

[ARGUED APRIL 12, 2016; DECIDED OCTOBER 11, 2016]

No. 15-1177

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

PHH CORPORATION, et al.,
Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

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

**MOTION TO INTERVENE BY ATTORNEYS GENERAL OF THE
STATES OF CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA,
MAINE, MARYLAND, MASSACHUSETTS, MISSISSIPPI, NEW MEXICO,
NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND,
VERMONT AND WASHINGTON, AND THE DISTRICT OF COLUMBIA**

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STATEMENT OF INTEREST OF MOVING PARTY

The Attorneys General of the States of Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont and Washington, and the District of Columbia (the "State Attorneys General" or the "movants") seek to intervene in the present action in which the Respondent Consumer Financial Protection Bureau (CFPB) has petitioned this Court pursuant to Fed. R. App. P. 35(b) for rehearing *en banc* of this Court's ruling holding the structure of the CFPB unconstitutional. The State Attorneys General have a vital interest in this matter. As the representatives of millions of citizens across the country, the State Attorneys General have used their express statutory authority to bring civil actions to enforce consumer financial protection laws and to pursue regulatory actions in coordination with the CFPB to protect consumers against unfair, deceptive, and abusive financial practices. The current ruling, if permitted to stand, will undermine the power of the State Attorneys General to effectively protect consumers against abuse in the consumer finance industry. The movants have not sought the consent of any of the parties.

BACKGROUND

In 2010, following the global financial crisis, Congress created the CFPB as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,

Pub. L. No. 111-203. The CFPB's purpose is to provide a single point of accountability for enforcing federal consumer financial laws and protecting consumers in the financial marketplace. In addition to exercising centralized enforcement power, the CFPB is responsible for interpreting consumer financial legislation and regulating the marketplace for consumer financial products.

In creating the CFPB, Congress recognized that the financial crisis was the result, in large part, of regulatory failures in the existing mortgage lending marketplace and fragmented authority over consumer financial protection laws. *See* David Carpenter, "The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title X, the Consumer Financial Protection Bureau," Congressional Research Service (July 21, 2010), available at <http://www.llsdc.org/assets/DoddFrankdocs/crs-r41338.pdf>. To address this problem, Congress structured the agency with a single Director, appointed by the President to a five-year term, and removable only for cause. *See* 12 U.S.C. § 5491(c)(3). By structuring the CFPB in this manner, Congress intended to make the CFPB a powerful, centralized, independent force for protecting consumers in the financial marketplace.

This case arose out of a finding by the CFPB that petitioner PHH Mortgage had violated the Real Estate Settlement Procedures Act (RESPA). In petitioning this Court for review on June 6, 2015, PHH argued that the CFPB's structure

violated the separation of powers because the Director, by being subject to removal only for cause, was not sufficiently accountable to the President.

This Court heard argument on the petition on April 12, 2016, and issued its decision on October 11, 2016. In its decision, a divided panel of this Court held that the structure of the CFPB was unconstitutional. To remedy the violation, the panel ordered that the statute's provision specifying that the Director may only be terminated for cause be severed from the remainder of the statute. The result was to render the Director effectively an at-will employee. The panel further held that the CFPB had misinterpreted the Real Estate Settlement Procedures Act, had violated due process by improperly applying its misinterpretations retroactively, and had erroneously exercised its enforcement powers on misconduct that occurred outside the statute of limitations. On November 18, 2016, the CFPB filed a petition for rehearing *en banc*. On December 22, 2016, following an invitation from this Court, the United States filed a brief in support of the petition.

When PHH filed the original petition for review in June, 2015, there was little reason for the State Attorneys General to intervene. At that time, the CFPB still had an independent Director and was fully committed to seeking rehearing to challenge the panel's ruling and defend the constitutionality of the bureau's independent structure. But as a result of the presidential election, the situation has changed. As president-elect, Donald Trump has expressed strong opposition to the

Dodd-Frank reforms. According to numerous media accounts, the Trump administration is planning to fire and replace the current Director as soon as possible and take other steps that could directly impact how, and whether, this litigation proceeds. *See, e.g.,* Ben Walsh, *Trump Moves Closer To Gutting Elizabeth Warren's Consumer Watchdog*, Huffington Post (Jan. 12, 2017); http://www.huffingtonpost.com/entry/trump-consumer-financial-protection-bureau_us_5877ac9ee4b05b7a465e3262; Yuka Hayashi, *Critics Look for Opening to Fire Head of the CFPB*, The Wall St. Journal (Dec. 27, 2016), <http://www.wsj.com/articles/fight-over-cfpb-chief-richard-cordray-heats-up-1482836402>; Yuka Hayashi, *Trump Versus Cordray: Can New President Fire CFPB Chief on Day One?*, The Wall St. Journal (Dec. 2, 2016), <http://www.wsj.com/articles/trump-versus-cordray-can-new-president-fire-cfpb-chief-on-day-one-1480719515>; Aditya Bamzai, *The President's Removal Power and the PHH Litigation*, Notice & Comment Blog (Nov. 22, 2016), <http://yalejreg.com/nc/the-presidents-removal-power-and-the-phh-litigation-by-aditya-bamzai>.

