

Petitions for Rehearing En Banc Filed in Fifth Circuit Decision Finding FHFA Is Unconstitutionally Structured

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In July 2018, in [*Collins v. Mnuchin*](#), 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 only allows the President to remove the FHFA Director “for cause” while “leav[ing] intact the remainder of HERA and the FHFA’s past actions.”

Both the plaintiffs and the FHFA have filed petitions for rehearing en banc. The plaintiffs, shareholders of two of the housing government services enterprises (GSEs), sought 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](#) seeks 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](#) seeks reconsideration of the Fifth Circuit’s ruling that the FHFA’s structure is unconstitutional. It argues that the plaintiffs did not have Article III standing to bring a separation of powers challenge and that the Fifth Circuit’s constitutionality ruling conflicts with U.S. Supreme Court precedent and the D.C. Circuit’s en banc PHH decision.

The issue of the CFPB’s constitutionality [is currently before the Fifth Circuit](#) in the interlocutory appeal of All American Check Cashing from the district court’s ruling upholding the CFPB’s constitutionality. [As we have observed](#), the Fifth Circuit’s decision in *Collins* could influence how another Fifth Circuit panel might approach the CFPB’s constitutionality. Indeed, in its Unopposed Petition for Initial Hearing En Banc asking the Fifth Circuit to hear its interlocutory appeal en banc as an initial matter, All American Check Cashing argues that hearing its appeal through the normal panel process “could be a waste [of] judicial resources, especially if this Court votes to rehear *Collins* en banc.” It also argues that initial consideration of its appeal en banc “would eliminate any possibility of intra-circuit inconsistency and guarantee that the Fifth Circuit speaks with one voice regarding the constitutionality of [the FHFA’s and the CFPB’s] structures.”

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