

EXHIBIT A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION INFORMATION STATEMENT

Docket Number(s): 18-2743(L), 18-3033(CON), 18-2860(XAP), 18-3156(XAP)

Caption [use short title]

Motion for: Stay of Issuance of the Mandate

Consumer Financial Protection
v. RD Legal Funding, LLC

Set forth below precise, complete statement of relief sought:

Defendants-Appellees/Cross-Appellants respectfully request
that this Court stay issuance of the mandate pending
the filing and disposition of a petition for writ of certiorari
with the Supreme Court of the United States pursuant to
Federal Rule of Appellate Procedure 41(d)

MOVING PARTY: RD Legal Funding Partners, LP, et al.,

OPPOSING PARTY: Consumer Financial Protection Bureau & People of the State of New York

Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

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Court- Judge/ Agency appealed from: United States District Court for the Southern District of New York-Hon. Loretta A. Preska

Please check appropriate boxes:

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain):

Has this request for relief been made below? Yes No

Has this relief been previously sought in this court? Yes No

Requested return date and explanation of emergency:

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
 Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: 10/06/2020

Signature of Moving Attorney:

/s/Michael D. Roth

Date: 1/20/21

Service by: CM/ECF Other [Attach proof of service]

No. 18-2743(L)

18-3033(CON), 18-2860(XAP), 18-3156(XAP)

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Appellant-Cross-Appellee,

PEOPLE OF THE STATE OF NEW YORK,

by Letitia James, Attorney General for the State of New York,

Plaintiff-Appellant-Cross-Appellee,

v.

RD LEGAL FUNDING, LLC, RD LEGAL FUNDING PARTNERS, LP,

RD LEGAL FINANCE, LLC, RONI DERSOVITZ

*Defendants-Third-Party-Plaintiffs-Third-Party-
Defendants-Appellees-Cross-Appellants.*

On Appeal from the United States District Court
for the Southern District of New York

**APPELLEES-CROSS-APPELLANTS' MOTION TO STAY
ISSUANCE OF THE MANDATE PENDING THE FILING AND
DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellee and Cross-Appellant 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 Federal Rule of Appellate Procedure 26.1(a), Appellee and Cross-Appellant 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 Federal Rule of Appellate Procedure 26.1(a), Appellee and Cross-Appellant 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.

/s/Michael D. Roth
Michael D. Roth

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INTRODUCTION

Appellees/Cross-Appellants RD Legal Funding Partners, LP, RD Legal Finance, LLC, RD Legal Funding, LLC, and Roni Dersovitz (collectively “RD Legal”) move to stay this Court’s mandate pending the filing and disposition of a petition for a writ of certiorari with the United States Supreme Court. This Court should grant that motion because the petition will “present a substantial question” and “there is good cause for a stay.” Fed. R. App. P. 41(d)(1).

The petition presents substantial questions because this Court’s decision—issued without addressing whether appellate jurisdiction existed in light of the belated ratification of the appeal by the Consumer Financial Protection Bureau (“CFPB”)—conflicts with the Supreme Court’s decision in *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (“*NRA Victory Fund*”), the Ninth Circuit’s recent decision in *CFPB v. Seila Law*, No. 17-56324, 2020 WL 7705549 (9th Cir. Dec. 29, 2020), applying *NRA Victory Fund*, and the long line of cases holding that an appellate court’s first obligation is to verify its own jurisdiction. Those splits create substantial questions for the Supreme Court to resolve. *See* Sup. Ct. R. 10(a).

