

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

BRIEF OF APPELLANT LAW OFFICES OF CRYSTAL MORONEY, P.C.

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CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant Law Offices of Crystal Moroney, P.C., by and through its undersigned counsel, hereby states that it has no corporate parents and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

This appeal offers an object lesson on what happens to civil liberties when Congress purposefully structures an administrative agency to evade the Constitution’s carefully calibrated separation of powers. Congress designed the Consumer Financial Protection Bureau (“CFPB”) to be free from the political branches—not reliant on Congress for appropriations nor on the President for superintendence of its statutory duties. An agency free to spend more than half-a-billion dollars each year to pursue its law enforcement agenda as it sees fit is accountable to no one. And it has acted like it.

This case began three years prior to *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), a June 29, 2020 Supreme Court decision that severed a provision from CFPB’s enabling statute because it violated the separation of powers. At the time of the decision, CFPB had already issued a civil investigative demand (“CID”) to Law Offices of Crystal Moroney, P.C. (“Law Firm”), and it did so without a whiff of suspicion of wrongdoing. The Law Firm was a small, woman-owned business with 17 employees, including one attorney. It offered clients debt recovery legal advice and services and maintained a Better Business Bureau (“BBB”) rating of “A-”. The CID demanded more than three years of documents and information encompassing the entirety of the Law Firm’s practice, including confidential and privileged client communications and information. The Law Firm

complied to the fullest extent permitted by state bar ethics rules, but that was not enough for CFPB.

The Law Firm's punishment for resisting CFPB was the process itself, which CFPB used as leverage against the small business. Long after the Law Firm's attorneys filed their briefs and began oral argument preparation, just four days before the hearing, CFPB mooted the case by withdrawing the CID. Less than one week after the first case was dismissed, however, CFPB issued a second substantially similar CID, tacking on a demand for an additional two years of documents. Within two weeks, CFPB issued CIDs to at least one client of the Law Firm, and at least one of that client's clients, further tightening the screws. CFPB took every opportunity to make the Law Firm's ability to resist increasingly costly—both financially and reputationally.

Then, *Seila Law* vindicated the Law Firm's constitutional argument that the CFPB Director's tenure protection from the President violated the separation of powers. The Law Firm was right that CFPB had no authority to issue its CIDs. Despite all this, CFPB now asks this Court to whistle past the graveyard, forestall CFPB's day of reckoning with the Constitution, and tacitly approve the agency's atrocious tactics in this case. CFPB claims its ratification cures the unconstitutionality of its prior acts, despite publicly acknowledging that the acts themselves were unconstitutional at least two months prior to issuing the CID.

What has changed since June 2017, when all this began? For the Law Firm, the consequences of unconstitutional governmental coercion are palpable.

Although the Law Firm's BBB rating has improved to "A," it is nearly insolvent due to costs directly attributable to serial CIDs. Having expended more than \$75,000 in compliance and defense costs to date, the Law Firm made drastic reductions in salary and staffing to stay afloat. The once-small business is now a shell of its former self, with a staff of five, and it is out of cost-saving measures to offset additional expenses not related to the business or *legitimate* oversight.

For CFPB, it presses forward as if Supreme Court decisions do not have consequences. It issues let-by-gones-be-by-gones ratifications without skipping a beat. It is now the first agency in American history to be independent of congressional oversight but completely dependent on the President. Its funding structure is a gross violation of the Constitution. Curiously, *Seila Law*'s rebuke of its structure has emboldened it.

The Law Firm has a right to be free from the unconstitutional exercise of governmental authority, but it has been a victim of that very thing for almost four years. CFPB should not be permitted to violate the Appropriations and Vesting Clauses by receiving funding that is unreviewable by Congress. It should not be permitted to use ratification as an end-run around its knowing breach of the separation of powers. And it should not be allowed to expand its jurisdiction to

interfere with the practice of law or to demand documents and information already in its possession. This Court must put a stop to this rogue agency's disregard for constitutional norms and penchant for abusive tactics.

JURISDICTIONAL STATEMENT

If CFPB is constitutional, the district court had jurisdiction to decide this case under 12 U.S.C. § 5562(e)(1). After briefing and oral argument, Hon. Kenneth M. Karas granted CFPB's Petition ("Order"). Order (Aug. 19, 2020) (J.A.-9). The Law Firm filed a timely Notice of Appeal. Notice of Appeal (Oct. 21, 2020) (J.A.-10). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did the district court err in holding that CFPB's funding structure does not violate the Appropriations and Vesting Clauses of the United States Constitution, where CFPB does not receive its funding through bicameral passage and presentment of bills, and its appropriations are the product of the President's unfettered discretion to redirect earnings from a self-funded independent agency?

2. Did the District Court err in holding that CFPB's Director validly ratified the enforcement proceeding, where ratification is only necessary because the Director knowingly acted without constitutional authority in the first instance, where a highly irregular ratification process evinces the Director's lack of detached and considered judgment, where retroactivity would destroy Appellant's

intervening rights and be inequitable, and where nobody at CFPB had the authority to initiate the enforcement action?

3. Did the District Court err in enforcing the Second CID, where the CID regulates the practice of law or interferes with the attorney-client relationship, or where the CID is unreasonably overbroad and unduly burdensome because it seeks documents and information in CFPB's possession?

STATEMENT OF THE CASE

A. The Parties

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

Crystal G. Moroney, Esq., is the President and Managing Officer of Respondent-Appellant Law Firm. Ms. Moroney is an attorney licensed to practice law in New York and New Jersey. Show Cause Hr'g Tr. at 44 (Aug. 18, 2020) (J.A.-113). The Law Firm principally provides legal advice and services to clients seeking debt recovery solutions. *Id.* at 44 (J.A.-113). The Law Firm employs just one attorney and four support staff. Aff. of Crystal G. Moroney, ECF-023-8, ¶ 5 (Jan. 11, 2021). Although the Law Firm's collection policies and communications with debtors are CFPB-regulated activities, the Law Firm's practice of law is regulated by the New York and New Jersey State Bars. Hr'g Tr. at 44 (J.A.-113).

2. Petitioner-Appellee CFPB

CFPB was originally conceived as an independent executive agency, 12 U.S.C. § 5491(a), headed by a single Director nominated by the President and approved with the advice and consent of the Senate, *id.* § 5491(b)(1)-(2). CFPB enforces eighteen enumerated consumer-protection laws and prohibits consumer financial activities it deems “unfair, deceptive, or abusive.” *Id.* §§ 5481(12), 5531(a). As originally constituted, the Director enjoyed significant autonomy from presidential oversight, serving a five-year term and removable only for cause. *Id.* § 5491(c). CFPB, however, is no longer autonomous from the President. The Supreme Court severed Title X’s for-cause removal provision, eliminating CFPB’s independence from the President while leaving the balance of Title X intact. *Seila Law*, 140 S. Ct. at 2210-11.

