UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-3471

Caption [use short title]

Motion for: Stay Pending Appeal

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

Set forth below precise, complete statement of relief sought:

Appellant/Movant Law Offices of Crystal Moroney, PC seeks a stay of the Southern District of New York's August 19, 2020 order enforcing CFPB's Petition to Enforce its Second Civil Investigative Demand, pending the Law Firm's Second Circuit appeal.

MOVING PARTY: Law Offices of Crystal Moroney, P.C.

OPPOSING PARTY: Bureau of Consumer Financial Protection

☐ Plaintiff ☑ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Michael P. DeGrandis

OPPOSING ATTORNEY: Kevin E. Friedl

[name of attorney, with firm, address, phone number and e-mail]

New Civil Liberties Alliance	Bureau of Consumer Financial Protection
1225 19th Street, NW, Suite 450, Washington, DC 20036	1700 G Street, NW, Washington, DC 20552
mike.degrandis@ncla.legal | (202) 869-5208	kevin.friedl@cfpb.gov | (202) 435-9268

Court-Judge/Agency appealed from: Hon. Kenneth M. Karas, District Judge, Southern District of New York, White Plains Division

Please check appropriate boxes:

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

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

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

Has request for relief been made below? ☑ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☑ No
Requested return date and explanation of emergency: January 21, 2021

A stay is necessary to preserve the status quo pending appeal and to avoid irreparable harm to Appellant/Movant.

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

Date: January 11, 2021

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Form T-1080 (rev. 12-13)

20-3471

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BUREAU OF CONSUMER FINANCIAL PROTECTION,
Petitioner-Appellee,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EMERGENCY MOTION TO STAY ENFORCEMENT OF CIVIL INVESTIGATIVE DEMAND PENDING RESOLUTION OF APPEAL

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

Counsel for Respondent-Appellant

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INTRODUCTION

Respondent-Appellant Law Offices of Crystal Moroney, P.C. ("Law Firm" or "Appellant") respectfully moves this Court for stay pending appeal, under Fed. R. App. P. 8(a)(2) and 27 and Local Rule 27.1(d), to preserve the *status quo* among the parties. The August 19, 2020 order ("Order") from which the Law Firm appeals enforces the Consumer Financial Protection Bureau's ("CFPB" or "Appellee") November 19, 2019 civil investigative demand ("Second CID") to the Law Firm. Issued without suspicion of wrongdoing, the Second CID demands documents, reports, and information dating back to January 1, 2014, spanning the breadth of the Law Firm's practice.

The Law Firm's appeal implicates matters of first impression. In *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), the Supreme Court held that the Consumer Financial Protection Bureau's ("CFPB" or "Appellee") single Director was unconstitutionally insulated from the President's removal. 140 S. Ct. at 2211. The *Seila Law* Court did two things: (1) it severed CFPB's constitutionally defective removal protection from its enabling statute; and (2) it directed lower courts to determine whether and how CFPB's Director may ratify her prior unconstitutional acts. *Id.* at 2208.

Notably, the Supreme Court did ***not*** consider whether CFPB's funding structure is unconstitutional because that issue was not before the Court.

Moreover, no circuit court has ever deliberated on the constitutionality of a funding structure like the post-*Seila Law* CFPB. Currently, the President and CFPB's Director, who is now directly answerable to the President, make demands for appropriations that are unreviewable by Congress and wholly unrelated to user fees or assessments on regulated parties. In this way, severance of the Director's removal protection compounded CFPB's funding structure's Appropriations Clause violations.

There are also several fatal flaws in Director Kraninger's purported ratification of the enforcement action, not the least of which is her unabashed admission that she knew her office was unconstitutionally insulated from removal, prior to *Seila Law*. Despite this admission, she pursued an investigation of the Law Firm. In addition to these issues of first impression, Appellant will assert on appeal that CFPB's civil investigative demand ("CID") is unreasonable and represents a barefaced attempt by CFPB to regulate the practice of law. This case manifests a serious jurisdictional overreach by CFPB.

