[[ORAL ARGUMENT HELD APRIL 12, 2016]]

No. 15-1177

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

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PHH CORPORATION; PHH MORTGAGE CORPORATION; PHH HOME LOANS, LLC; ATRIUM INSURANCE CORPORATION; and ATRIUM REINSURANCE CORPORATION,

*Petitioners*,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

*Respondent*.

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On Petition for Review of an Order of the Consumer Financial Protection Bureau
(CFPB File 2014-CFPB-0002)

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# MOTION OF SENATOR SHERROD BROWN AND REPRESENTATIVE MAXINE WATERS FOR EN BANC RECONSIDERATION OF DENIAL OF MOTION FOR LEAVE TO INTERVENE

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## MOTION FOR RECONSIDERATION BY THE FULL COURT

Movants Senator Sherrod Brown and Representative Maxine Waters respectfully move this Court to reconsider, *en banc*, the February 2, 2017, denial of their motion to intervene (*see* Addendum).

## STATEMENT OF EXCEPTIONAL IMPORTANCE

This matter involves an issue of exceptional importance under Fed. R. App. P. 35(b) because, as discussed *infra*, intervention is necessary to ensure that the panel's significant constitutional ruling is fully reviewed by the judiciary.

## INTRODUCTION AND SUMMARY

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, movants 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). As an independent agency focused solely on protecting American consumers from harmful practices of the financial services industry, the CFPB was designed to prevent a recurrence of the problems that helped foster the 2008 financial crisis and near-collapse of the American economy.

In this action, brought by petitioner PHH Corporation to contest a CFPB enforcement order, a divided panel of this Court concluded that the Bureau's leadership structure is unconstitutional. *See PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016). The panel therefore severed the provision of Dodd-Frank that protects the CFPB Director from removal without cause, converting the Bureau into an executive agency subject to the policy direction of the President. *Id.* at 39. The Bureau petitioned for rehearing *en banc* of the panel decision, and the Department of Justice submitted a filing supporting that request, which is pending.

Late last month, movants moved to intervene in this action because recent events made clear that their interests in preserving the CFPB leadership structure for which they voted may not be adequately represented by the new Administration, and they wanted to ensure that the panel's decision on this important constitutional question would not be insulated from full review by the courts. *See* Mot. of Sen. Sherrod Brown and Rep. Maxine Waters for Leave to Intervene (Jan. 26, 2017) (Mot.). As movants explained in their motion, if the panel decision is allowed to stand without full review by the courts, they will have suffered concrete injury: their votes in favor of the CFPB's independent status will have been nullified, as would the effect of any votes establishing single-director independent agencies in the future. It is, of course, true that members of Congress suffer no judicially actionable injury if the courts, after full review, conclude that a

piece of legislation for which they voted is unconstitutional; the same is not true if a panel decision reaching that conclusion is insulated from further review by the executive branch's unwillingness to defend the law. Because recent events strongly suggest that may happen here, movants sought to intervene to ensure that the law is zealously defended throughout the court system. PHH opposed that motion, and on Feb. 2, 2017, the panel denied the motion without explanation, along with the intervention motions of two other groups of intervenors.

This Court should grant the motion to intervene. First, it is imperative that the panel's far-reaching decision be subject to full consideration by the judiciary. Allowing movants to intervene is the only way to ensure that this ruling will not be artificially shielded from review at the whim of the President—the very individual whose power the ruling increases. Second, movants have standing to intervene, and the arguments to the contrary that PHH offered in opposing the motion are meritless. Finally, movants have satisfied each of the other criteria for intervention.

In the alternative to granting the motion, this Court should hold it in abeyance pending further developments in this case.

