Superior Court of the District of Columbia
Civil Division

Environmental Working Group, *Plaintiff*, v. Tyson Foods, Inc., *Defendant*, The Center for Constitutional Responsibility, 4532 Cherry Hill Road, No. 538 Arlington, VA 22207 *[Proposed] Intervenor-Defendant*.	Case No. 2024-CAB-005935

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

Plaintiff the Environmental Working Group ("EWG") brought this action as a private attorney general to enforce the D.C. Consumer Protection Procedures Act, D.C. Code § 28–3901, *et seq.* ("the CPPA") on behalf of the supposed public interest. The Center for Constitutional Responsibility ("the Center") is an organization dedicated to preserving our constitutional structure and the separation of powers, including by opposing the unlawful delegation of public enforcement authority to unaccountable private plaintiffs. The Center seeks to intervene in this case to protect its interests and to advance three legal defenses that Defendant Tyson Foods, Inc., has not: (1) that EWG's

claims violate the separation of powers, (2) that EWG's claims violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States, and (3) that if this Court has jurisdiction over EWG's claims, then EWG's CPPA claims violate Article I of the Constitution of the United States because they do not present a purely local issue that may be adjudicated by judges appointed without the protections of Article III.

The Center satisfies the requirements for permissive intervention under D.C. Superior Court Rule 24(b) and should be allowed to intervene to advance defenses fundamental to the public interest that otherwise will not be presented.

BACKGROUND

A. This action and EWG's use of consumer protection claims to advance environmental goals.

On September 18, 2024, EWG filed this lawsuit alleging that Tyson Foods, Inc., violated the D.C. Consumer Protection Procedures Act, D.C. Code § 28–3901, *et seq.* Compl. ¶ 1. EWG does not allege that Tyson has injured EWG. Rather, EWG filed suit under a provision of the CPPA that expressly allows uninjured plaintiffs to enforce the law and obtain broad recovery for others while receiving attorneys' fees for itself. *See* D.C. Code § 28–3905(k)(1)(D) (authorizing "public interest organization[s], on behalf of the interests of a consumer or a class of consumers" to sue for misleading trade practices).

EWG alleges that Tyson's nationwide marketing and representations unlawfully deceived D.C. consumers—but not EWG, its members, or any identified consumer—in two ways. *First*, by representing to consumers generally that it is committed to net-zero

greenhouse gas emissions across its global operations by 2050, even though it allegedly does not have a realistic plan to achieve that goal. Compl. ¶ 113-118. *Second*, by misleadingly representing to consumers that it is producing "climate-smart" beef, even though there are allegedly not indications that Tyson's beef produces fewer greenhouse gas emissions. *Id*. ¶ 119.

Although these claims are styled as consumer protection claims, EWG's admitted mission is not the protection of local D.C. consumers, but national and global environmental advocacy. EWG is dedicated to "advocacy to highlight policies and industry practices that pose a threat to public health and to the environment." *Id*. ¶ 18. Its consumer protection claims are thus a vehicle for environmental advocacy, as illustrated by the fact that EWG's claims are focused exclusively on alleged misrepresentations related to climate change and the global environment. The Complaint is replete with discussions of national or global environmental issues. *See, e.g., id.* ¶ 40 (discussing "global anthropogenic methane emissions"), ¶ 41 (discussing "global GHG emissions"), ¶ 43 (discussing "U.S. agricultural emissions"); ¶ 80 (discussing Tyson's "Scope 3 emissions"); ¶ 95 (discussing Tysons's alleged spending on reducing GHGs).

B. The Center for Constitutional Responsibility and its mission to oppose the unlawful delegation of enforcement authority to unaccountable private attorneys general.

The Center for Constitutional Responsibility is a nonprofit organization that is dedicated to preserving the separation of powers and the accountability of the political

branches at all levels of government in the United States. The Center is particularly concerned with the increasingly common delegation to unaccountable private parties of the executive's exclusive power to enforce public laws. This delegation—which deputizes the plaintiffs' bar and private citizens to act as roving, unaccountable "private attorneys general"—is a threat to democratic accountability and the cohesiveness of our union. Laws, especially on contentious topics, should be enforced by government officials that answer to the people. The Center aims to prevent the unlawful and unwise delegation of sovereign enforcement authority and often advances these arguments in courts across the country.