It is imperative that this Court resolve these weighty issues, but absent a stay pending appeal, Appellant will be robbed of her right to have this Court do so. Requiring the Law Firm to comply with the CID while Appellant challenges its validity on appeal will make permanent the constitutional harm for which

Appellant seeks vindication ***and*** cause complete ruination of the Law Firm. In short, without a stay, there will be no Appellant to assert an appeal.

On the other hand, a delay in enforcement of the CID would not harm CFPB and it would advance the public interest. CFPB issued the CID without ***any*** suspicion of wrongdoing and without ***any*** consumer complaints. Moreover, Appellant has already provided CFPB with much of the information sought by the CID because the Law Firm produced documents, generated reports, and answered interrogatories pursuant to a prior CID that CFPB voluntarily dismissed on the eve of an enforcement hearing in 2019. The lack of suspicion of wrongdoing coupled with CFPB's dilatory action investigating the Law Firm, demonstrate that any delay to allow the Law Firm to pursue its rights on appeal will not harm CFPB or the public.

Thus, all the relevant factors favor staying the district court's Order until this Court can rule on the important constitutional and statutory issues regarding the existence or scope of CFPB's authority, pending appeal.

BACKGROUND

The present controversy began more than three years ago, on June 23, 2017, when CFPB issued its first CID to the Law Firm ("First CID"). Enforcement Hr'g Tr. at 44 (Aug. 18, 2020) (Exhibit A). CFPB voluntarily withdrew that CID on November 4, 2019, four days prior to its enforcement hearing. *See* First Decl. of

Assae-Bille, ECF-2-1, ¶ 9 (Feb. 25, 2019) (Exhibit B). Six days after its self-mooted hearing, CFPB issued another CID that it describes as "substantially similar" to the first. Enforcement Tr. at 44. The Second CID is the subject matter of the appeal pending here.

On April 27, 2020, CFPB filed an Amended Petition to Enforce the Second CID. Enforcement Tr. at 51. At the August 18, 2020 hearing, the Law Firm argued that the CID is unenforceable because CFPB's funding structure is unconstitutional, its post-*Seila Law* ratification is fatally flawed, and that the CID is unreasonable because it attempts to regulate the practice of law, among other things. Enforcement Tr. at 53, 59 & 47. The district court ruled in favor of CFPB and entered its Order on August 19. Order to Enforce CID, ECF-29 (Aug. 19, 2020) (Exhibit C). The Law Firm filed its Notice of Appeal on October 7. Notice, ECF-38 (Oct. 7, 2020) (Exhibit D).

Pursuant to Fed. R. App. P. 8(a)(2)(A)(ii), the Law Firm first moved the district court to stay pending the appeal, but the district court denied the stay.[1] Order, ECF-46 (Dec. 20, 2020) (Exhibit E). While the district court agreed with the Law Firm regarding the standard of review, the court concluded that it did not meet that standard. Stay Hr'g Tr. at 24, 38 (Dec. 16, 2020) (Exhibit F).

[1] The enforcement and motion to stay hearings were oral arguments without in-person or remote testimony.

SUMMARY OF ARGUMENT

To preserve the *status quo*, this Court should stay enforcement of the Order pending resolution of the appeal. There are three principal reasons a stay is warranted. First, absent a stay, Appellant will endure irreparable injury by suffering the constitutional harm that the Law Firm seeks to vindicate here and because compliance with the burdensome CID will ensure Appellant's complete ruination. The Law Firm will close its doors and fire all five of its employees if it must comply with the Order before the appeal is decided.

