

[[ORAL ARGUMENT HELD APRIL 12, 2016]]

No. 15-1177

---

IN THE 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  
(CFPB File 2014-CFPB-0002)

---

MOTION OF SENATOR SHERROD BROWN AND REPRESENTATIVE  
MAXINE WATERS FOR LEAVE TO INTERVENE

---

Elizabeth B. Wydra  
Brienne J. Gorod  
Brian R. Frazelle  
Simon Lazarus  
CONSTITUTIONAL ACCOUNTABILITY CENTER  
1200 18th Street, N.W.  
Suite 501  
Washington, D.C. 20036  
(202) 296-6889  
elizabeth@theusconstitution.org

*Counsel for Movants*

## TABLE OF CONTENTS

|                                                                                            | <b>Page(s)</b> |
|--------------------------------------------------------------------------------------------|----------------|
| TABLE OF AUTHORITIES .....                                                                 | ii             |
| INTRODUCTION AND BACKGROUND .....                                                          | 1              |
| ARGUMENT .....                                                                             | 7              |
| I.    Movants Are Entitled To Intervene as of Right .....                                  | 7              |
| A.    This Motion Is Timely .....                                                          | 8              |
| B.    Movants Have a Legally Protected Interest in this Action .....                       | 14             |
| C.    This Action Threatens To Impair Movants' Interest .....                              | 17             |
| D.    Movants' Interests May Not Be Adequately Represented.....                            | 20             |
| II.    In the Alternative, this Court Should Grant Movants Permissive<br>Intervention..... | 21             |
| CONCLUSION .....                                                                           | 22             |

## TABLE OF AUTHORITIES

|                                                                                                | Page(s)     |
|------------------------------------------------------------------------------------------------|-------------|
| <u>CASES</u>                                                                                   |             |
| <i>Acree v. Republic of Iraq</i> ,<br>370 F.3d 41 (D.C. Cir. 2004) .....                       | 12          |
| <i>Amador Cty., Cal. v. U.S. Dep’t of Interior</i> ,<br>772 F.3d 901 (D.C. Cir. 2014) .....    | 8-9, 13, 14 |
| <i>Amalgamated Transit Union Int’l v. Donovan</i> ,<br>771 F.2d 1551 (D.C. Cir. 1985) .....    | 14          |
| <i>Ameron, Inc. v. U.S. Army Corps of Eng’rs</i> ,<br>787 F.2d 875 (3d Cir. 1986) .....        | 16          |
| <i>Bldg. &amp; Constr. Trades Dep’t v. Reich</i> ,<br>40 F.3d 1275 (D.C. Cir. 1994) .....      | 7           |
| <i>Campbell v. Clinton</i> ,<br>203 F.3d 19 (D.C. Cir. 2000) .....                             | 15, 16      |
| <i>Chenoweth v. Clinton</i> ,<br>181 F.3d 112 (D.C. Cir. 1999) .....                           | 15          |
| <i>Coleman v. Miller</i> ,<br>307 U.S. 433 (1939) .....                                        | 15          |
| <i>Crossroads Grassroots Policy Strategies v. FEC</i> ,<br>788 F.3d 312 (D.C. Cir. 2015) ..... | 8, 14, 19   |
| <i>Dimond v. District of Columbia</i> ,<br>792 F.2d 179 (D.C. Cir. 1986) .....                 | 8, 14, 20   |
| <i>Fund For Animals, Inc. v. Norton</i> ,<br>322 F.3d 728 (D.C. Cir. 2003) .....               | 14, 19, 20  |
| <i>Humphrey’s Ex’r v. United States</i> ,<br>295 U.S. 602 (1935) .....                         | 4           |
| <i>I.N.S. v. Chadha</i> ,<br>462 U.S. 919 (1983) .....                                         | 16          |
| <i>Karsner v. Lothian</i> ,<br>532 F.3d 876 (D.C. Cir. 2008) .....                             | 7           |
| <i>Kennedy v. Sampson</i> ,<br>511 F.2d 430 (D.C. Cir. 1974) .....                             | 15          |

