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

No. 15-1177

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 Consumer Financial Protection Bureau

MOTION TO INTERVENE IN ANY *EN BANC* PROCEEDINGS THAT MAY BE GRANTED, BY STATE NATIONAL BANK OF BIG SPRING, THE 60 PLUS ASSOCIATION, INC., AND COMPETITIVE ENTERPRISE INSTITUTE

GREGORY JACOB
Counsel of Record
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20006
(202) 383-5300
gjacob@omm.com

C. BOYDEN GRAY
ADAM R.F. GUSTAFSON
JAMES R. CONDE
BOYDEN GRAY & ASSOCIATES
801 17th Street, Suite 350
Washington, DC 20006
(202) 955-0620
gustafson@boydengrayassociates.com

Counsel for Moving Parties
(additional counsel listed on inside cover)

SAM KAZMAN
HANS BADER
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St. NW, Floor 7
Washington, DC 20006
(202) 331-1010

Co-Counsel for Movant
Competitive Enterprise Institute

STATEMENT OF INTEREST OF THE MOVING PARTIES

Moving parties State National Bank of Big Spring, the 60 Plus Association, and the Competitive Enterprise Institute ("movants") are jointly filing this motion to intervene in the present action in which the Respondent Consumer Financial Protection Bureau (CFPB) has petitioned for rehearing *en banc* of this Court's ruling that the CFPB's structure is unconstitutional. Movants are plaintiffs in a separate lawsuit, filed in 2012, that challenges the constitutionality of the CFPB. *State Nat'l Bank of Big Spring v. Lew*, No. 12-1032 (D.D.C. June 21, 2012). More than 18 months ago, this Court determined that movants face ongoing constitutionally cognizable injury caused by the CFPB, *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015), in the form of compliance obligations and the enforcement of regulations promulgated by the unconstitutionally structured agency. That is, unlike the other would-be intervenors, movants' standing has already been confirmed by this Court.

Despite this ongoing injury, movants' case is now held in abeyance in district court pending this Court's resolution of the *en banc* petition. Movants' harm will be greatly exacerbated should this Court decide the present action on statutory and due process grounds rather than separation of powers grounds, resulting in years of additional delay in the resolution of their claims. Movants seek to intervene to ensure that their constitutional claims are considered by this

Court without the risk of further delay in a case that has already lasted more than four years without a merits determination.

MOTION TO INTERVENE

Pursuant to 28 U.S.C. § 2348, Rule 15(d) of the Federal Rules of Appellate Procedure, and Circuit Rule 15(b), State National Bank of Big Spring, the 60 Plus Association, and the Competitive Enterprise Institute ("movants") hereby move for leave to intervene as of right in this case, to ensure that this Court decides the constitutional claim that movants share with PHH, and to avoid further delay and the resulting harm movants have suffered for the past four years without a merits determination.

To the extent necessary, movants also request, pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure, that the Court waive the requirement that this motion be filed within 30 days after the petition for review was filed.

INTRODUCTION

The present case arose out of a finding by the CFPB that petitioner PHH Mortgage had violated the Real Estate Settlement Procedures Act (RESPA). The CFPB alleged that PHH encouraged its customers to enter into relationships with certain mortgage insurers who would purchase reinsurance from PHH subsidiaries. According to the CFPB, the fees paid to PHH for reinsurance constitute illegal kickbacks under RESPA. In November 2014, a CFPB Administrative Law Judge ruled that PHH had violated RESPA and assessed a fine of $6.4 million for the violations. In the first ever appeal of a CFPB Administrative Order, CFPB Director

Richard Cordray affirmed the ALJ's finding that PHH violated RESPA, but increased the penalty from $6.4 million to $109 million, an increase of over *1600%*.[1]

In its appeal to this Court, PHH advanced two distinct lines of argument. PHH primarily argued that the CFPB incorrectly interpreted Section 8 of RESPA to bar these so-called captive reinsurance arrangements and that, in so doing, the CFPB retroactively departed from prior interpretations of the same provision by the Department of Housing and Urban Development. PHH alternatively argued that the structure of the CFPB is unconstitutional and violates the separation of powers by improperly insulating the CFPB Director from democratic accountability to the President and the Congress. As Judge Henderson noted in her partial concurrence and partial dissent, *PHH Corp. v. CFPB*, 839 F.3d 1, 59 n.4 (D.C. Cir. 2016) (Henderson, J., concurring in part and dissenting in part), PHH thus has two distinct paths to obtain relief from the CFPB enforcement order it challenges: a statutory path and a constitutional path.