Second, the Law Firm has a substantial possibility of success on appeal. Appellant's assertion that CFPB's funding is unconstitutionally structured is a matter of first impression—not just in this circuit, but in any of the circuits. Because this case presents an issue of first impression, the district court had no binding authority—much less persuasive authority from another court of appeals—on which to rely in its decision. The lack of precedent increases the likelihood that that this Court will disagree with the district court and that Appellant will prevail. Furthermore, it is well-established that CFPB cannot regulate the practice of law, as it has done by demanding confidential and privileged attorney-client information from the Law Firm. The Court must assess Appellant's degree of possible success on a sliding scale that considers the other stay factors, including the catastrophic irreparable harm Appellant will suffer without a stay.

Lastly, the negligible harm to CFPB and the public interest support a stay. CFPB will not be harmed if this Court enters a stay, as demonstrated by the glacial pace by which it pursued compliance with the First CID back in June 2017. And after CFPB self-mooted that "substantially similar" CID one year ago, it has still not reviewed the documents it acquired during that investigation. Moreover, because the current CID is not the result of consumer complaints or based on suspicion of unlawful activity, there is no reason to believe that the Law Firm's continued operation poses any harm to the public or CFPB's mission. Indeed, the public interest favors a stay where constitutional authority is under scrutiny, particularly where the Supreme Court has already struck down CFPB's unprecedented leadership structure and Appellant challenges another unprecedented component of CFPB's structure. Without a stay, CFPB will proceed undaunted and continue to regulate the practice of law and force Appellant's liquidating compliance before this Court can decide Appellant's fundamental challenge to CFPB's jurisdictional authority.

All relevant factors thus favor staying the district court's order until this Court can rule on the important constitutional and statutory issues presented on appeal, lest the appeal not be heard at all.

ARGUMENT

When considering whether to stay a final order, this Court considers four factors:

> (1) whether the movant will suffer irreparable injury absent a stay; (2) whether a party will suffer substantial injury if a stay is issued; (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal; and (4) the public interests that may be affected.

Hirschfeld v. Bd. of Elections, 984 F.2d 35, 39 (2d Cir. 1993). In weighing these factors, this Court uses "a sliding scale," such that "the necessary level or degree of possibility of success will vary according to the court's assessment of the other stay factors[.]" *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006) (internal quotations and citations omitted). Where the government is a party, the harm to the government and the public interest merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). This Court should stay enforcement pending appeal because each factor weighs in favor of a stay.

I. APPELLANT WILL SUFFER IRREPARABLE INJURY ABSENT A STAY PENDING APPEAL

Absent a stay pending appeal, the Law Firm's principal, Ms. Moroney, has two choices: (A) comply with the demands of an agency that she understands is both unconstitutionally structured and acting outside its statutory mandate and by complying, accept complete business ruination at the hands of CFPB's unreasonably costly and burdensome demands; or (B) refuse to comply, face contempt fines and state bar sanctions, and find a new career. This leave Ms. Moroney no real choice, at all. A Hobson's Choice by which a party may either accede to a constitutional violation or suffer non-compensable (and irreversible, in this case) economic injury is the very definition of irreparable harm. *See Red Earth LLC v. United States*, 657 F.3d 138, 146 (2d Cir. 2011) (holding that where a federal statute is alleged to violate constitutional rights, a Hobson's Choice of compliance with an unconstitutional act or economic injury as a result of the act's enforcement tips the public interest in favor of injunctive relief).

A. Absent a Stay, Appellant Will Suffer Irreparable Harm to Constitutional Rights that Will Moot All or Part of the Appeal

Appellant's threshold objection to the enforcement action is that the Bureau's funding structure is unconstitutional—the agency has no authority whatsoever to investigate, adjudicate, or enforce the CID. *See* Enforcement Tr. at 53. The district court acknowledged that the question of the Bureau's constitutionality "may very well be a prerequisite determination that has to be made[.]" *Id.* at 22.

