

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-3471

Caption [use short title]

Motion for: Stay of Mandate Pending the Filing of a Petition for a Writ of Certiorari

Set forth below precise, complete statement of relief sought: The court decided this case on March 23, 2023. Appellant seeks a stay of the mandate to allow it to file a petition for a writ of certiorari in the U.S. Supreme Court, which it intends to do by June 21, 2023.

CFPB v. Law Offices of Crystal Moroney, P.C.

MOVING PARTY: Law Offices of Crystal Moroney, P.C. OPPOSING PARTY: Consumer Financial Protection Bureau

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Richard Samp OPPOSING ATTORNEY: Kevin Friedl New Civil Liberties Alliance Consumer Financial Protection Bureau 1225 19th Street NW, Suite 450 1700 G Street, NW Washington, DC 20036 Washington, DC 20052

Court- Judge/ Agency appealed from: Judge Kenneth M. Karas, SDNY

Please check appropriate boxes:

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

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

Has this request for relief been made below? Has this relief been previously sought in this court? 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? Has argument date of appeal been set? Case was argued 1/18/2022; decided 3/23/2023

Signature of Moving Attorney: /s/Richard A. Samp Date: 4/28/2023 Service by: CM/ECF Other [Attach proof of service]

No. 20-3471

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

CONSUMER FINANCIAL PROTECTION BUREAU,
Petitioner-Appellee,

v.

LAW OFFICES OF CRYSTAL MORONEY, P.C.,
Respondent-Appellant.

On Appeal from the United States District Court
for the Southern District of New York
No. 20-cv-3240; Hon. Kenneth M. Karas

**MOTION TO STAY THE MANDATE PENDING
THE FILING OF A PETITION FOR A WRIT OF CERTIORARI**

Pursuant to Rule 41(d)(2) of the Federal Rules of Appellate Procedure, Respondent-Appellant Law Offices of Crystal Moroney, P.C. (“Moroney”) hereby moves to stay the Court’s issuance of the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. In support of the motion, Moroney states as follows:

1. This action involves a petition by Petitioner-Appellee Consumer Financial

Protection Bureau (CFPB) to enforce a civil investigative demand (“CID”) that it served on Moroney in 2019.

2. Moroney produced a substantial number of documents in response to the CID (and in response to an earlier CID issued by CFPB in 2017). When Moroney resisted further production, CFPB filed its enforcement petition in April 2020 in U.S. District Court for the Southern District of New York.

3. In both the district court and this Court, Moroney argued that the CID is unenforceable for several reasons, including that (1) CFPB’s funding structure violates the Appropriations Clause of Article I, § 9, cl. 7 of the Constitution, and (2) Congress violated the Vesting Clause of Article I, § 1 of the Constitution when it created CFPB’s funding structure and thereby delegated substantial legislative authority to CFPB.

4. The district court rejected those arguments and granted CFPB’s enforcement petition on August 19, 2020.

5. On March 23, 2023, this Court affirmed. It rejected Moroney’s constitutional challenges to CFPB’s funding structure. Slip op. 12-14, 19-21.

6. The Court noted the Fifth Circuit’s recent decision striking down CFPB’s funding structure as a violation of the Appropriations Clause. *Id.* at 14-15 (citing *Community Financial Services Ass’n of America, Ltd. v. CFPB (CFSA)*, 51 F.4th 616

(5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023). The Court stated that it could find no support for the Fifth Circuit’s holding in either “Supreme Court precedent,” “the Constitution’s text,” or “the history of the Appropriations Clause,” *id.* at 15-17, and concluded, “For all these reasons, we respectfully decline to follow the Fifth Circuit’s decision in *CFSA*.” *Id.* at 19.

7. As the Court noted, the Supreme Court granted CFPB’s petition for a writ of certiorari in February and is now reviewing *CFSA*. As framed by CFPB, the Question Presented by its petition is, “Whether the court of appeals erred in holding that the statute providing funding to the Consumer Financial Protection Bureau (CFPB), 12 U.S.C. 5497, violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding.”

8. Moroney intends to seek Supreme Court review of the decision of this Court to uphold the constitutionality of CFPB’s funding structure. Moroney will file a petition for a writ of certiorari no later than June 21, 2023.

9. Rule 41(d)(2)(A) provides that a party may move to stay issuance of this Court’s mandate “pending the filing of a petition for a writ of certiorari in the Supreme Court.” To obtain a stay, a party “must show that the certiorari petition would present a substantial question and that there is good cause for a stay.”

10. Moroney easily satisfies the Rule 41 standard for obtaining a stay. Moroney's contention that CFPB's funding structure violates Article I of the Constitution presents a "substantial question." Indeed, the Fifth Circuit held in *CFSA* that the CFPB's funding structure violates separation-of-powers principles embedded in the Constitution and, accordingly, vacated CFPB's Payday Lending Rule as "the product of the Bureau's unconstitutional funding scheme." 51 F.4th at 643.

11. As this Court's opinion acknowledged, its decision upholding CFPB's funding structure irreconcilably conflicts with the Fifth Circuit's decision. In light of the Supreme Court's decision to review the Fifth Circuit's decision, there is an extremely high probability that it will either grant Moroney's petition or hold the petition pending its decision in *CFSA*—at which point it will either deny the petition or vacate this Court's ruling, depending on how it decides *CFSA*.

12. Accordingly, good cause exists for staying the mandate. It makes little sense for the Court to issue its mandate now, given that the Supreme Court will soon address the precise constitutional issue raised in this case and will almost surely apply that decision to this case.

13. CFPB will not be prejudiced by a temporary stay. Although CFPB's investigation of Moroney is ongoing, it has not pressed Moroney to produce additional documents in connection with the CID for a considerable period of time.

At the same time, CFPB has not provided Moroney the requested assurance that the documents produced to date fully satisfy Moroney's obligations under the CID.

14. Moroney requests that the stay remain in effect through June 2023 and that it be extended (pursuant to Rule 41(d)(2)(B)) once Moroney informs the Court that it has filed a petition for a writ of certiorari. Rule 41(d)(2)(B) provides that when "the party who obtained the stay files a petition for the writ and so notifies the circuit court in writing within the period of the stay," "the stay continues until the Supreme Court's final disposition."

15. Before filing this motion, counsel for Moroney contacted counsel for CFPB to ascertain CFPB's position regarding a stay of the mandate. Counsel for CFPB declined to consent to the motion.

WHEREFORE, Appellant Moroney respectfully requests that the Court grant its motion to stay the mandate pending the filing of a petition for a writ of certiorari.

Respectfully submitted,

/s/ Richard A. Samp

Richard A. Samp

Senior Litigation Counsel

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April 28, 2023

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2023, I electronically filed the Appellant's motion to stay the mandate with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/CF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp