NO. 20-1758

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners RD Legal Funding Partners, LP, *et al.,* raised two questions in their petition for certiorari: whether ratification is an appropriate remedy for the separation-of-powers violation identified in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192, 2202 (2020); and whether, after *Seila Law* found the CFPB's structure unconstitutional, the CFPB could nonetheless ratify an enforcement action and subsequent appeal long after the time for doing either had run. Both questions are ones over which lower courts are in disarray. Both are ones of critical constitutional importance. And both are ones that this Court should answer now, not later.

The government nevertheless contends that review is premature because (1) on appeal, the appellate court remanded for the district court to consider these issues again, (2) this 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 (3) the evident disarray among the lower courts does not amount to a circuit split. BIO 5. In sum, the government argues, review is not warranted "at this time and in this case." *Id*. But if not now, then when? The legal issues are cleanly presented, *Collins* only complicates the muddle in which the lower courts find themselves after *Seila Law*, and delay in resolving these fundamental issues results in the sort of prolonged litigative trench warfare—in this case already more than four and half years—that few, if any, parties can afford against the government. Moreover, the fact that even the government itself isn't entirely sure

what to make of *Collins* is a reason to grant review, not deny it. Finally, the government's assumption that kicking the constitutional can down the road carries no cost to regulated parties is simply wrong. Take RD Legal—the time spent litigating these issues (and *prevailing* on its constitutional challenge) has come at no small expense and led to a potential increase in statutory penalties of more than a billion dollars. *See* Pet. 5. This Court should grant certiorari.

ARGUMENT

I. The Legal Issues Are Cleanly Presented And The Procedural Posture Of This Case Does Not Preclude Review

The government's principal argument for denying review has to do not with the merits, but the procedural posture of this case. Because the appellate court adjudicated some of the issues before it, vacated the district court's judgment, and remanded for further proceedings, the government contends that this is reason enough to deny the petition. While the government is right that there is no bar to raising these issues again after the district and appellate courts pass on them a second time, *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 (2001) (per curiam); *Panama R. Co. v. Napier Shipping Co.*, 166 U. S. 280, 284 (1897), it's wrong in contending that there is "[n]o sound basis" to review those issues now. BIO 6.

While a petition for certiorari *may* be denied where the decision to be reviewed is not final, BIO 6 (citing *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916)), there is no barrier to this Court's review now. *Abbott v. Veasey*, 137 S. Ct. 612,

613 (2017) (mem.) (statement of Roberts, C.J., respecting the denial of certiorari). In this case, the district court's original decision was final as to the CFPB—based upon its (correct) conclusion that the CFPB's structure violated separation of powers—and the district court dismissed the CFPB's suit. To the extent this case has been subsequently placed into an interlocutory posture, it is because the appellate court punted. Rather than resolving the underlying questions of law, the Second Circuit remanded for the district court to consider (*for a second time*) whether the CFPB could cure its constitutional infirmities through a ratification that the CFPB does not dispute occurred after the time for bringing suit or filing a notice of appeal had run. That, for all the reasons set forth in RD Legal's petition, was error—and more importantly, error as to questions of exceptional importance over which lower courts are already divided.

II. Contrary To The Government's Contentions, There Is Every Reason To Grant Review Now

The importance of those questions—and the disagreement among the lower courts even before *Collins* complicated matters—warrants review now.

1. As an initial matter, the government never disputes that these are questions of exceptional importance. Moreover, as the government grudgingly acknowledges, BIO 9, the lower courts are already divided over those questions. *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); *see* 997 F.3d at 840, 843-45 (Bumatay, J., dissenting from the

denial of rehearing en banc) (contending 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"); *see also 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); *CFPB v. Navient Corp.*, No. 3:17-cv-101, 2021 WL 134618, at *10 (M.D. Pa. Jan. 13, 2021) (applying ratification, but concluding that an otherwise untimely ratification could be cured by invoking equitable tolling), motion to certify interlocutory appeal granted, 2021 WL 772238 (M.D. Pa. Feb. 26, 2021), interlocutory appeal denied, No. 21-8011 Dkt. 13 (3d Cir. 2021); *CFPB v. Nat'l Collegiate Master Student Loan Tr.*, No. 17-1323, 2021 WL 1169029, at *5 (D. Del. Mar. 26, 2021) (applying ratification but finding it untimely); *CFPB v. Access Funding, LLC*, No. 1:16-cv-03759, 2021 WL 2915118, at *15-16 (D. Md. July 12, 2021) (concluding post-*Collins v. Yellen* that the constitutional defect had to be cured by ratification, and that ratification had to either occur before the running of the statute of limitations or be excused by equitable tolling).