Good cause also exists for a stay because, if the mandate issues, RD Legal will be forced to dispute the same issue simultaneously in two different courts, rather than one (or, had this Court reached the correct result and dismissed the CFPB's appeal, none). That's because absent a stay, RD Legal will have to contest the same question of the (im)propriety of the CFPB's belated ratification before both the Supreme Court and the district court. But had this Court dismissed the CFPB's appeal for lack of jurisdiction, as it was required to do under *NRA Victory Fund*, the matter would be over. Instead, because this Court exerted jurisdiction that it did not have to decide certain issues in the appeal *and* remand the ratification issue to the district court (which had already rejected the CFPB's first failed attempt at ratification), the courts' and the parties' resources will be needlessly expended in potentially duplicative proceedings. "Letting the process play itself out" does real-world damage to real-life litigants like RD Legal, not for days, or even months, but years. This Court should take that damage into account. Every day that RD Legal is forced to defend itself against an action (and an appeal) that the CFPB lacked the authority to bring compounds the constitutional injury. This Court should grant the motion to stay.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves an enforcement action brought by the CFPB, which the district court dismissed, and from which the CFPB appealed. The CFPB and NYAG filed suit on February 7, 2017. 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. (JA780-83). The district court held the CFPB's structure unconstitutional, its single-director-removable-only-for-cause provision not severable from the remainder of the Consumer Financial Protection Act (the "CFPA"), and the underlying joint enforcement action unsustainable. The district court also rejected the attempted ratification, recognizing that it was an issue of agency law and holding 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."¹ (SA105-06). After striking down the CFPA, the court found no basis for federal jurisdiction over the NYAG's claims, dismissed

¹ The CFPB did not challenge that part of the district court's ruling on appeal.

the NYAG's state law claims without prejudice, and entered judgment in favor of RD Legal. (SA109-10, 116, 119.) On September 14, 2018, the CFPB filed its appeal from that decision, the NYAG later appealed, and RD cross-appealed. And during the two-year pendency of this appeal, the NYAG has been pursuing its claims in state court, where the case is past the responsive pleading phase and well into discovery.

After the Supreme Court decided *Seila Law* and while this appeal was pending, the CFPB sought to ratify both the bringing of the enforcement action *and* the filing of the notice of appeal—even though the time for doing either had long since lapsed.² That second attempt at ratification came over three years after the CFPB brought this enforcement action and nearly two years after it filed its notice of appeal, as RD Legal pointed out to this Court. CA Dkt. No. 240.

Nevertheless, this Court issued a summary order on October 30, 2020, affirming in part, reversing in part, and remanding the case to the district court to determine whether the CFPB's belated attempt at

² The CFPB's 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. CA Dkt. No. 237-2.

ratification could cure the structural constitutional problem recognized by the Supreme Court in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192, 2202 (2020). Specifically, the panel affirmed the district court's holding that the CFPB's structure was unconstitutional and reversed its holding that the separation of powers problem could not be cured by severing the for-cause removal provision. But despite the fact that the CFPB's ability to bring the appeal in the first place (and thus this Court's jurisdiction over it) depended on the sufficiency of the second attempted ratification, the Court never addressed that issue. Indeed, it did not even acknowledge that the CFPB had 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 (even though the district court would presumably be unable to even address the ratification of the appeal).

Whether the panel simply overlooked the issue or implicitly decided it, either way it 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 on the propriety of that

ratification. Nor did it address the scope of remand. And it declined, without further explanation, to address any issues raised on cross-appeal over which it did have jurisdiction, even though the NYAG, whose claims were dismissed without prejudice, can still leverage those erroneous legal rulings against RD Legal. CA Dkt. No. 228.

RD Legal subsequently filed a petition for rehearing en banc or panel rehearing, which the Court subsequently denied on January 14, 2021. CA Dkt. No. 267 (1/14/2021 Order). Absent a stay, the mandate will issue on January 21, 2021. Fed. R. App. P. 41(b). RD Legal intends to file a petition for certiorari with the Supreme Court within the allotted time period.³ Counsel for the CFPB and NYAG were notified of RD Legal's intent to file this motion, and both parties have indicated that they oppose the motion to stay the mandate. Counsel for the NYAG indicated that it would determine whether it would submit an opposition at a later date.

³ Under the Supreme Court's March 19, 2020 order, the deadline for RD Legal to file that petition is June 14, 2021. Sup. Ct. R. 13(1); March 19, 2020 Order. RD Legal is asking, however, for only 90 days to file its petition (up to and including April 2, 2021), and will use its best efforts to file within that time.

