EXHIBIT A

No. 17-56324

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEILA LAW, LLC,
Appellant,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Appellee.

On Appeal from the United States District Court
Central District of California, Case No. 8:17-cv-01081-JLS(JEM)
Honorable Josephine L. Staton

SUPPLEMENTAL BRIEF OF RESPONDENT-APPELLANT SEILA LAW, LLC

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STATEMENT REGARDING ORAL ARGUMENT

This matter presents issues of extraordinary importance on remand from the Supreme Court: whether acts taken by the Consumer Financial Protection Bureau against Respondent-Appellant while the agency was unconstitutionally structured can be ratified, and what relief is Respondent-Appellant entitled to receive as a result of the agency's structural constitutional violation. Because of the importance and complexity of the issues on remand, Respondent-Appellant respectfully requests that the Court hold oral argument.

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I. INTRODUCTION

The only meaningful relief for Respondent-Appellant Seila Law LLC to remedy the structural constitutional violation in this case is for the Court to deny enforcement of the civil investigative demand (CID) issued by the Consumer Financial Protection Bureau (CFPB) to Seila Law.

From the outset, Seila Law challenged the CFPB's constitutionality as a defense against the issuance and enforcement of the CID. There is "no theory that would permit [a court] to declare [an agency's] structure unconstitutional without providing relief" to a party that timely raised the structural defect as a "defense to an enforcement action." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994). The Supreme Court held in this case that the CFPB's "structure" "violate[d] the separation of powers," *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192, 2202 (2020), and Seila Law is now entitled to appropriate relief, *see Ryder v. United States*, 515 U.S. 177, 182-83 (1995).

Despite the clear precedent requiring that Seila Law receive meaningful relief on its constitutional challenge, the CFPB asserts that Seila Law is effectively entitled to no remedy at all. In particular, the CFPB claims that, despite Seila Law's victory at the Supreme Court, the CID is still enforceable because it was ratified first by an Acting Director of the CFPB and then by the current Director just days after the Supreme Court's decision. The CFPB is mistaken. Those "ratifications" do not

change the equation: both are ineffective because the CFPB has not established that it could have validly issued the CID "at the time the act was done" or "at the time the ratification was made." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (citation and emphasis omitted). The Court should therefore reverse the district court's decision enforcing the CID.

II. BACKGROUND

Seila Law is a California-based law firm operated by a solo practitioner. It offers a wide variety of legal services to individual clients, including assistance in obtaining relief from consumer debt. In 2017, the CFPB issued the CID as part of an investigation, in connection with the CFPB's enforcement proceedings against another party, into whether Seila Law violated federal consumer-financial laws. *See* Suppl. Br. 1-2. The CID requested several years' worth of information and documents from Seila Law concerning its organization and practices. ER99-106.

Seila Law asked the CFPB to set aside the CID because, among other things, the CFPB's structure was unconstitutional. ER89-97. The CFPB denied Seila Law's request. Seila Law submitted partial responses to the CID, reiterated its objections, and declined to provide further information or documents.

The CFPB then filed a petition to enforce the CID in the United States District Court for the Central District of California. ER260. Seila Law opposed the petition and renewed its defense that the CID was invalid because the CFPB was

unconstitutionally structured. ER50. The district court rejected that defense and granted the petition subject to one minor modification to the CID not relevant here. ER1.

This Court affirmed, agreeing with the district court that the CFPB's structure was constitutional. *See* Dkt. No. 44. In its briefing on appeal, the CFPB had claimed that then-Acting Director Mulvaney "ratified" the decision to issue and prosecute the CID, rendering the appeal moot. Seila Law disputed that argument, but the Court did not address it in its decision.

The Supreme Court granted review and held that the CFPB's structure, which insulated the Director from removal by the President except for "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3), was "unprecedented" and violated the separation of powers. *Seila Law*, 140 S. Ct. at 2193. After declaring the CFPB's structure unconstitutional, the Court severed the Director's removal protection from the remainder of the Dodd-Frank Act. *Id.* at 2192. The Court then remanded the case for this Court to address "the appropriate remedy" considering the CFPB's ratification arguments. *Id.* at 2207, 2208. Specifically, the Supreme Court directed this Court to determine "in the first instance" whether any "alleged ratification in fact occurred and whether, if so, it is legally sufficient to cure the constitutional defect" inherent in the issuance and prosecution of the CID. *Id.* at 2208.