**TABLE OF AUTHORITIES – cont’d**

|                                                                                                           | <b>Page(s)</b> |
|-----------------------------------------------------------------------------------------------------------|----------------|
| <i>Mass. Sch. of Law at Andover, Inc. v. United States</i> ,<br>118 F.3d 776 (D.C. Cir. 1997) .....       | 7              |
| <i>Military Toxics Project v. E.P.A.</i> ,<br>146 F.3d 948 (D.C. Cir. 1998) .....                         | 15             |
| <i>Moore v. U.S. House of Representatives</i> ,<br>733 F.2d 946 (D.C. Cir. 1984) .....                    | 17             |
| <i>Morrison v. Olson</i> ,<br>487 U.S. 654 (1988) .....                                                   | 4              |
| <i>Nat. Res. Def. Council v. Costle</i> ,<br>561 F.2d 904 (D.C. Cir. 1977) .....                          | 17, 19         |
| <i>Nuesse v. Camp</i> ,<br>385 F.2d 694 (D.C. Cir. 1967) .....                                            | 17, 18, 19     |
| <i>PHH Corp. v. CFPB</i> ,<br>839 F.3d 1 (D.C. Cir. 2016) .....                                           | 5              |
| <i>Raines v. Byrd</i> ,<br>521 U.S. 811 (1997) .....                                                      | 15, 16, 17     |
| <i>Republic of Iraq v. Beaty</i> ,<br>556 U.S. 848 (2009) .....                                           | 12             |
| <i>Roane v. Leonhart</i> ,<br>741 F.3d 147 (D.C. Cir. 2014) .....                                         | 13, 19         |
| <i>Smoke v. Norton</i> ,<br>252 F.3d 468 (D.C. Cir. 2001) .....                                           | 9, 12, 14      |
| <i>Smuck v. Hobson</i> ,<br>408 F.2d 175 (D.C. Cir. 1969) .....                                           | 19             |
| <i>Trbovich v. United Mine Workers of Am.</i> ,<br>404 U.S. 528 (1972) .....                              | 20             |
| <i>United States v. British Am. Tobacco Austl. Servs., Ltd.</i> ,<br>437 F.3d 1235 (D.C. Cir. 2006) ..... | 9              |
| <i>Windsor v. United States</i> ,<br>797 F. Supp. 2d 320 (S.D.N.Y. 2011) .....                            | 16             |

**TABLE OF AUTHORITIES – cont’d**

|                                                                                                                                                       | <b>Page(s)</b> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| <b><u>STATUTES, REGULATIONS, AND LEGISLATIVE MATERIALS</u></b>                                                                                        |                |
| Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,<br>Pub. L. No. 111-203, 124 Stat. 1376 .....                                       | 1              |
| Fed. R. App. P. 15(d) .....                                                                                                                           | 8              |
| Fed. R. App. P. 26(b) .....                                                                                                                           | 8              |
| Fed. R. Civ. P. 24(a)(2).....                                                                                                                         | 7, 14, 18      |
| Fed. R. Civ. P. 24(b)(1)(B) .....                                                                                                                     | 21             |
| Fed. R. Civ. P. 24(b)(3).....                                                                                                                         | 21             |
| H.R. Rep. No. 111-367, pt. 1 (2009) .....                                                                                                             | 2              |
| S. Rep. No. 111-176 (2010).....                                                                                                                       | 2, 3, 4        |
| 12 U.S.C. § 5491(c)(3).....                                                                                                                           | 3-4            |
| 12 U.S.C. § 5564(e) .....                                                                                                                             | 18             |
| <b><u>OTHER AUTHORITIES</u></b>                                                                                                                       |                |
| Gregory T. Angelo, <i>Donald Trump Should Fire Richard Cordray</i> , The Hill,<br>Jan. 5, 2017 .....                                                  | 11, 18         |
| Kate Berry & Ian McKendry, <i>CFPB’s Precarious Future Under Trump</i> ,<br>Nov. 9, 2016.....                                                         | 10             |
| Susan Block-Lieb, <i>Accountability and the Bureau of Consumer Financial<br/>Protection</i> , 7 Brook. J. Corp. Fin. & Com. L. 25 (2012).....         | 4              |
| Elizabeth Dexheimer, <i>GOP Push To Kill Key Consumer-Protection Agency<br/>Poses Risks</i> , Chi. Trib., Dec. 26, 2016.....                          | 11             |
| Geoff Dyer et al., <i>Trump and Clinton Focus Frantic Final Push on<br/>Battleground States</i> , Fin. Times, Nov. 6, 2016.....                       | 10             |
| Yuka Hayashi, <i>Critics Look for Opening To Fire Head of the CFPB</i> , Wall St.<br>J., Dec. 27, 2016.....                                           | 11             |
| Letter from Eric H. Holder, Jr., Att’y Gen. of the United States, to John A.<br>Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) ..... | 9              |

**TABLE OF AUTHORITIES – cont’d**

|                                                                                                                                                                                 | <b>Page(s)</b> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| Jamie Lovegrove, <i>Ex-Congressman from Lubbock Meets with Trump about Consumer Protection Post</i> , Dallas Morning News, Jan. 12, 2017 .....                                  | 11             |
| Press Release, Sherrod Brown, Sen. for Ohio, Banking Committee Democrats: Trump Administration Needs Cordray as Consumer Watchdog (Jan. 17, 2017) .....                         | 11-12          |
| Press Release, Ben Sasse, U.S. Sen. for Neb., Sasse and Lee to Trump: Fire Cordray (Jan. 9, 2017).....                                                                          | 6              |
| Brena Swanson, <i>Former SEC Commissioner Named to CFPB Landing Team by Trump Transition Team</i> , Housingwire, Nov. 22, 2016.....                                             | 10             |
| Letter from Maxine Waters, Rep., U.S. House of Representatives, et al., to Donald Trump, President-elect of the United States (Jan. 9, 2017) .....                              | 11             |
| Arthur E. Wilmarth, <i>The Financial Services Industry’s Misguided Quest To Undermine the Consumer Financial Protection Bureau</i> , 31 Rev. Banking & Fin. L. 881 (2012) ..... | 3              |