If CFPB is acting without constitutional authority, the CID is a nullity. Without a stay, CFPB will demand documents and information to which it may not have a lawful right, which would cause two irreparable harms. First, the unlawful exercise of governmental authority violates Ms. Moroney's constitutional rights—a harm that is presumptively irreparable. *See Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("[T]he *alleged* violation of a constitutional right [] triggers a finding of irreparable harm.") (emphasis in original). This Court should presume irreparable harm because "when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (quoting 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2948, at 440 (1973) (internal quotations omitted)).

Second, absent a stay, the Law Firm's appeal could be rendered moot because it would be subjected to the constitutional harm of which it complains before this Court can consider the appeal. If compelled to respond to the CID, there may be nothing left for this Court to decide.

B. Absent a Stay, Appellant Will Suffer Complete Ruination

Ms. Moroney's Law Firm faces imminent irreparable injury in the form of complete ruination. To be clear, the irreparable harm that Appellant will suffer is not excessive expenses. Rather, the Law Firm will imminently suffer total, non-compensable, financial ruin absent a stay. Financial ruination is undeniably irreparable harm. *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.*, 588 F.2d 24, 28-29 (2d Cir. 1978) ("It is firmly established that '[a] threat to the continued existence of a business can constitute irreparable injury[.]'"). *See also*

Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989) (explaining that monetary loss "that cannot be rectified by financial compensation" is an irreparable injury); *JSG Trading Corp. v. TrayWrap Inc.*, 917 F.2d 75, 79 (2d Cir. 1990) (defining "irreparable injury" as "one that cannot be redressed through a monetary award.").

The likelihood of ruin to the Law Firm is not theoretical. The substantial time and resources that Ms. Moroney expended in response to the First CID, issued after CFPB openly admitted it was unconstitutionally structured, provides non-speculative projection of future costs. Appellant's first fruitless attempt at compliance cost the Law Firm $75,000 in fees and expenses, forced Appellant to layoff nearly half of the staff before the end of 2019, and substantially hindered Appellant's ability to conduct business. Aff. of Crystal G. Moroney, ¶¶ 13-17, 22 (Jan. 11, 2021) (Exhibit G). Now, CFPB seeks immediate enforcement of the Second CID before the Law Firm can pursue an appeal asserting that this CID is ***also*** an unconstitutional nullity.

Using the First CID as a baseline, compliance with the second CID will cost Appellant more than $75,000 in expenses, require more than 650 hours of Ms. Moroney's time, divert staff away from their core business responsibilities (but this time, a staff of five, not a staff of 17), and substantially hinder Ms. Moroney's efforts to maintain her business. *Id.* at ¶¶ 28-31. The Second CID's temporal scope is ***double*** that of the first and extends far beyond the applicable statute of limitations. *Id.* at ¶¶ 10-11. The Law Firm remained in business during the First CID and enforcement proceeding because, from June 2017 through 2019, Ms. Moroney reduced staffing by 47% and reduced her salary from $155,000 to $96,600 per year. *Id.* at ¶ 16-17.

Absent a stay pending appeal, the costs of complying with the CID will exceed Law Firm profits. *Id.* at ¶ 28. Having already reduced staff to a skeleton crew and her own salary to the bare minimum to make ends meet, Appellant cannot afford to remain in business while incurring the additional cost of complying with another unconstitutional CID. *Id.* at ¶ 23. Since 2017, the Law Firm has posted net losses each year, with the exception of 2018, where it had a net profit of just $360. Aff. of Howard Messing, ¶¶ 16-21 (Jan. 11, 2021) (Exhibit H). The losses would be much more extreme, and the $360 profit would be a loss in the tens of thousands of dollars, had Ms. Moroney not slashed her salary and cut staff to stay afloat. *See id.*

