UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of: **INTEGRITY ADVANCE, LLC and JAMES R. CARNES,** **Respondents.**	))))))))))))	**RESPONDENTS' MOTION TO DISMISS ON GROUNDS LIMITED TO FEBRUARY 7, 2020 ORDER**

RESPONDENTS' MOTION TO DISMISS
ON GROUNDS LIMITED TO FEBRUARY 7, 2020 ORDER

Pursuant to 12 C.F.R. § 1081.212 and Administrative Law Judge ("ALJ") Christine L. Kirby's February 7, 2020 Order (Dkt. 251), Respondents Integrity Advance, LLC and James R. Carnes ("Respondents") respectfully request that the ALJ dismiss this action with prejudice on separation of powers grounds. In support thereof, Respondents incorporate by reference the accompanying memorandum of law.

Respectfully submitted,

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Dated: February 19, 2020

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February 2020, I caused a copy of the foregoing Respondents' Motion to Dismiss on Grounds Limited to February 7, 2020 Order to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on opposing counsel at the following addresses:

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I. INTRODUCTION AND SUMMARY

Pursuant to Administrative Law Judge ("ALJ") Christine L. Kirby's February 7, 2020 Order, Respondents Integrity Advance, LLC and James R. Carnes ("Respondents") respectfully submit this brief in support of their Motion to Dismiss on Grounds Limited to February 7, 2020 Order.[1]

The Consumer Financial Protection Bureau ("CFPB") is a government agency unlike any other in U.S. history. It possesses enormous power over American businesses, consumers, and the U.S. economy as a whole. It has the power to prescribe its own rules, to investigate and enforce what it deems to be violations of nineteen consumer financial protection laws, and to adjudicate those claims. All of that power is concentrated in one individual: the Director of the CFPB. The Director serves a five-year term, with the potential to serve even longer until a successor is appointed. And, despite exercising substantial executive authority, the Director can only be removed by the President "for inefficiency, neglect of duty, or malfeasance in office." The Director alone may set the CFPB's budget, a decision which Congress is explicitly prohibited from reviewing. This degree of independence and insulation from accountability is no doubt the function of Congressional design, but it is fundamentally at odds with the tradition of diffusion, not concentration, of power in our system of governance. Remarkably, the CFPB agrees. Although it previously sought to defend the constitutionality of the agency's structure, it has since changed course. The CFPB itself now believes that the

[1] In accordance with ALJ Kirby's Order, Respondents' Motion is limited to arguing for dismissal on the ground that the CFPB is unconstitutional because it violates the separation of powers. Respondents reserve the right to raise any and all additional arguments in support of dismissal and/or summary disposition at the appropriate time.

single-Director structure of the CFPB, in which the Director may only be removed for cause, violates the separation of powers. There is no basis for the ALJ to conclude otherwise here.[2]

The ALJ also should conclude that the unconstitutional for-cause removal provision is not severable from Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The language, structure, and history of the CFPB's establishing legislation demonstrate that independence was the central feature by Congressional design. Indeed, ensuring the CFPB's independence was deemed so important that Congress denied even itself the power to influence the CFPB through the power of the purse. Severing the for-cause removal provision and leaving the rest of Title X in place would not only conflict with Congressional design, it would drastically change the nature of the CFPB. The effect would be to transfer a massive amount of power to the President, who could now remove the Director at will, at the expense of Congress, which would remain powerless to influence the CFPB using the power of the purse. Congress surely could not have intended such a result. Congress may very well decide that a CFPB answerable only to the President is better than no CFPB at all, but that is a decision that Congress must make in the first instance. It is not in the province of any other branch of Government.

