

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
CIVIL APPEAL PRE-ARGUMENT STATEMENT (FORM C)**

1. SEE NOTICE ON REVERSE

2. PLEASE TYPE OR PRINT

3. STAPLE ALL ADDITIONAL PAGES

Case Caption: Bureau of Consumer Financial Protection v. Law Offices of Crystal Moroney, P.C.	District Court or Agency: S.D.N.Y.	Judge: Hon. Kenneth M. Karas
	Date the Order or Judgment Appealed from was Entered on the Docket: August 19, 2020	District Court Docket No.: 7:20-cv-3240
	Date the Notice of Appeal was Filed: October 7, 2020	Is this a Cross Appeal? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

Attorney(s) for Appellant(s): <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant	Counsel's Name:	Address:	Telephone No.:	Fax No.:	E-mail:
	Michael P. DeGrandis New Civil Liberties Alliance, 1225 19th Street, NW, Suite 450, Washington, DC 20036 tel. (202) 869-5210 fax (202) 869-5238 mike.degrandis@ncla.legal Jared Mc				

Attorney(s) for Appellee(s): <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant	Counsel's Name:	Address:	Telephone No.:	Fax No.:	E-mail:
	Kevin E. Friedl Consumer Financial Protection Bureau, 1700 G Street, NW, Washington, DC 20552 tel. (202) 435-9268 Kevin.Friedl@cfpb.gov				

Has Transcript Been Prepared? Yes	Approx. Number of Transcript Pages: 79	Number of Exhibits Appended to Transcript: 0	Has this matter been before this Circuit previously? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes, provide the following: Case Name: 2d Cir. Docket No.: Reporter Citation: (i.e., F.3d or Fed. App.)
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ADDENDUM "A": COUNSEL MUST ATTACH TO THIS FORM: (1) A BRIEF, BUT NOT PERFUNCTORY, DESCRIPTION OF THE NATURE OF THE ACTION; (2) THE RESULT BELOW; (3) A COPY OF THE NOTICE OF APPEAL AND A CURRENT COPY OF THE LOWER COURT DOCKET SHEET; AND (4) A COPY OF ALL RELEVANT OPINIONS/ORDERS FORMING THE BASIS FOR THIS APPEAL, INCLUDING TRANSCRIPTS OF ORDERS ISSUED FROM THE BENCH OR IN CHAMBERS.

ADDENDUM "B": COUNSEL MUST ATTACH TO THIS FORM A LIST OF THE ISSUES PROPOSED TO BE RAISED ON APPEAL, AS WELL AS THE APPLICABLE APPELLATE STANDARD OF REVIEW FOR EACH PROPOSED ISSUE.

PART A: JURISDICTION


1. <u>Federal Jurisdiction</u>		2. <u>Appellate Jurisdiction</u>	
<input checked="" type="checkbox"/> U.S. a party	<input type="checkbox"/> Diversity	<input checked="" type="checkbox"/> Final Decision	<input type="checkbox"/> Order Certified by District Judge (i.e., Fed. R. Civ. P. 54(b))
<input type="checkbox"/> Federal question (U.S. not a party)	<input type="checkbox"/> Other (specify): _____	<input type="checkbox"/> Interlocutory Decision Appealable As of Right	<input type="checkbox"/> Other (specify): _____

IMPORTANT. COMPLETE AND SIGN REVERSE SIDE OF THIS FORM.

PART B: DISTRICT COURT DISPOSITION (Check as many as apply)																												
<p>1. <u>Stage of Proceedings</u></p> <input type="checkbox"/> Pre-trial <input type="checkbox"/> During trial <input type="checkbox"/> After trial	<p>2. <u>Type of Judgment/Order Appealed</u></p> <table style="width:100%;"> <tr> <td><input type="checkbox"/> Default judgment</td> <td><input type="checkbox"/> Dismissal/other jurisdiction</td> </tr> <tr> <td><input type="checkbox"/> Dismissal/FRCP 12(b)(1) lack of subject matter juris.</td> <td><input type="checkbox"/> Dismissal/merit</td> </tr> <tr> <td><input type="checkbox"/> Dismissal/FRCP 12(b)(6) failure to state a claim</td> <td><input checked="" type="checkbox"/> Judgment / Decision of the Court</td> </tr> <tr> <td><input type="checkbox"/> Dismissal/28 U.S.C. § 1915(e)(2) frivolous complaint</td> <td><input type="checkbox"/> Summary judgment</td> </tr> <tr> <td><input type="checkbox"/> Dismissal/28 U.S.C. § 1915(e)(2) other dismissal</td> <td><input type="checkbox"/> Declaratory judgment</td> </tr> <tr> <td></td> <td><input type="checkbox"/> Jury verdict</td> </tr> <tr> <td></td> <td><input type="checkbox"/> Judgment NOV</td> </tr> <tr> <td></td> <td><input type="checkbox"/> Directed verdict</td> </tr> <tr> <td></td> <td><input type="checkbox"/> Other (specify):</td> </tr> </table>	<input type="checkbox"/> Default judgment	<input type="checkbox"/> Dismissal/other jurisdiction	<input type="checkbox"/> Dismissal/FRCP 12(b)(1) lack of subject matter juris.	<input type="checkbox"/> Dismissal/merit	<input type="checkbox"/> Dismissal/FRCP 12(b)(6) failure to state a claim	<input checked="" type="checkbox"/> Judgment / Decision of the Court	<input type="checkbox"/> Dismissal/28 U.S.C. § 1915(e)(2) frivolous complaint	<input type="checkbox"/> Summary judgment	<input type="checkbox"/> Dismissal/28 U.S.C. § 1915(e)(2) other dismissal	<input type="checkbox"/> Declaratory judgment		<input type="checkbox"/> Jury verdict		<input type="checkbox"/> Judgment NOV		<input type="checkbox"/> Directed verdict		<input type="checkbox"/> Other (specify):	<p>3. <u>Relief</u></p> <table style="width:100%;"> <tr> <td><input type="checkbox"/> Damages:</td> <td><input type="checkbox"/> Injunctions:</td> </tr> <tr> <td><input type="checkbox"/> Sought: \$ _____</td> <td><input type="checkbox"/> Preliminary</td> </tr> <tr> <td><input type="checkbox"/> Granted: \$ _____</td> <td><input type="checkbox"/> Permanent</td> </tr> <tr> <td><input type="checkbox"/> Denied: \$ _____</td> <td><input type="checkbox"/> Denied</td> </tr> </table> <p style="text-align: center; font-weight: bold;">Petition to enforce CID granted</p>	<input type="checkbox"/> Damages:	<input type="checkbox"/> Injunctions:	<input type="checkbox"/> Sought: \$ _____	<input type="checkbox"/> Preliminary	<input type="checkbox"/> Granted: \$ _____	<input type="checkbox"/> Permanent	<input type="checkbox"/> Denied: \$ _____	<input type="checkbox"/> Denied
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<input type="checkbox"/> Denied: \$ _____	<input type="checkbox"/> Denied																											

PART C: NATURE OF SUIT (Check as many as apply)

<p>1. <u>Federal Statutes</u></p> <table style="width:100%;"> <tr> <td><input type="checkbox"/> Antitrust</td> <td><input type="checkbox"/> Communications</td> <td><input type="checkbox"/> Freedom of Information Act</td> </tr> <tr> <td><input type="checkbox"/> Bankruptcy</td> <td><input type="checkbox"/> Consumer Protection</td> <td><input type="checkbox"/> Immigration</td> </tr> <tr> <td><input type="checkbox"/> Banks/Banking</td> <td><input type="checkbox"/> Copyright <input type="checkbox"/> Patent</td> <td><input type="checkbox"/> Labor</td> </tr> <tr> <td><input type="checkbox"/> Civil Rights</td> <td><input type="checkbox"/> Trademark</td> <td><input type="checkbox"/> OSHA</td> </tr> <tr> <td><input type="checkbox"/> Commerce</td> <td><input type="checkbox"/> Election</td> <td><input type="checkbox"/> Securities</td> </tr> <tr> <td><input type="checkbox"/> Energy</td> <td><input type="checkbox"/> Soc. Security</td> <td><input type="checkbox"/> Tax</td> </tr> <tr> <td><input type="checkbox"/> Commodities</td> <td><input type="checkbox"/> Environmental</td> <td></td> </tr> <tr> <td colspan="3"><input checked="" type="checkbox"/> Other (specify): <u>Dodd-Frank Act, Title X</u></td> </tr> </table>	<input type="checkbox"/> Antitrust	<input type="checkbox"/> Communications	<input type="checkbox"/> Freedom of Information Act	<input type="checkbox"/> Bankruptcy	<input type="checkbox"/> Consumer Protection	<input type="checkbox"/> Immigration	<input type="checkbox"/> Banks/Banking	<input type="checkbox"/> Copyright <input type="checkbox"/> Patent	<input type="checkbox"/> Labor	<input type="checkbox"/> Civil Rights	<input type="checkbox"/> Trademark	<input type="checkbox"/> OSHA	<input type="checkbox"/> Commerce	<input type="checkbox"/> Election	<input type="checkbox"/> Securities	<input type="checkbox"/> Energy	<input type="checkbox"/> Soc. Security	<input type="checkbox"/> Tax	<input type="checkbox"/> Commodities	<input type="checkbox"/> Environmental		<input checked="" type="checkbox"/> Other (specify): <u>Dodd-Frank Act, Title X</u>			<p>2. <u>Torts</u></p> <input type="checkbox"/> Admiralty/ Maritime <input type="checkbox"/> Assault / Defamation <input type="checkbox"/> FELA <input type="checkbox"/> Products Liability <input type="checkbox"/> Other (Specify):	<p>3. <u>Contracts</u></p> <input type="checkbox"/> Admiralty/ Maritime <input type="checkbox"/> Arbitration <input type="checkbox"/> Commercial <input type="checkbox"/> Employment <input type="checkbox"/> Insurance <input type="checkbox"/> Negotiable Instruments <input type="checkbox"/> Other Specify	<p>4. <u>Prisoner Petitions</u></p> <input type="checkbox"/> Civil Rights <input type="checkbox"/> Habeas Corpus <input type="checkbox"/> Mandamus <input type="checkbox"/> Parole <input type="checkbox"/> Vacate Sentence <input type="checkbox"/> Other
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<p>5. <u>Other</u></p> <input type="checkbox"/> Hague Int'l Child Custody Conv. <input type="checkbox"/> Forfeiture/Penalty <input type="checkbox"/> Real Property <input type="checkbox"/> Treaty (specify): _____ <input type="checkbox"/> Other (specify): _____	<p>6. <u>General</u></p> <input type="checkbox"/> Arbitration <input type="checkbox"/> Attorney Disqualification <input type="checkbox"/> Class Action <input type="checkbox"/> Counsel Fees <input type="checkbox"/> Shareholder Derivative <input type="checkbox"/> Transfer	<p>7. Will appeal raise constitutional issue(s)?</p> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Will appeal raise a matter of first impression? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No																									

1. Is any matter relative to this appeal still pending below? <input type="checkbox"/> Yes, specify: _____ <input checked="" type="checkbox"/> No	
2. To your knowledge, is there any case presently pending or about to be brought before this Court or another court or administrative agency which:	
(A) Arises from substantially the same case or controversy as this appeal?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
(B) Involves an issue that is substantially similar or related to an issue in this appeal?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
If yes, state whether <input type="checkbox"/> "A," or <input type="checkbox"/> "B," or <input type="checkbox"/> both are applicable, and provide in the spaces below the following information on the <i>other</i> action(s):	
Case Name:	Docket No. Citation: Court or Agency:
Name of Appellant: <u>Law Offices of Crystal Moroney, P.C.</u>	
Date: <u>October 21, 2020</u>	Signature of Counsel of Record: 

NOTICE TO COUNSEL

Once you have filed your Notice of Appeal with the District Court or the Tax Court, you have only 14 days in which to complete the following important steps:

1. Complete this Civil Appeal Pre-Argument Statement (Form C); serve it upon all parties, and file it with the Clerk of the Second Circuit in accordance with LR 25.1.
2. File the Court of Appeals Transcript Information/Civil Appeal Form (Form D) with the Clerk of the Second Circuit in accordance with LR 25.1.
3. Pay the \$505 docketing fee to the United States District Court or the \$500 docketing fee to the United States Tax Court unless you are authorized to prosecute the appeal without payment.

PLEASE NOTE: IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN 14 DAYS, YOUR APPEAL WILL BE DISMISSED. SEE LOCAL RULE 12.1.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
CIVIL APPEAL PRE-ARGUMENT STATEMENT (FORM C)

ADDENDUM A

1. Brief Description of the Nature of the Action

Petitioner Consumer Financial Protection Bureau (CFPB) petitioned to enforce its November 14, 2019 civil investigative demand (CID), issued to Respondent Law Offices of Crystal Moroney, P.C., in the District Court for the Southern District of New York (White Plains Division). The CID seeks documents and information related to an investigation into whether the Respondent (1) disregarded consumer warnings that debts were the result of identity theft or otherwise disregarded disputed debt in a manner that was “unfair, deceptive, or abusive;” (2) ignored consumer cease-and-desist requests or engaged in prohibited communications with consumers or third parties, or failed to provide required notices, or made false or misleading representations; or (3) failed to correct and update furnished information or failed to maintain reasonable policies and procedures. *See* Am. Pet. to Enforce CID, S.D.N.Y. Case No. 7:20-cv-3240, ECF No. 6, ¶ 8 (Apr. 27, 2020).

Respondent sought dismissal of the enforcement proceeding on three principal grounds: (1) Title X of the Dodd-Frank Act is unconstitutional because it violates the appropriations and vesting clauses Article I of the United States Constitution; (2) the CFPB Director’s post-*Seila Law*¹ ratification of the November 2019 CID and pertinent regulations and guidance was ineffectual; and (3) the November 2019 CID is unreasonable because it is not relevant to a legitimate CFPB purpose, some of the information sought is duplicative of a prior CID and already within CFPB’s possession, and CFPB has not followed the required the administrative

¹ In *Seila Law LLC v. CFPB*, the Supreme Court held that CFPB’s Director was unconstitutionally insulated from removal. *Seila Law LLC v. CFPB*, ___ U.S. ___, 140 S. Ct. 2183, 2202 (June 29, 2020) (“[T]he CFPB’s single-Director configuration is incompatible with our constitutional structure.”).

steps in its investigation.² *See generally*, Resp. to Order to Show Cause, S.D.N.Y. Case No. 7:20-cv-3240, ECF No. 19 (July 15, 2020).

2. Result in the District Court for the Southern District of New York

The District Court ordered enforcement of the November 2019 CID. Show Cause Hr'g Tr. at 78 (Aug. 18, 2020). The court held that: (1) Title X does not violate the appropriations and vesting clauses in the Constitution (*Id.* at 53-58); (2) the CFPB Director validly ratified the Petition to Enforce the November 2019 CID (*Id.* at 58-72); (3) Petitioner made a *prima facie* showing that the November 2019 CID is reasonable (*Id.* at 72-78).³

3. Notice of Appeal and Current Southern District of New York Docket Sheet

A copy of Appellant Law Offices of Crystal Moroney, P.C. Notice of Appeal, filed October 7, 2020 in the District Court for the Southern District of New York, and a current copy of the District Court docket sheet, are attached as Exhibit A and B, respectively.

4. Order Forming Basis for Appeal

The basis for this appeal is the District Court's decision issued from the bench at the August 18, 2020 Show Cause Hearing. The hearing transcript is attached as Exhibit C.

² Respondent also asked the court below to deny enforcement of the November CID because a required party had not been joined to the action, but Respondent did not seek dismissal of the enforcement action on this ground.

³ Regarding Respondent's joinder argument not seeking dismissal, the District Court also ruled that Fed. R. Civ. P. 19 is not applicable to enforcement proceedings. Show Cause Hr'g Tr. at 78.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
CIVIL APPEAL PRE-ARGUMENT STATEMENT (FORM C)

ADDENDUM B

List of Issues Proposed to be Raised on Appeal and Their Standard of Review

- Issue 1:** Whether the District Court erred in holding that CFPB's funding structure does not violate the appropriations and vesting clauses of Article I of the United States Constitution, and consequently, the Nondelegation Doctrine. This issue should be reviewed *de novo*, as the District Court's conclusions interpreted one or more federal statutes and constitutional provisions to determine the constitutionality of CFPB's funding structure. *United States v. Weingarten*, 632 F.3d 60, 63 (2d Cir. 2011).
- Issue 2:** Whether the District Court erred in holding that the CFPB Director's purported ratification of her own prior unlawful actions cured their inherent defects. This issue should be reviewed *de novo*, as the District Court's conclusions interpreted the validity a federal agency Director's actions, who occupied an unconstitutional office when she acted in the first instance. *Id.*
- Issue 3:** Whether the District Court erred in holding that the November 2019 CID is reasonable and does not exceed CFPB's statutory authority. This issue should be reviewed *de novo*, as the District Court's conclusions interpreted one or more federal statutes to determine the CID's validity. *Id.*
- Issue 4:** Whether the District Court erred in holding that the November 2019 CID is reasonable and not overly broad or unduly burdensome. This issue should be reviewed for abuse of discretion. *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 41 (2d Cir. 2004).

EXHIBIT A:
Notice of Appeal

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BUREAU OF CONSUMER
FINANCIAL PROTECTION,

Petitioner-Appellee,

v.

LAW OFFICES OF CRYSTAL
MORONEY, P.C.,

Respondent-Appellant.

