

**In the United States Court of Appeals
for the Ninth Circuit**

No. 17-56324

CONSUMER FINANCIAL PROTECTION BUREAU,
PETITIONER-APPELLEE

v.

SEILA LAW LLC, RESPONDENT-APPELLANT

MOTION BY APPELLANT FOR A STAY OF THE MANDATE

Pursuant to Federal Rule of Appellate Procedure 41(d), appellant Seila Law LLC moves the Court for a stay of the mandate pending the filing of a petition for a writ of certiorari in the United States Supreme Court. The Consumer Financial Protection Bureau has notified appellant that it opposes this motion.

1. In 2017, the CFPB issued a civil investigative demand to appellant as part of an investigation into whether appellant violated federal consumer financial protection law. Appellant asked the CFPB to set aside the civil investigative demand on several grounds, including that the CFPB's structure was unconstitutional. E.R. 89-97. The CFPB declined to set aside the civil investigative demand; appellant submitted partial responses to that demand,

reiterated its objections, and declined to provide further information or documents. The CFPB filed a petition in federal court to enforce its civil investigative demand, and the district court held that the demand was valid. E.R. 1-13. This Court affirmed. *See* 923 F.3d 680 (2019).

The Supreme Court granted review and vacated the panel's decision, holding that the CFPB's structure violated the separation of powers. *See* 140 S. Ct. 2183, 2192 (2020). The Supreme Court also held that the statutory provision protecting the CFPB Director from removal except for cause could be severed from the remainder of the act that created the CFPB. *See id.* Noting that the CFPB had raised before this Court the issue of whether the civil investigative demand could be ratified, the Supreme Court remanded the case for 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." *Id.* at 2208.

2. On remand, the CFPB submitted a ratification that then-Director Kathy Kraninger signed after the Supreme Court's decision in this case. *See* Dkt. 56, at 5-6. Appellant argued in its supplemental brief that then-Director Kraninger's ratification was invalid because an action taken by an agency without authority cannot be ratified if the principal lacked the authority to take the action when the action was taken. *See* Supp. Br. 7-8. Appellant thus contended that the appropriate remedy was dismissal of the petition to enforce the civil

investigative demand—a remedy that furthered the “structural purposes” of the separation of powers and “create[d] incentives” for litigants to challenge structural constitutional defects. Supp. Br. 5-6 (quoting *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018)).

This Court disagreed, holding that then-Director Kraninger’s ratification cured any constitutional defect in the investigative demand. See Panel Slip Op. 5. In reaching that conclusion, the panel held that the Court’s decision in *CFPB v. Gordon*, 819 F.3d 1179 (2016), foreclosed any relief to appellant from the civil investigative demand issued by the CFPB before the for-cause removal restriction was severed. See Slip Op. 6.

3. After the panel issued its decision on remand from the Supreme Court, a judge called for a vote to determine whether the case should be reheard en banc. The Court denied rehearing, with Judge Bumatay, joined by Judges Callahan, Ikuta, and VanDyke, dissenting. See En Banc Dissent 6-17. In the dissenting judges’ view, ratification is not “a proper remedy for separation-of-powers violations” that affect an agency’s structure. *Id.* at 13. The dissenting judges further contended 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.” *Id.* at 8, 16-17.

4. Federal Rule of Appellate Procedure 41(d) governs motions to stay the mandate pending the filing of a petition for a writ of certiorari. Under that rule, a court of appeals may stay the mandate when a petition for certiorari “would present a substantial question” and “there is good cause for a stay.” Fed. R. App. P. 41(d)(1). In contrast, this Court will not stay the mandate if it “determines that the petition for certiorari would be frivolous or filed merely for delay.” 9th Cir. R. 41-1; *see also United States v. Pete*, 525 F.3d 844, 851 n.9 (9th Cir. 2008).

Appellant plans to file a petition for certiorari presenting the exceptionally important question of whether the ratification of the CFPB’s civil investigative demand is an appropriate remedy for the separation-of-powers violation identified by the Supreme Court. Applying the relevant standards here, a stay of the mandate is warranted.

a. Whether an agency may later ratify actions taken at a time the agency itself was laboring under a structural separation-of-powers defect is a “substantial question.” Fed. R. App. P. 41(d)(1). That question has engendered serious debate among judges on this Court. *Compare* Slip Op. 4-10 *with* En Banc Dissent 6-17. In the view of four judges, the panel’s answer to that question—*i.e.*, that ratification is available to cure a structural constitutional violation retrospectively—is at odds with Supreme Court precedent applying longstanding principles of agency law. *See* En Banc Dissent 14 (citing *FEC v.*

NRA Political Victory Fund, 513 U.S. 88 (1994); *District Township of Doon v. Cummins*, 142 U.S. 366 (1892); and *Norton v. Shelby County*, 118 U.S. 425 (1886)). Those judges also believe the panel’s decision is inconsistent with case law requiring remedies for separation-of-powers violations to be meaningful. *See id.* at 13 (citing *Lucia*, 138 S. Ct. 2044, and *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993)). For the reasons stated in Judge Bumatay’s opinion, there is a reasonable chance that the Supreme Court will grant certiorari in this case.

b. In addition, “there is good cause for a stay” of the mandate. Fed. R. App. P. 41(d)(1). This Court previously stayed the district court’s order pending appeal, *see* Dkt. 8, and similarly issued a stay of the mandate pending Appellant’s prior petition for certiorari in this case, *see* Dkt. 49. Under the district court’s order, appellant must comply with the CFPB’s civil investigative demand within 10 days, unless the district court or the CFPB establishes a later compliance date. If the 10-day compliance window remains in place, appellant will be forced to comply with the district court’s order by providing the CFPB with all of the information the investigative demand requests. But that, of course, is part of the harm that appellant seeks to avoid. And compliance could potentially moot the case, thwarting Supreme Court review.

Absent a stay, appellant will thus suffer the exact prejudice it seeks to avoid by litigating the question of whether ratification is an appropriate remedy for the separation-of-powers violation identified by the Supreme Court. In these circumstances, a stay is appropriate. *Cf. John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (noting that “[t]he fact that disclosure would moot that part of the Court of Appeals’ decision requiring disclosure . . . would also create an irreparable injury”); *In re Roche*, 448 U.S. 1312, 1316 (1980) (Brennan, J., in chambers) (continuing a stay pending the resolution of a petition for certiorari when applicant faced choice of mooting his assertion of privilege or facing jail time for contempt). A short additional stay to allow the Supreme Court to act on a petition for certiorari is amply warranted under these circumstances.

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The motion for a stay of the mandate should be granted.

Respectfully submitted,

/s/ Kannon K. Shanmugam
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MAY 20, 2021

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, hereby certify that, on May 20, 2021, a copy of the foregoing motion was filed through the Court's electronic filing system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM