ORAL ARGUMENT HELD APRIL 12, 2016

No. 15-1177

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS, LLC, ATRIUM INSURANCE CORPORATION, AND ATRIUM REINSURANCE CORPORATION,
Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

On Petition For Review Of An Order
Of The Consumer Financial Protection Bureau

PETITIONERS' OPPOSITION TO 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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INTRODUCTION AND SUMMARY

The motion to intervene filed by certain state Attorneys General ("state AGs") should be denied. The motion is egregiously untimely, there is no good cause for the delay in seeking to intervene, and there is no standing to intervene.

ARGUMENT

I. The State AGs' Motion Is Untimely.

1. A motion for leave to intervene "*must* be filed within 30 days after the petition for review is filed." Fed. R. App. P. ("FRAP") 15(d) (emphasis added). PHH filed its petition for review on June 19, 2015—*more than 19 months ago*. Pet., Doc. 1559308. Since then, this case has been briefed, argued, and decided; the Consumer Financial Protection Bureau ("CFPB") has sought rehearing; and petitioners and the United States have filed responses. The state AGs' motion thus comes more than a year-and-a-half after the deadline for intervention. To permit such a late intervention would "sanction[] an undisputed failure to comply with applicable . . . rules." *Alabama Power Co. v. ICC*, 852 F.2d 1361, 1366–68 (D.C. Cir. 1988). The motion should be denied on this basis alone.

2. The state AGs argue that "good cause" exists to extend the FRAP 15(d) deadline by more than a year-and-a-half, *see* Mot. 6, but that argument is specious. The state AGs do not contend that they were unaware of this much-publicized litigation or the law's deadlines. Both cases that the state AGs cite in support of

their motion involved district court intervention under Federal Rule of Civil Procedure 24, which lacks FRAP 15(d)'s thirty-day deadline, and are therefore utterly inapposite. *See Amador Cty. v. United States Dep't of the Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014); *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001). The State AGs have failed to cite a single example of this Court extending FRAP 15(d)'s deadline at all—much less 19 months after the petition for review—and Petitioners are unaware of any such example. This is not the case in which this Court should start.

The state AGs' good-cause argument is also implausible. *First*, the factors that the state AGs claim motivated them to file their motion were entirely and reasonably foreseeable more than a year ago. The separation-of-powers concerns surrounding the CFPB have been apparent since the Consumer Financial Protection Act ("CFPA") was enacted in 2010. And it has been public knowledge since the beginning of this case and widely reported that petitioners were challenging the CFPB's structure as violating the separation of powers. *See* Mot. for Stay Pending Judicial Review at 11–12 (June 26, 2015), Doc. 1559758. There has *always* been the potential that the Executive Branch might be disinclined to defend a statute that severely impairs the President's authority over a "powerful, centralized" federal agency. Mot. 2. Indeed, the Executive Branch is generally reluctant to approve of limitations on the President's removal authority. *See*, *e.g.*, Panel Op. 30 (discussing

President William J. Clinton, Statement on Signing the Social Security Independence and Program Improvements Act of 1994, 2 Pub. Papers 1471, 1472 (Aug. 15, 1994)). The response brief filed by the United States on December 23, 2016—a month before the state AGs filed this motion to intervene—confirms this fact: That brief conspicuously did *not* defend the constitutionality of the CFPB. *See* U.S. Resp. to Pet. for Reh'g En Banc (Dec. 22, 2016), Doc. 1652666.

Moreover, even if the results of the November presidential election were relevant to the question of intervention (and they plainly are not), the state AGs fail to explain their additional two-and-a-half-month delay before seeking to intervene. In that time, the CFPB sought rehearing and petitioners and the United States filed responses—and the state AGs remained silent. In *Amador County*, on which the state AGs rely, this Court affirmed a district court's rejection of a motion to intervene as untimely because, as here, the intervenor should have known "from the outset of [the] litigation" that the case could affect its asserted interest, and that they may have had reason to "question[] the adequacy of the United States' representation." 772 F.3d at 904. Thus, even if the supposed "'potential inadequacy of representation came into existence'" only on Election Day, *id.*—and it did not—the state AGs' motion would *still* be untimely.

Second, the possibility that the CFPB would be ruled unconstitutional was equally foreseeable. In particular, it was clear from the beginning of this suit that

one possible outcome of petitioners' judicial challenge to the CFPB's structure was to render the Director accountable to the President *regardless* of which administration occupied the White House. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 508–09 (2010). The state AGs did not need to read newspaper articles speculating on what "the Trump administration is planning" (Mot. 4) to realize that, if the CFPB Director were like every other cabinet secretary, then the CFPB would be accountable to the President like every other Executive Branch agency. The panel's questions about the constitutionality of the agency at oral argument last year were a matter of public record. The state AGs' decision to wait until after not just the presidential election but the inauguration to seek to intervene, long after the case was brought, is the opposite of "good cause."