Case No. 7:20-cv-03240-KMK

NOTICE OF APPEAL

Notice is hereby given that Respondent Law Offices of Crystal Moroney, P.C. appeals to the United States Court of Appeals for the Second Circuit from this Court's Order granting Petitioner's Petition to Enforce the Civil Investigative Demand, entered August 19, 2020 (ECF No. 29).

Respectfully submitted,



Dated: October 7, 2020

Michael P. DeGrandis, *pro hac vice*
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
tel.: (202) 869-5210
mike.degrandis@ncla.legal

*Counsel to Respondent-Appellant
Law Offices of Crystal Moroney, P.C.*

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2020, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's CM/ECF system upon all counsel of record in the above-captioned case. A courtesy copy will also be e-mailed to the Petitioner-Appellee.



Michael P. DeGrandis

EXHIBIT B:
Current District Court Docket Sheet

APPEAL,ECF,RELATED

**U.S. District Court
Southern District of New York (White Plains)
CIVIL DOCKET FOR CASE #: 7:20-cv-03240-KMK**

Bureau of Consumer Financial Protection v. Law Offices of
Crystal Moroney, P.C.

Assigned to: Judge Kenneth M. Karas

Related Case: 7:19-cv-11594-KMK

Cause: 15:1692 Fair Debt Collection Act

Petitioner

**Bureau of Consumer Financial
Protection**

represented by **Jehan A. Patterson**
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
202-435-7264
Email: jehan.patterson@cfpb.gov
ATTORNEY TO BE NOTICED

Kevin E. Friedl
Consumer Financial Protection Bureau
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Washington, DC 20552
202-435-9268
Email: kevin.friedl@cfpb.gov
ATTORNEY TO BE NOTICED

Elisabeth Vanessa Assae-Bille
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
(202)-435-7688
Email: elisabeth.assae-bille@cfpb.gov
ATTORNEY TO BE NOTICED

V.

Respondent

Law Offices of Crystal Moroney, P.C.

represented by **Michael P DeGrandis**
New Civil Liberties Alliance
1225 19th St. NW
Suite 450
Washington, DC 20036
202-869-5208
Email: mike.degrandis@ncla.legal
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
04/24/2020	<u>1</u>	PETITION TO ENFORCE CIVIL INVESTIGATIVE DEMAND..Document filed by Bureau of Consumer Financial Protection. (Attachments: # <u>1</u> Memorandum in Support of Petition to Enforce Civil Investigative Demand, # <u>2</u> Declaration of E. Vanessa Assae-Bille in Support of Petition to Enforce Civil Investigative Demand, # <u>3</u> Exhibit A, # <u>4</u> Exhibit B, # <u>5</u> Exhibit C, # <u>6</u> Exhibit D, # <u>7</u> Exhibit E, # <u>8</u> Exhibit F, # <u>9</u> Text of Proposed Order to Show Cause).(Assae-Bille, Elisabeth) (Entered: 04/24/2020)
04/24/2020	<u>2</u>	FILING ERROR – PDF ERROR – CIVIL COVER SHEET filed. (Attachments: # <u>1</u> Related Case Statement).(Assae-Bille, Elisabeth) Modified on 4/27/2020 (jgo). (Entered: 04/24/2020)

04/24/2020	<u>3</u>	MOTION for Elisabeth Vanessa Assae-Bille to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by Bureau of Consumer Financial Protection. (Attachments: # <u>1</u> Affidavit of E. Vanessa Assae-Bille for Admission Pro Hac Vice, # <u>2</u> Certificate of Good Standing, # <u>3</u> Text of Proposed Order for Admission Pro Hac Vice).(Assae-Bille, Elisabeth) (Entered: 04/24/2020)
04/24/2020	<u>4</u>	NOTICE OF APPEARANCE by Jehan A. Patterson on behalf of Bureau of Consumer Financial Protection..(Patterson, Jehan) (Entered: 04/24/2020)
04/24/2020		>>> NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. <u>3</u> MOTION for Elisabeth Vanessa Assae-Bille to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (laq) (Entered: 04/24/2020)
04/24/2020	<u>5</u>	BRIEF re: <u>1</u> Petition (Other), <i>to Enforce Civil Investigative Demand (Memorandum in Support)</i> . Document filed by Bureau of Consumer Financial Protection..(Assae-Bille, Elisabeth) (Entered: 04/24/2020)
04/27/2020		***NOTICE TO ATTORNEY REGARDING DEFICIENT CIVIL COVER SHEET. Notice to attorney Elisabeth Vanessa Assae-Bille to RE-FILE Document No. <u>2</u> Civil Cover Sheet. The filing is deficient for the following reason(s): the PDF was not signed by the attorney;. Re-file the document using the event type Civil Cover Sheet found under the event list Other Documents and attach the correct PDF. Use civil cover sheet issued by S.D.N.Y. dated June 2017. The S.D.N.Y. Civil Cover Sheet dated June 2017 is located at http://nysd.uscourts.gov/file/forms/civil-cover-sheet.. (jgo) (Entered: 04/27/2020)
04/27/2020		***NOTICE TO ATTORNEY TO ELECTRONICALLY FILE RELATED CASE STATEMENT. Notice to Attorney Elisabeth Vanessa Assae-Bille, for non compliance with Local Rule 13 of the Division of Business Among Judges. Attorney must electronically file the Related Case Statement separately. Use the event type Statement of Relatedness found under the event list Other Documents. (jgo) (Entered: 04/27/2020)
04/27/2020		CASE OPENING INITIAL ASSIGNMENT NOTICE: The above-entitled action is assigned to Judge Unassigned. .(jgo) (Entered: 04/27/2020)
04/27/2020		Case Designated ECF. (jgo) (Entered: 04/27/2020)
04/27/2020		CASE REFERRED TO Judge Kenneth M. Karas as possibly related to 19-cv-11594. (jgo) (Entered: 04/27/2020)
04/27/2020	<u>6</u>	AMENDED PETITION amending <u>1</u> Petition (Other), against Law Offices of Crystal Moroney, P.C..Document filed by Bureau of Consumer Financial Protection. Related document: <u>1</u> Petition (Other).. (Attachments: # <u>1</u> Memorandum in Support of Amended Petition to Enforce Civil Investigative Demand, # <u>2</u> Declaration of E. Vanessa Assae-Bille in Support of Amended Petition to Enforce Civil Investigative Demand, # <u>3</u> Exhibit A, # <u>4</u> Exhibit B, # <u>5</u> Exhibit C, # <u>6</u> Exhibit D, # <u>7</u> Exhibit E, # <u>8</u> Exhibit F).(Assae-Bille, Elisabeth) (Entered: 04/27/2020)
04/27/2020	<u>7</u>	PROPOSED ORDER TO SHOW CAUSE WITHOUT EMERGENCY RELIEF. Document filed by Bureau of Consumer Financial Protection. Related Document Number: [ECF 6]..(Assae-Bille, Elisabeth) Proposed Order to Show Cause to be reviewed by Clerk's Office staff. (Entered: 04/27/2020)
04/27/2020	<u>8</u>	CIVIL COVER SHEET filed..(Assae-Bille, Elisabeth) (Entered: 04/27/2020)
04/27/2020	<u>9</u>	STATEMENT OF RELATEDNESS re: that this action be filed as related to 7:19-cv-11594-KMK. Document filed by Bureau of Consumer Financial Protection..(Assae-Bille, Elisabeth) (Entered: 04/27/2020)
05/13/2020		CASE ACCEPTED AS RELATED. Create association to 7:19-cv-11594-KMK. Notice of Assignment to follow. (ad) (Entered: 05/13/2020)
05/13/2020		Magistrate Judge Lisa M. Smith is so designated. Pursuant to 28 U.S.C. Section 636(c) and Fed. R. Civ. P. 73(b)(1) parties are notified that they may consent to proceed before a United States Magistrate Judge. Parties who wish to consent may access the

		necessary form at the following link: https://nysd.uscourts.gov/sites/default/files/2018-06/AO-3.pdf . (ad) (Entered: 05/13/2020)
05/13/2020		NOTICE OF CASE REASSIGNMENT to Judge Kenneth M. Karas. Judge Unassigned is no longer assigned to the case. (ad) (Entered: 05/13/2020)
05/13/2020		***NOTICE TO COURT REGARDING PROPOSED ORDER TO SHOW CAUSE WITHOUT EMERGENCY RELIEF. Document No. 7 Proposed Order to Show Cause Without Emergency Relief, was reviewed and approved as to form. (dt) (Entered: 05/13/2020)
05/13/2020	<u>10</u>	ORDER TO SHOW CAUSE: IT IS HEREBY ORDERED that on July 16, 2020, at 11:30 a.m. or as soon thereafter as the parties can be heard, the Respondent shall appear before the Honorable Kenneth M. Karas United States District Judge, in Courtroom 521, located at 300 Quarropas Street, White Plains, NY, to show cause, if there be any, why an Order Compelling Compliance with CID should not be granted in accordance with the Petition filed by the Bureau. IT IS FURTHER ORDERED that: A copy of this Order, together with the petition and its exhibits, shall be served in accordance with Rule 4.1(a) of the Federal Rules of Civil Procedure and 12 U.S.C. § 5562(e)(2) upon Respondent within 14 days of the date that this Order is served upon counsel for the Bureau. Proof of service must be made to the Court pursuant to Rule 4(l) unless Respondent has waived service. Pursuant to Rule 4.1(a), the Court hereby appoints E. Vanessa Assae-Bille, or any other person designated by the Bureau, to effect service in this case. Proof of service completed pursuant to paragraph 1, above, shall be filed with the Clerk as soon as practicable. (And as further set forth herein.) Show Cause Hearing set for 7/16/2020 at 11:30 AM in Courtroom 521, 300 Quarropas Street, White Plains, NY 10601 before Judge Kenneth M. Karas. (Signed by Judge Kenneth M. Karas on 5/13/2020) (jca) (Entered: 05/13/2020)
05/26/2020	<u>11</u>	WAIVER OF SERVICE RETURNED EXECUTED. Law Offices of Crystal Moroney, P.C. waiver sent on 5/15/2020. Document filed by Bureau of Consumer Financial Protection..(Patterson, Jehan) (Entered: 05/26/2020)
06/09/2020	<u>12</u>	FIRST LETTER MOTION to Consolidate Cases 7:19-cv-11594, 7:20-cv-03240 addressed to Judge Kenneth M. Karas from DeGrandis dated 06/09/2020., FIRST LETTER MOTION to Stay addressed to Judge Kenneth M. Karas from DeGrandis dated 06/09/2020., FIRST LETTER MOTION to Expedite addressed to Judge Kenneth M. Karas from DeGrandis dated 06/09/2020. Document filed by Law Offices of Crystal Moroney, P.C.. (Attachments: # <u>1</u> Exhibit Unreported 2020 SDNY Case, # <u>2</u> Exhibit Unreported 2001 SDNY Case).(DeGrandis, Michael) (Entered: 06/09/2020)
06/09/2020	<u>13</u>	ORDER with respect to <u>12</u> Letter Motion to Consolidate Cases; with respect to <u>12</u> Letter Motion to Stay; with respect to <u>12</u> Letter Motion to Expedite. The Bureau is to respond to this letter by 6/11/20. In submitting its response, the Bureau should know that the Court is inclined to consolidate and stay this case along the lines suggested by Plaintiff. So Ordered. (Signed by Judge Kenneth M. Karas on 6/9/2020) (jca) (Entered: 06/09/2020)
06/09/2020		Set/Reset Deadlines: Responses due by 6/11/2020 (jca) (Entered: 06/09/2020)
06/10/2020	<u>14</u>	MOTION for Kevin E. Friedl to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by Bureau of Consumer Financial Protection. (Attachments: # <u>1</u> Affidavit, # <u>2</u> Text of Proposed Order, # <u>3</u> Certificate of Good Standing).(Friedl, Kevin) (Entered: 06/10/2020)
06/10/2020		>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 14 MOTION for Kevin E. Friedl to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (ad) (Entered: 06/11/2020)
06/11/2020	<u>15</u>	ORDER FOR ADMISSION PRO HAC VICE granting <u>14</u> Motion for Kevin E. Friedl to Appear Pro Hac Vice. (Signed by Judge Kenneth M. Karas on 6/11/2020) (rj) (Entered: 06/11/2020)
06/11/2020	<u>16</u>	LETTER RESPONSE to Motion addressed to Judge Kenneth M. Karas from Kevin E. Friedl dated June 11, 2020 re: <u>12</u> FIRST LETTER MOTION to Consolidate Cases

		7:19-cv-11594, 7:20-cv-03240 addressed to Judge Kenneth M. Karas from DeGrandis dated 06/09/2020.FIRST LETTER MOTION to Stay addressed to Judge Kenneth M. Karas from DeGrandis dated 06/09/2020.FIRST LETTER MOTION to Expedite addressed to Judge Kenneth M. Karas from DeGrandis dated 06/09/2020. . Document filed by Bureau of Consumer Financial Protection..(Friedl, Kevin) (Entered: 06/11/2020)
06/12/2020	<u>17</u>	ORDER denying <u>12</u> Letter Motion to Consolidate Cases; denying <u>12</u> Letter Motion to Stay; denying <u>12</u> Letter Motion to Expedite. The Court agrees with the Bureau that a stay in both cases, to be followed by a scheduling conference, is unnecessary. Instead, the Court will adjust the briefing schedule in the enforcement proceeding. Ms. Moroney's opposition is due by no later than July 15, 2020, and the CFPB's response is due by no later than July 29, 2020. Oral argument will be held on August 18, 2020 at 2:00 p.m. In the meantime, the Court will grant Ms. Moroney's request for a stay in her case (No. 19-CV-11594) until the Bureau's Petition is resolved to avoid any duplication of efforts, and because any decision on the CID may affect claims brought by Ms. Moroney. The Court will determine any renewed request for consolidation thereafter. SO ORDERED. (Signed by Judge Kenneth M. Karas on 6/12/2020) (jca) (Entered: 06/12/2020)
06/12/2020		Set/Reset Hearings: Oral Argument set for 8/18/2020 at 02:00 PM before Judge Kenneth M. Karas. (jca) (Entered: 06/12/2020)
07/02/2020	<u>18</u>	NOTICE of Ratification. Document filed by Bureau of Consumer Financial Protection. (Attachments: # <u>1</u> Declaration of Ratification).(Friedl, Kevin) (Entered: 07/02/2020)
07/15/2020	<u>19</u>	RESPONSE in Opposition to Motion re: <u>12</u> FIRST LETTER MOTION to Consolidate Cases 7:19-cv-11594, 7:20-cv-03240 addressed to Judge Kenneth M. Karas from DeGrandis dated 06/09/2020.FIRST LETTER MOTION to Stay addressed to Judge Kenneth M. Karas from DeGrandis dated 06/09/2020.FIRST LETTER MOTION to Expedite addressed to Judge Kenneth M. Karas from DeGrandis dated 06/09/2020. <i>Response to Order to Show Cause</i> . Document filed by Law Offices of Crystal Moroney, P.C.. (Attachments: # <u>1</u> Exhibit Seila Law LLC v. CFPB, # <u>2</u> Exhibit Feb. 2, 2020 Decision and Order (Second CID), # <u>3</u> Exhibit Oct. 2, 2017 Schedule of Withheld Documents, # <u>4</u> Exhibit Mar. 12, 2020 Follett CID Response, # <u>5</u> Exhibit June 9, 2020 Petition to Enforce FedChex).(DeGrandis, Michael) (Entered: 07/15/2020)
07/16/2020	<u>20</u>	MEMO ENDORSEMENT on re: <u>19</u> Response in Opposition to Motion,,, filed by Law Offices of Crystal Moroney, P.C. ENDORSEMENT:This Opposition exceeds the 25-page limit set forth in the Court's individual rules, and is therefore rejected. It appears from the docket that Respondent has not submitted a prior request to exceed the 25-page limit. SO ORDERED. (Signed by Judge Kenneth M. Karas on 7/16/2020) (jca) (Entered: 07/16/2020)
07/16/2020	<u>21</u>	FIRST LETTER MOTION for Leave to File Excess Pages addressed to Judge Kenneth M. Karas from Michael DeGrandis dated 07/16/2020. Document filed by Law Offices of Crystal Moroney, P.C...(DeGrandis, Michael) (Entered: 07/16/2020)
07/17/2020	<u>22</u>	ORDER granting <u>21</u> Letter Motion for Leave to File Excess Pages. Granted. SO ORDERED. (Signed by Judge Kenneth M. Karas on 7/16/2020) (jca) (Entered: 07/17/2020)
07/23/2020	<u>23</u>	CONSENT LETTER MOTION for Leave to File Excess Pages addressed to Judge Kenneth M. Karas from Jehan A. Patterson dated 07/23/2020. Document filed by Bureau of Consumer Financial Protection..(Patterson, Jehan) (Entered: 07/23/2020)
07/23/2020	<u>24</u>	ORDER granting <u>23</u> Letter Motion for Leave to File Excess Pages. Granted. SO ORDERED. (Signed by Judge Kenneth M. Karas on 7/23/2020) (jca) (Entered: 07/23/2020)
07/29/2020	<u>25</u>	REPLY re: <u>19</u> Response in Opposition to Motion,,, . Document filed by Bureau of Consumer Financial Protection. (Attachments: # <u>1</u> Affidavit Second Assae-Bille Declaration).(Assae-Bille, Elisabeth) (Entered: 07/29/2020)
08/13/2020	<u>26</u>	FILING ERROR – WRONG EVENT TYPE SELECTED FROM MENU – MOTION for two attorneys to present argument on behalf of Petitioner at Order to

