

[Banking and Finance Law Daily Wrap Up, GOVERNMENT SPONSORED ENTERPRISES—U.S.: Government urges Court to turn down challenge to FHFA structure, \(Nov. 4, 2019\)](#)

Banking and Finance Law Daily Wrap Up

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By [Lisa M. Goolik, J.D.](#)

While arguing that a petition for *writ of certiorari* filed by Fannie Mae and Freddie Mac shareholders does not meet the criteria for review, the government pushes the Court to grant its own petition in the case.

The federal government, as respondents to a petition for *writ of certiorari* in a case (*Collins v. Mnuchin*, No. 19-422) brought by Fannie Mae and Freddie Mac shareholders against the Federal Housing Finance Agency, is arguing that the U.S. Supreme Court should not review the shareholders' challenges to the constitutional and remedial holdings of the U.S. Court of Appeals for the Fifth Circuit as they do not meet the Court's criteria for review. The government, however, [contended](#) that the Court should grant the government's own [petition](#) for *writ of certiorari* seeking a review of the Fifth Circuit's holding that the shareholders could raise claims that the FHFA exceeded its statutory authority when it entered a financial arrangement with the Treasury Department.

Fifth Circuit holding. While 16 judges for the Fifth Circuit generated eight separate opinions in order to resolve the shareholders' challenges, in the end, two distinct majority opinions [addressing](#) the issues separately concluded that:

1. the shareholders should be able to raise claims that, in reaching the agreement with Treasury, the FHFA exceeded its statutory authority;
2. the FHFA's organization violated the Constitution's separation-of-powers principle; and
3. the only remedy available for the constitutional violation was to convert the FHFA from an independent agency to an executive branch agency whose director can be removed by the president at will.

The shareholders [challenged](#) the holding, asking the Court to review whether the FHFA's structure—a single head removable only for cause—violates the separation of powers. The shareholders also challenged the remedial holding, arguing that it was an inadequate remedy for the constitutional violation.

The government's position. In its brief for the respondents, the government argues that while the Court should grant review of the government's petition for a *writ of certiorari* in *Mnuchin v. Collins*, No. 19-563, which seeks review of the appellate court's statutory holding, it should deny review of the shareholders' petition for a *writ of certiorari*, which seeks review of constitutional and remedial holdings. Unlike the statutory holding, the government argued, the constitutional and remedial holdings do not meet the Court's criteria for review.

As to the constitutional holding, the government argued that the Court has already granted review of substantially the same constitutional issue in *Seila Law v. Consumer Financial Protection Bureau*, and the current challenge would be "a poor vehicle" for reviewing the issue. "Most notably," the government noted, "the shareholders prevailed on that issue in the court of appeals, and thus have no basis for seeking this Court's review of that decision."

The government also argued that "multiple threshold obstacles"—including constitutional standing and that the challenge may be statutorily barred—would prevent the Court from reaching the constitutional question in the unusual circumstances of this case.

In addition, the remedial holding, the government wrote, was correct and does not conflict with any decision of the Court or of any other court of appeals. Further, the same threshold obstacles present in the shareholders challenge to the constitutional holding prevent the Court from considering the remedial question.

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