EN BANC ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017
No. 15-1177

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

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

PETITIONERS' OPPOSITION TO MOTION TO INTERVENE IN *EN BANC* PROCEEDINGS BY STATE NATIONAL BANK OF BIG SPRING, THE 60 PLUS ASSOCIATION, INC., AND COMPETITIVE ENTERPRISE INSTITUTE

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INTRODUCTION AND SUMMARY

The motion to intervene by amici curiae State National Bank of Big Spring, the 60 Plus Association, and the Competitive Enterprise Institute (collectively, "Amici") is the most egregiously untimely yet in a string of intervention motions. *See* Mot. to Intervene (Feb. 15, 2017), Doc. 1661457 ("Mot."). And, as with the other would-be intervenors, none of these three movants has standing to intervene because none has a cognizable interest in the actual agency order on review. An interest in the precedential effect of a decision and frustration with the pace of unrelated litigation does not constitute Article III standing. Like the other intervention motions, this motion appears to be little more than a naked attempt to seize control of this litigation from the actual litigants for the purpose of someday petitioning the Supreme Court for a writ of certiorari in the event the defeated litigant determines that it is not in its interest to do so. That goal is equally illegitimate when pursued by those who agree with PHH on the separation-of-powers question as it is for those who disagree. This motion, as well as the others, should be rejected.

Amici have their own case against the CFPB—a pre-enforcement declaratory judgment action challenging, among other things, the constitutionality of the CFPB's structure. *See State Nat'l Bank of Big Spring v. Lew*, No. 1:12-cv-1032 (D.D.C.). In July 2016, the district court rejected several of Amici's arguments and ordered their challenge held in abeyance pending resolution of the proceedings in PHH's case.

See State Nat'l Bank of Big Spring v. Lew, 197 F. Supp. 3d 177, 178 (D.D.C. 2016). In October 2015, Amici expressed their interests in this case by filing an *amicus curiae* brief supporting PHH's separation-of-powers arguments. *See* Br. of State National Bank of Big Spring et al. as Amici Curiae in Supp. of Pet'rs. (Oct. 5, 2015), Doc. 1576614. Then, in February 2017—more than four months after the panel issued its decision, and following the panel's summary *rejection* of the three previous untimely motions to intervene—Amici decided to try to convert themselves into parties.

Amici make no pretense of claiming any interest in the $109 million enforcement order that the CFPB issued against PHH under the Real Estate Settlement Procedures Act ("RESPA"). Instead, Amici assert that their reason for intervening is to "ensur[e]" that the separation-of-powers issues "will be decided in this case." Mot. 4. That request is wholly improper. It is a transparent effort to overcome the stay in Amici's own case—a stay that the district judge recently reaffirmed—and to litigate PHH's case in a manner beyond the control or interests of PHH. *See* Mot. 3.

Even if that untenable tactic were otherwise permissible, it is elementary that a third party's purported interest in securing a particular precedent does *not* create standing to intervene. Although Amici state that they would like to see this Court resolve the separation-of-powers question in PHH's favor so they can urge the district court to apply such a holding in their case, they have not even attempted to

show that they will be aggrieved by affirmance or reversal of the *order on review*. The fact that State National Bank of Big Spring has standing, as an entity regulated by the CFPB, to bring its *own* challenge to the constitutionality of the agency does not mean that it has standing to intervene in *this* controversy, and the other Amici are advocacy groups not regulated by the CFPB at all.

Amici's motion to intervene is also long out of time—by nearly 600 days. Motions to intervene "must be filed within 30 days after the petition for review is filed," Fed. R. App. P. ("FRAP") 15(d), and PHH filed its petition in June 2015. The notion that the 30-day period under FRAP 15(d) instead begins to run from a district court's denial of a request for a certified interlocutory appeal so that the parties can ask this Court to "consolidate" a case with another appeal that has already been decided by a panel, as Amici suggest, is nonsensical.