		Show Cause hearing . Document filed by Bureau of Consumer Financial Protection..(Patterson, Jehan) Modified on 8/18/2020 (lb). (Entered: 08/13/2020)
08/14/2020	<u>27</u>	MEMO ENDORSEMENT granting <u>26</u> MOTION for two attorneys to present argument on behalf of Petitioner at Order to Show Cause hearing. ENDORSEMENT: Granted. SO ORDERED. (Signed by Judge Kenneth M. Karas on 8/14/2020) (jca) (Entered: 08/14/2020)
08/14/2020	<u>28</u>	NOTICE OF TELECONFERENCE INFORMATION: For the week of August 17, 2020, the Court will hold all civil conferences, hearings, and/or oral arguments by telephone. Counsel shall call the following number at the designated time: Meeting Dial-In Number (USA toll-free): (888) 363-4749 Access Code: 7702195. Please enter the conference as a guest by pressing the pound sign (#). Given that much of the Court is operating remotely and has limited mail capability, counsel involved in any pro se cases shall mail a copy of this Notice to or otherwise inform the pro se party of the above teleconference information. Counsel in any pro se inmate cases shall ensure that the pro se party is on the line before calling the above-referenced number. For initial conferences, counsel shall submit a proposed case management and discovery schedule via ECF by 5 p.m. on the evening before the initial conference. Any requests for adjournments should be filed as soon as possible and clearly explain why the conference should be adjourned. SO ORDERED. (Signed by Judge Kenneth M. Karas on 8/14/2020) (jca) (Entered: 08/14/2020)
08/14/2020		Set/Reset Hearings: Telephone Conference set for 8/18/2020 at 02:00 PM before Judge Kenneth M. Karas. (jca) (Entered: 08/14/2020)
08/18/2020		Minute Entry for proceedings held before Judge Kenneth M. Karas: Oral Argument held via teleconference on 8/18/2020. Kevin E. Friedl, Jehan A. Patterson, and E. Vanessa Assae-Bille appeared on behalf of Petitioner. Michael P. DeGrandis and Jared McLain appeared on behalf of Respondent. Angela O'Donnell served as court reporter. Oral arguments were made on Petitioner's Petition to Enforce the Civil Investigative Demand. (Dkt. No. 6.) The Petition is granted for the reasons stated on the record. (See Order.) The Parties may request a transcript of the record. (BKJ) (Entered: 08/19/2020)
08/19/2020	<u>29</u>	ORDER: For the reasons stated on the record at the Oral Argument on August 18, 2020, the Court grants Petitioner's Petition to Enforce the Civil Investigative Demand, (Dkt. No. 6). SO ORDERED. (Signed by Judge Kenneth M. Karas on 8/19/2020) (jca) (Entered: 08/19/2020)
09/04/2020	<u>30</u>	FIRST LETTER MOTION to Stay <i>Pending Appeal</i> addressed to Judge Kenneth M. Karas from DeGrandis dated 09/04/2020. Document filed by Law Offices of Crystal Moroney, P.C...(DeGrandis, Michael) (Entered: 09/04/2020)
09/08/2020	<u>31</u>	LETTER RESPONSE in Opposition to Motion addressed to Judge Kenneth M. Karas from Kevin E. Friedl dated Sept. 8, 2020 re: <u>30</u> FIRST LETTER MOTION to Stay <i>Pending Appeal</i> addressed to Judge Kenneth M. Karas from DeGrandis dated 09/04/2020. . Document filed by Bureau of Consumer Financial Protection. (Attachments: # <u>1</u> CFPB v Chou Team Realty LLC, No. 20-cv-00043 (C.D. Cal. Aug. 21, 2020)).(Friedl, Kevin) (Entered: 09/08/2020)
09/08/2020	<u>32</u>	ORDER with respect to <u>30</u> FIRST LETTER MOTION to Stay Pending Appeal. CFPB is to respond to this letter by 9/15/20. SO ORDERED. (Signed by Judge Kenneth M. Karas on 9/8/2020) (jca) (Entered: 09/08/2020)
09/08/2020		Set/Reset Deadlines: Responses due by 9/15/2020 (jca) (Entered: 09/08/2020)
09/11/2020	<u>33</u>	ORDER terminating <u>30</u> FIRST LETTER MOTION to Stay Pending Appeal. Respondent is to file the Motion To Stay by no later than September 18, 2020. The CFPB is to file a Response by no later than September 24, 2020. SO ORDERED. (Signed by Judge Kenneth M. Karas on 9/11/2020) (jca) (Entered: 09/11/2020)
09/11/2020		Set/Reset Deadlines: Motions due by 9/18/2020. Responses due by 9/24/2020 (jca) (Entered: 09/11/2020)
09/18/2020	<u>34</u>	FIRST MOTION to Stay <i>Pending Appeal</i> . Document filed by Law Offices of Crystal Moroney, P.C.. (Attachments: # <u>1</u> Supplement Memorandum in Support, # <u>2</u> Exhibit Ex A Affidavit, # <u>3</u> Exhibit Ex B 8/24/20 Email, # <u>4</u> Exhibit Ex C Unpublished

		Opinion, # <u>5</u> Exhibit Ex D Show Cause Hearing Transcript, # <u>6</u> Exhibit Ex E 2/11/20 Decision & Order, # <u>7</u> Exhibit Ex F Proposed Order to Stay).(DeGrandis, Michael) (Entered: 09/18/2020)
09/24/2020	<u>35</u>	RESPONSE in Opposition to Motion re: <u>34</u> FIRST MOTION to Stay <i>Pending Appeal</i> . . Document filed by Bureau of Consumer Financial Protection..(Friedl, Kevin) (Entered: 09/24/2020)
10/01/2020	<u>36</u>	ORDER FOR ADMISSION PRO HAC VICE granting <u>3</u> MOTION for Elisabeth Vanessa Assae-Bille to Appear Pro Hac Vice. (Signed by Judge Kenneth M. Karas on 10/1/2020) (jca) (Entered: 10/01/2020)
10/07/2020	<u>37</u>	FILING ERROR – NO ORDER SELECTED FOR APPEAL – FIRST NOTICE OF APPEAL. Document filed by Law Offices of Crystal Moroney, P.C.. Filing fee \$ 505.00, receipt number ANYSDC–22018813. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit..(DeGrandis, Michael) Modified on 10/7/2020 (nd). (Entered: 10/07/2020)
10/07/2020		***NOTICE TO ATTORNEY REGARDING DEFICIENT APPEAL. Notice to attorney DeGrandis, Michael to RE-FILE Document No. <u>37</u> Notice of Appeal.. The filing is deficient for the following reason(s): the order/judgment being appealed was not selected;. Re-file the appeal using the event type Corrected Notice of Appeal found under the event list Appeal Documents – attach the correct signed PDF – select the correct named filer/filers – select the correct order/judgment being appealed. (nd) (Entered: 10/07/2020)
10/07/2020	<u>38</u>	FIRST NOTICE OF APPEAL from <u>29</u> Order,. Document filed by Law Offices of Crystal Moroney, P.C.. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit..(DeGrandis, Michael) (Entered: 10/07/2020)
10/07/2020		Appeal Fee Paid electronically via Pay.gov: for <u>38</u> Notice of Appeal. Filing fee \$ 505.00. Pay.gov receipt number ANYSDC–22018813, paid on 10/7/2020. (tp) (Entered: 10/07/2020)
10/07/2020		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: <u>38</u> Notice of Appeal. (tp) (Entered: 10/07/2020)
10/07/2020		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for <u>38</u> Notice of Appeal filed by Law Offices of Crystal Moroney, P.C. were transmitted to the U.S. Court of Appeals. (tp) (Entered: 10/07/2020)
10/20/2020		NOTICE OF REDESIGNATION TO ANOTHER MAGISTRATE JUDGE. The above entitled action has been redesignated to Magistrate Judge Andrew E. Krause. Please note that this is a reassignment of the designation only. (ad) (Entered: 10/20/2020)

EXHIBIT C:

Show Cause Hearing Transcript (Aug. 18, 2020)

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 BUREAU OF CONSUMER FINANCIAL,

4 Petitioner,

5 -against- 20 Civ. 3240 (KMK)

6 LAW OFFICES of CRYSTAL MORONEY,

7 Respondent.

8 -----x

9 United States Courthouse
10 White Plains, New York

11 August 18, 2020

12
13 HONORABLE KENNETH M. KARAS,
14 District Court Judge

15
16 CONSUMER FINANCIAL PROTECTION BUREAU
17 Attorneys for Petitioner
18 1700 G Street NW
19 Washington, DC 20552

20 BY: E. VANESSA ASSAE-BILLE
21 KEVIN E. FRIEDL
22 JEHAN A. PATTERSON

23 NEW CIVIL LIBERTIES ALLIANCE
24 Attorneys for Respondent
25 1225 19th Street NW Suite 450
Washington, DC 20036

BY: MICHAEL P. DeGRANDIS
JARED McCLAIN

1 THE CLERK: Consumer Financial Protection versus Law
2 Offices of Crystal Moroney PC, 20CV3240.

3 Counsel, please state your appearances for the
4 record.

5 MS. ASSAE-BILLE: E. Vanessa Assae-Bille for CFPB.

6 MS. PATTERSON: Jehan Patterson, also for the CFPB.

7 MR. FRIEDL: And Kevin Friedl, also for the CFPB.

8 MR. DeGRANDIS: Michael DeGrandis, for Law Offices of
9 Crystal Moroney PC.

10 MR. McCLAIN: Jared McClain, also for the Law Offices
11 of Crystal Moroney PC.

12 THE COURT: All right, so we are gathered here for
13 the oral argument on the CFPB's petition to enforce its CID
14 that was issued back in November. So I have read the papers,
15 but I certainly don't want to deny anybody the opportunity to
16 supplement them. So I'll let you, CFPB, go first.

17 MS. ASSAE-BILLE: Thank you, your Honor. On behalf
18 of CFPB today I will address the issues that squarely relate to
19 the enforceability of the CID; however, my colleague, Kevin
20 Friedl, is available to answer any questions your Honor may
21 have regarding the constitutionality or ratification argument.

22 The central question before this Court is whether the
23 Bureau has met the four criteria that determine the
24 enforceability of a CID. We contend that it has.

25 First and foremost, the Bureau has a legitimate

1 purpose for conducting this investigation. As described in the
2 CFPB's notification of purpose, this investigation concerns
3 whether the respondents violated provisions of the Consumer
4 Financial Protection Act, the Fair Debt Collection Practices
5 Act, and the Fair Credit Reporting Act.

6 The CID, which we submitted as Exhibit A, is narrowly
7 focused on the company's performance of debt collection and
8 credit recording activities. For instance, it requests
9 information concerning the respondent's operations, names of
10 companies for which it collects debt, consumer disputes and
11 complaints, policies and procedures, debt-collection phone
12 scripts, and importantly, recordings of debt-collection calls
13 with consumers.

14 The CID does not, however, ask for information
15 protected by the attorney-client privilege nor does the
16 privilege automatically attach simply because the respondent is
17 a law firm. As the Second Circuit has articulated, documents
18 attain no special protection just because they are housed in a
19 law firm. On the contrary, it attaches only once the party
20 asserting it has shown that the communications at issue
21 occurred between a lawyer and their client or potential client
22 and that the communication was for the purpose of securing an
23 opinion of law, legal services, or assistance in some legal
24 proceeding. None of the Bureau's requests seek communications
25 protected by the attorney-client privilege. And in fact, the

1 only communications sought by the CID are call recordings in
2 which the respondent was collecting or attempting to collect
3 debts from consumers.

4 Now, the Bureau is subject to Section 5517 of the
5 Consumer Financial Protection Act which prohibits the Bureau
6 from exercising its enforcement authority over the practice of
7 law. We note here that the exclusion contains important
8 qualifications that we believe take this CID out of danger, so
9 to speak, but the Court need not even reach this qualification
10 because Section 5517(n) authorizes the Bureau to issue a CID to
11 any person exempted by the practice of law exclusion where the
12 person is a service provider and the Bureau is carrying out its
13 responsibilities and function under Section 5562 of the statute
14 which applies to investigation and administrative discovery.
15 That Section, 5562, authorizes the Bureau to issue a CID to any
16 person that it has reason to believe may be in possession,
17 custody, or control of evidence that is relevant to a violation
18 of Federal Consumer Financial Law. So, here the respondent is
19 a proper recipient of the CID because it is such a person.

20 Beyond demonstrating that its investigation has a
21 legitimate purpose and that the inquiry is relevant to that
22 purpose, for the CID to be enforceable, the Bureau must also
23 not have the information sought in its possession. This is
24 very much the case here. As the Court is aware, the Bureau
25 issued a CID to the respondent in June 2017, but the

1 respondent's production in response to that CID was woefully
2 deficient. For instance, as respondent concedes in its
3 opposition, it's withheld information responsive to at least 15
4 requests and some of their subparts. The privilege log that
5 the respondent submitted in response to the 2017 CID asserts
6 that the respondent withheld 569,862 phone recordings that were
7 responsive to that first CID. And in addition, respondent
8 withheld, by our count, at least 144 dispute letters from
9 consumers in part because these letters allegedly identified
10 the respondent's clients. And that's before we even get to the
11 many pages that the respondent clawed back.

12 To the extent the respondent did produce documents,
13 that production was overwhelmingly in an improper format. The
14 Bureau's regulation at 12 C.F.R. 5562 requires that responses
15 to the Bureau's CID be submitted in a medium requested by the
16 Bureau. To that end, the first CID was issued with clear and
17 detailed instructions regarding the formatting, including the
18 requirement that information be produced to the Bureau in
19 original or native files. All in all, the only document that
20 the respondent produced in the correct format was a data
21 dictionary in Excel format.

22 Furthermore, none of the 2017 production was
23 certified, and so the Bureau has no guarantee that the answers
24 or documents that were produced at the time were and continue
25 to be true and accurate.

1 Lastly, we want to stress that the two CIDs are not
2 identical. Crucially, the applicable period of the CID before
3 this Court is longer and covers a more recent span of time. In
4 other words, it seeks information that did not exist in 2017 or
5 that changed in the years since. And so it is the Bureau's
6 position that it is indeed requesting information that is not
7 in its possession.

8 Lastly, your Honor, the Bureau has followed the
9 administrative steps required to issue the CID. The CID
10 contained the proper notification of purpose that informs the
11 respondent of the purpose of the investigation, it was issued
12 by a deputy assistant director in the Office of Enforcement,
13 and it was served to the respondent by certified U.S. Mail.
14 Therefore, the four elements of enforceability are met here,
15 and the Bureau's CID should be upheld.

16 I also want to touch on the Federal Rule of Civil
17 Procedure Rule 19 argument. We believe that Rule 19 does not
18 require the joinder of FedChex in this matter. Respondent has
19 provided no case law supporting the application of Rule 19 to a
20 miscellaneous proceeding like this one to enforce an
21 administrative CID, but even if the rule applied, joinder is
22 not needed to protect FedChex's interests because, again, the
23 CID does not seek communications between the respondent and
24 FedChex or any other information protected by the
25 attorney-client privilege. And even if it did, the Second

1 Circuit has made clear that the attorney-client privilege can
2 be asserted by the client or by one authorized to do so on the
3 client's behalf. There's no reason here that respondent could
4 not assert the attorney-client privilege over communications
5 they had with FedChex, and ostensibly respondent has attempted
6 to do so, although, again, the Bureau believes that respondent
7 has ultimately failed to meet its burden.

8 For these reasons, your Honor, the Bureau believes
9 joinder is unnecessary and that this Court should enforce the
10 CID.

11 THE COURT: All right, thank you. I know you had
12 mentioned that Mr. Friedl is available to answer questions on
13 the constitutional issues.

14 I don't know, Mr. Friedl, if you want to add anything
15 to what was said in your papers on those issues or you just
16 want to be reactive.

17 MR. FRIEDL: Kevin Friedl here, your Honor. I would
18 just say something brief at the outset about the funding
19 argument and the argument concerning the ratification, and I'll
20 take them in that order, unless the Court would prefer a
21 different approach.

22 With respect to funding, the Court is, of course,
23 aware of this argument already having seen it in respondent's
24 lawsuit against the Bureau where the respondent sought a
25 preliminary injunction, essentially shutting down this

1 investigation. In denying that request, this Court
2 specifically considered the argument that the Bureau's
3 statutory method of funding somehow violated the Constitution
4 and found that there was -- excuse me, the respondent had not
5 shown any likelihood of success on the merits of that claim.

6 I would just highlight one thing which was the
7 Court's observation of the "overwhelming weight of the case law
8 which rejects plaintiff's claim." The Court cited district
9 court decisions from Central District of California, Middle
10 District of Pennsylvania, District of Montana, as well as the
11 DC Circuit sitting *en banc*, all of which looked at the Bureau's
12 funding specifically and rejected the argument that there was
13 any constitutional problem there.

14 We also cite a Third Circuit decision in our reply
15 which did not look specifically at the Bureau's statute but
16 does speak to the broader issue of Congress' flexibility in
17 exercising its power of the purse to fund in different ways
18 federal initiatives or federal agencies.

19 We submit that nothing in respondent's opposition in
20 this case warrants revisiting the Court's earlier, albeit
21 preliminary, conclusion with respect to this claim.

