No. 18-90015
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff - Respondent,

v.

ALL AMERICAN CHECK CASHING, INCORPORATED;
MID-STATE FINANCE, INCORPORATED;
and MICHAEL E. GRAY, Individually,
Defendants - Petitioners.

On Appeal from the United States District Court for the
Southern District of Mississippi
Case No. 3:16-cv-356-WHB-JCG

PLAINTIFF-RESPONDENT CONSUMER FINANCIAL PROTECTION BUREAU'S ANSWER IN OPPOSITION TO PETITION FOR PERMISSION TO APPEAL

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INTRODUCTION

The Consumer Financial Protection Bureau ("Bureau") sued All American Check Cashing, Inc.; Mid-State Finance, Inc.; and Michael E. Gray ("Defendants") nearly two years ago, alleging that they engaged in unfair, deceptive, and abusive practices in their check cashing and payday lending business. Since then, the parties have completed discovery, filed dispositive motions, and have begun trial preparation. Now, with trial less than three months away and the Bureau's summary judgment motion still pending, Defendants ask for interlocutory review of their claim that it is unconstitutional for the Bureau to be led by a Director who can be removed by the President only for cause. But here's the rub: Since last November, the Bureau has been led by an Acting Director who can be removed by the President *at will*. And the Bureau's Acting Director has ratified the Bureau's decision to sue Defendants. Even if there were a constitutional defect with the Bureau's initiation of this suit, that defect has been cured.

So whatever the abstract merits of Defendants' constitutional argument, it does not control whether the Bureau, now led by an Acting Director who is removable at will, may prosecute this case. As a result, interlocutory review will only delay the ultimate resolution of this litigation.

This Court should reject Defendants' request for immediate review of their now-inapplicable constitutional argument.

BACKGROUND

A. The Bureau

As part of its response to the 2008 financial crisis, Congress enacted the Consumer Financial Protection Act of 2010 ("CFPA"), 12 U.S.C. § 5481-5603.[1] The CFPA established the Bureau and charged it with enforcing certain pre-existing consumer financial laws, as well as the newly enacted CFPA. *Id.* § 5491(a).

When Congress created the Bureau, it drew from its experience with other financial regulators. As it did with the Office of the Comptroller of the Currency, Congress provided that the Bureau would have a single Director who served a five-year term. *See id.* § 2 (OCC); *id.* § 5491(c)(1) (Bureau). And as it did with the leaders of the Federal Trade Commission and the Federal Reserve Board (among many others), Congress provided that the Bureau's Director would be removable by the President only for cause. *See* 15 U.S.C. § 41 (FTC); 12 U.S.C. § 242 (FRB); *id.* § 5491(c)(3) (Bureau); *see also PHH Corp. v. CFPB*, 881 F.3d 75, 91-92 (D.C. Cir. 2018) (en banc) (collecting other examples). And Congress built on its experience with other

[1] The CFPA is Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (Dodd-Frank Act).

regulators, such as the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency when it chose to fund the Bureau primarily outside of the annual appropriations process. *See* 12 U.S.C. § 243 (FRB); *id.* §§ 1815(d), 1820(e) (FDIC); *id.* § 16 (OCC); *id.* § 5497 (Bureau).

Although the Bureau's former Director, Richard Cordray, was removable only for cause, *see id.* § 5491(c)(3), the Bureau's current head is removable by the President at will. On November 24, 2017, Director Cordray resigned. President Trump then designated Mick Mulvaney to serve as the Bureau's Acting Director pursuant to the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d. *See* The White House, Office of the Press Secretary, *Statement on President Donald J. Trump's Designation of OMB Director Mick Mulvaney as Acting Director of the Consumer Financial Protection Bureau* (Nov. 24, 2017), www.whitehouse.gov/the-press-office/2017/11/24/statement-president-donald-j-trumps-designation-omb-director-mick. In his capacity as Acting Director, Mr. Mulvaney is removable by the President at will. The CFPA's removal provision by its terms applies only to "the Director," not to an Acting Director. 12 U.S.C. § 5491(c)(3). As the Department of Justice's Office of Legal Counsel explained, "Congress does not, by purporting to give tenure

protection to a Senate-confirmed officer, afford similar protection to an individual who temporarily performs the functions and duties of that office when it is vacant." *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. ___, 2017 WL 6419154, at *7 (Nov. 25, 2017) (citing *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996), which held that an officer removable only for cause becomes removable at will if that officer holds over beyond the officer's designated term).