Aside from these threshold failings, Amici fall far short of satisfying the criteria for intervention. The constitutionality of the CFPB's structure is already properly before the Court and neither the Court nor the parties need Amici's intervention in order properly to brief the issues. Amici apparently believe that they can "obviat[e] *en banc* consideration of the constitutional avoidance question," Mot. 13, but this Court has directed the parties to address that very question on an abbreviated schedule already underway. *See* Order 2 (Feb. 16, 2017), Doc. 1661681. Moreover, their presence in this case as intervenors would not somehow import their case into

this one: the constitutional avoidance analysis would still turn on what issues are necessary to a resolution of *PHH's case*. Finally, Amici's supposed "interest in the expeditious resolution of its own constitutional challenge to the CFPB," Mot. 15, does not give them a procedural right to parachute into *another* party's case and disrupt the orderly briefing and disposition of that appeal, however frustrated they may be with the pace of their own district court litigation. In all events, PHH is fully capable, as it has already ably demonstrated, of briefing all the issues in this case.

Amici are free to continue participating in this case in the manner most useful to the Court and most welcome by the parties—as *amici curiae*. But there is simply no basis in law or fact to permit Amici to intervene as parties, particularly at this late juncture. Their motion, like the other intervention motions, should be denied.

ARGUMENT

I. Amici Lack Article III Standing To Intervene.

"[A] movant seeking to intervene as of right must . . . demonstrate Article III standing." *In re Endangered Species Act Section 4 Deadline*, 704 F.3d 972, 976 (D.C. Cir. 2013). The movant's standing, moreover, must be specific to the lawsuit that the movant seeks to join. That is, the asserted injury must be "fairly traceable *to the challenged agency action*." *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013) (emphasis added) (quotation marks omitted); *accord Nat'l Ass'n of Home Builders v. U.S. Fish & Wildlife Serv.*, 786 F.3d 1050, 1053

(D.C. Cir. 2016) (intervenors must show injury "fairly traceable *to the challenged conduct*" (emphasis added)). Moreover, the Article III standing inquiry must "satisf[y] [the] second element of Rule 24(a)(2)" of the Federal Rules of Civil Procedure, *Defenders of Wildlife*, 714 F.3d at 1323, which requires would-be intervenors to demonstrate a legally protected "interest relating to the property or transaction *that is the subject of the action*," Fed. R. Civ. P. 24(a)(2) (emphasis added).

Amici do not even attempt to identify any legally protected interest affected by the actual CFPB order at issue in this lawsuit. That order applies only to PHH, not to Amici, and Amici have not sought to show that they would be aggrieved in any way by its reversal or affirmance, or even that they have an interest in the proper interpretation of RESPA. Indeed, Amici admit that their only motivation here is to "ensur[e] that one of their key constitutional claims" in a *different* case—one currently held in abeyance—"will be decided *in this case*." Mot. 4 (emphasis added). Tellingly, Amici made a variant of this same argument to the district court as a reason why that court should certify an interlocutory appeal that Amici could then ask this Court to "consolidate" with this appeal. *Id.* at 7–8. The district court rejected that argument, and Amici offer no persuasive reason why this Court should countermand the district court and permit Amici to bypass the normal channels of judicial review.

Putting aside the impropriety of using intervention as a means to circumvent an abeyance order, Amici's interest in the *reasoning* of this Court's opinion is also manifestly insufficient to support intervention. A would-be intervenor's "concern about the precedential effect of an adverse decision is not sufficient to confer standing." *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1515–16 (D.C. Cir. 1994) (per curiam). Indeed, the "mere precedential effect" of an adverse legal decision is "not, alone, enough to create Article III standing, *no matter how foreseeable the future litigation*." *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998) (emphasis added); *cf. Conference Grp., LLC v. FCC*, 720 F.3d 957, 963 (D.C. Cir. 2013) (rejecting view that "'the mere potential precedential effect of an agency action affords a bystander to that action a basis for complaint'" (citation omitted)).

These principles apply with even more force where, as here, the would-be intervenor is concerned not merely with an *adverse* legal opinion, but with *any* opinion that leaves its "constitutional claims . . . unresolved." Mot. 4. If Amici were truly aggrieved by the CFPB's order, as PHH is, then it is unclear why Amici would have any interest in the *rationale* this Court employs in vacating that order. It is well-established that a party's interest in securing a decision with a particular legal rationale is insufficient to provide standing to appeal the decision if it produces no adverse consequences. *See Mathias v. WorldCom Techs., Inc.*, 535 U.S. 682, 684

(2002) (per curiam) (holding that "a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous"). It is similarly insufficient to afford Amici standing to intervene here.

Amici attempt to distract the Court from this fatal flaw by noting that this Court has held that State National Bank, as an entity regulated by the CFPB, "'has standing to challenge the constitutionality of the CFPB.'" Mot. 14 (quoting *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 54 (D.C. Cir. 2015)). That is true, but irrelevant: The Bank's standing to bring *its own* suit against the CFPB does not give Amici standing to intervene in *this* dispute.[1] While the two suits raise an overlapping legal question, State National Bank has suffered no "injury" that is "fairly traceable *to the challenged agency action*" here—the CFPB enforcement order issued against PHH under RESPA. *Defenders of Wildlife*, 714 F.3d at 1323 (emphasis added) (quotation marks omitted). Nothing in *State National Bank* suggests that Amici possess a legally protected "interest relating to the property or transaction that is the subject of [this] action," Fed. R. Civ. P. 24(a)(2), as is necessary to show that they have Article III standing to intervene in this particular lawsuit, *Defenders of Wildlife*, 714

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[1] Amici gloss over the fact that the Court in *State National Bank* discussed only the *Bank's* standing as a regulated entity. *State Nat'l Bank*, 795 F.3d at 53. The Court never suggested that the *advocacy groups* have Article III standing. *See id.* at 53 n.1 (noting that these groups "do not advance arguments for standing independent of the Bank's arguments").

F.3d at 1323. A contrary holding would lead to the absurd result that the Bank would have standing to intervene in *any* CFPB enforcement action simply because it involves an exercise of enforcement power by an unconstitutionally structured agency.[2]

Amici assert that they have an "interest in preserving for . . . Supreme Court review the constitutional issue decided by the panel," Mot. 9, but PHH, represented by experienced counsel, is fully capable of representing that interest. Moreover, even if that were not so, Amici's intervention would be of no help in ensuring Supreme Court review because they lack a cognizable interest in the order under review. As the Supreme Court has made clear, an intervenor must have Article III standing to continue litigating issues where the original party ceases to participate in the case. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64–65 (1997).

To the extent Amici are interested in the issues presented, their *amicus curiae* brief allows them to be heard and to advise the Court as to the possible effects of its

[2] Several other pending challenges raise questions concerning the constitutionality of the CFPB's structure. *See*, *e.g.*, *CFPB v. CashCall, Inc.*, No. 17-80006 (9th Cir. Jan. 13, 2017); *John Doe Co. v. CFPB*, No. 17-cv-00049 (D.D.C. Jan. 10, 2017); *CFPB v. J.G. Wentworth, LLC*, No. 16-cv-02773 (E.D. Pa. June 7, 2016); *CFPB v. NDG Fin. Corp.*, No. 15-cv-05211 (S.D.N.Y. July 6, 2016); *CFPB v. Intercept Corp.*, No. 16-cv-00144 (D.N.D. June 6, 2016); *CFPB v. All Am. Check Cashing, Inc.*, No. 3:16-cv-00356 (S.D. Miss. May 11, 2016). Allowing Amici to intervene could incentivize other CFPB challengers to inundate the Court (and the parties) with yet more intervention requests.

decision in this matter on Amici's pending litigation, a traditional function of such briefs. But Amici lack a sufficient legally protected interest that would allow them to transform themselves into parties to this action. Their motion should be denied for lack of standing.