The foregoing costs and burdens alone are sufficient to demonstrate the Law Firm's likelihood of total ruin if the CID is not stayed pending appeal. But in the "new normal" of COVID-19, the Law Firm—once a small business—is now a shell of its prior self. This "new normal" presents perilous new challenges that leave it teetering on the edge of insolvency, accelerating the imminent ruination posed by pre-appeal CID enforcement. Between March and June 2020, New York closed Appellant's doors and Ms. Moroney had to operate with just four employees—including herself—remotely. Moroney Aff. at ¶ 37. Due to the shutdowns, many Law Firm clients could not provide it with the work upon which Appellant had previously relied. *Id.* at ¶ 38. The partial reopening in June enabled the Law Firm to hire back only one employee, requiring Ms. Moroney to personally take on additional roles including bookkeeping, consumer contact, and other administrative tasks, to keep the Law Firm afloat. *Id.* at ¶ 39. Many debtors—quite understandably—can no longer afford to pay their debts due to hardship or loss of employment during the COVID-19 crisis, nor will they be able to, for the foreseeable future. *Id.* at ¶ 40. And Ms. Moroney's twin 9-year-old children have not been in school since March 2020, so she has been tending to their care and education during this time. *Id.* at ¶ 41.

Thus, Ms. Moroney's time at home is split among childcare, homeschooling, and fulfilling additional administrative roles necessary to maintain her business.[2] *Id.* at ¶ 42. Although the Second CID did not cause these dynamics, Appellant's

[2] This Court may take judicial notice of the fact of the hardships created by remote learning for parents and their young children. *See, e.g.*, Bethany Mandel, *'Remote learning' is a disaster, and terrible for children*, N.Y. Post (Sept. 16, 2020), *available at* https://nypost.com/2020/09/16/remote-learning-is-a-disaster-and-terrible-for-children/. One of the challenges faced by parents is vigilant monitoring of young children's engagement and attention. *See id.*

compliance with the First CID reduced Appellant to a skeleton staff prior to the pandemic and extended Ms. Moroney's responsibilities to the edge of her personal and professional capacity. Pre-appeal CID-compliance will cause the Law Firm's insolvency, and COVID-19 will accelerate the process.

With a staff of five trying to do the work of 17, the Law Firm cannot afford to have Ms. Moroney expend any more time complying with serial CIDs, cannot afford to have any more staff time dedicated to CID compliance, cannot afford to lay off more staff, cannot afford $75,000 or more in additional compliance costs, and Ms. Moroney cannot afford further reductions to her salary. *Id.* at ¶¶ 32-34. While either harm is sufficiently irreparable to justify a stay pending appeal, the combination of constitutional harm and Appellant's total ruination without the possibility for compensation is patent irrevocable harm.

II. APPELLANT HAS A SUBSTANTIAL POSSIBILITY OF SUCCESS ON APPEAL

The Law Firm's appellate questions far exceed the applicable standard for a stay pending appeal. This Court will issue a stay where an appellant "has demonstrated 'a substantial possibility, although less than a likelihood, of success' on appeal[.]" *Hirschfeld*, 984 F.2d at 39 (quoting *Dubose v. Pierce*, 761 F.2d 913, 920 (2d Cir. 1985)) (additional citations omitted). Whether the Law Firm has demonstrated a substantial possibility of success will be determined along a "sliding scale," such that "the necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other stay factors[.]" *Thapa*, 460 F.3d at 334 (quoting *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002)). Specifically, the

> probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply stated, more of one excuses less of the other.

Id. Indeed, "less than a likelihood of success" means "something ***less*** than 50 percent." *Mohammed*, 309 F.3d at 102 (emphasis added). And where the gravity of injury to the Law Firm is contrasted with the negligible injury to CFPB if the Order is or is not stayed, "the degree of likelihood of success on appeal need not be set too high." *Id.* Thus, the Court need not believe that Appellant is more likely than not to prevail on appeal—the Court may conclude only that the Appellant could possibly succeed. The Law Firm's possibility of success, though, far exceeds this low standard and warrants a stay.