B. Proceedings below

On May 11, 2016, the Bureau filed its complaint against Defendants, alleging that, in connection with their offering and providing of payday loans and check cashing services, Defendants had engaged in abusive, deceptive, and unfair acts and practices that violated the CFPA. (ECF 1, alleging violations of 12 U.S.C. §§ 5531(a), 5536(a).) By July 2017, the parties had completed a year of expert and fact discovery. Meanwhile, on May 24, 2017, Defendants filed a Motion for Judgment on the Pleadings, raising a variety of constitutional challenges, including the issue they now seek to raise before this Court: that the Bureau is unconstitutionally structured because its Director was removable by the President only for cause. ECF 144. The Bureau opposed, arguing, *inter alia*, that it was not necessary for the court to address any of Defendants' constitutional

challenges because Defendants' answer disputed the central facts of the Bureau's complaint. ECF 177. As the Bureau explained, if Defendants ultimately prevailed on the merits, they would obtain the same relief that they sought through their motion – dismissal – without the need for the court to address the constitutional issues. *Id*. On August 4, 2017, the Bureau filed its Motion for Summary Judgment. ECF 201. That motion has been fully briefed, but the district court has not issued a ruling.

On March 21, 2018, the district court denied Defendants' Motion for Judgment on the Pleadings. ECF 236. The court rejected all of Defendants' arguments, including the challenge to the constitutionality of the Bureau's structure. In rejecting that challenge, the court relied on the reasons set forth by the en banc D.C. Circuit in *PHH v. CFPB*, *supra*. ECF 236 at 4-5.

When the Bureau originally filed its Complaint against Defendants, it was headed by Director Cordray. But the Bureau has continued the prosecution of the case under the direction of Acting Director Mulvaney. Indeed, on February 5, 2018, the Bureau filed with the district court a Notice that the Acting Director had ratified the Bureau's decision to file a lawsuit against Defendants, accompanied by a declaration from Acting Director Mulvaney. ECF 231, 231-1. In his declaration, Mr. Mulvaney explained that he had reviewed the Bureau's decision to file a lawsuit

against Defendants; he had been briefed by the Bureau's Office of Enforcement regarding the case (once the Bureau issues a complaint, its Office of Enforcement has responsibility for the prosecution); and he then ratified the Bureau's decision.

C. Order certifying interlocutory appeal

On March 26, 2018, Defendants moved to certify for interlocutory appeal two issues addressed by the district court in its order denying their Motion for Judgment on the Pleadings: whether the Bureau is constitutionally structured, and whether, with respect to the allegations of the complaint, Defendants were denied their constitutional right to fair notice. ECF 239.

The following day, before the Bureau had an opportunity to respond, the court granted Defendants' motion in part. ECF 240. The court held that Defendants had not shown grounds for interlocutory review of their fair notice argument. However, with respect to Defendants' challenge to the Bureau's structure, the court held that interlocutory appeal was justified. The court stated that the issue presented a controlling issue of law that had yet to be addressed by this Court. The district court also concluded that there was substantial ground for difference of opinion as to the issue, based on the fact that three judges dissented from the D.C. Circuit's decision en

banc in *PHH v. CFPB*. Finally, the court held that an interlocutory appeal regarding the Bureau's structure would materially advance the ultimate termination of the litigation because it would "avoid the anticipated two week jury trial, which in turn, would prevent the parties' incurring additional litigation expenses and would prevent the expenditure of judicial resources." ECF 240 at 3. Neither Defendants' motion nor the court's order made any mention of the ratification of the Bureau's complaint by its Acting Director. Finally, the court stayed further proceedings (even though Defendants never moved for a stay).

