No. 18-307

IN THE

Supreme Court of the United States

STATE NATIONAL BANK OF BIG SPRING, ET AL.,
Petitioners,

v.

STEVEN MNUCHIN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Government agrees that Petitioners' constitutional challenge to the novel structure of the Bureau of Consumer Financial Protection ("CFPB") raises an important question that warrants this Court's review. Opp. 9-10. It contends, however, that this case is a poor vehicle to decide that question because (1) there is a substantial jurisdictional question pertaining to Petitioners' standing, Opp. 11, and (2) "it is unlikely that the case would be considered by the full Court," as Justice Kavanaugh wrote the D.C. Circuit's unanimous 3-0 decision in 2015 categorically rejecting the Government's position that Petitioners lack standing. Opp. 10.

The petition for a writ of certioriari should be granted, as it presents no vehicle problem of any kind. There can be no serious question that Petitioners have standing to challenge the constitutionality of the CFPB's structure. There also is no requirement that Justice Kavanaugh recuse himself from considering the constitutional merits challenge presented by the petition, which is entirely distinct from the standing issues that he previously decided. Certainly, if this case had returned to the D.C. Circuit for consideration of the merits following the 2015 standing remand, *State National Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015), then-Judge Kavanaugh and the two other panel judges (Judge Judith Rogers and Judge Nina Pillard) would not even have thought of recusing themselves from hearing Petitioners' merits challenge simply because they had previously decided the standing question. Moreover, even if Justice Kavanaugh (or any other Jus-

tice, for that matter) did recuse himself from hearing this case, that would not be a reason to deny the petition, as this Court routinely decides cases of exceptional importance with fewer than nine sitting Justices, and is well-equipped to do so.

The Government's litigation tactics have successfully delayed resolution of Petitioners' challenge to the constitutionality of the CFPB, which was filed in June of 2012, for more than six years. Pet. 6-8. That question of concededly exceptional importance is now fully ready to be considered by this Court in a pure facial challenge, with no complicating factors. This case is an ideal vehicle for considering it, and the Government cannot manufacture an eleventh-hour vehicle problem through the expedient of threatening to resurrect a meritless standing challenge that the D.C. Circuit unanimously rejected more than three years ago, and that the Government then accepted without seeking any form of further review. The petition should be granted.

I. PETITIONERS UNQUESTIONABLY HAVE STANDING.

As the D.C. Circuit held in 2015, there is no reasonable question that Petitioner State National Bank ("the Bank") has standing to challenge the constitutionality of the CFPB.[1] "The Bank is not a

[1] The standing inquiry ends once the Court has satisfied itself one petitioner has standing. Petitioners the 60 Plus Association and the Competitive Enterprise Institute accordingly do not advance standing arguments independent of the Bank's. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 518, 127 S. Ct. 1438,

mere outsider asserting a constitutional objection to the Bureau. The Bank is regulated by the Bureau." *State Nat'l Bank*, 795 F.3d at 53. Then-Judge Kavanaugh and Judges Rogers and Pillard unanimously agreed on this point, emphatically stating: "***There is no doubt*** that the Bank is regulated by the Bureau. Under *Lujan,* the Bank therefore has standing to challenge the constitutionality of the Bureau." *Id.* (emphasis added), *citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "The Supreme Court has stated that 'there is ordinarily little question' that a regulated individual or entity has standing to challenge an allegedly illegal statute or rule under which it is regulated. So it is in this case." *Id.*, *citing Lujan*, 504 U.S. at 561-62. The Government did not seek reconsideration of this ruling in any way, through panel rehearing, rehearing *en banc*, or a petition for a writ of certiorari.

The Government now seeks to resurrect its rejected and erroneous standing argument, suggesting that the Bank is not truly regulated by the CFPB because it is the Office of the Comptroller of the Currency, rather than the CFPB, that has statutory authority to enforce the CFPB's rules against the Bank. Opp. 11. That is nonsense. It is indisputable that the CFPB promulgates regulations that apply to the Bank, and the Bank has every right to demand that

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1453, 167 L. Ed. 2d 248 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."); *Grocery Mfrs. Ass'n v. E.P.A.*, 693 F.3d 169, 175 (D.C. Cir. 2012) (same).

the promulgator of the rules that are enforced against it be constitutionally structured. The existence and the identity of the intervening police officer that enforces the CFPB's unconstitutionally promulgated rules against the Bank is irrelevant.

The Government also retreads its failed argument that the costs the Bank has incurred to ensure it remains in compliance with the CFPB's regulations do not qualify as Article III injuries. There is no need for an extended analysis of the numerous regulatory costs the Bank has incurred as a result of the CFPB's prolific regulatory activities, as the D.C. Circuit decided the question on the clearest possible grounds:

> The Bureau has already exercised its broad regulatory authority to impose new obligations on banks, including State National Bank. For example, in 2012 the Bureau promulgated the Remittance Rule. *See* 12 C.F.R. §§ 1005.30–1005.36. The Remittance Rule imposes disclosure requirements on institutions that offer international remittance transfers, which are electronic money transfers. The Rule also offers a safe harbor, but banks such as State National Bank must incur costs to ensure that they are properly complying with the terms of that safe harbor. *See* 77 Fed.Reg. 50,244, 50,274–75 (Aug. 20, 2012). The Bank indeed alleged that it must now monitor its re-