Delegations of private enforcement authority violate fundamental principles of separation of powers applicable to the federal government and to the District. This is because the power to enforce the law—and accountability for enforcement decisions—rests solely with the executive branch. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (The executive branch's obligation to "take Care that the Laws be faithfully executed" is its "most important constitutional duty." (citation omitted)). And when the executive branch decides whether to bring a civil suit to enforce "general compliance" with federal law, it exercises a quintessential executive branch function. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021). When private plaintiffs wield the power to advance "the undifferentiated public interest in . . . compliance with the law," they usurp this exclusive executive power. *Lujan*, 504 U.S. at 577.

Delegations of that authority are also fundamentally unwise. The decision to vest the executive power exclusively in the executive branch protects individual liberty by leaving to elected executive officials the discretion *not* to enforce violations of law when enforcement would be unjust or otherwise inappropriate. As then-Judge Kavanaugh explained,

> One of the greatest *unilateral* powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior. . . . After enacting a statute, Congress may not mandate the prosecution of violators of that statute. Instead, the President's prosecutorial discretion and pardon powers operate as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed.

In re Aiken Cnty., 725 F.3d 255, 264 (D.C. Cir. 2013).

An executive who is accountable to the voters can be expected to strive to exercise prudent judgment and only take enforcement action when doing so is reasonable and in the public interest. Self-identifying public interest organizations have no such check. By their very nature, these organizations do not need to carefully weigh enforcement decisions because they "face no significant political repercussions for setting unwise enforcement priorities." Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 Duke Env't L. & Pol'y F. 39, 49 (2001). Unsurprisingly, they often enforce the law in service of their own ideological or policy goals. As Justice Breyer explained: "The delegation of state authority to private individuals authorizes a purely

ideological plaintiff . . . to bring into the courtroom the kind of political battle better waged in other forums." *Nike, Inc. v. Kasky*, 539 U.S. 654, 679 (2003) (Breyer, J., dissenting).

Worse, private enforcers can mix ideology and policy with plainly improper motivations for enforcement because they are "unencumbered by the legal and practical checks that constrain public enforcement agencies." *Laufer v. Arpan LLC*, 29 F.4th 1268, 1295 (11th Cir. 2022) (Newsom, J., concurring) (quoting Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 837 (2008)). There is nothing stopping private enforcers of public statutes from selecting their targets for improper reasons, like the resources the defendant has available to fight the allegation or even the defendant's political stances.

Despite this, there has been a growing and disturbing trend of legislatures creating private rights of action that turn private citizens into bounty hunters seeking out legal violations for pecuniary or other gain, including in some of the most contentions areas of policy. *E.g.*, Cal. Bus. & Prof. Code § 22949.64 (creating private right of action related to firearms); Tex. Health & Safety Code Ann. § 171.208(a) (creating private right of action related to abortion). These laws intentionally pit one group of citizens against another on extraordinarily contentious issues and dramatically heighten the risk of "unrestrained factionalism" that our Founders worried would "do significant damage to the fabric of government." *Storer v. Brown*, 415 U.S. 724, 736 (1974); *see also* The Federalist No. 51, at

349 (James Madison) (noting that the best security for liberty is a system where "each" branch "may be a check on the other").

C. This action presents concerns central to the Center's mission.

The Center seeks to intervene in this action because EWG's claims represent the precise type of unlawful delegation of enforcement authority that the Center advocates against. EWG's claims are brought under the CPPA's provision authorizing uninjured public advocacy organizations to act as private attorneys general pursuing their own conception of the public interest. EWG is not accountable to the public and therefore is unconstrained in how it chooses to wield its enforcement authority. Rather than enforcing the CPPA only when D.C. consumers are harmed and there is a cognizable public interest in enforcement, EWG can instead choose to bring an enforcement action to advance a broader ideological agenda related to environmental issues. The Center thus seeks to intervene to protect its interest in lawful and accountable civil enforcement litigation brought only by executive branch officials and their subordinates.

