NO. 20-______

In the
Supreme Court of the United States

RD LEGAL FUNDING, LLC, RD LEGAL FUNDING PARTNERS, LP, RD LEGAL FINANCE, LLC, and RONI DERSOVITZ,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU AND THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Jeffrey M. Hammer
CALDWELL HAMMER LLP
633 West Fifth Street
Suite 1710
Los Angeles, CA 90071
(213) 712-1390

Anne M. Voigts
Counsel of Record
Michael D. Roth
David K. Willingham
KING & SPALDING LLP
633 West Fifth Street
Suite 1600
Los Angeles, CA 90071
(213) 443-4355
avoigts@kslaw.com

Counsel for Petitioners

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QUESTIONS PRESENTED

Respondent Consumer Financial Protection Bureau brought an enforcement action against Petitioners RD Legal Funding Partners, LP, *et al.*, while, as *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192, 2202 (2020) held, the CFPB's "structure" "violate[d] the separation of powers." Before *Seila Law* was decided, the district court here also found the CFPB's structure unconstitutional, and the CFPB appealed. While this case was on appeal and after *Seila Law* was decided, the CFPB submitted a declaration purporting to ratify both its bringing of the initial enforcement action and its appeal. Although ratification requires that the ratifying party be able to do the act ratified when it was done *and* when the ratification was made, the CFPB could not act while unconstitutionally structured, and the purported ratification here came years after the time for either bringing an action or filing an appeal had run. Despite the CFPB's failure to meet those two fundamental requirements, and the Second Circuit's obligation to determine its own jurisdiction, the appellate court presumed it could act, determining some (*but not all*) issues on the merits, and remanding to the district court to consider the purely legal issues of ratification.

The questions presented are:

1. Whether ratification is an appropriate remedy for the separation-of-powers violation identified in *Seila Law*.

2. Whether, after *Seila Law* found the CFPB's structure unconstitutional, the CFPB could ratify an enforcement action and subsequent appeal long after the time for doing either had run.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, RD Legal Funding Partners, LP, by and through its undersigned counsel, hereby states that it has no corporate parents and no publicly held corporation owns 10% or more of its stock.

Pursuant to Supreme Court Rule 29.6, RD Legal Finance, LLC, by and through its undersigned counsel, hereby states that it has no corporate parents and no publicly held corporation owns 10% or more of its stock.

Pursuant to Supreme Court Rule 29.6, RD Legal Funding, LLC, by and through its undersigned counsel, certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, listed here in reverse chronological order:

- *Consumer Fin. Prot. Bureau v. RD Legal Funding LLC*, No. 18-2743-cv (L) (2d Cir. Jan. 14, 2021) (order denying rehearing), included as appendix C, unreported.
- *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, No. 18-2743 (2d Cir. Oct. 30, 2020), included as Appendix A, reported at 828 F. App'x 68.
- Order amending Order in *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, No. 17-CV-890 (S.D.N.Y. Sept. 12, 2018), included as Appendix B, reported at 2018 WL 11219167.
- Order in *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, No. 17-CV-890 (S.D.N.Y. June 21, 2018), included as Appendix B, reported at 332 F. Supp. 3d 729.

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This case raises two questions of exceptional importance over which judges are split: First, whether ratification is a proper remedy for structural separation-of-powers violations; and second, whether even if ratification applies in theory, it can cure a constitutional violation after the time for doing the act ratified has lapsed. The answer to both is no.

First, to conclude that ratification can cure structural error conflicts with this Court's cases holding that parties injured by a constitutionally defective executive agency or official are entitled to relief. Here, Petitioners pursued a successful constitutional challenge. If the end result is that their constitutional injury can be remedied by an untimely ratification, their reward for success is to face penalties that have increased by potentially *more than a billion dollars*. That doesn't cure their constitutional injury, it compounds it.

Second, applying ratification here can't be squared with the requirement that the ratifying party have the authority to do the act ratified at the time it was done *and* at the time of ratification. Indeed, even if ratification can apply, and even if an unconstitutionally structured agency is deemed to have the authority to do the act ratified at the time it was done, to hold that ratification can occur out-of-time whenever an agency belatedly chooses to do so squarely conflicts with *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) ("*NRA Victory Fund*").

Even so, courts and judges are in a hopeless muddle, reaching contradictory results based on conflicting reasoning. This Court should grant

certiorari to resolve these conflicts and provide necessary clarity on two important questions about the appropriate remedy for structural constitutional violations. In the alternative, because ratification was indisputably untimely, this Court should summarily reverse, and direct the Second Circuit to (a) comply with NRA Victory Fund by dismissing the CFPB's appeal, and (b) reinstate the district court's original judgment against the CFPB. This Court should also direct the Second Circuit to decide the remaining issues raised in the appeal and cross-appeal between RD Legal and the New York Attorney General.

Because those facts are undisputed, this case is a good vehicle to resolve these questions. After the CFPB brought suit against Petitioners, the district court correctly concluded that the CFPB's structure was unconstitutional and dismissed the CFPB's claims. After the CFPB appealed and this Court decided *Seila Law,* the CFPB Director submitted a declaration to the appellate court purportedly ratifying both the CFPB's initial bringing of the enforcement action and its filing of the notice of appeal years after the time for doing both had run. The propriety of that ratification is a pure question of law. And the only permissible course of action under *NRA Victory Fund* was for the Court of Appeals to dismiss the CFPB's appeal for lack of jurisdiction.