II. Amici's Motion Is Inexcusably Untimely.

Amici's request for intervention is even more tardy than the untimely motions filed by the other would-be intervenors. A motion to intervene in an administrative-review proceeding "*must* be filed within 30 days after the petition for review is filed." FRAP 15(d). PHH filed its petition for review on June 19, 2015—more than *600 days* before Amici sought to intervene. In the interim, the parties litigated the merits, the panel issued its decision, and the parties briefed a petition for rehearing en banc—all while Amici sat on the sidelines. Indeed, Amici filed their late request *after* a panel of this Court summarily rejected three other out-of-time motions to intervene. Amici's yet-more belated request should be denied.

Amici strain credibility by offering several arguments for why their motion should be "deemed timely" (Mot. 6) despite the clear text of FRAP 15(d) and their nearly 600 days of delay. Each argument fails.

First, Amici contend that this Court can effectively ignore the 30-day deadline in light of "all the circumstances of the case" because, according to Amici, this Court "applies the same standards for intervention as in the district court." Mot. 6 (citing

Mass. Sch. of Law at Andover, Inc. v. United States, 118 F.3d 776, 779 (D.C. Cir. 1997) (quotation marks omitted). Amici then recite a litany of reasons why the "unique circumstances of this case" show that their motion to intervene is timely. Mot. 9 (quotation marks omitted); *see id.* at 9–12. This breezy attempt to replace a textually explicit, mandatory deadline with an amorphous "totality-of-the-circumstances test" (*id.* at 13) should be rejected—not only because it is incorrect but because the consequences for orderly intervention practice in this Court would be devastating.

There is no dispute that Amici's motion to intervene is subject to FRAP 15(d). *See* Mot. 1. That rule expressly provides that where, as here, a person desires to intervene in a proceeding seeking "[r]eview of an agency order," the person "must file a motion for leave to intervene" within "30 days after the petition for review is filed." FRAP 15(a), (d). Since FRAP 15(d) does not provide further *substantive* standards for intervention, it is true that "appellate courts have turned to the rules governing intervention in the district courts under Fed.R.Civ.P. 24," *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517–18 (7th Cir. 2004), at least when analyzing issues other than timeliness. But while FRAP 15(d) may not contain substantive standards, it *does* provide a 30-day deadline, and PHH is not aware of any decision of this Court in a FRAP 15 case holding that this deadline can be replaced with a "totality-of-the-circumstances test for timeliness." Mot. 13.

Indeed, if the 30-day-rule for intervention does not apply to this "proceeding under this rule," FRAP 15(d), then it will never apply at all. As this Court has long recognized, disregarding the deadline would "sanction[] an undisputed failure to comply with applicable . . . rules." *Ala. Power Co. v. ICC*, 852 F.2d 1361, 1367 (D.C. Cir. 1988). FRAP 15(d) applies by its terms and should be enforced by this Court.

Second, Amici "request that this Court exercise its discretion to extend the 30-day intervention deadline of Rule 15(d)." Mot. 12 (citing FRAP 26(b)). While the Federal Rules do authorize this Court to extend certain deadlines for "good cause shown," FRAP 26(b), this Court has held that where, as here, a motion to intervene has been filed "[a]fter a case has been fully litigated" and "after appellate argument and decision," this Court will generally "deny" the motion except in a "rare case offering truly imperative reasons for intervention," *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1553 (D.C. Cir. 1985). Here, Amici lack any cognizable explanation for their egregiously untimely motion to intervene—much less a "truly imperative" one.

Amici contend that they sought an interlocutory appeal (for the purpose of attempting to "consolidate" their case with this appeal) when they "recognized" in December 2016 that if the en banc Court were to avoid the constitutional question, it would "delay resolution" of Amici's constitutional claim, and that they moved to