## INTRODUCTION AND BACKGROUND

Movants Senator Sherrod Brown and Representative Maxine Waters are, respectively, the Ranking Members of the Senate Banking Committee and the House Financial Services Committee. In addition to serving as the Ranking Members of the committees with jurisdiction over the banking industry and the federal financial regulatory agencies, they helped draft, and voted for, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376, which established the Consumer Financial Protection Bureau (CFPB). In October 2016, a divided panel of this Court held that the leadership structure Congress chose for the Bureau—a single director removable only for cause—is unconstitutional. Movants now seek to intervene in this litigation because recent events have made it clear that their interests in preserving the leadership structure they voted for may no longer be adequately represented by the new Administration. Indeed, absent intervention, it is possible that the panel’s decision will be insulated from review, thus nullifying movants’ votes to establish the CFPB as an independent agency and their ability to establish similar independent agencies in the future. The motion to intervene should be granted.

In 2008, the nation was plunged into the worst financial crisis since the Great Depression, a calamity that “shattered” lives, “shuttered” businesses, and

caused millions of families to lose their homes. S. Rep. No. 111-176, at 39 (2010); *see id.* (“the financial crisis has torn at the very fiber of our middle class”). After more than fifty hearings devoted to “prob[ing] and evaluat[ing] the causes of the economic downfall” and “assess[ing] the types of reforms needed,” *id.* at 42, 44, Congress determined that the financial crisis was caused in large part by “the spectacular failure of the prudential regulators to protect average American homeowners” from “risky” and “unaffordable” financial products, in favor of protecting the “short-term profitability of banks.” *Id.* at 15. A key explanation for this regulatory failure, Congress found, was the fact that “[c]onsumer protection in the financial arena [was] governed by various agencies with different jurisdictions and regulatory approaches,” resulting in a “disparate regulatory system” that did not “aggressive[ly] enforce[] against abusive and predatory loan products.” H.R. Rep. No. 111-367, pt. 1, at 91 (2009).

To remedy these failures and establish “a new regulatory framework that can respond to the challenges of a 21st century marketplace,” S. Rep. No. 111-176, at 42, Congress enacted Dodd-Frank. Critical to Dodd-Frank’s legislative plan was the creation of the CFPB, a new agency with the sole responsibility of protecting American consumers from harmful practices of the financial services industry. By creating the CFPB, Congress sought to “end[] the fragmentation of the current system by combining the authority of the seven federal agencies involved in



consumer financial protection . . . , thereby ensuring accountability” and “leaving regulatory arbitrage and inter-agency finger pointing in the past,” S. Rep. No. 111-176, at 10-11, 168. An effective Bureau, Congress stated, could “prevent[] a recurrence of the same problems” in consumer finance that helped foster the financial crisis and the near-collapse of the American economy. *Id.* at 42.

To ensure that the new Bureau could effectively fulfill its mandate, Congress provided that the agency would be led by a single director. Lawmakers understood that the nation needed a regulator that could “respond quickly and effectively” to “new threats to consumers,” S. Rep. No. 111-176, at 18, and it knew that the CFPB’s effectiveness could be hampered by the delay and gridlock to which commissions are susceptible. *See* Arthur E. Wilmarth, *The Financial Services Industry’s Misguided Quest To Undermine the Consumer Financial Protection Bureau*, 31 Rev. Banking & Fin. L. 881, 919 (2012) (administrative law scholars generally associate the single-director model with greater “efficiency and accountability”).

Critically, lawmakers also determined that the Bureau needed to be an *independent* regulatory agency in order to remain a vigilant guardian of American consumers’ interests and avoid being unduly influenced by the financial industry. Congress thus made the CFPB director removable by the President only for cause, namely “inefficiency, neglect of duty, or malfeasance in office.” 12 U.S.C.