It didn't. Rather than answer the critical question of law before it, the court punted. It decided some issues on the merits—leaving others raised by Petitioners on cross-appeal unresolved—and then remanded the case for the district court to resolve in the first instance whether that belated attempt at

ratification could cure the constitutional problem.[1] In so doing, the court overlooked whether—or implicitly assumed that—it had appellate jurisdiction. That in turn squarely conflicts with *NRA Victory Fund* and the long line of cases requiring courts to ensure appellate jurisdiction before deciding a case, not after. And in so doing, the Circuit exacerbated the constitutional injury to Petitioners. This Court should either grant certiorari or, in the alternative, summarily reverse.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 828 F. App'x 68 (2d Cir. 2020) and reproduced at App.1–4. The opinion of the United States District Court for the Southern District of New York is reported at 332 F.Supp. 3d 729 (S.D.N.Y. 2018) and reproduced at App.5–95.

JURISDICTION

The Second Circuit issued a summary order on October 30, 2020. It subsequently issued an order denying rehearing en banc on January 14, 2021. This petition is timely under this Court's March 19, 2020 order extending the time to file a petition for certiorari. This Court has jurisdiction under 28 U.S.C. § 1254.

[1] In fact, this would not be "the first instance" because the district court had already rejected the CFPB's first attempt at ratification for reasons equally applicable to its second, and the CFPB did not appeal that part of the district court's ruling.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions appear in the Appendix at App.105–29.

STATEMENT OF THE CASE

A. The CFPB, Separation of Powers Principles, and *Seila Law*

The Constitution vests the Executive power—"*all* of it"—in the President. *Seila Law*, 140 S. Ct. at 2191 (emphasis added); U.S. Const. art. II, § 1, cl. 1. That purposeful consolidation of power in a single individual is intended to "ensure both vigor and accountability" to the people. *Printz v. United States*, 521 U.S. 898, 922 (1997). While the President may delegate that authority, such authority always remains under "the ongoing supervision and control of the elected President." *Seila Law*, 140 S. Ct. at 2203; *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010) ("[E]xecutive power without the Executive's oversight . . . subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts."). Part and necessary parcel of the President's oversight of the Executive Branch is the power to remove federal officers. *Myers v. United States*, 272 U.S. 52, 114 (1926) (holding that such power is "vested in the President alone").

The Dodd-Frank Act of 2010 established the CFPB as an independent agency to implement and enforce nineteen consumer protection statutes. *Seila Law,* 140 S. Ct. at 2193. To carry out its duties, Congress granted the agency "vast rulemaking, enforcement, and adjudicatory authority," including

the authority to conduct investigations, issue subpoenas, carry out in-house adjudications, and prosecute civil actions in federal court. *Seila Law,* 140 S. Ct. at 2191; *see* 12 U.S.C. §§ 5562, 5564(a), (f). It also granted the CFPB the power to seek broad remedies, including "any appropriate legal or equitable relief," reformation of contracts, and civil penalties that have increased to up to $1,190,546 per day. 12 U.S.C. § 5565(a)(1)–(2), (c); 12 C.F.R. § 1083.1.

Moreover, the CFPB's decisions are insulated from Congress's appropriations decisions because it is statutorily entitled to a stream of revenue directly from the Federal Reserve. *Seila Law*, 140 S. Ct. at 2194. The CFPB thus "acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens." *Id*. at 2202 n.8.

To ensure the CFPB's independence, Congress provided that the agency would be headed by a single Director, serving for a five-year term, and removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(1), (3). As a result, the CFPB Director was effectively unanswerable to the President. *See, e.g., Seila Law*, 140 S. Ct. at 2204 (raising the concern that some Presidents may have no "influence [over CFPB] activities" and be "saddled with a holdover Director from a competing political party who is dead set *against* [the President's] agenda").

This Court addressed the constitutionality of the CFPB's structure in *Seila Law*. In concluding that that structure violated the Constitution, this Court

acknowledged that despite the CFPB's enormous and wide-ranging powers, its Director was "neither elected by the people nor meaningfully controlled . . . by someone who is." *Id.* at 2203. As this Court explained, such an arrangement has "no basis in history and no place in our constitutional structure." *Id.* at 2201. Accordingly, the CFPB Director's "insulation from removal by an accountable President" offended fundamental separation of powers principles, "render[ing] the agency's structure unconstitutional." *Id.* at 2204.

As a plurality of the Court acknowledged, that defect was so severe, that if the removal protection were not severable, "the entire agency" would be "unconstitutional and powerless to act," leaving "no agency . . . with statutory authority to maintain this suit or otherwise enforce the demand." *Id.* at 2208 (plurality op.). The Court thus faced a choice: Either the Director's tenure protection could be removed and the CFPB "may continue to exist and operate," or there would be "*no agency at all*." *Id.* at 2207, 2210. Concluding that "Congress would have preferred a dependent CFPB to *no agency at all*," *id.* at 2210, the Court severed the Director's tenure protection. Three Justices joined this severance analysis, while four others joined the judgment. Two other Justices would have denied severance and granted Seila Law relief then and there. *Seila Law*, 140 S. Ct. at 2224 (Thomas, J., concurring in part and dissenting in part).

