No. 20-1758

In the Supreme Court of the United States

RD LEGAL FUNDING, LLC, ET AL., PETITIONERS

v.

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the constitutional defect in the statutory provision restricting the President's power to remove the Director of the Consumer Financial Protection Bureau requires dismissal of a civil enforcement action and of an appeal filed by the Bureau.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 828 Fed. Appx. 68. The opinion and order of the district court (Pet. App. 5-95) is reported at 332 F. Supp. 3d 729. The order of the district court amending its opinion (Pet. App. 96-102) is not published in the Federal Supplement but is available at 2018 WL 11219167.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 2020. A petition for rehearing was denied on January 14, 2021 (Pet. App. 103-104). The petition for a writ of certiorari was filed on June 14, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2010, Congress passed and President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376. The Act established a new federal agency known as the Consumer Financial Protection Bureau (CFPB or Bureau). 12 U.S.C. 5511(a). The Bureau is headed by a single Director who is appointed by the President, with the advice and consent of the Senate, for a term of five years. 12 U.S.C. 5491(b)(1)-(2) and (c)(1). The Act provided that the President may remove the Director "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

As relevant here, the Dodd-Frank Act makes it unlawful for a person involved in "offering or providing a consumer financial product or service" to engage in any "unfair, deceptive, or abusive act or practice." 12 U.S.C. 5481(6)(A), 5536(a)(1)(B). The Act also makes it unlawful to "knowingly or recklessly provide substantial assistance" to a violator of that prohibition. 12 U.S.C. 5536(a)(3). The Act authorizes the Bureau and state attorneys general to sue to enforce those provisions. 12 U.S.C. 5564(a), 5552.

2. Petitioners are Roni Dersovitz and three entities that he founded and owns: RD Legal Funding, LLC; RD Legal Finance, LLC; and RD Legal Funding Partners, LP. Pet. App. 3. This case arises out of petitioners' transactions with two groups: (1) athletes who had developed brain injuries while playing in the National Football League and who were entitled to compensation under a settlement, and (2) claimants who qualified for compensation from the September 11th Victim Compensation Fund. *Id.* at 8-9. Petitioners offered to

advance funds to those individuals, but the complaint alleges that in so doing they engaged in or substantially assisted deceptive and abusive practices. *Id.* at 11-13. In particular, the complaint alleges that petitioners misled the football players and September 11 claimants into believing that they were selling their compensation awards, but that the transactions actually functioned as loans with usurious interest rates. *Id.* at 8, 20-21.

In February 2017, the CFPB and the New York Attorney General sued petitioners in federal district court, raising claims under the Dodd-Frank Act. Pet. App. 14. At the time, the Bureau was led by Director Richard Cordray. D. Ct. Doc. 136, at 7 (Mar. 19, 2021).

Petitioners moved to dismiss the complaint, arguing as relevant here that the Dodd-Frank Act's restriction on removal of the Bureau's Director violated the Constitution. Pet. App. 14. While that motion was pending, Director Cordray was replaced by Acting Director Mick Mulvaney. D. Ct. Doc. 136, at 2. The Bureau notified the court that Acting Director Mulvaney had ratified the Bureau's decision to bring this suit. Pet. App. 3, 92. The Bureau further argued that, because Acting Director Mulvaney could be removed at will, petitioners were not entitled to dismissal of the suit. See *id.* at 92.

The district court dismissed the claims. Pet. App. 5-95 (opinion and order on motion to dismiss); *id.* at 96-102 (order amending opinion and order). The court determined, as relevant here, that the Dodd-Frank Act's restrictive standard for removal of the CFPB's Director violated the Constitution; that the restriction could not be severed from the rest of Title X of the Act (the title that establishes the Bureau and defines its powers); and that Title X was therefore invalid in its entirety. *Id.* at 90-92. The court also concluded that, because the re-

moval restriction was not severable from the rest of Title X, and because Acting Director Mulvaney would at some point be replaced by a new Director to whom the statutory removal restriction would apply, Acting Director Mulvaney's ratification of the initiation of the suit could not cure the constitutional problem. *Id.* at 92-94.

3. The Bureau and New York appealed. Pet. App. 2-3. Acting Director Mulvaney was still serving in that capacity at the time the appeal was commenced, but he was replaced by Director Kathleen Kraninger after the CFPB's notice of appeal was filed. D. Ct. Doc. 136-1, ¶ 1.

While the appeal was pending, this Court decided *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020). The Court held that the statutory provision restricting the President's power to remove the Bureau's Director violated the Constitution, *id.* at 2197-2207, but was severable from the rest of the Act, *id.* at 2207-2211 (opinion of Roberts, C.J.); *id.* at 2245 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part). The Court remanded the case so that the lower courts could determine whether the action at issue there had been properly ratified. *Id.* at 2211.