2. In the government's view, this Court should wait for other Circuits to consider "issues concerning the CFPB's ability to ratify past actions" to see if a deeper conflict develops among the Circuits. BIO 10

(citing *CFPB v. Law Offices of Crystal Moroney, PC.,* No. 20-3471 (2d Cir. 2020); *CFPB v. All Am. Check Cashing, Inc.*, No. 18-60302 (5th Cir. 2018) (en banc); *CFPB v. Nationwide Biweekly Admin., Inc.,* No. 18-15431 (9th Cir 2018); *CFPB v. CashCall, Inc.,* No. 18-55407 (9th Cir. 2018)). Not so. First, two of those four cases are from the Ninth Circuit, which already ruled on these issues on remand from *Seila Law*—and denied rehearing en banc. Second, and even more importantly, the government's position assumes that waiting comes at no cost for courts or litigants. That's not true. RD Legal's petition presents clear questions of law, the answers to which should ultimately come from this Court.[1] Delay simply expends the resources of the courts and litigants and discourages the bringing of valid constitutional challenges like RD Legal's.[2] Delay, therefore, unfairly benefits the

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[1] In *Collins*, this Court explained that the remand in *Seila Law* "did not resolve any issue concerning ratification, including whether ratification was necessary." 141 S. Ct. at 1788. The two cases have thus left lower courts to struggle with how to deal with the CFPB's post-*Seila Law* attempts to ratify enforcement actions, including this one. Ultimately, only this Court can harmonize the remand in *Seila Law* with the implications of *Collins*, as well as to harmonize those decisions with other precedents. *Cf. id.* at 1795-96 (Gorsuch, concurring in part) (noting remedial provision of *Collins* "defies" precedent).

[2] The government also contends that the progress of the suit will not be meaningfully altered even if RD Legal ultimately succeeds because the Bureau could just intervene in the New York Attorney General's ongoing pursuit of this action. BIO 8 (citing 12 U.S.C. § 5552(b)(2)). But if RD Legal ultimately succeeds (as it should), the CFPB's claims would be time-barred because claims in intervention do not relate back to the original filing. *Cresta Blanca Wine Co. v. E. Wine Corp.*, 143 F.2d 1012,

government as it imposes virtually no costs on it; private litigants, on the other hand, must contend with extraordinary expenditures of time and resources.

3. Notably, in contending that there is no conflict worth addressing, the government never once cites, let alone addresses, this Court's decision in *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). If ratification applies, that decision made clear that for any such 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." *Id.* (quoting *Cook v. Tullis*, 85 U.S. 332, 338 (1874) (emphasis omitted)). Accordingly, this 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, and dismissed the petition for want of jurisdiction. The government has tried repeatedly elsewhere to avoid the clear import of *NRA Victory Fund*, first by trying to distinguish it, second, by arguing for the novel and unwarranted application of equitable tolling, and third, by contending that *Collins v. Yellen* controls. Here, the government simply ignores it. But *NRA Victory Fund* is plainly on point, equitable tolling does not apply, and *Collins* doesn't mention, let alone abrogate, *NRA Victory Fund*. Indeed, *Collins* doesn't even involve a situation in which a statutory limitations period applies to the actions taken.

1014 (2d Cir. 1944); *Ceribelli v. Elghanayan*, No. 91-3337, 1994 WL 529853, at *2 (S.D.N.Y. Sept. 28, 1994) (same).

If review is denied, RD Legal—like every other entity and individual in the pending cases the government cites—will be forced to expend significant resources it can't get back even if it prevails. Despite the government's attempts to downplay the costs of that delay, being forced to defend oneself against an action that should not proceed *is* "meaningful litigation" and the issues anything but "abstract[]." BIO 9 (quoting *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959)). Indeed, it's not "meaningful litigation" that is missing; what is missing is *meaningful relief* for parties who successfully pursue constitutional challenges to an enforcement action.

III. This Court's Decision In *Collins* Provides An Additional Reason For Review

The government takes the position that this Court's intervening decision in *Collins* provides another basis for denying certiorari because it "*may* allow the lower courts to reject petitioners' claim for relief without deciding the questions presented ...." BIO 7 (emphasis added). It doesn't argue that courts *should* read *Collins* as making it "unnecessary for those courts to consider ratification." BIO 8. Notably, in this case and others, the CFPB has continued to argue that ratification is needed and sufficient, even after *Collins*. *See, e.g.*, ECF No. 149 at 2 (post-*Collins,* CFPB arguing that "its ratification and continued pursuit of this action ... confirms that the removal restriction has no effect on this case").[3] Indeed, the government carefully eschews offering any affirmative

[3] Citations to "ECF No." refer to the district court docket below.

position as to how *Collins* should be read, arguing instead that because courts *could* read *Collins* one way, this Court should deny review. But even that relatively anodyne position depends on a series of assumptions, none of which are well-founded.