3. Even if Rule 15(d)'s strict deadline did not apply, this Court has held that "as a general rule" it "will deny motions to intervene" filed, as here, *after* a panel decision. *See Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 (D.C. Cir. 1985) (per curiam). In *Amalgamated Transit*, a municipal transit authority waited until this Court had issued judgment before seeking to intervene in order to defend a decision of the Secretary of Labor and "to secure a right to petition for a writ of certiorari from the Supreme Court." *Id*. at 1552. This Court denied the motion for the "obvious reason" that "it is unduly disruptive" and "places an unfair burden" on the parties. *Id*. at 1553. As the Court recognized, "[i]t

would be entirely unfair, and an inexcusable waste of judicial resources, to allow a potential intervenor to l[ie] in wait until after the parties and the trial and appellate courts have incurred the full burden of litigation before deciding whether to participate in the judicial proceedings." *Id.*; *see also Pitts v. Thornburgh*, No. 88-5058, 2003 WL 21384601, at *1 (D.C. Cir. May 28, 2003) (per curiam) ("Intervention is even more disfavored where, as here, the motion for leave to intervene comes *after* the court of appeals has decided a case.") (internal quotation marks omitted).

Here, as in *Amalgamated Transit*, intervention would be grossly unfair to petitioners, who suddenly would be faced with the burden of litigating any further judicial proceedings against seventeen new (and sovereign) party opponents. Indeed, the state AGs' motion is even more egregious than the unduly delayed motion in *Amalgamated Transit*. That motion was filed "more than four months" after oral argument and "almost two months after" this Court issued its judgment. 771 F.2d at 1552. Here, the state AGs' motion was filed *more than eight months* after oral argument and *more than three months* after this Court issued its judgment. And like the transit authority, the state AGs fail to identify "any case in which intervention was permitted at this late stage." *Id.* at 1553. For all of these reasons, the blatantly untimely intervention motion should be denied.

II. The State AGs Have No Legally Protected Interest At Stake.

1. Even if the state AGs' extreme delay were excusable (and it is not), they would lack standing to intervene because they have no legally protected interest in this case. PHH petitioned for review of an enforcement proceeding brought by the CFPB alone. The CFPA provides that such proceedings are limited to the CFPB and the covered person or service provider who is the subject of the enforcement action. *See* 12 U.S.C. § 5563(b). Those proceedings are *not* open to other regulators or officious intermeddlers. The CFPA's review provision defines the zone of legally protected interests in this proceeding—and it does not include the state AGs.

The state AGs do not assert any interest in the enforcement of the Real Estate Settlement Procedures Act ("RESPA"), the only statute being enforced against petitioners in this proceeding. Nor is the involvement of the state AGs necessary or appropriate to protect the Executive Branch's interests in the interpretation and enforcement of RESPA. In *Amalgamated Transit*, this Court recognized that a federal agency, not an intervening third party, is best positioned to protect its interests in a judicial challenge to the agency's decision in an administrative proceeding. This Court held that "the real party in interest" was the Secretary of Labor, not the transit authority, because the case involved a challenge to the Secretary's exercise of his statutory discretion. 771 F.2d at 1553–54. It did not matter that the court's decision would have a direct impact on the Secretary's future

decisions with respect to the transit authority because the same would be true "in *any* appeal to which an agency is a party and a third-party faces some liability or loss of funds if the agency does not prevail." *Id.*; *see also Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 537–38 (D.C. Cir. 1999) (denying motion to intervene in challenge to FERC rate order where third party "sought to intervene" "[b]ecause of the possible precedential impact" of a case). Similarly, here, the Executive Branch is the only real party in interest, yet the state AGs seek intervention for the express purpose of countermanding what they fear will be the Executive Branch's interests in this case. Like the intervenor in *Amalgamated Transit*, the state AGs have no standing to pursue their own notion of the Executive Branch's interests, and their speculation that this Court's opinion may affect them in the future is simply irrelevant for purposes of standing.

2. The state AGs' other arguments are equally unavailing. The state AGs claim to have a legally cognizable interest in the "independence" of the CFPB Director from the President, Mot. 10, but that argument is a bridge too far. The state AGs are state officers authorized only to represent "the interests of their States and their States' citizens," Mot. 4, whose interests are "undifferentiated and common to all members of the public." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575 (1992) (internal quotation marks omitted). They plainly have no standing to defend the constitutionality of a federal statutory provision that applies to only one federal

Officer—the Director of the CFPB. *Cf. Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) ("We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to."); *id.* at 2663 (rejecting argument that private citizens could "assert [California's] interest on the State's behalf").

