

THE  
NATIONAL LAW REVIEW

---

## Seila Law to seek U.S. Supreme Court review of Ninth Circuit ruling that CFPB's structure is constitutional

---

Monday, June 10, 2019

Appellant Seila Law has filed [a motion for a stay of the Ninth Circuit's mandate](#) in [its decision ruling that the CFPB's single-director-removable-only-for-cause structure is constitutional](#) pending the filing by Seila Law of a petition for a writ of certiorari with the U.S. Supreme Court. Seila Law has not sought a rehearing en banc by the Ninth Circuit.

Appellant Seila Law had asked the Ninth Circuit to overturn the district court's refusal to set aside a Bureau civil investigative demand, arguing that the CID was invalid because the CFPB's structure is unconstitutional. In rejecting the constitutional challenge, the Ninth Circuit relied on U.S. Supreme Court precedent, which in the Ninth Circuit's view, "indicate that the for-cause removal restriction protecting the CFPB's Director does not 'impede the President's ability to perform his constitutional duty' to ensure that the laws are faithfully executed." The Ninth Circuit commented that "the Supreme Court is of course free to revisit those precedents, but we are not."

In support of its motion, Seila Law argues that there is a reasonable chance the Supreme Court will grant the petition because "the question of whether the CFPB's structure violates the constitution's separation of powers is 'substantial' under any sense of the term" and because the question "has engendered serious debate among federal judges." It also argues that there is good cause for the stay because, in the absence of the stay, Seila Law would have to decide whether to comply with the CFPB's CID, thereby potentially mooting the case.

There is currently no circuit split regarding the CFPB's constitutionality, with both the Ninth Circuit and the en banc D.C. Circuit having ruled that the CFPB's structure is constitutional. Two other cases involving a challenge to the CFPB's constitutionality are currently pending in the circuit courts, either of which could create a circuit split. On March 12, 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. The other case is RD Legal Funding, which is pending in the Second Circuit but in which briefing has not yet been completed. The district court in RD Legal Funding held that the CFPB's structure is unconstitutional and struck the CFPB (Title X of Dodd-Frank) in its entirety.

While the CFPB has defended its constitutionality to date, it may be unable to oppose Seila Law's petition for certiorari. Dodd-Frank Section 1054(e) provides:

The Bureau may represent itself in its own name before the Supreme Court of the United States, provided that the Bureau makes a written request to the Attorney General within the 10-day period which begins on the date of entry of the judgment which would permit any party to file a petition for writ of certiorari, and the Attorney General concurs with such request or fails to take action within 60 days of the request of the Bureau.

The Ninth Circuit's judgment was entered on May 6 and we are not aware of a request by the CFPB to the Attorney General to represent itself before the Supreme Court. Thus, assuming the CFPB has not made such a request, only the Department of Justice could respond on behalf of the CFPB to Seila Law's petition for a writ of certiorari. The DOJ, however, has previously taken the position that the CFPB's structure is unconstitutional and that the proper remedy is to sever the Dodd-Frank Act's for-cause removal provision.

**Ballard Spahr**  
LLP

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

[Constitutional Law](#)  
[Financial Institutions & Banking](#)  
[Litigation / Trial Practice](#)  
[9th Circuit \(incl. bankruptcy\)](#)  
[All Federal](#)

More specifically, the DOJ took that position in opposing the petition for a writ of certiorari filed in September 2018 by State National Bank of Big Spring and two D.C. area non-profit organizations that sought Supreme Court review of a D.C. Circuit decision upholding the CFPB's constitutionality. Despite agreeing on the merits with SNB and the other petitioners that the CFPB's structure is unconstitutional, [the DOJ filed a brief](#) in which it argued that the Supreme Court should nevertheless deny the petition because the SNB case was a poor vehicle for consideration of the constitutionality question. The DOJ pointed to other cases then pending in the courts of appeal that raised a similar constitutional challenge but would be a better vehicle. In addition to All American Check Cashing and RD Legal Funding, the DOJ pointed to the Seila Law case which was then still pending in the Ninth Circuit. SNB's petition was denied by the Supreme Court.

Thus, the DOJ might not oppose Seila Law's petition for a writ of certiorari and instead agree with Seila Law that the CFPB's structure is unconstitutional. It is also possible that given the importance of the issue, the Supreme Court would grant Seila Law's petition even in the absence of a circuit split. Should it do so, it could be necessary for the Supreme Court to appoint an amicus curiae to defend the Ninth Circuit's judgment, an action that is part of the Supreme Court's usual practice when no party is defending the circuit court's judgment.

Copyright © by Ballard Spahr LLP

**Source URL:** <https://www.natlawreview.com/article/seila-law-to-seek-us-supreme-court-review-ninth-circuit-ruling-cfpb-s-structure>