The Court, however, declined to opine on the ratification debate because it "turn[ed] on case-specific factual and legal questions not addressed below and

not briefed" before the Court. *Seila Law*, 140 S. Ct. at 2208 (plurality opinion). Instead, it left the issue for lower courts to consider in the first instance. *Id.*

B. *Seila Law*'s Progeny

That decision, however, has spawned confusion in the lower courts over whether and how to apply ratification. Take *Seila Law* itself. On remand, a three-judge panel concluded that ratification did apply, that the agency had the authority to do the act ratified at the time it was done, and that it still had the authority to issue a Civil Investigative Demand when it subsequently ratified its act. *CFPB v. Seila Law LLC*, 984 F.3d 715, 718 (9th Cir. 2020), *as amended on denial of reh'g,* 997 F.3d 837 (9th Cir. 2021).[2] After a judge of the court sua sponte requested a vote on whether to rehear the case en banc, the Circuit denied rehearing, despite a sharp dissent by four judges. Those judges would have held that ratification is not "a proper remedy for separation-of-powers violations" that affect an agency's structure and that "no ratification is permissible" because the Supreme Court's "determination that severance was necessary confirms that the CFPB lacked Executive authority pre-severance" and "[t]he doctrine of ratification does not permit the CFPB to retroactively gift itself power that it lacked." 997 F.3d at 843 (Bumatay, J., dissenting) (citing *NRA Victory Fund,* 513 U.S. 88; *Dist. Twp. of Doon v. Cummins,* 142 U.S. 366 (1892); and *Norton v. Shelby Cty.,* 118 U.S. 425 (1886)). Moreover, the dissenters concluded, even if

[2] The mandate in that case is currently stayed to allow Seila Law to petition for certiorari. Even if this Court were not to take this case, it should hold it pending a decision on that petition.

ratification were an appropriate remedy, it is only effective if the principal has the power to do the act ratified *at the time of the act* and the Director's "insulation from presidential control rendered the whole agency unconstitutional. With no agency empowered to enforce the laws at the time of the CFPB's prior actions, no ratification is permissible." 997 F.3d at 840 (Bumatay, J., dissenting).

Some courts have expressed hesitation about not applying ratification to the CFPB's actions based on concerns that failing to do so would be too sweeping a remedy. *See, e.g., CFPB v. Citizens Bank, N.A.,* No. 20-044, 2020 WL 7042251, at *8 (D.R.I. Dec. 1, 2020) (declining to condemn "all past (or just all pending) CFPB actions, without the possibility of ratification" because of the potential for regulatory disruption). Another applied ratification, but concluded that an otherwise untimely ratification could be cured by invoking equitable tolling. *See CFPB v. Navient Corp.,* No. 3:17-cv-101, 2021 WL 134618, at *10 (M.D. Pa. Jan. 13, 2021), *motion to certify interlocutory appeal granted*, 2011 WL 772238 (M.D. Pa. Feb. 26, 2021). A third applied ratification, but found it untimely. *CFPB v. Nat'l Collegiate Master Student Loan Tr.,* No. 17-1323, 2021 WL 1169029, at *5 (D. Del. Mar. 26, 2021). And here, in dealing with a first attempt at ratification, the district court found ratification inapplicable because ratification is an issue of agency law and the attempted ratification failed to "address accurately the constitutional issue raised in this case, which concerns the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf." App.93. And still other courts have yet to rule. *See,*

e.g., CFPB v. All Am. Check Cashing, Inc., et al., No. 18-60302 (5th Cir. filed Apr. 24, 2018) (stayed pending *Yellin v. Collins,* No 19-563 (U.S.)); *CFPB v. Cashcall, Inc.,* No. 18-55407 (9th Cir. filed Mar. 28, 2018), *CFPB v. Nationwide Biweekly Admin., et al.,* No. 18-15431 (9th Cir. filed Mar. 15, 2018); *CFPB v. Law Offices of Crystal Moroney,* No. 20-3471 (2d Cir. filed Oct. 7, 2020).

C. Overview of This Case

Petitioners RD Legal Funding Partners, LP, RD Legal Finance, LLC and RD Legal Funding, LLC (collectively, the "RD Entities") are affiliated finance companies providing a valuable and lawful service: They pay a lump sum to customers who want immediate liquidity to purchase their customers' interests in future proceeds from legal settlements or judgments. Here, these transactions include the purchase of part of customers' proceeds from the September 11th Victim Compensation Fund, and the settlement fund created in connection with *In re: National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB, MDL-2323 (E.D. Pa.). Far from engaging in the "deceptive and abusive" practices alleged here, the RD Entities provide customers the information necessary to make informed decisions about whether to sell their settlement proceeds.

