UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	**ENFORCEMENT COUNSEL'S CONSOLIDATED OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AND MOTION TO STAY PROCEEDINGS**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	
Respondents.	)	

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I. Introduction

More than four years into this proceeding, Respondents Integrity Advance and James Carnes seek to raise an entirely new affirmative defense, one they have long been aware of but never previously chose to assert. Respondents now claim that this proceeding has been flawed from the start and must be dismissed (or—what they really ask for—further delayed) because a provision in the Consumer Financial Protection Act ("CFPA") governing the removal of the Bureau's Director is unconstitutional.

The ALJ should deny both Respondents' Motion to Dismiss and Motion to Stay Proceedings. Respondents cannot be allowed to interject new legal issues into this matter that they could have raised years ago but chose not to. To consider waived arguments such as this one would conflict with both the letter and the spirit of the rules governing adjudications by entertaining defenses Respondents did not include in their Answer and delaying what is meant to be an expeditious proceeding. Doing so would also give Respondents a procedural windfall that is not available to other litigants and that cannot be justified by the reason this case was remanded.

Moreover, even if Respondents had properly preserved the constitutional issue they now seek to assert, that argument would provide no grounds for dismissal because it is beyond the power of this tribunal to adjudicate. It is fundamental that an administrative agency cannot hold unconstitutional its own organic statute. Respondents' argument belongs instead in federal court, where Respondents will have a chance to raise it (again assuming it has not been waived) if there is an adverse final decision at the close of this administrative proceeding. Indeed, the Bureau's Director has repeatedly made the same point, and refused to adjudicate this constitutional issue, in the context of another Bureau administrative process.

Respondents' related request to stay this case for the several months it is likely to take before the Supreme Court issues a decision on the removal provision in *Seila Law LLC v. CFPB* is

equally infirm. Respondents identify nothing in the rules governing this proceeding that would authorize a stay in these circumstances. Moreover, a stay would serve no purpose because *Seila Law* is unlikely to dispose of the claims in this case. A stay would also injure the Bureau and the public interest by further delaying the Bureau's efforts to secure relief for consumers who were systematically misled by Respondents about the terms and costs of their small-dollars loans.

The ALJ should deny Respondents' Motion to Dismiss and Motion to Stay Proceedings.

II. Legal Standards

To prevail on their Motion to Dismiss, Respondents must show that they are entitled to dismissal as a matter of law. *See* 12 C.F.R. § 1081.212(b).

To prevail on their Motion to Stay Proceedings—assuming the ALJ finds that a stay is even available in these circumstances—Respondents "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which [they] pray[] will work damage to someone else." *Landis v. North American Co*., 299 U.S. 248, 255 (1936). In considering a stay, the ALJ should, "in 'the exercise of judgment,' … 'weigh competing interests and maintain an even balance' between the court's interests in judicial economy and any possible hardship to the parties." *Belize Soc. Dev. Ltd. v. Belize*, 668 F.3d 724, 732–33 (D.C. Cir. 2012) (quoting *Landis*, 299 U.S. at 254–55).

III. Argument

A. Respondents Cannot Assert Entirely New Affirmative Defenses at This Late Date and Without Cause

The ALJ has discretion to manage these proceedings in accordance with the rules and statutes governing Bureau adjudications generally. *See* Order Directing a Remand to the Bureau's Administrative Law Judge (May 29, 2019) [Dkt. 216] at 9 (directing ALJ to determine "the conduct of further proceedings"); *cf. Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 124–25 (D.C. Cir. 2015) (remand of administrative proceeding due to Appointments

Clause problem did not require any particular procedures—only that the agency "conduct a remand proceeding that complied with [the governing statute]"). The ALJ should not allow Respondents to interject an entirely new affirmative defense into this proceeding more than four years after it began and with no good cause shown.