## ARGUMENT

### I. The Motion To Intervene Should Be Granted

#### A. Intervention Is Needed To Ensure that the Panel's Significant Constitutional Ruling Is Fully Reviewed by the Judiciary

The panel decision in this case concluded that a law can violate the Constitution's separation of powers without diminishing the power of any branch of government. Based on that novel proposition, the panel fundamentally altered a major federal agency that Congress established to address of one of the worst crises ever to confront the nation—undermining that agency's ability to play the role that Congress intended. *See* Mot. at 1-5. In addition, the panel decision forever prohibits Congress from establishing other independent agencies with "authority to enforce laws against private citizens" that are led by single directors. *PHH Corp.*, 839 F.3d at 20. And perhaps most broadly, the decision arrogates to the judiciary a right to strike down any administrative structure that, in a court's view, "threatens individual liberty," *id*. at 34, untethered from any specific constitutional imperative.

A ruling like this, it should go without saying, should not be artificially shielded from the review to which lower appellate court decisions are normally subject in our judicial system. Still less should the choice to insulate this decision from review rest in the hands of the executive branch. When a court decision increases the power of the President at the expense of Congress, the President

should not be able to unilaterally deprive the judicial branch of its ability to fully consider whether that decision is correct.[1]

As explained in the motion to intervene, however, an unusual sequence of events has created a risk of precisely this outcome. There is a distinct possibility 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, the Administration will have prevented full judicial consideration of the constitutionality of the Bureau's structure. More generally, it will have prevented full judicial consideration of a decision that significantly enhances its own power vis-à-vis Congress. Only through intervention can movants prevent that result, by ensuring

[1] In its opposition to movants' motion, PHH argued that "the CFPA commits to the Attorney General (who is accountable to President) the exclusive discretion to decide whether [a petition for *certiorari*] shall be filed." Pet'rs' Opp. to Mot. at 7 (citing 12 U.S.C. § 5564(e)). But the provision PHH cites, which requires the Bureau to notify the Department of Justice before "represent[ing] itself in its own name before the Supreme Court," merely provides the Department an opportunity to have the Solicitor General's Office handle litigation at the Supreme Court. It hardly suggests an intent on Congress's part to allow the Attorney General to insulate significant constitutional rulings from Supreme Court review. Significantly, 28 U.S.C. § 530D(a) requires the executive branch to notify Congress when it decides not to defend a law, precisely to ensure that the executive branch does not have the final say regarding whether laws are zealously defended in court. *Cf.* Mem. for the Hon. Abner J. Mikva, Counsel to the President, 18 U.S. Op. Off. Legal Counsel 199, 200 (Nov. 2, 1994) ("The Supreme Court plays a special role in resolving disputes about the constitutionality of enactments.").

that there will be a zealous defense of the constitutionality of the law they worked to pass and for which they voted.

**B. Movants Have Standing**

Because the outcome of this action threatens to inflict concrete injury on movants, they have standing to intervene. "In narrow circumstances, legislators have a judicially recognized, personal interest in maintaining the 'effectiveness of their votes.'" *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1337 (D.C. Cir. 1999) (quoting *Raines v. Byrd*, 521 U.S. 811, 822 (1997)). Specifically, when legislators' votes "have been completely nullified," *Raines*, 521 U.S. at 823, they may seek judicial redress to "have their votes given effect." *Coleman v. Miller*, 307 U.S. 433, 438 (1939); *see Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015) (reaffirming *Coleman*). Thus, this Court has repeatedly acknowledged that federal legislators like movants have standing to contest the alleged nullification of their past or future votes, stressing that "[n]o more essential interest could be asserted by a legislator." *Kennedy v. Sampson*, 511 F.2d 430, 436 (D.C. Cir. 1974); *see Goldwater v. Carter*, 617 F.2d 697, 702-03 (D.C. Cir. 1979) (*en banc*), *vacated on other grounds*, 444 U.S. 996 (1979); *Moore v. U.S. House of Representatives*, 733 F.2d 946, 951-53 (D.C. Cir. 1984).