intervene "promptly" after the district court (predictably) denied their attempted appeal. Mot. 6–8. Of course, that argument is nothing more than an invitation to restart FRAP 15(d)'s 30-day clock whenever a litigant in a separate case attempts an unusual procedural maneuver and fails, and it assumes that this Court would actually have *allowed* their desired "consolidation." Amici also make no attempt to explain why they failed to "recognize[e]" before December 2016 the obvious fact that PHH is presenting both statutory and constitutional arguments. In fact, Amici filed an *amicus curiae* brief in this case in October 2015, *after* PHH filed its opening brief, that addressed *both* sets of arguments. *See* Opening Br. for Pet'rs (Sept. 28, 2015), Doc. 1575240. Amici thus had all relevant information before them well before they decided to participate as *amici*. Indeed, Amici's brief confirms that they understood the potential implications of PHH's case on their own, stating that "[t]he merits of *amici*'s claim in their own case may therefore be affected by the Court's decision here." Br. of State National Bank of Big Spring et al. as Amici Curiae in Supp. of Pet'rs. 1 (Oct. 5, 2015), Doc. 1576614.

In playing up the "risk" of constitutional avoidance, Mot. iv, Amici also materially mischaracterize the relevance of PHH's challenge to the constitutionality of the Bureau's structure. As the panel correctly held, the constitutionality of the CFPB's structure *must* be decided by this Court if there is any possibility that the CFPB may continue its proceedings against PHH. *See PHH Corp. v. CFPB*, 839

F.3d 1, 9 & n.1 (D.C. Cir. 2016). Because the panel ordered the case remanded to the CFPB for further proceedings, it was therefore necessary for the panel to ensure that it was sending the case to an agency that could lawfully continue to operate. That is no less imperative for the en banc proceedings now underway. If Amici believe that there remains some quantum of doubt that justifies their intervention, it existed long ago.

Amici's claim that 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" (Mot. 13) is highly misleading and ignores the late stage of the litigation here. Each of the cases they cite involved a clerk's order granting unopposed motions to intervene at the early stages of the case, filed before the briefing ever began—*not* after a panel had already decided the case.[3] They thus do not involve the "entirely unfair" situation presented here, where "the positions of all interested parties have been fixed" in the nineteen months of litigation that has occurred already, *Amalga-*

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[3] *See Nw. Corp. v. FERC*, No. 16-1176 (Sept. 19, 2016), Doc. 1636326 (granting unopposed motion to intervene filed 76 days after petition for review and before issuance of briefing schedule); *NextEra Desert Ctr. Blythe, LLC v. FERC*, No. 16-1003 (Mar. 14, 2016), Doc. 1603840 (granting unopposed motion to intervene filed 56 days after petition for review and together with issuance of briefing schedule); *In re Aiken Cty.*, No. 10-1050 (May 3, 2010), Doc. 1243011 (granting unopposed motion to intervene filed 49 days after petition for review and before issuance of briefing schedule).

mated Transit, 771 F.2d at 1553, and where any new parties thrust into the accelerated en banc proceedings already underway would be tremendously distracting and disruptive.

Amici also assert that good cause exists because their belated participation would "serve judicial economy"—supposedly "by obviating *en banc* consideration of the constitutional avoidance question . . . , by expediting final resolution of the inevitable question of the CFPB's constitutionality *vel non*, and by avoiding duplicative litigation in movants' own case." Mot. 13. It is difficult to see how forcing the Court to address an argument it might otherwise properly avoid serves the Court's interest in economy. In any event, this Court granted en banc review in part to confirm that the panel was correct in holding that the constitutionality of the CFPB could not be avoided. *See* Order 2 (Feb. 16, 2017), Doc. 1661681 (directing the parties to brief this issue). PHH is now briefing that question on the Court's abbreviated schedule. Moreover, Amici's premise is wrong: Their presence as an intervenor in this case would do nothing to affect this Court's analysis as to whether the resolution of the separation-of-powers question is necessary to a decision in *this* case given *its* procedural posture. *See*, *e.g.*, *Ill. Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990). Intervention would not, as Amici suppose, somehow import their case into this one.