ARGUMENT

Federal Rule of Appellate Procedure 41(d)(1) allows the appellate courts to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court if “the petition would present a substantial question and . . . there is good cause for a stay.” RD Legal plainly satisfies both prongs.

A “substantial question” is one that raises a “reasonable probability” that four justices will vote to grant certiorari, or a “fair prospect” that five justices will vote to reverse the panel’s judgment. *See Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers); *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam). In determining whether there is such a probability or prospect, this Court has looked to whether, for example, the decision in question “conflict[s] with the decision of another United States court of appeals on the same important matter,” or “has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of [the Supreme] Court’s supervisory power.” Sup. Ct. R. 10(a). The decision here conflicts with both the Supreme Court’s decision in *NRA Victory Fund* and the long line of cases requiring appellate courts

to verify their jurisdiction and holding that a timely notice of appeal is a jurisdictional prerequisite.⁴

RD Legal has also shown good cause for granting the stay. In determining whether a party has shown good cause, courts consider the “likelihood that irreparable harm will result from the denial of a stay.” *Ind. State Police Pension Tr.*, 556 U.S. at 960 (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009)). More generally, “the propriety of [a stay] is dependent upon the circumstances of the particular case,” and the “traditional stay factors contemplate individualized judgments in each case.” *Id.* at 961 (cleaned up). “[I]n a close case it may be appropriate to balance the equities,” to assess the relative harms to the parties, “as well as the interests of the public at large.” *Id.* at 960 (quoting *Conkright*, 556 U.S. at 1402). Here, the CFPB lacked the authority to bring an enforcement action against RD Legal in the first place, and it lacked the authority to appeal the district court’s decision dismissing that

⁴ The Court’s decision to decline to address the ratification issue, or other issues properly before it, is also a clear departure from the accepted usual course of judicial proceedings. The same ratification issue is presented in three cases before the Ninth Circuit and one case before the Fifth Circuit, and this Circuit is the *only* court to duck ruling on the propriety of the CFPB’s attempted ratification.

action. Every day that RD Legal has to defend itself against an action that should never have been brought compounds those constitutional injuries. Moreover, denying a stay puts the district court and the Supreme Court in the position of simultaneously passing on the same legal issue. Accordingly, this Court should grant a stay.

I. The Petition Presents Substantial Questions

A. The Panel's Decision Conflicts With Controlling Supreme Court Case Law Regarding Ratification

This case raises a question of exceptional importance: whether, after *Seila Law LLC*, 140 S. Ct. at 2192, 2202, held that the CFPB's "structure" "violate[d] the separation of powers," the government agency can escape the consequences of that constitutional error by ratifying an enforcement action and subsequent appeal long after the time for commencing either has lapsed. The answer to that question is plain: under the Supreme Court's decision in *NRA Victory Fund*, 513 U.S. at 98, it can't. Accordingly, the panel should have dismissed the CFPB's appeal for lack of jurisdiction. It didn't. Instead, this Court remanded the case for the district court to resolve in the first instance whether the CFPB's belated attempt while the appeal was pending to ratify both the initial bringing of the enforcement action *and* its filing of the notice of

appeal could cure the constitutional problem.⁵ But under *NRA Victory Fund*, this Court lacked jurisdiction over the CFPB's appeal, and its assumption to the contrary squarely conflicts with that decision as well as the line of cases following it.

Under *NRA Victory Fund*, 513 U.S. at 98, for ratification to be effective, "it is essential that the party ratifying [i.e., the principal] should be able" (1) "to do the act ratified at the time the act was done," and (2) "*also at the time the ratification was made.*" But the CFPB lacked authority to bring this suit when it was filed or to pursue this appeal when it was noticed. 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." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993) ("*Victory Fund I*"); *but see Seila Law*, 2020 WL 7705549, at *3 (holding that the CFPB had authority to

⁵ 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 court's ruling.

initially issue the CID because its “constitutional infirmity relate[d] to the Director alone, not to the legality of the agency itself”).