Respondents' "assertion that the [Bureau] is unconstitutionally composed cannot be regarded as anything other than an affirmative defense against an enforcement proceeding. As such, it must be raised in the pleading." *FEC v. Legi-Tech, Inc*., 75 F.3d 704, 707 (D.C. Cir. 1996). This requirement is reflected in the rules governing adjudications, which state that "[t]he answer must set forth affirmative defenses, if any, asserted by the respondent." 12 C.F.R. § 1081.201(b). Respondents did not raise any argument about the CFPA's removal provision in their Answer and Affirmative Defenses. *See* [Dkt. 21]. For that matter, they did not raise the issue in their first motion to dismiss, *see* [Dkt. 28]; or in their motion for summary disposition, *see* [Dkt. 89]; or after a D.C. Circuit opinion (later overturned) held the removal provision unconstitutional, *see PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *rev'd in relevant part*, 881 F.3d 75 (D.C. Cir. 2018); or during their appeal to the Director, *see, e.g.*, Respondents' Opening Appeal Brief (Nov. 4, 2016) [Dkt. 184]; or at any other point since this proceeding was initiated in November 2015. The ALJ therefore should treat Respondents' constitutional argument, along with any other new defenses they might seek to raise later in this proceeding, as waived.

The fact that this case has been remanded does not change this analysis. That remand was necessary, of course, because of a constitutional defect in the manner in which the prior ALJ was appointed. *See generally Lucia v. SEC*, 138 S. Ct. 2044 (2018). Because ALJ Parlen L. McKenna was not properly appointed under *Lucia*, Director Kraninger ordered these additional proceedings in which the ALJ and the parties are to "give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by Judge McKenna." Order Directing a Remand to the

Bureau's Administrative Law Judge (May 29, 2019) [Dkt. 216] at 9. But the reasons for revisiting the prior ALJ's legal conclusions do not apply to Respondents' decisions about what issues to raise in response to the Notice of Charges. Simply put, the flaw in ALJ McKenna's appointment has nothing to do with Respondents' own choice of affirmative defenses. Certainly, it does not give Respondents a license to inject new issues into this proceeding that they could have sought to raise years ago but did not.

For similar reasons, the D.C. Circuit held in *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015) that a constitutional defect in the Copyright Royalty Board did not provide grounds for a party appearing before the Board to revisit its own prior litigation choices on remand. "There is no Appointments Clause problem," the court explained, "in limiting [that party] to the evidence that it decided, on its own volition, to submit to the previous Board." *Id.* at 122. The same reasoning applies to Respondents' decision, on their own volition, to assert certain affirmative defenses in this proceeding but not others.[1]

To be sure, waiver is not automatic in all cases. *See Legi-Tech*, 75 F.3d at 707 (district court did not abuse its discretion by considering waived constitutional objection). But no good cause exists to excuse Respondents' waiver here. The constitutional challenge they seek to raise was no secret even at the time they filed their Answer. *See CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 894 (S.D. Ind. 2015) (rejecting similar challenge); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1087–88 (C.D. Cal. 2014) (same). Respondents even previously sought to stay this

[1] There is no inconsistency in holding Respondents to their choice of defenses and the ALJ's recent determination that Enforcement Counsel can pursue Count IV of the Notice of Charges. *See* Order Denying Respondents' Motion to Dismiss and/or For Summary Disposition on Grounds Limited to October 28, 2019 Order and Denying Respondents' Request for Additional Discovery (Jan. 24, 2010) [Dkt. 249] at 10–11. Enforcement Counsel's prior decision to drop that count was made in reliance on a decision of ALJ McKenna that is no longer entitled to any weight, and the decision was made effective in another order by the ALJ that also "has no effect in this new hearing." *Id.* at 11. In contrast, Respondents' choice of affirmative defenses was their decision alone.

proceeding based on a (since-overturned) D.C. Circuit opinion holding the removal provision unconstitutional, *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *rev'd in relevant part en banc*, 881 F.3d 75 (D.C. Cir. 2018)—but there, Respondents relied only on the opinion's holding about the applicable statute of limitations and made no mention of its constitutional analysis. *See* Order Denying Respondents' Motion to Stay Appeal and Remand to Hearing Officer (Oct. 21, 2016) [Dkt. 180] ("Stay Ord."); Order Denying Respondents' Motion to Stay Proceedings (May 27, 2016) [Dkt. 97]. Respondents can hardly claim that there was any impediment to their raising this defense before now.[2]