The injury now threatening movants fits squarely within this precedent. The panel decision in this case, if left in place, will eliminate the provision in Dodd-

Frank that protects the CFPB Director from removal at will, transforming the Bureau into an executive agency subject to the President's policy preferences. *PHH Corp.*, 839 F.3d at 39. Thus, movants' votes in favor of an *independent* Bureau capable of playing its intended role under Dodd-Frank will be undone. *See* Mot. at 1-5. It would be one thing if this came about because the courts held the provision unconstitutional after full review. It is quite another if it comes about only because the panel decision is artificially insulated from the review to which it normally would be subject in our judicial system. In the latter case, movants' votes will have been nullified within the meaning of *Coleman* and this Court's holdings.[2] Just as in *Coleman* and *Kennedy*, the legitimacy of movants' votes—which prevailed in the political process—will hinge entirely on the whims of the executive, unless movants are permitted to intervene to defend the law they enacted.[3]

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[2] Movants have not argued, therefore, that a legislator has standing "any time a court strikes down a statute for which he or she had voted." Opp. at 7. Rather, as explained, *see* Mot. at 16-17, the unusual sequence of events in this litigation has created a risk that movants' votes will be nullified by the executive branch's acquiescence in the panel decision.

[3] This Court has not overruled *Kennedy* or its other decisions recognizing standing based on vote nullification. In both *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), and *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), the legislator plaintiffs simply objected to purportedly illegal actions of the President. In both cases, the plaintiffs' claims were foreclosed by *Raines* because the injuries alleged were, at most, abstract dilutions of institutional authority, *Chenoweth*, 181 F.3d at 115; *Campbell*, 203 F.3d at 22, that were fully curable through legislative action, *Chenoweth*, 181 F.3d at 116; *Campbell*, 203 F.3d at 23. Neither case

Furthermore, movants are entitled to proceed as individual legislators apart from their respective institutions. Although PHH argues that individual legislators cannot suffer cognizable injuries, this Court's case law is to the contrary, *see supra* at 6-7, and neither *Raines* nor *Arizona State Legislature* overrules those cases.

*First*, the Supreme Court in *Raines* distinguished *Coleman*; it did not overrule it. *See Raines*, 521 U.S. at 824 & n.7 ("appellees' claim does not fall within our holding in *Coleman* . . . . appellees cannot show that their vote was denied or nullified as in *Coleman*"). As the Court explained in *Raines*, the plaintiffs there alleged only an "abstract dilution of institutional legislative power," which the Court distinguished from the "vote nullification at issue in *Coleman*." *Id*. at 826. Moreover, the *Raines* plaintiffs—unlike in *Coleman*—could cure their own purported injury simply by passing legislation. *Id.* at 824; *see Campbell*, 203 F.3d at 24.

*Second*, in *Arizona*, the plaintiff was a state legislature asserting an institutional injury to the legislative body as a whole—a loss of "authority to draw congressional districts." *Ariz. State Legislature*, 135 S. Ct. at 2659. Because the

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involved vote nullification. *See Chenoweth*, 181 F.3d at 117 (plaintiffs "cannot claim their votes were effectively nullified by the machinations of the Executive"); *Campbell*, 203 F.3d at 22 ("Neither claim [of the plaintiffs] is analogous to a *Coleman* nullification."). While the majority opinion in *Chenoweth* speculated about the possible effects of *Raines* on this Court's legislator-standing decisions, *see Chenoweth*, 181 F.3d at 116-17, that discussion "was dicta," *Campbell*, 203 F.3d at 154 n.6.

defendants argued that *Raines* foreclosed the legislature's standing, the Court explained why that was not so. In *Raines*, it said, there was a mismatch between the plaintiffs (individual legislators) and the alleged injury—a purely institutional grievance that "'necessarily [impacted] all Members of Congress and both Houses . . . equally.'" *Id*. at 2664 (quoting *Raines*, 521 U.S. at 821). There was no such mismatch in *Arizona*, because the state legislature was "an institutional plaintiff asserting an institutional injury." *Id*.

