries.³³

Despite the patent risks posed by asbestos, and that TSCA was overhauled in 2016 to give EPA regulatory authority to ban it, EPA’s actions on asbestos to date, including its decisions about how to frame the risk evaluation of asbestos; its choosing to base its asbestos risk evaluation on incomplete information; and its issuing the Asbestos SNUR; give the undersigned states no confidence that EPA will use its authority under TSCA and ban this dangerous substance once and for all.

Appropriate Time For Chlor-Alkali Industry To Adapt

The undersigned Attorneys General are mindful both of the demand for chlorine in the U.S. for water system treatment and other beneficial uses and that approximately one-third of U.S. chlor-alkali plants currently use asbestos-containing diaphragms in producing chlorine. As a result of the Reinstein Bill, these plants will instead have to manufacture (or secure from others) and use asbestos-free diaphragms. The undersigned Attorneys General appreciate that the U.S. chlor-alkali industry may require additional reasonable time to transition from the use of asbestos diaphragms in its production processes and, subject to an adequate demonstration of need, recognize that it may be appropriate to include a mechanism in the Reinstein Bill for these manufacturers to fully institute an asbestos ban. That said, we understand that it is economically feasible to meet chlorine demands using asbestos-free production methods. In fact, as of 2013, only one plant in the European Union was still using asbestos diaphragms, with some using asbestos-free diaphragms since 2003.³⁴ In addition to eliminating potential exposures to

³¹ We respectfully disagree with the characterization of the Asbestos SNUR as preventing the return of asbestos to the market, as expressed by Representative John Shimkus during the hearing “Ban Asbestos Now: Taking Action to Save Lives and Livelihoods,” on the Reinstein Bill (May 8, 2019), *archived and available at* <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-ban-asbestos-now-taking-action-to-save-lives-and-livelihoods>. Rather, the Asbestos SNUR merely provides a process through which uses of asbestos that have not been prohibited can return to the market.

³² There are reports that a Russian mining company recently praised the Trump Administration for downplaying the health risks of the cancer-causing mineral. *See, e.g.,* <http://www.newsweek.com/trumps-face-stamped-russian-asbestos-products-tied-putin-donald-our-side-1018327> (last accessed Jul. 11, 2018).

³³ *See* Current Asbestos Bans, International Ban Asbestos Secretariat, revised Oct. 23, 2018, *available at* http://ibasecretariat.org/alpha_ban_list.php.

³⁴ Best Available Techniques (BAT) Reference Document for the Production of Chlor-alkali, 2014, European Commission Integrated Pollution Prevention and Control Bureau, Brinkmann, et al., p. 24, *available at* http://publications.jrc.ec.europa.eu/repository/bitstream/JRC91156/cak_bref_102014.pdf.

asbestos, non-asbestos diaphragms also use less energy and last longer than asbestos diaphragms.³⁵

Conclusion

The undersigned Attorneys General strongly support the “Alan Reinstein Ban Asbestos Now Act of 2019,” H.R. 1603, to prohibit the manufacture, processing and distribution in commerce of asbestos and to require EPA to report to Congress on legacy asbestos in buildings. We would welcome the opportunity to work with your Committee to ensure that the legislation that results from your consideration of the bill adequately addresses the unreasonable risk to health and environment posed by asbestos, both with respect to future uses and the consideration of ongoing exposure risk from past uses.

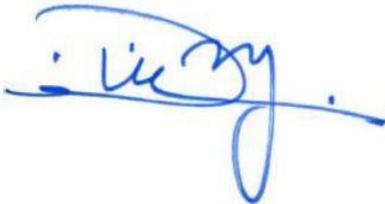
Sincerely,



XAVIER BECERRA
California Attorney General



MAURA HEALEY
Massachusetts Attorney General



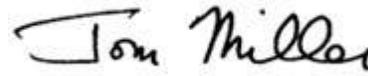
WILLIAM TONG
Connecticut Attorney General



KATHLEEN JENNINGS
Delaware Attorney General

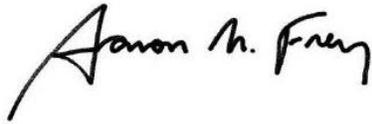


CLARE E. CONNORS
Hawaii Attorney General

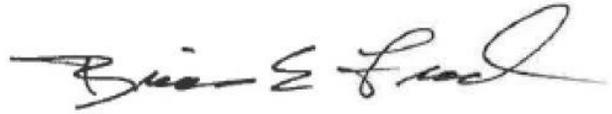


TOM MILLER
Iowa Attorney General

³⁵ *Id.* at pp. 68, 119-121.



AARON M. FREY
Maine Attorney General



BRIAN E. FROSH
Maryland Attorney General



KEITH ELLISON
Minnesota Attorney General



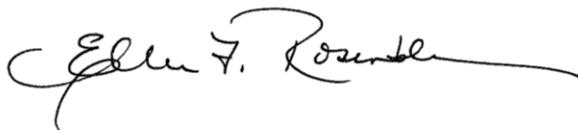
GURBIR S. GREWAL
New Jersey Attorney General



LETITIA JAMES
New York State Attorney General



JOSH STEIN
North Carolina Attorney General



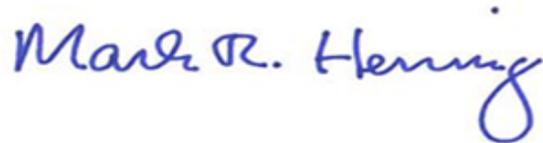
ELLEN F. ROSENBLUM
Oregon Attorney General



PETER F. NERONHA
Rhode Island Attorney General



THOMAS J. DONOVAN, JR.
Vermont Attorney General



MARK R. HERRING
Virginia Attorney General



BOB FERGUSON
Washington State Attorney General



KARL A. RACINE
District of Columbia Attorney General