All three factors comprising the possibility-of-success standard tilt heavily in Appellant's favor: (1) the precedent upon which the lower court's decision was based; (2) the standard of review on appeal; and (3) whether the Court will defer to a federal agency's position. *See Hayes v. City Univ. of New York*, 503 F. Supp. 946, 963 (S.D.N.Y. 1980). First, Appellant's principal argument, that CFPB's funding is unconstitutionally structured, is likely to succeed on appeal. As the Supreme Court has emphasized, "'Perhaps the most telling indication of [a] severe constitutional problem' with an executive entity 'is [a] lack of historical precedent' to support it." *Seila Law*, 140 S. Ct. at 2201 (internal citations omitted). And there is no historical precedent for CFPB's funding structure. In rare instances not applicable here, some courts have held that some agencies may receive funding from "fees, assessments, or investments rather than the ordinary appropriations process." *See PHH Corp. v. CFPB*, 881 F.3d 75, 95 (D.C. Cir. 2018) (*en banc*). But the exception is narrow, so "these few scattered examples … shed little light." *See Seila Law*, 140 S. Ct. at 2201 (internal quotations omitted). CFPB, on the other hand, is not self-funded through the collection of "fees, assessments, or investments" from users or regulated parties. Rather, the President, or President through CFPB's Director, makes a demand of the Fed, which the Fed cannot refuse. U.S.C. § 5497(a)(1)-(2).

This appeal presents a matter of first impression—not only in this Court, but in every other circuit in United States. While holding that Title X does not violate the Appropriations or Vesting Clauses of the United States Constitution, the court below also held that *Seila Law* did ***not*** decide the constitutionality of CFPB's funding structure. Enforcement Tr. at 58, 54-55. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality) ("[C]ases cannot be read as foreclosing an argument that they never dealt with."); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to constitute precedents.”).

One question on appeal will be whether the Constitution permits the President or a lone Director of a federal agency to make unreviewable demands for funding from a second agency that is self-funded, rather than receive its appropriations through bicameral bill passage and presentment or through user fees or assessments on regulated parties. The district court’s citations to other cases that previously upheld CFPB’s funding structure were issued pre-*Seila Law*, before the Supreme Court severed the Director’s for-cause removal provision, the severance of which gave the President control over CFPB’s budget and enforcement actions. In other words, following *Seila Law*, CFPB became the first and only federal agency that is ***dependent*** on the President but ***independent*** from Congress. By the very nature of Appellant’s defenses and the lack of precedent, there is a substantial possibility, if not likelihood, of Appellant’s success on appeal.

Second, this Court will conduct a *de novo* review of the appeal because the Law Firm will pose questions of statutory and constitutional law. *CFPB v. Gordon*, 819 F.3d 1179, 1187 (9th Cir. 2016). Where an appeals court does not afford any deference to the decision of a district court, there is a substantial possibility of success on appeal. *Id.*

Third, CFPB is not entitled to any deference regarding whether the agency believes its own funding structure is constitutional. The Second Circuit "review[s] an agency's disposition of constitutional issues *de novo*." *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 91 (2d Cir. 2009). Additionally, in its Decision and Order in the administrative proceeding, CFPB asserted that it lacks competency to decide whether its funding structure is constitutional:

> [T]he administrative process set out in the Bureau's statute and regulations for petitioning to modify or set aside a CID is not the proper forum for raising and adjudicating challenges to the constitutionality of the Bureau's statute.

Decision & Order on Pet. to Set Aside or Modify CID at 2 (Feb. 11, 2020) (Exhibit I). Certainly, CFPB's current self-serving litigation position that its funding structure is constitutional should not be afforded any deference, particularly where CFPB's own interpretation of its enabling statute prohibits it from asserting its constitutionality in the course of its administrative proceedings. *See id.*

Thus, in the absence of appellate precedent, with the *de novo* standard upon which this Court will consider the appeal, and the lack of deference the Court will show CFPB's statutory interpretation on review, Appellant has at least a substantial possibility of success on appeal, though it need only show some possibility of success.