Thus, the most that could be said of *Arizona State Legislature*, as is relevant here, is that "individual legislators may not support standing by alleging *only* an institutional injury." *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214 (10th Cir. 2016) (emphasis added) (discussing *Arizona* and *Raines*). An "institutional injury," as defined by the Supreme Court, is one that necessarily damages "'*all* Members of Congress . . . equally.'" *Ariz. State Legislature*, 135 S. Ct. at 2664 (quoting *Raines*, 521 U.S. at 821 (emphasis added)). By contrast, vote nullification under *Coleman* injures only the individual legislators whose votes are nullified. *See Kerr*, 824 F.3d at 1215 ("Only the state senators [in *Coleman*] whose votes were allegedly nullified suffered an injury; the twenty senators who voted in favor of the amendment at issue were not aggrieved at all. Thus, *Coleman* did not concern injury to the power of the legislature as a whole."). The discussion in *Arizona*, therefore, leaves untouched the injury alleged here by movants.

In sum, movants risk being injured in a way that this Court's decisions have repeatedly recognized confers standing, and those decisions remain good law. And as explained, movants' intervention raises no separation-of-powers concerns, because they merely seek to defend a duly enacted law, not hale the President or their colleagues into court or prevail upon the judiciary to resolve a political controversy. If anything, the constitutional separation of powers weighs in favor of permitting members of Congress to defend laws that the executive branch will not. *See* Mot. at 16-17. Movants have standing to intervene.

**C. Movants Satisfy the Intervention Criteria**

Movants also meet the requirements for intervention as of right, having demonstrated "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 [that] interest." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015); *see* Fed. R. Civ. P. 24(a)(2).

Because movants have constitutional standing to intervene in this action, they necessarily have "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2); *see Crossroads*, 788 F.3d at 320. Moreover, disposing of the action "may as a practical matter impair or impede" their ability to protect that interest, which the existing parties may not "adequately

represent." Fed. R. Civ. P. 24(a)(2); *see* Mot. at 17-21. The only remaining question—and the only one that PHH contested—is whether the motion to intervene was "timely." Fed. R. Civ. P. 24(a).

As movants have explained, they sought to intervene as soon as practicable after it became clear that their interests may no longer be adequately represented because of the change in Administration. *See* Mot. at 8-14. Under the standards articulated by this Court, their motion was timely.

Timeliness is judged "in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *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)).

The first factor—time elapsed—is measured "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)). For the reasons explained in the motion, the potential inadequacy of representation in this case began only in December, as the presidential transition unfolded and signs first emerged that the new Administration would take a hostile stance toward the CFPB

and might seek to replace its current director. *See* Mot. at 9-12. As soon as the evidence made it apparent that movants could not count on the new Administration to represent their interests in this litigation, they acted—filing their motion within a week of President Trump's inauguration.[4]

With regard to the second and third factors, movants' reasons for intervening are significant, and they have no other recourse to preserve their rights. As previously explained, it is possible that the new Administration could prevent review of the panel decision in this case—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 happen, movants' votes conferring independent status on the CFPB would be nullified—deprived of their validity without full judicial consideration of the basis for that deprivation. Only through intervention can movants ensure that the law they enacted will continue to be zealously defended and that the panel decision will receive full consideration by the judiciary.

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[4] Such evidence has continued to accumulate since the motion's filing. *See, e.g.*, Michael C. Bender & Damian Paletta, *Donald Trump Plans to Undo Dodd-Frank Law, Fiduciary Rule*, Wall St. J., Feb. 3, 2017 (reporting remarks of White House National Economic Council Director Gary Cohn: "He also said that the White House wouldn't need a change in the law to redirect the mission of the Consumer Financial Protection Bureau . . . . He suggested the White House could influence the mission of the bureau, set up as an independent agency, by putting a new person at its helm to replace Richard Cordray, the agency's director. Asked about potential changes at the agency, he said, 'Personnel is policy.'").

