UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE NATIONAL BANK OF BIG SPRING, *et al.*,	)	
Plaintiffs,	)	
v.	)	
	)	Case No. 1:12-cv-01032 (ESH)
JACOB J. LEW, in his official capacity as United States Secretary of the Treasury and *ex officio* Chairman of the Financial Stability Oversight Council, *et al.*,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO ORDER OF JANUARY 5, 2017

In response to the Court's Order of January 5, 2017 [ECF No. 71], Defendants respectfully submit "their position on how to proceed in this case." Simply put, the Court should continue to hold this case in abeyance until the D.C. Circuit mandate issues in *PHH*, as the Court indicated it would do during the October 19, 2016 conference call. Despite Plaintiffs' request, there is no reason to revisit that approach.

Plaintiffs propose that the Court "pave the way for the consolidation of this case with *PHH* on appeal by entering partial summary judgment in favor of Plaintiffs on their standalone claim that the Dodd-Frank Act's for-cause removal provision . . . is unconstitutional," ECF No. 70 at 1, and against Plaintiffs with respect to the appropriate remedy for that claim, *id.* at 1–2. According to Plaintiffs, this "partial summary adjudication order could then be certified by this Court to the D.C. Circuit under 28 U.S.C. § 1292(b)," "giv[ing] the D.C. Circuit the opportunity to resolve this case and *PHH* together." *Id.* at 2.

Plaintiffs have not developed their argument that their proposed order would satisfy the requirements for an interlocutory appeal under § 1292(b)—which is perhaps not surprising given

that they have simply filed a motion requesting a status conference—and do not even mention the requirement "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C § 1292(b). Plaintiffs' proposal, moreover, is both extraordinary and procedurally impractical. In effect, Plaintiffs seek: (1) the ability to file an interlocutory appeal from a decision in their favor (2) to join a case in which the D.C. Circuit Court of Appeals is entertaining a petition for en banc review. If the D.C. Circuit decides to grant the petition, Plaintiffs intend to (3) proceed directly to an en banc court of appeals (bypassing panel review) (4) in the context of a case in which a panel of the D.C. Circuit already has decided the same issue in their favor. In other words, the D.C. Circuit already has the opportunity to review en banc the very issue Plaintiffs seek to place before it. The best option, under these circumstances, is to wait for the D.C. Circuit to act, especially given Plaintiffs' recognition that, even after en banc review, additional appellate practice will be necessary. *See* ECF No. 1 at 70. Needless to say, Plaintiffs have failed with this proposal to demonstrate "that exceptional circumstances justify a departure from the ordinary policy of postponing appellate review until after entry of final judgment," *Garcia v. Johanns*, 444 F.3d 625, 636 (D.C. Cir. 2006).

1. Plaintiffs' request raises a threshold question about their ability to pursue the proposed interlocutory appeal. Since Plaintiffs request judgment *in their favor* on the constitutionality of the Director's for-cause removal protection, they could not pursue an interlocutory appeal from an order that addressing only that issue. Plaintiffs' suggestion that "the issue of the appropriate remedy for their standalone constitutional claim . . . be summarily resolved *against Plaintiffs* as part of the same partial summary adjudication based on the panel decision in *PHH*, which declined to do more than invalidate the CFPB's unconstitutional for-cause removal provision,"

ECF No. 70, at 2 (emphasis added), does not necessarily solve this problem. As the panel decision in *PHH* makes clear, there is no substantial ground for a difference of opinion as to the appropriate remedy if the for-cause removal provision is unconstitutional. *See PHH v. CFPB*, 839 F.3d 1, 8 (D.C. Cir. 2016) ("Supreme Court precedent dictates" that the court "simply sever the statute's unconstitutional for-cause provision from the remainder of the statute"); *see also id.* at 37–39. Thus, the question of the appropriate remedy would not, in and of itself, be an appropriate question for certification under § 1292(b). Whether Plaintiffs could bootstrap their way into the Court of Appeals by tacking this remedy question (over which there is no substantial grounds for difference of opinion) to the merits issue, that they propose be resolved in their favor, is a matter that would benefit from the full briefing that a proper motion (for relief other than a status conference) would permit.

