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' REPLY BRIEF IN SUPPORT OF NOTICE OF SUPPLEMENTAL AUTHORITY AND REQUEST FOR RECONSIDERATION**

RESPONDENTS' REPLY BRIEF IN SUPPORT OF NOTICE OF SUPPLEMENTAL AUTHORITY AND REQUEST FOR RECONSIDERATION

In *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7, 2020 WL 3492641 (U.S. June 29, 2020), the Supreme Court of the United States held that the Consumer Financial Protection Bureau ("CFPB") has been, from its creation, an unconstitutionally structured agency. Although the Supreme Court allowed the CFPB to survive by severing the unconstitutional for-cause removal provision from the Dodd-Frank Act, it remanded the case back to the lower court to decide the issue of whether the CFPB's prior unlawful actions could be "ratified" by a properly constituted agency. *See id.* at *19. Enforcement Counsel's Opposition ("Opp'n") confirms that no such ratification has occurred here. So, even if ratification is "legally sufficient to cure the constitutional defect in the original" filing, it has not occurred here and the constitutional defect remains. *See id.* And because no such ratification *can* occur here because the statute of limitations expired, the ALJ should reconsider her ruling and dismiss this action.

Enforcement Counsel does not dispute, as it cannot, that ratification is necessary to cure the separation of powers problem inherent in the CFPB's filing of charges against

Respondents at a time when the CFPB was unconstitutionally structured. *See generally* Opp'n; *see also Seila Law*, 2020 WL 3492641, at *19 (remanding case to the lower court to determine if dismissal is the appropriate remedy, whether ratification had occurred, and whether any such ratification was "legally sufficient to cure the constitutional defect in the original demand"). Director Kraninger clearly is aware of the obligation to ratify past actions taken when the CFPB was unlawfully structured, and she has expressly done so in a number of other cases following the Supreme Court's decision in *Seila Law*. *See, e.g.*, *CFPB v. CashCall, Inc.*, Nos. 18-55407, 18-55479 (Dkt. 61) (9th Cir. July 10, 2020); *CFPB v. RD Legal Funding, LLC*, No. 18-2743 (Dkt. 237) (2nd Cir. July 10, 2020); *CFPB v. Navient Corp. et al.*, No. 3:17-CV-00101-RDM (Dkt. 506) (M.D. Pa. July 14, 2020).

Yet, Enforcement Counsel provides no explanation for why Director Kraninger has declined to ratify this action. Instead, Enforcement Counsel contends that Director Kraninger will have an opportunity to ratify this action once "the full administrative process runs its course," and she enters a final order against Respondents. Opp'n at 2-4. But that argument ignores the ongoing harm to Respondents that, even by Enforcement Counsel's analysis, currently is occurring and has not been cured. *See Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) (when a party "raise[s a] constitutional challenge as a defense to an enforcement action," there is "no theory that would permit [a court] to declare the [agency]'s structure unconstitutional without providing relief to the [party]"); *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 & n.5 (2018) (relief for structural violation must "cure the constitutional error" by "design[ing]" a "remed[y]" that not only "advance[s] th[e] purposes" of the Constitution, but also creates "incentives to raise [constitutional] challenges").