§ 5491(c)(3). Lawmakers appreciated that a for-cause removal provision would ensure that Bureau experts had the political independence necessary to effectively regulate. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 687-88 (1988) (“Were the President to have the power to remove FTC Commissioners at will, the ‘coercive influence’ of the removal power would ‘threate[n] the independence of [the] commission.’” (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 630 (1935))); S. Rep. No. 111-176, at 24 (testimony recommending, *inter alia*, “improving regulatory independence”); *id.* at 174 (a “strong and independent Bureau . . . will reduce the incentive for State action and increase uniformity”); Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 Brook. J. Corp. Fin. & Com. L. 25, 38 (2012) (removal limits “are intended to permit appointees both to develop expertise on technical subjects and to take politically unpopular action” (quotation marks omitted)).

In this action, mortgage lender PHH Corporation and others petitioned for review of a CFPB order declaring that PHH had violated Section 8 of the Real Estate Settlement Procedures Act through its captive reinsurance arrangements, which the Bureau determined were in violation of prohibitions on kickbacks in real estate settlement services. A panel of this Court ruled on October 11, 2016, that the CFPB’s order must be vacated because the Bureau’s interpretation of the Act was incorrect and was applied retroactively against PHH without fair notice. Two

members of the panel also concluded that the Bureau's leadership structure is unconstitutional because the Bureau exercises substantial executive authority while being led by a single director removable only for cause, instead of by a board or commission. To remedy this perceived constitutional defect, the panel severed the provision of Dodd-Frank that makes the CFPB Director removable only for cause. "As a result," this Court explained, "the CFPB now will operate as an executive agency. The President of the United States now has the power to supervise and direct the Director of the CFPB, and may remove the Director at will at any time." *PHH Corp. v. CFPB*, 839 F.3d 1, 39 (D.C. Cir. 2016).

By nullifying the removal protections for the Director provided for in Dodd-Frank, and thus transforming the CFPB into an executive agency subject to the policy direction of the President, the panel decision fundamentally altered the Bureau and hindered its ability to play the role that Congress intended, as discussed above. In addition to undermining Congress's plan for the CFPB, the panel decision also prevents Congress from establishing other independent agencies headed by single directors, at least if those agencies "have authority to enforce laws against private citizens," *id.* at 20.

On November 18, 2016, the Bureau filed a petition for rehearing *en banc* of the panel decision. On December 22, 2016, PHH opposed that petition, and the United States Solicitor General, at this Court's invitation, also filed a brief, which

supports the CFPB's request for *en banc* rehearing.

As noted earlier, movants Senator Sherrod Brown and Representative Maxine Waters are, respectively, the Ranking Members of the Senate Banking Committee and the House Financial Services Committee. In addition to serving as the Ranking Members of the committees with jurisdiction over the banking industry and the federal financial regulatory agencies, they participated in the drafting of Dodd-Frank and thus understand how critical the CFPB Director's for-cause removal provision is to the Bureau's ability to play its intended role effectively. The panel decision harms them in a concrete way by nullifying their considered votes in favor of the CFPB's independent status, and by nullifying the effect of any votes establishing single-director independent agencies in the future.

Until now, movants' interests in this case have been adequately represented by the CFPB, which has zealously defended the constitutionality of the Bureau's structure. Recently, however, it has become increasingly clear that movants' interests may no longer be adequately represented by the new Administration. Two of movants' congressional colleagues have pressed the Administration to replace the CFPB's current director as "the first marker in the long process of rolling-back" the agency, Press Release, Ben Sasse, U.S. Sen. for Neb., Sasse and Lee to Trump: Fire Cordray (Jan. 9, 2017), <http://www.sasse.senate.gov/public/index.cfm/press-releases?ID=F7DBD9EB->

1B73-4F72-B15B-8B6BC80BBEE2, one of a number of actions under consideration by the new Administration that may prevent the Bureau from seeking reversal of the panel's decision. Thus, movants seek to intervene to defend the constitutionality of the important law they helped enact.

Counsel for movants has consulted with counsel for all parties. Petitioners plan to oppose the motion, while respondent takes no position.

## **ARGUMENT**

### **I. Movants Are Entitled To Intervene as of Right**

Intervention in the court of appeals 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) (citing *Bldg. & Constr. Trades Dep’t v. Reich*, 40 F.3d 1275, 1282-83 (D.C. Cir. 1994)). Thus, upon timely motion, this Court must permit a party to intervene if the movant “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); see *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008). “In deciding whether a party may intervene as of right,” therefore, this Court “employ[s] a four-factor test requiring: 1) timeliness of the application to intervene; 2) a legally protected interest; 3) that the action, as a practical matter,

impairs or impedes that interest; and 4) that no party to the action can adequately represent the potential intervenor's interest." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015). Where an unfavorable court decision will inflict concrete injury upon a movant, the prospect of that injury establishes the type of interest in the action that warrants intervention. *See, e.g., id.* at 317; *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).

Because each requirement for intervention is met here, Senator Brown and Representative Waters must be permitted to intervene.