Following issuance of the mandate, the CFPB submitted evidence of its purported ratifications. The first was by then-Acting Director Mulvaney, dated March 16, 2018, and the second was by Director Kraninger, dated July 9, 2020. Dkt. No. 56.

III. ARGUMENT

A. The Appropriate Remedy Is To Decline Enforcement Of The CID.

The appropriate remedy for the structural constitutional violation identified by the Supreme Court is to deny the CFPB's petition to enforce the CID issued to Seila Law. A party that raises a "timely challenge" to the constitutional validity of the structure of an agency is entitled to "whatever relief may be appropriate if a [constitutional] violation indeed occurred." *Ryder*, 515 U.S. at 182-83. In a wide variety of contexts, actions by officers laboring under structural constitutional defects have been set aside. *See, e.g., Lucia v. SEC*, 138 S. Ct. 2044, 2055-56 (2018); *Stern v. Marshall*, 564 U.S. 462, 503 (2011); *Ryder*, 515 U.S. at 188; *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 & n.40 (1982).

In particular, because an agency with a structural constitutional defect lacks the authority to take executive action, any exercise of executive power by the agency is void. *See NRA Political Victory Fund*, 6 F.3d at 822, 828; *see also Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014). That

principle applies with full force to the exercise of power by an officer who has been impermissibly insulated from removal by the President. Article II vests the entire executive power in the President and charges him with ensuring the proper administration of the laws. If the President lacks the ability to remove an agency's head, the agency is unaccountable and cannot be "entrusted with executive powers." *Bowsher v. Synar*, 478 U.S. 714, 732 (1986).

That is precisely what occurred here. The CFPB exercised executive power by issuing and attempting to enforce the CID to investigate potential violations of federal consumer-protection law. But the CFPB was unconstitutionally structured and therefore could not exercise executive power. Seila Law made a timely challenge to the exercise of that power by raising the unconstitutionality of the CFPB's structure in opposition to the CFPB's petition for enforcement. ER57-62. The CFPB's issuance and subsequent enforcement of the CID are therefore void, and Seila Law is "entitled to relief." *Bowsher*, 478 U.S. at 727 n.5; *see also Lucia*, 138 S. Ct. at 2055.

As the Supreme Court has made clear, the remedy in a separation-of-powers case should be crafted to further the "structural purposes" of the separation of powers and "to create incentives" for litigants to challenge structural constitutional defects. *Lucia*, 138 S. Ct. at 2055 n.5 (alterations omitted) (quoting *Ryder,* 515 U.S. at 183). In an enforcement action, the only remedy that properly incentivizes challengers to

raise separation-of-powers issues and disincentivizes Congress and the President from violating the structural provisions of the Constitution is dismissal of the enforcement action. If severance and ratification were the norm, then no "rational litigant" would raise these challenges. *See* Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 509 (2014). Whether the courts could remedy such a violation would then often turn on whether a particular presidential administration was willing to follow the unconstitutional statute. "But the separation of powers does not depend on the views of individual Presidents." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010).

To ensure that litigants have sufficient incentives to require the government to honor the separation of powers, the appropriate remedy for a regulated party that successfully raises a separation-of-powers challenge as a defense to an enforcement action is dismissal of the action. In this case, that means the petition to enforce the CID issued to Seila Law should be dismissed.

B. The CFPB's Purported Ratifications Are Invalid.

The CFPB does not dispute that, at the time it issued the CID and commenced this enforcement action, its structure precluded it from constitutionally exercising executive power. The CFPB nonetheless argues that the CID should be enforced because "[t]he CID, and this action to enforce it, have now been formally and

expressly ratified by not one but two Bureau officials removable at will by the President." Suppl. Br. 5. According to the CFPB, the purported ratifications "cure" the constitutional defect in the issuance and enforcement of the CID. *Id.*

The CFPB is wrong. The Supreme Court has held that for a valid ratification to occur "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." *NRA Political Victory Fund*, 513 U.S. at 98 (citation and emphasis omitted). The ratifications cited by the CFPB do not satisfy either requirement.

