ORAL ARGUMENT HELD APRIL 12, 2016

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 BY SENATOR SHERROD BROWN AND REPRESENTATIVE MAXINE WATERS

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INTRODUCTION AND SUMMARY

Senator Brown and Representative Waters (the "Legislators") have not provided any jurisprudentially cognizable reason why they should be allowed to intervene in this case, particularly at this late date. First, the Legislators must demonstrate Article III standing to intervene. But individual members of Congress do not possess standing simply because legislation they voted for is found to be unconstitutional. Second, the Legislators openly admit that the sole purpose of their motion is to pursue further proceedings in this case before the Supreme Court. That authority, however, rests exclusively with the Attorney General pursuant to the law enacted by Congress that (as they repeatedly insist) they themselves wrote. The Legislators' speculation that they may in the future personally disagree with decisions made by the Executive Branch regarding the defense of litigation against federal agencies does not entitle them to become private Attorneys General in such cases, especially in the Supreme Court. Third, there is no good cause for the Legislators' egregious delay in seeking to intervene, and PHH would be severely prejudiced by the sudden insertion in this case of new and gratuitous party opponents. Fourth, for many of the same reasons, the Legislators also fail to meet the standard for intervention. For all of these reasons, this Court should deny the motion to intervene.

ARGUMENT

I. Individual Members Of Congress Do Not Have Standing To Intervene In This Case.

The motion to intervene must be denied for a fundamental, jurisdictional reason: The Legislators lack standing. In apparent recognition of this problem, the Legislators previously sought an invitation to appear in this case as amici. *See* Mot. of Current and Former Members of Congress for Invitation to File Brief as Amici Curiae in Support of Resp.'s Pet. for Reh'g En Banc (Nov. 29, 2016), Doc. 1648254. This attempt to convert themselves into intervenors should be rejected.

1. A party seeking to intervene in a challenge to agency action must possess Article III standing. *See*, *e.g.*, *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 538–39 (D.C. Cir. 1999). That means, inter alia, a discrete, individualized, concrete, and redressable harm. The Legislators claim that they were "injured" by the panel's decision because their votes in support of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")—which established the CFPB as an independent agency headed by a single Director insulated from constitutional accountability—"'have been completely nullified,'" along with any future votes they might cast for such an agency, by virtue of the panel's decision in this case. Mot. 15 (quoting *Raines v. Byrd*, 521 U.S. 811, 823 (1997)). In support of that thesis, the Legislators assert that "'Congress is . . . a proper party to defend the constitutionality of'"

the Consumer Financial Protection Act ("CFPA"). Mot. 16 (quoting *INS v. Chadha*, 462 U.S. 919, 939 (1983)).

But Senator Brown and Representative Waters, two individual Members of Congress, are not "Congress." Nor do they claim that they are authorized to represent either House of Congress in seeking redress for any presumed constitutional injury (which in itself does not exist) to those institutions. Their own supposed "injury" is no different than the "injury" that all 535 members of Congress experience when any portion of any statute they enacted is found to be unconstitutional by any court for any reason. The Legislators "have not been singled out for specially unfavorable treatment as opposed to other Members" of Congress. *Raines*, 521 U.S. at 821. Accordingly, the individual Legislators plainly lack standing to intervene.

As the Supreme Court recently reiterated, "*individual Members* of Congress lack[] standing" to challenge or defend a law if they have "'not been authorized to represent their respective Houses of Congress,'" because any "'institutional injury' . . . scarcely zeroe[s] in on any individual Member." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015) (quoting *Raines*, 521 U.S. at 821, 829). Instead, any "alleged injury 'necessarily [impacted] all Members of Congress and both Houses equally,'" and therefore individual Members of Congress have no "'personal stake' in [such a] suit." *Id.* (quoting *Raines*, 521 U.S. at 821, 829–30) (ellipsis omitted). Indeed, an individual legislator's claimed injury is

almost always "wholly abstract and widely dispersed," because it "runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power." *Raines*, 521 U.S. at 821, 829.