Undeterred, the state AGs argue that the panel's opinion "effectively giv[es] the President veto power over" the state AGs' attempts to enforce the CFPA under 12 U.S.C. § 5552. Mot. 10. But the panel's opinion does no such thing. The CFPB cannot unilaterally "veto" states' attempts to enforce the CFPA. State AGs are merely required to notify the CFPB of the intended enforcement action before filing, 12 U.S.C. § 5552(b)(1)(A), and the CFPB may then "intervene in the action as a party," *id.* § 5552(b)(2)(A). The state AGs would remain free to pursue their own enforcement actions, and the courts would remain the ultimate arbiters of any disagreements. Regardless, it is well established in this Circuit that the mere "possible precedential impact" of a decision is insufficient to confer standing. *See Rio Grande Pipeline*, 178 F.3d at 537–38; *Deutsche Bank Nat'l Tr. Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013) ("the creation of adverse legal precedent is insufficient to create Article III standing, even where future litigation is foreseeable").

The state AGs also never explain their illogical and ultimately speculative contention that a constitutionally accountable CFPB would somehow "undermine" regulatory coordination. Mot 11–12. To the contrary, states routinely coordinate with constitutionally accountable federal agencies, such as the Department of Justice. Moreover, if a presidential administration favored coordination with states while a CFPB Director opposed it, then the CFPB's constitutional accountability would *enhance* such coordination.

At bottom, this motion is simply an effort by the state AGs to intervene in order "to file a petition for certiorari," as they admit, in the event the Solicitor General does not. Mot. 8. But the state AGs clearly should not be given control over efforts to seek Supreme Court review in this case. Under the CFPA as enacted, the CFPB must seek approval from the United States Attorney General before filing a certiorari petition, *see* 12 U.S.C. § 5564(e)—and the Attorney General is directly accountable to the President. Granting intervention would therefore *circumvent* one of the only means that Congress provided for the President to supervise litigation involving the CFPB. Moreover, giving the state AGs the ability to commandeer this case at the Supreme Court would be a massive and impermissible intrusion into the Executive's responsibility and constitutional prerogative to control the defense of litigation against the United States. That outcome cannot be squared with either the CFPA or constitutional principles.

The state AGs may not appoint themselves as gratuitous defenders of a federal Executive Branch agency, or assume control of federal constitutional litigation, simply on their assertion that an "independent" CFPB is preferable to one in which the President may remove the Director based on policy disagreements. That generalized point of view, divorced from any cognizable interest in this judicial proceeding, is precisely the kind of interest that must be litigated in the political arena, to the extent not precluded by the Constitution itself.

III. The State AGs Fail To Meet The Standard For Intervention.

Because the State AGs' motion to intervene is so far out of time with no good cause for the delay, and they have no Article III standing in this matter, the motion is doomed as a procedural and jurisdictional matter. Thus, this Court need not even address the merits of the intervention request. In any event, the motion plainly fails to meet the standard for either mandatory or permissive intervention.

That is so for many of the same reasons that the state AGs lack standing. Among other things, the state AGs' policy opinion about the need for an independent CFPB does not rise to the level of a legally protected interest in this lawsuit, and they have failed to articulate any way in which the Director's accountability to the President would impair any valid interest of theirs. Finally, allowing intervention so late in the day would greatly prejudice PHH. As noted above, if the motion is granted, PHH would face a whole new set of party-opponents in any further judicial

proceedings. Moreover, these would-be intervenors have made clear that they plan to drag the case out by petitioning for certiorari if the United States does not, thus unilaterally further delaying the award of relief that PHH successfully obtained before the panel months ago. Indeed, PHH has already been put to the delay and expense of responding to this patently deficient motion.

* * *

Allowing intervention would threaten to transform the current rehearing proceeding into a political platform for 17 state Attorneys General, and would incentivize countless other would-be intervenors to join the fray at this exceedingly late stage of the appeal.* That prospect is entirely unhelpful to the judicial process, unfair to PHH, and vividly illustrates why the Court should move expeditiously to deny the rehearing petition and issue the mandate so that PHH may enjoy the relief to which it is entitled.

CONCLUSION

This Court should deny the state AGs' motion to intervene.

* In fact, as of the filing of this opposition, two more motions to intervene have been filed. PHH will promptly and separately respond to those motions.

Dated: January 27, 2017

Respectfully submitted,

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Dated: January 27, 2017

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CERTIFICATE OF SERVICE

I hereby certify that, on January 27, 2017, an electronic copy of the foregoing response was filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon all counsel of record.

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