1. The CFPB lacked authority to issue the CID and commence this action from the outset.

The CFPB does not seriously attempt to argue that it, as the ratifying party, had the authority to issue the CID before the Supreme Court's decision in this case. *See NRA Political Victory Fund*, 513 U.S. at 98. That is unsurprising, given that the Supreme Court squarely held that the CFPB's structure was unconstitutional, precluding it from exercising executive power. Instead, the CFPB mentions this first ratification requirement only in passing while citing this Court's decision in *CFPB v. Gordon*, 819 F.3d 1179 (2016). *See* Suppl. Br. 7-8.

This Court's decision in *Gordon* itself demonstrates why the ratification here is ineffective. In *Gordon*, the Court approved of the ratification of an enforcement action brought by the CFPB under former Director Cordray while he held office in violation of the Appointments Clause. 819 F.3d at 1191-92. The deficiency at issue

in *Gordon* concerned the authority of the Director as the CFPB's *agent*, not the authority of the CFPB itself as the *principal*. Because this Court believed that the CFPB, as the principal, had the authority to take the challenged action from the beginning, the first prong of the ratification test was not at issue in *Gordon*. *See id.*

Here, by contrast, the constitutional violation concerns "the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf." *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018). The CFPB, as the *principal*, therefore never had authority to issue the CID or commence these proceedings to enforce it. *Gordon* recognized the critical importance of this distinction, noting that the ratification there would be valid only if "the principle . . . had authority to bring the action in question." 819 F.3d at 1191. 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). Now that the Supreme Court has held unconstitutional the structure that the CFPB possessed at the time of issuance of the CID and commencement of these proceedings, ratification is unavailable. *See, e.g.*, *id.*, *NRA Political Victory Fund*, 6 F.3d at 822; *see also Noel Canning*, 705 F.3d at 493, 514 (holding that an NLRB action was "void *ab initio*" because of a structural defect).

The CFPB's reliance on *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996) is unavailing. *See* Suppl Br. 8-9. As an initial matter, the court in *Legi-Tech* failed

to mention or apply the two-prong ratification analysis applied by the Supreme Court in *NRA Political Victory Fund*. Instead, the court relied on the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), according de facto validity to the FEC's previous actions despite the presence of an Appointments Clause violation. *See Legi-Tech*, 75 F.3d at 708. In *Ryder*, however, the Supreme Court declined to extend that aspect of *Buckley* "beyond [its] facts" and instead held that a party that raises a "timely challenge" to the constitutional validity of the structure of an agency is entitled to "whatever relief may be appropriate if a [constitutional] violation indeed occurred." *Ryder*, 515 U.S. at 182-83. Dismissing the underlying petition to enforce the civil investigative demand would provide appropriate relief, furthering the "structural purposes" of the separation of powers and "creat[ing] incentives" for litigants to challenge structural constitutional defects. *Lucia*, 138 S. Ct. at 2055 n.5 (alterations and citations omitted).

The CFPB also argues that the Supreme Court's decision in *Lucia* supports its position that Seila Law has already received all the relief to which it is entitled. *See* Suppl. Br. 15-16 n.5. Not so. *Lucia* involved an improper appointment, and the constitutional defect did not infect the *commencement of the case* or the *decision to bring it*, but rather its *adjudication*. *Lucia*, 138 S.Ct. at 2055. Under those circumstances, "the appropriate remedy for an adjudication tainted with an

appointments violation [was] a new hearing before a properly appointed official." *Id.* (quotations and citation omitted).

This case is different. Here, the "taint" of the constitutional violation suffered by Seila Law infects the very issuance of the CID and commencement of these proceedings in the first instance. If the mandate to provide an appropriate remedy for constitutional violations is to mean anything, dismissal of this tainted action is required.

The CFPB separately notes that, under the Third Restatement of Agency, a ratification can be valid even if the principal lacked authority to take the ratified action when the agent originally took it. *See* Suppl. Br. 7 n.2. But the Supreme Court took the opposite view in *NRA Political Victory Fund*—a view that the Court has held for over a century. 513 U.S. at 98; *see Cook v. Tullis,* 85 U.S. (18 Wall.) 332, 338 (1874). In addition, modern Restatements "must be used with caution" because those Restatements do not "describ[e] the law" but instead "set forth [the authors'] aspirations for what the law ought to be." *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part)). *NRA Political Victory Fund* is controlling here, and the CFPB cannot satisfy its first requirement.

