

believe the issue of the appropriate remedy for their standalone constitutional claim can be summarily resolved *against* Plaintiffs as part of the same partial summary adjudication based on the panel decision in *PHH*, which declined to do more than invalidate the CFPB's unconstitutional for-cause removal provision. This Court's partial summary adjudication order could then be certified by this Court to the D.C. Circuit under 28 U.S.C. § 1292(b) as "involv[ing] a controlling question of law as to which there is substantial ground for difference of opinion," thus allowing the D.C. Circuit to efficiently resolve in a single sitting all pending merits questions within its jurisdiction pertaining to the standalone constitutionality of the CFPB Director's for-cause removal provision. The remainder of Plaintiffs' claims would be reserved in this Court for further adjudication following the D.C. Circuit's *en banc* resolution of *PHH*.

Proceeding in this manner will have distinct advantages for both this Court and the D.C. Circuit. Most importantly, it would give the D.C. Circuit the opportunity to resolve this case and *PHH* together. Among other things, this would honor the D.C. Circuit's expressed expectation that this case "will be before [it] relatively quickly," as stated by Judge Henderson in her concurring/dissenting opinion. *PHH*, 2016 WL 5898801, at *59 n. 4, *citing State Nat'l Bank of Big Spring v. Lew*, No. CV 12-1032 (ESH), 2016 WL 3812637, at *1 (D.D.C. July 12, 2016) (holding in abeyance resolution of challenge to CFPB's constitutionality until the decision here). While nothing would compel the D.C. Circuit to accept the certified question, we believe it would be likely to do so in part because whereas *PHH* may be susceptible of resolution on statutory grounds alone, *see PHH*, 2016 WL 5898801, at *56 ("But my colleagues don't stop there. Instead, they unnecessarily reach PHH's constitutional challenge, thereby rejecting one of the most fundamental tenets of judicial decisionmaking.") (Henderson, J., concurring in part and dissenting in part), Plaintiffs' challenge in this case is not.¹ Thus, it is inevitable that Plaintiffs'

¹ It is worth noting that if the two cases are not consolidated, there is a distinct possibility that the *en banc* D.C. Circuit will vacate the panel decision in *PHH* on the grounds suggested by Judge Henderson's concurrence/dissent, awarding *PHH* judgment solely on statutory grounds and avoiding the constitutional question entirely. That disposition would leave this Court in the unenviable position of being required to resolve Plaintiffs' challenge to the CFPB's

standalone claim challenging the constitutionality of the Dodd-Frank Act's for-cause removal provision will reach the D.C. Circuit, and that Court will likely see the wisdom in definitively resolving the issue in a single adjudication.

The Court has previously shown itself willing to proceed in this case through partial summary adjudication, as it did in its July 12, 2016 order granting the CFPB partial summary judgment on the question of the effectiveness of Director Cordray's ratification statement. Plaintiffs request that the Court again proceed by partial summary adjudication here, in the interest of judicial economy and a speedy and efficient resolution of this long-pending case. The Government opposes this request, which Plaintiffs accordingly request that the Court address through a status conference.²

WHEREFORE, Plaintiffs respectfully request that the Court set a status conference as requested herein. A proposed order is attached.

Dated: January 4, 2017

Respectfully submitted,

/s/ Gregory Jacob

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constitutionality with a vacated panel decision in *PHH* having been the last word on the matter, but having no further legal effect, and without the D.C. Circuit having provided any further guidance on the point. Partial summary adjudication followed by certification would avoid this conundrum.

² One of the Government's primary arguments appears to be that it does not believe the D.C. Circuit will accept the case for purposes of consolidation. The Court has express authority to do so under Federal Rule of Appellate Procedure 3(b)(2), however, and recently consolidated a much wider variety of cases for initial hearing en banc in the Clean Power Plan litigation. *See West Virginia v. Environmental Protection Agency*, No. 15-1363 at Doc. #1613489 (D.C. Cir. May 16, 2016).

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CERTIFICATE OF SERVICE

I, Gregory Jacob, hereby certify that on January 4, 2016, I electronically filed the foregoing through the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ Gregory Jacob _____

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