

State National Bank of Big Spring replies to DOJ's opposition to petition for certiorari; SCOTUS to consider petition at Jan. 11 conference

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State National Bank of Big Spring (SNB) and the other petitioners for certiorari [have filed a reply to the brief filed by the Department of Justice](#) in which, despite agreeing with the petitioners that the CFPB's structure is unconstitutional, the DOJ argued that the U.S. Supreme Court should deny the petition.

In its brief, the DOJ argued that the SNB case “would be a poor vehicle to consider the question [of the CFPB's constitutionality] for multiple reasons.” Such reasons included the DOJ's claim that if the Supreme Court were to grant the petition, the case would likely not be considered by the full Court because of Justice Kavanaugh's previous participation in the case while a D.C. Circuit judge. Specifically, Judge Kavanaugh authored the D.C. Circuit's decision that reversed the district court and held that the petitioners had standing to challenge the CFPB's constitutionality.

A second reason offered by the DOJ was that 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.”

In its reply, SNB asserts that “there can be no serious question concerning the Bank's standing to challenge the CFPB's constitutionality, and the Government's manufactured standing question does not present an obstacle to this Court's consideration of the petition.” SNB further argues that nothing in the judicial disqualification statute (28 U.S.C. section 455) or the Code of Conduct for United States Judges would require Justice Kavanaugh's recusal. In the alternative, SNB argues that even if Justice Kavanaugh were to decide that recusal was warranted because of his prior participation, “any recusal should be limited to the issue decided in that appeal—namely, Petitioners' standing to bring this suit.” According to SNB, “[r]ecusing from the threshold jurisdictional question would not require a Justice to recuse from the merits.”

[The Supreme Court docket](#) indicates that the filings in the case have been distributed for consideration by the Justices at their January 11 conference. In its brief, the DOJ had noted 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.

Citing the Dodd-Frank provision that requires the Bureau to seek the Attorney General's consent before it can represent itself in the Supreme Court, the DOJ asked 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." We will be interested to see if the Supreme Court follows the DOJ's suggestion should it grant the petition for certiorari.

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