2. The CFPB lacked the authority to act at the time of the purported ratifications.

The purported ratifications also fail because the CFPB has not established that it could "do the act ratified . . . at the time the ratification was made." *NRA Political*

Victory Fund, 513 U.S. at 98 (quotation omitted). As the Supreme Court has 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." *Id.* "The bringing of an action," in other words, "cannot be ratified after the cause of action or right to appeal has been terminated by lapse of time," such as the running of the limitations period. *See id.* (quoting Restatement (Second) of Agency § 90, cmt. a); *see* Restatement (Second) of Agency § 90, cmt. c.

The CFPB has failed to establish that Director Kraninger's ratification occurred before the expiration of the limitations period for bringing any claims related to the CID against Seila Law (or any other individual or entity). The CFPB acknowledges that it issued the CID "as part of an effort to investigate [Seila Law's] alleged involvement" in the Morgan Drexen debt-relief program. *See* Suppl. Br. 1-2. The CFPB filed its enforcement action against Morgan Drexen on August 20, 2013, alleging claims under the Consumer Financial Protection Act of 2010 and the Telemarketing and Consumer Fraud and Abuse Prevention Act. *See CFPB v. Morgan Drexen Inc., et al*, Civ. No. 13-1267 (C.D. Cal.), Dkt. 1, ¶ 1. On February 18, 2016, the CFPB filed an application in the Morgan Drexen case accusing Seila Law of "violat[ing] the rights of consumers harmed by Morgan Drexen's debt relief scheme." *See id.* Dkt. No. 411. After discovery, the district court dismissed the

proceedings against Seila Law and closed the Morgan Drexen case. *See id.* Dkt. Nos. 511 and ER83. On February 27, 2017, the CFPB issued the CID to Seila Law. ER99. The CID's Notification of Purpose described the same statutory violations alleged in the Morgan Drexen action. *See id.*

The CFPB is permitted to issue a civil investigative demand when it "has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, *relevant to a violation . . . before the institution of any proceedings under the Federal consumer financial law*." *Id.* § 5562(c)(1) (emphasis added). Subject to certain exceptions not relevant here, however, the CFPB is not permitted to bring any action "more than three years after the date of discovery of the violation to which an action relates." 12 U.S.C. § 5564(g)(1). Here, as set forth above, the CFPB knew of Seila Law's alleged violations at least as early as February 18, 2016, when it accused Seila Law of engaging in the same conduct it alleged against Morgan Drexen. At a minimum, the CFPB knew of these alleged practices no later than February 27, 2017, when it issued the CID. *See* 12 U.S.C. § 5562(c)(2) (stating that a CID from the CFPB must set forth "the nature of the conduct constituting the alleged violation" within the CFPB's purview).

Because more than three years has passed since the CFPB discovered the alleged violations to which the CID relates, the CFPB is time-barred from bringing

any action against Seila Law based on those alleged violations. 12 U.S.C. § 5564(g)(1). As a result, the CID serves no valid purpose, and Director Kraninger's purported ratification on July 9, 2020, "came too late in the day to be effective." *NRA Political Victory Fund*, 513 U.S. at 98-99 (citing *Nasewaupee v. Sturgeon Bay,* 77 Wis. 2d 110, 116–119 (1977) (holding that ratification was ineffective when it came after the statute of limitations had run)).

The purported ratification by then-Acting Director Mulvaney in March 2018 is ineffective too. Because that purported ratification occurred while the CFPB—the principal—was unconstitutionally structured, the CFPB was not able to "do the act ratified" at the time of his purported ratification. *See, e.g., RD Legal*, 332 F. Supp. 3d at 785. And as the en banc Fifth Circuit recently held in a similar context, a statutory removal restriction on the director of an independent agency applies to an acting director appointed under the Federal Vacancies Reform Act. *See Collins v. Mnuchin*, 938 F.3d 553, 589 (2019). Accordingly, neither Director Kraninger's nor then-Acting Director Mulvaney's ratifications of the CID were effective.

IV. CONCLUSION

For the foregoing reasons, the Court should reverse the district court's order enforcing the CID.

Dated: September 30, 2020

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