#### **A. This Motion Is Timely**

Filed as soon as practicable after it became clear that the change in Administration might lead movants' interests to no longer be adequately represented, this motion to intervene is timely. While Federal Rule of Appellate Procedure 15(d) prescribes a default period of 30 days for "a person who wants to intervene in a proceeding" challenging agency action, Fed. R. App. P. 15(d), the Rules also make clear that "[f]or good cause, the court may extend the time prescribed by these rules . . . to perform any act, or may permit an act to be done after that time expires," *id.* R. 26(b). Indeed, as this Court has made clear, the timeliness of a motion to intervene "is to be judged in consideration of all of the circumstances," including the time that has passed since the suit was brought, the reason for intervention, and the risk of prejudice to the existing parties. *Amador*

*Cty., Cal. v. U.S. Dep't of Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014) (quoting *United States v. British Am. Tobacco Austl. Servs., Ltd.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006)).

With respect to the first factor, “courts measure elapsed time from when the ‘potential inadequacy of representation [comes] into existence.’” *Id.* at 904 (quoting *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (alteration in original)). Thus, there is no need for parties who have a real interest in the case to intervene, so long as their interests are being adequately represented by the existing parties. Here, movants’ interests have thus far been adequately represented by the CFPB, which has zealously defended the constitutionality of the law movants helped pass, including petitioning for *en banc* review of the panel’s decision.

Recently, however, it has become increasingly clear that movants’ interests may no longer be adequately represented by the new Administration. Significantly, when President Trump was elected in November, it was less evident that his Administration might fail to adequately represent movants’ interests in a zealous defense of the constitutionality of the CFPB’s structure. After all, the executive branch generally defends duly enacted laws, *see* Letter from Eric H. Holder, Jr., Att’y Gen. of the United States, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> (“the

Department [of Justice] has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense”), and although candidate Trump at times expressed hostility to Dodd-Frank, he at no point during the campaign “specifically endorse[d] any plan to alter the CFPB.” Kate Berry & Ian McKendry, *CFPB’s Precarious Future Under Trump*, Nov. 9, 2016, <http://www.americanbanker.com/news/law-regulation/cfpbs-precarious-future-under-trump-1092356-1.html>. Indeed, during the campaign, candidate Trump often spoke in populist terms about the need to protect American workers and consumers, Geoff Dyer et al., *Trump and Clinton Focus Frantic Final Push on Battleground States*, *Fin. Times*, Nov. 6, 2016 (discussing Trump’s “populist message”)—exactly what the CFPB has been doing under the leadership of its current director, Richard Cordray.

As the presidential transition unfolded, however, it became increasingly clear that the new Administration’s interests and movants’ interests were unlikely to align regarding the future of the CFPB and the constitutionality of the Bureau’s structure. President-elect Trump appointed prominent critics of financial regulation to his CFPB landing team, *see, e.g.*, Brena Swanson, *Former SEC Commissioner Named to CFPB Landing Team by Trump Transition Team*, *Housingwire*, Nov. 22, 2016, <http://www.housingwire.com/articles/38589-former-sec-commissioner-named-to-cfpb-landing-team-by-trump-transition-team>, and



increasingly there have been signals that the new Administration may seek to replace the CFPB's current director, *see, e.g.*, Elizabeth Dexheimer, *GOP Push To Kill Key Consumer-Protection Agency Poses Risks*, Chi. Trib., Dec. 26, 2016, <http://www.chicagotribune.com/business/ct-consumer-protection-agency-risks-20161223-story.html> (“Trump’s transition advisers already are evaluating ways to legally fire CFPB Director Richard Cordray, according to people familiar with the matter.”); *see also* Gregory T. Angelo, *Donald Trump Should Fire Richard Cordray*, The Hill, Jan. 5, 2017, <http://thehill.com/blogs/congress-blog/economy-budget/312830-donald-trump-should-fire-richard-cordray>; Yuka Hayashi, *Critics Look for Opening To Fire Head of the CFPB*, Wall St. J., Dec. 27, 2016, <http://www.wsj.com/articles/fight-over-cfpb-chief-richard-cordray-heats-up-1482836402>; Jamie Lovegrove, *Ex-Congressman from Lubbock Meets with Trump about Consumer Protection Post*, Dallas Morning News, Jan. 12, 2017, <http://www.dallasnews.com/news/politics/2017/01/12/ex-congressman-lubbock-meets-trump-consumer-protection-post>; *cf.* Letter from Maxine Waters, Rep., U.S. House of Representatives, et al., to Donald Trump, President-elect of the United States (Jan. 9, 2017), [http://democrats.financialservices.house.gov/uploadedfiles/cmw\\_cfpb\\_letter\\_-\\_01.09.2017.pdf](http://democrats.financialservices.house.gov/uploadedfiles/cmw_cfpb_letter_-_01.09.2017.pdf); Press Release, Sherrod Brown, Sen. for Ohio, Banking Committee Democrats: Trump Administration Needs Cordray as Consumer

Watchdog (Jan. 17, 2017), <https://www.brown.senate.gov/newsroom/press/release/banking-committee-democrats-trump-administration-needs-cordray-as-consumer-watchdog>. In sum, the evidence that has steadily accumulated since the election has now made it apparent that movants cannot count on the new Administration to represent their interests in this litigation.