LEGAL STANDARD

Under District of Columbia Superior Court Rule 24(b), the Court may permit anyone to intervene who presents a "a claim or defense that shares with the main action a common question of law or fact," so long as intervention will not "unduly delay or prejudice the adjudication of the original parties' rights" and the motion to intervene is "timely." D.C. Super. Ct. Civ. Rule 24(b). "'[P]ermissive intervention is an inherently

discretionary enterprise' and the court enjoys considerable latitude under Rule 24(b)." *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 10 (D.D.C. 2007) (quoting *E.E.O.C. v. Nat'l Child.'s Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998)).[1]

ARGUMENT

I. The Center should be allowed to permissively intervene.

This Court should exercise its discretion to grant the Center permissive intervention. The Center proposes to present three purely legal defenses that share "a common question of law or fact" with EWG's claims because they go to whether EWG can bring them *at all*. Allowing the Center to present these legal defenses will contribute to the resolution of this case and serve the public interest because they go to the core of the District's governmental structure. And intervention will not unduly delay or prejudice the resolution of this case both because this motion is timely and because the Center agrees to follow the schedule this Court sets with respect to the existing parties.

A. The Center's arguments share a "common question of law or fact" with EWG's claims.

Rule 24(b) authorizes intervention when the movant "has a claim or defense that shares with the main action a common question or law or fact." D.C. Super. Ct. Civ. Rule 24(b)(1)(B). This is not a demanding requirement. Even when an intervenor has only "a

[1] "The D.C. and Federal rules on intervention . . . are substantially identical," and so D.C. courts frequently "look to federal court decisions" interpreting the federal rule. *Jones v. Fondufe*, 908 A.2d 1161, 1163 n.2 (D.C. 2006) (citation omitted).

'general interest' in the subject of the suit," that can be sufficient to warrant permissive intervention. *Textile Workers Union of Am., CIO v. Allendale Co.*, 226 F.2d 765, 769 (D.C. Cir. 1955); *see also E.E.O.C.*, 146 F.3d at 1046 (same). The Center's proposed defenses—which squarely address whether EWG may bring these claims on behalf of consumers—satisfy that standard.

When a defendant-intervenor asserts defenses "that squarely respond to the challenges made by plaintiffs in the main action," they "assert a claim or defense in common with the main action." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *see also Sierra Club*, 523 F. Supp. at 10 (holding that intervenors that "present defenses to the precise claims brought by plaintiffs" have "defenses with common questions of law and fact with plaintiffs' claims"). In *Emmco Insurance Company v. White Motor Corporation*, for instance, the intervenor's arguments involved "questions of law and fact" common to the original action because it sought to ensure "that the proper evidence was introduced at trial concerning the extent of damages" in the product liability case at issue. 429 A.2d 1385, 1386 (D.C. 1981).

Here, the Center seeks to intervene to advance three purely legal defenses to EWG's claims that "squarely respond," *Kootenai*, 313 F.3d at 1111, to the "precise claims brought by plaintiffs," *Sierra Club*, 523 F. Supp. 2d at 10.

i. The Center's proposed separation of powers defense "squarely responds" to EWG's CPPA claims.

The Center seeks to raise the defense that the CPPA claims at issue here violate the separation of powers because EWG cannot exercise the Attorney General's exclusive power to bring and prosecute enforcement actions on behalf of the public interest. It is a fundamental principle of the separation of powers that only the executive branch may wield the executive power to enforce the law. To be sure, private plaintiffs may sue to vindicate their own *private* rights, even when doing so may have the indirect effect of enforcing the law. But a private citizen cannot act as a private attorney general. Where private plaintiffs attempt to do so—as EWG does here—they violate the separation of powers by wielding executive authority vested exclusively in the executive branch. The separation of powers is thus a defense built on the very claims that EWG alleges and seeks to develop.