This action arises out of efforts by the CFPB and New York Attorney General ("NYAG") to invalidate those transactions on the dubious theory that—despite clear contractual terms and contrary caselaw—they aren't true sales and should instead be recharacterized as loans (i.e., "extensions of credit"

under the Consumer Financial Protection Act ("CFPA")). Because the RD Entities did not tell their customers something they did not themselves believe—namely, that the transactions were loans rather than the sales the RD Entities believed and continue to believe them to be, the CFPB and NYAG claim that the RD Entities engaged in deceptive practices.

D. The CFPB's Suit and Subsequent Appeal

The CFPB and NYAG filed suit on February 7, 2017, alleging those transactions were unfair, deceptive, or abusive acts or practices (UDAAP) that violated Section 1054 of the CFPA and various state laws. 12 U.S.C. § 5564.

Over a year later, facing constitutional challenges to its structure, the CFPB sought to insulate the suit by filing a notice of ratification on May 11, 2018. (2d Cir. Joint Appx. ("JA") 780–83). In rejecting that attempted ratification, the district court recognized that ratification is an issue of agency law and correctly held that the attempted ratification failed to "address accurately the constitutional issue raised in this case, which concerns the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf." (2d Cir. Special Appx. ("SA") 105–06). The CFPB did not challenge that part of the district court's ruling on appeal.

Instead, the CFPB challenged the court's holding that the agency's structure was unconstitutional, that its single-director-removable-only-for-cause provision was not severable, and that the underlying joint enforcement action had to be dismissed. After striking down the CFPA in its entirety, the court found no

basis for federal jurisdiction over the NYAG's claims, dismissed the NYAG's state law claims without prejudice, and entered judgment in favor of the RD Entities and their principal (collectively, "RD Legal"). (SA109–10, 116, 119.) On September 14, 2018, the CFPB filed its appeal from that decision, the NYAG later appealed, and RD Legal cross-appealed.

On appeal, after the Supreme Court decided *Seila Law*, the CFPB's then-Director, Kathleen Kraninger, submitted a declaration dated July 8, 2020. In that declaration, she asserted that she understood she was removable for cause, she had considered the bases for bringing the enforcement action and for appealing its dismissal, and she ratified both decisions. 2d Cir. Dkt. No. 237-2 at 2. That declaration, however, came too late—over three years after the CFPB brought this enforcement action and nearly two years after it filed its notice of appeal. RD Legal pointed this out to the Second Circuit in a responsive Federal Rule of Appellate Procedure 28(j) letter and in subsequent filings. 2d Cir. Dkt. No. 240.

E. The Appellate Court's Decision

After oral argument, the panel issued a summary order following *Seila Law*, affirming the district court's holding that the for-cause removal provision was unconstitutional, reversing its holding that the provision was not severable, and declining to address the issues raised in RD Legal's cross-appeal. But despite the fact that the CFPB's ability to bring the appeal in the first place (and thus the appellate court's jurisdiction over it) depended on the sufficiency of the second attempted ratification, the panel never addressed that issue. Indeed, it did not even

acknowledge that Kraninger purportedly ratified two actions—the initial bringing of the enforcement action *and* the noticing of the appeal. Instead, it remanded for the district court to consider in the first instance the validity of Kraninger's ratification. The appellate court never explained why it could remand the ratification issue to the district court when the appellate court's jurisdiction over the appeal (and thus its ability to remand) depended itself on the propriety of that ratification, or how the district court could consider appellate jurisdiction at all.

F. RD Legal's Petition for Rehearing

RD Legal subsequently filed a petition for rehearing. As it noted, unlike *Seila Law* or the other cases addressing the CFPB's ability to ratify its earlier actions, this is the only post-*Seila Law* case also raising appellate jurisdiction issues because this is the only case where the CFPB is the appellant. RD Legal contended that the panel erred under *NRA Victory Fund*, 513 U.S. at 98, in assuming it had jurisdiction to remand the ratification issue to the district court. Even if ratification applied here, RD Legal argued, under Supreme Court law, for it to be effective, "it is essential that the party ratifying [i.e., the principal] should be able" "to do the act ratified" (1) "at the time the act was done," and (2) "also *at the time the ratification was made*." *Id.* (quoting *Cook v. Tullis*, 85 U.S. 332, 338 (1874)) (emphasis in original). Because the CFPB could meet neither prong and because ratification implicated both the CFPB's ability to maintain this appeal and the appellate court's jurisdiction over it, RD Legal contended, the panel could not exercise jurisdiction it didn't have to remand

the issue back to the district court. The Second Circuit declined to grant rehearing en banc.

The Circuit also declined to grant a stay of the mandate and the ratification issues are currently pending before the district court. The CFPB's primary arguments there are based on equitable doctrines in an attempt to justify its untimely ratification. Those doctrines do not apply to the noticing of an appeal.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to consider two questions of exceptional importance over which judges are split: First, whether, ratification is a proper remedy for structural separation-of-powers violations; and second, whether ratification can cure a constitutional violation after the time for doing the ratified act has run. In answering those questions, courts have reached contradictory results based on conflicting reasoning. This Court should grant certiorari to resolve that confusion.