Thus, the Legislators' asserted—in this case imaginary—injuries are not their own, but belong to those whom they represent. When a Member of Congress casts a vote, the "legislative power thus committed is not personal to the legislator but belongs to the people." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011). The individual legislators' "personal interest in full and unfettered exercise of their authority is no greater than that of all the citizens for whose benefit . . . the authority has been conferred." *Moore v. United States House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in the result); *see also Chenoweth v. Clinton*, 181 F.3d 112, 117 (D.C. Cir. 1999) (holding that individual legislators do not have standing to challenge an executive order on the grounds that the action "dilut[ed] their authority as Members of Congress"). Because a legislator's constituents have no standing to litigate a generalized interest in a statute's constitutionality, an individual legislator may not invoke his or her representative capacity as a basis for doing the same.

In some cases, an entire legislative institution as a single body may have standing to authorize litigation. *See*, *e.g.*, *Ariz. State Legislature*, 135 S. Ct. at 2664.

Without such authorization, however, an individual member of that body does not have standing to unilaterally usurp the broader institution's litigation prerogative. *See*, *e.g.*, *Raines*, 521 U.S. at 829 n.10 ("'Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take.'") (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 (1986)). In *Karcher v. May*, for example, the Supreme Court held that former presiding officers of a state legislature who had intervened, along with their legislative bodies, to defend the constitutionality of a state law had standing to defend a statute only if they acted "in their official capacities as presiding officers on behalf of the . . . Legislature," but lost standing to appeal when they "lost their official status" to represent the legislature and the legislature itself withdrew its appeal. 484 U.S. 72, 76–78 (1987). Thereafter, the legislators "lack[ed] authority to pursue th[e] appeal on behalf of the legislature." *Id.* at 81. The Court explained that the individuals' "intervention as presiding legislative officers does *not* entitle them to appeal in their other individual and professional capacities." *Id.* (emphasis added). In the wake of *Arizona State Legislature*, lower courts have reiterated that "individual legislators may not support standing by alleging only an institutional injury," *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214 (10th Cir. 2016), such as "the diminution of legislative power," *Raines*, 521 U.S. at 821.

Despite the Supreme Court's clear instruction in *Karcher*, *Raines*, and *Arizona State Legislature*, the Legislators argue in a footnote that this Court's decision in *Moore* should be construed to confer standing on individual legislators. Mot. 17 n.1. They also note that in *Chenoweth*, this Court remarked in passing that *Moore* "may remain good law, in part" after *Raines*. *Chenoweth*, 181 F.3d at 116. But since *Chenoweth* was decided, this Court has not cited *Moore* once. Furthermore, after *Arizona State Legislature*, it is not reasonably open to question that "*individual Members* of Congress lack[] standing" to assert such generalized grievances. 135 S. Ct. 2664.

In short, "Article III standing is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)). Yet that is precisely what the Legislators are attempting to accomplish by seeking to intervene in this lawsuit.

2. In any event, the Legislators' votes were not, as they claim, "completely nullified." *Raines*, 521 U.S. at 823. Complete nullification occurs when an individual legislator's vote was denied determinative effect, *id.*, such as if a body that required "unanimous consent" to take action ignored one member's negative vote, *Bender*, 475 U.S. at 544–45 n.7, or if the members' votes were tied but the body took action anyway, *Coleman v. Miller*, 307 U.S. 433, 438 (1939). *See Baird v. Norton*,

266 F.3d 408, 412 (6th Cir. 2001) ("For legislators to have standing as legislators, then, they must possess votes sufficient to have either defeated or approved the measure at issue.").

Here, in contrast, the Legislators' votes for Dodd-Frank, which includes the CFPA, were not dispositive of its passage, nor were they denied their effect. To the contrary, the Legislators' votes were duly counted, and Dodd-Frank and the CFPA were sent to the President for approval. That is all the Constitution's separation of powers requires; Members of Congress do not have standing to usurp the Executive's legal decisions, as the Legislators are attempting to do here. Nor are their votes "nullified" any time a court strikes down a statute for which he or she had voted.