The current structure of the CFPB violates the Constitution, and the for-cause removal provision cannot simply be severed from the Dodd-Frank Act. Because the CFPB lacks

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[2] As set forth in Respondents' contemporaneously-filed Motion to Stay Proceedings, the constitutionality of the CFPB's structure and the severability of the for-cause removal provision are currently at issue before the Supreme Court of the United States. *See Seila Law LLC v. CFPB*, 140 S. Ct. 427 (Oct. 18, 2019) (granting *certiorari*). For the reasons stated in Respondents' Motion to Stay Proceedings, the ALJ should defer ruling on this Motion to Dismiss and stay further proceedings pending the Supreme Court's decision in *Seila Law*.

constitutional authority to pursue this action against Respondents, the ALJ should dismiss this action with prejudice.

II. BACKGROUND

A. Background on the Consumer Financial Protection Bureau

In July 2010, Congress passed the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (12 U.S.C. 5301 *et seq.*). *See PHH Corp. v. CFPB*, 881 F.3d 75, 80 (D.C. Cir. 2018) (*en banc*). Title X of the Dodd-Frank Act established the CFPB, an "independent bureau" headed by a single Director appointed by the President and confirmed by the Senate. *Id.* at 80-81 (citing 12 U.S.C. § 5491(a)). The Director of the CFPB "serves a five-year term, with the potential of a holdover period pending confirmation of a successor," and the President may only remove the Director "'for inefficiency, neglect of duty, or malfeasance in office,' *i.e.*, for cause." *Id.* at 81 (citing 12 U.S.C. § 5491(c)).

The Director "wields enormous power over American businesses, American consumers, and the overall U.S. economy." *Id.* at 165 (Kavanaugh, J., dissenting). By design, the Director is empowered to "unilaterally implement[] and enforce[] 19 federal consumer protection statutes, covering everything from home finance to student loans to credit cards to banking practices." *Id.* The Director has broad authority to "prescribe rules or issue orders or guidelines pursuant to" those 19 consumer protection statutes—a power that was previously exercised by seven government agencies. 12 U.S.C. § 5581(a)(1)(A); *id.* § 5581(b). The Director may issue subpoenas, conduct hearings and adjudication proceedings, and pursue a broad range of legal and equitable relief. *Id.* § 5562(b)(1); *id.* § 5563(a); *id.* § 5565(a)(2). The Director also has the sole power to determine the CFPB's budget, *id.* § 5497(a)(1), a decision that is insulated from Congressional review, *id.* § 5497(a)(2)(C).

B. Procedural History

On May 29, 2019, Director Kathleen L. Kraninger remanded this matter to ALJ Kirby for a "new hearing and recommended decision in accordance with the Bureau's Rules of Practice for Adjudication Proceedings." Dkt. 216 at 2, 9. In part due to significant legal developments in the time since the prior proceedings occurred, Respondents filed a Motion to Open Record for a New Hearing in which Respondents argued, *inter alia*, that further discovery was needed on the statute of limitations issue. *See* Dkt. 229A at 7-8. By Order dated October 28, 2019, the ALJ denied further discovery and ordered briefing on the merits of the threshold statute of limitations issue. Dkt. 238.

Following briefing and oral argument on the statute of limitations issue, the ALJ denied Respondents' Motion to Dismiss/and or for Summary Disposition on Grounds Limited to October 28, 2019 Order, and directed that the parties file a Joint Proposed Schedule for further proceedings by February 6, 2020. Dkt. 249. The parties conferred but were unable to agree, so each party offered its own proposed schedule. Dkt. 250. By Order dated February 7, 2020, the ALJ directed that the parties brief the issue of whether the CFPB is unconstitutional because it violates separation of powers principles. Dkt. 251. This brief sets forth Respondents' position on that issue.

III. LEGAL STANDARD

Pursuant to 12 CFR § 1081.212(b), "[a] respondent may file a motion to dismiss asserting that, even assuming the truth of the facts alleged in the notice of charges, it is entitled to dismissal as a matter of law."

Dismissal as a matter of law is appropriate where an agency lacks the constitutional authority to act. *See CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 784 (S.D.N.Y. 2018) (dismissing CFPB from the action, finding that it 'lack[ed] authority to bring

this enforcement action because its composition violates the Constitution's separation of powers'") (citing *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993)); *see also FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1315 (D.C. Cir. 1980) ("The exercise of jurisdiction by any governmental body in the United States is subject to limitations reflecting principles of international and constitutional law, as well as the strictures of the particular statute governing that body's conduct."); *CFPB v. All American Check Cashing, Inc. et al*., No. 3:16-cv-00356 (S.D. Miss., Dkt. 240 at 3, filed Mar. 27, 2018) (recognizing that "the case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity").

IV. ARGUMENT

Article II of the Constitution vests executive power exclusively in the President of the United States. U.S. Const. art. II, § 1. It is the President, and the President alone, who is charged with the authority to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. But "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010). That is precisely why the "traditional default rule" is that limitations on the President's ability to remove executive officers are unconstitutional. *Id.* at 509. The Supreme Court has only recognized two exceptions to this rule, neither of which apply in this case.[3]

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[3] In *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935), the Supreme Court upheld a limitation on the President's power to remove officers of a multi-member independent agency, the Federal Trade Commission. And in *Morrison v. Olson*, 487 U.S. 654, 691 (1998), the Supreme Court upheld a limitation on the President's power to remove certain inferior officers with "limited jurisdiction and tenure and lacking policymaking or significant administrative authority." As explained *infra* in Section IV.A, neither of those exceptions apply here.

The United States, and even the CFPB itself, has concluded that the single-Director structure of the agency, in which the Director may only be removed for cause, violates Article II of the Constitution. *See* Letter from CFPB at 2, *CFPB v. CashCall, Inc.*, Nos. 18-55407 & 18-55479 (9th Cir., Dkt. 57, filed Sept. 18, 2019) ("The Bureau's Director has now determined that the for-cause removal provision is unconstitutional. Accordingly, the Bureau will no longer defend the constitutionality of that provision in this Court or in any other."); Brief for the Respondent at 7, *Seila Law LLC v. CFPB*, No. 19-7 (U.S. Sept. 17, 2019) ("The United States previously informed this Court that it has also concluded the statutory restriction on the President's authority to remove the Director violates the Constitution's separation of powers." (citing Gov't Br. in Opp'n, *State Nat'l Bank of Big Spring v. Mnuchin*, No. 18-307 (Dec. 10, 2018)).

A District Court that recently considered this issue likewise concluded that the structure of the CFPB violates the separation of powers. *See RD Legal Funding, LLC*, 332 F. Supp. 3d at 784 (concluding "based on considerations of history, liberty, and presidential authority" that the CFPB "is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single Director") (citation omitted). The ALJ should reach the same conclusion here.[4] The ALJ should further conclude that the for-cause removal provision is not severable from the Dodd-Frank Act and dismiss this action with prejudice.

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[4] Although the D.C. Circuit upheld the constitutionality of the for-cause removal provision in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (*en banc*), that issue is presently pending before the Supreme Court. *See Seila Law*, 140 S. Ct. 427. As noted above, the ALJ should defer ruling on this Motion to Dismiss until the Supreme Court renders its decision.

A. The CFPB's structure is unprecedented.

"[T]he Supreme Court has repeatedly emphasized the significance of historical practice" in separation of powers cases. *PHH Corp.*, 881 F.3d at 166 (Kavanaugh, J., dissenting); *see also Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) ("In separation-of-powers cases this Court has often 'put significant weight upon historical practice.'") (citation omitted). For that reason, "[p]erhaps the most telling indication of [a] severe constitutional problem with" an entity is "the lack of historical precedent" supporting its existence. *Free Enter. Fund*, 561 U.S. at 505. Such is the case here. Other than the CFPB, there has never been an independent agency led by a single Director that has exercised the same level of executive authority.[5] *See PHH Corp.*, 881 F.3d at 165-66 (Kavanaugh, J., dissenting).