To be clear, the answer to both questions is plainly no. To conclude that ratification can cure structural error conflicts with both this Court's cases holding that parties injured by a constitutionally defective executive agency or official are entitled to relief, and the ratification doctrine's requirement that the ratifying party have the authority to do the act ratified at the time it was done. And finally, to conclude that ratification can occur whenever an agency belatedly chooses to do so squarely conflicts with *NRA Victory Fund*. To hold that ratification (particularly an untimely one) can cure any constitutional structural injury would discourage parties from pursuing legitimate separation-of-powers challenges and leave

courts with no meaningful curb for congressional encroachment on executive power.

I. Whether Ratification Is an Appropriate Remedy for Structural Constitutional Violations Presents a Question of Exceptional Importance Over Which Judges Have Disagreed.

This Court did not assume, let alone decide in *Seila Law*, that ratification could as a legal matter cure the CFPB's constitutional infirmities. And for good reason—it cannot. The decisions to the contrary run afoul of this Court's decisions requiring a remedy for structural violations and the ratification doctrine's essential requirements.

1. As a threshold matter, courts have disagreed over whether the constitutional problem here was limited to a single official, or permeated the structure of the agency as a whole. The separation-of-powers challenge to the CFPB's structure decided in *Seila Law* involved the structure and authority of the CFPB itself, not an agent's lack of authority to make decisions on behalf of the CFPB. The problem, as this Court saw it, was not too little power, but too much. *Seila Law*, 140 S. Ct. at 2201, 2203 (repeatedly emphasizing the "significant" power accorded the CFPB director). Moreover, the absence of for-cause removal was not the only constitutional concern. To the contrary, as this Court acknowledged, "several other features of the CFPB combine to make the Director's removal protection even more problematic" because "the agency's unique structure also forecloses certain indirect methods of Presidential control." *Id.* at 2204.

Nevertheless, some lower courts have concluded that the constitutional infirmity relates to the Director alone, not the legality of the agency itself. *See, e.g., Seila Law,* 997 F.3d at 846–47; *see also CFPB v. Gordon*, 819 F.3d 1179, 1192 (9th Cir. 2016) (noting no issues with CFPB's authority). Others, however, have (correctly) reached the contrary conclusion. *See, e.g., Nat'l Collegiate Master Student Loan Tr.*, 2021 WL 1169029, at *4 ("[N]o question that the Bureau initiated this action against the Trusts at a time when *its structure* violated the Constitution's separation of powers.") (emphasis added); *see also* App.93 (holding that the constitutional issues "concern[] the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf").

Indeed, the Ninth Circuit decisions in *Gordon* and in *Seila Law* on remand can't be squared with this Court's decision in *Seila Law* itself. *See Seila Law*, 997 F.3d at 846–47 (holding that "constitutional infirmity relate[d] to the Director alone, not to the legality of the agency itself" and concluding that if there had been a structural defect with the CFPB, this Court would not have remanded the case to determine if there was a valid ratification). *Cf. Seila Law*, 997 F.3d at 844 (Bumatay, J., dissenting) ("[B]ased on the Court's intervening decision in *Seila Law*, that ratification inquiry must now come out differently."). As explained in *Seila Law*, though, the constitutional issues were not whether then-Director Cordray acted within his authority in purporting to authorize the CFPB to take action in the first instance, but whether at that time, the *CFPB'*s structure as a whole violated the separation of powers. *See, e.g., Seila Law*, 140 S. Ct. at 2192 ("We therefore hold that the structure of

the CFPB violates the separation of powers."); *id.* at 2201 ("Such an *agency*" has "no place in our constitutional structure.") (emphasis added). As this Court recognized, the problem with CFPB's structure was that it allowed the Director to wield too much unchecked authority, not that the Director was acting without authority. *See id.* at 2191 ("[T]he Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy."). And that is a structural flaw that affects the agency as a whole.[3]

2. Moreover, this Court and others have held that such constitutional structural flaws require a remedy. *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) ("*Victory Fund I*") (when a regulated party "raise[s] [a] constitutional challenge as a defense to an enforcement action," "no theory . . . would permit [a court] to declare the [agency's] structure unconstitutional without providing relief"); *see also Seila Law*, 140 S. Ct. at 2208 (plurality) (recognizing that dismissal is the "straightforward remedy" for the undisputed "constitutional defect"), 2220 (Thomas, J.,

[3] That distinguishes cases raising separation-of-powers challenges to an agency's structure, where ratification should not apply, from those raising Appointments Clause challenges to a single official, where courts have held that it does. *See Gordon*, 819 F.3d at 1192 (holding that, after invalidation of CFPB Director's recess appointment, the Director's "ratification, done after he was properly appointed as Director, resolves any Appointments Clause deficiencies"); *see also Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (holding that, after invalidation of Board members' recess appointments, NLRB properly ratified the appointment of its Regional Director who, in turn, ratified his prior unauthorized actions).

joined by Gorsuch, J., concurring in part and dissenting in part); *Ryder v. United States*, 515 U.S. 177, 182–83 (1995) (challenger "entitled to a decision on the merits . . . and whatever relief may be appropriate"); *Noel Canning v. NLRB*, 705 F.3d 490, 493, 514 (D.C. Cir. 2013), *aff'd sub nom. NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014) (structural constitutional defect made the NLRB's proceedings "void *ab initio*"). That makes good sense: Absent meaningful relief for successful constitutional challenges, there is no incentive to raise them. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018). "In the agency context," therefore, "'[i]ssues of separation of powers'" are "structural errors" that come with the straightforward remedy of dismissal. *See Sw. Gen., Inc. v. NLRB*, 796 F.3d 67, 79 (D.C. Cir. 2015), *aff'd sub nom. NLRB v. Sw. Gen., Inc.*, 137 S. Ct. 929 (2017) (quoting *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000)); *see, e.g., Lucia,* 138 S. Ct. at 2055 & nn.5–6 (2018) (vacating unconstitutional ALJ's adjudication despite attempted ratification); *Stern v. Marshall,* 564 U.S. 462, 503 (2011) (affirming dismissal of claim decided by unconstitutional Bankruptcy Court).

