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WLF Asks Fifth Circuit to Grant En Banc Rehearing in Constitutional Challenge to FDIC’s Structure (*Burgess v. Whang*)

“The panel’s decision allows agencies to evade constitutional scrutiny and shields structural flaws from timely Article III review.”

— Cory Andrews, WLF General Counsel & Vice President of Litigation

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Court of Appeals for the Fifth Circuit to grant rehearing en banc to revisit a panel’s flawed ruling that federal courts lack jurisdiction to enjoin FDIC enforcement actions under 12 U.S.C. § 1818(i)(1). WLF contends that the panel’s broad interpretation of the statute’s exhaustion scheme improperly delays challenges to agencies’ constitutional violations, such as improper removal protections and denial of jury trials.

The case stems from an FDIC enforcement proceeding against former bank executive Cornelius Burgess, alleging fiduciary breaches and seeking fines and industry bans. An FDIC administrative law judge adjudicated the enforcement action without a jury. The U.S. District Court for the Northern District of Texas granted a preliminary injunction, citing Seventh Amendment and separation-of-powers violations, but the Fifth Circuit vacated that ruling on the theory that district courts lack jurisdiction pending final agency action.

In its amicus brief, WLF argues that the appeals court’s decision contravenes the canon of constitutional avoidance by raising grave doubts about § 1818(i)(1)’s validity, as it insulates agencies from pre-enforcement review of constitutional flaws. Not only does this erode Article III oversight but it circumvents executive accountability. WLF urges en banc review to adopt a narrow statutory reading that allows citizens federal-court access and ensures timely judicial checks on agency overreach.

Celebrating its 48th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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