

THE
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DOJ agrees CFPB is unconstitutional but opposes grant of certiorari in State National Bank of Big Spring case

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Despite agreeing on the merits with State National Bank of Big Spring (SNB) and the other [petitioners for certiorari](#) that the CFPB's structure is unconstitutional, the Department of Justice [has filed a brief](#) in which it argues that the U.S. Supreme Court should deny the petition. (The other petitioners are two D.C. area non-profit organizations that in 2012, together with SNB, brought one of the first lawsuits challenging the CFPB's constitutionality.)

The D.C. District Court initially dismissed the petitioners' complaint for lack of standing but on appeal, in an opinion authored by Judge (now Justice) Kavanaugh, the D.C. Circuit held that the plaintiffs did have standing and remanded the case to the district court. Further proceedings in the case were held in abeyance by the district court pending the outcome of the PHH case in the D.C. Circuit.

Following the D.C. Circuit's en banc PHH decision that held the CFPB's structure is constitutional, the district court lifted its abeyance order and, with the parties having agreed that PHH foreclosed the district court from ruling in favor of the plaintiffs on their constitutional challenge, entered judgment against the plaintiffs. On June 8, 2018, the D.C. Circuit entered an order summarily affirming the district court's judgment. Citing its en banc PHH decision, the D.C. Circuit order stated that "the merits of the parties' positions are so clear as to warrant summary action."

In its brief, the DOJ calls the principal question presented by the case—whether the Bureau's single-director-removable-only-for-cause structure violates the separation of powers—is an "important one that warrants [the Supreme] Court's review in an appropriate case" and that "absent legislative action eliminating the restrictions on removal...will ultimately need to be settled by [the Supreme] Court." Nevertheless, the DOJ asserts that the SNB case "would be a poor vehicle to consider the question for multiple reasons."

Such reasons consist of the following:

- If the Supreme Court were to grant the petition, it is unlikely the case would be considered by the full Court because of Justice Kavanaugh's previous participation in the case while a D.C. Circuit judge, and his authoring of the D.C. Circuit's standing decision. The DOJ asserts that "[p]articularly for a question of this magnitude, the Court may wish to wait for a vehicle in which all nine Justices are likely to participate." (It is not surprising that the DOJ would want Justice Kavanaugh to participate given that he authored the D.C. Circuit panel decision in PHH that held the CFPB's structure is unconstitutional and a dissent in the D.C. Circuit's en banc PHH decision that reversed the panel's decision and held the structure is constitutional.)
- Before it could reach the merits of the constitutionality issue, the Supreme Court would have to resolve in the petitioners' favor the jurisdictional issue of whether the petitioners have standing. According to the DOJ, "petitioners' standing is sufficiently questionable to present a significant vehicle problem."
- There are other cases pending in the courts of appeal that raise a similar constitutional challenge and "one or more of those cases may not present the same obstacles that could impede the full Court from considering the merits of this important issue." The pending cases cited by the DOJ are the [All American](#)

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[Check Cashing](#) case pending in the Fifth Circuit, the [RD Legal Funding](#) case pending in the Second Circuit, and the *Seila Law* case pending in the Ninth Circuit. (*Seila Law* involves an appeal from the district court's refusal to set aside a Bureau civil investigative demand. Oral argument in the Ninth Circuit is scheduled for January 8, 2019.)

On the merits, the DOJ argues that the Bureau's structure is unconstitutional and the proper remedy is to sever the Dodd-Frank Act's for-cause removal provision. The DOJ notes, however, that its position "is that of that of United States, not the position of the Bureau to date." Citing the Dodd-Frank provision that gives the Bureau independent litigation authority in the lower courts, the DOJ observes that while the Bureau continued to defend the constitutionality of its structure in the lower courts under Acting Director Mulvaney, a new Director, Kathy Kraninger, will assume (and now has assumed) leadership of the Bureau.

The DOJ then notes that if the Supreme Court were to grant the petition for certiorari, it would be the Court's "usual practice to appoint an amicus curiae to defend the judgment of the court of appeals" when no party is doing so. The DOJ then cites the Dodd-Frank provision that requires the Bureau to seek the Attorney General's consent before it can represent itself in the Supreme Court and asks the Court, before appointing an amicus curiae, to give the Bureau's new Director "a reasonable opportunity...to determine whether the Bureau will seek to defend the court of appeals' judgment in this Court and for the Acting Solicitor General to determine whether he will authorize the Bureau to do so." (The DOJ indicates in a footnote that the Solicitor General (Noel Francisco) is recused in the case. Presumably, the reason for the recusal is that Mr. Francisco's former law firm is representing one of the amici that has filed a brief with the Supreme Court in support of SNB.)

We note that although the Bureau did continue to defend its constitutionality under Acting Director Mulvaney, it did so as a fallback to its primary argument that because Acting Director Mulvaney is removable at will by the President and had ratified the CFPB's decision to bring the lawsuit in question, any constitutional defect that may have existed with the CFPB's initiation of the lawsuit was cured. The continued viability of that argument is questionable given that Ms. Kraninger, who is now Director, can only be removed by the President for cause. In its Fifth Circuit appeal, All American Check Cashing recently [filed a letter](#) in which it noted the Senate's confirmation of Ms. Kraninger and stated that "[t]his refutes once and for all the CFPB's contention that a purported ratification by the former Acting Director somehow cured the defects in the CFPB's structure." It bears observing that a ruling by the Supreme Court that the CFPB's structure is unconstitutional and the proper remedy is to sever the for-cause removal provision would mean that Ms. Kraninger's five-year term could be cut short should a Democratic President be elected in 2020.

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