The District Code explicitly recognizes "the principle of separation of powers in the structure of the District of Columbia government." D.C. Code § 1-301.44. Like the federal government, the District is built on a "tripartite structure" where the legislative, executive, and judicial powers are separated. *Unum Life Ins. Co. of Am. v. District of Columbia*, 238 A.3d 222, 232 (D.C. 2020). Because of that, the District has "long acknowledged that the separation-of-powers principles" that "'are applicable to the three branches of government at the federal level' likewise 'govern the exercise of each branch's powers' in the District Charter." *Fraternal Ord. of Police Metro. Police Dep't Lab. Comm. v.*

District of Columbia, 290 A.3d 29, 41 (D.C. 2023) (quoting *Wilson v. Kelly*, 615 A.2d 229, 231 (D.C. 1992) (alteration omitted)). The "separation of powers principles" that govern in the District, moreover, are those that "may be authoritatively pronounced by the Supreme Court from time to time." *Wilson*, 615 A.2d at 232 n.8. So, when addressing separation of powers questions, the D.C. Court of Appeals relies on Supreme Court precedent outlining the roles and limits of each branch of federal government. *See, e.g.*, *Hessey v. Burden*, 584 A.2d 1, 4-6 (D.C. 1990) (relying on U.S. Supreme Court decisions to decide whether public advocate position intruded on the prerogative of the mayor and the executive branch).

Federal separation of powers instructs that *only* the executive branch may enforce the law on behalf of the public interest. Article II of the Constitution vests "the executive Power" in the "President of the United States," U.S. Const. art. II, § 1, as part of defining the executive branch from its sister branches. This Clause prohibits the vesting of the executive power in anyone else or any other branch of government—"all of it" resides with the President. *Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020). The Take Care Clause separately gives the President "supervisory . . . responsibilit[y]" over those who execute the law. *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). And because the President has supervisory authority only over individuals in the executive branch, it necessarily follows that only individuals in the executive branch may execute the law.

District law is of a piece. Section 1-204.22 states: "The executive power of the District shall be vested in the Mayor who shall be the chief executive officer of the District

government." The Mayor is likewise instructed that she "shall take care that the laws be faithfully executed." D.C. Code. § 1-301.76. To be sure, unlike the federal government, not *all* of the executive power is vested in the Mayor. Rather, the executive power is split between the Mayor and the separately elected Attorney General. But *both* reside in the executive branch. The Attorney General's executive power is to "have charge and conduct of all law business of the said District and all suits instituted by and against the government thereof." D.C. Code § 1-301.81. He also "shall be responsible for upholding the public interest" and litigating "on behalf of this public interest." *Id.* Indeed, this ability to litigate on behalf of the people of the District is a core executive function. *See TransUnion LLC*, 594 U.S. at 429 (explaining that when the United States decides whether to bring a civil suit to enforce "general compliance" with federal law, it exercises a quintessential Executive Branch function). A "lawsuit," after all, "is the ultimate remedy for a breach of the law, and it is to the [executive branch] . . . that the Constitution entrusts [that] responsibility.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam). That is why the power to litigate on the public's behalf resides exclusively within the executive branch, and, specifically, in the Attorney General.

The CPPA delegates enforcement authority to public interest organizations in direct violation of these separation of powers principles. "The CPPA is a comprehensive statute designed to provide procedures and remedies for a broad range of practices which injure consumers." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015) (internal

quotation marks and citations omitted). "The CPPA's original enactment permitted suits to be brought by '[a]ny consumer who suffers any damage as a result of ... a trade practice.'" *Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 182 (D.C. 2021) (citing D.C. Code § 28-3905(k)(1) (1976)). Such actions were consistent both with standing principles and the traditional and unchallenged authority of the Council to create rights of action for individuals to use the courts to redress violations of their individual rights. But in 2012, the Council amended the CPPA to permit so-called "public interest organization[s]" to bring suits "on behalf of the interests of a consumer or a class of consumers." D.C. Code § 28-3905(k)(1)(D). Rather than "pursuing any independent interest of the organization or its members," *Animal Legal Def. Fund.*, 258 A.3d at 183, these organizations can "bring an action seeking relief … if the consumer or class could bring an action [in their own capacity]," D.C. Code § 28-3905(k)(1)(D). Put differently, uninjured public interest organizations are authorized under the CPPA to file suit to vindicate the public interest, despite the separation of powers vesting in the Attorney General *exclusively* this quintessentially executive function to enforce the law on behalf of the public.