22 I'm happy to say more about this argument now if your
23 Honor has questions or potentially wait until after respondent
24 has had a chance to --

25 THE COURT: Yes, I don't have any questions now, so

1 if you want to turn to ratification, you can.

2 MR. FRIEDL: Okay, and I'll try to be brief with this
3 one as well. The ratification by Director Kraninger after the
4 Supreme Court held invalid but severable this removal provision
5 fully remediates any objection that respondent might have to
6 the removal provision, the ratification really confirms that
7 this removal provision has played no role in the Bureau's
8 decision to issue and seek to enforce this CID.

9 I'd just say very briefly that ratification is a
10 well-established remedy drawn from principles of agency law and
11 it works retroactively to cure defects in an agency's initial
12 action by rendering that action valid. Here, as I said,
13 respondent's objection has been that the CID was issued without
14 sufficient presidential oversight through an official who the
15 President could fire at will. That objection has now been
16 fully addressed by the director's affirmation while she was
17 removable at will that the CID should be enforced.

18 Respondent objects in its opposition that while this
19 would really leave it with no remedy at all, but that's just
20 not the case. The Supreme Court has emphasized, including in
21 the *Seila Law* decision itself where it was quoting its earlier
22 removal provision case *Free Enterprise Fund*, that in these
23 kinds of cases, the remedy has to be tailored to the
24 constitutional problem, and that here you have really a very
25 neat one-to-one match between the scope of the problem alleged

1 and the scope of the remedy. And that remedy I would point out
2 is also one that is well tailored to take into account the
3 other interests at stake here, including the interests of the
4 Bureau in pursuing its legitimate law enforcement
5 investigation, and the interests of those consumers who may
6 have been harmed by the suspected violations of law under
7 investigation here.

8 THE COURT: On that point though, that's just kind of
9 an ends-justifies-the-means argument, but I think the
10 counterargument is that what incentive is there for somebody to
11 challenge something based on an unconstitutional structure is
12 what the argument is here, respondent's argument here, as it
13 was in *Seila Law*, and if ratification is this sort of the
14 rubber-stamp exercise, then why would anybody bother.

15 MR. FRIEDL: Well, I think that, you know, the court
16 in *Lucia* mentioned that in appointment clause cases it tries to
17 craft remedies that do create an incentive for bringing these
18 challenges. It's notable that the court in that case did not
19 dismiss the enforcement action at issue. It remanded for
20 another hearing before a properly appointed ALJ, the problem
21 with the appointment, of the first ALJ who had heard the SEC's
22 case. The court didn't think there that it was necessary to
23 actually dismiss that action. It didn't think in *Seila Law*, it
24 gave no indication in *Seila Law* that it thought dismissal or
25 denial of that CID petition was necessary to incentivize to

1 bring such claims. It remanded for further proceedings.
2 Surely it could have, if it thought it was necessary, simply
3 denied the CID petition.

4 So it's true that the court has talked about creating
5 incentives, but I think it has to also be read in light of the
6 court's other statement that these remedies have to be
7 tailored. And, again, the basis of the objection here is we
8 shouldn't have to comply with the CID because we don't know
9 that the Bureau would have wanted to pursue it if the director
10 was under the President's plenary supervision. That's what
11 makes the removal provision at all relevant to a CID proceeding
12 in the first place, and that objection has been squarely
13 answered by the director's confirmation after she became
14 removable at will that the CID should be enforced and this case
15 should move forward.

16 And, you know, I would also point out that the Bureau
17 certainly wouldn't recognize this as sort of a legitimate
18 incentive, but it is also the case that the respondent has won
19 significant delay in this, in the prosecution of the CID just
20 by raising this issue. *Seila Law* itself, that involved a CID
21 that was issued in February 2017.

22 Clearly, I would submit that the on-the-ground
23 experience suggests that there is some sort of incentive to
24 raising these kinds of claims.

25 THE COURT: Okay. Anything else on this point?

1 MR. FRIEDL: I would leave it there, your Honor.

2 Thank you.

3 THE COURT: All right, anything else from the Bureau?

4 MS. ASSAE-BILLE: Nothing else, your Honor.

5 THE COURT: Thank you both very much.

6 Who wants to speak on behalf of the respondent?

7 MR. DeGRANDIS: I would like to, your Honor, Michael
8 DeGrandis of the New Civil Liberties Alliance, appearing on
9 behalf of the respondent.

10 THE COURT: (Indiscernible)

11 MR. DeGRANDIS: I'm sorry, you're breaking up, sir.

12 THE COURT: I just said good afternoon.

13 MR. DeGRANDIS: Oh, thank you, good afternoon.

14 I'm joined, too, by Crystal Moroney and my colleague
15 at NCLA, Jared McClain.

16 Your Honor, the petition should be denied because the
17 Bureau manifests a structural or constitutional defect that the
18 Supreme Court in *Seila Law* didn't cure, and that's the funding
19 mechanism. It violates Article I of the United States
20 Constitution.

21 Now, the Bureau tries to downplay its funding
22 structure as commonplace, but make no mistake, in the history
23 of United States, Congress has never before divested itself of
24 the power of the purse such that one agency can requisition
25 on-demand funding outside the appropriations process from a

1 second agency. Moreover, the President has never had this
2 plenary authority over an agency where the funding is not
3 appropriated by Congress and not reviewed by Congress.

4 And so it's the respondent's position that this is a
5 threshold issue upon which all the other issues in this case
6 rely. The Court can't enforce a second CID if the Bureau
7 doesn't have the authority to bring an enforcement action under
8 the CFPA. So to be clear, this is a non-delegation doctrine
9 issue. Because last year the Supreme Court explained that
10 Congress can't transfer to another branch powers which are
11 strictly and exclusively legislative. And that's their words,
12 the *Gundy* case, strictly and exclusively legislative.

13 And so what we see with Title X is that Congress
14 isn't seeking assistance from a federal agency with
15 implementing law. That's not how it structured the funding.
16 Congress is instead divesting itself of its strict and
17 exclusive legislative duties to make appropriations through
18 law. That's the issue here.

19 The whole point of the appropriations clause was
20 directed for fear that the executive would possess unbounded
21 power. That's decidedly what the founders did not want, and in
22 fact, then Judge Kavanaugh raised that issue in I think it was
23 *US Department of Navy versus FLRA*.

24 So today's Bureau embodies that fear though, the fear
25 that an executive would have control not just over executing

1 the law but also over determining what his or her funding
2 should be in executing the law.

3 What I really want to impart to the Court is this is
4 a case of first impression. Contrary to the Bureau's
5 assertion, *Seila Law* did not bless the CFPB'S funding
6 structure. In fact, it made the nondelegation problem even
7 worse. The President now exercises complete financial and
8 strategic dominion over the Bureau. And I'll also note he
9 exercises this power that he doesn't even enjoy with respect to
10 his own agency, the Executive Office of President of the United
11 States. That receives funding in review from Congress, but the
12 CFPB does not.

13 So this issue of first impression is, of course, then
14 one that no court has ever ruled on because every single case
15 before this was one in which the director was not dependent on
16 the President for authority, and now the President has this
17 total control.

18 And in fact, I'd like to quote the *Seila Law* court
19 here, this should raise some red flags. The *Seila Law* court
20 said, "Perhaps the most telling indication of a severe
21 constitutional problem with an executive and state is a lack of
22 historical precedent to support it."

23 Contrary to the Bureau's brief in this case, CFPB's
24 funding is not commonplace. While certainly in rare instances
25 not applicable to the Bureau some courts have held that there

1 are appropriations clause exceptions of sorts for self-funding,
2 self-funding is limited, and the Bureau is not self-funding.
3 It doesn't collect fees. It doesn't collect assessments.
4 Instead, it goes to another governmental entity and demands
5 funding that that governmental entity can't even refuse.

6 Just one of the examples that the CFPB gives for what
7 a similar, what it perceives to be similar agency, is the Fed
8 itself. But the Fed gets assessments from large banks that are
9 regulated by the Fed. There's a direct relationship there, and
10 that's an entirely different circumstance than the Feds going
11 somewhere else.

12 And I will also add, we noted this in our briefing,
13 so unless you want to get into the details, we don't
14 necessarily need to get into the details, but the self-funded
15 agency examples that do exist out there don't have the broad
16 investigative and enforcement authority as the CFPB does. And
17 *Seila Law* made that clear just how extraordinary the CFPB is.
18 It is unique. And I believe it called it, said that it had
19 knee-buckling penalties that it could assess against private
20 citizens. And on top of all that, Title X prohibits the
21 appropriations committee to the House and Senate from reviewing
22 CFPB funding.

23 Now, perhaps Congress can appropriate through a
24 formula where an agency receives funding based upon receipts
25 for the agency's operation, and those are typically user fees.

1 But what it certainly cannot do is allow an agency or the
2 President to determine its own level of funding. That's rank
3 divestment of Congress's strict and exclusive duty to
4 appropriate funding. Congress has never done this before. And
5 no court has ever reviewed this type of action before.

6 There's absolutely no historical analogue here. And
7 I think that that should be a telling indication of a severe
8 constitutional problem. And so I would say that with absolute
9 control over the CFPB funding, the President has nearly doubled
10 his funding resources just on top of the executive Office of
11 President funds while Congress hasn't lifted a finger. But it
12 could also go the other way around, couldn't it? I mean, the
13 President could instead of seeking 690 plus million dollars for
14 CFPB, couldn't the President just pick one dollar? Couldn't
15 the President just end CFPB operations for the year or for the
16 rest of his term or however that works out? He certainly
17 could. That's the nature of this non-delegation problem.
18 That's what happens when Congress divests itself of this
19 funding authority, and I think that it's an important point to
20 make.

21 One last thing that I would add to this is that we
22 also see that most of the time when courts, when the Supreme
23 Court is comfortable with a certain divergence from strict
24 appropriations clause funding for agencies, I'm talking about
25 usually a -- I shouldn't just say funding for agencies, any

1 sort of structural nuance to an agency, court tends to be less
2 understanding of that when there's more than one layer. We see
3 that in *Free Enterprise Fund*. *Free Enterprise Fund* was dealing
4 with a different issue as in it was the vesting power of the
5 President. Here we're dealing with the vesting power of
6 Congress. I think those two points are related, and the *Free*
7 *Enterprise* court was particularly disturbed by two levels of
8 tenure protection. Here, we have two levels of appropriations
9 protection. This instance, the Fed, who gives money, gives
10 money when demanded by the CFPB, gives money to the CFPB, the
11 Fed itself doesn't receive regular appropriation, it is
12 appropriated through a funding formula that Congress has set up
13 for its operations. So there's a double layer there as well.
14 So I think that that's important.

15 So this unchecked authority is inconsistent with
16 constitutional design and purpose. The founders, it was very
17 important to them they vest control over spending and lawmaking
18 with Congress. And again, just to quote *Seila Law*, quoting
19 Federalist 58, they warn that "The power over the purse is the
20 most complete and effectual weapon in representing the
21 interests of the people." And so, Title X violates
22 nondelegation doctrine, does not fund the CFPB through the
23 constitutionally prescribed process of congressional enactment
24 via bicameralism and presentment. I think those are important
25 issues here. And I say that it is a threshold question because

1 we have to answer that question, is the CFPB constitutionally
2 funded, before we can get to the vacation issue because the
3 Supreme Court was clear in *Seila Law* explaining that, well, we
4 can't answer the ratification problem because, first of all, it
5 wasn't a question presented. Second of all, because it wasn't
6 a question presented, it was not thoroughly briefed.

7 Moreover, the court said, and you know what,
8 ratification turns on case-specific factual and legal
9 questions, so this is a better question to ask lower courts.
10 Well, this Court won't be able to get to the factual and legal
11 question surrounding the nuances of this particular case
12 without first determining whether the CFPB is, in fact, a valid
13 entity as it is currently funded. And so, when we look, if we
14 get to that point where we can look at ratification, I think
15 this also highlights why this is important, I believe the CFPB
16 and the law office agree on the baseline principle upon which
17 agency law is founded. I think Judge Preska said it well in
18 the *RD Legal Funding* case, I'll quote her here, "Ratification
19 addresses situations in which an agent was without authority at
20 the time he or she acted and the principal later approved the
21 agent's prior unauthorized acts."

22 So to the extent that ratification is ever available,
23 the ratifier must be able to do the act at the time the
24 ratification is made. The Supreme Court has talked about this
25 in *FEC versus NRA Political Fund*. This is black letter agency

1 law, if the Bureau's funding is unconstitutional, Director
2 Kraninger can't ratify anything, so that the Court won't be
3 able to reach the factual or legal issues.

4 The Supreme Court has explained that remedies for
5 separation of powers violations must advance the Constitution's
6 structure and purpose, but also create incentives to bring such
7 challenges.

8 And one thing that I would like to highlight here, I
9 don't think we should forget where we came from. I don't think
10 we should forget what Ms. Moroney has gone through to get to
11 this point with respect to the stress and strain of close to
12 \$80,000 worth of attorneys fees in defending, but also in
13 compliance fees in attempting to comply with the CFPB's first
14 CID. This isn't nothing. This is real harm to her, her
15 inability -- she's the only lawyer in her law firm. The
16 inability of her to expand her firm, even engage in projecting
17 for her business, being able to develop new business, being
18 able to control costs, and so on and so forth. I won't belabor
19 that point. We discussed that in greater detail during the
20 preliminary injunction hearing. I do think it's important that
21 we keep in mind where we've come from. And that if the CFPB
22 can just come back and say, never mind, I know we were
23 unconstitutionally structured before, we're just going to
24 ratify it, you were conducting that investigation, and
25 Ms. Moroney suffered all of those costs, all of those harms

1 while you were unconstitutional. That is hardly fair.

2 And I'll also add that the cases that the Bureau
3 cites here to support its position regarding ratification
4 involve appointments clause violations. So there is a
5 difference between say Director Cordray, who is invalidly
6 appointed, then becoming validly appointed, and then ratifying
7 his prior act. There's a difference between that and Director
8 Kraninger who was validly appointed. No one questions her
9 appointment. What we question, actually, we don't question,
10 what *Seila Law* told us was that she was unauthorized in the
11 first place, she lacked the authority because she's
12 unconstitutionally insulated from presidential control. She
13 lacked the very authority to make the decisions in the first
14 place. I think that's a very important point here. And to
15 rule otherwise, to rule that the separation of powers violation
16 of the CFPB, of the director's position with the CFPB, I should
17 say, that it can simply be ratified by the very director who
18 was unauthorized to act in the first place, would render the
19 Supreme Court's *Seila Law* decision merely advisory and really
20 enable Director Kraninger to perpetuate the separation of
21 powers violation. There must be a remedy here, and that remedy
22 should be dismissal. She can't ratify this.

23 I will add that ratification is an actionable remedy,
24 the purpose of which is to convert unlawful acts, such as the
25 director's in this case, into lawful ones. But there's also a

1 doctrine of unclean hands. You can't benefit from an equitable
2 defense. If the party has acted in a way that's unfair, has
3 gained an advantage, and I think that would certainly be the
4 case here, because at all relevant times, Director Kraninger
5 knew that her position was unconstitutionally empowered. She
6 told Congress that in September 2019. This CID was issued in
7 November 2019. This is a blatant exercise of power that she
8 knew she did not have. So this is not a good faith mistake.
9 This a deliberate constitutional violation.

10 To the extent the Court finds any of the citations
11 that the CFPB brings forth to suggest that the ratification is
12 valid, none of those apply because none of those are
13 circumstances in which the governmental agent that acted
14 unconstitutionally knew it was acting unconstitutionally at the
15 time, and that's the case here.

16 So the funding defect must be resolved before
17 reaching the issue of whether Director Kraninger can ratify the
18 this enforcement action because she has to make a showing, and
19 she hasn't made a showing, that the CID, that when issuing the
20 CID in the first instance, that she had the power to do so.
21 And it seems that she's already admitted, that she admitted in
22 September she didn't have the power to do so, and that the
23 Supreme Court has agreed that she did not have the power to do
24 so.

25 Now, I will say that, if we get past the

1 constitutional issue, and if the Court disagrees with the
2 respondent, if the Court believes that the CFPB is
3 constitutionally funded and then the Court says, you know what,
4 Director Kraninger can ratify her own prior bad action, then we
5 get to the issue of enforcing the second CID.

6 THE COURT: Before we get to that, just one quick
7 question.

8 MR. DeGRANDIS: Sure.

9 THE COURT: What if the CFPB decided, what if the
10 director decided, okay, ratification is a tricky issue for us,
11 so withdraw the CID and I'm just going to issue a new one. Is
12 there anything that could stop the director from doing that?

13 MR. DeGRANDIS: Assuming that the CFPB is
14 constitutional, I think the only --

15 THE COURT: Obviously, right. Right, right. You're
16 right, that question assumes, and I understand the argument
17 that that may very well be a prerequisite determination that
18 has to be made, but just with respect to the ratification
19 issue, and in particular, addressing your argument regarding
20 the stripping your client of a remedy here, what would stop the
21 director from doing that?

22 MR. DeGRANDIS: Nothing would stop the director from
23 doing that. The director could -- the director is now validly
24 in charge of the CFPB. Again, assuming all of the other
25 assumptions here. So, yes, she could say, you know what, let's

1 just go ahead and take a look at this issue again and reissue
2 the CID, which would be the next discussion, there would be
3 certain limitations there based on the facts of this case, I
4 believe.

5 Ms. Moroney isn't here to say to the CFPB, were it
6 the constitutional, cannot demand certain documents from her.
7 That's not her position.