Given that it has only recently become apparent that movants' interests may no longer be adequately represented—and, indeed, President Trump took office less than a week ago—this first factor weighs in favor of permitting intervention. *See, e.g., Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004) (“courts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court”), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009); *Smoke*, 252 F.3d at 471 (intervention motion is timely where movants did not intervene until the government actually “equivocated about whether it would appeal the adverse ruling of the district court”).

With regard to the second factor, movants' reasons for intervening are significant, as explained in greater detail below. In short, it is possible that the new Administration could prevent review of the panel decision in this case—either by attempting to fire the CFPB's current director, or by prohibiting the Bureau from seeking Supreme Court review should this Court decline to grant the pending

petition for *en banc* review. If that were to occur, movants' votes to create the CFPB as an independent agency would be nullified without full judicial consideration of the constitutionality of the agency's structure. Only through intervention can movants ensure that there will be a zealous defense of the constitutionality of the law they worked to pass and for which they voted.

Finally, and perhaps most significantly, intervention will not prejudice the existing parties. *See Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) ("The requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties."); *Amador Cty.*, 772 F.3d at 905 ("the length of time passed is not in itself the determinative test" because "we do not require timeliness for its own sake" (internal quotation marks omitted)). If this Court grants *en banc* review, movants will file their brief in accordance with any schedule adopted by the Court. If other parties' motions for intervention are also granted, movants will coordinate with those additional intervenors to try to prevent repetitive briefing. And if this Court declines to grant *en banc* review, movants will file a petition for *certiorari* with the Supreme Court according to the timeline prescribed by the Supreme Court rules. Thus, granting intervention should not affect the scheduling of the case. *Cf.* *Amador Cty.*, 772 F.3d at 905 ("delay caused by a potential intervenor was sufficient to constitute prejudice where a decision on the merits was pending").

In short, because the “potential inadequacy of representation came into existence only at the appellate stage,” *Smoke*, 252 F.3d at 471—and even then, only recently—and because intervention will not “*unfairly* disadvantage[] the original parties,” *Amador Cty.*, 772 F.3d at 905 (emphasis in original) (internal quotation marks omitted); *Amalgamated Transit Union Int’l v. Donovan*, 771 F.2d 1551, 1552-53 (D.C. Cir. 1985), this motion is timely.

### **B. Movants Have a Legally Protected Interest in this Action**

The outcome of this action threatens to inflict concrete injury on movants, giving them a legally protected interest in the action.

When a proposed intervenor demonstrates standing under Article III, that “is alone sufficient to establish that the [intervenor] has ‘an interest relating to the property or transaction which is the subject of the action.’” *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)(2)); see *Crossroads Grassroots Policy Strategies*, 788 F.3d at 320 (“since Crossroads has constitutional standing, it *a fortiori* has an interest relating to the property or transaction which is the subject of the action” (quotation marks omitted)). The prospect of an unfavorable court decision can give rise to an injury in fact sufficient to establish standing and a right to intervene. See, e.g., *id.* at 317; *Dimond*, 792 F.2d at 192. Thus, a legally protected interest arises when intervenors “would suffer concrete injury if the court grants the relief the

petitioners seek.” *Military Toxics Project v. E.P.A.*, 146 F.3d 948, 954 (D.C. Cir. 1998).

That is the case here. Because the panel’s decision transforms the CFPB into an executive agency, movants’ considered votes establishing the Bureau as an *independent* agency “have been completely nullified,” *Raines v. Byrd*, 521 U.S. 811, 823 (1997), giving rise to an injury in fact under *Coleman v. Miller*, 307 U.S. 433 (1939); *see Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000) (interpreting “nullify” to mean “treating a vote that did not pass as if it had, or vice versa”); *Chenoweth v. Clinton*, 181 F.3d 112, 116-17 (D.C. Cir. 1999) (noting that legislator standing based on vote nullification under *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), is not foreclosed by *Raines*).

In addition to nullifying movants’ votes establishing the Bureau’s independence, the panel’s ruling also prevents movants from voting to create independent agencies led by single directors in the future. *Cf. Raines*, 521 U.S. at 824 (“Nor can [plaintiffs] allege that the Act will nullify their votes in the future in the same way that the votes of the *Coleman* legislators had been nullified.”). After all, movants are “powerless” to undo the panel’s constitutional ruling, and thus, as in *Coleman*, they “ha[ve] no legislative remedy.” *Campbell*, 203 F.3d at 23; *see id.* at 24 (“the [*Raines*] Court denied [legislators] standing as congressmen because they possessed political tools with which to remedy their purported injury”).