Although “established in the Federal Reserve System” (“Fed”), 12 U.S.C. § 5491(a), CFPB’s scope of authority, investigations, enforcement actions, rules, orders, and employees are autonomous from the Fed’s Board of Governors

(“Board”), *id.* § 5492(c).¹ CFPB has exclusive rulemaking authority with respect to consumer financial law.² *Id.* § 5512(b)(4).

CFPB financial statements are also independent of the Board’s and Fed’s statements. *Id.* § 5497(a)(4)(F). While CFPB provides OMB with its financial operating plans, *id.* § 5497(a)(4)(A), OMB does not consent to or approve CFPB’s budget, nor does it have “any jurisdiction or oversight over [CFPB’s] affairs or operations[,]” *id.* § 5497(a)(4)(F). In sum, CFPB

acts 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 (internal citation omitted).

B. Background and Procedural History

1. The First CID and Enforcement Action

CFPB issued a CID to the Law Firm on June 23, 2017 (“First CID”). Hr’g Tr. at 44 (J.A.-113). In compliance with the First CID, the Law Firm “produced thousands of pages of documents and other data” but withheld documents that

¹ The Board is its own independent agency. Fed. Res. Sys. Purposes & Functions, 3 (Oct. 2016), *available at* https://www.federalreserve.gov/aboutthefed/files/pf_complete.pdf.

² If regulations “put the safety and soundness of the United States banking system or the stability of the financial system ... at risk[,]” the FSOC may set aside CFPB regulations by a two-thirds vote. 12 U.S.C. § 5513(a).

implicated Ms. Moroney's ethical obligations to her clients. *Id.* at 45 (J.A.-114). CFPB asserted that the production was "a partial response," since some material was withheld and clawed back. *Id.* at 44 (J.A.-113). Regardless of the parties' characterization of completeness, the parties agree that the Law Firm at least partially complied with the First CID.

CFPB sought to enforce the First CID at a November 8, 2019 hearing, but just four days prior, CFPB withdrew the CID and moved for dismissal. *Id.* at 46 (J.A.-115). The court denied the Petition to Enforce as moot. Order, 7:19-cv-01732-NSR, ECF-27 (Nov. 7, 2019). Within hours of the dismissal, CFPB announced that it would issue a second CID.

2. The Second CID, Ratification, and Enforcement Action

CFPB issued a second CID to the Law Firm on November 14, 2019 ("Second CID"). Hr'g Tr. at 46 (J.A.-115). The Second "CID sought 'substantially similar' information to the 2019 CID but it's not identical." *Id.* at 44 (J.A.-113). On December 5, 2019, Ms. Moroney's Law Firm petitioned CFPB to set aside or modify the Second CID on constitutional and statutory grounds. Pet. to Set Aside, ECF-6-5 (Dec. 5, 2019). On February 11, 2020, the Director denied the Law Firm's Petition to Set Aside or Modify the Second CID. Decision & Order, ECF-6-6 at 4 (Feb. 10, 2020) (J.A.-58). CFPB filed its second enforcement action on April 27, 2020. Am. Pet. to Enforce CID, ECF-6 (Apr. 27, 2020).

Then, on June 29, 2020, the Supreme Court severed the CFPB Director's tenure protection. *Seila Law*, 140 S. Ct. at 2210-11. A mere three days later, on July 2, 2020, CFPB filed a Notice of Ratification purporting to ratify this enforcement action, which the Director originally filed knowingly without constitutional authority. Notice of Ratification, ECF-18 (July 2, 2020) (J.A.-66). On August 19, 2020, the court granted CFPB's Petition to Enforce. Order, ECF-29 (Aug. 19, 2020) (J.A.-9).

SUMMARY OF THE ARGUMENT

Title X was supposed to establish the most independent agency in American history, free from the control of the political branches, ensuring transparency and fairness in consumer financial transactions. Instead, CFPB has become the first federal agency in American history to be independent of Congress but completely dependent upon the President. This dynamic is a direct affront to the Constitution, and it poses a serious threat to civil liberties, as the Law Firm can attest. The district court's Order errs in three principal ways. First, Title X violates the Appropriations and Vesting Clauses of Article I of the Constitution. Second, the Director's attempted ratification was ineffectual. Third, the CID is unreasonable because it seeks information prohibited by Title X.

The "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the

legislative process.” *INS v. Chadha*, 462 U.S. 919, 945 (1983). The explicit and unambiguous provisions of the Appropriations and Vesting Clauses require that Congress make appropriations through the bicameralism-and-presentment process. U.S. Const. art. I, §§ 9, 1, 7. Appropriations are not ministerial powers that may be assigned to the President. *See Wayman v. Southard*, 23 U.S. 1, 45-46 (1825). Congress’s “power of the purse” is exclusively legislative, and nondelegable. *See Dep’t of the Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012).

Even if appropriations authority were delegable, Title X lacks an intelligible principle to which the President’s discretion is limited and to which he could conform. Minimally, an intelligible principle must contain Congress’s clear statement of a “general policy.” *See Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019). But Title X’s purpose is to establish an agency independent from presidential and congressional control, and the President’s authority over CFPB’s funding contradicts that purpose. *See generally*, 12 U.S.C. § 5491.

If this Court decides that Title X does not violate the Appropriations and Vesting Clauses, the Second CID is still invalid because CFPB’s attempted ratification of it was ineffectual. Equitable estoppel bars ratification because the Director exercised governmental power that she knew she could not lawfully wield. *See Oubre v. Entergy Operations*, 522 U.S. 422, 426 (1998). Additionally, a ratification of an unlawful act requires a “detached and considered judgment” of

the invalid agent's prior action. *See Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 796 F.3d 111, 118 (D.C. Cir. 2015). But the ratification process in this case was highly irregular because the Director's knowledge of her unlawful acts is unprecedented. Additionally, CFPB did not attempt to ratify its regulations until six days after the ratifying the CID. Rat. of Bureau Actions Rule, 85 Fed. Reg. 133, 41330, § VI (July 10, 2020) (executed July 7, 2020). This incongruity created a jurisdictional problem and a highly irregular ratification process.