By contrast, movants' claims against the CFPB are strictly constitutional, and can only be remedied by a constitutional holding. On June 21, 2012, movants filed a complaint seeking a declaration that the CFPB's structure is

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[1] Press Release, CFPB, *CFPB Director Cordray Issues Decision in PHH Administrative Enforcement Action* (June 4, 2015, http://www.consumerfinance.gov/about-us/newsroom/cfpb-director-cordray-issues-decision-in-phh-administrative-enforcement-action/.

unconstitutional and an injunction preventing the CFPB and Director Cordray from exercising any of its delegated powers under Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203 (July 21, 2010). Following over four years of proceedings, movants still await a decision on the merits of their case, which is now held in abeyance by the district court.

On January 17, 2017, the district court in movants' litigation denied their request that the court issue an interlocutory order on the unconstitutionality of the CFPB Director's for-cause removal protection and then certify that order to this Court under 28 U.S.C. § 1292(b). That would have allowed this Court to efficiently resolve in a single sitting all pending merits questions within its jurisdiction pertaining to the removal issue standing alone. The district court denied movants' request because it believes the outcome of *PHH* may also resolve movants' case, ***even though the present case can be resolved on statutory grounds that are unavailable to movants***: "I am persuaded… that we should wait to see what [the Court of Appeals] will do." Mot. Hr'g Tr. 22, *State Nat'l Bank of Big Spring v. Lew*, No. 12-1032 (D.D.C. Jan. 17, 2017).

The freeze imposed by the district court—now 18 months and counting after this Court determined that movant is suffering ongoing constitutionally cognizable harm—substantially harms movant, while offering no sure path to a resolution of movants' claims. Simply put, if this Court elects to grant the CFPB's petition for

en banc rehearing in this case and then decides the case on the statutory grounds described above, as Judge Henderson would have done, movants' constitutional claims will be left unresolved, and the district court will be left without binding guidance from this Court as to how the constitutional question should be answered. That would delay resolution of movants' case, prolonging the harm they suffer from being subject to unconstitutionally promulgated regulations and ensuring that they will wait even longer for an eventual, inevitable merits determination from this Court. In the case of the Bank, these costs ultimately harm the consumers and small businesses it serves and the communities in which they reside.

By granting this motion, this Court would eliminate further harm and delay to movants by ensuring that one of their key constitutional claims, which is substantially similar to PHH's constitutional claim, will be decided in this case. The Court would still retain the option to decide PHH's specific claim on statutory grounds without deciding the constitutional issues, but through movants would have parties in the case before it whose ongoing injury can be resolved only by a ruling on the constitutional merits. Such an outcome would advance judicial economy and reduce further prejudice to movants.

GROUNDS FOR INTERVENTION

I. Movants Are Entitled to Intervene as of Right.

Intervention in this Court "is governed by the same standards as in the district court." *Mass. Sch. of Law at Andover v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997). Thus, this Court grants 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). Applying this standard, the Court has identified four prerequisites to intervene 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) (quoting *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)). Having satisfied these four prerequisites, movants are entitled to intervene as of right.

A. This Motion Is Timely or Should Be Deemed Timely.

Under the Federal Rules of Appellate Procedure, a motion for leave to intervene is ordinarily due 30 days after the filing of a petition for review of

agency action. *See* Fed. R. App. P. 15(d). But because this Court applies the same standards for intervention here as in the district court, *see Mass. Sch. of Law at Andover*, 118 F.3d at 779, "[t]he timeliness of a motion to intervene must be considered in light of all the circumstances of the case," *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004) (citing Wright & Miller et al., Federal Practice and Procedure § 1916, at 532 (2d ed. 1986)).

Even if timeliness were determined solely by compliance with the 30-deadline of Rule 15(d), this Court has discretion to extend that deadline for good cause shown. *See* Fed. R. App. P. 26(b).