8 So with respect to those limitations, there are
9 problems with the CID in whole or in part that prohibit the
10 CFPB from seeking its full enforcement here. And as I say, I
11 said before, I think the parties are in agreement regarding the
12 four elements that the CFPB must meet, but the CFPB has failed
13 to meet these four elements. So first and foremost, the
14 demands are not for a legitimate purpose.

15 So going back to your question, your Honor, if
16 Director Kraninger said, never mind, I'm just going to go ahead
17 and issue a third CID, that would be fine, but the third CID
18 must be for a legitimate purpose. There are legitimate reasons
19 why the CFPB may want information from a law firm that collects
20 debt, but it can't impact the practice of law. The CFPB itself
21 says, and I'm going to quote here, "The Bureau may not exercise
22 any supervisory or enforcement authority with respect to the
23 activity engaged in by an attorney as part of the practice of
24 law under the laws of the state in which the attorney is
25 licensed to practice law." And that's exactly what's happening

1 here. Ms. Moroney bent over backwards to comply with all
2 demands for documents and information related to a third-party
3 contact regarding debt collection. She drew the line at client
4 confidences and privileged information as required by New York
5 and New Jersey State bars.

6 THE COURT: Why not do a privilege log?

7 MR. DeGRANDIS: They have done a privilege log, and
8 we did attach it to our brief. Mr. Canter had provided an
9 extensive list of the documents provided and not provided and
10 explained why those documents weren't provided. To the extent
11 that the privilege log, the CFPB finds the privilege log
12 insufficient, I'll say, we need at some point a mediator to
13 help out with that. The impasse was over this information.
14 And when Ms. Moroney said I'm not going to provide you with
15 client confidences or privileged material, the CFPB -- I should
16 say after that she said I will try to get waivers from my
17 client, and the client said something to the effect of, oh,
18 heck no. And so she couldn't do that. She was duty-bound not
19 to turn that over. The CFPB told her, well, then we're going
20 to enforce. And so at that point there was nothing more to
21 negotiate with the CFPB on this issue and that -- to the extent
22 that the privilege log provided is in any way insufficient,
23 that should have been litigated at the November 2019 show cause
24 hearing, but the CFPB chose not to do that.

25 And I'll say, this is also related to CFPB's argument

1 that, hey, gee, we don't have documents in our possession. Not
2 true. You have the documents in your possession. They make
3 these feeble process arguments. It's not in the format that we
4 requested. Well, okay, it's not in the format that you
5 requested, but it's perfectly readable, and if you had any sort
6 of formatting objection, you waived that as soon as you mooted
7 the first show cause hearing.

8 So now that you issue a second CID it was incumbent
9 upon you to review those documents, narrowly tailor your second
10 CID for those documents you don't have.

11 It at least appears to Ms. Moroney that they haven't
12 looked at those documents. You think if they were really
13 interested in -- and I think Mr. Friedl was saying that there
14 are suspected violations of law under investigation. Well, if
15 they're suspected violations of law, my goodness, I certainly
16 would hope that the CFPB would have gone through the
17 information that it had in its possession. It just seems
18 strange that they wouldn't do that.

19 I also take issue with how narrowly the CFPB is
20 viewing an attorney's responsibility to his or her client.
21 It's not just about privileged documents, and I appreciate CFPB
22 isn't specifically asking for privileged documents. It's also
23 about confidentiality. Attorneys have an equally important
24 responsibility in protecting privilege as it does in protecting
25 confidentiality. That is a very important issue here that

1 implicates Ms. Moroney's license to practice law in New York
2 and New Jersey. And the requests do implicate confidential
3 information that the attorney has that she received from her
4 client which is why we're now, I guess we're moving on three
5 plus years, we've been saying to the CFPB, I have and
6 Ms. Moroney's other attorneys have been saying, if you need
7 this information, go ahead and go to the client and seek that
8 information. And we know the CFPB knows how to do this, and we
9 know that because they've got a case in California against one
10 of her clients, against FedChex. That is the appropriate path,
11 not going through the attorney because going through the
12 attorney ends up interfering with the attorney-client
13 relationship.

14 So I will say this, too, I think the Supreme Court
15 case of *Endicott Johnson Corp. versus Perkins* really lays out
16 the question that the Court should ask of itself when trying to
17 determine whether the scope of an administrative subpoena like
18 a CID is reasonable, whether the CFPB is stepping outside its
19 statutory authority in trying to regulate the practice of law.
20 I'm slightly restating this for our purpose here, but the
21 Supreme Court essentially said the question is can the CFPB
22 fully perform its statutory duty without the attorney-client
23 confidences and privileged materials that it's demanding from
24 the law firm? And I think the question has to be yes. To the
25 extent that there are client confidences, there's no reason,

1 it's plainly irrelevant because the client confidences can be
2 discovered, can be acquired from the clients themselves. And I
3 think that's an important point here.

4 And another thing, the CFPB glosses over all of the
5 interrogatories that Ms. Moroney's law firm answered. There
6 are over 80 interrogatories that she answered. There's no
7 explanation as to why she would have to reanswer those
8 questions, why even the format was something that the CFPB
9 didn't like. It's just not clear why the CFPB is issuing a
10 second CID that doesn't take into account the information it
11 already has.

12 And I think the second point here though, and I think
13 I've probably have covered the issue a little bit, so I won't
14 belabor the point, is that the CFPB hasn't followed a lot of
15 the required administrative steps. Again, some of this is
16 related more to the ratification argument. There is a question
17 regarding the timing of ratification, of regulations, and
18 guidance, along with when this particular enforcement action
19 was ratified, but I want to highlight the Bureau is being a bit
20 disingenuous here. They claim that the authority to issue and
21 enforce CID comes directly from the Consumer Financial
22 Protection Act rather than any Bureau regulation. An element
23 of that is true, but that's not the complete truth. In fact,
24 the amended petition to enforce the CID and the memorandum in
25 support cite to Code of Federal Regulations not fewer than nine

1 times, and the attachments not fewer than 18 additional times.
2 There's a whole host of implementing regulations and the CFPB
3 gives the CFPB the authority to implement those regulations
4 regarding investigations and CID enforcement and so on and so
5 forth.

6 So I think I would like to just reiterate one point,
7 and that is objections to the formalities, the extent CFPB is
8 claiming they don't have these documents. I think those are
9 waived when it voluntarily dismissed the 2019 enforcement
10 action. And I think for that reason the CFPB needs to go back
11 to the drawing board regarding its CID if it has the authority
12 to issue one in the first place.

13 The only last point I'd like to make here is related
14 to Rule 19. I think the one thing, and I'm sure the Court is
15 aware of this but I think I should say it here, non-joinder
16 isn't a defense to an enforcement action. The respondent is
17 not seeking relief here. She merely asserts that if this Court
18 finds, obviously, the Bureau's funding structure doesn't
19 violate nondelegation doctrine, that the Bureau properly
20 ratified its unlawful acts, that in order to -- to the extent
21 that the CID implicates FedChex's interests, and only to that
22 extent, that FedChex must be joined to that portion so that
23 they can defend their interests, or the CFPB should amend the
24 petition to enforce to specifically exclude documents related
25 to FedChex.

1 Again, this implicates Ms. Moroney's ethical
2 obligations, and the concern is, what if California denies a
3 petition to enforce against FedChex? Ms. Moroney already asked
4 FedChex if they would waive confidential privilege here, and
5 they said no. So she's under instructions from her client,
6 don't provide those documents. What if the California court
7 says, that's right, you don't have to provide those documents,
8 but this Court is free to say, yes, Ms. Moroney, you do have to
9 provide those documents. Well, that puts Ms. Moroney in a very
10 awkward spot. It also, as a practical matter, impedes
11 FedChex's ability to protect its interests. There are
12 inconsistent obligations here for Ms. Moroney with respect to
13 what she is supposed to do in protecting her client's
14 confidential and privileged information.

15 So I think that's really all I have, and obviously
16 I'm happy to answer any questions you have, your Honor.

17 THE COURT: You've covered a great deal of material,
18 and as I said, I've read the papers which were quite
19 comprehensive, so I very much appreciate your efforts, and I'm
20 sure your client does as well.

21 Thank you very much, Mr. DeGrandis.

22 MR. DeGRANDIS: Thank you.

23 THE COURT: All right, does anybody else from the
24 Bureau want to reply?

25 MS. ASSAE-BILLE: Yes, your Honor. I'd like to

1 respond to a few points that are not related to the
2 constitutionality or ratification points.

3 THE COURT: Okay.

4 MS. ASSAE-BILLE: So, first, the respondent brings up
5 *Endicott Johnson Corporation v. Perkins*. Respondent cites this
6 1943 Supreme Court case and states on its brief on page 30 that
7 in that case the court concluded that the government could
8 issue an administrative subpoena because the evidence sought
9 was not plainly incompetent or irrelevant to any lawful
10 purpose. Confusingly, however, the respondent then concludes
11 that the essential question is whether the Bureau can fully
12 perform its statutory duty without the information demanded.
13 That interpretation distorts the very standard that respondent
14 quotes in its own brief. The central question is simply
15 whether the evidence sought is not plainly incompetent or
16 irrelevant, and that standard is certainly part of what is one
17 of the elements that is articulated in *United States*
18 *Construction Products*, which is the case that outlines the four
19 criteria for enforcing a CID. We believe that distinction to
20 be meaningful because it is typical in these investigations for
21 the government to collect a number of documents that are
22 certainly plainly relevant and not incompetent but that the
23 government may not necessarily rely upon to prove its case down
24 the line. We doubt that the *Endicott* court intended to tie the
25 Bureau's hands in the way that the respondent attempts to do

1 now. What matters here is relevance. And as I said earlier,
2 nothing the Bureau has requested is irrelevant.

3 I also want to touch on the privilege log question.
4 We are fairly confused here because the respondent asserts that
5 they have provided a privilege log. The CID before this Court
6 was issued on November 14, 2019. The respondent has produced
7 nothing since that date. They have not produced documents,
8 they have not produced answers. And certainly they have not
9 produced a privilege log as required by -- and as is their
10 right under 12 C.F.R. 1080.8, which provides that if a
11 respondent is withholding information on the basis of
12 attorney-client privilege, then they must produce the privilege
13 log.

14 Again, respondent has not done so here, nor do they
15 identify any request to which they believe the attorney-client
16 privilege should attach in their opposition brief. Instead,
17 they vaguely reference that there are concerns about -- that
18 the Bureau has sought information relating to their
19 representation of their client and that we have sought
20 information regarding their contacts with their clients, but
21 those allusions do not meet the burden in the legal standard.
22 And in the Second Circuit case of *United States versus*
23 *Construction Products Research* where an administrative subpoena
24 was challenged based on the attorney-client privilege, failure
25 to provide an adequate privilege log was sufficient for the

1 court to uphold the subpoena.

2 In this, the respondent suggests that perhaps a
3 mediator could help us resolve the issues down the line, but in
4 our view, your Honor, the respondents have had plenty of
5 opportunity to provide a privilege log, not only in response to
6 the CID, but after the director denied its petition to set
7 aside or modify the CID, the respondent could have provided a
8 privilege log and did not do so. They could have attempted to
9 provide a privilege log while opposing this very petition and
10 they have not done so. So in our view, the time to submit a
11 log has passed, and respondent's failure to do so weighs in
12 favor of upholding and enforcing the CID.

13 I also want to touch on this confidentiality argument
14 that the respondent has referred to in, again, fairly vague
15 terms in their brief and again today in this hearing. What
16 they're referring to is New York of Professional -- New York
17 Rule of Professional Conduct 1.6. We contend that that rule
18 does not render the purpose of the CID illegitimate, nor does
19 it preclude enforcement of the CID. We underscore again that
20 we are not seeking information related to the practice of law,
21 as is plain from the CID that is attached as Exhibit A. And
22 Rule 1.6 applies to legal clients.

23 Here, any information the Bureau seeks about the
24 respondent's relationship to its client is limited to the
25 debt-collection services and credit-furnishing services that

1 the respondent provide. So we contend that Rule 1.6 is not
2 triggered, but even if it were, a number of courts have
3 recognized that Rule 1.6 does not prevent a government agency
4 from obtaining certain client information through an
5 administrative subpoena.

6 In any event, the respondent appears to concede that
7 an order from this Court would fall under the exception to Rule
8 1.6 which permits disclosures of confidential information to
9 comply with other law or a court order. The Bureau's position
10 is that this subpoena already brings, already triggers this
11 exception, but certainly a court order from the Court would
12 absolutely remove any Rule 1.6 concerns.

13 I also want to go back to this argument about what
14 the Bureau has in its possession. The respondent characterizes
15 its production as perfectly reasonable. While that may be
16 their view, that is not the standard that applies here. Again,
17 the Bureau's regulation at 12 C.F.R. 5562(c)(1)(A) require that
18 responses to our CID be submitted in the medium requested by
19 the Bureau, pardon me, and that's also 12 U.S.C. (c)(10). So
20 both the statute and the regulation permit us to ask for
21 information in a certain format, and that is not a cosmetic
22 concern. A client's production would contain metadata that
23 provides additional information about documents such as their
24 source, their dates of creation, their custodian, and so forth,
25 things that you cannot simply get from taking a look at a

1 document and seeing it as readable. But, of course, all of
2 that is secondary to the fact that, again, the Bureau's statute
3 and regulation are fairly clear on what the respondent's
4 obligations were here. And we also do not follow the argument,
5 nor has the respondent provided any legal authority to support
6 its argument, its contention, pardon me, that in withdrawing
7 its first petition the Bureau somehow waived its objections to
8 the production's format. That is certainly not our position.
9 We have never conceded such a thing, and we continue to
10 maintain that the production was improper and that we should
11 not have to rely on it in response to the second CID.

12 Now, the respondent with respect to Rule 19 has
13 brought up that the Bureau could simply obtain the information
14 that it seeks from Moroney, from the respondent from its
15 client. Even if FedChex -- even if the Bureau has issued a CID
16 to FedChex, and they had, and FedChex were to comply, the
17 respondent would still have to produce information in response
18 to each of the other -- to each of the requests in the CID
19 which asks for information relating to services that it offers
20 to other clients. And, again, information that is not in the
21 Bureau's possession and information that is solely in the
22 custody or control of the respondent.

23 We also want to note that, as the respondent has
24 refused to comply with the CID, the Bureau does not have in its
25 possession information, complete information about who the

1 respondent's clients are. So perhaps FedChex complies, but the
2 Bureau is interested in having a sense of the identity of those
3 other clients on whose behalf the respondent performed
4 debt-collection and credit-furnishing activities. So that
5 argument to us again really does not -- should not exempt the
6 respondent from having to comply with the CID.

7 And I also want to add on that point that, again,
8 suggesting that the Bureau can obtain some of the information
9 from another party isn't -- it's not -- it doesn't resolve the
10 fact, it doesn't contradict the fact that the respondent is a
11 person under, as defined in the Bureau's organic statute, is a
12 person from which the Bureau can seek information.

13 So we just don't believe that it makes any difference
14 that the Bureau could hypothetically obtain a modicum of
15 information from other parties.

16 And the last thing I'll say here is I just want to go
17 back to the practice of law exclusion that is in Section 5517
18 of the Consumer Financial Protection Bureau. It's certainly
19 true that the Bureau cannot exercise supervisory and
20 enforcement authority over the practice of law, but as I
21 mentioned at the outset of this hearing, the exclusion contains
22 an important qualification, and we did not, for space-related
23 reasons, we did not outline those qualifications in our reply,
24 but I'll do so here to clarify this issue for the Court.

25 First, the law exclusion provision permits the Bureau

1 to bring lawsuits against any law firm engaged in the provision
2 of consumer financial services where the services are not part
3 of the legal representation. And that's codified in 12 U.S.C.
4 5517(e)(2)(A). This is in line with case law that says that
5 where an attorney acts as a collection agent, the
6 communications between him and his client are not protected by
7 the privilege.

8 Second, the limitation does not apply to a consumer
9 financial service that is offered or provided by an attorney to
10 any consumer who is not receiving legal advice or services from
11 the attorney in connection with such a financial service. And
12 that's under (e)(2)(B) of the same statute.

13 So this exemption, for instance, clearly entitles the
14 Bureau to those debt-collection calls between the respondent
15 and consumers, presuming that the respondent is not providing
16 legal advice or opinions of law to the same consumers from whom
17 it is collecting facts.

18 And third, third and lastly, the limitation, the
19 statute says that the limitation is not to be construed to
20 limit the Bureau's authority with respect to any attorney to
21 the extent the attorney is otherwise subjected to any of the
22 enumerated consumer laws. And here we want to point out that
23 the Federal Debt Collection Practices Act and the Fair Credit
24 Reporting Act are enumerated consumer laws.

25 So, again, we firmly believe that the practice-of-law

1 exclusion does not foreclose the enforcement of the CID before
2 this Court.

3 THE COURT: All right. Thank you very much,
4 Ms. Assae-Bille.

5 Mr. Friedl, did you want to address the
6 constitutional issues? Again, I've read all the papers, but if
7 there's anything in particular that was said by Mr. DeGrandis,
8 feel free.

9 MR. FRIEDL: Absolutely, your Honor. I think
10 Mr. DeGrandis did cover a lot of ground. It won't surprise you
11 to hear we disagree with it, but I will stand on the papers and
12 just highlight a few brief points out of respect for the
13 Court's time, which I recognize the Court has already been very
14 generous with this afternoon.