2. Regardless of how that threshold issue should be resolved, Plaintiffs' request for certification should be denied.

The question of law that Plaintiffs would have the Court certify for interlocutory appeal has already been addressed by a panel of the D.C. Circuit. Plaintiffs' proposed interlocutory appeal would be pointless if the D.C. Circuit denies the CFPB's petition for rehearing en banc (which provides a sufficient reason to deny this request as premature), pointless if the full D.C. Circuit grants the petition and rejects the panel's constitutional ruling, and pointless if the full D.C. Circuit grants the petition and sustains the panel's constitutional ruling. Plaintiffs identify only one hypothetical scenario in which their proposed interlocutory appeal would serve any purpose at all: if the D.C. Circuit grants the CFPB's petition but ultimately decides that *PHH* should be resolved on statutory grounds alone. See ECF No. 70, at 2. At this point, one can only speculate as to how the D.C. Circuit will dispose of *PHH*. But taking an interlocutory appeal to

deny any judge of the D.C. Circuit the option of avoiding the constitutional issue in *PHH* would not be an appropriate use of § 1292(b).[1]

If the full D.C. Circuit were to grant the CFPB's petition and then adopt Judge Henderson's constitutional-avoidance approach, this Court would be positioned to issue a ruling that addresses all merits and remedial issues in this case, based on the already-filed summary judgment briefs and any additional submissions that the Court invites to address *PHH*. Then the D.C. Circuit could efficiently address all of those issues in a single appeal.

3. The proposed interlocutory appeal almost certainly will not resolve this suit. Plaintiffs ask the Court to deny their request that Title X be invalidated in its entirety, so that they can appeal that decision along with what they term the "standalone claim," *i.e.*, the merits claim raised in PHH. But even if the D.C. Circuit reviews the "standalone claim" en banc, it is unlikely to resolve this case because Plaintiffs' complaint contains a separations-of-power claim different from the standalone claim. Plaintiffs' claim comprises the argument that the for-cause removal provision is unconstitutional because of supposed defects under both Articles I and II of the Constitution. So, if the en banc D.C. Circuit resolves the "standalone" constitutional claim in favor of the CFPB, then Plaintiffs likely will file a subsequent appeal arguing that their kitchen

[1] Plaintiffs' suggestion that the Court certify for interlocutory appeal their "standalone" challenge to the Director's for-cause removal protection does not square with their earlier presentation of their separation-of-powers claim. Far from raising a "standalone" challenge to the Director's for-cause removal protection, Plaintiffs have urged the Court *not* to consider the constitutionality of "a single structural feature of the CFPB (*e.g.*, for-cause removal protection) . . . in isolation." ECF No. 62, at 1. Plaintiffs instead have maintained that Director's for-cause removal protection should be considered "in light of the CFPB's [alleged] full independence from Congress." *Id.* at 15. Plaintiffs now seem to recast their merits arguments in light of *PHH* without explaining why their current proposal would be appropriate in light of the merits arguments they advanced in their summary judgment briefs, or why this Court should not wait for the D.C. Circuit to issue its mandate in *PHH* so that, whatever its disposition, this Court can issue a single decision that addresses all of Plaintiffs' interrelated merits arguments.

sink constitutional claim should succeed where the "standalone claim" failed. And even if the en banc court were to uphold the panel decision, the wrangling in this case likely would not be over. With respect to the "standalone claim," the en banc court would be unlikely to broaden the remedy proposed by the panel in *PHH*. *PHH*, 839 F.3d at 8 ("Supreme Court precedent dictates" that the court "simply sever the statute's unconstitutional for-cause provision from the remainder of the statute"); *see also id*. at 37–39. Plaintiffs however have not forsworn the argument that their kitchen sink claim merits broader relief – *i.e.*, the invalidation of Title X in toto. Thus, there almost certainly will be future appeals about the kitchen-sink claim and what remedy, if any, should attend it.

4. Additionally, although the *PHH* majority did not "consider the legal ramifications of [its] decision for past CFPB rules," 839 F.3d at 39 n.19, Plaintiffs asserted on the October 19 conference call that the panel decision (if it stands) entitles them to an order invalidating these rules. Unless Plaintiffs have abandoned this argument—which their motion does not mention—their proposed order would not fully resolve the question of Plaintiffs' remedy if the Director's for-cause removal protection (and no other part of Title X) is unconstitutional, as the *PHH* panel held. Addressing the validity of the CFPB's past rules would require further briefing in this Court prior to any appeal.

* * * * *

Although Plaintiffs assert that their proposal would permit the D.C. Circuit to resolve the constitutionality of the Director's for-cause removal protection "in a single adjudication," ECF No. 70, at 3, in fact it will likely require piecemeal litigation on Plaintiffs' Article I-cum-Article II separations of power claim and/or remedial issues of whether Title X in its entirety violates separation-of-powers principles and, if the provision granting the Director for-cause removal

protection alone is unconstitutional, what remedies are available to Plaintiffs for "past CFPB rules." Instead of adopting an approach that is all but guaranteed to produce two appeals in this case on related issues, the Court should wait to see what happens in *PHH*, determine the effect of the D.C. Circuit's disposition of that case here, and then issue an order that resolves all of the outstanding merits and remedial questions in a final judgment which could then be addressed in a single appeal (along with the prior ruling on the validity of rules issued by the CFPB before Director Cordray's Senate-confirmed appointment).

Dated: January 11, 2017

Respectfully submitted,

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