Ratification also poses an issue of fundamental fairness. Ratification cannot destroy intervening rights of third parties. *Pape v. Home Ins. Co.*, 139 F.2d 231, 235 (2d Cir. 1943). If CFPB may ratify here, the Law Firm's intervening rights would be destroyed. The Law Firm stands at the brink of insolvency as a direct consequence of the application of unconstitutional governmental coercion. It would be inequitable and render Appellant's right to be free from unconstitutional exercises of governmental authority a mere formalistic pretense.

Moreover, ratification cannot remedy structural constitutional violations in an agency's enabling statute, as CFPB is attempting here. Remedies for structural constitutional violations must advance both the Constitution's structural purposes and create incentives to bring such challenges. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018). Mere prospective relief frustrates both goals. And it is important to note that nobody at CFPB was accountable to the President upon issuance of the

CID, so nobody could issue it or seek its enforcement. So nobody at CFPB is competent to execute a ratification.

The Second CID is also unenforceable for two independent reasons. First, CFPB may not regulate the practice of law. 12 U.S.C. § 5517(e)(1). Its demand directly interferes with the attorney-client relationship. Second, the CID seeks documents already in CFPB's possession. CFPB concedes that the Law Firm "had submitted only *partial responses* to the prior CID[.]" Mem. in Support of Am. Pet., ECF-6-1, at 3 (emphasis added). Partial or not, CFPB cannot demand duplicative responses.

CFPB's prior breach of the separation of powers and current violation of the Appropriations and Vesting Clauses infects every action CFPB once took, and currently takes. This malignancy manifests itself here through an irregular and haphazard attempt at ratification, aggrandizement of its jurisdiction, and its unlawful demand for information already in its possession. This Court should reverse the district court's decision and order dismissal of the Second CID.

ARGUMENT

The court below erred in three principal ways. First, Title X violates the Appropriations Clause and the Vesting Clause of Article I of the United States Constitution by divesting Congress of its constitutional prerogative to make appropriations through law. Second, the Director's attempted ratification of the

invalid CID was ineffectual because the Director cannot ratify her deliberate violations of the Constitution, she did not make a detached and considered judgment, and ratification would inequitably destroy Appellant's intervening rights. Third, the CID is unreasonable because it seeks information prohibited by Title X. Analyzing these issues *de novo*, this Court should reverse the district court and dismiss the offending CID.

I. TITLE X'S FUNDING STRUCTURE UNCONSTITUTIONALLY DIVESTS CONGRESS OF ITS EXCLUSIVE PREROGATIVE TO APPROPRIATE FUNDING THROUGH LAW

The district court erred by holding that Title X's funding structure does not violate the Appropriations Clause. Title X unconstitutionally divests Congress of the power of the purse—a power which Congress cannot assign to another branch. But even if Congress could delegate its appropriations authority, Title X lacks an intelligible principle necessary to effectuate that delegation.

CFPB's funding structure is unprecedented. Our Constitution does not allow an Executive Branch law enforcement agency to be funded outside of the bicameralism-and-presentment process. The Nondelegation Doctrine's prohibition against this *sui generis* arrangement is even more important where, as here, the President's unreviewable power to appropriate funds is combined with his plenary control over investigations and enforcement priorities of an agency capable of imposing "knee-buckling penalties against private citizens."

A. Title X’s Funding Structure Divests Congress of Its Control over CFPB’s Appropriations, Reassigning Control to the Executive

CFPB’s funding structure is unprecedented because the President controls appropriations of a federal law enforcement agency. Instead of funding through bicameral passage and presentment of appropriations bills as the Appropriations Clause requires, CFPB submits quarterly demands to the Board for Fed earnings. The Board may not modify CFPB’s demands or withhold funds. 12 U.S.C. § 5497(a)(1).

Under Title X, the Director may demand funding that he or she unilaterally³ deems to be “reasonably necessary” to carry out the agency’s mission, *id.* § 5497(a)(1), up to a statutory cap of 12% of the Fed’s earnings, plus employment cost index increases, *id.* § 5497(a)(2)(A)-(B). FY2020’s transfer cap was \$696 million.⁴ Annual Financial Report FY2020, at 6 (Nov. 16, 2020).⁵ CFPB deposits Fed funds into the “Bureau Fund,” 12 U.S.C. § 5497(b), which “shall not be construed to be Government funds or appropriated monies” and are entirely under

³ Title X’s purpose is to “vest[] significant governmental power in the hands of a ***single individual accountable to no one***.” *Seila Law*, 140 S. Ct. at 2200-01 (emphasis added). The single-Director appoints a Deputy, 12 U.S.C. § 5491(b)(5)(A), hires employees, *id.* §§ 5493(a)(1)(A)-(B), *etc.*

⁴ If Fed funds are insufficient, CFPB may request more through the bicameralism-and-presentment process. 12 U.S.C. § 5497(e)(2).

⁵ Available at https://files.consumerfinance.gov/f/documents/cfpb_annual-financial-report_fy-2020.pdf.

CFPB's control until expended, *id.* § 5497(c)(1)-(2).⁶ To ensure complete independence from Congress, the Committees on Appropriations of the House and Senate are *prohibited* from reviewing CFPB's funding. *Id.* § 5497.

Title X specifies four reports that CFPB must produce through the course of a year. These reports are neither requests for appropriations, nor are they review or oversight of future appropriations. First, CFPB submits an annual consumer-complaints report to Congress that provides metrics regarding complaints received. *Id.* § 5493(b)(3)(C). Second, CFPB must submit a semi-annual report to one Senate committee and two House committees, none of which is an appropriations committee, that merely justifies CFPB's self-declared budget from the previous year, *id.* § 5496(a), (c)(2), listing the amount of Fed funds transferred and expended by CFPB, *see, e.g.*, Semi-Annual Report of the CFPB, § 2 (Spring 2020).⁷

Third, CFPB submits an annual report to the Senate and House Committees on Appropriations regarding the Director's financial operating plans and forecasts, CFPB's current financial condition, results of CFPB operations, and the sources

⁶ CFPB also maintains a Consumer Financial Civil Penalty Fund ("CPF"). 12 U.S.C. § 5491(d). Civil penalties deposited into CPF are paid to victims or expended for consumer education and financial literacy. 12 C.F.R. 1075.100. CPF's self-funding program is not at issue in this appeal.