Respondents' attempt to introduce a new affirmative defense years into this proceeding also runs counter to the letter and the spirit of the rules governing adjudications. As noted above, those rules require Respondents to set forth any affirmative defenses in their Answer, and Respondents did not assert this defense in that pleading. 12 C.F.R. § 1081.201(b). Moreover, the rules are emphatic that "the Bureau's policy is to conduct … adjudication proceedings fairly and expeditiously." *Id.* § 1081.101. Thus, "[i]n the conduct of such proceedings, the hearing officer and counsel for all parties shall make every effort at each stage of a proceeding to avoid delay." *Id.*; *see also* CFPB Rules of Practice for Adjudication Proceedings (Final Rule), 77 Fed. Reg. 39058 (June 29, 2012) ("In drafting the Final Rule, the Bureau endeavored to create an adjudicatory process that provides for the expeditious resolution of claims . . . ."). In keeping with that emphasis, the rules impose a number of strict deadlines, including a requirement that the entirety of proceedings before the ALJ be concluded within 300 days. 12 C.F.R. § 1081.400(a). This remand alone has lasted

[2] As Respondents note, the Bureau has, since this proceeding began, adopted the view that the removal provision is unconstitutional. *See* Respondents' Motion to Dismiss on Grounds Limited to February 7, 2020 Order (Feb. 19, 2020) [Dkt. 253] at 6 ("Mot. to Dismiss"). The Bureau also takes the position, however, that the provision's invalidity does not affect the remainder of the CFPA. And the Director has emphasized that the provision's infirmity "does not affect [her] commitment to fulfilling the Bureau's statutory responsibilities." Letter from Director Kraninger to House Speaker Pelosi Pursuant to 28 U.S.C. § 530D, at 2 (Sept. 17, 2019) (attached as Exhibit A).

nearly that long. Respondents should not be allowed to further delay the resolution of this case based on little more than their own change of mind.

B. The Argument That Respondents Seek to Raise Here, Even if Not Waived, Is One This Tribunal Lacks the Power to Adjudicate

1. Administrative agencies cannot hold unconstitutional their own organic statutes.

"[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974)). Thus, agencies and administrative tribunals routinely decline to decide the constitutionality of statutes they are charged to administer.[3]

This practice is itself grounded in the separation of powers. "Administrative agencies are entrusted to administer statutes and thus perform quasi-judicial duties by ascertaining facts and interpreting the law in carrying out the will of the legislature." *Richardson*, 47 E.C.A.B. 171, 1995 WL 1088682, at *8 (Emps.' Comp. Appeals Bd. Nov. 3, 1995). In contrast, it is a paradigmatic "judicial function" of the courts "to exercise power to determine the constitutional legality of congressional enactments." *Id.* What's more, "[w]ere an agency to conclude that a duly enacted statute was unconstitutional, it might thereby preclude any review of that issue by the courts." *Howard Enters., Inc*., 93 F.T.C. 909, 1979 WL 198936, at *25 (1979). These considerations are at their most pressing "when the constitutional claim asks the agency to act contrary to its statutory

[3] *See, e.g.*, *Miami Int'l Holdings, Inc. v. Nasdaq Ise, LLC*, Case CBM2018-00021, 2019 WL 4855629, at *31–32 (Patent Trial and Appeal Bd. Oct. 1, 2019); *Sec'y of Labor v. Watson*, OSHRC Docket No. 16-2022, 2019 WL 5704681, at *31 n.25 (Occupational Safety Health Review Comm'n Sept. 27, 2019); *Dan Backer, Esq.*, AO 2018-07, 2018 WL 2411789, at *4 (Fed. Election Comm'n May 24, 2018); *REDACTED*, Bd. Vet. App. 1320396, 2013 WL 4450398, at *2–3 (Bd. of Veterans Appeals June 25, 2013); *21st Century Fax(Es) Ltd.*, 17 F.C.C.R. 1384, 2002 WL 27541, at *3 (Fed. Commc'n Comm'n Jan. 9, 2002); *Richardson*, 47 E.C.A.B. 171, 1995 WL 1088682, at *8 (Emps.' Comp. Appeals Bd. Nov. 3, 1995); *Echevarria*, 5 E.A.D. 626, 1994 WL 715039, at *8 (Envtl. Prot. Agency Dec. 21, 1994).

charter," such as by "question[ing] its own statutory authority." *Riggin v. Office of Senate Fair Emp't Practices*, 61 F.3d 1563, 1569 (Fed. Cir. 1995).