Notably, "[u]ntil this point in U.S. history, independent agencies exercising substantial executive authority have all been multi-member commissions or boards." *Id.* at 173 (providing a "sample list" of twenty-five such entities). The Supreme Court considered, and upheld, the constitutionality of one such entity, the Federal Trade Commission ("FTC"), in *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). The CFPB, however, is not modeled after the FTC. Though the CFPB and FTC may possess similar powers, the CFPB is not subject to the same kinds of checks and balances. Unlike the FTC, the CFPB is not comprised of multiple members who are "called upon to exercise the trained judgment of a body of experts."[6]

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[5] Even if the CFPB could point to an analogous agency, which it cannot, it would surely constitute the type of "anomal[y]" or "isolated" example that "does not count for much when assessed against an otherwise settled historical practice." *PHH Corp.*, 881 F.3d at 176 (Kavanaugh, J., dissenting) (citing *NLRB v. Canning*, 573 U.S. 513, 538 (2014); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)).

[6] The *PHH* majority suggested that there is no separation of powers concern because Congress did create "a multi-member body of experts to check the CFPB Director: the Financial Stability Oversight Council (FSOC)." *PHH Corp.*, 881 F.3d at 98 (citing 12 U.S.C. § 5321).

Id. at 624. Nor is the CFPB a "non-partisan" entity designed to "act with entire impartiality." *Id.* The CFPB instead is led by one Director who is not accountable to anyone else inside of the CFPB or in the White House. *See PHH Corp.*, 881 F.3d at 165-66 (Kavanaugh, J., dissenting); *see also* 12 U.S.C. § 5491(c) (for-cause removal provision); *id.* 5497(a)(2)(C) (prohibiting Congress from reviewing the Director's budgetary decisions). The CFPB, in short, is not in the same category as the kind of independent agency upheld in *Humphries Executor*.

The CFPB also cannot rely on *Morrison v. Olson*, 487 U.S. 654 (1988), the only other situation in which the Supreme Court has recognized an exception to the President's otherwise plenary removal power. In *Morrison*, the Supreme Court upheld a provision allowing the Attorney General to remove an independent counsel only for "good cause" because "the independent counsel is an inferior officer . . . with limited jurisdiction and tenure and lacking policymaking or significant administrative authority." *Id.* at 691. That is not the case here. The Director of the CFPB serves a five-year term (and potentially longer if no successor is appointed), 12 U.S.C. § 5491(c); possesses wide-ranging jurisdiction, *id.* § 5565(a)(1); and has significant policymaking authority, *id.* § 5581(a)(1)(A). Thus, *Morrison* does not provide any historical support for the existence of the CFPB.

The CFPB has previously identified only three other potentially analogous agencies: the Social Security Administration, the Office of Special Counsel, and the Federal

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That argument misses the mark. The only limitation on the CFPB's authority identified by the *PHH* majority is that the FSOC "may stay or [by a two-thirds vote] veto any CFPB regulation that threatens the 'safety and soundness' of the national economy." *Id.* (citing 12 U.S.C. § 5513). The *PHH* majority identified no similar restraint on the CFPB's power to bring enforcement actions, which goes to the core of executive power. Moreover, the FSOC's limited oversight of the CFPB does nothing to remedy the unconstitutional limitation on the President's removal authority. The President remains powerless to remove the Director of the CFPB for any reason other than "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c).

Housing Finance Agency. *See PHH Corp.*, 881 F.3d at 173-74 (Kavanaugh, J., dissenting). As the CFPB now agrees, however, none of those agencies is similar in kind to the CFPB. *See* Brief for Respondent Supporting Vacatur at 32-35, *Seila Law LLC v. CFPB*, No. 19-7 (U.S. Dec. 9, 2019) (acknowledging "[t]he historical dearth of single-headed independent agencies" and explaining why none of the examples it identified in *PHH* constitute historical precedent for the CFPB's structure).[7]