If ratification can cure a structural violation of the Constitution, that means that the proper remedy for the underlying constitutional violation is effectively no remedy at all. Permitting ratification doesn't cure the constitutional injury, it exacerbates it. Take this case: By wrongly defending its constitutionality for more than four years in this case, the CFPB forced RD Legal to battle to right a constitutional wrong, all while the potential civil penalties increased by more than $8.6 million for Tier 1 penalties and $1.6 billion for Tier 3 penalties. 12 U.S.C. § 5565(c); 12 C.F.R.

§ 1083.1. If the CFPB can belatedly ratify its actions, RD Legal will be worse off for having brought a successful constitutional challenge. That makes no sense. Allowing the CFPB unlimited mulligans discourages valid constitutional challenges, and rewards the CFPB for its constitutional intransigence and Congress for its overreach. *See Lucia*, 138 S. Ct. at 2055 n.5 (remedies must incentivize parties to raise constitutional challenges).

3. There is another fundamental problem with applying the ratification doctrine, as the Ninth Circuit and other courts have done, to sanitize after the fact actions the CFPB took while unconstitutionally constituted. Ratification is a principle of agency law employed when a purported agent acts without authority, but the CFPB seeks to apply ratification not to the acts of an agent (the Director), but to the principal itself (the CFPB). *NRA Victory Fund*, 513 U.S. at 98. That it cannot do—at least not without conflict with existing caselaw on ratification.

"[R]atification starts with the assumption that the agent did not have actual authority at the time he acted," *GDG Acquisitions LLC v. Gov't of Belize*, 849 F.3d 1299, 1310 (11th Cir. 2017), and addresses the effect of a principal's subsequent approval of that action. *See also Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) ("Ratification occurs when a principal sanctions the prior actions of its purported agent.") (cleaned up). This fundamental premise is recognized in both the Restatement (Second) of Agency and the Restatement (Third) of Agency. *See* Restatement (Second) of Agency § 82 (1958) (ratification gives effect to unauthorized act of

an agent); Restatement (Third) of Agency § 4.01(1) (2006) (defining ratification as "the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority"). The Restatement (Third) of Agency even explains that the result of a valid ratification is to give effect to the agent's act as if had been done with "actual authority." Restatement (Third) of Agency § 4.02(1). Ratification is about attribution—when a principal can properly be held responsible for an act by an otherwise unauthorized agent.

But here the constitutional problem was not an agent with too little authority, but a principal with too much. Indeed, it was the CFPB itself—not its Director—that filed this enforcement action and noticed the appeal, both while the agency was unconstitutional structured. *See* 12 U.S.C. § 5564(a)–(b). That is not a situation to which agency law or ratification applies. When a situation involves conduct by "an actor [who] is not an agent and does not purport to be one," the doctrine of ratification does not apply. Restatement (Third) of Agency § 4.03 cmt b. In such situations "the agency-law doctrine of ratification is not a basis on which another person may become subject to the legal consequences of the actor's conduct. Other bodies of law govern the circumstances under which such a consequence might occur." *Id.*

4. Simply put, the cases holding that ratification applies conflict with cases holding that because ratification is a creature of agency law, the doctrine does not apply to situations that do not involve purported agents acting without authority. *See, e.g., Kristensen v. Credit Payment Servs. Inc.*, 879 F.3d

1010, 1014 (9th Cir. 2018) ("'When an actor is not an agent and does not purport to be one,' the doctrine of ratification does not apply.") (quoting Restatement (Third) of Agency § 4.03 cmt. b) (alteration omitted); *Perry v. Scruggs*, 17 F. App'x 81, 91 n.1 (4th Cir. 2001) (finding "doctrine of ratification does not apply" where situation did not involve a purported agent acting without authority); *Parmenter v. FDIC*, 925 F.2d 1088, 1093 n.1 (8th Cir. 1991) ("[I]f no agency relationship exists at all, the doctrine of ratification does not apply.") (quoting Harold Gill Rueschlein & William A. Gregory, The Law of Agency and Partnership, § 27, at 73 (2d ed. 1990)). The decisions by the Ninth Circuit and other courts applying ratification to cure the structural problem here conflict with those fundamental premises of ratification.