EWG admits that it sues Tysons *only* as a public interest organization interested in serving what it sees as the public interest. Compl. ¶¶ 37-38. It describes itself as an advocacy organization "acting on behalf of the interests of consumers" consistent with its mission to educate the public about environmental issues. *Id.* ¶ 21. But uninjured

individuals or groups filing an enforcement action on behalf of the broader public interest is exactly what the separation of powers prohibits. To satisfy the separation of powers, any action must be brought either by an injured consumer (if any exist) seeking redress of that private injury, or by the Attorney General who is empowered to act on the public's behalf. The separation of powers is thus a defense against EWG's CPPA claims that shares common law and facts with the main action.

ii. The Center's proposed Due Process defense also "squarely responds" to EWG's CPPA claims.

The Center also proposes to defend against EWG's claims by arguing that it violates the Due Process Clause of the Fifth Amendment to the Constitution of the United States for EWG to prosecute these claims. That is because the Due Process Clause prohibits delegating executive enforcement authority to a private organization that has a financial stake in the outcome of the litigation. As with the proposed separation of powers defense, this defense responds directly to EWG's claims and relies on the very facts that EWG alleges and seeks to prove.

The Due Process Clause states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring). Courts have thus relied on this Clause to limit delegations of government authority to interested private parties. Most notably, in *Carter v. Carter Coal Co.*, the Supreme Court held that an act empowering

majority coal producers to exercise delegated legislative authority to set wage and hour requirements for minority coal producers was "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." 298 U.S. 238, 311 (1936). Although this dealt with delegation of legislative, not Executive power, the fundamental due process problem in *Carter Coal* was the "self-interested character of the delegatees" who were supposed to be acting in the public interest. *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 821 F.3d 19, 28 (D.C. Cir. 2016).

Allowing EWG—or any other public interest organization—to litigate on behalf of consumers and the public interest more broadly poses the same Due Process problem. Public interest organizations have a financial interest in bringing these suits because they may collect "reasonable attorney's fees" under the CPAA. D.C. Code § 28-3905(k)(2)(B); *see also* Compl. at 32 (EWG requesting attorneys' fees). That is not a Due Process problem for injured individuals because the attorneys merely help make that individual whole after his injury.

Public interest organizations, however, are in a completely different boat. Attorneys' fees are essential to their financial operations and advance their mission to bring more suits. This creates a perverse incentive for public interest groups to seek out suits to file to collect attorneys' fees, even if those suits do not serve the public interest. And those distorted incentives present the same basic concern that the Supreme Court recognized as violating due process in *Carter Coal*.

Moreover, the Supreme Court has cautioned that a statutory "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980) (explaining that due process limits the ability of interested individuals to prosecute violations of law); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987) (explaining that a party is entitled to a "disinterested" prosecutor, even as "prosecutors may not necessarily be held to as stringent a standard of disinterest as judges"). These "impermissible factors" are ever-present here, where public interest groups have an incentive not only to pursue litigation, but to target businesses and issues of political or cultural salience even if the alleged offenses do not actually harm anyone.

iii. The Center's proposed argument that the exercise of jurisdiction over EWG's claims violates Article I is based on the facts that EWG itself alleges.

The Center finally proposes to defend against EWG's claims by arguing that Article I of the Constitution prohibits this Court from exercising jurisdiction over EWG's claims because those claims concern a national, rather than a purely local, issue. As with the other defenses, this defense shares a common question of law or fact with EWG's claims because it squarely responds to those claims.

Earlier in this nation's history, the Supreme Court held that the District of Columbia's courts were full federal courts under Article III of the Constitution, such that

their judges had full constitutional protections of their independence, such as life tenure and guaranteed salaries. *See O'Donoghue v. United States*, 289 U.S. 516, 534-35 (1933). But Congress has since refashioned the court system, creating two sets of courts: (1) "constitutional courts manned by Art. III judges to which the citizens of the District must or may resort for consideration of those constitutional and statutory matters of general concern," which are the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit; and (2) "strictly local courts, the Superior Court and the District of Columbia Court of Appeals." *Palmore v. United States*, 411 U.S. 389, 407 (1973).