II. The Legislators' Effort To Control This Case In The Supreme Court Is Precluded By Law.

In addition to the fatal jurisdictional defect, the motion is squarely precluded by the CFPA and underlying constitutional principles. The Legislators have openly admitted that they are seeking to intervene in this case for the purpose of filing "a petition for *certiorari* with the Supreme Court" if the United States does not. Mot. 13. But the CFPA commits to the Attorney General (who is accountable to the President) the exclusive discretion to decide whether such a petition shall be filed. 12 U.S.C. § 5564(e). The Legislators' effort to wrest control from the Attorney General

of any Supreme Court proceedings in this case is thus precluded by the unequivocal direction of Congress as articulated in Section 5564(e).

Although the CFPA affords the CFPB a measure of independent litigating authority, Section 5564(e) clearly gives the President the ability to supervise litigation involving the agency in the Supreme Court, and properly so in light of core constitutional principles. Litigation decisions about federal laws are quintessentially Executive Branch judgments. "[I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). As to those judgments, the Department of Justice was created in 1870 so that the United States could speak with one voice in the federal courts. Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870). The Attorney General has delegated to the Solicitor General the authority to decide whether and when the United States will file a petition for certiorari, and on what issues, in any given case, 28 C.F.R. § 0.20—and that officer often rejects impassioned pleas to seek Supreme Court review from Executive Branch Departments and agencies based on the larger interests of the United States.

As the Supreme Court has recognized, "the Solicitor General's traditional role in conducting and controlling all Supreme Court litigation on behalf of the United States and its agencies" is "critical to the proper management of Government litigation brought before [the Supreme] Court." *FEC v. NRA Political Victory Fund*, 513

U.S. 88, 93 (1994) (narrowly construing a statutory grant to an independent agency of the authority to "appeal any civil action" as not providing the authority to petition for a writ of certiorari). In the Supreme Court, there is only one United States, and the position of the United States is ultimately determined by the President.

Permitting Members of Congress to step in and control the course of judicial proceedings when they disagree with the Executive's litigation decisions would be a massive and impermissible intrusion into the President's responsibility and constitutional prerogative to control the defense of litigation against the United States. Congress cannot take that power away from the President and, in Section 5564(e), made that abundantly clear. This Court may not confer that authority on other entities who, by way of an intervention motion, would like to take over for the Executive.

Just as the Constitution's separation of powers does not give Congress the power to control Executive Branch litigation decisions in specific cases, neither does it give that power to individual Members of Congress. Thus, even if these Members of Congress would have the necessary standing to file a petition for certiorari—and they would not, *see Hollingsworth*, 133 S. Ct. at 2663; *Karcher*, 484 U.S. at 76–78; *supra* at 2–7—that function is legislatively confirmed to be confined to the Executive.

III. The Legislators' Motion Is Untimely.

In all events, the Legislators' motion is inexcusably tardy. A motion for leave to intervene "*must* be filed within 30 days after the petition for review is filed." Fed. R. App. P. ("FRAP") 15(d) (emphasis added). The Legislators' motion, however, comes more than *a year-and-a-half* after PHH filed its petition for review on June 19, 2015, and more than three months after this Court issued its decision and judgment. To permit such blatantly late intervention would "sanction[] an undisputed failure to comply with applicable . . . rules." *Alabama Power Co. v. ICC*, 852 F.2d 1361, 1366–68 (D.C. Cir. 1988). This motion is egregiously untimely and can and should be denied on this basis alone, just like the other motion to intervene filed by certain state Attorneys General (and other would-be intervenors). *See* Opp. to State AGs' Mot. To Intervene at 1–6 (Jan. 27, 2017), Doc. 1657964.

Although the Legislators argue that the timeliness of their motion should be judged in "'consideration of all of the circumstances,'" Mot. 8–9 (quoting *Amador Cty. v. U.S. Dep't of Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014)), that standard applies to motions to intervene in the district court under Federal Rule of Civil Procedure 24, not motions to intervene in the court of appeals under FRAP 15(d), which includes an explicit 30-day deadline. The Legislators cite no decision applying district court standards to allow intervention in the court of appeals in a case subject to FRAP 15(d) after the expiration of the 30-day deadline, and petitioners are unaware

of any instance in which this Court has ever done so. This politicized and exceedingly late motion is not the place to start. Even if FRAP 15(d)'s strict deadline did not apply, the relevant circumstances cut *against* the Legislators. This Court has held that "as a general rule" it "will deny motions to intervene" filed, as here, *after* a panel decision and judgment. *See Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 (D.C. Cir. 1985) (per curiam).