The Social Security Administration ("SSA") "long existed first as a multi-member independent agency" and only relatively recently had its structure changed to a single-Director model. *PHH Corp.*, 881 F.3d at 174 (Kavanaugh, J., dissenting). Notably, when the change was signed into law in 1994, "President Clinton issued a signing statement pronouncing that the change in the agency's structure was constitutionally problematic." *Id.* Because the constitutionality of the SSA's new structure is contested, "the historical precedent counts for little because it is not settled." *Id.* Moreover, unlike the CFPB, the SSA "does not possess unilateral authority to bring law enforcement actions against private citizens, which is the core of the executive power and the primary threat to individual liberty posed by executive power." *Id.* And "[a]lthough the agency does possess limited power to seek civil sanctions against those who file improper claims, the Commissioner [of the SSA] may initiate such a proceeding 'only as authorized by the Attorney General,' who is an executive officer accountable to the President."

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[7] In *PHH*, then-Judge Kavanaugh considered two additional independent entities with a single-Director structure: the "now-defunct independent counsel law" and the Comptroller of the Currency. *See PHH Corp.*, 881 F.3d at 176, 177 n.4 (Kavanaugh, J., dissenting). Neither provides a historical precedent for the CFPB. Unlike the Director of the CFPB, the independent counsel was an inferior officer who "exercised only executive power, not rulemaking or adjudicative power" and "had only a limited jurisdiction for particular defined criminal investigations where the Department of Justice had a conflict of interest." *Id.* at 176. Similarly, unlike the Director of the CFPB, the Comptroller of the Currency, who also is an inferior officer, is removable at will by the President. *Id.* at 177 n.4 (citing 12 U.S.C. § 2).

Id. at 175 (citation omitted). Thus, the Commissioner of the SSA does not possess anywhere near the same breadth of unchecked power that is bestowed upon the Director of the CFPB.

The Office of Special Counsel ("OSC") similarly does not constitute a historical precedent for the CFPB. The OSC became a single-Director agency in 1978, and the constitutionality of that structure has been challenged since its creation. *Id.* Moreover, unlike the CFPB, the OSC "has a narrow jurisdiction and mainly enforces certain personnel rules against government employers and employees, such as the prohibition against improper political activity by government employees." *Id.* The OSC "may not enforce laws against private citizens or impose fines and penalties on private citizens." *Id.* The OSC therefore is not analogous to the CFPB.

Nor does the Federal Housing Finance Agency ("FHFA") constitute a historical precedent. The FHFA was only created in 2008, and the constitutionality of its structure also has been under attack. *Id.* at 175-76. In fact, at least one court has concluded that its structure is unconstitutional. *See Collins v. Mnuchin*, 938 F.3d 553, 563 (5th Cir. 2019) ("[T]he Shareholders argue that FHFA lacked authority to adopt the Third Amendment because its Director was not removable by the President. We adhere to the panel's reasoning and conclusion that FHFA's design, an independent agency with a single Director removable only 'for cause,' violates the separation of powers."). Thus, to the extent that the FHFA holds any value as a historical precedent, it is actually a precedent for striking down the CFPB's structure as unconstitutional.

In short, the power bestowed upon the Director of the CFPB, which is "massive in scope, concentrated in a single person, and unaccountable to the President," is unprecedented and

antithetical to the American system of governance. *PHH Corp.*, 881 F.3d at 166 (Kavanaugh, J., dissenting).

B. <u>The structure of the CFPB impacts individual liberty.</u>

The lack of historical precedent for a principal officer of the United States as powerful and autonomous as the Director of the CFPB is not an accident: "[i]t reflects a deep and abiding concern for safeguarding the individual liberty protected by the Constitution." *Id.* at 183; *see also Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam) (Framers viewed separation of powers "as a vital check against tyranny"). The Framers' deep-rooted interest in safeguarding individual liberty is threatened by the CFPB's structure.