First, the fundamental issue in this case is whether there is a meaningful constitutional remedy for the bringing of an enforcement action by an unconstitutionally constituted agency. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018). By contrast, *Collins* confronted the "unique context" in which (a) the challenged action was not taken by unconstitutionally insulated directors, but simply overseen by them; and (b) the challenge was brought not by private party defendants subject to an unconstitutional enforcement action, but by plaintiff shareholders in government-sponsored entities seeking affirmative relief involving the unwinding of government contracts and disgorgement of hundreds of millions of dollars. *See Collins*, 141 S. Ct. at 1799 (Gorsuch, J., concurring in part) ("nothing" in *Collins* "undoes ... prior guidance authorizing more meaningful relief in other situations"); *Seila Law*, 140 S. Ct. at 2221 (Thomas, J., concurring, joined by Gorsuch, J.) (noting that he would have held that "the alleged ratification does not cure the constitutional injury").

Nevertheless, the government suggests that *Collins* applies with equal force here. BIO 8. As an initial matter, unlike in *Collins*, RD Legal raised its separation-of-powers challenge as a defense to an enforcement proceeding brought by the CFPB against

petitioners.[4] When the CFPB did so, it was unconstitutionally insulated from both presidential and congressional control—the former through its restrictions on removal and the latter through its self-funding provisions. When parties "raise the constitutional challenge as a defense to an enforcement action," there is "no theory that would permit [a court] to declare the [agency's] structure unconstitutional without providing relief." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993). But that's precisely what the CFPB has argued, contending that the constitutional defect "has no practical effect at this point … on … the Bureau's prosecution of this case." ECF No. 136 at 1.

The government also suggests that petitioners must (but can't) show "compensable harm" within the meaning of *Collins*. BIO 8. That argument (a) misreads *Collins*; (b) ignores the fact that the CFPB previously conceded the separation of powers violation in its structure; and (c) overlooks the fact that petitioners are defendants in an enforcement action who are not looking for compensation, but have been injured nonetheless by the CFPB's unconstitutional structure, its shifting position regarding that structure, and its belated ratification efforts. After *Seila Law*, the CFPB did not dispute the constitutional injury. Instead, it contended that ratification alone provides "an adequate and appropriate remedy" "exactly tailored to the scope of [petitioners'] objection." ECF No. 136 at 4-5. But even if the CFPB could change its position, *Collins*

[4] The CFPB's enforcement authority and self-funding power differentiate it in these cases from FHFA in *Collins v. Yellen*.

expressly laid out two non-exclusive examples where an unconstitutional removal provision, like the one here, "would clearly cause harm":

> Suppose, for example, that the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have "cause" for removal. Or suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way. In those situations, the statutory provision would clearly cause harm.

Collins, 141 S. Ct. at 1789. *Collins*'s non-exhaustive "example[s]" of "clear[]" constitutional injuries include demonstrating that the President wanted to fire the Director—but couldn't—as a general matter. *Id.* Even under the government's restrictive reading, RD Legal has shown harm: this case was filed on February 7, 2017, under the watch of then-Director Cordray, when President Trump wanted to, but could not, fire Cordray because of the for-cause removal provision, and when pending litigation made it harder for the President to fire Cordray. ECF No. 154 at 4-5. Moreover, this Court has made it clear that litigants are "*not* required to prove that the Government's course of conduct would have been different in a 'counterfactual world.'" *Seila Law*, 140 S. Ct. at 2196 (emphasis added) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512 n.12 (2010)). To the extent there is tension between *Collins* and *Seila Law* (and *NRA Victory Fund*), only this

Court can properly resolve that question of law. It should do so now.

IV. This Court Should Grant Review Now

In sum, this Court should grant review now because:

- It fully tees up the first question presented: Whether ratification is an appropriate remedy for separation of powers violations. The district court ruled on this purely legal issue, it was fully briefed on appeal but the Second Circuit punted, and the Second Circuit could not implicitly exercise jurisdiction without addressing the issues before it including the propriety of the action and timeliness of the appeal.
- The case squarely presents ratification in the context of an enforcement action and underlying appeal, and both of those actions must be taken within statutorily-determined time periods.
- As a result, it also squarely presents the second question presented: Whether and how *NRA Victory Fund* applies—as well as whether and how *Collins* applies in the context of enforcement actions (both questions which only this Court can finally answer).

Providing that guidance now would conserve judicial resources. It would avoid penalizing private parties by forcing them to engage in extended and expensive litigation to determine their constitutional

rights and remedies—all while the CFPB's meter on statutory penalties is running. And it would answer constitutional questions which even the government does not dispute are of exceptional importance.

CONCLUSION

For these reasons, this Court should grant certiorari.

Respectfully submitted,

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