Seeking to justify this long delay, the Legislators speculate that only recently has it "become increasingly clear" that the Executive Branch might not zealously defend unconstitutional restrictions on its own authority. Mot. 9–12. But this possibility (which is still nothing more than that) was entirely foreseeable from the beginning of this suit, when petitioners unambiguously and forcefully raised their separation-of-powers challenge. The Legislators should have known "from the outset of this litigation" that the CFPB Director's independence from Executive Branch oversight was a central issue, and they certainly could have anticipated that the United States might refuse to defend a law stripping the President of his authority under Article II faithfully to enforce the laws of the United States. *Amador Cty.*, 772 F.3d at 904. Indeed, the Executive Branch is generally reluctant to defend legislation that usurps the President's core constitutional authority, which the CFPA unquestionably does. *See* Opp. to State AGs' Mot. To Intervene at 2–3; *see also* Memorandum from Walter Dellinger, Assistant Att'y Gen., Office of Legal Counsel,

for Hon. Abner J. Mikva, Counsel to the President, 18 U.S. Op. Off. Legal Counsel 199, 201 (Nov. 2, 1994) ("The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency.").

Moreover, it was no secret that a new President would be elected in November 2016. Or that a new President might have his or her own views about the importance of separation of powers or the proper approach to Government litigation. Allowing intervention every time a new President takes office, as the Legislators suggest, would create a flood of new parties in pending cases at least every eight years.

Even if concern over potential changes in the political landscape could somehow excuse the Legislators' delay (and they cannot), those circumstances do not lessen the severe prejudice to petitioners that would result from granting intervention. PHH filed its petition for review in June 2015. Throughout the entire, much-publicized panel proceeding, the Legislators chose to remain on the sidelines. Petitioners prevailed in this challenge more than three months ago, yet they are still waiting to enjoy the relief to which they are entitled. Granting intervention now would inject new party opponents into the case and cause considerable additional delay and expense for petitioners, who suddenly would be forced into a dispute with individual Members of Congress whose admitted purpose is to prolong the case by petitioning for certiorari in the event the United States does not.

The unfairness that would result is precisely why the Supreme Court has adopted a "general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." *Karcher*, 484 U.S. at 77 (1987). Moving the goalposts to allow new parties at this late date would be patently unfair and prejudicial to petitioners.

IV. The Legislators Fail To Meet The Standard For Intervention

Given the multiple legal and procedural problems with the Legislators' motion, there is no need for the Court to address the question whether the motion meets the particular standards for either mandatory or permissive intervention. For many of the same reasons set forth above and in PHH's separate opposition to the motion of certain state Attorneys General (at 10–11)—most notably, the lack of any legally protected interest or impairment thereof, and the prejudice to PHH—the motion fails those standards.

* * *

The spate of motions to intervene filed at this late stage of the appeal—all for the impermissible purpose of usurping the Executive Branch's prerogatives as to whether to file a petition for certiorari in the Supreme Court—illustrate and underscore the fundamental defect inherent in the CFPA. The CFPA and these motions all aim to create a governmental entity completely severed from the Executive

Branch and the separation of powers contemplated by the Constitution. But the separation of powers reserves litigation decisions for the Executive Branch, and it denies Article III standing to individual legislators who seek to enter a case as parties merely because they disagree with the Executive Branch's litigation decisions.

CONCLUSION

For the foregoing reasons, and those discussed in PHH's separate opposition to the motion of the state Attorneys General, this Court should deny the motion to intervene.

Dated: January 31, 2017

Respectfully submitted,

/s/ Theodore B. Olson

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Dated: January 31, 2017

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CERTIFICATE OF SERVICE

I hereby certify that, on January 31, 2017, an electronic copy of the foregoing response 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 all counsel of record.

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