Enforcement Counsel's argument also concedes the well-established rule that "for a ratification to be effective, 'it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made*.'" *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (emphasis in original) (citation omitted); *see also id.* at 98-99 (finding that the Solicitor General's attempted ratification of a filing decision "simply came too late in the day to be effective" because the time period for filing had already passed). The cases cited by Enforcement Counsel recognize that a ratification cannot be made where the official attempting the ratification does not have the power to take the underlying action at the time of the ratification. *See, e.g.*, *Doolin Sec. Sav. Bank, F.S.B. v. OTS*, 139 F.3d 203, 213 (D.C. Cir. 1998) (allowing ratification because "[t]he timing problem posed in *NRA* is not present here," as "[n]o statute of limitations would have barred" the validly appointed officer "from reissuing the Notice of Charges himself"); *CFPB v. Gordon*, 819 F.3d 1179, 1190-91 (9th Cir. 2016) (allowing ratification because it occurred at a time where "the CFPB had the authority to bring the action" and "after [Richard Cordray] was properly appointed as Director"); *see also Advanced Disposal Servs. E., Inc. v. N.L.R.B.*, 820 F.3d 592, 604 (3d Cir. 2016) (allowing ratification where "[t]here [wa]s no statutory or administrative limitation preventing [the governmental official's action] at the time he ratified it" and noting that "the *NRA* 'timing issue' is [thus] not implicated here"). In keeping with this rule, other courts have invalidated "untimely" attempts at ratification that occur "beyond the statues of limitations" governing a party's claims. *See, e.g., Benjamin v. V.I. Port Auth.*, 684 F. App'x 207, 212 (3d Cir. 2017) (concluding that "any attempts at ratification were either untimely or improper" because the attempted ratification occurred after the statute of limitations had expired); *First Telebanc Corp. v. First Union Corp.*, 2007 WL 9702557, at *10 (S.D. Fla. Aug.

6, 2007) ("[R]atification attempted after the statute of limitations has run on a cause of action is ineffective.").

Pursuant to this well-established rule, even if Director Kraninger attempted to ratify this action now or at the conclusion of the proceedings, she cannot do so because the relevant statutes of limitations have run. Enforcement Counsel does not advance any legal argument to the contrary. And for good reason—even under the CFPB's interpretation of "discovery," the CFPB clearly would have "discovered" the alleged violations by June 2014. *See* Resp'ts' Notice of Suppl. Authority at 4. Because Enforcement Counsel cannot rely on a legal argument, they revert to "equity." Enforcement Counsel contends, without support, that "[e]quity surely permits a fully accountable Director to ratify claims the agency had already brought during the limitations period." Opp'n at 4. But even in the single case cited by Enforcement Counsel, the court noted that "equitable tolling applies only in 'rare and exceptional circumstances.'" *Harris v. Boyd Tunica, Inc.*, 628 F.3d 237, 239 (5th Cir. 2010). Indeed, the court *declined* to apply the doctrine of equitable tolling in that case. *Id.* at 240. There is similarly no basis to apply equitable tolling here, even assuming that that doctrine applies.

Enforcement Counsel's appeal to equity also is contrary to the law and the purposes of statutes of limitations. Enforcement Counsel goes so far as to make the incredible argument that the statute of limitations on its claims—which are based on conduct occurring more than eight years ago—did not begin to run until June 29, 2020, when the Supreme Court issued its decision in *Seila Law*. *See* Opp'n at 5 n.1. Indeed, according to Enforcement Counsel's view, because, as the CFPB conceded before the Supreme Court, the CFPB was unconstitutionally structured for ten years, it can now reopen the statute of limitations and bring claims against any covered person for conduct dating back to the inception of the Consumer

Financial Protection Act. But such a view is fundamentally inconsistent with the plain language of the statutes themselves as well as the well-established role of statutes of limitations in our judicial system. *See Gabelli v. SEC*, 568 U.S. 442, 452 (2013) (citing *Adams v. Woods*, 6 U.S. 336 (1805)) (noting that, more than 200 years ago, Chief Justice Marshall "emphasiz[ed] the importance of time limits on penalty actions, stating that it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'"); *Artis v. District of Columbia*, 138 S. Ct. 594, 608 (2018) (citing *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) ("Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system."). The relevant statutes of limitations apply with full force here, and they bar any current attempt by Director Kraninger to ratify this action. *See supra* at 3-4 (citing cases).[1]

Finally, Enforcement Counsel is wrong in its assertion that "[t]here is no reason to revisit" the ALJ's conclusion that Respondents have forfeited the separation of powers issue. Opp'n at 1. There is ample reason to reconsider that ruling. In *Seila Law*, the Supreme Court resolved an important question of federal law, making it the law of the land that the CFPB's structure has been unconstitutional from its inception and calling into question all of its past actions as a result. In seeking to sidestep this significant and material change in the law, Enforcement Counsel cites to a single out-of-circuit case that applies a more stringent forfeiture