III. Appellee Will Suffer Negligible Harm by a Stay Pending Appeal and the Public Interest Is Best Served by a Stay

The stay factors regarding whether Appellee will suffer substantial injury if this Court issues a stay, and an assessment of the public interests that may be affected by a stay, merge where the government is a party. *Nken*, 556 U.S. at 435. In stark contrast to the irreparable harm to the Law Firm and the likely mooting of the appeal absent a stay, a stay will not injure CFPB. Moreover, the "public interest is ***best*** served by ensuring the constitutional rights of persons within the United States are upheld." *Coronel v. Decker*, 449 F. Supp. 3d 274, 287 (S.D.N.Y. 2020) (emphasis added).

CFPB did not issue the first or second CID because of consumer complaints, nor has CFPB accused the Law Firm of any wrongdoing in briefing or arguments in this case. *See* Am. Pet. to Enforce CID, ECF-6, ¶ 1 (Apr. 27, 2020) (quoting CID Notice of Purpose as generally investigating debt collectors and not referring to any allegations of wrongdoing) (Exhibit J). These facts demonstrate that neither CFPB nor the public will suffer harm if CFPB's investigation is temporarily delayed while the Law Firm appeals the legitimacy of the CID.

Additionally, CFPB's dilatory actions over the last three and a half years further demonstrate that it will suffer no appreciable harm by a stay. CFPB delayed enforcement of the 2017 CID, which was "substantially similar" to the current CID, for nearly ***15 months*** after reaching an impasse with the Law Firm over confidential and privileged information,[3] it delayed serving Appellant with the first Petition to Enforce for another ***seven months***, and then it voluntarily dismissed the First CID on the eve of the first enforcement hearing in November 2019. Mem. in Support of Pet. to Enforce [2017] CID, ECF-1 (Feb. 25, 2019) (Exhibit K); First Assae-Bille Decl. at ¶ 9; Aff. of Serv., ECF-9 (Sept. 18, 2019) (Exhibit L); Not. of Withdrawal of the CID & Sugg. of Mootness, ECF-26 (Nov. 4, 2019) (Exhibit M).[4] Cumulatively, that is nearly ***two years*** of self-imposed delays by CFPB. And despite these delays, CFPB ***still*** has not reviewed the documents that it admits are already in its possession, prior to seeking enforcement of the second CID. *See* Second Assae-Bille Decl. at ¶ 8 (acknowledging "partial responses to the 2017 CID"). CFPB's desire to finally begin enforcing its CID after all this time cannot outweigh the considerable irreparable harm that the Law Firm will suffer absent a stay.

Furthermore, the public has a strong interest in preventing unconstitutional agencies from pursuing burdensome enforcement actions while appellate courts

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[3] The parties ended cooperative negotiations around September 2017. First Assae-Bille Decl. at ¶ 9.

[4] These citations document admissions made by CFPB in the first enforcement proceeding, *CFPB v. Law Offices of Crystal Moroney, P.C.*, No. 7:19-cv-1732-NSR. CFPB attached the 2017 CID and discusses the product of that investigation to support its Petition to Enforce the 2019 CID at issue in this appeal. *See, e.g.*, Second Decl. of Assae-Bille, ECF-6-2, ¶¶ 7-9 (Apr. 24, 2020) (Exhibit N).

work out complex constitutional questions that go to the heart of an agency's enforcement authority. *See, e.g.*, *Laube v. Haley*, 234 F. Supp. 2d 1227, 1252 (M.D. Ala. 2002) ("[T]here is a strong public interest in requiring that the plaintiffs' constitutional rights no longer be violated[.]"); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) ("The vindication of constitutional rights ... serve[s] the public interest almost by definition."). This is all the more true where, as here, the Court will deliberate on issues of first impression. Moreover, the public interest in a stay is particularly strong in this case because the Supreme Court has already struck down one aspect of CFPB's unprecedented structure, and described the agency as

> a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and ***levying knee-buckling penalties against private citizens***. And, of course, it is the only agency of its kind run by a single Director.