Whether evaluating movants' timeliness in light of the unique circumstances of this case or extending the 30-day deadline for good cause, this Court should deem this motion timely.

1. Background

This motion to intervene was filed promptly after it appeared that movants' interests would not be adequately represented in this case.

As described above at page iii, the movants here are plaintiffs in a separate lawsuit challenging the constitutionality of the CFPB. *State Nat'l Bank of Big Spring v. Lew*, No. 12-1032 (D.D.C. filed June 21, 2012). Movants' case presents no alternative, non-constitutional ground for decision like the one that PHH urges here and that Judge Henderson would have adopted. Until now, movants have

participated in the present case as *amici curiae*, arguing against the CFPB on exclusively constitutional grounds. The panel agreed with movants that the CFPB's removal protection is unconstitutional.

On November 18, 2016, the CFPB filed a petition for rehearing *en banc*, urging the Court to take up "what may be the most important separation-of-powers case in a generation," Doc. No. 1646917, at 1, and to "reconsider[]" the panel's holding "that for-cause removal is unconstitutional as applied to the Bureau's director." *Id.* at 11. The petition did not suggest that the Court should evade that issue on constitutional avoidance grounds.

On December 22, 2016, the United States filed a response to the petition, urging the Court to grant rehearing *en banc* but suggesting that it "decline to reach . . . the constitutional issue." Doc. No. 1652666, at 14 (quotation marks omitted).

Movants recognized that heeding the United States' constitutional avoidance suggestion would senselessly delay resolution of movants' separate constitutional challenge, still pending in the district court, and would increase their injurious compliance costs. On January 4, they moved the district court for an interlocutory order holding that the CFPB's for-cause removal protection is unconstitutional on the basis of the panel opinion in *PHH*, and for an order certifying that "controlling question of law" for appeal pursuant to 28 U.S.C. § 1292(b). ECF No. 70, at 2, *State Nat'l Bank of Big Spring v. Lew*, No. 12-1032 (D.D.C. Jan. 4, 2017).

Movants' requested course of action in the district court would have allowed this Court to consolidate movants' appeal with *PHH*, removing any possible justification for avoiding the constitutional question both cases share. And it would have allowed movants to represent their own interests as appellants in the consolidated case.

The district court denied the motion for an appealable interlocutory order in a hearing on January 17, 2017. At that point, it became clear that movants would not be able to participate as parties in *PHH*, except through intervention.

Movants file this motion to intervene fewer than 30 days after the district court foreclosed their only other chance to represent their own interests in *PHH*.

2. The Motion Is Timely Under These Circumstances.

"The timeliness of a motion to intervene must be considered in light of all the circumstances of the case, . . . including the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the possibility of prejudice to the existing parties." *Acree*, 370 F.3d at 49 (citing Wright & Miller et al., Federal Practice and Procedure § 1916, at 532 (2d ed. 1986)). In addition, this Court considers when the "potential inadequacy of representation came into existence." *Amador Cty. v. Dep't of Interior*, 772 F.3d 901, 904 (D.C. Cir. 2014) (citation omitted). All of these factors, considered in

light of "the unique circumstances of this case," *Acree*, 370 F.3d at 50, favor the timeliness of this motion to intervene.

First, "the purpose for which intervention is sought" is to preserve the constitutional question for this Court's review by removing the constitutional avoidance rationale suggested by the United States' response. Judge Henderson herself predicted that movants' separate challenge would be "before this Court relatively quickly" and did not anticipate that the district court would continue to hold it in abeyance after the panel decision. *See PHH Corp.*, 839 F.3d at 59 n.4 (Henderson, J., concurring in part and dissenting in part) (citing *State National Bank of Big Spring* and characterizing the district court as holding it in abeyance "until the decision here"). An intervenor's interest in "preserv[ing] [an] issue for appellate review" is a sound purpose for intervention and weighs in favor of the motion's timeliness. *Acree*, 370 F.3d at 50. By the same token, movants have an interest in preserving for *en banc* and Supreme Court review the constitutional issue decided by the panel.