Given the position of the president-elect and the new administration, it is urgent that the State Attorneys General intervene in order to protect the interests of their States and their States' citizens in an independent CFPB. Their intervention will not prejudice any party and their interests are not likely to be adequately represented by any of the current parties to the litigation. Intervention will also

benefit the Court by providing it with the unique perspective of the State Attorneys General.

GROUNDNS FOR INTERVENTION

The incoming administration has indicated that it may not continue an effective defense of the statutory for-cause protection of the CFPB director. A significant probability exists that the pending petition for rehearing will be withdrawn, or the case otherwise rendered moot, in a way that directly prejudices the interests of the State Attorneys General and the citizens of the States that they represent. Allowing the State Attorneys General to intervene would eliminate that risk and ensure that the courts can resolve this important controversy.

I. Leave To Intervene As Of Right Should Be Granted.

The State Attorneys General have significant and legally protected interests in the effective enforcement of federal consumer finance protection laws, in which they themselves have a legally recognized enforcement role. Intervention in this Court “is governed by the same standards as in the district court.” *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997); *see also Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 517-18 (7th Cir. 2004) (“Rule 15(d) does not provide standards for intervention, so appellate courts have turned to the rules governing intervention in the district courts under Fed. R. Civ. P. 24.”). Under those standards, this Court must permit intervention as of right when a proposed

intervenor “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2).

This Court considers four factors in granting intervention as of right: (1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant’s interests. *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008).

These factors all favor intervention here.

A. This Motion Is Timely.

The State Attorneys General filed this motion promptly after it appeared that their interests might no longer be protected, and therefore this motion is timely even at this late stage in the litigation. Although a motion for leave to intervene in a case seeking review from agency action must be filed 30 days after the petition for review is filed, *see* Fed. R. App. P. 15(d), this Court has discretion to extend the time to file a motion for leave to intervene, or to permit the motion to be filed after the ordinary due date. *See* Fed. R. Civ. P. 26(b) (“For good cause shown, the court may extend the time prescribed by these rules or by its order to perform an act, or may permit an act to be done after that time expires.”). In considering the

timeliness of a motion to intervene, a court must consider all the circumstances, including when the "potential inadequacy of representation [comes] into existence." *Amador Cty. v. U.S. Dep't of Interior*, 772 F.3d 901, 903-904 (D.C. Cir. 2014); *see also Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (holding that district court abused its discretion in deeming post-judgment intervention motion untimely because "the potential inadequacy of representation came into existence only at the appellate stage," and prior to that point, the movants' "interests were fully consonant with those of the Government, and those interests were adequately represented by the Government's litigation of the case").

Neither at the time the petition was initially filed, nor at any other point in the course of this important litigation until the most recent events, was there any reason for the State Attorneys General to believe that their interests would not be represented in full. The need for intervention only became apparent after the presidential election and indications from the incoming administration revealed that the continued defense of the statute might be ended. Based on these circumstances, the State Attorneys General acted diligently to file their motion.

Moreover, the timing of the motion also does not prejudice any party to this case. The State Attorneys General do not intend to file additional briefs in this matter unless the Court orders briefing for the *en banc* proceedings and the State Attorneys General will comply with whatever schedule the Court sets. Intervention

will not prejudice the CFPB because the State Attorneys General are merely advocating in support of the petition that the agency itself has already filed; and it cannot disadvantage the private petitioners, who will have every opportunity to respond to movants' submissions on the merits in due course. Likewise, if the participation of the State Attorneys General is necessary to file a petition for certiorari, they would do so under the normal timing and procedural restraints applicable to such a petition, giving the other parties in this case every ordinary opportunity to be heard in response.

B. Movants Have A Legally Protected Interest In This Action.

The State Attorneys General have important and legally protected interests in this litigation that justifies intervention as of right. This Court has held that an intervenor's showing of Article III standing necessarily satisfies this factor. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003). Moreover, intervenors have standing to *defend* the status quo of a regulatory scheme, even if further agency action might be necessary before the intervenors are directly harmed by the outcome of the Court's decision. *See Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 317-318 (D.C. Cir. 2015).