⁷ Available at https://files.consumerfinance.gov/f/documents/cfpb_semi-annual-report-to-congress_spring-2020.pdf.

and application of CFPB funds in the prior year. 12 U.S.C. § 5497(e)(4). This annual report offers only a retrospective of CFPB’s stewardship of agency funds, since Appropriations Committees cannot review CFPB’s funding demands. *See* Annual Financial Report FY2020. Lastly, CFPB receives GAO and independent auditors’ audit reports. 12 U.S.C. § 5496a. The GAO audit primarily assesses whether CFPB’s financial statements are accurate, *see* GAO-IG Act Annual Report, § 1.1 (Feb. 2020),⁸ and the independent audits primarily assess budget formulation and execution, *see* KPMG Independent Audit of Selected Ops. & Budget, at 5 (Apr. 4, 2019).⁹

In *Seila Law*, the Supreme Court severed from Title X the CFPB Director’s tenure protection from the President. *See Seila Law*, 140 S. Ct. at 2210-11. Since CFPB’s single-Director now serves at the pleasure of the President, the President has plenary control over CFPB’s appropriations. Moreover, since “the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties[,]” the President does now, too. *Id.* at 2189. Indeed, the President and his CFPB enjoy *two* layers of financial independence to execute their enforcement

⁸ Available at https://files.consumerfinance.gov/f/documents/cfpb_gao-ig-act_report_2020-02.pdf.

⁹ Available at https://files.consumerfinance.gov/f/documents/bcfp_independent-audit-selected-operations-budget_fy2018.pdf.

priorities, since Fed earnings are also not appropriated by Congress. *Id.* at 2193-94. This executive-controlled appropriations process over a law enforcement agency has “no basis in history and no place in our constitutional structure.” *See id.* at 2201.

B. The Vesting Clause of Article I Prohibits Congress from Divesting Itself of Its Exclusive Responsibility to Make Appropriations Through Law

Congress’s duty to make appropriations through law is nondelegable because the Constitution’s allocation of prerogative powers among the coordinate branches cannot be reassigned except by constitutional amendment. The Supreme Court has explained that “[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.” *Chadha*, 462 U.S. at 945.

One such “explicit and unambiguous provision” is the Appropriations Clause, which states that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. art. I, § 9. This is a “straightforward and explicit command[.]” *Dep’t of the Navy*, 665 F.3d at 1347 (quoting *OPM v. Richmond*, 496 U.S. 414, 424 (1990)) (internal quotations omitted). Congress’s responsibility to appropriate, often called “the power of the purse,” serves the “fundamental and comprehensive purpose” of “assur[ing] that public funds will be spent according to the letter of the difficult judgments reached

by Congress as to the common good[.]” *Richmond*, 496 U.S. at 427-28. The Clause “means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.” *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). *See also County of Suffolk v. Sebelius*, 605 F.3d 135, 141 (2d Cir. 2010) (quoting *Richmond*, 496 U.S. at 424).

Alexander Hamilton explained that any deviation from the Article I, § 9 appropriations process is antithetical to the constitutional design:

The design of the Constitution in this [Appropriations Clause] provision was, as I conceive, to secure these important ends,—that the *purpose*, the *limit*, and the fund of every expenditure should be ascertained by a previous law. The public security is complete in this particular, if no money can be expended, but for *an object*, to an extent, and *out of a fund*, which the laws have prescribed.

Alexander Hamilton, *Explanation* (Nov. 11, 1795) in *The Works of Alexander Hamilton*, Vol. VII, (John C. Hamilton ed. 1851) (emphasis in original). And

James Madison explained why it was so important to our structure of government that the Constitution vested this power in Congress:

This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

Federalist No. 58 (J. Madison). Consistent with this original understanding, “[t]he Clause protects Congress’s exclusive power over the federal purse.” *Dep’t of the Navy*, 665 F.3d at 1347 (internal quotations omitted).

A second “explicit and unambiguous” constitutional provision is the Vesting Clause: “*All* legislative Powers herein granted shall be vested in a Congress[.]” U.S. Const. art. I, § 1 (emphasis added). Only Congress may enact law and may do so only through bicameralism and presentment. U.S. Const. art. I, § 7; *Chadha*, 462 U.S. at 945-46 (emphasizing mandatory language in Article I, §§ 1 & 7, cls. 2-3). Thus, the exclusive authority to enact appropriations law rests with Congress through the bicameralism-and-presentment process. *See Clinton v. City of New York*, 524 U.S. 417, 438 (1998).

“The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity.” *Loving v. United States*, 517 U.S. 748, 758 (1996); *Gundy*, 139 S. Ct. at 2121. The Nondelegation Doctrine, therefore, does not bar assignment of some non-legislative tasks to another branch. For instance, Congress may assign ministerial powers that are consistent with the assignee’s inherent powers. *Wayman*, 23 U.S. at 45-46 (holding that the Judiciary Act’s assignment of judicial procedure to the judiciary is consistent with the judiciary’s power of superintendence over its docket). Also, Congress may delegate fact-

finding to the executive if fact-finding is necessary to implement Congress's policies in contingent—if-this, then-that—laws. *Field v. Clark*, 143 U.S. 649, 693 (1892) (“[The President] was the mere agent of the law-making department to ascertain and declare the event upon which [Congress's] expressed will was to take effect.”).

There is a critical constitutional difference, though, between “powers which are strictly and *exclusively* legislative[,]” and therefore cannot be assigned, and “powers which the legislature *may* rightfully exercise itself[,]” which may be assigned. *Wayman*, 23 U.S. at 42-43 (emphasis added). The Nondelegation Doctrine also prohibits assignments that “call[] for the exercise of judgment or discretion that lies beyond the traditional authority of the President[.]” *See Loving*, 517 U.S. at 772 (distinguishing assignments regarding the President's role as Commander-in-Chief and its inherent power).

In Title X, Congress has assigned its exclusive legislative appropriations duty to the President, who has no inherent power related to appropriations authority outside of the bicameralism-and-presentment process. *See Clinton*, 524 U.S. at 438 (stating that the President cannot enact, amend, or repeal appropriations). Then-Judge Kavanaugh has explained that the Clause serves “as a restriction upon the disbursing authority of the Executive department,” *Dep't of the Navy*, 665 F.3d at 1347 (Kavanaugh, J.) (quoting *Cincinnati Soap*, 301 U.S. at

321). But Title X surrenders disbursing authority to the President, turning the Appropriations Clause on its head. This unconstitutional assignment carries with it the danger that “the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.” *Id.* (quoting 3 Joseph Story, *Commentaries on the Constitution* § 1342, at 213-14 (1833)).

Acting with reassigned appropriations power, the President now decides how much funding is “reasonably necessary” to carry out the agency’s mission, without any meaningful guidance, limitation, or control by the Legislative Branch. The President may choose any amount from \$0 to nearly \$700 million, without any fact-finding or review by Congress. The purpose of appropriations is to keep the President’s pursuit of his agenda “constantly beholden to Congress’s willingness to fund it[.]” Zachary S. Price, *Funding Restrictions & Separation of Powers*, 71 *Vand. L. Rev.* 357, 368 (Mar. 2018). But Title X gives the President an almost literal blank check—plenary control over CFPB’s funding, without congressional oversight or interference, giving the President unfettered power to pursue his law enforcement agenda. Hence, Title X’s assignment of appropriations authority to the President is patently unconstitutional.

