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## Fifth Circuit hears oral argument in All American Check Cashing

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On March 12, the U.S. Court of Appeals for the Fifth Circuit heard oral argument in All American Check Cashing's interlocutory appeal from the district court's ruling upholding the CFPB's constitutionality.

All American Check Cashing and the other appellants sought the interlocutory appeal after the district court [denied their motion for judgment on the pleadings](#) in a lawsuit filed by the CFPB that alleges the appellants engaged in abusive, deceptive, and unfair conduct in connection with making certain payday loans, failing to refund overpayments on those loans, and cashing consumers' checks. Citing the D.C. Circuit's *en banc* PHH decision, the district court rejected the defendants' argument that the CFPB is unconstitutional based on its single-director-removable-only-for-cause structure. It subsequently agreed to certify the constitutionality issue for interlocutory appeal to the Fifth Circuit which accepted the appeal. (The district court also rejected All American Check Cashing's three other grounds for its motion for judgment on the pleadings: the CFPB violates due process because it fails to give fair notice of the conduct it proscribes; the CFPB violates the non-delegation doctrine because Congress did not clearly delineate the general policy for, or the boundaries of delegated authority to, the CFPB; and the CFPB violates principles of federalism because the CFPB based several of its CFPB claims on alleged violations of state law by All American Check Cashing.)

The Fifth Circuit panel hearing the oral argument consisted of two judges appointed by President Reagan, Judge Jerry Smith and Senior Judge Patrick Higginbotham, and a third judge appointed by President Obama, Judge Stephen Higginson. The panel's questions and comments provided no clear clues as to how individual judges were leaning. Most of the questioning was devoted to exploring each party's arguments as to why U.S. Supreme Court precedent provided support for its position on the CFPB's constitutionality.

[In its briefs](#), the CFPB relied primarily on the argument that because Acting Director Mulvaney was removable at will by the President and ratified the CFPB's decision to bring the lawsuit against the appellants, any constitutional defect that may have existed with the CFPB's initiation of the lawsuit was cured. While it also argued that the CFPB's structure is constitutional under existing U.S. Supreme Court precedent, the CFPB did so as a fallback argument. In the oral argument, however, the CFPB's counsel made the constitutionality of the CFPB's structure his principal argument, using the ratification argument only for purposes of arguing why All American Check Cashing would not be entitled to judgment on the pleadings in the CFPB's lawsuit if the panel were to conclude that the CFPB's structure is unconstitutional and strike the for-cause removal provision. The CFPB's counsel argued that Acting Director Mulvaney's ratification would satisfy All American Check Cashing's right to have the complaint filed by a CFPB Director removable at will, and that by Director Kraninger also becoming removable at will, the company's right for the lawsuit to be prosecuted by a Director removable at will would be satisfied. To the extent the panel provided any clues as to how it might rule, their questions and comments suggested significant concern about the potential far-reaching consequences of a ruling striking all of Title X of the CFPB rather than one only striking the for-cause removal provision.

At the end of January, an *en banc* Fifth Circuit heard oral argument in the rehearing of [Collins v. Mnuchin](#), in which a Fifth Circuit panel found that the Federal Housing Finance Agency (FHFA) is unconstitutionally structured because it is excessively insulated from Executive Branch oversight. It determined that the appropriate remedy for the constitutional violation was to sever the provision of the Housing and Economic Recovery Act of 2008 (HERA) that

**Ballard Spahr**  
LLP

Article By [Ballard Spahr LLP](#)  
[Alan S. Kaplinsky](#)  
[Consumer Finance Monitor](#)

[Financial Institutions & Banking](#)  
[Litigation / Trial Practice](#)  
[5th Circuit \(incl. bankruptcy\)](#)

only allows the President to remove the FHFA Director “for cause” but “leave intact the remainder of HERA and the FHFA’s past actions.”

Petitions for rehearing *en banc* were filed by both the plaintiffs and the FHFA. The plaintiffs, shareholders of two of the housing government services enterprises (GSEs), are seeking to invalidate an amendment to a preferred stock agreement between the Treasury Department and the FHFA as conservator for the GSEs. Their petition for rehearing *en banc* sought reconsideration of the panel’s rulings that the FHFA acted within its statutory authority in entering into the agreement and that the FHFA’s unconstitutional structure did not impact the agreement’s validity.

The FHFA’s petition for rehearing *en banc* sought reconsideration of the Fifth Circuit’s ruling that the FHFA’s structure is unconstitutional. In addition to arguing that the panel’s constitutionality ruling conflicts with U.S. Supreme Court precedent and the D.C. Circuit’s *en banc* PHH decision, the FHFA argued that the plaintiffs do not have Article III standing to bring a separation of powers challenge.

In the *All American Check Cashing* oral argument, both parties were asked whether the panel should hold its decision until the *en banc* court issues its decision in *Collins v. Mnuchin*, with one judge observing that the *en banc* court could “overrule” their decision in *All American Check Cashing*. All American Check Cashing’s counsel urged the panel not to hold its decision because the *en banc* court might not reach the constitutionality issue. The CFPB’s counsel however indicated that it may be appropriate for the panel to wait to issue its decision if panel members knew that the *en banc* court will reach the constitutionality issue.

A recording of the oral argument is [available here](#).

Two other cases involving a challenge to the CFPB’s constitutionality are currently pending in the circuit courts. In *RD Legal Funding*, which is pending in the Second Circuit, the CFPB and New York Attorney General filed their opening briefs at the end of last week. In *Seila Law*, which is pending in the Ninth Circuit, [oral argument](#) was held on January 9, 2019.

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