The Supreme Court has recognized that the D.C. Superior Court is a territorial court created by Congress under its exclusive, plenary Article I authority to rule the District of Columbia. And it is therefore a municipal, local court, not an Article III federal court of the United States. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, LLC, 590 U.S. 448, 471 (2020). That is why it is not required to possess the structural protections that guarantee judicial independence, such as lifetime appointment and fixed compensation.

Because the D.C. Superior Court is—and can only be—a local court given its creation under Article I as a court lacking Article III structural protections, it may only adjudicate "matters of *strictly local* concern" to the District of Columbia. *Id.* at 470-71 (emphasis added) (citation omitted). Were it otherwise, a plaintiff could circumvent the structural protections of Article III, which advance liberty by guaranteeing that parties

have judges with a certain amount of independence, by sending matters of national importance to the local D.C. courts.

This case is an archetypical example of the abuse of D.C.'s Article I court's local jurisdiction. This is a suit against an out-of-jurisdiction defendant—a company headquartered in Arkansas and incorporated in Delaware. And the subject of the case is not a matter of strictly local concern. EWG attacks Tyson's aspirations on global climate change and the national promotion of its efforts to reduce emissions, all of which occur outside the District of Columbia. Both categories of statements addressed in the complaint occurred on the Internet, outside of the District of Columbia. And the complaint does not identify a single D.C. resident who has allegedly been injured or affected by Tyson's public statements. Or a single D.C. resident who has ever heard or read Tyson's statements. Although this Court has held this is sufficient to establish personal jurisdiction over these fundamentally national claims, it does not follow that this Court also has subject matter jurisdiction consistent with Article I of the Constitution. Where, as here, an advocacy organization brings suit to control the nation-wide actions of a defendant—none of which happened in the District of Columbia except the alleged sale of some products—this Court would go beyond its jurisdictional bounds as a purely local court to adjudicate those claims.

B. The Center's motion is timely.

"Rule 24(b) requires that an application for intervention be 'timely' filed." *Emmco*, 429 A.2d at 1386. The Center's request to intervene is timely.

This Court has "sound discretion" to determine whether an action is timely. *Id.* at 1387. "Timeliness is to be determined from all the circumstances." *Id.* (quoting *NAACP v. New York*, 413 U.S. 345, 366 (1973)). Those circumstances include: "the length of the intervenor's delay in filing its application," "the reason for the delay," and "the stage to which the litigation had progressed when intervention was sought," "the prejudice that the original parties may suffer if the application is granted," and "the prejudice that the intervenor may suffer if its application is denied." *Id.*

The Center has not delayed in seeking intervention. This case has "not progressed beyond the initial stages." *Compare Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60, 64-65 (1st Cir. 2008) (granting motion to intervene filed "approximately nine months" after movant became aware of the case), *with Emmco Ins. Co.*, 429 A.2d at 1387 (motion untimely when filed four years after the suit began and on the eve of trial). The Center has moved to intervene less than one week after Tyson answered the complaint, before this Court's initial scheduling conference, and before any meaningful discovery has occurred. *See Cabot LNG Corp. v. P.R. Elec. Power Auth.*, 162 F.R.D. 427, 429 (D.P.R. 1995) (finding intervention motion filed three months after the case was filed timely because, among other things, "no scheduling order has been issued" and "discovery has not begun");

Students for Fair Admissions Inc. v. Univ. of N.C., 319 F.R.D. 490, 494 (M.D.N.C. 2017) (finding motion timely when filed seven months after the complaint, three months after the answer, and six weeks after discovery began); *North Dakota v. Heydinger*, 288 F.R.D. 423, 429 (D. Minn. 2012), *report and recommendation adopted*, No. 11-CV-3232 SRN/SER, 2013 WL 593898 (D. Minn. Feb. 15, 2013) (finding motion timely even though "more than a year has passed since Plaintiffs filed the Amended Complaint" because "the parties have not engaged in a Rule 16 conference or discovery").