[1] Enforcement Counsel's reliance on *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997), is misplaced. *See* Opp'n at 4. That case dealt with a statute of limitations which ran from "the date on which the cause of action arose" and thus "incorporate[d] the standard rule that the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry*, 522 U.S. at 201 (citation omitted). That is not the case here, where the relevant statutes of limitations run from "the date of discovery of the violation to which an action relates" (Consumer Financial Protection Act claims) and from "the date of the occurrence of the violation" (Truth in Lending Act and Electronic Funds Transfer Act claims). Dkt. 239 at 6, 20. Thus, there is a "contrary indication," Opp'n at 4, in the relevant statutes that renders *Bay Area Laundry* inapposite.

standard than is applied in the D.C. Circuit. *See* Opp'n at 1-2 (citing *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605-06 (4th Cir. 1999)) (noting that "[t]he intervening law exception to the general rule that the failure to raise an issue timely in the district court waives review of that issue on appeal applies when 'there was strong precedent' prior to the change . . . ").[2] But in the D.C. Circuit, courts "are not rigidly limited to issues raised in the tribunal of first instance" but rather "have a fair measure of discretion to determine what questions to consider and resolve for the first time on appeal." *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992). Courts generally exercise that discretion in cases involving "uncertainty in the state of the law; a novel, important, and recurring question of federal law; an intervening change in the law; and extraordinary situations in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process[.]" *Id.* (citations omitted). The *Roosevelt* court exercised that discretion in considering an otherwise

[2] The *Holland* case also is distinguishable. In *Holland*, the court declined to apply the intervening law exception in large part because it found that the Supreme Court decision at issue in that case could not "be viewed as effecting a change in the law of Fifth Amendment takings jurisprudence sufficient to excuse the failure to raise a takings challenge earlier." 181 F.3d at 606. That is plainly not the case where, as here, the Supreme Court's decision in *Seila Law* constitutes a significant and material change in the law that goes to the very power of the CFPB to maintain this enforcement action against Respondents.

In any event, the ALJ should reconsider her ruling even under *Holland*. As noted previously, at the time that Respondents filed their Answer in December 2015, the weight of authority suggested that the CFPB's structure was constitutional. *See CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1088 (C.D. Cal. 2014) ("[T]he for cause removal provision of the CFPB, when considered as a part of the CFPB's overall structure and mission, does not impermissibly interfere with the President's power to assure that the laws be faithfully executed."); *CFPB v. ITT Educ. Servs.*, 219 F. Supp. 3d 878, 893 (S.D. Ind. 2015) ("[W]e conclude that the structure of the CFPA is permissible when viewed through this doctrinal prism [including Humphrey's Executor and Morrison]."). Moreover, at that time, the CFPB defended the constitutionality of the statute. Respondents should not be deemed to have waived or forfeited the separation of powers defense in such circumstances, particularly where the defense is substantially reliant on a Supreme Court ruling issued just a few weeks ago and after the CFPB changed its position and conceded before the Supreme Court that its structure was unconstitutional.

waived issue where "a relevant Supreme Court decision intervened[,]" noting that "given the 'state of evolving definition and uncertainty,' an appellate court appropriately answers, and does not bypass, a (preliminary) question of such 'importance to the administration of federal law.'" *Id.* at 419. Such is the case here. The Supreme Court's decision in *Seila Law* constitutes the exact kind of intervening change in law that makes the separation of powers issue "newly ripe for raising," Dkt. 257 at 4, and the ALJ should not consider that issue to have been waived or forfeited. *See Roosevelt*, 958 F.2d at 419 & n.5.

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For the foregoing reasons, and for the reasons stated in Respondents' opening brief, the ALJ should reconsider her ruling that Respondents forfeited the separation of powers defense, consider the defense on its merits, and order dismissal.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of July 2020, I caused a copy of the foregoing Respondents' Reply Brief in Support of Notice of Supplemental Authority and Request for Reconsideration 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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