Indeed, to allow ratification here would invert those fundamental premises by permitting an agent to ratify the acts of the principal. But for nearly 150 years courts have described ratification in its common law terms as a principal ratifying the unauthorized acts of an agent, not vice versa. *See, e.g., Cook*, 85 U.S. at 338 (describing ratification by principal of acts by "an individual pretending to be the agent"); *Clews v. Jamieson*, 182 U.S. 461, 483 (1901) ("A principal can adopt and ratify an unauthorized act of his agent . . . ."); *Leviten v. Bickley, Mandeville & Wimple, Inc.*, 35 F.2d 825, 827 (2d Cir. 1929) ("Ratification" is the "subsequent adoption" by a principal of an act done by another "while purporting to act as [that principal's] agent").

5. Even if ratification could apply to the acts of a principal, concluding that it applies here also conflicts

with this Court's decision in *NRA Victory Fund* and others. For a ratification to be effective, "it is essential that the party ratifying [i.e., the principal] should be able" "to do the act ratified" (1) "at the time the act was done," and (2) "also at the time the ratification was made." *NRA Victory Fund*, 513 U.S. at 98 (cleaned up). As to the first prong, that is so because "[t]o ratify is to give validity to the act of another, [it] implies that the person or body ratifying has *at the time* power to do the act ratified," *Norton*, 118 U.S. at 451 (emphasis added), and "a ratification can have no greater effect than a previous authority," *Dist. Twp. of Doon*, 142 U.S. at 376.

To hold that ratification can apply to the acts taken by an agency when it was unconstitutionally structured conflicts with those principles and *NRA Victory Fund*'s first prong because ratification cannot "give legal significance to an act which was a nullity from the start," *Newman v. Schiff*, 778 F.2d 460, 467 (8th Cir. 1985), and an unconstitutionally structured agency "lacks authority to bring [an] enforcement action." *Victory Fund I*, 6 F.3d at 822. That is particularly true here, where the CFPB was not accountable to the President and, through him, to the people, and thus the agency did not "ha[ve] the authority to bring the action" on behalf of the Executive branch. *Seila Law,* 997 F.3d at 844 (Bumatay, J., dissenting) (quoting *Gordon*, 819 F.3d at 1192); *Bowsher v. Synar,* 478 U.S. 714, 732 (1986) (holding that officers not controlled by the President are not "entrusted with executive powers")). As the dissenters from the denial of rehearing in *Seila Law* noted, "[t]he doctrine of ratification does not permit

the CFPB to retroactively gift itself power that it lacked." 997 F.3d at 845 (Bumatay, J., dissenting).

II. Whether an Entity Can Ratify an Action After the Time for Doing so Has Run Presents a Question of Exceptional Importance Over Which Courts Have Split.

1. Even if applicable, ratification doesn't let the CFPB cure its earlier actions after the time for taking those actions has passed. As this Court explained, "[i]f an act to be effective in creating a right against another or to deprive him of a right must be performed before a specific time, an affirmance is not effective against the other *unless made before such time*." *NRA Victory Fund*, 513 U.S. at 98 (emphasis added) (quoting Restatement (Second) of Agency § 90). In fact, this Court gave two examples from the Restatement (Second) of Agency where the ratification doctrine is ineffective, both of which apply here: "The bringing of an action, or of an appeal, . . . cannot be ratified after the cause of action or right to appeal has been terminated by lapse of time." *NRA Victory Fund*, 513 U.S. at 98 (quoting Restatement (Second) of Agency § 90 cmt. a).

Applying that principle, the Court held that the Solicitor General could not retroactively ratify the FEC's unauthorized decision to file for certiorari after the time for filing had lapsed. It therefore dismissed the petition for want of jurisdiction. Following *NRA Victory Fund*, courts have consistently distinguished between attempts to ratify litigation that occurred after the running of the statute of limitations and those that occurred before. *Compare Benjamin v. V.I. Port Auth.*, 684 F. App'x 207, 212 (3d Cir. 2017)

(affirming dismissal where ratification came after statute of limitations ran) *with Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 604 (3d Cir. 2016) ("*NRA* timing issue is not implicated here") (cleaned up); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213 (D.C. Cir. 1998) (ratification permissible because "timing problem posed in *NRA* is not present here" and a valid officer was not barred from "starting the administrative proceedings over again"), *superseded by statute on other grounds, Jooce v. FDA*, 981 F.3d 26, 28 (D.C. Cir. 2020), *petition for cert. pending* (U.S. filed Mar. 3, 2021) (No. 20-1203).

2. The Second Circuit's decision to exercise jurisdiction despite the untimeliness of the CFPB's ratification cannot be squared with *NRA Victory Fund* or its progeny. It is undisputed here that Director Kraninger's attempted ratification on July 8, 2020, executed more than three years after the CFPB brought the underlying enforcement action (February 7, 2017)—and more than two years after the CFPB noticed its appeal (September 14, 2018)—came after the time for bringing an enforcement action or noticing an appeal had lapsed. *See* 12 U.S.C. § 5564(g)(1) (three-year statute of limitations); Fed. R. App. P. 4(a)(1)(B)(ii) (requiring notice of appeal be filed within 60 days). Thus, even if ratification does apply, the appropriate course here was dismissal, not a summary decision remanding, because the ratification came "too late in the day to be effective." *NRA Victory Fund*, 513 U.S. at 98.