Finally, intervention will not prejudice the existing parties, neither causing them any "unfair detriment" nor disrupting the litigation. *Amador Cty.*, 772 F.3d at 905; *see* Mot. at 13-14. Movants seek only to stand in the CFPB's shoes to defend Dodd-Frank should the new Administration prevent the Bureau from doing so. The CFPB did not oppose movants' intervention, and PHH offered no support for its conclusory assertion that it would be prejudiced. *See* Opp. at 12. It is not unfair to anyone to subject the panel decision in this case to the same opportunity for review as every other panel decision.

In opposing intervention, PHH also argued that movants should have sought to join this case at its inception, because they should have known that ultimately the Department of Justice might not defend the constitutionality of the Bureau. This does not pass the laugh test. Among other reasons, when President Obama signed the Act, he issued no signing statement, nor indicated in any way that he or the Justice Department viewed the CFPB Director's removal protections as problematic. To the contrary, he lauded the new agency.[5] Moreover, the Department of Justice has forcefully defended the CFPB's constitutionality against

[5] *See* Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010) ("[T]hese protections will be enforced by a new consumer watchdog with just one job: looking out for people—not big banks, not lenders, not investment houses—looking out for people as they interact with the financial system."), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act.

the very arguments advanced by PHH. *See* Combined Mem. in Support of Defendants' Cross-Mot. for Summary Judgment and Dismissal and in Opp. to Plaintiffs' Mot. for Summary Judgment, at 11-30, *State Nat'l Bank of Big Spring v. Lew*, No. 12-1032 (D.D.C. Jan. 8, 2016). The notion that movants should have intervened at the outset of this case—and by implication, should have done the same in every other case across the country where a party has challenged the Bureau's constitutionality—is fanciful.

While arguing that movants are too late to intervene, PHH also hinted that they are too early, stating that it is "still nothing more than" a "possibility" that the new Administration will refuse to defend the Bureau. Opp. at 11. This inconsistency only highlights the dilemma faced by movants and the appropriateness of their response. If movants had sought intervention before they did, their claims would have been deemed speculative, because there was no indication yet that the new President would seek to prevent the Bureau from defending itself in this litigation. If movants had waited longer, they would have opened themselves up to legitimate accusations of delay. Instead, movants took the most reasonable course available, and acted at exactly the right time—as soon as the evidence became undeniable that they could not count on the new Administration to represent their interests in preserving the CFPB's independent status.

In sum, movants' request is neither tardy nor premature. Because the motion is timely, and because they have also met every other requirement for intervention, the motion should be granted.[6]

## II. In the Alternative, the Motion To Intervene Should Be Held in Abeyance

If the Court does not grant the motion to intervene, it should at a minimum hold the motion in abeyance pending further developments. If, for instance, the Administration were to attempt to remove Director Cordray from his position—eliminating any remaining doubt about its intentions—the motion could then be granted, ensuring that such a development would not prevent the significant constitutional questions in this case from being fully reviewed by the court system. If nothing else, the motion to intervene should be granted at the conclusion of the proceedings in this Court to ensure that an interested party can seek Supreme Court review, or can defend Dodd-Frank's constitutionality if PHH were to seek Supreme Court review. In no event should procedural maneuvering by the executive branch be permitted to shield from scrutiny a lower court decision increasing the executive's power at the expense of the legislative branch.

[6] Movants also satisfy the requirements for permissive intervention (Mot. at 21), and the motion should be granted for that reason, as well.

## CONCLUSION

This Court should grant this motion for *en banc* reconsideration and grant the motion for leave to intervene.

Respectfully submitted,

/s/ Elizabeth B. Wydra
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Dated: February 12, 2017

## CERTIFICATE OF PARTIES AND DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 27(a)(4), movants certify that except for those parties who have moved for invitation to files 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 12th day of February, 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 3,771 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 12th day of February, 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 February 12, 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 12th day of February, 2017.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra
*Counsel for Movants*

## ADDENDUM

*PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Feb. 2, 2017) (per curiam order denying motion for leave to intervene)

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**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

**O R D E R**

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