15 With respect to funding, Mr. DeGrandis said that this
16 is a nondelegation doctrine issue, but in all these filings and
17 in the presentation today, it's never -- it's such a challenge,
18 it has never actually articulated that doctrine requires
19 certain delegations of congressional authority to be guided by
20 an intelligible principle. And so long as they are, there's
21 not a constitutional problem.

22 It's not even clear here exactly what the delegation
23 is that's under attack. I presume it's the -- really the main
24 funding provision in 12 U.S.C. 5497(a) and (b), but that just
25 authorizes the transfer of a certain amount up to a capped

1 amount of funds from the combined earnings of the Federal
2 Reserve System as determined by the director to be reasonably
3 necessary to carry out the authorities of the Bureau under the
4 federal consumer financial law, and it actually goes on, I
5 won't read the whole thing. But these provisions include, you
6 know, actually a far clearer and more definite principle to
7 guide the director's decision-making on that point as compared
8 to others that the Supreme Court has upheld against
9 nondelegation challenges.

10 The respondent also highlights that the Bureau draws
11 funds from the combined earnings of the Federal Reserve System,
12 such as one agency taking money from another as a factual
13 matter. I don't know if this was in our brief, I want to be
14 clear that the Bureau is formally part of the Federal Reserve
15 System. That's in 12 U.S.C. 5481(a). But more to the point,
16 the factual distinction that respondent wants to draw between
17 the Bureau and other agencies really don't make a difference
18 under either the nondelegation doctrine or other framing of
19 this challenge under the appropriations clause. That clause
20 requires that payment of money from the Treasury must be
21 authorized by statute. That was the Supreme Court's holding in
22 the *Office of Personnel Management* case we cite and, of course,
23 that is the case here. The Bureau's method of funding is
24 authorized by its organic statute and Congress remains free at
25 any time to amend that statute to do so.

1 And so the comparison to *Free Enterprise Fund* where
2 there were sort of two stacked removal restrictions really is
3 completely inapposite. The problem there was that double
4 layers of removal provision made a difference for the
5 President's ability to oversee the members of the accounting
6 board that was at issue there. He couldn't remove those
7 officials even for cause, he had to work through the FEC
8 commissioners who the court assumed for purpose of that case
9 were removable only for cause. So there was a double layer
10 that made a difference.

11 The Bureau's funding, whether it is drawing money
12 from Federal Reserve System, from its own imposition of fees or
13 from some other method, it really doesn't make any difference,
14 it's an appropriation made by statute and it is something that
15 Congress could revisit at any time if it sees fit.

16 Unless your Honor has questions on this, I would just
17 turn to ratification and address two or three points quickly.

18 The respondent says the cases we cite on ratification
19 involve appointments clause violations. That's not true. We
20 cite a case from the DC Circuit, *FEC v Legi-Tech*, which
21 involves what the court called a structural separation of
22 powers problem where there were potentially congressional
23 appointees were part of that commission at that point in a
24 nonvoting capacity but were appointments clause issue. Nor is
25 there any reason that this Court should ignore the cases that

1 approved ratification in the appointments clause context such
2 as the just a Ninth Circuit's decision in *Gordon*. In this
3 case, as in cases like *Gordon*, the initial problem is with the
4 exercise of authority by an agent, the head of the agency. In
5 *Gordon*, the problem is that official had not been properly
6 appointed. Here the problem was that official is not
7 properly -- was not properly removable. But in both cases that
8 initial defect in the agent's authority is cured by subsequent
9 ratification once the problem is solved. There's no reason to
10 discount those cases just because they involve the appointments
11 clause.

12 Respondent also invokes the doctrine of unclean hands
13 and suggests the Bureau couldn't ratify any bad actions. But
14 what bad action? The Bureau hasn't done anything in this case
15 beyond come to this Court seeking a judicial resolution of the
16 dispute over the CID in an attempt to carry out its
17 congressionally mandated mission. And nothing in the *Seila Law*
18 decision suggests that -- undermines that or suggests that the
19 Bureau was engaged in some sort of bad conduct requiring overly
20 broad remedy to deter that conduct going forward. It was the
21 Bureau's position that prevailed in *Seila Law*, that the removal
22 provision is unconstitutional but severable. So I had to
23 address that point. And the final -- I'll just rest there,
24 unless your Honor has any other questions, we would just stand
25 on our briefs.

1 THE COURT: I have no other questions. Thank you for
2 making those points.

3 All right, we've been at this for a while, but I
4 don't want to deny respondent a chance. If there's anything
5 else you want to say, by all means.

6 MR. DeGRANDIS: Thank you, your Honor, very quickly
7 then. What I'd like to point out regarding the constitutional
8 issue is that the delegation problem is Congress divesting
9 itself trying to delegate its authority to make appropriations
10 through law. So I would like to sort of answer or address that
11 concern that the CFPB stated there. And regardless of its
12 place, the CFPB's place in federal agency hierarchy of things,
13 it's still deciding some funding. It doesn't matter what its
14 relationship is to the Federal Reserve, what matters is that
15 the President or the director can demand of the Federal Reserve
16 payment instead of going to Congress and getting Congress to
17 appropriate those funds.

18 The next point I'd like to make with respect to
19 ratification is only that when I use the word bad, this wasn't
20 a moral argument. I am not saying that the director is a bad
21 person or anyone at the CFPB is bad. The bad acts are the
22 unconstitutional acts, and the director at all relevant times
23 knew that what she was doing was unconstitutional. She knew
24 that she didn't have the constitutional authority, she
25 previously admitted that, and the *Seila Law* court confirmed

1 that for us.

2 I have two points that I'd like to close with which
3 are related to the CID itself.

4 First of all, with respect to waiver of any
5 formatting objection, my grounds for saying that are the same
6 reasons that I would think the CFPB is saying that it didn't
7 receive a privilege log with the second CID. They're
8 100 percent correct, there is no privilege log with the second
9 CID. Ms. Moroney has not complied with the second CID in any
10 way, shape, or form, so there is no privilege log. But there
11 is also -- they still have documents in their possession from
12 the first CID. So if they wanted, if the CFPB wanted to make
13 those objections, the right time to make those objections would
14 have been at the November show cause hearing, not now. And I'm
15 a little confused by the CFPB's statement that the time to
16 submit a privilege log in this particular case has passed.
17 CFPB has jumped up and down and all around promising that there
18 is absolutely no harm in ignoring a CID until it comes time for
19 a court to order enforcement. So it surprises me that they
20 would suggest the time has passed. But we will admit that
21 there has not been a privilege log to this point for the second
22 CID.

23 And lastly, regarding the *Endicott* case, I would
24 agree the *Endicott* case doesn't tie the CFPB's hand. I don't
25 think that's the right way to look at it. The *Endicott* case

1 does deal with plainly incompetent or irrelevant information.
2 What makes information plainly incompetent or irrelevant is
3 where that information isn't targeted toward a legitimate
4 purpose, doesn't advance the exploration of issues related to
5 the CFPB's statutory duty, and that's our position here with
6 respect to the client confidences and names of clients and so
7 on and so forth.

8 So that's really the issue and why we think that
9 while we are subject certainly to CFPB inquiries regarding just
10 the collection of debt we'll say, that inquiry is limited to
11 third-party documents, it is limited to those sorts of things.
12 And Ms. Moroney, while she has turned over the vast majority of
13 that information, to the extent that there is more that's
14 required because the second CID has an additional two-year
15 timeframe roughly thereabouts, that would be an adjustment that
16 would have to be made if this Court decides to enforce a second
17 CID. She's objecting to those legitimate portions of the CID.

18 That's all I have to say.

19 THE COURT: All right.

20 Anything else from anybody? Okay.

21 Well, what's the band say, a long strange trip it's
22 been. So here we are.

23 Seila Law comes down which provides some
24 illumination, but what I want to do is give you a ruling now,
25 because if you wait for me to write an opinion, I think this

1 will not be in anybody's interest. So I'm going to go through
2 some factual background. Obviously what I relate to you here
3 is taken from submissions from both respondent and the Bureau.

4 Now, according to the Bureau, respondent is a law
5 firm that collects on delinquent or defaulted consumer debt on
6 behalf of various creditors. Respondent also provides
7 information to credit reporting agencies about consumers from
8 whom it is seeking to collect debt, but respondent does clarify
9 and consistent themes throughout its position here in this case
10 that it is a law firm that provide legal advice and services to
11 clients. Indeed, there's no disputing that, nor is there any
12 disputing the fact that Ms. Moroney is licensed to practice law
13 in this state and in New Jersey, and that her firm is regulated
14 by the New York and New Jersey Rules of Professional Conduct,
15 and of course her continued ability to practice as a licensed
16 attorney is conditioned upon strict adherence to those rules.

17 We all know the first CID was issued to respondent
18 back in June of 2017. According to the Bureau, this CID sought
19 "substantially similar" information to the 2019 CID but it's
20 not identical. What's more, the Bureau claims that respondent
21 produced a partial response to the 2017 CID but it withheld and
22 "clawed back a significant amount of material." And there's
23 also a claim that some of the documents were not produced in
24 compliance with the Bureau's standards regarding electronically
25 stored information, that there was no certification, that their

1 responses to the 2017 CID were true and complete.

2 Now respondent counters by noting that it did provide
3 written responses to the interrogatories, produced thousands of
4 pages of documents and other data, and to the extent that there
5 was a decision to not produce certain documents, that was based
6 on the attorney-client privilege and other nondisclosure
7 principles, or because the material, the responsive materials
8 might have been inextricably intertwined with privileged
9 material. But in particular what the Bureau contends is that
10 respondent originally identified about 1793 pages of responsive
11 material, along with 1150 pages of which was comprised of data
12 dictionary tables that were duplicative of Excel spreadsheets
13 that the respondent also produced, and that the respondent also
14 withheld responses to at least 15 of the Bureau's requests,
15 including 144 letters of dispute that it deemed to be
16 responsive to the Bureau's request for legal actions and
17 administrative proceedings filed against respondent or its
18 principals relating to the company's debt or information
19 furnishing activities.

20 Now respondent does claim that, well, first of all,
21 respondent has made the point that it retained ethics counsel
22 for independent advice, and relied on that advice in evaluating
23 its duty under Rule 1.6 of the New Jersey and New York Codes of
24 Professional Conduct to protect the information it deemed to be
25 covered by attorney-client privilege. There was a request for

1 waiver from clients, which was declined. And so from
2 respondent's perspective, the Bureau was putting respondent in
3 a position to violate ethical obligations regarding asserted
4 confidences.

5 There was correspondence that explained some of these
6 points and then ultimately what happened was is that in
7 November of 2019 the Bureau withdrew the 2017 CID. That was on
8 November 4.

9 On November 14, the Bureau had issued the 2019 CID,
10 and all of what was requested is spelled out in the petition at
11 paragraph 1. It's also Exhibit A to Ms. Assae-Bille's
12 declaration. The respondent takes the view that the two CIDs
13 are not initiated due to any consumer complaints regarding any
14 of the purposes listed in the Notice of Purpose because
15 otherwise the Bureau would have indicated as such.

16 The CID was issued by a deputy assistant director of
17 the Office of Enforcement and was served on respondent by way
18 of certified U.S. Mail, return receipt requested. The
19 materials were due by December 16 of 2019. On December 2,
20 respondent and counsel for the Bureau met and conferred in
21 accordance with 12 C.F.R. 1080.6(c).

22 There was some discussion about modification, but
23 that was never forthcoming. Instead, respondent filed a
24 petition requesting that the director set aside or modify the
25 CID which stayed the deadline for respondent to actually answer

1 the CID. And this request is made both on constitutional and
2 statutory grounds and sought a modification to excuse
3 respondent from producing any material that had previously been
4 submitted in connection with the 2017 CID.

5 That petition was denied. There was a request to
6 have respondent fully comply with the 2019 CID within ten days.
7 Also, the director determined that the respondent's petition
8 was untimely.

9 The bottom line here is that by March 19 of 2020,
10 counsel for respondent indicated that respondent did not intend
11 to comply with the 2019 -- not comply, respond to the 2019 CID.

12 So there's been no production of materials in
13 response to the CID, and as has been acknowledged, there's been
14 no privilege log with respect to the 2019 CID, but respondent
15 does aver that the only documents that have been withheld from
16 its response to the 2017 CID were those related to the practice
17 of law, not documents exclusively related to third-party debt
18 collection, and that respondent has produced all policies and
19 procedures that the Bureau had requested in the 2017 CID.

20 There's also, I mean I'll note this because
21 respondent makes this point in its papers, there is a pending
22 petition to enforce a CID against FedChex Recovery, which I'll
23 just call FedChex today, which is another one of respondent's
24 clients, which is out in the Central District of California.
25 From respondent's perspective, that CID seeks the same

1 information sought in the CID at issue here regarding
2 respondent's contacts with that client.

3 So the 2019 CID does contain notification of purpose.
4 According to the Bureau, the CID sought from respondent
5 materials that may be relevant to the Bureau's investigation
6 that were not already in its possession, including certain
7 interrogatories, written reports, documents, et cetera.

8 The requests in the CID include, among other things,
9 respondent's organizational structure, its employees, business
10 activities, debt-collection activity, identities of creditors
11 or third parties for whom respondent performed debt-collection
12 activities, information on consumer complaints and disputes,
13 policies and procedures, handbooks, guidance, and training
14 materials, and recordings and calls between respondent and
15 consumers or third parties related to debt-collection attempts.

16 All right, so just for the record, in terms of some
17 background of CFPB, it was created in 2010 by Congress as an
18 "independent financial regulator within the Federal Reserve
19 System." The statute that enables the Bureau is the CFPB, or
20 Title X, of the 2010 Dodd-Frank Wall Street Reform and Consumer
21 Protection Act.

22 The Bureau is tasked with implementing and enforcing
23 financial consumer protection laws. This is all laid out, of
24 course, in *Seila Law*.

25 Now, upon its creation, Congress transferred the

1 administration of 18 federal statutes to the Bureau and enacted
2 a new prohibition on any unfair, deceptive, or abusive act or
3 practice by certain participants in a consumer finance sector.
4 Also, the Bureau is able to implement this standard and the
5 statutes under its purview through binding regulations.

6 Also, along with its rule-making authority, the
7 Bureau also has adjudicatory authority, as it's allowed to
8 conduct certain administrative proceedings.

9 Congress vested the Bureau with certain enforcement
10 powers which allows it to conduct investigations, issue
11 subpoenas, and CIDs, initiate administrative adjudications, and
12 prosecute civil actions in federal court.

13 The Bureau is authorized to seek restitution,
14 disgorgement, injunction, and civil penalties up to \$1 million
15 for each day that a violation occurs.

16 As part of its enforcement authority, the Bureau can
17 issue CIDs, which are a type of investigative administrative
18 subpoena. In fact, the CFPB provides the Bureau with its
19 authority to issue the CIDs and enforce them in federal court.
20 For that I'm citing 12 U.S.C., Section 5562(c)(1) and (e)(1).

21 So under the CFPB the Bureau can issue a CID when "it
22 has reason to believe that any person...may have information
23 relevant to violation of federal consumer financial law."
24 That's from 5562(c)(1).

25 The Bureau can initiate a proceeding to enforce the

1 CID in federal court by filing a petition, which is what we're
2 dealing with here.

3 The director has the five-year term. The director is
4 appointed by the President and does require Senate approval.

5 Until the Supreme Court's decision in *Seila Law*, the
6 President was able to remove the director only for
7 "inefficiency, neglect of duty, or malfeasance in office." But
8 in *Seila Law*, the Supreme Court determined that the Bureau's
9 leadership by a single independent director violated separation
10 of powers, as it vested "significant governmental power in the
11 hand of a single individual accountable to no one," and that
12 the director's "insulation from removal by an accountable
13 President...rendered the agency's structure unconstitutional."
14 That's from 140 Supreme Court at pages 2203-4. But the Supreme
15 Court did determine the removal restriction was severable from
16 the other provision of the law that established the Bureau. So
17 the Court ruled that the agency may continue to operate, but
18 its director must be removable by the President at will. Page
19 2192.

20 In terms of funding, the Bureau does not receive
21 direct appropriations from Congress. Instead, each quarter the
22 Bureau receives funding directly from the Federal Reserve,
23 which transfers funds to finance the Bureau from "combined
24 earnings from the Federal Reserve System." That's from Section
25 5497(a). The Federal Reserve itself is funded outside the

1 appropriations process through bank assessment, as noted in
2 *Seila Law* at page 2194.

3 Each year the Bureau's director determines the amount
4 of funding "reasonably necessary to carry out" the duties of
5 the Bureau up to a cap of 12 percent of the combined earnings
6 annually adjusted for inflation. In recent years, that budget
7 has exceeded a half a billion dollars.

8 To exceed the cap, the Bureau has to obtain
9 additional funding in the ordinary appropriations process.

10 The funding is not reviewable by Congress, including
11 the committees on appropriations in both the House and the
12 Senate, but the director does report annually to the House and
13 Senate appropriations Committee about the Bureau's "financial
14 operating plans and use of funds." And that's spelled out in
15 5497(e) (4).

16 All right, so we got here because of the petition,
17 but also it's worth noting that the respondent brought an
18 action against the Bureau and against the director in her
19 official capacity seeking declaratory judgment and injunctive
20 relief against the bureau.

21 On January 22nd of this year, the Court did issue an
22 order to show cause. Oral argument was held on February 27
23 where the Court from the bench denied the motion. And then an
24 amended complaint was filed on April 30th.

25 The instant petition was filed April 24, which was

1 accepted by this Court as related, and then we've had really
2 very thorough and comprehensive briefing through the early part
3 of the summer and here we are.