Soon after this Court decided *Seila Law*, the Bureau notified the court of appeals in this case that Director Kraninger had ratified the decisions to sue petitioners and to appeal the district court's dismissal of the complaint. C.A. Doc. 237-1 (July 10, 2020). In a declaration filed with the court, Director Kraninger confirmed her understanding that, under *Seila Law*, the President could remove her at will. C.A. Doc. 237-2 (July 8, 2020).

In a summary order, the court of appeals vacated the district court's judgment and remanded the case for further proceedings. Pet. App. 1-4. Applying *Seila Law*, the

court of appeals "affirm[ed] the district court's holding that the for-cause removal provision is unconstitutional," "reverse[d] the district court's holding that the for-cause removal provision is not severable from the remainder of [Title X]," and "remand[ed] for the district court to consider in the first instance the validity of Director Kraninger's ratification of this enforcement action." *Id.* at 4.

ARGUMENT

Petitioners contend (Pet. 13-27) that the Bureau's efforts to ratify its decisions to bring this suit and then to file an appeal were ineffective. Those contentions do not warrant this Court's review. The case comes to this Court in an interlocutory posture; the court of appeals and the district court have not yet addressed petitioners' arguments; the Court's intervening decision in *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021), may make it unnecessary to resolve the issues raised in the petition; and the questions presented are not the subject of a circuit conflict. The petition for a writ of certiorari should be denied.

1. Petitioners principally argue (Pet. 13) that this Court should grant review to decide "whether ratification is a proper remedy for structural separation-of-powers violations" and "whether ratification can cure a constitutional violation after the time for doing the ratified act has run." Those questions do not warrant this Court's review at this time and in this case.

a. The current interlocutory posture of this case weighs heavily against the Court's review. The court of appeals vacated the district court's judgment and remanded the case for further proceedings, see Pet. App. 4, and those proceedings are now ongoing, see, *e.g.*, D. Ct. Doc. 136. Under this Court's usual practice, that

fact "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *National Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari). If petitioners prevail on remand, there may be no need for the Court to consider the questions raised here. And if they do not, they may raise their current contentions, together with any additional issues that arise out of proceedings on remand, in a single petition after the court of appeals renders a final decision. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."); see also Stephen M. Shapiro et al., *Supreme Court Practice* 250 (10th ed. 2013) ("It is often most efficient for the Supreme Court to await a final judgment and a petition for certiorari that presents all issues at a single time rather than reviewing issues on a piecemeal basis.").

b. Interlocutory review is particularly inappropriate here because neither the court of appeals nor the district court has yet addressed the questions presented by the petition. The court of appeals "remand[ed] for the district court to consider in the first instance the validity of Director Kraninger's ratification of this enforcement action." Pet. App. 4. The district court has not yet addressed that issue, and proceedings to resolve it remain ongoing. See, *e.g.*, D. Ct. Doc. 132 (Mar. 12, 2021), 136 (Mar. 19, 2021), 138 (Apr. 2, 2021). No sound basis exists for this Court—which is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718

n.7 (2005)—to consider in the first instance the extent of the Bureau Director's ratification authority. See, *e.g.*, *Seila Law*, 140 S. Ct. at 2211 (declining to consider a ratification argument in the first instance).

c. This Court's intervening decision in *Collins* v. *Yellen*, 141 S. Ct. 1761 (2020), may allow the lower courts to reject petitioners' claim for relief without deciding the questions presented in the certiorari petition. In *Collins*, the Court held that a constitutional defect in a statutory provision restricting the President's power to remove the Director of the Federal Housing Finance Agency did not require invalidating a contract adopted and implemented by the Agency. *Id.* at 1787-1789. The Court explained that the contract had been adopted by an Acting Director; that Congress had not attempted to restrict the President's power to remove the Acting Director; and that, as a result, there was no basis for setting aside the contract in its entirety. *Id.* at 1781-1783, 1787. The Court further determined that, even with respect to subsequent actions that confirmed Directors had taken to implement the contract, the challengers' argument was "neither logical nor supported by precedent," and that there was "no reason" to regard those actions as "void." *Id.* at 1787.

The reasoning of *Collins* provides an independent basis for rejecting petitioners' claim for relief. Petitioners seek (Pet. 19) to invalidate two actions taken by the Bureau: the filing of the suit in district court and the filing of an appeal to the Second Circuit. But the Bureau filed the appeal while it was led by an Acting Director, see p. 4, *supra*, who had no statutory protection from removal, see *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. 10 (Nov. 25, 2017), slip op. (OLC Memorandum).

And while the Bureau was led by a confirmed Director when it filed this suit, see p. 3, *supra*, "there is no reason to regard [the filing of the suit] as void," *Collins*, 141 S. Ct. 1787. To be sure, the Court in *Collins* suggested that removal restrictions could in some cases "inflict compensable harm," but petitioners have not shown that the restriction has done so here. *Id.* at 1789. Nor could they. Through two different Administrations and four different Directors, the Bureau has consistently maintained that petitioners' deceptive and abusive practices were unlawful.