The State Attorneys General have a sufficiently concrete stake in the outcome of this litigation to support intervention based on their key role in enforcing consumer protection laws and regulations on behalf of their constituents,

and protecting consumers from abuses in consumer finance. One of the consumer protection laws that the State Attorneys General enforce is the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), which in Title X, known as the Consumer Financial Protection Act of 2010 (CFPA), established the CFPB.

Pursuant to the CFPA, the State Attorneys General are authorized to bring civil actions to enforce the provisions of the CFPA and the regulations that the CFPB issues pursuant to the CFPA. *See* 12 U.S.C. § 5552(a)(1). The State Attorneys General in States across the country have exercised this authority to bring civil actions for violations of the CFPA, including violation of prohibitions on usurious and otherwise illegal lending practices, *Commonwealth of Pennsylvania v. Think Fin., Inc.*, E.D.Pa No. 2:14-CV-07139, violations of two sections of the CFPA, 12 U.S.C. §§ 5565 and 5538, and the CFPB's "Regulation O" the Mortgage Assistance Relief Services Rule, 12 C.F.R. Part 1015, *Office of the Attorney Gen. v. Berger Law Group, P.A.*, M.D.Fl, Tampa Division, No. 8:14-CV-1825-T-30MAP, violation of provisions governing for-profit secondary schools, *Illinois v. Alta Colleges, Inc.*, N.D.Ill, Eastern Division, No. 14 C 3786, and violation of CFPB's Regulation Z, 12 C.F.R. Part 1026. *King v. HSBC Bank Nevada, N.A.*, N.M., No. 13-CV-504 RHS/KBM.

When the State Attorneys General bring such enforcement actions, the CFPA requires them to provide notice to the CFPB, which may intervene in any such action as a party, be heard on all matters arising in the action, and appeal any order or judgment to the same extent as any other party in the proceeding. *See* 12 U.S.C. § 5552(b). In requiring such notice, Congress presumed the CFPB would be headed by an independent Director who would intervene or take other actions free from political influence. Removal of the Director's independence as a result of this Court's ruling would turn Congressional intent on its head, effectively giving the President veto power over the State Attorneys General's enforcement of the CFPA. It would also fly in the face of the understanding of state attorneys general, who were a crucial part of the debate on the passage of the CFPA, that the CFPB would be a strong independent agency that would promote enforcement by the state attorneys general of both the CFPA and state consumer protection laws. *See* The Creation of a Consumer Financial Protection Agency to be the Cornerstone of America's New Economic Foundation: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs, 111th Cong., 20-21, 34-36, 66-69, 86-87 (July 14, 2009), available at <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg54789/pdf/CHRG-111shrg54789.pdf>. If that independence is going to be eradicated by judicial decision, the State Attorneys General should at least be heard on this critical issue.

Having a Director who is independent of political influence is also critical to the ability of State Attorneys General to coordinate effective regulatory actions with and through the CFPB. The CFPA directs the CFPB to coordinate regulatory actions with state attorneys general and other regulators. *See* 12 U.S.C. § 5552(c). Pursuant to this authority, between 2013 and 2015, the CFPB coordinated with Connecticut and 46 other states and the District of Columbia to investigate and resolve allegations that Chase Bank USA N.A. and Chase Bankcard Services, Inc. (Chase) engaged in unfair, misleading and deceptive business practices in connection with its consumer credit card debt collection business. Chase ultimately agreed to pay \$50 million in consumer restitution, \$136 million to the states and CFPB, and halt collection actions on 528,000 consumers nationwide. Press Release of AG Jepsen, July 8, 2015, <http://www.ct.gov/ag/cwp/view.asp?A=2341&Q=568030&pp=12&n=1>. In another example of CFPB coordination, all fifty states, the District of Columbia and the CFPB and Federal Communications Commission (FCC) investigated claims that wireless telephone providers Sprint and Verizon billed consumers for premium text message subscription services that they had not signed up for or otherwise agreed to. The coordinating regulators were able to reach a \$158 million global settlement to provide refunds for affected consumers and payments to the regulators. Press Release of AG Jepsen and Commissioner of Consumer Protection Jonathan Harris

of May 12, 2015, <http://www.ct.gov/ag/cwp/view.asp?Q=565736&A=2341>. The independence of the CFPB and its Director from political influence is critical to the success of such regulatory efforts. Because this Court's ruling threatens to undermine the ability of the State Attorneys General to bring effective civil enforcement and coordinated regulatory actions free from political influence and interference, the State Attorneys General have a vital interest in intervening in this case.