In contrast to an agency like the FTC, the Dodd-Frank Act concentrates sweeping enforcement, rulemaking, and adjudicative powers in one individual who is unanswerable to the President, to anyone else inside of the CFPB, and, ultimately, to the people. *See PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting) ("The Director *alone* may decide what rules to issue. The Director *alone* may decide how to enforce, when to enforce, and against whom to enforce the law. The Director *alone* may decide whether an individual or entity has violated the law. The Director *alone* may decide what sanctions and penalties to impose on violators of the law.") (emphasis in original). The Director is not even subject to Congress' power of the purse, as the Director is empowered to set the CFPB's budget without any input by Congress. *See* 12 U.S.C. §§ 5497(a)(1), 5497(a)(2)(C).

The CFPB's structure insulates it from any meaningful check on its exercise of power and thus "poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than a multi-member independent agency does." *See PHH Corp.*, 881 F.3d at 166 (Kavanaugh, J., dissenting). In fact, other than the President, "the Director enjoys significantly more unilateral power than any single member of any other

independent agency." *Id.* at 171-72 (emphasis deleted). But, unlike the President, the Director is not accountable to the people through the electoral process. That is not only a historical anomaly, it is a threat to individual liberty. *See, e.g.*, *In re Aiken Cty.*, 725 F.3d 255, 264 (D.C. Cir. 2013) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.") (quoting The Federalist No. 47 (J. Madison)).

C. The CFPB's structure infringes on the President's authority.

As the CFPB itself has recognized, "[j]ust as the President's ability to 'select[] . . . administrative officers is essential' to the exercise of 'his executive power,' so too is his ability to 'remov[e] those for whom he can not continue to be responsible.'" Brief for Respondent Supporting Vacatur at 11, *Seila Law LLC v. CFPB*, No. 19-7 (U.S. Dec. 9, 2019) (citing *Myers v. United States*, 272 U.S. 52, 117 (1926)). Indeed, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Id.* (citing *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)); *see also Free Enter. Fund*, 561 U.S. at 484 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."). The Dodd-Frank Act flouts those well-established constitutional principles by impermissibly limiting the President's power to remove the Director.

The threat to Presidential power is underscored by the fact that "[a]s a result of the CFPB's novel single-Director structure and the five-year fixed term for the Director, a President may be stuck for years — ***or even for his or her entire four-year term*** — with a single Director who was appointed by a prior President and who has different policy views." *PHH Corp.*, 881 F.3d at 189 (Kavanaugh, J., dissenting) (emphasis added). Even worse, should Congress refuse to confirm a new Director, a President who is re-elected could be stuck with a

Director he or she did not appoint for even longer than five years, as the previous Director continues to hold his or her position until a successor is confirmed. *See* 12 U.S.C. § 5491(c)(2).

The same type of threat to Presidential authority does not present itself in the context of a multi-member agency like the FTC. FTC commissioners serve staggered terms, so "the President is generally assured to have an opportunity to appoint at least some of its members, and the partisan-balance requirement that is common for such commissions further increases the likelihood that at least some of the holdover members share the President's views." Brief for Respondent Supporting Vacatur at 36, *Seila Law LLC v. CFPB*, No. 19-7 (U.S. Dec. 9, 2019). Moreover, the President may designate the chair of the agency and may remove that person from the chair position at will. That power "is important because, by statute, the 'chairs of multimember agencies have been granted budget, personnel, and agenda control.'" *PHH Corp.*, 881 F.3d at 189 (Kavanaugh, J., dissenting) (citation omitted).

In short, the sweeping, unchecked power given to the Director of the CFPB "does not merely add" to the encroachment on executive authority, it "transforms it." *Free Enter. Fund*, 561 U.S. at 496. As such—and as the CFPB itself agrees—the single-Director structure of the CFPB violates the separation of powers. *See* Brief for Respondent Supporting Vacatur at 36, *Seila Law LLC v. CFPB*, No. 19-7 (U.S. Dec. 9, 2019) ("The interference with executive power caused by the removal restriction on the Bureau's Director is exacerbated by both the Bureau's single-headed nature and its wide-ranging policymaking and enforcement authority over private conduct.").