That is just what Respondents ask for here. They argue that the ALJ should conclude not only that the CFPA's removal provision is unconstitutional, but that the constitutional flaw with this provision renders invalid the whole of the statute, including the provisions authorizing the ALJ to oversee this proceeding. Even putting aside the fact that this argument directly conflicts with the stated position of the official who will review any decision by the ALJ in this case, as discussed below, Respondents' request makes little sense.

That is because this tribunal—like other administrative bodies—lacks the authority to hold unconstitutional the very statute that is the source of its power to act. *See Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 673 (6th Cir. 2018) ("An administrative agency may not invalidate the statute from which it derives its existence and that it is charged with implementing."); *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995) ("It was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional.").[4] An agency is, after all, purely a "creature of statute," with "no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Congress did not, when it established the Bureau and provided for adjudication proceedings before an ALJ, also confer authority on the agency or the ALJ to undo the very statute that Congress passed, and the President later signed into law, by adjudging it invalid. Enforcement Counsel is unaware of—and Respondents have not

[4] *Accord Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) ("The agency is an inappropriate forum for determining whether its governing statute is constitutional."); *Buckeye Indus., Inc. v. Sec'y of Labor*, 587 F.2d 231, 235 (5th Cir. 1979) ("No administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer."); *Miami Int'l Holdings*, 2019 WL 4855629, at *32 (party's constitutional arguments "would have us question our statutory authority and our ability to conduct those reviews—something we decline to do").

identified—any example of an agency ever having held in an adjudication that its own organic statute is unconstitutional. Respondents have provided no reason that this tribunal should become the first to do so.

The fact that Director Kraninger has taken the position in litigation in the federal courts that the CFPA's removal provision (but not the entirety of the CFPA) is unconstitutional does not make it proper for the ALJ to adjudicate this constitutional claim here. Indeed, since taking that position, Director Kraninger has herself repeatedly declined to adjudicate, in a different type of administrative process, that very claim. In resolving administrative petitions to modify or set aside Bureau civil investigative demands, *see generally* 12 U.S.C. § 5562(f), the Director has explained that such "administrative process . . . is not the proper forum for raising and adjudicating challenges to the constitutionality of the Bureau's statute." *Law Offices of Crystal Moroney, P.C.*, 2019-MISC-Law Offices of Crystal Moroney, P.C.-0001, at 2–3 (Feb. 10, 2020), *available at* https://go.usa.gov/xdmaV.[5] More generally, the Director has made clear that the constitutional infirmity with the removal provision does not affect the Bureau's ability to enforce the law. *See* Letter from Director Kraninger to House Speaker Pelosi Pursuant to 28 U.S.C. § 530D, at 2 (Sept. 17, 2019) (attached as Exhibit A).

2. Respondents will have the opportunity to press their argument in the court of appeals, should the Director ultimately find them liable.

The CFPA provides that final orders in Bureau adjudication proceedings are reviewable in the appropriate court of appeals. 12 U.S.C. § 5563(b)(4). Assuming *arguendo* that Respondents have not waived their defense concerning the removal provision, that argument can be decided in

[5] *See also Golden Valley Lending, Inc.*, 2019-MISC-HPUL Entities-0001, at 5–6 (Feb. 18, 2020) (same), *available at* https://go.usa.gov/xdwZ4; *FedChex Recovery, LLC*, 2019-MISC-FedChex Recovery LLC-0001, at 2–3 (Jan. 26, 2020) (same), *available at* https://go.usa.gov/xdPj3; *Equitable Acceptance Corp.*, 2019-MISC-Equitable Acceptance Corp.-0001, at 2 (Dec. 26, 2019) (same), *available at* https://go.usa.gov/xdPjC.

the court of appeals in the event Respondents are found liable here. *See generally Elgin v. Dep't of Treasury*, 567 U.S. 1, 18 n.8 (2012) ("It is not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge to a federal statute that the agency concluded it lacked authority to decide.").

Director Kraninger's orders resolving CID petitions have taken the same view. In explaining that constitutional challenges to the CFPA are not properly decided as part of the administrative CID petition process, the Director has emphasized that parties can instead seek to raise such objections "as a defense … in district court" in the event that the Bureau seeks a court order enforcing the CID. *See, e.g.*, *Law Offices of Crystal Moroney*, at 2. The same principle applies here, where Respondents—again assuming that they have properly preserved their separation-of-powers argument—will have a chance to make that argument in a court of appeals if they are found liable in this proceeding.

