[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

PETITION FOR REHEARING *EN BANC* OF DENIAL OF 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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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 AGs") hereby move for a rehearing *en banc* of the panel's *per curiam* denial of the State AGs Motion to Intervene.

STATEMENT OF EXCEPTIONAL IMPORTANCE

This matter involves an issue of exceptional importance under Fed. R. App. P. 35(b) for the following reasons.

First, denying the motion to intervene prevents the State AGs from defending their sovereign enforcement interest in maintaining an independent Consumer Financial Protection Bureau (CFPB) Director with whom the State AGs are required to consult prior to exercising their own statutory responsibility to enforce federal financial consumer protection law. Federal law authorizes the State AGs to enforce provisions of the Consumer Financial Protection Act (CFPA) and the regulations that the CFPB issues pursuant to the CFPA. *See* § 12 U.S.C. 5552(a)(1). The State AGs are required to exercise their statutory responsibilities in consultation with the CFPB. *See* 12 U.S.C. § 5552(b). Additionally, the CFPB is authorized to intervene in any suit that the State AGs have authority to bring under the CFPA. *Id.*

If the underlying decision stands, the State AGs' consultations with the CFPB Director and any decision by the Director to intervene in the State AGs' financial consumer protection lawsuits will necessarily reflect the political views of the president of the day. Such a circumstance is antithetical to the current statutory framework in which the State AGs exercise sovereign enforcement authority in consultation with a CFPB Director insulated from the changing views of whomever may be president. Under current law, the State AGs exercise their statutory responsibilities under the CFPA alongside a CFPB Director who is independent. Today, when the State AGs and the CFPB make decisions on whether to cooperate on overlapping investigations, share investigative documents and materials, bring coordinated legal actions, or enter into coordinated legal settlements, those decisions are made by an independent CFPB Director, insulated from the political views of the current administration. *See also* 12 U.S.C. § 5552(c) (directing the CFPB to coordinate regulatory actions with state attorneys general). Such a fundamental change in the CFPA's statutory framework is of exceptional importance because it directly affects how the State AGs exercise their own sovereign enforcement responsibilities under the CFPA.

Second, this matter involves an issue of exceptional importance because an independent CFPB was expressly created to combat the regulatory failures that led to the worst financial crisis in eighty years. *See The Restoring American Financial*

Stability Act of 2010, Senate Rept. 111-176, at 39 (finding that the financial crisis cost 8 million U.S. jobs and erased $13 trillion in American household wealth); at 40 (finding that "[t]his devastation was made possible by a long-standing failure of our regulatory structure to keep pace with the changing financial system …"); at 166 (finding that "it was the failure by the prudential regulators to give sufficient consideration to consumer protection that helped bring the financial system down."). If there is to be a judicial imposition of such a fundamental change in the CFPB's structure so as to make its Director an at-will employee, there should be an adequate defense of the CFPA's constitutionality. Unfortunately, the Trump administration has made it plain that it will not provide an adequate defense in this litigation. *See* Mot. to Intervene of State AGs at 4 (listing news articles); *see also* Mot. to Intervene of Sen. Brown and Rep. Waters, at 10-11 (same); and Mot. to Intervene of Americans for Financial Reform, et al., at 3, n.1 (same). For example, in a patent reference to the CFPB and this litigation, on February 3, 2017, the White House spokesman referred to the Dodd-Frank legislation as "disastrous policy" and "establishing an unaccountable and unconstitutional new agency that does not adequately protect consumers." *See* Press Briefing by Press Secretary Sean Spicer, Feb. 3, 2017, copy available at https://www.whitehouse.gov/the-press-office/2017/02/03/press-briefing-press-secretary-sean-spicer-232017-8. When asked directly whether the administration intended to fire CFPB Director Richard

Cordray, Mr. Spicer said, "I don't have a staff announcement on the CFPB right now, but we'll see where we go." *Id.*