3. Under *NRA Victory Fund*, the only option the appellate court had was to dismiss the CFPB's appeal

for lack of jurisdiction. The appellate court's decision deciding some of the issues and remanding others conflicts with two other lines of cases requiring that appellate courts confirm their own jurisdiction and holding that a timely valid notice of appeal in a civil case is a jurisdictional prerequisite.

First, under well-settled law, even where no party questions jurisdiction, appellate courts are nonetheless "obliged to assure ourselves that appellate jurisdiction exists" *before* reaching the merits, not after. *See Uniformed Fire Officers Ass'n v. de Blasio,* 973 F.3d 41, 46 (2d Cir. 2020); *Shattuck v. Hoegl*, 523 F.2d 509, 513 (2d Cir. 1975); *see also Lee-Barnes v. Puerto Ven Quarry Corp.*, 513 F.3d 20, 24 (1st Cir. 2008) (noting appellate courts' "unflagging obligation to notice jurisdictional defects" and "to verify that appellate jurisdiction lies before addressing the merits of any appeal") (cleaned up); *Palmer v. City Nat'l Bank*, 498 F.3d 236, 240 (4th Cir. 2007) (same). Here, the Director purportedly ratified two separate actions—the bringing of the enforcement action and the noticing of the appeal—and the latter necessarily implicated the appellate court's jurisdiction.

That's because the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. *Bowles v. Russell*, 551 U.S. 205, 214 (2007) (holding courts have no authority to create equitable exceptions to jurisdictional requirements). The appellate court's conclusion that it could remand the ratification issue to the district court (even though it involved issues of appellate jurisdiction) presupposes that it had jurisdiction to do so in the first place. It didn't.

Under well-settled law, once an appellate court concludes that jurisdiction is lacking, it must dismiss the appeal. *E.g., Bowles,* 551 U.S. at 210; *Baxter v. Lancer Indus., Inc.*, 324 F.2d 286, 287 (2d Cir. 1963) (per curiam); *Gomez v. ABM Janitorial Servs. Ne. Inc.*, No. C.A. 16-3428, 2017 WL 3971368, at *1 (3d Cir. Feb. 16, 2017). The appellate court here turned that rule on its head, deciding issues over which it didn't have jurisdiction, and not those over which it did. It declined to reach the fundamental question about its ability to decide the case, despite black-letter law requiring appellate courts to verify their own jurisdiction before reaching the merits, not after. Instead, it assigned to the district court jurisdictional issues that the appellate court was obligated to decide itself in the first instance. *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 87 (2d Cir. 1961) ("An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts.") (cleaned up). Because the decision here raises a question of exceptional importance and conflicts with precedent from the Supreme Court, this Court should grant certiorari. In the alternative, because the conflict with *NRA Victory Fund* is clear, this Court should summarily reverse, and direct the Second Circuit to (a) comply with *NRA Victory Fund* by dismissing the CFPB's appeal for lack of appellate jurisdiction; and (b) reinstate the district court's original judgment against the CFPB.

III. This Court Should Address These Questions Now.

As noted above, questions about whether and how ratification should apply to structural constitutional

violations have divided courts and judges. Those violations aren't simply technical footfaults—minor procedural errors with no real-world consequences. To the contrary, they undercut essential constitutional protections intended to ensure individual liberties. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) ("[T]he doctrine of separation of powers is a *structural safeguard* . . ., establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."). Moreover, absent meaningful remedies for such violations, they will only multiply because "Congress . . . has no qualms about designing new agencies in ways that push the constitutional envelope. It is up to the courts, therefore, to keep Congress within constitutional boundaries." Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 Notre Dame L. Rev. 1475, 1493 (2018).

But courts can't do so in any meaningful way if such constitutional trespasses can be wholly cured by a ratification that comes years after the deadline for taking the challenged action. And that failure has real world consequences. In this case, the appellate court's failure to grapple with the issues of ratification and jurisdiction just compounded the constitutional injury and monetary exposure to RD Legal. Indeed, RD Legal's "reward" for a successful constitutional challenge is exposure to kill-the company sanctions. This case presents the legal issues cleanly—there is no

dispute about the fact that Director Kraninger's ratification came after the time for bringing an action or noticing an appeal had lapsed, and the issues were briefed before the court below. Moreover, these questions are recurring ones that have led to a series of decisions with conflicting reasoning and results. The individuals and entities challenging the CFPB's actions should not have to wait for these questions to be answered by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari. In the alternative, this Court should summarily reverse, and direct the Second Circuit to: (a) comply with *NRA Victory Fund* by dismissing the CFPB's appeal for lack of appellate jurisdiction; and (b) reinstate the district court's original judgment against the CFPB. This Court should also direct the Second Circuit to decide the remaining issues raised in the appeal and cross-appeal between RD Legal and the New York Attorney General.

Respectfully submitted,

Jeffrey M. Hammer
CALDWELL HAMMER LLP
633 West Fifth Street
Suite 1710
Los Angeles, CA 90071
(213) 712-1390

Anne M. Voigts
Counsel of Record
Michael D. Roth
David K. Willingham
KING & SPALDING LLP
633 West Fifth Street
Suite 1600
Los Angeles, CA 90071
(213) 443-4355
avoigts@kslaw.com

Counsel for Petitioners

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