Second, as the Supreme 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) (citing Restatement (Second) of Agency § 90 (1958)); *see also* Restatement (Second) of Agency § 90 cmt. a (“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”). Applying that principle, the Court held in *NRA Victory Fund* 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 wasn’t 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); *see also Seila Law*, 2020 WL 7705549, at *4 (confirming that under *NRA Political Victory Fund*, a decision must be ratified within any relevant limitations period and holding that the ratification of a CID was not invalid because the “statutory limitations period pertains solely to the bringing of an enforcement action, which the CFPB has not yet commenced”).

Here, the CFPB lacked authority to act at the time of the purported second ratification, executed more than three years after the CFPB brought the underlying enforcement action—and more than two years after the CFPB noticed this appeal.⁶ Thus, under *NRA Victory Fund*, the

⁶ 12 U.S.C. § 5564(g)(1) bars any action brought more than 3 years after the date of discovery of the violation to which the action relates. And under Federal Rule of Appellate Procedure 4(a)(1)(B), a notice of appeal must be filed within 60 days after entry of judgment if the United States, its agency, or officer is a party.

only thing this Court could do was dismiss the CFPB's appeal for lack of jurisdiction. Because it didn't and because that decision conflicts with *NRA Victory Fund* and its progeny, this case presents a substantial question warranting a stay.

B. The Panel's Decision Also Conflicts With Supreme Court and Circuit Case Law Requiring That Appellate Courts Confirm Their Jurisdiction Over A Case Before Reaching The Merits And Holding That A Timely Notice of Appeal Is A Jurisdictional Requirement

The panel's decision affirming in part, reversing in part, and remanding the ratification issue also conflicts with two other lines of cases requiring that appellate courts confirm their own jurisdiction before addressing the merits and holding that a timely notice of appeal in a civil case is a jurisdictional requirement.

Appellate courts are "obliged to assure [them]selves 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); *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" (emphasis added) (quotation marks omitted); *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 this 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 panel'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. That conflict satisfies the Supreme Court's criteria for granting certiorari and creates a substantial question warranting a stay.

II. There Is Good Cause For A Stay

Good cause also exists for a stay because RD Legal has had to defend itself against an enforcement action and subsequent appeal that the CFPB lacked the authority either to bring in the first place or to ratify later. Had this Court dismissed the CFPB's appeal for lack of jurisdiction, as it was required to do under *NRA Victory Fund*, the matter

would be over as to the CFPB. Every day that RD Legal is forced to defend itself against an action (and an appeal) that the CFPB lacked the authority to bring compounds the constitutional injury. Moreover, if the mandate issues, RD Legal will be forced to dispute the same ratification issue simultaneously in two different courts, rather than one, and the courts' and the parties' resources will be needlessly expended in potentially duplicative proceedings in the district court that could be mooted by a decision from the Supreme Court. Finally, neither the CFPB nor the NYAG can point to any prejudice that would flow from staying the mandate. The CFPB's attempted ratification will need to be addressed and fully vetted before its substantive claims can proceed—thus, facilitating Supreme Court review of the CFPB's attempted ratification might actually expedite, rather than delay, the resolution of the CFPB's claims. And the NYAG has been pursuing its claims against RD Legal in state court during the two-year pendency of this appeal, so it has no grounds to claim prejudice from a stay of the mandate. Accordingly, this Court should find good cause to issue a stay.

CONCLUSION

Because the petition presents a substantial question and because RD Legal has shown good cause, this Court should grant the motion to stay.

Respectfully submitted,

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January 20, 2021

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A), excluding the parts exempted by Fed. R. App. P. 32(f) and 27(a)(2)(B), because it contains 3,210 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook size 14 font.

Date: January 20, 2021

/s/Michael D. Roth
Michael D. Roth

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/Michael D. Roth
Michael D. Roth