The Trump administration is, of course, entitled to its policy views. Nevertheless, in light of these views, it is clear that the Trump administration does not intend to provide an adequate representation to defend the constitutionality of an independent CFPB Director in any *en banc* review, or in assessing the legal merits of any appeal to the U.S. Supreme Court. Moreover, even if the CFPB is (as of this writing) defending this case, the Trump administration has made it clear that it may fire Director Cordray at any time and replace him with a Director that shares the President's views of the constitutionality of the CFPB. *See Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (stating that intervention requires only that "the applicant shows that representation of his interest '*may be*' inadequate."). Given these circumstances, it is the State AGs that can provide an adequate representation to defend the constitutionality of an independent CFPB Director and denial of their motion to intervene denies the State AGs that opportunity.

GROUNDS FOR INTERVENTION

It is urgent that the State AGs intervene in order to protect the interests of their States and their States' citizens in an independent CFPB. Because the Trump administration has indicated it may fire CFPB Director Cordray and that it opposes

an independent CFPB Director, the federal parties may not continue an adequate defense of this litigation. 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 AGs and the citizens of the States that they represent. *See* Thomas Boyd, *The Fastest Way to Fire Richard Cordray*, Wall Street Journal (Feb. 7, 2017) (advocating that President Trump simply order Director Cordray to withdraw this appeal or be fired), copy available at https://www.wsj.com/articles/the-fastest-way-to-fire-richard-cordray-1486511893. Intervention by the State AGs will not prejudice any party and their interests. Intervention will also benefit the Court by providing it with the unique perspective of the State AGs as parties with direct enforcement authority under the CFPA and who statutorily are required under the CFPA to work in consultation with the CFPB Director.

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

The State AGs have significant and legally protected interests in the effective enforcement of federal consumer finance protection laws, in which they themselves have a legally recognized, sovereign 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 AGs filed this motion promptly after it appeared that their interests might no longer be protected. Therefore, this motion is timely. There is no need for an intervenor to file a motion until a potential inadequacy in representation comes into existence. *Amador Cty. v. U.S. Dep't of Interior*, 772 F.3d 901, 904 (D.C. Cir. 2014). In determining when a potential inadequacy of representation comes into existence, a court should consider all the relevant circumstances,

Amador at 903, and, even then, a court may still extend the time for filing a motion for good cause shown, *see* Fed. R. Civ. P. 26(b).

Here, the State AGs assert that the potential inadequacy of representation did not come into existence until very recently when it became apparent that the Trump administration was intent on firing Director Cordray. *See* Mot. to Intervene of State AGs at 4 (listing news articles); *see also* Mot. to Intervene of Sen. Brown and Rep. Waters, at 10-11 (same); and Mot. to Intervene of Americans for Financial Reform, et al., at 3, n.1 (same). Until the Trump administration's intention to fire Director Cordray became apparent, the State AGs had every reason to expect that the CFPB would continue to adequately defend the constitutionality of its independent Director. Indeed, because Director Cordray (as of this writing) has not been actually fired, this motion might be more easily characterized as early, rather than late. Regardless, courts generally consider motions to intervene in a "'flexible and discretionary' way, considering 'all four factors as a whole rather than focusing narrowly on any one of the criteria.'" *Windsor v. U.S.*, 797 F. Supp. 2d 320, 323-24 (S.D.N.Y. 2011) (citation omitted). Applying this common sense approach, the Trump administration's public discussion of whether to fire Director Cordray, coupled with the administration's stated preference for less financial regulation, cannot but chill CFPB's ability to adequately represent the State AGs' interest in an independent CFPB Director. *Cf. Cheng Fan Kwok v. INS*, 392 U.S.

206, 210 n.9 (1968) (the Supreme Court inviting a private member of its Bar to appear and present oral argument after the INS agreed with the petitioner's view that the relevant statute was unconstitutional in that it violated the separation of powers doctrine). Thus, the State AGs' motion to intervene is timely now.

Moreover, the timing of the motion also does not prejudice any party to this case. The State AGs do not propose to file additional briefs in this matter unless the Court orders briefing for the *en banc* proceedings and the State AGs will comply with whatever schedule the Court sets. Intervention will not prejudice the CFPB because the State AGs 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 AGs 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. The State AGs Have A Legally Protected Interest In This Action.

The State AGs 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 AGs have a sufficiently concrete stake in the outcome of this litigation to support intervention based on their statutory role in enforcing the CFPA. Pursuant to the CFPA, the State AGs are authorized to bring sovereign 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 AGs in states across the country have exercised this authority to bring 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 AGs 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 decided the CFPB should be headed by an independent Director who would intervene or take other actions free from the political influence inherent in at-will removal by the president of the day. Removal of the Director's independence as a result of this Court's ruling would turn Congress' intent on its head. When the State AGs and the CFPB make decisions on whether to cooperate on overlapping investigations, share investigative documents and materials, bring coordinated legal actions, or enter into coordinated legal settlements, those decisions would not be insulated from the shifting political views of whomever may be president.

Having a director who is independent of political influence is also critical to the ability of State AGs 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. *See* Press Release of AG Jepsen, July 8, 2015, at 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, 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. *See* Press Release of AG Jepsen and Commissioner of Consumer Protection Jonathan Harris of May 12, 2015, at 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 AGs to bring effective civil enforcement and coordinated regulatory actions free from political influence and interference, the State AGs have a vital interest in intervening in this case.

C. This Action Threatens To Impair Movants' Interest.

Should the CFPB forgo further defense of this action, the interests of the State AGs, 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 CFPB, 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 AGs and their States' citizens will be directly prejudiced. These facts satisfy 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 AGs could be vindicated or repaired in some other litigation. If the CFPB does not defend the law, the institutional ramifications to the independence

of the CFPB – and the State AGs' interest in preserving that independence – are clear.

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

The interests of the State AGs will not be adequately represented by the executive branch because it is clear that the Trump administration will not defend the constitutionality of an independent CFPB Director. Additionally, if Director Cordray is removed, he will certainly be replaced by a person opposed to maintaining an independent CFPB Director. It is also likely that even if Director Cordray remains in office, the Department of Justice 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 shows 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 AGs are adequately protected in this litigation.

II. Alternatively, Permissive Intervention Should Be Granted.

The State AGs 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 AGs, if permitted to intervene, would have a defense that would share a common question of law with the main action because the State AGs will only 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 AGs 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. Accordingly, permissive intervention is warranted.

CONCLUSION

This Court should grant this motion for rehearing *en banc* and grant the State AGs' motion to intervene.

INTERVENOR
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/s/ Matthew J. Budzik
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Dated: February 10, 2017

CERTIFICATION OF SERVICE

I hereby certify that on this 10th day of February, 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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ADDENDUM

1) *PHH Corp. v. CFPB,* No. 15-1177 (D.C. Cir. Feb. 2, 2017) (Per Curiam Order of Panel on Motion to Intervene).

2) Certificate of Parties and Amici (Circuit Rule 28(a)(1)(A).

3) Disclosure Statement (Curcuit Rule 26.1).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1177 **September Term, 2016**

CFPB-2014-CFPB-0002

Filed On: February 2, 2017

PHH Corporation, et al.,

Petitioners

v.

Consumer Financial Protection Bureau,

Respondent

BEFORE: Henderson and Kavanaugh, Circuit Judges; Randolph, Senior Circuit Judge

ORDER

Upon consideration of the motion of 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, Washington, and the District of Columbia for leave to intervene, and the opposition thereto; the motion of Senator Sherrod Brown and Representative Maxine Waters for leave to intervene, and the opposition thereto; and the motion of Americans for Financial Reform, Maeve Brown, Center for Responsible Lending, Leadership Conference on Civil and Human Rights, Self-Help Credit Union, and United States Public Interest Research Group, Inc. for leave to intervene, it is

ORDERED that the motions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

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.