> mittances to stay within the safe harbor, and the monitoring program causes it to incur costs. *See* Purcell Decl. ¶¶ 18, 20, J.A. 105

State Nat'l Bank, 795 F.3d at 53. The Government labels these "self-inflicted costs incurred to address a highly speculative possibility of regulatory harm." Opp. 11. The D.C. Circuit had no trouble rejecting that argument, however, because the costs incurred by the Bank were, by the CFPB's *own admission,* the *expected* regulatory impact on business like the Bank that seek to remain within the Remittance Rule's safe harbor. *See* 77 Fed. Reg. at 50,274-75 (recognizing that businesses will bear a real "cost" in "counting remittance transfers (to ensure the conditions of the safe harbor are met)."). *See also Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 28 (D.C. Cir. 1990) ("increased time and expense necessary … to monitor [agency] activities under new agency regulation" constitutes an injury-in-fact (citing *Pac. Legal Found. v. Goyan*, 664 F.2d 1221 (4th Cir. 1981))). The record indisputably establishes that the Remittance Rule forced the Bank to assume that very expense. For example, under the rule the Bank had no reasonable choice but to adopt a policy barring its personnel from offering more than ninety-nine transfers annually. JA105 (¶ 18).

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.

II. THIS CASE CAN BE HEARD BY A NINE-JUSTICE COURT.

All nine Justices are eligible to hear this case. Respondents imply without legal argument that Justice Kavanaugh would have to recuse because he "previously participated in this case while a judge on the D.C. Circuit, authoring the court of appeals' decision addressing petitioners' standing to challenge the constitutionality of the Bureau's structure." Opp. 10. That is not so. Justice Kavanaugh's participation in a separate appeal from a separate district court judgment on a separate legal issue does not meet the high bar for recusal in this proceeding. "A Justice . . . cannot withdraw from a case as a matter of convenience or simply to avoid controversy. Rather, each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case." 2011 Year-End Report on the Federal Judiciary 9 (Dec. 31, 2011).

A. The Judicial Disqualification Statute Does Not Require Recusal.

With the exception of certain specified circumstances not relevant here, *see* 28 U.S.C. § 455(b), a Justice's recusal is required by statute only if "his impartiality might reasonably be questioned," *id.* § 455(a). This Court has held that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, *or of prior proceedings*, do not constitute a basis for a bias or partiality motion [under § 455(a)] unless they display a deep-seated favoritism or antagonism that would make fair judgment impossi-

ble." *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis added). Indeed, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Id.* There is no reason to treat this case as an exception. Respondents do not allege that Justice Kavanaugh's ruling in a separate appeal from the district court's prior order produced anything like the "deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.*

B. The Judicial Code of Conduct Does Not Require Recusal.

The Code of Conduct for United States Judges also contains a judicial disqualification provision, which "closely tracks the language of § 455. 2 Guide to Judiciary Policy: Ethics and Judicial Conduct 74, http://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf. But "[t]he Code of Conduct, by its express terms, applies only to lower federal court judges." 2011 Year-End Report on the Federal Judiciary 3 (Dec. 31, 2011). To be sure, the Supreme Court is not "exempt from the ethical principles that lower courts observe," including the principle of impartiality. And "[a]ll Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations." *Id.* at 4. But the Code of Conduct "does not adequately answer some of the ethical considerations unique to the Supreme Court" and does not provide "its definitive source of ethical guidance." *Id.* at 5.

C. In The Alternative, Any Recusal Could Be Limited To Standing Issues.

Even if Justice Kavanaugh were to decide that recusal is warranted because of his participation in a separate jurisdictional appeal, any recusal should be limited to the issue decided in that appeal—namely, Petitioners' standing to bring this suit. In that earlier proceeding, the D.C. Circuit reversed an order dismissing State National Bank's complaint for lack of jurisdiction. *State Nat'l Bank*, 795 F.3d at 57. But that was a different appeal from a different order on a different legal question than the appeal, order, and questions on review here. As the D.C. Circuit noted in its first decision, the parties to the first appeal "ha[d] not briefed the merits of the constitutional challenge to the Bureau," 795 F.3d 48 at 54, so the court remanded for the district court "to consider in the first instance the Bank's constitutional challenge," *id.* at 57. The standing appeal was a separate matter from the structural constitutional question presented here. Recusing from the threshold jurisdictional question would not require a Justice to recuse from the merits.

Most courts of appeals to have considered the question agree that "a judge may, in an appropriate case, decide certain issues and recuse himself or herself as to others." *Ellis v. United States*, 313 F.3d 636, 642 (1st Cir. 2002); *see Decker v. GE Healthcare Inc.*, 770 F.3d 378, 389 (6th Cir. 2014) ("The majority view approves partial recusals as an important case-management device. . . . We join the majority view

that 28 U.S.C. § 455(a) does not categorically prohibit partial recusal." (citing *Ellis*, 313 F.3d at 642; *Pashaian v. Eccelston Props., Ltd.*, 88 F.3d 77, 84–85 (2d Cir. 1996); *United States v. Kimberlin*, 781 F.2d 1247, 1258–59 (7th Cir. 1985)).

The widely accepted practice of partial recusal makes sense, because there is no reasonable ground for questioning the partiality of a judge as to an issue that his prior opinion did not touch, absent some cause for inferring bias or prejudice against one of the parties. If an eight-justice Court determines that State National Bank has standing, there is no basis for excluding Justice Kavanaugh from consideration of the merits.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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