LEGAL STANDARD

"Interlocutory appeals are generally disfavored, and statutes permitting them must be strictly construed." *Allen v. Okam Holdings, Inc.*, 116 F.3d 153, 154 (5th Cir. 1997); *see Mae v. Hurst*, 613 Fed. App'x 314, 318 (5th Cir. 2015) (same). Indeed, such appeals are "reserved for exceptional cases." *Waste Mgmt. of La. v. Jefferson Parish Council*, 594 Fed. App'x 820, 821 (5th Cir. 2014). An interlocutory appeal is appropriate only if the district court first certifies that all three of the following criteria are met: 1) the order involves a controlling question of law; 2) there is substantial ground for difference of opinion as to that question; and 3) immediate appeal from that order may materially advance the ultimate termination of

the litigation. 28 U.S.C. § 1292(b). These criteria "are conjunctive, not disjunctive." *Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000).

District court certification is not alone enough, however. "[E]ven if the district judge certifies the order under § 1292(b), the appellant still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (internal quotation marks omitted). Further, the legislative history of the Interlocutory Appeal Act explains that "the granting of the appeal is also discretionary with the court of appeals which may refuse to entertain such an appeal in much the same manner that the Supreme Court today refuses to entertain application for writs of certiorari." S. Rep. 85-2434 at 4 (1958). Thus, "[p]ermission to appeal is granted sparingly, not automatically." *Alabama Labor Council, etc. v. Alabama*, 453 F.2d 922, 924 (5th Cir. 1972). Ultimately, certification must further the policy of "permitting interlocutory appeals only for the purpose of minimizing the total burdens of litigation on parties and the judicial system by accelerating or at least simplifying trial court

proceedings." 16 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3930 at 511 (3d ed. 2012).

ARGUMENT

THIS COURT SHOULD NOT GRANT PERMISSION FOR DEFENDANTS TO APPEAL THE DISTRICT COURT'S DENIAL OF THEIR CHALLENGE TO THE BUREAU'S STRUCTURE

Defendants fail to satisfy the criteria of 28 U.S.C. § 1292(b) for two reasons. First, they ask this Court to address an issue that is not a "controlling question of law" because it is no longer relevant to this case. Although the Bureau was once headed by a Director who was removable by the President only for cause, that is no longer true – the CFPA's for-cause removal provision does not apply to its current Acting Director. Defendants' constitutional challenge to the CFPA's for-cause removal is therefore not controlling. And second, an interlocutory appeal at this time will not "materially advance the ultimate termination of the litigation" because the case can be resolved promptly in the district court either on the Bureau's pending summary judgment motion or at a trial that had been scheduled to begin in less than three months.

A. The issue raised by Defendants is not a "controlling question of law"

Defendants' challenge to the constitutionality of the for-cause removal provision that applies to the Bureau's Director does not present a controlling question of law in this case because that removal provision does not apply to the Bureau's current Acting Director, Mick Mulvaney. Mr. Mulvaney is removable at will by the President and has ratified the decision to bring this enforcement action.

In their Petition, Defendants contend that they are particularly concerned that the President cannot remove the Bureau's Director at will because the Director decides "'how to enforce, when to enforce, and against whom to enforce the law; and what sanctions and penalties" to seek. Petition at 12-13 (quoting *PHH v. CFPB*, 881 F.3d at 165 (Kavanaugh, J., dissenting)).[2] But since November 24, 2017, this is no longer true because, as of that day, the Bureau has been headed by Acting Director Mulvaney,

[2] Defendants also mention in passing that the Bureau is funded outside of the annual appropriations process. *See* Petition at 4, 12. But as the court recognized in *PHH v. CFPB*, 881 F.3d at 95-96, "Congress can, consistent with the Appropriations Clause, create governmental institutions" funded outside of "the ordinary appropriations process," and this "has no constitutionally salient effect on the President's power." *See also Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 388 F.3d 405, 409 (3d Cir. 2004) (explaining that "Congress may ... decide not to finance a federal entity with appropriations," but rather through some other funding mechanism).

who is removable by the President at will. Further, as explained above, the Acting Director specifically reviewed the Bureau's decision to file the lawsuit against Defendants and was briefed regarding the case. He then ratified the lawsuit. ECF 231-1. Thus, the decision to pursue the enforcement action against Defendants has now been made by an executive officer whom the President may remove at will.[3]

Because the Bureau's Acting Director is removable at will, his ratification cured any potential constitutional defect with the Bureau's decision to initiate this action. *See CFPB v. Gordon*, 819 F.3d 1179, 1191-92 (9th Cir. 2016) (applying principles from the Restatement of Agency to hold that subsequent ratification cured an earlier Article II problem); *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) ("Ratification can remedy defects arising from the decisions of improperly appointed officials"); *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016) (concluding that ratifications by properly