The availability of review in the court of appeals is enough to vindicate Respondents' constitutional claim. That point is clear from the many cases rejecting attempts by litigants in agency adjudications to collaterally attack those proceedings in court before they have been resolved. For example, in *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015), the D.C. Circuit dismissed the plaintiff's attempt to prematurely bring constitutional challenges to an ongoing SEC adjudication. "Even assuming Jarkesy is right that Congress has unconstitutionally delegated power to the SEC," the court explained, "Jarkesy has no inherent right to avoid an administrative proceeding at all." *Id.* at 27. Instead, "his rights can be vindicated by a reversal of the Commission's final order" in the court of appeals after the resolution of the agency proceeding. *Id.* (internal quotation marks omitted); *accord Tilton v. SEC*, 824 F.3d 276, 285 (2d Cir. 2016) ("That post-proceeding relief, although imperfect, suffices to vindicate the litigant's constitutional claim.").

It is true that a litigant in this situation will necessarily incur the "expense and disruption of defending itself" in the adjudication proceeding before receiving a resolution of its constitutional claim. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980). But the Supreme Court has expressly held that the resulting "expense and annoyance" "is part of the social burden of living under government" and "does not constitute irreparable injury." *Id.* (internal quotation marks omitted); *accord USAA Fed. Sav. Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988) ("Where . . . the 'injury' inflicted on the party seeking review is the burden of going through an agency proceeding, [*Standard Oil*] teaches that the party must patiently await the denouement of proceedings within the Article II branch."). Respondents thus will suffer no cognizable harm from having to raise their claim in the appropriate forum.

C. A Stay of This Proceeding Is Unwarranted

Although Respondents have moved to dismiss this matter, they candidly acknowledge that what they really want is a few months' more delay. *See* Mot. to Dismiss [Dkt. 253] at 2 n.2 (asking ALJ to defer ruling on motion to dismiss and instead stay proceedings). The ALJ should deny Respondents' Motion to Stay Proceedings. The rules of adjudication do not authorize a stay in these circumstances, and, in any event, a stay would serve no purpose and would harm both the Bureau and the public interest.[6]

[6] The ALJ could also choose to deny Respondents' Motion to Stay Proceedings for failure to comply with 12 C.F.R. § 1081.205(f), which requires that all non-dispositive motions "be accompanied by a signed statement representing that counsel for the moving party has conferred … with opposing counsel in a good faith effort to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement." Respondents note that the parties conferred about this motion but fail to include the required attestation—even though one reason Director Cordray denied Respondents' previous stay motion was that it too lacked such a statement. Stay Ord. [Dkt. 180], at 1–2 ("Integrity Advance's failure to file the signed statement required by Rule 205(f) justifies my rejection of its Motion.").

1. The rules of adjudication do not provide for a stay in these circumstances.

Respondents identify no authority in the Rules that would specifically authorize the ALJ to stay this proceeding until the appeal of a different case is fully resolved. They point only to the ALJ's general authority to "regulate the course of a proceeding" and to rule upon all "appropriate" motions. *See* Respondents' Motion to Stay Proceedings [Dkt. 252] at 2 ("Mot. to Stay") (citing 12 C.F.R. § 1081.104(b)). But those broadly worded provisions have to be read in light of the Rules' clear emphasis on "avoid[ing] unnecessary delay," 12 C.F.R. § 1081.104(a), and resolving adjudication proceedings "fairly and expeditiously," *id.* § 1081.101. The ALJ's general authority to "regulate the course of a proceeding" cannot be understood to authorize a stay in these circumstances when so many other provisions of the Rules make clear that proceedings should move steadily forward to a decision, s*ee, e.g.*, *id.* § 1081.400(a) (ALJ must issue recommended decision within 300 days), and when other provisions of the Rules specifically govern when stays may issue, *see, e.g.*, *id.* § 1081.211(f) (stays pending interlocutory review).