By facilitating adjudication of the constitutional question, intervention would serve movants' interest in avoiding the compliance costs that they continue to incur as a result of the CFPB's unconstitutional regulation and enforcement. *See State Nat'l Bank of Big Spring*, 795 F.3d at 53 ("[B]anks such as State National Bank must incur costs to ensure that they are properly complying.")

Intervention also serves the related purpose of promoting judicial economy. Movants' presence in the case would obviate consideration of Judge Henderson's constitutional avoidance concerns. Deciding this case without issuing a precedential holding on the constitutionality of the CFPB's for-cause removal protection would waste judicial resources: movants' separate case presents the same constitutional question, and it will inevitably come before this Court—though not as "quickly" as Judge Henderson assumed, because of the district court's decision to hold it in abeyance. *PHH*, 839 F.3d at 59 n.4 (Henderson, J., concurring in part and dissenting in part).

Second, intervention is necessary to "preserv[e] the applicant's rights," *Acree*, 370 F.3d at 49, including the right to be free from unconstitutional regulation, enforcement risk, and compliance costs. As this Court recognized when movants' case was last before it, "[t]he Bureau has already exercised its broad regulatory authority to impose new obligations on banks, including State National Bank." *State Nat'l Bank of Big Spring*, 795 F.3d at 53. Vacating the panel opinion on constitutional avoidance grounds would prolong State National Bank's regulatory uncertainty and their compliance cost injuries. *See id.* Intervention is now the only way to preserve movants' rights, because the district court's January 17 order otherwise deprives this Court of the power to consider movants' case together with PHH's.

Third, allowing movants to intervene at this stage poses no "possibility of prejudice to the existing parties," *Acree*, 370 F.3d at 49, because movants' constitutional argument has already been addressed by the parties and the panel, and movants will not file an intervenors' brief unless the Court decides to rehear the case *en banc*. *See Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) ("[E]ven where a would-be intervenor could have intervened sooner, in assessing timeliness a court must weigh whether any delay in seeking intervention 'unfairly disadvantaged the original parties.'" (alteration omitted) (quoting *NRDC v. Costle*, 561 F.2d 904, 908 (D.C. Cir. 1977))).

Finally, in considering the timeliness of a motion to intervene, this Court considers when the "potential inadequacy of representation came into existence." *Amador Cty.*, 772 F.3d at 904 (citation omitted); *see, e.g.*, *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) ("[A] post-judgment motion to intervene in order to prosecute an appeal is timely" when "the potential inadequacy of representation came into existence only at the appellate stage." (quoting *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986))).

Until January 17, movants hoped that they could represent themselves in this case as parties through consolidation rather than intervention. On January 17, the district court denied movants' request for an appealable interlocutory order that would have made consolidation possible. Only then did it become clear that

intervention was the only way for movants to ensure adequate representation of their interest in the outcome of this case. This intervention motion, filed fewer than 30 days later, is timely.

3. This Court Has Good Cause to Extend the Deadline.

In the alternative, movants request that this Court exercise its discretion to extend the 30-day intervention deadline of Rule 15(d). *See* Fed. R. App. P. 26(b) ("For good cause shown, the court may extend the time prescribed by these rules or by its order to perform an act, or may permit an act to be done after that time expires.").

Movants have good cause for not intervening within 30 days of PHH's petition for review. PHH filed its petition on June 19, 2015, with no indication that it was challenging the unconstitutional structure of the CFPB. Doc. No. 1559308.[2] The first indication that PHH was challenging the Bureau's structure came more than 30 days later on July 24, 2015, in PHH's Statement of Issues. Doc. No. 1564427, at 2. When they learned of the case, movants participated as *amici*, providing the fullest articulation of the constitutional argument that was submitted to this Court.

[2] PHH's Petition "s[ought] review of the CFPB's final agency action on the grounds that it is arbitrary, capricious, an abuse of discretion with the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; violates federal law, including but not limited to, the United States Constitution, RESPA, and the Consumer Financial Protection Act of 2010, as well as regulations promulgated under those statutes; and is otherwise contrary to law." Pet. for Review, Doc. No. 1559308, at 3 (June 19, 2015).

Likewise, movants have good cause to move to intervene at this stage in the litigation. Until the district court denied movants' motion for an appealable interlocutory order on January 17, 2017, Petitioners intended to represent their own interests in this case through consolidation. *See supra* pp. 6–8.