[3] Thus, the situation here is quite different from cases such as *Ryder v. United States*, 515 U.S. 177 (1995), *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), or *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015). *See* Petition at 18-19. In each of those cases, the court refused to accord de facto validity to the actions of invalidly appointed officers or of an unconstitutionally structured agency. *See Ryder*, 515 U.S. at 183-84; *NRA Political Victory Fund*, 6 F.3d at 828; *SW Gen.*, 796 F.3d at 81-83. But, unlike here, in none of those cases had the challenged actions been ratified by an officer or agency that was not subject to challenge.

appointed officials were "sufficient to cure" problem with board appointments that previously left agency without authority to act).

When an agent lacks authority to act on behalf of a principal (*i.e.*, assuming *arguendo* that Director Cordray lacked authority to act on behalf of the Bureau), the principal (the Bureau, acting through its agent Acting Director Mulvaney) may subsequently authorize actions that were taken by the agent who lacked authority. *See* Restatement (Third) of Agency, ch. 4, intro. note; *id*. § 4.01 cmt. b; *United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907). Such a ratification has retroactive effect: It "operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally." *Marsh v. Fulton Cnty.*, 77 U.S. 676, 684 (1870); *accord Heinszen*, 206 U.S. at 382 (stating that ratification "retroactively give[s]" an agent's acts "validity"). Because the Bureau is no longer headed by a Director who is removable by the President only for cause, and because the Bureau's Acting Director, who is removable by the President at will, has ratified the decision to file a lawsuit against Defendants, the constitutionality of the for-cause removal provision is no longer relevant to this case and is therefore not a controlling question of law.[4]

[4] Defendants contend that the Bureau has "acknowledged" that the issue they seek to have this Court address is dispositive. *See* Petition at 17, citing ECF 151 at 4. What counts, however, is whether the issue is controlling, and

Defendants made no mention of the Bureau's current Acting Director, or of his ratification, in the Motion for Certification that they filed before the district court. *See* ECF 239. And in their Petition before this Court, they relegate that discussion to a footnote on the penultimate page. *See* Petition at 21 n.1. But as explained above, those facts are central to whether the constitutional question the district court certified actually presents a controlling question of law in this case.[5]

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as explained above, it is not. When the Bureau filed ECF 151, the Bureau's Director had not been replaced by the Acting Director. Moreover, the Bureau made the statement in a motion for an extension of time to respond to Defendants' Motion for Judgment on the Pleadings. In that context, the Bureau was simply recognizing that the issue, which Defendants characterized as dispositive, was complex.

[5] Because the district court apparently never considered the Bureau's argument that the Acting Director's ratification cured any constitutional defect, this Court should decline to permit an appeal that would require it to resolve the ratification issue in the first instance. *See United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F3d 648, 658 (5th Cir. 2004) (declining to consider an issue on interlocutory review that district court had not addressed); *see also Montano v. Texas*, 867 F.3d 540, 546 (5th Cir. 2017) (explaining that "a court of appeals sits as a court of review, not of first view" (internal quotation marks omitted)). Moreover, if the district court were ultimately to resolve this case in Defendants' favor on the merits, there would be no need for it to reach the constitutional question at all. *Hale v. King*, 642 F.3d 492, 504 n.38 (5th Cir. 2011) ("[a] fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them" (internal quotation marks omitted). Thus, this Court should not permit this appeal to go forward and then decide later whether the appeal actually involves a controlling issue of law, as Defendants urge. *See* Petition at 21 n. 1.

Defendants cite the D.C. Circuit's decision in *FEC v. NRA Political Victory Fund* and contend that if this Court agrees that the Bureau's structure "'violates the Constitution,' then the agency 'lacks authority to bring [an] enforcement action'" and the case must be dismissed. Petition at 17 (quoting *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993)). But Defendants' ignore the D.C. Circuit's later decision in *FEC v. Legi-Tech*, 75 F.3d 704 (D.C. Cir. 1996), which makes clear that the Bureau's action should proceed.