2. A stay would serve no purpose because the decision in *Seila Law* is highly unlikely to dispose of the claims here.

Even assuming that a stay may issue here, Respondents have not shown that a delay for the several months it will likely take the Supreme Court to issue a decision in *Seila Law* would be justified. Because the CFPA's removal provision, if held invalid, can be severed from the rest of the statute, *Seila Law* is unlikely to dispose of the Bureau's claims here. There is thus no reason this proceeding need be delayed until that opinion comes out. *See* Order Denying Mot. for Stay, *BCFP v. Certified Forensic Loan Auditors, LLC*, No. 2:19-cv-07722 (C.D. Cal. Feb. 21, 2020) (denying motion to stay Bureau enforcement action pending the decision in *Seila Law*) (attached as Exhibit B).

Seila Law presents the question whether the CFPA's removal provision is constitutional and, if not, whether its invalidity affects the remainder of the statute. If the Supreme Court upholds the provision, that is of course no obstacle to the Bureau seeking relief in this matter. But even if the Court holds the provision invalid, its own recent precedent as well as the express language of the statute call for simply severing the provision from the CFPA while leaving the rest of the statute in place. That is what the Supreme Court did in 2010 when it last confronted an unconstitutional removal restriction (with no justice disagreeing that severance would be the appropriate remedy). *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508–10 (2010). And that is what Congress provided for here by including an express severability clause in the statute stating that "[i]f any provision of this Act . . . is held to be unconstitutional, the remainder of this Act . . . shall not be affected thereby." 12 U.S.C. § 5302. Indeed, one justice already reached this conclusion with respect to the Bureau. While on the D.C. Circuit, then-Judge Kavanaugh concluded that the CFPA's removal restriction is unconstitutional but that the appropriate remedy was to sever it and allow the Bureau to "continue to operate . . . as an executive agency." *PHH Corp.*, 881 F.3d at 200 (Kavanaugh, J., dissenting).

If the removal provision is severed, that "would not affect the CFPB's ability to maintain the present" enforcement proceeding. *CFPB v. Navient Corp.*, No. 3:17-cv-101, 2017 WL 3380530, at *18–19 (M.D. Pa. Aug. 4, 2017); *accord* Order Denying Stay at 3, *Certified Forensic Loan Auditors*, No. 2:19-cv-07722 (C.D. Cal. Feb. 21, 2020) (because the CFPA's removal provision is severable, "it appears unlikely that the Bureau's claims will be disturbed" even if the Supreme Court holds the provision unconstitutional); *cf. Collins v. Mnuchin*, 938 F.3d 553, 595 (5th Cir. 2019) (en banc) (any "ongoing injury" to plaintiffs challenging the constitutionality of another independent agency headed by a single person "is remedied by a declaration that the 'for cause' restriction is declared removed").

Instead, severance would assure that any recommended decision by the ALJ that is adverse to Respondents will be reviewable by a Director who is removable at will. *See* 12 C.F.R. § 1081.402. If the Director ultimately decides in that scenario that Respondents "violated the law as the Notice of Charges had alleged," that will "necessarily [be] an affirmation of the validity of the charges." *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213 (D.C. Cir. 1998); *see generally Legi-Tech*, 75 F.3d at 708 (ratification by an agency free from constitutional defect cured the constitutional defect with the agency at the time enforcement action began); *CFPB v. Gordon*, 819 F.3d 1179, 1192 (9th Cir. 2016) (same).

Respondents are simply wrong that a stay would benefit "judicial economy" or is needed to avoid "inconsistent judgments" about the removal provision's constitutionality. Mot. to Stay [Dkt. 252] at 4–6. A stay would not benefit judicial economy because, again, the decision in *Seila Law* is unlikely to preclude the claims in this case from moving forward. A stay therefore would simply put off for several months what the parties can and should begin doing today. That is not "in the interest of judicial economy." *Id.* at 5. A stay is also not necessary to avoid the risk of inconsistent judgments about the removal provision. There is no such risk. As noted already, this tribunal lacks the authority to issue a judgment on the CFPA's constitutionality. Instead, either the ALJ or the Director can assess the impact of the decision in *Seila Law* at the time that case is decided and apply it to this proceeding as appropriate. *Cf.* Stay Ord. [Dkt. 180], at 2 (Director's order denying motion for stay based on *PHH*, in part because the Director was "fully capable of addressing the impact on this matter of the D.C. Circuit's panel decision in [*PHH*], *once that decision is finalized*." (emphasis added)).

Respondents have thus fallen well short of demonstrating that a stay would serve any purpose in these circumstances—let alone one that might outweigh the significant harms that a stay would cause.