C. Title X Does Not Establish an Intelligible Principle Limiting the President’s Discretion or to Which He Must Conform

Even if Congress could divest itself of its duty to appropriate, it did so unconstitutionally here because Title X does not articulate an intelligible principle. The Supreme Court has allowed Congress to “delegate”¹⁰ in some circumstances, but only if Congress “lay[s] down by legislative act an intelligible principle” guiding execution of the law. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 408-09 (1928).

The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.

Loving, 517 U.S. at 771. A statutory “intelligible principle” is one that limits executive discretion and requires conformance. *See Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 342 (1974). This avoids an unconstitutional

¹⁰ The term “delegate” is misleading because it connotes an easily revocable transfer where none exists. Although Congress may revoke a “delegation,” it may do so only through the Article I, § 7’s bicameralism-and-presentment process. That process empowers the President to veto any effort to revoke powers reassigned to his or her office, so Congress cannot unilaterally reverse a delegation. Congress must obtain the President’s assent or secure veto-proof supermajorities in both houses before any previous delegation can be undone. Thus, by its very nature, “delegation” fundamentally reorders the constitutional system and transforms the relationships between the branches. “Divestment” more accurately describes this more permanent reordering and transformation of legislative and executive authority, but Appellant uses the term “delegate” in this section to be consistent with intelligible-principle language used by the courts.

exercise of legislative power by the executive. *See Gundy*, 139 S. Ct. at 2123 (citing *Mistretta v. United States*, 488 U. S. 361, 372 (1989)).

Minimally, an intelligible principle must contain Congress's clear statement of a "general policy" stating the "boundaries of [] authority" upon which the executive may act. *See id.* at 2129. For instance, even if Congress declares a policy, it cannot delegate authority without standards for presidential action or without requiring fact-finding as a basis for executive action. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935). In *Panama Refining*, the National Industrial Recovery Act ("NIRA") allowed the President to prohibit transportation of petroleum, to aid Great Depression recovery. *See id.* at 406. NIRA was unconstitutional because it did not qualify the President's authority, establish any criteria to govern the President, or require any presidential fact-finding as a condition of action. *See id.* at 415. Moreover, the Court found the statutory policy of prohibiting "transportation of the excess production" did not substantively limit anything since the President had unrestrained authority to prohibit transportation, or not. *See id.* at 415. Likewise, in *Schechter*, the Supreme Court held that Recovery Act § 3's delegation was unconstitutional because it allowed the President to "impose his own conditions ... as in his discretion he thinks necessary to effectuate the policy declared by the Act." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538-39 (1935) (internal quotations omitted).

“Unfettered discretion” to do what the President “thinks may be needed or advisable” is unconstitutional. *Id.* at 537-38 (1935).

Title X fails the “general policy” test. Its purpose is to establish an agency independent from presidential and congressional control that “enforce[s] Federal consumer financial law consistently for the purpose of ensuring that ... markets for consumer financial products and services are fair, transparent, and competitive.” *See* 12 U.S.C. §§ 5511, 5491, 5497, 5536(a), 5581. CFPB’s Director serves at the President’s pleasure, which means that the President has unitary control over CFPB’s authority, *id.* § 5492(b), including the Director’s quarterly appropriations demand, *id.* § 5497(a). Title X’s delegation of appropriations power to the President poses a far worse delegation problem than that in *Panama Refining*, 293 U.S. at 415. The President’s new plenary authority over CFPB’s funding contradicts Title X’s policy of insulating CFPB’s funding and enforcement autonomy from the political branches. On this point alone, Title X violates the Nondelegation Doctrine.

That Congress prohibited its appropriations committees from reviewing CFPB funding underscores Congress’s goal of leaving funding to the unfettered discretion of the Executive Branch. Instead of principles, Title X has three standardless elements of executive-appropriations: (1) Appropriations must be “reasonably necessary” to fulfill CFPB’s law enforcement responsibilities, 12

U.S.C. § 5497(a)(1); (2) appropriations may “tak[e] into account such other sums made available ... from the preceding” appropriations period, *id.* § 5497(a)(1); and (3) appropriations may not exceed a percentage of the Fed’s annual earnings, plus employment cost index increases, *id.* § 5497(a)(2)(A)-(B).

That which is “reasonably necessary” to perform CFPB’s duties does not provide any guidance or limitation at all. In *Schechter*, the delegation was unconstitutional because it allowed the President to “impose his own conditions ... as in his discretion he thinks necessary to effectuate the policy declared by the Act.” *Schechter Poultry*, 295 U.S. at 538-39 (internal quotations omitted). The same is true here, where the President may appropriate any amount between \$0 and the current funding cap of nearly \$700 million. And even if the President cannot entirely defund CFPB, his unfettered discretion permits him to reduce appropriations to hinder, if not halt, enforcement he disfavors. Or he could always demand the maximum amount of funds, to add to CFPB’s unobligated balance, to drain the public fisc, or to benefit CFPB. There is no articulable principle delimiting the President’s discretion to impose his own will on CFPB’s appropriations—without regard for the policy declared by the Act. *See id.*

As CFPB’s FY2020 Annual Report shows, the gap between appropriations and funding cap varies greatly and is subject to the sole discretion of the President after FY2020:

FIGURE 3: BUREAU FUND FISCAL YEAR TRANSFERS REQUESTED COMPARED TO THE FUNDING CAP, OBLIGATIONS AND UNOBLIGATED BALANCE (\$ MILLIONS)

CFPB Annual Financial Report FY2020, at 9. The significant variance between the cap and appropriations shows the President’s unfettered discretion in Title X. Between FY2019-2020, for example, appropriations increased by \$69 million and CFPB’s balance increased by \$7 million. *Id.* But the cap grew only \$17 million. *Id.* Since the President does not have to appropriate pursuant to a fact-finding report, “reasonably necessary” has no meaning, it just reflects his singular, unqualified opinion that appropriations and unobligated balance should increase.