Legi-Tech involved the same constitutional problem identified in *NRA Political Victory Fund*. In both cases, the FEC was unconstitutionally structured when it initiated a civil enforcement action against a defendant. *See Legi-Tech*, 75 F.3d at 706. In *Legi-Tech*, however, the D.C. Circuit held that the FEC's complaint should not be dismissed. *Id.* at 708-09. This was because by the time *Legi-Tech* reached the D.C. Circuit, the FEC had been reconstituted to correct the constitutional flaw, and the reconstituted FEC had ratified its earlier decision to bring the enforcement action. *Id.* at 706. The D.C. Circuit held that the ratification was "an adequate remedy for the ... constitutional violation" and reversed the district court's order dismissing the case. *Id.* at 709; *see also Gordon*, 819 F.3d at 1191-92 ("agree[ing] with the D.C. Circuit's approach" in *Legi-Tech* and holding that

ratification cured an Article II defect with the Bureau's initiation of a case). Here, Acting Director Mulvaney – who is removable at will – now leads the Bureau and has ratified the Bureau's earlier decision to enforce the law against Defendants. So even assuming, contrary to virtually every court to address the issue,[6] that the for-cause removal provision of the CFPA was unconstitutionally flawed, ratification remedied that flaw.[7] Thus, the issue

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[6] In addition to the court below, the following decisions have held that the Director's for-cause protection does not offend the separation of powers under the Constitution: *PHH v. CFPB*, *supra*; *CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961 (C.D. Cal. 2017), *stayed pending appeal*, No. 17-55721 (9th Cir. June 1, 2017); *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 3:15-cv-2106, 2017 WL 3948396 (N.D. Cal. Sept. 8, 2017), *appeal docketed*, No. 18-15431 (9th Cir. Mar. 15, 2018); *CFPB v. TCF Nat'l Bank*, No. 0:17-cv-00166, slip op. (D. Minn. Sept. 8, 2017) (ECF 89); *CFPB v. Seila Law LLC*, No. 8:17-cv-01081, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017), *stayed pending appeal*, No. 17-56324 (9th Cir. Sept. 13, 2017); *CFPB v. Navient Corp.*, No. 3:17-cv-101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017); *CFPB v. CashCall, Inc.*, No. 2:15-cv-07522, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016), *appeal docketed*, No. 18-55479 (9th Cir. April 12, 2018); *CFPB v. ITT Educ. Servs.*, Inc., 219 F. Supp. 3d 878 (S.D. Ind. 2015); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082 (C.D. Cal. 2014). The sole decision holding the for-cause provision unconstitutional relied exclusively on the reasoning of the now-vacated panel decision in *PHH v. CFPB*. *See CFPB v. D&D Mktg.*, No. 2:15-cv-09692, 2016 WL 8849698 (C.D. Cal. Nov. 17, 2016), *interlocutory appeal granted*, No. 17-55709 (9th Cir. May 17, 2017). The Ninth Circuit permitted an interlocutory appeal in *D&D Marketing*, but it did so while the Bureau was still headed by Director Cordray, who was removable only for cause.

[7] Defendants also argue that "the inherently temporary nature of the Acting Director's tenure makes the question 'capable of repetition yet evading review.'" Petition at 21 n.1 (quoting *Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 422 (5th Cir. 2014)). It may be that the Acting

on which Defendants seek interlocutory review does not present a controlling question of law.

In any event, even if this Court were to reach the constitutional question (despite the Acting Director's ratification) and hold that the CFPA's for-cause removal provision is unconstitutional under current law (despite the near-unanimous view of other courts), Defendants would still not be entitled to the judgment on the pleadings they seek. Instead, the proper remedy for the constitutional violation Defendants assert would be to sever the for-cause removal provision and remand to the district court for further proceedings on the merits. That was the remedy ordered in the now-vacated panel decision in *PHH v. CFPB*, 839 F.3d 1, 39 (D.C. Cir. 2016). There the court held that the for-cause removal provision was unconstitutional. *Id.* at 36. But it also held that the appropriate remedy was to sever that provision from the CFPA and remand for further proceedings before a Bureau that would then be headed by a Director who was removable at will. *Id.* at 39. (The court reached this conclusion in part because the Dodd-Frank Act includes an express severability clause that

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Director's tenure is only temporary, but Defendants have not raised any challenge regarding the Acting Director, who is, after all, removable at will. If, in the future, the Bureau is once again headed by a Director who is removable by the President only for cause, that Director will be serving a five-year term, 12 U.S.C. § 5491(c)(1), and the issue will not evade review.

applies to the CFPA. 839 F.3d at 38 (citing 12 U.S.C. § 5302).) In its brief to the en banc D.C. Circuit, the United States agreed. *See PHH*, 881 F.3d at 198 (Kavanaugh, J. dissenting) (en banc).