This Court has not minced words about the disruption associated with intervention in the late stages of a case: "It would be entirely unfair, and an inexcusable waste of judicial resources, to allow a potential intervenor to lay in wait until after the parties and the trial and appellate courts have incurred the full burden of litigation before deciding whether to participate in the judicial proceedings." *Amalgamated Transit*, 771 F.3d at 1553. Amici suggest intervention is nonetheless appropriate because the district court's abeyance order is inconsistent with Judge Henderson's "predict[ion] that movants' separate challenge would be 'before this Court relatively quickly.'" Mot. 9 (quoting *PHH*, 839 F.3d at 59 n.4 (opinion of Henderson, J.)). But Judge Henderson merely noted that the Court is likely to hear a challenge to the CFPB's structure in the ordinary course, as other such challenges are working their way through the lower courts, *not* that the Court should condone the "unduly disruptive" practice of allowing a party whose case is pending in the district court to intervene in the late stages of another party's case. *Amalgamated Transit*, 771 F.2d at 1553.

Amici also contend that there is good cause for their failure to intervene within FRAP 15(d)'s 30-day deadline because they could not have known that PHH would challenge the constitutionality of the CFPB's structure until July 24, 2015. Mot. 12. But, consistent with the above-discussed standing doctrine, parties intervene to defend or challenge particular agency action, not issues. That is why the time to move

for intervention runs with the filing of a petition for review—not the statement of issues—that puts the world on notice that a certain agency action is being contested. In any event, PHH's petition stated that the CFPB's order violated the "United States Constitution," Petition for Review 3 (June 19, 2015), Doc. 1559308, and PHH's motion for a stay—filed only a week later—expressly challenged the constitutionality of the CFPB's structure, *see* Mot. for Stay Pending Judicial Review 11–12 (June 26, 2016), Doc. 1559758. Amici thus had ample time to satisfy FRAP 15(d)—and have no excuse for waiting until February 2017 to seek to intervene.

III. Amici Fail To Satisfy Rule 24's Requirements Of Intervention.

Even if Amici had standing and were not subject to FRAP 15(d)'s 30-day deadline, Amici *still* would be unable to satisfy the requirements for intervention of right or permissive intervention under Federal Rule of Civil Procedure 24. *See Mass. Sch. of Law*, 118 F.3d at 779 (holding, in a case not subject to FRAP 15, that "intervention in the court of appeals is governed by the same standards as in the district court" (emphasis removed)).

1. First, Amici cannot show that they are entitled to intervene as of right. Under Rule 24, a court must grant intervention if four conditions are satisfied: "(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." *SEC v. Prudential Sec., Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998); *see* Fed. R. Civ. P. 24(a)(2). Failure to meet any one of these requirements is fatal, *Catanzano ex rel. Catanzano v. Wing*, 103 F.3d 223, 232 (2d Cir. 1996), and Amici fail to satisfy all four.

As explained already, there is no plausible argument that Amici's motion to intervene is timely. Even if this Court were to apply Amici's "totality-of-the-circumstances test for timeliness" (Mot. 13) and ignore FRAP 15(d)'s mandatory 30-day deadline, Amici's motion *still* would be untimely for the same reason that they lack good cause to extend the deadline under FRAP 26(b). *See supra* Part II.

Amici also cannot show a legally protected "interest relating to the property or transaction that is the subject of the action," Fed. R. Civ. P. 24(a)(2), because they lack Article III standing to intervene in this case, as also explained above. The requirement of a "legally protectable" interest is a "gloss" upon Rule 24 that is "required by Article III" of the Constitution. *S. Christian Leadership Conf. v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984) (per curiam). The absence of Article III standing thus means that Amici have no right to intervene as a matter of law.

Relatedly, Amici cannot show that the disposition of these proceedings may "impair or impede" any interest they might have. Fed. R. Civ. P. 24(a)(2). It is true,

of course, that Amici's pending suit could be adversely affected by a decision rejecting PHH's constitutional arguments on the *merits*. But that "risk" is no different than the risk they face from *any* intervening decision from an appellate court with precedential effect on an issue in their case.