Similarly, that the President may “tak[e] into account such other sums made available[,]” when appropriating funds is meaningless. For one, the language is permissive, further reinforcing the President’s unchecked discretion over the appropriations. The Report confirms this standard is toothless. It notes that in FY2018, the Director “chose to use” \$145 million of CFPB’s unobligated balance

in lieu of appropriations. *Id.* The Director could so “choose” because unobligated balances have no statutory floor or ceiling, and his choice was an exercise of unfettered discretion. The FY2020 balance of \$75 million might be high or low. That judgment is not one based on fact—it is simply up to the President to decide. Regardless, the funds may not be clawed back since appropriations remain under the President’s control until expended. 12 U.S.C. § 5497(c)(1)-(2).

That appropriations may not exceed a percentage of the Fed’s annual earnings, plus index increases, is neither a measurable standard nor a meaningful limit, either. CFPB has never demanded the full cap, which strongly suggests that the nominal “limit” that Congress placed on CFPB’s funding has always exceeded CFPB’s enforcement needs. Moreover, adjusting for index increases, that limit only increases each year—and with it, the President’s discretion increases. Unlike most budget appropriations, which Congress attends to each fiscal year, Congress has divested its ability to curtail or reassess CFPB’s funding in the future absent the President’s assent during the bicameralism-and-presentment process or with veto-proof majorities in both houses of Congress. And considering that the cap is a percentage, not a definite number, Congress has limited its own ability to forecast what the full cap will be in years to come.

That the President may choose funding in any amount between \$0 and the cap shows that the cap does not provide “boundaries of [] authority” within which

the President may act, as required by *Gundy* and the Constitution. *See Gundy*, 139 S. Ct. at 2129.

Cases that uphold delegations where a mere “reasonableness” standard suffices as an intelligible principle are inapt here. Appropriations and other fundamentally legislative tasks do not suffer from “technical problems” associated with “our increasingly complex society,” which were deemed to justify delegations in prior cases. *See, e.g., Mistretta v. United States*, 488 U.S. 361 (1989). For example, in upholding the Attorney General’s pre-SORNA offender registration rule, the *Gundy* Court relied upon delegations of authority categorically different than the purported delegation on appeal here. This is true of all other permissible delegations, such as those for executive-fixing of air quality standards, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001), sentencing guidelines, *Mistretta*, 488 U.S. 361, chain broadcasting regulations, *Nat’l Broadcasting Co. v. United States*, 319 U.S. 190 (1943), orders authorizing railroad leased-control, *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12 (1932), beef price controls, *Yakus v. United States*, 321 U.S. 414 (1944), and natural gas rate ceilings, *Federal Power Com. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). These cases bear no resemblance to a delegation of the power of the purse.

Title X violates the Nondelegation Doctrine because it fails to provide any intelligible principle that prescribes the rules for the President's conduct in appropriating funds.

D. CFPB's Funding Structure Is Unlike Any Funding Structure Previously Conceived by Congress

As the Supreme Court emphasized in *Seila Law*, “[p]erhaps 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 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)).

And there is no historical precedent for CFPB's funding structure. In rare instances not applicable to CFPB, some courts have held that there is an Appropriations Clause exception for some (though certainly not all) governmental institutions that 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 for “self-funded” independent agencies is narrow, so ““these few scattered examples’ ... shed little light.” *See Seila Law*, 140 S. Ct. at 2201 (quoting *NLRB v. Noel Canning*, 573 U. S. 513, 538 (2014) (regarding tenure protected principal officers).

For instance, consider the Fed. Under federal law, the Federal Reserve may “levy semi-annually upon the Federal reserve banks ... an *assessment*[.]” 12 U.S.C. § 243 (emphasis added). Also, the FDIC may require that “[a]ny institution

that becomes insured by the [FDIC] ... shall pay the [FDIC] any *fee* which the [FDIC] may by regulation prescribe[.]” *Id.* § 1815(d) (emphasis added). The National Park Service “may establish, modify, charge, and collect recreation *fees* at Federal recreational lands and waters[.]” 16 U.S.C. § 6802 (emphasis added). And the United States Postal Service may collect “all *revenues* received by the Postal Service.” 39 U.S.C. § 2401(a) (emphasis added). In each of these examples, fees, assessments, or proceeds are collected from users of governmental programs or regulated parties to self-fund those programs.

CFPB, on the other hand, is *not* self-funded. It is funded through the Fed—the President can simply self-determine how much funding CFPB should have, without having to provide any evidence regarding his funding decision. This funding structure is distinct from the “fees, assessments, or investments” from users or beneficiaries of its products or services on which self-funded agencies rely.

Moreover, unlike self-funded entities, CFPB administers *18* federal statutes, 12 U.S.C. § 5481, and a statutory prohibition against “any unfair, deceptive, or abusive act or practice” in the area of consumer finance, *id.* § 5536(a). The Supreme Court noted that

Congress also vested the CFPB with *potent* enforcement powers. The agency has the authority to conduct investigations, issue subpoenas and

civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court.

Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2193 (2020) (emphasis added). No other government agency has this much power to regulate, investigate, and punish, while simultaneously enjoying autonomy from congressional appropriations.

Unconstrained by constitutional checks and balances, the executive power to enforce and the legislative power to fund are consolidated in the Executive Branch, and specifically, in the President. Even the most scrupulous chief executive would find it difficult to resist the temptation use the weight of CFPB to reward friends and punish enemies. Since CFPB does not fit one of the narrow exceptions for self-funded governmental entities, and since CFPB's funding comes from another entity that does not receive appropriations from Congress, CFPB's funding is unconstitutional.

II. RATIFICATION CANNOT REHABILITATE THE INVALID CID, BUT EVEN IF IT COULD, THE FORMER DIRECTOR'S ATTEMPTS TO RATIFY WERE INEFFECTUAL

If this Court decides that Title X does not violate the Appropriations Clause and Vesting Clause, the Second CID still cannot be enforced, because it is a nullity and CFPB's attempted ratification was ineffectual.

Even CFPB recognized that *Seila Law* rendered the Second CID invalid because Title X unconstitutionally insulated the Director from presidential

removal. *See* Kraninger Decl., ECF-18-1 at ¶¶ 2-3 (July 2, 2020) (J.A.-68-69).

The Supreme Court severed Title X’s for-cause removal provision allowing CFPB, for now, to “remain fully operative without the offending tenure restriction.” *Seila Law*, 140 S. Ct. at 2210-11. Chief Justice Roberts explained that whether ratification occurred or whether ratification is legally sufficient to cure the consequences of Title X’s constitutional defects retroactively, is for lower courts to decide because *Seila Law*’s parties did not brief that issue. *See id.* at n.12.

For a ratification to be valid, the ratifier must: (1) “still have the authority” to take the action that the agent invalidly undertook; (2) have full knowledge of the unlawful action; and (3) make a detached and considered affirmation of the unlawful action. *See Advance Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016). The “last two requirements are intended to ensure that the ratifier does not blindly affirm the earlier decision without due consideration.” *Id.* at 602-03.