Here, severing the for-cause removal provision would not affect the Bureau's authority to prosecute this action. Both before and after any such severance, the Bureau would be led by a Director who is removable by the President at will.

B. An interlocutory appeal will not materially advance the termination of this case

An appeal of the district court's interlocutory order denying Defendants' Motion for Judgment on the Pleadings also will not materially advance the ultimate termination of the litigation. To the contrary, an interlocutory appeal will substantially delay termination because, as explained above, the statutory restriction that Defendants challenge currently has no effect.

Such a delay would be particularly unwarranted given how close the district court is to a final resolution of the case. Discovery concluded nine months ago. The Bureau filed a Motion for Summary Judgment, and that motion was fully briefed by the end of September 2017. When the district court stayed all proceedings, it had yet to address that motion, and on March 29, 2018, it issued an order holding resolution of summary

judgment in abeyance "until the interlocutory appeal has been decided by the United States Court of Appeals for the Fifth Circuit." ECF 241. But if the district court were to grant the Bureau's motion, that would terminate the litigation, and would result in a final order that Defendants would be entitled to appeal.

The district court held that an immediate appeal would materially advance the termination of the litigation because "[a] decision that the case cannot proceed at this time would avoid the anticipated two week jury trial, which, in turn, would prevent the parties' incurring addition[al] litigation expenses and would prevent the expenditure of judicial resources." ECF 240 at 3. Although the court is concerned regarding the length of a possible trial, the actual length will depend on whether the court grants all or part of the Bureau's summary judgment motion. Further, before the district court stayed further proceedings, the pretrial conference was scheduled for May 10, 2018, and trial was set to commence in June. An interlocutory appeal could well delay the termination of litigation because it is doubtful that an appeal could be completed before the scheduled date for the trial. *See Shurance v. Planning Control Int'l, Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988) (court denied interlocutory appeal where the appeal would not be completed before the scheduled trial date); *Baranski v. Serhant*, 602 F.

Supp. 33, 36 (N.D. Ill. 1985) (court held that "[d]elay is a particularly strong ground for denying [interlocutory] appeal if certification is sought ... shortly before trial" where trial was scheduled to commence in five months). Thus, if Defendants' Petition is granted, it will likely delay, not advance, termination of the litigation.[8]

CONCLUSION

For the reasons set forth above, this Court should deny Defendants' Petition for Permission to Appeal the district court's interlocutory order denying the Motion for Judgment on the Pleadings.[9]

Respectfully submitted,

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[8] In *Collins v. Mnuchin*, No. 17-20364 (5th Cir.), which has already been briefed and argued, this Court is considering, *inter alia*, a challenge to the constitutionality of the structure of the Federal Housing Finance Agency (FHFA). In a letter that it submitted on February 2, 2018, pursuant to Fed. R. App. P. 28(j), the FHFA argued that its structure is "materially identical" to the Bureau's structure. But unlike the Bureau, the FHFA is headed by a director who is removable by the President only for cause, not an Acting Director who is removable at will.

[9] If this Court grants the Defendants' Petition for Permission to Appeal, the Bureau requests that this Court expedite the appeal.

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CERTIFICATE OF COMPLIANCE

The Bureau's Answer in Opposition complies with the length limits permitted by Fed. R. App. P. 5(c)(1). It contains 4511 words, excluding the portions exempted by Fed. R. App. P. 32(f). This Answer 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 (14-point Georgia) using the Microsoft Word 2010 word processing program .

Dated: April 13, 2018

/s/ Lawrence DeMille-Wagman
Attorney for Plaintiff-Appellee
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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2018, I electronically filed the Consumer Financial Protection Bureau's Answer in Opposition to Petition for Permission to Appeal with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that counsel for all parties in the case, listed below, are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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