D. <u>The for-cause removal provision is not severable from the Dodd-Frank Act.</u>

Although the CFPB agrees that the for-cause removal provision is unconstitutional, it has taken the position that that provision can simply be severed from the

Dodd-Frank Act. *See* Brief for Respondent Supporting Vacatur at 46-48, *Seila Law LLC v. CFPB*, No. 19-7 (U.S. Dec. 9, 2019). Not so.

In considering whether an unconstitutional provision in a statute is severable, a court asks "whether the statute, minus any invalid provision, 'will function in a manner consistent with the intent of Congress' and 'is legislation that Congress would . . . have enacted.'" *PHH Corp.*, 881 F.3d at 139 (Henderson, J., dissenting) (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)) (emphasis deleted). Although "a court should not 'nullify more of a legislature's work than is necessary' because the 'ruling of unconstitutionality' already 'frustrates the intent of the elected representatives of the people[,]'" a court also should not "use the severability doctrine to 'rewrit[e]' an unconstitutional statute because that also 'circumvent[s] the intent of the legislature.'" *Id.* at 160 (citing *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329-30 (2006)).

Severing the for-cause removal provision would contravene Congressional intent and constitute an improper attempt to rewrite the statute. Independence is the "*sine qua non*" of Title X. *Id.* at 161. In creating the CFPB, Congress deliberately established it as an "independent bureau," a term that has long been understood "to describe an agency run by principal officers sheltered from the 'President's power to remove.'" *Id.* (citing 12 U.S.C. § 5491(a)); *see also id.* at 110 (Congress intended the CFPB to be "one step removed from political winds and presidential will") (Pillard, J., maj'y op.). Thus, the CFPB's governing statute "ties . . . [its] very existence to its freedom from the President." *Id.* Moreover, considering that the powers transferred to the CFPB previously resided in agencies that were "themselves more or less free from Presidential control," severing the provision that guarantees independence from the President "would by judicial decree transfer to the executive branch far-

reaching new powers that, before Title X, resided with several non-executive agencies." *Id.* at 162.

Numerous floor statements from Congressional members in support of Title X further highlight Congress' intent that the CFPB be independent of Presidential control. *See id.* (collecting citations). And, perhaps most indicative of Congressional intent, "Congress so valued the CFPB's independence that it forfeited its *own* oversight by exempting the agency from appropriations." *Id.* at 162 (emphasis in original). Severing the for-cause removal provision would drastically change that structure and "yield a mutant CFPB responsive to the President—and hence to majoritarian politics and lobbying—*but nowise accountable to the Congress*." *Id.* at 163 (emphasis in original). Surely, that is not the result that Congress intended or a law that it would have passed.

The existence of a general severability clause in the Dodd-Frank Act does not alter this conclusion. *See* 12 U.S.C. § 5302 ("If any provision of this Act . . . is held to be unconstitutional, the remainder of this Act . . . shall not be affected thereby."). As an initial matter, the existence of a severability clause is not dispositive and, at most, "creates only a rebuttable 'presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision.'" *Id.* at 161 (citing *Alaska Airlines, Inc.*, 480 U.S. at 686); *see also United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("[T]he ultimate determination of severability will rarely turn on the presence or absence of such a clause."). To the extent that there is a presumption of severability here, it is rebutted for all of the reasons stated above. The severability clause—which appears almost six hundred pages before the provision at issue and is one part of a more-than-800 page piece of legislation—says nothing with respect to whether Congress would have preferred a CFPB led by a single Director

answerable only to the President to no CFPB at all. *See PHH Corp.*, 881 F.3d at 163 (Henderson, J., dissenting).