4 In terms of legal standard, it is well established
5 "that an agency can conduct an investigation even though it has
6 no probable cause to believe that any particular statute is
7 being violated." That's what the Second Circuit said in *US*
8 *versus Construction Products Research Inc.*, 73 F.3d 464, 470.
9 For example, administrative agencies can investigate merely on
10 suspicion that the law is being violated.

11 The Court's role in a proceeding to enforce an
12 administrative subpoena, which is basically what we're dealing
13 with here, is very limited, what the Second Circuit noted in
14 *NLRB versus American Medical Response, Inc.*, but of course the
15 agency's efforts have to be reasonable. Whatever information
16 they're seeking by way of the compulsory process has to be
17 reasonable, which is satisfied if an agency demonstrates that
18 the investigation is being conducted for a legitimate purpose,
19 that the inquiry may be relevant to that purpose, that the
20 information sought is not already in the administrative
21 agency's possession, and that the administrative steps required
22 have been followed. That's all from *American Medical Response*
23 at page 192.

24 If a subpoena satisfies these requirements it's
25 typically enforced unless the party opposing it demonstrates

1 that the subpoena is unreasonable or issued in bad faith or for
2 some other improper purpose, or that compliance would be
3 unnecessarily burdensome.

4 In terms of the respondent's attacks on the subpoena,
5 I'll start with the funding structure, and respondent argued
6 that the Bureau itself is unconstitutional because it doesn't
7 receive appropriations from Congress, instead ceding Congress's
8 funding authority to the Bureau itself and to the President,
9 which violates, in respondent's view, the appropriations clause
10 and the vesting clause. And this is all spelled in pages 14
11 through 19 of respondent's memorandum of law. And what
12 respondent specifically argues is that in the wake of *Seila*
13 *Law*, that *Seila Law* ostensibly rendered the Bureau's funding
14 structure "inconsistent with the congressional statutory design
15 and purpose," and also is inconsistent with the constitutional
16 design and purpose given that it permits the President to
17 determine and direct the Bureau's funding and budget. Of
18 course, the Bureau disagrees, and even goes so far as to say
19 that *Seila Law* resolved the issue of the CFPB's
20 constitutionality.

21 Article I, sections 1 and 9, provides that "no money
22 shall be drawn from the treasury, but in consequence of
23 appropriations made by law," and that "all legislative powers
24 herein granted shall be vested in a Congress of the United
25 States."

1 So with respect to the Appropriations Clause, the
2 Supreme Court has underscored its straightforward and explicit
3 command, "it simply means that no money can be paid out of the
4 Treasury unless it has been appropriated by an act of
5 Congress." That's from *Office of Personnel Management versus*
6 *Richmond*, 496 U.S. 414, 424.

7 Here, the Bureau is funded from the earnings of the
8 Federal Reserve which Congress has, in fact, authorized by
9 statute. I've already discussed 5497. And that's important
10 here because the Appropriations Clause "does not in any way
11 circumscribe Congress from creating self-financing programs
12 without first appropriating the funds as it does in typical
13 appropriation and supplement appropriation acts," which is, in
14 the Court's view, exactly what Congress has done here. That's
15 a quote from *AINS Inc. versus United States*, 56 Federal Court
16 of Claims 522, 539, I'll note a case that was affirmed by the
17 Federal Circuit but abrogated on other grounds by the Federal
18 Circuit. Other cases that have addressed this issue is *CFPB*
19 *versus Think Finance, LLC*, 2018 WL 3707919 at *2, the District
20 of Montana there determined that the CFPB's funding does not
21 violate the Appropriations Clause; ditto the Central District
22 of California in two cases, *CFPB versus D&D Marketing*, 2016 WL
23 8849698, and *CFPB versus Morgan Drexen, Inc.*, 60 F.Supp. 3d
24 1082, 1089. Indeed, although the Supreme Court referenced the
25 Bureau's funding structure in *Seila Law*, it did so to point to

1 the level of power vested in a director removable only for
2 cause not to independently suggest that the funding mechanisms
3 were somehow unconstitutional. For example, on page 2203, the
4 Supreme Court noted "the CFPB's single-director structure
5 contravenes this carefully calibrated system by vesting
6 significant governmental power in the hands of a single
7 individual accountable to no one. The director does not even
8 depend on Congress for annual appropriations." So I think it's
9 fair to say that although the Bureau's funding structure was
10 not directly at issue in *Seila Law*, in deciding to sever the
11 for-cause removal provision of the CFPA, the Supreme Court did
12 note "the only constitutional defect we have identified in the
13 CFPB structure is the director's insulation from removal," and
14 that that constitutional defect "disappear[ed]" with a director
15 removable at will by the President.

16 It's also important to note that the courts have held
17 that Congress may "choose to loosen its own reins on public
18 expenditure. Congress may also decide not to finance a federal
19 entity with appropriations." This was noted in the *Morgan*
20 *Drexen* case at 1089. Indeed, as the Bureau points out,
21 Congress has provided similar independence to other financial
22 regulators, like the Federal Reserve, the FDIC, the OCC, the
23 National Credit Union Administration, and the Federal Housing
24 Finance Agency. And this was all discussed in *PHH Corp. versus*
25 *CFPB*, 881 F.3d 75, 81. Also, *CFPB versus Navient Corp.*, 2017

1 WL 3380530 at *16, which lists these and some other agencies as
2 independent agencies that operate completely outside the normal
3 appropriations process. Indeed, these other agencies have been
4 deemed to have complete, uncapped budgetary autonomy, as noted
5 in *PHH II*, 881 at page 81. Indeed, the Federal Reserve has
6 been around for over 100 years, and like the CFPB, has broad
7 investigative and enforcement authority, including the power to
8 conduct on-site examinations of banks under its purview and to
9 impose certainly monetary penalties.

10 Also, I just find it unconvincing, although it's
11 certainly stridently argued that this is a narrow exception
12 limited to agencies that receive funding from fees and the
13 like. There's really no authority to support this narrow
14 exception theory of the self-funded governmental entities. I
15 think *PHH II*, the case, in fact, respondent cites for the
16 proposition, the DC Circuit found "the way the CFPB is funded
17 fits within the tradition of independent financial regulators"
18 and does not violate the Constitution. In fact, the DC Circuit
19 totally *en banc* found that "the requirement that the CFPB seek
20 congressional approval for funding beyond the statutory cap
21 makes it more constrained in this regard than other financial
22 regulators."

23 Plus, Congress hasn't relinquished control over all
24 the agency's funding, so although the CFPB restricts the House
25 and Senate Appropriations Committees from reviewing the

1 Bureau's primary funding source, it doesn't strip Congress as a
2 whole of its power to modify appropriations as it sees fit.
3 That's from *CFPB versus ITT Educational Services, Inc.*, 219
4 F.Supp. 3d 878, 896, that's A Southern District of Indiana
5 decision from 2015. In fact, the *CFPB* has a formula-based
6 spending cap on the amount that the Bureau's director can
7 derive from the Fed, and the *CFPA* further "imposes a number of
8 other conditions on the director's use of the funds so
9 derived." And that's from the *ITT* case page 896 n.12.

10 What's more, Congress "might not have exempted the
11 *CFPB* from congressional oversight via the appropriations
12 process if it had known the *CFPB* would come under executive
13 control." But it "remains free to change how the *CFPB* is
14 funded at any time." That's noted by *Navient Corp.*, 2017 WL
15 3380530 at *16. And in fact, the *PHH I* case, which is *PHH*
16 *Corp. versus CFPB*, reported at 839 F.3d 1, at page 36 n.16,
17 "Congress can always alter the *CFPB*'S funding in any
18 appropriations cycle or at any other time. Section 5497 is not
19 an entrenched statute shielded from future congressional
20 alteration, nor could it be."

21 And to the extent that the argument is that the
22 nondelegation doctrine applies because Congress has transferred
23 its authority to another branch of government, which in fact is
24 the argument that's made at page 15, the Supreme Court has
25 indicated that "in our increasingly complex society replete

1 with ever changing and more technical problems...Congress
2 simply cannot do its job absent an ability to delegate power
3 under broad general directives." That's from *Gundy versus*
4 *United States*, 139 Supreme Court at 2123. Thus, "a statutory
5 delegation is constitutional as long as Congress lays down by
6 legislative act an intelligible principle to which the person
7 or body authorized to exercise the delegated authority is
8 directed to conform." And that's from the same page. As such,
9 "the constitutional question is whether a Congress has supplied
10 an intelligible principle to guide the delegee's use of
11 discretion," and there's really been no explanation of what
12 aspect of the funding structure lacks that intelligible
13 principle. In fact, by limiting the funding that the director
14 may request from the Fed, with a formula-based spending cap on
15 the amount, it seems clear that the CFPB does not lack for a
16 principle or have some sort of unguided or unchecked authority
17 granted to the CFPB. So the Court finds that Title X does not
18 violate the appropriations and vesting clauses in the
19 Constitution.

20 Turning to the ratification issue, on July 2nd, the
21 Bureau filed a notice of ratification issued by the director.
22 She noted that "in her capacity as the director, she considered
23 the basis for the CFPB's decision to issue the CID to
24 respondent, to deny respondent's request to modify or set aside
25 the CID, and to file a petition requesting that the District

1 Court enforce the CID." She also noted that she ratified this
2 decision on behalf of the Bureau and that she understood that
3 the President may now remove her with or without cause." And
4 that's from paragraph three, four and five of her declaration.

5 The argument is that the 2019 CID is invalid because
6 it's the product of an unconstitutionally structured federal
7 agency, and when Director Kraninger acted prior to *Seila Law*,
8 she was an invalid agent acting without any authority, thus,
9 any actions taken by her were basically null and void and can't
10 be saved by ratification. The second point is that even if
11 Director Kraninger was able to ratify her previous actions as
12 an unconstitutionally insulated director, the 2019 CID would
13 still be unenforceable because the ratification does not cure
14 the structural constitutional defect identified by the Supreme
15 Court, only the President himself can ratify the director's
16 prior acts. The third argument is that even if a director had
17 validated her prior acts, she did not purport to ratify the
18 regs until the week after she ratified the enforcement action.
19 And finally, that the director failed to perform a detached and
20 considered judgment of the act that she ratified.

21 Now, *Seila Law* left open the question of validity of
22 a ratification by the director, but of course, the
23 circumstances there were different, as the CID had been issued
24 by a different director, Director Cordray, the first director,
25 and was subsequently ratified by Acting Director Mulvaney, who

1 the CFPB argued could be removed at will by the President
2 because of his status as an acting director. The Supreme Court
3 found that the question of whether the alleged ratification, in
4 fact, occurred and whether it is legally sufficient to cure the
5 constitutional defect, the original demand...turned on
6 case-specific factual and legal questions not addressed below
7 and not briefed before the court. So the court remanded that
8 question finding the appropriate course was for the lower court
9 to consider those questions in the first instance. Of course,
10 the Court recognizes that Justice Thomas had a different view,
11 and it speaks for itself. I'm sure you all have read it.

12 All right, so addressing sort of the arguments in
13 turn. The first argument is, as I mentioned, that the actions
14 taken by the Bureau prior to *Seila Law* are nullities that
15 cannot be ratified. And because the court's severance of the
16 removal provision in Title X was prospective, respondent argues
17 that when the director acted, she was an invalid agent, as
18 such, her acts are void *ab initio*. And there's the other
19 argument, the related argument, that the ratification would
20 deprive the respondent of any remedy for the constitutional
21 violation, the separation of power violation, and vindication
22 for her claim that the Bureau was unconstitutionality ratified
23 to begin with.

24 And as I said, the other argument is that even if the
25 earlier actions could be ratified, only the President can do

1 ration, because the President was the Bureau's only lawfully
2 acting principal prior to severing the for-cause removal
3 provision.

4 Now, I think we all agree, and I think it was said so
5 during the argument, that the Supreme Court has made clear that
6 on the question of authorization or ratification, that this is
7 something that's typically governed by principles of agency
8 law. And this is discussed in the *Political Victory Fund* case,
9 513 U.S. 88, 98, and lower cases precisely dealing with
10 challenges to the CFPB structure have noted such, among others,
11 the *Gordon* case, which is a Ninth Circuit case, reported 819
12 F.3d 1179, 1191, and then *RD Legal Funding*, 332 F.Supp. 3d 729,
13 785.

14 In *political Victory Fund* the Supreme Court has
15 looked to the restatement of agency to determine whether an
16 after-the-fact authorization by the Solicitor General related
17 back to the date of an unauthorized filing by the FEC such that
18 the authorization would make the filing timely. The court
19 found that it didn't because under the restatement, "if an act
20 to be effective in creating a right against another or to
21 deprive him of a right must be performed before a specific
22 time, an affirmance is not effective against the other unless
23 made before such time." That's at page 98. The Court stated
24 that the rationale behind the rule was that it was "essential
25 that the party ratifying should be able not merely to do the

1 act ratified at the time the act was done, but also at time the
2 ratification was made." The emphasis is on the but-also
3 phrase, same page. Thus, because the filing deadline would
4 have already passed at the time the Solicitor General
5 authorized the act, the authorization in that case was invalid.

6 Now, courts have interpreted this as really amounting
7 to addressing a timing issue. So, for example, *Advance*
8 *Disposal Services Eastern, Inc. versus NLRB*, 820 F.3d 592, 603,
9 and they utilized the principles of agency law to determine
10 whether a later ratification authorizes an earlier action by an
11 agent particularly with respect to appropriations clause
12 violations. So what the Third Circuit said in the *Advance*
13 *Disposal* case is that the timing problem in *Political Victory*
14 *Fund* has since been read to require that the ratifier had the
15 power to reconsider the earlier decision at the time of
16 ratification. And so there the Third Circuit considered three
17 general requirements for ratification in determining whether a
18 properly constituted NLRB and its regional director could
19 ratify an action taken by the regional director at a time where
20 the board lacked a valid quorum given invalid recess
21 appointments of several members. So the three requirement are:
22 "First, the ratifier must, at time of ratification, still have
23 the authority to take the action to be ratified; second, the
24 ratifier must have full knowledge of the decision to be
25 ratified; third, the ratifier must make a detached and

1 considered affirmation of the earlier decision." So there the
2 Third Circuit ultimately found that the requirements were
3 satisfied, and that's the bottom line.

4 Now in *Gordon*, which is the Ninth Circuit case, the
5 parties agreed that although Director Cordray's initial recess
6 appointment was invalid and did not satisfy the requirements of
7 the appointments clause, later renomination and confirmation
8 was valid. So based on that, the Ninth Circuit determined that
9 a ratification issued by Director Cordray with respect to
10 enforcement action at issue in that case, paired with a
11 subsequent valid appointment, cured any initial Article II
12 deficiencies. In reaching that conclusion, the Ninth Circuit
13 reasoned that "under the second restatement, if the principal,
14 [the] (CFPB), had authority to bring the action in question,
15 then the subsequent ratification of the decision to bring the
16 case is sufficient." That's from 1191. It bears noting that
17 the Ninth Circuit did cite the "less stringent" third
18 restatement of agency, Section 4.04 comment B., which "advises
19 that a ratification is valid even if principal did not have
20 capacity to act at the time, so long as the person ratifying
21 had capacity to act at the time of ratification." So the Ninth
22 Circuit found that because Congress statutorily authorized the
23 Bureau to bring the action in question through the CFPA, the
24 Bureau had authority to bring the action at the time the
25 enforcement action was initiated, and thus, the director's

1 ratification, Director Cordray's ratification, after his proper
2 appointment resolved any appointment clause deficiencies.

3 So, as in *Advance Disposal* here, the Court's view is
4 that there appears to be no limitation that would prevent
5 Director Kraninger from bringing an enforcement action against
6 respondent at the time, given that she is now removable at will
7 by the President. Indeed, I think that was conceded during
8 argument. Furthermore, if the director is considered to be
9 both the agent and the principal, like the regional director in
10 *Advance Disposal*, she better than anyone else had full
11 knowledge of her earlier action. And, as in *Gordon*, here, if
12 the CFPB, if the Bureau is to be considered the principal, and
13 Congress authorized the Bureau to issue CIDs and bring the
14 actions in federal court to enforce consumer protection
15 statutes and regulations.

16 Now, it's true that some courts have distinguished
17 between ratification and cases involving appointments clause
18 violations and those involving structural defects. So this is,
19 of course, discussed and argued in *RD Legal Funding* by Judge
20 Preska where she thought the distinction was dispositive. But
21 unlike in the *RD Legal Funding* case, here the for-cause removal
22 provision has been severed and the structure of the Bureau is
23 no longer in contravention of the Constitution. So the
24 constitutional deficiency issue doesn't exist here anymore. Of
25 course, Judge Preska didn't have the benefit of the *Seila Law*

1 decision, which we obviously have here. As such, the relevant
2 question seems to be whether the constitutional violation has
3 been remedied and whether the remedy was effective and
4 adequately addressed the prejudice to respondent from the
5 constitutional violation. And that's the framing that was set
6 forth by the DC Circuit in the *Legi-Tech* decision, 75 F.3d 704,
7 708. If that's true, then dismissal of the enforcement action
8 is neither necessary nor appropriate.