At bottom, Amici's chief concern is a fear that PHH might not be able to *compel* the Court to address the constitutional issue, thereby jeopardizing Amici's "interest in the expeditious resolution of its own constitutional challenge to the CFPB." Mot. 15. But any such fear of an insufficiently favorable or speedy ruling does not satisfy Rule 24; as this Court has held, "mere failure to secure better remedies for a third party . . . is not a qualifying impairment." *Mass. Sch. of Law*, 118 F.3d at 780. Amici's own case will remain pending in any event, and Amici will remain free to press their constitutional arguments through the normal channels of review if this Court declines to decide PHH's separation-of-powers argument.

Amici also suggest that their interest in "'lessen[ing] the need for future litigation'" could be impaired. Mot. 15 (quoting *NRDC v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977)). But *Costle* in no way suggested that litigants may opt out of district court proceedings and opt *into* another party's appellate proceedings in order somehow to secure faster resolution of their legal issues. *Costle* merely authorized companies to intervene in district court proceedings so they could participate in a settlement agreement and thereby avoid litigation altogether. 561 F.2d at 906.

Even supposing the Court accepts Amici's asserted interest in forcing a ruling, that is not their right. Article III does not permit gratuitous interlopers to take over litigation from the real parties to a case or controversy. As the panel noted in its opinion, PHH has the authority, capability, and right to advance all of the potential bases for the provision of full relief from the CFPB's action against it. *See PHH*, 839 F.3d at 9 & n.1. That is why PHH, represented by capable counsel, (successfully) raised all relevant arguments in the first place, and there is utterly no reason to think that Amici can do a better job in pressing those arguments than PHH.

2. For similar reasons, the Court should reject Amici's fallback request for permissive intervention. Mot. 17–18. "Substantially the same factors are considered" for intervention of right and permissive intervention, *In re Bank of N.Y. Derivative Litig.*, 320 F.3d 291, 300 n.5 (2d Cir. 2003), and permissive intervention typically requires the would-be intervenor to show that it "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). Although Amici and PHH share a constitutional challenge to the CFPB's structure, permissive intervention is not justified here.

Intervention is permissible only "[o]n timely motion," Fed. R. Civ. P. 24(b)(1), and Amici cannot show that their motion is timely. *See, e.g.*, *EEOC v.*

Nat'l Children's Ctr., Inc., 146 F.3d 1042, 1046 (D.C. Cir. 1998) (permissive intervention requires "an independent ground for subject matter jurisdiction" and "a timely motion").

Even if these requirements were satisfied, permissive intervention would still be inappropriate as a discretionary matter because it would "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Adding three more parties (or even one) to this proceeding would further complicate an already complex case—creating confusion in the briefing, inevitably delaying resolution of the case, and unnecessarily creating more work for the Court and the original parties. *See Mass. Sch. of Law*, 118 F.3d at 782 (discussing "drawbacks of piling on parties," including "issue proliferation and confusion," "extra cost," and other "centrifugal forces springing from intervention"). Indeed, far from *avoiding* "duplicative litigation," Mot. 13, permitting Amici to intervene would *ensure it* by allowing Amici to submit separate briefs on the merits and potentially requiring PHH to respond. And intervention is entirely unnecessary because Amici have already expressed their views as *amici curiae*—and are free to do so again. The Court should therefore deny Amici's request for permissive intervention.

* * *

Granting Amici's egregiously late motion to intervene would be flatly contrary to this Court's precedents on Article III standing and would open a Pandora's

Box of similar tactical motions in the future. Like the other would-be intervenors, Amici are merely third parties with an interest in securing a particular precedent from this Court—but with no cognizable interest in the actual order under review. Amici's dismay with the speed of their own litigation does not change that conclusion. Nor does the fact that they agree with PHH on the separation-of-powers question make their motion to intervene any more appropriate than the other motions aimed at controlling Supreme Court review. This Court should reject Amici's effort to leapfrog over their case and splash into this one, and should allow the en banc proceedings and any further judicial review to proceed in orderly and fair fashion.

CONCLUSION

For the foregoing reasons, this Court should deny the motion for leave to intervene.

Dated: February 24, 2017

Respectfully submitted,

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I hereby certify that, on February 24, 2017, an electronic copy of the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon the following counsel for respondent Consumer Financial Protection Bureau, who is a registered CM/ECF user:

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