The Center likewise has good reason for seeking intervention now, after the Court denied Tyson's motion to dismiss. Tyson's motion to dismiss raised threshold questions about whether this Court possesses personal jurisdiction. That argument would have prevented this Court from reaching the merits of EWG's claims, meaning the Center's arguments about the substantive legality of the provision in the CPPA that authorizes uninjured plaintiffs to sue on behalf of consumers would have been premature. Indeed, because this court may resolve personal jurisdiction before resolving subject-matter jurisdiction, *see Davis v. Davis*, 957 A.2d 576, 581-82 (D.C. 2008), this Court also could have dismissed the complaint for lack of personal jurisdiction without reaching the Center's argument that exercising subject-matter jurisdiction over EWG's fundamentally national claims violates Article I.

By waiting to intervene until after this Court denied Tyson's motion to dismiss for lack of jurisdiction, the Center has avoided burdening this Court and the litigants with

additional, premature briefing. *See Heydinger*, 288 F.R.D. at 429 (noting, approvingly, that the intervenors "waited to intervene until the Court resolved" a pending motion for judgment on the pleadings).

C. Intervention will contribute to the equitable resolution of this case, not produce undue delay or prejudice.

Intervention will not "unduly delay or prejudice the adjudication of the original parties' rights," either. D.C. Super. Ct. Civ. Rule 24(b)(3); *see also Emmco*, 429 A.2d at 1387 (considering "the prejudice that the original parties may suffer if the application is granted" and "the prejudice that the intervenor may suffer if its application is denied" in reviewing a motion for permissive intervention).

"Rule 24(b) mentions only *undue* delay; normal delay does not require denying intervention, because adding parties to a case almost always results in some delay." *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 323 F.R.D. 553, 561 (E.D. Va. 2018) (cleaned up). And "[i]n determining whether extra time would be an undue delay, the court must balance the delay threatened by intervention against the advantages promised by it." *Ohio Valley Env't Coal., Inc. v. McCarthy*, 313 F.R.D. 10, 30 (S.D.W. Va. 2015).

Here, allowing the Center to intervene will not slow the case at all. Tyson's motion to dismiss has been resolved, and the Center does not intend to move to dismiss. This Court can therefore hold the scheduling conference already scheduled for February 28, 2025, and issue its scheduling order in the normal course. The Center intends to comply

with whatever scheduling order this Court issues. And the Center will move for summary judgment on the timeline contemplated by this Court's schedule.

Nor will intervention otherwise unduly prejudice the parties. The Center's arguments are purely legal and will not depend on discoverable facts, so intervention will not expand the scope of discovery. To be sure, the Center will raise arguments that Tyson has not raised. But requiring a plaintiff to prove its case is not undue prejudice—every plaintiff must do so. And part of the Center's arguments go to this Court's jurisdiction to resolve this dispute, *see supra* at 16-18, which this Court is required to raise even if the parties do not. *See In re D.M.*, 771 A.2d 360, 364 (D.C. 2001). None of this is the sort of undue prejudice that would justify denying the Center's motion to intervene.

To the contrary, intervention will "significantly contribute … to the just and equitable adjudication of the legal questions presented." *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 192 (2d Cir. 1978) (quoting *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 326, 1329 (9th Cir. 1977)). The CPPA's private enforcement provision raises questions going to the heart of the District of Columbia's governmental structure and this Court's jurisdiction that are plainly of public importance. It is "obvious" that "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder,* 721 F.3d 638, 653 (D.C. Cir. 2013); *see also Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (recognizing that it "is always in the public interest to" prevent a constitutional violation (citation omitted)).

Tyson has not raised these defenses in its answer or motion to dismiss. Thus, absent intervention, these important questions risk not being considered by this Court, and, if not preserved, not considered in any future appeal. As a leader on the issue of the constitutional limits against the private enforcement of public laws, the Center is uniquely qualified to assist this Court in addressing these foundational issues.

Conclusion

This Court should grant the Center for Constitutional Responsibility's motion to intervene and allow it to participate as a Defendant.

Dated: February 27, 2025

Respectfully submitted,

/s/ Steven P. Lehotsky

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