C. This Action Threatens To Impair Movants' Interest.

Should the respondent choose to forgo further defense of this action, the interests of the State Attorneys General, and the citizens whom they represent, will be seriously impaired. The panel's decision effectively rewrites the statute, permitting the immediate termination of the Director at will. This will not only compromise the independence of the agency, it will likely derail pending policy initiatives and enforcement actions and possibly call into question the validity of past initiatives. As a result, the State Attorneys General and their States' citizens will be directly prejudiced. That satisfies Rule 24(a)(2)'s requirement that an intervenor be "so situated that disposing of the action may as a practical matter impair or impede [its] ability to protect its interest"—a requirement that this Court has construed "as looking to the practical consequences of denying intervention, even where the possibility of future challenge . . . remains available." *Fund for*

Animals, 322 F.3d at 735 (quotation marks omitted). As this Court has made clear, “it is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation.” *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977). It is uncertain at best how the interests of the State Attorneys General could be vindicated or repaired in some other litigation. If the respondents decide not to defend the law, the institutional ramifications to the independence of the CFPB – and the State Attorney General's interests in preserving it – are clear.

D. The Interests of the State Attorneys General Will Not Be Adequately Represented By The Parties.

With the incoming administration, the interests of the State Attorneys General are unlikely to be adequately represented by the executive branch. There is reason to believe that the new administration will not maintain its defense of the CFPB. It is possible that Director Cordray will be removed and replaced by a person with a different policy agenda. It is also possible that even if the Director remains in office, the United States will not seek certiorari if the panel decision stands. This is more than enough to satisfy the fourth prong of the intervention standard, which requires only that “the applicant show[] that representation of his interest ‘*may be*’ inadequate.” *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). Moreover, “the burden of making that showing should be treated as minimal,” *id.*, and this Court “ha[s] described

this requirement as ‘not onerous,’” *Fund for Animals*, 322 F.3d at 735 (quoting *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986)). Here, permitting intervention is the only way to ensure that the interests of the State Attorneys General are adequately protected in this litigation.

2. Alternatively, Permissive Intervention Should Be Granted.

The State Attorneys General also satisfy the requirements for permissive intervention. This Court may grant permissive intervention when a proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In exercising its discretion to permit intervention, this Court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

The State Attorneys General, if permitted to intervene, would have a defense that would share a common question of law with the main action because the State Attorneys General, like the CFPB and the United States, will be arguing that this Court wrongly struck down the constitutionality of the CFPA provision making the Director of the CFPB subject to removal only for cause. It is the position of the State Attorneys General, like that of the CFPB and the United States, that in holding the removal provision unconstitutional, this Court wrongly departed from the Supreme Court's authority in *Humphrey's Executor v. United States*, 295 U.S.

602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988), concerning removal restrictions on members of independent agencies. By intervening, the State Attorneys General will be able to defend the constitutionality of the CFPA even if the president-elect's new administration opts not to do so.

As discussed above, this motion is timely, the State Attorneys General have standing, this litigation threatens the interests of the State Attorneys General that are not adequately represented by the parties, and, as discussed in Section I.A., intervention will not unduly delay or prejudice the adjudication of the original parties' rights. Accordingly, permissive intervention is warranted.

CONCLUSION

This Court should grant this motion for leave to intervene.

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ADDENDUM

1. Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements
2. Certificate of Parties and Amici Curiae Pursuant to Circuit Rule 27(a)(4) and Circuit Rule 28(a)(1)(A)
3. Disclosure Statement Pursuant to Circuit Rule 26.1

**Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type-Style Requirements**

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,343 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it been prepared in a proportionally spaced typeface using Microsoft Word in 14-point New Times Roman font.

/s/ Jane R. Rosenberg

Attorney for George Jepsen

Attorney General of State of Connecticut

Dated: January 23, 2017

**Certificate of Parties and Amici Curiae Pursuant to Circuit Rule 27(a)(4)
and 28(a)(1)(A):**

Except for the following, all parties, intervenors, and amici appearing before the Bureau of Consumer Financial Protection and in this Court are listed in the Addendum to the Respondent Consumer Financial Protection Bureau's Petition for Rehearing *en banc*:

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Disclosure Statement Pursuant to Circuit Rule 26.1

The movants are state attorneys general to whom the Corporate Disclosure Statement requirement set forth in Circuit Rule 26.1 does not apply.

CERTIFICATION OF SERVICE

I hereby certify that on this 23rd day of January, 2017, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

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