This Court has good cause to extend the deadline to permit movants to intervene. Movants' participation would serve judicial economy by obviating *en banc* consideration of the constitutional avoidance question that has already divided this Court, by expediting final resolution of the inevitable question of the CFPB's constitutionality *vel non*, and by avoiding duplicative litigation in movants' own case. *See supra* pp. 9–10.

4. This Court Frequently Deems Intervention Motions Timely Filed After the 30-Day Deadline.

Whether by applying its totality-of-the-circumstances test for timeliness or by exercising its discretion to extend deadlines under Rule 26(b), this Court frequently grants motions to intervene pursuant to Rule 15(d) that are filed more than 30 days after the underlying petition for review of an agency order. Just last year, the Court granted at least two such motions. *See* Doc. No. 1636326, *NorthWestern Corp. v. FERC*, No. 16-1176 (Sept. 19, 2016); Doc. No. 1603840, *NextEra Desert Ctr. Blythe, LLC v. FERC*, No. 16-1003 (Mar. 14, 2016). Even in complex cases of vast political significance, the Court will grant untimely intervention motions for good cause. For example, in the *In re Aiken County*

nuclear waste storage litigation, the Court granted a motion for leave to intervene out of time filed by the National Association of Regulatory Utility Commissioners (NARUC). There as here, the parallel proceedings in which the intervenor had hoped to raise its arguments were suspended pending resolution of *In re Aiken County*. *See* No. 10-1050 (Doc. No. 1243011).

B. Movants Have a Legally Protected Interest in this Action

In *State National Bank of Big Spring*, this Court held that "the Bank has standing to challenge the constitutionality of the [CFPB], and the case is ripe." 795 F.3d at 54; *see id.* at 53 ("The Bureau has already exercised its broad regulatory authority to impose new obligations on banks, including State National Bank."). That satisfies the "legally protected interest" prong of the test for intervention as of right, because "satisfying constitutional standing requirements demonstrates the existence of a legally protected interest." *Jones v. Prince George's Cty., Md.*, 348 F.3d 1014, 1019 (D.C. Cir. 2003) (citing *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998)).

C. This Proceeding Threatens To Impair or Impede Movants' Interest.

Because State National Bank "is regulated by the Bureau," it is "incur[ring] costs" to comply with the CFPB's unconstitutional regulations. *State Nat'l Bank of Big Spring*, 795 F.3d at 53. If the *en banc* Court were to vacate the panel's

constitutional holding and replace it with a decision rooted solely in statutory and due process considerations, movants' interest in the expeditious resolution of its own constitutional challenge to the CFPB would be thwarted. Movants are therefore "so situated that disposing of the action may as a practical matter impair or impede [their] ability to protect [their] interest." Fed. R. Civ. P. 24(a)(2). This requirement "look[s] 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). "[Q]uestions of 'convenience' [and 'the efficiency of . . . proceedings'] are clearly relevant." *Costle*, 561 F.2d at 910-11. Thus, "it is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Id.* at 910. To the contrary, intervention is justified here because a constitutional holding in this case "may lessen the need for future litigation to protect [movants'] interests," *id.* at 911, and would curtail unnecessary compliance costs that movants are now incurring.

D. Movants' Interests Are Not Adequately Represented.

Movants' interests are not adequately represented by PHH and its co-petitioners. Movants' challenge is "a facial one to the constitutionality of the" CFPB: it presents "no statutory ground on which to reverse any [CFPB] action because it ha[s] not yet taken action against" State National Bank. *PHH Corp.*, 839

F.3d at 59 (Henderson, J., concurring in part and dissenting in part). Consequently, movants cannot "obtain *full* relief without . . . addressing the Bureau's challenged structure." *Id.* (emphasis in original).