Seila Law, 140 S. Ct. at 2202 n.8 (emphasis added) (internal citation omitted). Absent a stay, CFPB will proceed undaunted and continue—once again without concern for its own constitutionality—to force Appellant's liquidating compliance and to wield its knee-buckling power against the public before this Court can decide the fundamental issue of CFPB's jurisdictional authority.[5]

Courts, including this one and the court below, have previously stayed CFPB's enforcement proceedings or delayed their briefing, as appellate courts and the Supreme Court determined the constitutionality of CFPB's structure. *See, e.g.*, *CFPB v. RD Legal Funding, LLC*, No. 18-2743, ECF-217 (2d Cir. Nov. 5, 2019); *CFPB v. Law Offices of Crystal Moroney, P.C.*, Mem. Endorsement, ECF-17 (June 12, 2020) (denying consolidation and stay but delaying briefing pending the Supreme Court's *Seila Law* decision) (Exhibit O); *CFPB v. Access Funding, LLC*, No. 1:16-cv-03759, ECF-123 (D. Md. Dec. 23, 2019). The stays awaiting *Seila Law* served the public interest because, as it turned out, the Supreme Court disagreed with most lower courts and ruled that CFPB's Director was unconstitutional. It is similarly within the public interest for this Court to stay the Order pending the Second Circuit's consideration of the constitutionality of CFPB's post-*Seila Law* funding structure in this matter of first impression, among other issues. Thus, further delaying enforcement so that Appellant may appeal the Order will advance the public interest and not injure CFPB.

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[5] Notably, the Supreme Court will again address the constitutionality of agency structures in its new term. *See, e.g.*, *Collins v. Mnuchin*, No. 19-422 (July 9, 2020) (granting petition for a writ of certiorari to the Supreme Court).

CONCLUSION

For the foregoing reasons, Respondent-Appellant Law Firm requests a stay pending appeal to maintain the *status quo* and prevent the appeal from being rendered moot by Appellant's compliance with the district court's Order.

Respectfully submitted,

Dated: January 11, 2021

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

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

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2021, I filed the foregoing Motion to Stay 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. I will also email a courtesy copy to Petitioner-Appellee's counsel.

Michael P. DeGrandis
Counsel to Respondent-Appellant

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 27(a)(2)(B), this document contains 5,195 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft® Word for Microsoft 365 MSO (16.0.13426.20352) 64-bit.

Michael P. DeGrandis
Counsel to Respondent-Appellant
January 11, 2021

INDEX OF EXHIBITS

Exhibit	Description
A	Enforcement Hearing Transcript (Aug. 18, 2020)
B	First Declaration of E. Vanessa Assae-Bille, ECF No. 2-1 (Feb. 25, 2019)
C	Order to Enforce CID, ECF No. 29 (Aug. 19, 2020)
D	Notice of Appeal, ECF No. 38 (Oct. 7, 2020)
E	Order Denying Stay, ECF No. 46 (Dec. 20, 2020)
F	Motion to Stay Hearing Transcript (Dec. 16, 2020)
G	Affidavit of Crystal G. Moroney (Jan. 11, 2021)
H	Affidavit of Howard Messing (Jan. 11, 2021)
I	Decision & Order on Petition to Set Aside or Modify (Feb. 11, 2020)
J	Amended Petition to Enforce [2019] CID, ECF No. 6 (Apr. 27, 2020)
K	Memorandum in Support of Petition to Enforce [2017] CID, ECF No. 1 (Feb. 25, 2019)
L	Affidavit of Service, ECF No. 9 (Sept. 18, 2019)
M	Notice of Withdrawal of the CID & Suggestion of Mootness, ECF No. 26 (Nov. 4, 2019)
N	Second Declaration of E. Vanessa Assae-Bille, ECF No. 6-2 (Apr. 24, 2020)
O	Memorandum Endorsement, ECF No. 17 (June 12, 2020)