Further, because this controversy is not “susceptible to political resolution,” intervention by these members of Congress does not implicate “separation-of-powers problems.” *Campbell*, 203 F.3d at 21. Movants do not seek to revive failed legislative efforts in a judicial forum, *cf. Raines*, 521 U.S. at 824 (“[T]heir votes were given full effect. They simply lost that vote.”), nor to assert that the executive branch has acted “in excess of statutory authority” or done “something Congress voted against.” *Campbell*, 203 F.3d at 22. Instead, the posture of this litigation has created an “unusual situation,” *id.*, in which a panel ruling of this Court has injured movants but—absent intervention—executive branch acquiescence in that ruling may insulate it from review.

In such a situation, separation-of-powers concerns weigh *in favor* of permitting movants to intervene, because legislators have a particularly strong interest in defending laws that the executive branch has declined to defend. *See I.N.S. v. Chadha*, 462 U.S. 919, 939 (1983) (“Congress is . . . a proper party to defend the constitutionality of [the statute.]”); *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 787 F.2d 875, 888 n.8 (3d Cir. 1986) (“Congress has standing to intervene whenever the executive declines to defend a statute”); *Windsor v. United States*, 797 F. Supp. 2d 320, 324 (S.D.N.Y. 2011) (“courts have permitted Congress to

intervene as a full party in numerous cases where the Executive Branch declines to enforce a statute that is alleged to be unconstitutional” (citing cases)).<sup>1</sup>

“[I]n the intervention area the ‘interest’ test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 910-11 (D.C. Cir. 1977) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). Because the panel’s holding injures movants by nullifying their votes in favor of an independent CFPB, as well as by preventing them from voting to create independent agencies led by single directors in the future, while a contrary result after *en banc* rehearing would redress that injury, movants have standing, and therefore an interest sufficient to intervene.

### **C. This Action Threatens To Impair Movants’ Interest**

In addition to having the requisite interest in this action, movants are “so situated that disposing of the action may as a practical matter impair or impede

---

<sup>1</sup> While these cases involve Congress as a body intervening, or authorizing a subset of legislators to do so, there is no reason why the same principle should not apply when individual legislators who have suffered injury seek to defend a statute that the executive branch is declining to defend. *See Moore v. U.S. House of Representatives*, 733 F.2d 946, 952 (D.C. Cir. 1984) (“[T]he fact that the House as a body may have been injured . . . does not negate an injury in fact to the individual members . . . . Standing principles do not require that a party be the most grievously injured, only that he be ‘among the injured.’”); *see also Raines*, 521 U.S. at 822 (explaining that *Coleman* involved individual legislators “suing as a bloc”).

[their] ability to protect [that] interest.” Fed. R. Civ. P. 24(a)(2); *see Nuesse*, 385 F.2d at 701 (explaining that this prong of the intervention test was “designed to liberalize the right to intervene in federal actions”).

Depending on how this litigation unfolds, the new Administration might be able to remove Director Cordray without cause and begin directing the CFPB’s litigation decisions, thus preventing it from further defending Dodd-Frank’s removal protections. Alternatively, the new Administration could attempt to remove Director Cordray for cause, as various commentators have urged, *see, e.g., Angelo, supra*, to achieve the same result. Either way, if the CFPB, acting at the direction of the new Administration, ceases its efforts to undo the panel’s constitutional ruling, there will be no party challenging that ruling in this Court, and thus movants’ votes to establish the Bureau as an independent agency will be nullified without full judicial review of the constitutional question presented in this case. Movants’ interests will likewise be impaired if the new Administration’s Department of Justice refuses to allow the Bureau to seek *certiorari* review of the panel decision, or of a similar ruling issued after *en banc* rehearing. *See* 12 U.S.C. § 5564(e).

Moreover, because movants are seeking to defend rather than challenge the constitutionality of the Dodd-Frank Act, “if the right to intervene is denied and the decision below becomes final, there is no apparent way for [them] to pursue their



interests in a subsequent lawsuit.” *Smuck v. Hobson*, 408 F.2d 175, 180-81 (D.C. Cir. 1969). Thus, “their interests would ‘as a practical matter’ be affected by a final disposition of this case without appeal.” *Id.* at 181. Although similar constitutional challenges to the Bureau’s leadership structure are being waged in other courts, the new Administration can prevent contrary rulings in those actions through the same means that it can prevent review of this Court’s panel decision.<sup>2</sup>

Finally, these movants have “particular, separate interests” in ensuring that their votes are not nullified absent full judicial review and in upholding the CFPB’s independence—interests that are aligned with, but not identical to, those of the other parties seeking to intervene in this action. *Costle*, 561 F.2d at 911. Because

---

<sup>2</sup> Even if movants did have an opportunity to advance their interests in a different action, that would not negate their right to intervene here. “[I]t is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation.” *Costle*, 561 F.2d at 910. Rather, because movants’ involvement in this action “may lessen the need for future litigation to protect their interests,” they are entitled to intervene. *Id.* at 911; *accord Fund For Animals*, 322 F.3d at 735. That is especially true because the persuasive value of a decision from this Court declaring the CFPB’s leadership structure unconstitutional may reduce the chances of obtaining a contrary result elsewhere. *See Crossroads Grassroots Policy Strategies*, 788 F.3d at 320 (“should Public Citizen seek a subsequent civil enforcement suit, the district court’s ruling would have persuasive weight with a new court”); *Roane*, 741 F.3d at 151 (“a decision rejecting the inmates’ claims could establish unfavorable precedent that would make it more difficult for [the intervenor] to succeed on similar claims if he brought them in a separate lawsuit of his own”); *Nuesse*, 385 F.2d at 702 (“Should this court on appeal render a decision in the Commissioner’s absence, and contrary to his view, he would presumably be hampered in seeking to vindicate his approach in another court.”).

intervention, as a practical matter, is the *only* means through which movants can protect those interests from being impaired, this requirement for intervention as of right is satisfied.

#### **D. Movants' Interests May Not Be Adequately Represented**

Movants' interests in this action may not be represented adequately by the existing parties. As explained above, indications have been accumulating steadily in recent weeks that the new Administration will seek to remove Director Cordray and, using its new control over the CFPB's litigating decisions, cease defending the constitutionality of the Bureau's independent status under Dodd-Frank. Even if this does not occur, the new Administration's Department of Justice may refuse to allow the Bureau to seek Supreme Court review of this Court's panel decision, or of any similar decision issued after *en banc* rehearing.

These circumstances easily satisfy the "minimal" burden imposed by the fourth prong of Rule 24(a)(2), which this Court has described as "'not onerous,'" *Fund For Animals*, 322 F.3d at 735 (quoting *Dimond*, 792 F.2d at 192), and which "is satisfied if the applicant shows that representation of his interest '*may be*' inadequate." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (emphasis added).

Because movants have an interest in preventing nullification of their landmark votes establishing the CFPB as an independent agency and in ensuring

that they can vote to create independent agencies led by single directors in the future, because those interests risk being impaired in this action, and because the existing parties may not adequately represent those interests, movants are entitled to intervene so that they may challenge the unprecedented and far-reaching decision of the panel in this case.

## **II. In the Alternative, this Court Should Grant Movants Permissive Intervention**

For essentially the reasons explained above, movants satisfy the standard for permissive intervention under Federal Rule of Civil Procedure 24, which permits “anyone to intervene who . . . 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). Here, movants seek nothing more than to defend the main action, just as the CFPB has done up to this point. Moreover, intervention would not “unduly delay or prejudice the adjudication of the original parties’ rights,” *id.* R. 24(b)(3), because movants seek only to adjudicate the rights of the original parties, so as to ensure that future actions by the executive branch do not insulate the panel’s decision from review.

## CONCLUSION

This Court should grant the motion for leave to intervene.

Respectfully submitted,

/s/ Elizabeth B. Wydra

Elizabeth B. Wydra

Brianne J. Gorod

Brian R. Frazelle

Simon Lazarus

CONSTITUTIONAL ACCOUNTABILITY CENTER

1200 18th Street, N.W.

Suite 501

Washington, D.C. 20036

(202) 296-6889

[elizabeth@theusconstitution.org](mailto:elizabeth@theusconstitution.org)

*Counsel for Movants*

Dated: January 26, 2017

**CERTIFICATE OF PARTIES AND DISCLOSURE STATEMENT**

Pursuant to D.C. Circuit Rules 27(a)(4), movants certify that except for those parties who have moved for invitation to file briefs as *amici curiae* in support of Respondent's petition for rehearing *en banc* (all of whose motions are pending as of the date of this filing), all parties, intervenors, and *amici* appearing in this Court are listed in the Addendum to Respondent's petition for rehearing *en banc*. Movants further state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

Executed this 26<sup>th</sup> day of January, 2017.

/s/ Elizabeth B. Wydra

Elizabeth B. Wydra

*Counsel for Movants*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 27, movants certify that this motion complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 4,905 words. Movants further certify that this motion 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 has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point Times New Roman font.

Executed this 26<sup>th</sup> day of January, 2017.

/s/ Elizabeth B. Wydra

Elizabeth B. Wydra

*Counsel for Movants*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on January 26, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 26<sup>th</sup> day of January, 2017.

/s/ Elizabeth B. Wydra

Elizabeth B. Wydra

*Counsel for Movants*