Moreover, if Congress had made such a judgment, it surely would have included a specific severability provision in Title X, as it did in an unrelated part of the Dodd-Frank Act. *See* 15 U.S.C. § 8232 (relating to state-based insurance reform). At best, the general severability provision in 12 U.S.C. § 5302 evidences Congress' intent that each Title of the Dodd-Frank Act be considered severable, not that every single provision in each Title of the lengthy Act be severable. At worst, the clause simply contains "boilerplate language" that does little to evidence a Congressional judgment as to whether a CFPB answerable only to the President would be preferable to a CFPB with some other structure. *PHH Corp.*, 881 F.3d at 163 (Henderson, J., dissenting). Either way, the severability clause does not change the conclusion: the single-Director structure of the CFPB violates separation of powers principles, and the offending provision cannot simply be excised from the Dodd-Frank Act. At least one District Court dealing with the issue after the *PHH* decision has reached exactly that conclusion. *See RD Legal Funding, LLC*, 332 F. Supp. 3d at 784 (holding that the CFPB is unconstitutionally structured and that the for-cause removal provision cannot be severed).

Congress is free to restructure the CFPB in a way that complies with the Constitution, but that is Congress' job; it is not in the purview of any other branch of Government. *See PHH Corp.*, 881 F.3d at 164 (Henderson, J., dissenting) ("A severability clause 'does not give the court power to amend' a statute[,]" nor "is it a license to cut out the 'heart' of a statute.") (citations omitted).

E. Dismissal is the appropriate remedy.

The unconstitutional provision at issue here does not simply concern "the authority of an agent to make decisions on the CFPB's behalf[,]" it "concerns the structure and

authority of the CFPB itself[.]" *RD Legal Funding, LLC*, 332 F. Supp. 3d at 785. Accordingly, because an unconstitutionally structured agency has no authority to act, the appropriate remedy is dismissal. *See id.* (dismissing CFPB from action, finding that "the CFPB 'lacks authority to bring this enforcement action because its composition violates the Constitution's separation of powers'") (citing *NRA Political Victory Fund*, 6 F.3d at 822); *see also Compagnie*, 636 F.2d at 1315 (an agency's exercise of jurisdiction "is subject to limitations reflecting principles of international and constitutional law, as well as the strictures of the particular statute governing that body's conduct"); *All American Check Cashing, Inc.*, No. 3:16-cv-00356 (S.D. Miss., Dkt. 240 at 3) (recognizing that "the case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity").

The constitutional infirmity cannot simply be "cured." *See RD Legal Funding, LLC*, 332 F. Supp. 3d at 785. In *RD Legal Funding, LLC*, the CFPB argued that it could defeat dismissal because then-Acting Director Mick Mulvaney, who was removable at will, "ratif[ied]" his predecessor's actions. *Id.* at 784. The court rejected the CFPB's argument and concluded that "the Ratification [did] not cure the constitutional deficiencies with the CFPB's structure[.]" *Id.* at 785. The same holds true here. Even if the CFPB could in theory "ratify" previous actions taken while the agency was unconstitutionally structured, which it cannot, the CFPB cannot raise that argument here because, unlike then-Acting Director Mulvaney, the current Director ***is*** subject to the unconstitutional for-cause removal provision. There is therefore no one who could "ratify" the CFPB's decision to file and proceed with this enforcement action against Respondents, if that was even a viable method of avoiding dismissal. Finally, because of the constitutional deficiencies, dismissal with prejudice is the appropriate remedy. *See CFPB et al. v. RD Legal Funding LLC et al.*, No. 17-CV-890 (S.D.N.Y., Dkt. 109, filed Sept. 18, 2018)

(dismissing CFPA claims with prejudice "[g]iven the Court's conclusion that 'there is no statute for [the New York Attorney General] to proceed under'").

V. CONCLUSION

For the foregoing reasons, the ALJ should dismiss this action with prejudice.

Respectfully submitted,

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Dated: February 19, 2020

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February 2020, I caused a copy of the foregoing Respondents' Brief in Support of their Motion to Dismiss on Grounds Limited to February 7, 2020 Order to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on opposing counsel at the following addresses:

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