Because the court of appeals' decision predated this Court's decision in *Collins*, the lower courts have not yet considered the effect of *Collins* on petitioners' challenges to the CFPB's prosecution of this enforcement suit. The courts below may conclude that *Collins* justifies rejection of those challenges, making it unnecessary for those courts to consider ratification. That possibility provides an additional reason for this Court to deny review. See Shapiro 248 (explaining that denial of a petition for a writ of certiorari may be appropriate if the Court "might be able to decide the case on another ground and thus not reach the [question presented]").

d. The Bureau filed this enforcement action alongside the State of New York. If the CFPB's prior actions in initiating this suit were ultimately vacated and the Bureau were dismissed as a party, the enforcement action would carry on with New York as the plaintiff. And in that event, the Bureau would have a statutory right to intervene in the case. See 12 U.S.C. 5552(b)(2). The progress of the suit therefore will not be meaningfully altered even if petitioners ultimately succeed in their challenges to the Bureau's prior conduct in this suit. Because this Court ordinarily prefers to decide questions

"in the context of meaningful litigation," resolution of the questions presented "can await a day when the issue[s] [are] posed less abstractedly." *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959); see Shapiro 249 ("If [the question presented] is irrelevant to the outcome of the case before the Court, certiorari may be denied.").

e. Even putting aside the procedural problems described above, the questions presented in the certiorari petition do not warrant the Court's review at this time. Petitioners do not identify any circuit conflict on the first question presented: "whether ratification is a proper remedy for structural separation-of-powers violations." Pet. 7. Petitioners acknowledge the Ninth Circuit's prior holding that ratification can be a proper basis for denying a challenge that is premised on the invalidity of a removal restriction. See *ibid.* (citing *CFPB* v. *Seila Law LLC*, 984 F.3d 715, 718 (9th Cir. 2020)). They identify no contrary decision of any court of appeals, but instead rely on a district-court decision, see Pet. 15 (citing *CFPB* v. *National Collegiate Master Student Loan Trust*, No. 17-1323, 2021 WL 1169029 (D. Del. Mar. 26, 2021)), and on a dissent from denial of rehearing en banc, see *ibid.* (citing *CFPB* v. *Seila Law LLC*, 997 F.3d 937, 840 (9th Cir. 2021) (Bumatay, J., dissenting)), both issued before this Court's decision in *Collins*.

Petitioners also do not identify any circuit conflict on the second question presented (Pet. 13): "whether ratification can cure a constitutional violation after the time for doing the ratified act has run." Petitioners identify one decision in which a court of appeals held that ratification was impermissible because the time for performing the ratified act had expired. See Pet. 22-23

(citing *Benjamin* v. *Virgin Islands Port Authority*, 684 Fed. Appx. 207 (3d Cir. 2017)). But that decision was unpublished; it involved the ratification of an action taken by a private corporation rather than by a federal agency; and the entity that took the action initially lacked the authority to do so. See *id.* at 211-212. In contrast, *Collins* makes clear that the removal provision did not deprive the Bureau Director of the power to carry out his official duties. See 141 S. Ct. at 1787-1788 & n.23.

Cases that raise issues concerning the CFPB's ability to ratify past actions are pending before other courts of appeals. See *CFPB* v. *Law Offices of Crystal Moroney, P.C.*, No. 20-3471 (2d Cir. 2020); *CFPB* v. *All American Check Cashing, Inc.*, No. 18-60302 (5th Cir. 2018) (en banc); *CFPB* v. *Nationwide Biweekly Admin.*, No. 18-15431 (9th Cir. 2018); *CFPB* v. *CashCall, Inc.*, No. 18-55407 (9th Cir. 2018). If those cases give rise to a circuit conflict, the Court can consider whether to grant review at that time. For now, however, the questions presented do not warrant the Court's review.

2. Petitioners argue in the alternative (Pet. 2) that this Court should summarily reverse the judgment below, direct the court of appeals to dismiss the CFPB's appeal, and reinstate the district court's original judgment against the CFPB. Petitioners contend that the Bureau's notice of appeal was defective, and that the Second Circuit therefore lacked jurisdiction over the appeal, because the statutory restriction on removal of the Director was still in effect when the notice of appeal was filed. No sound basis exists to grant petitioners the relief they seek.

Because this case arises in an interlocutory posture, this Court need not entertain petitioners' argument at

this time. Petitioners could raise that contention again in a petition for a writ of certiorari after final judgment. See *Garvey*, 532 U.S. at 508 n.1; p. 6, *supra*.

In any event, petitioner's contention lacks merit. When the Bureau filed its notice of appeal to the Second Circuit, it was led by Acting Director Mulvaney, who had no statutory protection from removal. See p. 4, *supra*. That fact alone defeats petitioners' argument that the notice of appeal should be regarded as void. See *Collins*, 141 S. Ct. at 1787. Petitioners argue (Pet. 2) that the Bureau did not properly ratify the decision to file the notice of appeal, but because the notice of appeal was valid when filed, subsequent ratification was unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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