The posture of PHH's claim, however, renders PHH vulnerable to the constitutional avoidance argument that Judge Henderson articulated in her partial dissent, and that the United States now urges in its response to the CFPB's rehearing petition. No matter how vigorous PHH's advocacy in favor of this Court reaching a constitutional holding in this case may be, PHH may well thus prove to be an ***inherently*** inadequate representative of movants' interests, for reasons that are beyond its control. Moreover, PHH's primary goal in this litigation is to vacate the CFPB's $109 million enforcement order against it. PHH's primary arguments in support of that outcome were grounded in its interpretation of RESPA and due process. *See* Pet'rs Opening Br., Doc. No. 1575240, at 45–51 (Sept. 28, 2015). Movants fully supported PHH as *amici* in the panel proceedings, but cannot count on PHH to defend the panel's constitutional holding as vigorously as movants would.

Intervention is warranted here, because PHH does not "adequately represent" movants' interest in establishing the unconstitutionality of the CFPB. Fed. R. Civ. P. 24(a)(2). The inadequate representation prong of the intervention standard requires only that "the applicant show[] 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). "[T]he burden of making that showing should be treated as minimal." *Id.*; *see also Fund for Animals*, 322 F.3d at 735 ("[W]e have described this requirement as 'not onerous.' " (quoting *Dimond*, 792 F.2d at 192)). Unless movants are permitted to intervene, their interests will not be adequately represented.

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

Even if movants do not meet the standard for intervention as of right, this Court should grant them permissive intervention, because they "ha[ve] a claim . . . that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Specifically, movants claim that the CFPB is unconstitutional for the reasons the panel relied on, among others. By intervening, movants would be able to ensure resolution of that constitutional claim even if PHH prevails on other grounds.

"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). Intervention would not unduly delay the adjudication, because the Court has not yet granted rehearing *en banc* or set a briefing schedule. And intervention would not prejudice the original parties, because the constitutional argument that movants would advance here has

already been briefed by the parties and resolved by the panel, and *en banc* briefing has not yet commenced. *See supra* at 11-12.

CONCLUSION

For the foregoing reasons, this Court should grant the motion to intervene.

Respectfully submitted.

GREGORY JACOB
Counsel of Record
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20006
(202) 383-5300
gjacob@omm.com

C. BOYDEN GRAY
ADAM R.F. GUSTAFSON
JAMES R. CONDE
BOYDEN GRAY & ASSOCIATES
801 17th Street NW, Suite 350
Washington, DC 20006
(202) 955-0620
gustafson@boydengrayassociates.com

Counsel for Amici Curiae

SAM KAZMAN
HANS BADER
COMPETITIVE ENTERPRISE INSTITUTE
1305 L St. NW, Floor 12
Washington, DC 20036
(202) 331-1010

Co-Counsel for Amicus Curiae
Competitive Enterprise Institute

February 14, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Moving Parties make the following disclosures:

State National Bank of Big Spring (the "Bank") is a federally-chartered bank. It has one parent company, SNB Delaware Financial, Inc., a Bank Holding Company in Dover, Delaware. SNB Delaware Financial, in turn, has one parent company, SNB Financial, Inc., a Texas Corporation and Bank Holding Company in Big Spring, Texas. No publicly held company has 10 percent or greater ownership of the Bank.

The 60 Plus Association, Inc. (the "Association") is a non-profit, non-partisan seniors advocacy group that is tax exempt pursuant to Section 501(c)(4) of the Internal Revenue Code. The Association has no parent corporation, and no publicly held company has 10 percent or greater ownership of the Association.

Competitive Enterprise Institute ("CEI") is a non-profit public interest organization that is tax-exempt pursuant to Section 501(c)(3) of the Internal Revenue Code. CEI has no parent corporation, and no publicly held company has 10 percent or greater ownership of CEI.

CERTIFICATE OF PARTIES AND AMICI

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), I 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.

/s/ Gregory F. Jacob
Gregory F. Jacob
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, D.C. 20006
Telephone: (202) 383-5300

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27, I certify that:

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 4,264 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 in Times New Roman 14-point font.

/s/ Gregory F. Jacob
Gregory F. Jacob
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, D.C. 20006
Telephone: (202) 383-5300

CERTIFICATE OF SERVICE

I certify that on this fourteenth day of February 2017, I electronically filed the foregoing brief with the Court. I further certify that on this fourteenth day of February 2017, I served the foregoing brief on all counsel of record through the Court's CM/ECF system.

/s/ Gregory F. Jacob
Gregory F. Jacob
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, D.C. 20006
Telephone: (202) 383-5300