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SDNY Judge Recognizes CFPB Acted Unconstitutionally, but Still Enforces CID Against NCLA Client

Bureau of Consumer Financial Protection v. Law Offices of Crystal Moroney

Washington, DC (August 18, 2020) – Oral argument was held telephonically today in *Bureau of Consumer Financial Protection v. Law Offices of Crystal Moroney* in the Southern District of New York. At the conclusion of argument, U.S. District Judge Kenneth M. Karas handed down a decision from the bench granting CFPB’s Petition to Enforce the Civil Investigative Demand (CID) it issued to the Law Offices of Crystal Moroney, P.C. The New Civil Liberties Alliance disagrees with the court’s ruling on numerous grounds but also recognizes that this case was always destined for higher court resolution given the current state of nondelegation precedent in lower courts.

The court ruled that while the Supreme Court’s *Seila Law* decision did not reach the Bureau’s unique funding structure, CFPB’s funding regime does not violate the Vesting or Appropriations Clauses of Article I. NCLA argued that CFPB’s funding structure violates the Appropriations Clause because the Bureau—not Congress—decides how much funding it receives each year and that Congress cannot divest its power of the purse or any other core legislative power. The court ruled CFPB had not done so here because it specified a formula in statute for the ceiling of how much the Bureau could obtain in annual funding.

The court also recognized that *Seila Law*’s holding applies to this case. Hence, as NCLA alleged, CFPB Director Kathy Kraninger was not lawfully empowered to act at the time the Bureau issued the CID because she was unconstitutionally insulated from removal by the President. However, the court ruled that she could nevertheless ratify her own prior invalid actions because the Bureau—not Kraninger herself—was the principal at the time of the unlawful act. NCLA disagrees with this ruling for several reasons, but one the court’s ruling failed to address stands out. Director Kraninger knew she was acting unconstitutionally at the time she acted in Nov. 2019—having admitted her unconstitutional status to Congress the previous September. This court today became the first ever to grant ratification where the ratifier knew what she was doing was unconstitutional in the first instance. NCLA will fully explore the possibility of appealing this and other aspects of the court’s decision.

It is unclear how this ruling impacts NCLA’s affirmative case against CFPB (filed in December 2019). While the court acknowledged that NCLA prevailed in its request for declaratory judgment that the Director was unconstitutionally insulated from removal by the President after *Seila Law*, the court did not comment on the other requests for relief presented in that case.

NCLA released the following statements:

“It took Ms. Moroney three years and \$80,000—to say nothing of the stress and strain on her personal and professional life—to finally get her day in court to defend against the CFPB’s unconstitutional structure and abusive practices. While we are disappointed with the result, we are eager to advance our arguments on appeal, where we hope to vindicate Ms. Moroney’s civil liberties once and for all.”

— **Michael P. DeGrandis, Senior Litigation Counsel**

“The result in this case shows the enfeebled nature of the current Nondelegation Doctrine in the lower federal courts. Congress gave away its birthright by funding CFPB through the Federal Reserve rather than with direct appropriations. If Congress can divest the core legislative power of the purse, which Article I of the Constitution vests in it, then the current version of the doctrine has outlived its usefulness. Thankfully, a majority of the U.S. Supreme Court has already signaled its willingness to revisit this crucial constitutional issue.”

— **Mark Chenoweth, Executive Director & General Counsel**

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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