9 And I think *Legi-Tech* is instructive here as one of
10 the few cases where a court examined whether ratification of a
11 previously brought enforcement action, in light of a structural
12 constitutional defect that had been cured, was sufficient to
13 remedy respondent's claimed injury against whom the enforcement
14 action was taken. In that case, what the DC Circuit did is it
15 handled a challenge to litigation brought by the FEC after the
16 circuit had determined that the agency's structure violated the
17 Constitution in the case called *FEC versus NRA Political*
18 *Victory Fund*, given the presence of two congressional officers
19 as non-voting *ex officio* members of the FEC. As in *Seila Law*,
20 however, the DC Circuit determined that the provision was
21 severable and the FEC thereafter voted to reconstitute itself,
22 excluding those *ex officio* members from all proceedings and
23 ratified former actions, including the agency's previous
24 probable cause finding and civil enforcement action.

25 Just as has happened here, the respondent in that

1 case argued that separation of powers is a structural
2 constitutional defect that made the entire investigation void
3 and that the FEC's later ratification of the PC finding
4 couldn't cure the constitutional violation given that the vote
5 at the end of the administrative process doesn't the remove the
6 taint, the structural taint, from the sequence of the decision.

7 And there the DC Circuit even acknowledged the
8 respondent was, in fact, prejudiced given the structural defect
9 in place at time, but the court framed the question as "the
10 degree of continuing prejudice after the FEC's reconstitution
11 and ratification," at page 708.

12 The DC Circuit assumed that no matter what course was
13 followed, other than a dismissal with prejudice, some effects
14 of the unconstitutional structure of the FEC are to be presumed
15 to have impacted on the action. The court nonetheless
16 determined there was no ideal solution to that problem because
17 "even were the commission to return to square one, it is
18 virtually inconceivable that its decisions would differ in any
19 way the second time from that which occurred the first time."
20 And that's what I think we have here, and that's what I
21 mentioned during argument. But even if the Court were to
22 dismiss this enforcement action, there's really no reason to
23 believe that the Bureau's decision to issue the CID to bring an
24 action would differ another time around. And I think that's
25 been acknowledged here. So, as in *Legi-Tech*, where there is no

1 significant change in the membership of the commission, there's
2 been no significant change in the leadership here, forcing the
3 Bureau to start at the beginning of the process, given what the
4 DC Circuit described as human nature, "promises no more
5 detached and pure consideration of the merits of the case than
6 in this case the Bureau's ratification decision reflected." So
7 the more efficient and sensible course seems to be to take the
8 ratification of this prior decision at face value and treat
9 that as the adequate remedy for the constitutional violation
10 bearing in mind "the discretion the judiciary employs in the
11 selection of remedies."

12 Indeed, ratification has similarly been found to be
13 an effective cure in cases involving appointments clause
14 violations that were later resolved, particularly when a
15 dismissal would likely result in a similar administrative
16 procedure. So one case is the DC Circuit's decision in *Wilkes*
17 *Barr Hospital Company LLC versus NLRB*. There's the *Doolin*
18 *Security Savings Bank* case, 139 F.3d 214, *Intercollegiate*
19 *Broadcast Systems*, 796 F.3d at 117.

20 Also, it's bears noting that before *Seila Law*, at
21 least two courts determined that even if the CFPA's for-cause
22 removal provision was severable, the enforcement action would
23 still being effective. And I'll note both a *PHH I* and *II* cases
24 where then Judge Kavanaugh determined that the for-cause
25 removal provision was, in fact, unconstitutional but that it

1 was severable from the rest of the CFPA. Judge Kavanaugh then
2 considered the petitioner's statutory objections to the
3 enforcement action and vacated the action on statutory grounds
4 but not based on the structural constitutional violation,
5 "because the constitutional ruling would not halt the CFPB's
6 ongoing operations or the CFPB's ability to uphold the order
7 against the petitioners."

8 And a similar decision was reached by Judge McMahon
9 in *CFPB versus NDG Financial Corp.*, 2016 WL 7188792.

10 Now, to the extent that there's the argument that not
11 only would this ruling deprive respondent of a remedy in this
12 case but also in the related case, the Court does not agree.
13 In the related case, the respondent seeks a declaratory
14 judgment that the CFPB'S single-director structure violates the
15 Constitution, but that's precisely the remedy that the
16 conclusion in *Seila Law* provides.

17 With respect to *Lucia versus SEC*, I think that case
18 is just different. The Supreme Court there determined that the
19 appointment of an ALJ who presided over an enforcement
20 proceeding did not comport with the appointments clause. The
21 court found that under its precedent, "one who makes a timely
22 challenge to the constitutional validity of the appointment of
23 an officer who adjudicates his case is entitled to relief."
24 That's from page 2055. The court determined that the
25 appropriate remedy for an adjudication tainted with

1 appointments violation is a new hearing before a properly
2 appointed official. But, here, as the Bureau points out, the
3 adjudication of the CID is before this Court, as is the
4 adjudication in the related case. So it's an
5 apples-and-oranges comparison. What's more, in *Lucia*, the
6 court found that another ALJ or the SEC itself would need to
7 hold a new hearing because the previous ALJ already both heard
8 the petitioner's case and issued an initial decision on the
9 merits. But here, there's been no "adjudication," by the
10 Bureau or the director, with respect to the enforcement action
11 and also there's no substitute decision-maker to revisit the
12 decision such as another ALJ.

13 To the extent that the respondent argues that the
14 Supreme Court determined in *Seila Law* that the only lawfully
15 acting principal is the President, I just don't think that's a
16 fair reading of *Seila Law*. Although the court, the Supreme
17 Court cited the well-established principle that the executive
18 power belongs to the President, it didn't issue any sort of
19 ruling on ratification in fact stating that "because it would
20 be impossible for one man to perform all the great business of
21 the state, the Constitution assumes that lesser executive
22 officers will assist the supreme magistrate in discharging the
23 duties of his trust." Quoting from the writing of George
24 Washington. Can you get a better source than that. There
25 really isn't any other authority to support this proposition,

1 as clever as it is.

2 So the Court finds that where the for-cause removal
3 provision has been severed, and thus, the constitutional
4 violation has dissipated, the ratification of the prior action
5 is valid.

6 Now there's the other argument, as I said, there's
7 the argument that the director has not validly ratified the
8 Bureau's regulations and its related guidance documents that
9 her ratification of this action is invalid. In fact, what the
10 respondent argues is because Director Kraninger ratified the
11 investigation and the enforcement on July 2 and regulations on
12 July 10, that she could not have attained the regulatory
13 authority to ratify this case until July 10 at the earliest.
14 And the respondent further argues that the ratification was, in
15 any event, ineffective, as "if anyone can ratify prior invalid
16 Bureau regulations, guidance documents, and enforcement
17 activities, only the President can."

18 The Court does not agree. The Bureau's authority to
19 issue and enforce CIDs is derived not just from the CFPB but
20 from the CFPA, and in deciding that the Bureau was
21 unconstitutionally constituted, the Supreme Court determined
22 that the removal provision was severable from any other
23 statutory provision relating to the Bureau's powers and
24 responsibilities. So the provisions related to the Bureau's
25 authority to issue CIDs, they remain valid based on *Seila Law*.

1 To the extent that there's this argument that the
2 director failed to perform a detached and considered judgment
3 of the actions she ratified, this argument is based on the
4 assumption that she couldn't have given the prior acts more
5 than a passing glance because it would have had to have been
6 done within a matter of days after *Seila Law*.

7 While it's certainly true a ratifier must make and
8 detached and considered judgment and not simply rubber-stamp an
9 earlier action, there's really no actual evidence to establish
10 that the director failed to conduct an independent evaluation
11 or make a detached considered judgment, it's merely speculation
12 based on sort of timing, but that's just, at the end of the
13 day, that's just not enough authority that says that somehow
14 that's enough. So, for example, in *Advance Disposal Services*,
15 the Court noted that mere lack of detail in the director's
16 express ratification is not sufficient to overcome the
17 presumption of regularity. In fact, elsewhere in that decision
18 the Third Circuit noted that the presumption of regularity
19 applied to the actions of an agency, and finding that those
20 opposing ratification, in that case, had "not produced evidence
21 that cast doubt on the agency's claim that the board of
22 director properly ratified the earlier actions." And the party
23 argued only that ratification was a "rubber-stamp." And also
24 *Legi-Tech*, the DC Circuit said that it couldn't examine the
25 internal deliberations of the commission, at least absent the

1 contention that one or more commissioners was actually biased.

2 Here, the ratification states that the director
3 considered the basis for the Bureau's decisions to issue the
4 CID, to deny respondent's request to modify or set aside the
5 CID, and to file a petition requesting that the district court
6 enforce the CID, and she ratified those decisions on behalf of
7 the Bureau. In the Court's view, that is sufficient under the
8 circumstances.

9 All right, now in terms of the enforceability of the
10 CID, as noted, the Court's role here is extremely limited, but
11 of course the information being sought has to be reasonable.
12 I've gone through all this. An agency does have to make only a
13 *prime facie* showing that the four requirements I discussed
14 earlier had been met.

15 In terms of the purpose of the investigation, the CID
16 indicates the purpose. It's all laid out in the CID. In the
17 Court's view, this reflects a legitimate, investigatory
18 purpose, as the CFPB expressly authorizes the Bureau to
19 investigate suspected violations of consumer protection laws,
20 such as the FDCPA and the FCRA, which is what is the purpose
21 here, among others. I'll just note a couple of cases that have
22 come to similar conclusions, *CFPB versus Heartland Campus*
23 *Decisions*, *ESCI*, 2018 WL 1089806, as I said, among others.

24 Now the argument here is that respondent sort of
25 states the purpose of the CID, arguing that it falls under the

1 practice-of-law exception, acknowledging that although the
2 respondent's services include debt-resolution activities that
3 might be regulated by the Bureau as the third party, the Bureau
4 is prohibited from regulating the practice of law and that the
5 Bureau has "pressed its obstinate demand for information and
6 documents, including those created in respondent's practice of
7 law that respondent is duty-bound to protect from disclosure."
8 The practice-of-law exclusion instructs the Bureau may not
9 exercise any supervisory or enforcement authority with respect
10 to an activity engaged in by an attorney as part of the
11 practice of law under the laws of the state in which the
12 attorney is licensed to practice law. So though while it's
13 true the CID sought information that regulated the practice of
14 law and that that would be impermissible on its face, that's
15 not the purpose of the CID. In fact, the Bureau has made this
16 quite clear that that is not the purpose of the CID.

17 The nature of the CID and the investigation falls
18 under an exception to the practice-of-law exclusion. Section
19 5517(e) (2) states that the exclusion "shall not be construed as
20 to limit the authority of the Bureau with respect to any
21 attorney to the extent that such attorney is otherwise subject
22 to any of the enumerated consumer laws or authorities
23 transferred." So here the Bureau seeks information about
24 possible violations, as I said, of the FDCPA and the FCRA, both
25 of which respondent is subject to and the Bureau represents

1 that the purpose of the CID is not to investigate in the actual
2 practice of law but is instead meant to gather information
3 about respondent's debt-collection activity, which the CID
4 specifically defines as activities, including attempts to
5 collect a debt, either directly or indirectly, excluding the
6 provision of legal services. I think respondent acknowledges
7 that that's not an impermissible purpose. I think there's just
8 a question of the extent to which the documents themselves that
9 are being sought, for example, might implicate attorney-client
10 privilege. And I will certainly talk about that in a minute.
11 But on its face, the Court finds that the purpose is
12 legitimate.

13 In terms of relevance, that could be broadly
14 interpreted, and the courts are supposed to defer to an
15 agency's appraisal of relevance. And so, unless it's obviously
16 wrong, the Court's not going to question it. Again, this gets
17 into the attorney-client confidences issue. And the Bureau
18 obviously disagrees that it is trying to seek or retain
19 information that is covered by the privilege because, for
20 example, the communications being sought do not reflect
21 communications by clients seeking an opinion of law, legal
22 services, or assistance in some legal proceeding involving
23 respondent. Instead, the CID seeks information related to
24 respondent's debt-collection business and specifically defines
25 debt-collection activities as excluding the provision of legal

1 services and directs respondent that if any responsive
2 materials were held on the basis of privilege that respondent
3 should submit a schedule of the documents and information
4 withheld that includes details, such as the subject matter,
5 dates, names, address, et cetera.

6 And any party asserting attorney-client privilege has
7 to demonstrate: The asserted holder of the privilege is or
8 sought to become a client; that the person to whom the
9 communication was made is the member of a bar or a court, or
10 that person's subordinate; in connection with this
11 communication is acting as lawyer; the communication relates to
12 a fact the attorney was informed, A, by a client, B, without
13 the presence of strangers, C, for the purpose of securing
14 primarily an opinion of law or legal services, or assistance in
15 some legal proceeding, and not for the purpose of committing a
16 crime or tort, and the privilege has been claimed and not
17 waived by the client. That's all spelled out in *SEC versus*
18 *Yorkville Advisors, LLC* 300 F.R.D. 152, 161.

19 As I said, it's pretty clear that the material that
20 the Bureau seeks is relevant in terms of how it relates to the
21 investigation and the statutory violations that the Bureau is
22 statutorily charged with investigating, and on the face the
23 requests appear to be related to debt-collection services
24 provided by respondent, and so they are relevant to the
25 investigatory purpose.

1 To the extent that there are broad assertions of
2 attorney-client privilege, that's really not going to get it
3 done. So, for example, to the extent that there is a claim
4 that the Bureau seeks attorney-client confidences and
5 privileged documents and information, those are not really
6 detailed at all, there's no specific examples given, there's
7 nothing about relating to specific legal advice the respondent
8 had given. So, for example, some of the documents that the
9 Bureau seeks, information on consumer complaints in recordings
10 of calls between respondent and consumers, that's not embodied
11 by the attorney-client privilege. Just on its face it's just
12 not.

13 And it also should be I think undisputed territory
14 that to the extent an attorney acts as a collection agent, any
15 communications between that attorney and the client are not
16 protected by the attorney-client privilege. Among other cases
17 that was noted in *Avoletta versus Danforth*, 2012 WL 3113151.
18 Again, the Bureau is saying that all it wants is information
19 related to respondent's activity and debt-collection
20 activities.

21 To the extent that there is information that is
22 privileged, then respondent can submit a privilege log, which
23 has not been done in connection with the CID.

24 And I think there's also, I think, force to the
25 Bureau's argument that Rule 1.6 specifically exempts an

1 attorney from any sort of responsibility to the extent the
2 information is required by an order of the Court. Among other
3 cases, *In re Alghanim*, 2018 WL 2356660.

4 Thus, because the Court's view is that the Bureau is
5 not seeking privileged information, it's conducting an
6 investigation, and the respondent hasn't shown that the Court
7 should otherwise refuse to enforce the CID on the basis of
8 relevance, the Court finds that the Bureau has demonstrated
9 that the information it seeks is relevant.

10 Again, to the extent there are specific objections
11 because there are specific documents or portions of documents
12 that are privileged, then a privilege log can be submitted.

13 In terms of what's already in the Bureau's
14 possession, the Bureau I think persuasively makes the point
15 that the previously identified pages from the 2017 CID, there
16 were some issues about formatting which that was provided,
17 there was clawback. So there was a clawback and redaction of
18 many of the pages that were responsive. And to the extent
19 respondent generally has said, hey, I produced thousands of
20 pages in response to the 2017 CID, that's not sufficient to
21 rebut the Bureau's representation, its showing as to what it
22 has not been given. Plus the 2017 and 2019 CIDs are not
23 identical. And so absent more specific detail, the Court finds
24 this objection not to be persuasive.

25 In terms of the administrative steps taken, the only

1 argument here has to do with the ratification, but the Court
2 has already ruled on that.

3 With respect to FedChex issue, the Court agrees that
4 Rule 19 is essentially not applicable here, not applicable to
5 enforcement proceedings, and I don't think respondent has made
6 the showing that, even if it somehow did apply, that it should
7 apply here. I'll note that the Court hasn't been able to find
8 a case within the Second Circuit regarding the applicability of
9 Rule 19 to enforcement proceedings, but there have been,
10 certainly are decisions that in the context of the SEC and CFTC
11 proceedings, that Rule 19 is not dispositive, among other cases
12 *SEC versus Princeton Economic International Limited*, 2001 WL
13 102333, at *1.

14 Even if it did apply, it's far from clear FedChex is
15 a necessary party. To the extent that the respondent has
16 information that is responsive to the CID that might
17 tangentially relate to FedChex, then respondent should produce
18 that material. To the extent that they are privileged, then
19 respondent can submit a privilege log, as previously discussed.

20 So for these reasons the Court grants the petition to
21 enforce the 2019 CID. To the extent, as I said, that there are
22 objections, specific objections regarding privileged material,
23 respondent should submit a schedule of that material as
24 directed by the CID to the Bureau. To the extent that the
25 respondent seeks modifications based on what it produced in

1 response to the 2017 CID, it can discuss this with the Bureau
2 and write specific details on the material if it feels
3 satisfied the requests from the 2019 CID that are duplicative
4 of the 2017 CID.

5 Sorry to keep you so long, is there anything else?

6 MS. ASSAE-BILLE: Not from the Bureau, your Honor.

7 MR. DeGRANDIS: For the respondent, we have nothing
8 further. Thank you, your Honor.

9 THE COURT: All right. Have a pleasant afternoon.
10 Everybody stay healthy.

11 MR. DeGRANDIS: Thank you, you, too.

12 MS. ASSAE-BILLE: Thank you, your Honor.

13 (Proceedings concluded)

14 CERTIFICATE: I hereby certify that the foregoing is a true and
15 accurate transcript, to the best of my skill and ability, from
my stenographic notes of this proceeding.

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Angela A. O'Donnell, RPR, Official Court Reporter, USDC, SDNY

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