The court below erred by holding that the Director ratified the invalid CID for at least four reasons. First, the Director’s deliberate violation of the separation of powers cannot be cured through ratification. Second, CFPB’s highly irregular ratification attempt was invalid because it was not the product of a detached and considered judgment. Third, ratification cannot be used, as is attempted here, to destroy the intervening rights of third parties or to create an inequitable result.

Fourth, nobody at CFPB had the constitutional capacity to issue the Second CID in November 2019.

A. Ratification Cannot Cure Deliberate Constitutional Violations

The district court erred by not addressing the Law Firm’s assertion that ratification is unavailable where the ratifier knowingly acted without authority in the first instance. CFPB’s Director intentionally violated the Constitution by pursuing this investigation prior to severance of the constitutionally defective for-cause removal provision. Equitable estoppel bars ratification here because the Director knowingly *shirked the burdens* of Title X’s unconstitutional for-cause removal provision, while she *retained the benefit* of her tenure-protected office’s authority to initiate investigations and seek judicial enforcement. *See Oubre*, 522 U.S. at 426 (“As a rule, equitable estoppel bars a party from shirking the burdens of a voidable transaction for as long as she retains the benefits received under it.”). CFPB cannot have it both ways.

From at least September 17, 2019, CFPB “determined that the for-cause removal provision of the [CFPA] is unconstitutional.” Letter from Kathleen L. Kraninger, CFPB Director, to Mitch McConnell, Sen. Majority Leader (Sept. 17, 2019). Considering this acknowledgement predated CFPB’s mooted of the First CID, there was no reason for CFPB to issue another CID when the Director knew she had no lawful authority to act. Nevertheless, CFPB issued the Second CID on

November 14, 2019, denied the Law Firm's Petition to Set Aside on February 10, 2020, and petitioned the district court for enforcement on April 27, 2020.

Moreover, CFPB's February 10 Decision and Order refused to defer the CID's deadlines until the Supreme Court decided the constitutionality of the Director's removal restriction in *Seila Law*, despite that CFPB had already asked the Court to sever the removal restriction. *Compare* Decision & Order at 2 (Feb. 10, 2020) (J.A.-56) *with* Resp't's Brief, *Seila Law LLC v. CFPB*, No. 19-7, at 7 (Sept. 17, 2019). Such obstinate refusal evinces the unclean hands with which CFPB would later seek ratification, despite the Law Firm's successful challenge to CFPB's authority through *Seila Law*.¹¹

There is no precedent permitting enforcement-action ratification where an agency intentionally violated a regulated party's constitutional right to be free from unlawful exercises of governmental authority. Where agencies make good-faith, inadvertent mistakes believing their authority to be constitutional, only to be proven wrong later, courts often use their equitable discretion to allow ratification to rehabilitate the unlawful actions. *See, e.g., Advance Disposal*, 820 F.3d at 603; *FEC v. Legi-Tech*, 75 F.3d 704, 709 (D.C. Cir. 1996). But that is not the case here. No court has ever permitted intentional unconstitutional acts to be cured by

¹¹ In the first enforcement action and in the second administrative proceeding, the Law Firm argued that Title X violated separation of powers.

officials who “discharge their duties in a way that is known to them to violate the United States Constitution[.]” *Cf. Butz v. Economou*, 438 U.S. 478, 507 (1978) (explaining that officers have immunity from damages for “mere mistakes in judgment” but not knowing constitutional violations). Thus, the Director’s attempt to ratify her prior unconstitutional acts are ineffectual.

B. CFPB’s Highly Irregular Attempted Ratification Is Invalid Because It Was Not a Detached and Considered Judgment

CFPB did not undertake a detached and considered review of the CID, and the court below erred in presuming that CFPB’s purported ratification was regular. A ratification of an unlawful act requires a “detached and considered judgment” of the invalid agent’s prior action. *See Intercollegiate*, 796 F.3d at 118 (quoting *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998)). The ratifier may not blindly affirm the earlier unauthorized decision without due consideration. *Advance Disposal*, 820 F.3d at 602-03.

On July 1, 2020—just three days after *Seila Law*—CFPB executed its Notice of Ratification of this enforcement action (filed July 2). Ratification Declaration, ECF-18-1 (July 2, 2020) (J.A.-68). In a five-paragraph Declaration, the Director claims to have considered the basis for the decision to issue the Second CID, to deny Appellant’s request to modify or set aside the CID, and to petition the district court for CID enforcement. *Id.* at ¶ 4 (J.A.-69). Conspicuously absent from her

Declaration is an explanation as to why the Director initiated each of these actions while knowingly lacking the authority to do so.

Six days *after* ratifying the Second CID, the Director executed a second ratification purporting to retroactively validate a decade of CFPB regulations and guidance. Rat. of Bureau Actions, 85 Fed. Reg. 133, 41330, § VI. The second ratification manifests a significant incongruity. Title X prohibits CFPB from seeking court-ordered CID-enforcement until its Director resolves petitions to modify or set aside CIDs. 12 U.S.C. § 5562(f). CFPB's regulations control the CID-set-aside process, requiring a timely meet-and-confer, and defining the scope and nature of the petition, enforcement response, and the Director's disposition, among other things. 12 CFR 1080.6(c)(3) & (e). So, although express ratifications may not usually require intricate detail, the court below was wrong to conclude that there was "really no actual evidence to establish that the director failed to conduct an independent evaluation or make a detached considered judgment," since the regulation that established the prerequisites for seeking judicial enforcement was ratified *after* the CID and enforcement action. *See* Hr'g Tr. at 71 (J.A.-140) (generally citing *Advance Disposal Servs.*). This cart-before-the-horse temporal incongruity is, at a minimum, highly irregular.

Considering this irregularity, CFPB's assertion that the Director reviewed—in just *three days* after *Seila Law*—all filings, documentation, arguments, findings,

and decisions associated with the Law Firm's two-CID and *three-year long* engagement with CFPB, is not credible. All the while, over the course of the next *six days*, the Director supposedly reviewed all the regulations, guidance documents, and supporting documentation that accumulated over the *ten-year* history of CFPB. That the ratifications were executed backwards and that there was a one-week gap between them is substantial evidence that the ratifications were not detached and considered, or at least that CFPB is not entitled to a presumption of regularity in the ratification of the Second CID and subsequent enforcement action.