3. The balance of equities weighs heavily against a stay.

A stay, while serving no purpose, would harm both the public interest and the Bureau. The Bureau is the primary enforcer of federal consumer financial laws. *See, e.g.*, 12 U.S.C. § 5511(a). It initiated this proceeding to address serious violations of multiple consumer financial protection laws, including the CFPA's prohibition on unfair and deceptive practices, involving many millions of dollars in potential liability. Numerous procedural twists have already delayed this proceeding far beyond the timelines envisioned in the rules governing adjudications. Halting any further progress for the months it will take for a decision in *Seila Law* would harm both the Bureau's and the public's "strong interest in the vigorous enforcement of consumer protection laws." *John Doe Co. v. CFPB*, 235 F. Supp. 3d 194, 205 (D.D.C. 2017). More particularly, both the Bureau and consumers have a compelling interest in resolving the Bureau's claims for relief that would compensate those individuals who were harmed by Respondents' illegal practices. Until this matter concludes, that consumer harm will remain unremediated.

For their part, the only hardship Respondents claim they would suffer from the denial of a stay is "the burden and expense of defending against this action." Mot. to Stay [Dkt. 252] at 5. But, as noted above, the expense of having to take part in an agency adjudication proceeding "does not constitute irreparable injury." *FTC v. Standard Oil*, 449 U.S. at 244. And because the CFPA's removal provision is severable from the rest of the statute, this case will almost certainly go forward no matter what the Supreme Court decides on that provision's constitutionality. Thus, Respondents are likely to incur the costs of continued litigation whether or not their request is denied, in which case the only question would be whether they begin incurring those costs now or in a few months. Respondents have thus entirely failed to meet their burden to "make out a clear case of hardship or inequity in being required to go forward." *Landis,* 299 U.S. at 255.

Respondents claim that the Bureau would not be harmed by a stay here because it requested, or did not oppose, stays in two other cases. *See* Mot. to Stay [Dkt. 252] at 6–7 (citing *CFPB v. RD Legal Funding, LLC*, No. 18-2743 (2d Cir.) and *CFPB v. CashCall, Inc.*, No. 18-55407 (9th Cir.)). But these cases are no help to Respondents. In both, there were no ongoing proceedings regarding the defendants' liability that would be delayed if the case were stayed. In *RD Legal*, the Bureau asked the Second Circuit to postpone argument on the constitutionality of the removal provision until *Seila Law* is decided because there, the constitutionality of the removal provision is the only issue properly before the court.

In *CashCall*, final judgment has already been entered in the district court and briefing and argument has concluded in the Ninth Circuit—all that is left is for the appeals court to issue its decision. That the Bureau did not oppose the court's delaying that decision until the Supreme Court resolves *Seila Law* in no way suggests that the Bureau faces no harm if proceedings here are delayed for months. Indeed, in circumstances like this, the Bureau has vigorously opposed stays of its enforcement actions. *See, e.g.*, Order Denying Stay, *BCFP v. Certified Forensic Loan Auditors,* No. 2:19-cv-07722 (C.D. Cal. Feb. 21, 2020) (attached as Exhibit B); Bureau's Opp'n to Stay, *BCFP v. Fair Collections & Outsourcing, Inc*., No. 8:19-cv-02817 (D. Md. Dec. 4, 2019).

The balance of equities strongly favors this case proceeding to a new recommended decision now rather than waiting until June.

IV. Conclusion

For all these reasons, the ALJ should deny Respondents' motion to dismiss or for a stay and allow this matter to proceed expeditiously to briefing on summary disposition.[7]

Respectfully submitted,

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Enforcement Counsel

March 4, 2020

[7] Enforcement Counsel respectively submits that the issues raised by Respondents' motions are sufficiently clear to be resolved without oral argument. *Cf.* Stay Ord. [Dkt. 180] (denying motion for stay without argument and without even waiting for response from Enforcement Counsel). Enforcement Counsel stands ready, however, to present oral argument if the ALJ determines that it would be of assistance in resolving the motions.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March 2020, I caused a copy of the foregoing Enforcement Counsel's Consolidated Opposition to Respondents' Motion to Dismiss and Motion to Stay Proceedings to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on Respondents' counsel at the following addresses:

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/s/ Stephen C. Jacques
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