Moreover, CFPB does not deserve the benefit of the doubt regarding the *bona fides* of its ultra-rapid ratification, given its willingness to ask the district court to exercise jurisdiction over this matter in April 2020, when CFPB knew its CID was constitutionally defective. In September 2019, two months prior to issuing the Second CID and four months prior to filing the Petition to Enforce, Director Kraninger officially announced to Congress that her office was unconstitutional. *See* Kraninger Letter (Sept. 17, 2019). Despite openly acknowledging her lack of constitutional authority to direct CFPB's enforcement action, CFPB plowed ahead in this case, even opposing a stay to await the

Supreme Court’s determination in *Seila Law*.¹² Once the Supreme Court ruled that CFPB had been proceeding unconstitutionally, Director Kraninger ratified her prior unconstitutional actions almost immediately. These actions do not show the detached and considered judgment required for a lawful ratification—they show a disturbing disregard for the law.

By the time the Director officially admitted that her office was unconstitutional, the Law Firm had been subjected to more than two years of an unlawful investigation. Nevertheless, the Director proceeded to press the enforcement of the First CID in district court, moot it, and then issue the Second CID and enforce it, knowing that she had no power to do any of those things. Then, more than three years into the unconstitutional investigation and enforcement of invalid serial CIDs, CFPB asks that it be allowed to proceed as if nothing ever happened. As if it never breached the separation of powers. As if there is no consequence to the Supreme Court’s holding that Title X’s structure is unconstitutional.

This unlawful behavior cost Appellant time away from her family and work, and legal fees petitioning a Director to set aside a CID that the Director knew she lacked the authority to adjudicate—to say nothing of the stress and strain of being

¹² All authority at CFPB flows through the Director. *Seila Law*, 140 S. Ct. at 2200-01 (Title X’s purpose is to “vest[] significant governmental power in the hands of a single individual accountable to no one.”).

subjected to a government investigation that the Director knew to be unconstitutional. The calendar and CFPB's admission regarding Title X's constitutionality speak for themselves—the purported ratification was highly irregular and neither detached nor considered. The enforcement action should be dismissed.

C. CFPB Cannot Ratify the Invalid CID Because Retroactivity Would Destroy Appellant's Intervening Rights and Achieve an Inequitable Result

The district court erred by holding that Appellant's injury was remedied the moment the structural constitutional defect in the Director's office was cured. It is “well settled ... that ratification does not date back to destroy intervening rights of third persons or otherwise to achieve an inequitable result.” *Pape*, 139 F.2d at 235 (citing Restatement of Agency § 89 (1933)). “[R]atification operates upon the act ratified precisely as though authority to do the act had been previously given, *except* where the rights of third parties have intervened between the act and the ratification.” *Cook v. Tullis*, 85 U.S. 332, 338 (1873) (emphasis added). “The retroactive efficacy of the ratification is subject to this qualification.” *Id.* CFPB's ratification cannot be valid because, if it were, retroactivity would destroy Appellant's intervening right to be free from unlawful governmental coercion, and it would be inequitable since the Law Firm has been subjected to unlawful

coercion for three-and-a-half years at great personal, professional, and economic expense.

During the period when Title X's for-cause removal provision was violating the separation of powers, a fact of which CFPB was aware for at least nine months before the purported ratification, the Law Firm expended \$75,000 in fees and expenses, and was forced to lay off nearly half of the staff before the end of 2019. *Aff. of Crystal G. Moroney*, ECF-23-8, ¶¶ 13, 16. The Law Firm has expended an additional \$5,000 in the Second CID's administrative proceeding, prior to the purported ratification. *Id.* ¶ 27. Ms. Moroney cut her salary from \$155,000 prior to June 2017, to \$96,600 today, to keep up with legal bills and CID-related costs. *Id.* ¶ 17. Appellant suffered these concrete and particularized harms, among others, at the hands of an agency that lacked the constitutional authority to impose them. Appellant had a right to be free from such unlawful exercise of governmental authority, but ratification would compound, rather than vindicate, that right. This Court should not allow CFPB to ratify the CID because the Bureau's *pro forma* ratification, after knowingly proceeding against the Law Firm without lawful authority, would be inequitable and render Appellant's right to be free from unconstitutional exercises of governmental authority a mere formalistic pretense.

Moreover, ratification cannot remedy structural constitutional violations in an agency's enabling statute, as CFPB is attempting in this case. The Supreme Court has held that remedies for structural constitutional violations must advance both the Constitution's structural purposes and create incentives to bring such challenges. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018). Mere prospective relief for those subjected to the coercion of unconstitutional structures frustrates both Supreme Court goals.

Because separation-of-powers challenges exist to secure individual liberty, *Clinton*, 524 U.S. at 452, ratification “destroy[s the public’s] intervening right[.]” to be free from unlawful exercises of governmental authority and “achieve[s] an inequitable result[.]” *see Pape*, 139 F.2d at 235. Ratification also all but eliminates officials' disincentives to act beyond the bounds of their lawful authority, transmuting the public's successful challenges into pyrrhic victories. Actions taken by unconstitutionally structured agencies, therefore, must be nullities. *See Seila Law*, 140 S. Ct. at, 2221 (Thomas, J., concurring and dissenting).

FEC v. NRA Political Victory Fund is instructive here. The D.C. Circuit held that the FEC's congressionally appointed members violated the separation of powers and, since this violation was a defense to an enforcement action, prospective relief was not enough. *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827-828 (D.C. Cir. 1993), *aff'd on other grounds*, *FEC v. NRA Political*

Victory Fund, 513 U.S. 88 (1994). Thus, the court dismissed the action because unconstitutional structures must afford regulated parties retroactive relief. *See id.* at 828.

In *Lucia v. SEC*, the Supreme Court held that a successful challenge to the constitutional structure of the SEC “is entitled to relief.” *Lucia*, 138 S. Ct. 2044 at 2055. To provide Lucia with complete relief, the Court ordered “a new hearing before a properly appointed official ... [t]o cure the constitutional error” of the invalid appointment of SEC ALJs. *See id.* (quoting *Ryder v. United States*, 515 U.S. 177, 183 (1995)). Likewise, in *NLRB v. Noel Canning*, the Supreme Court affirmed the D.C. Circuit’s holding that NLRB proceedings that violated the Recess Appointments Clause were void *ab initio* because they “implicate[d] fundamental separation of powers concerns.” *Noel Canning v. NLRB*, 705 F.3d 490, 514 (D.C. 2013), *aff’d NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014).

FEC v. Legi-Tech does not depart from this line of cases. The D.C. Circuit held that the FEC validly ratified its enforcement action because the Commissioners who lawfully voted for enforcement were the same Commissioners who ratified their vote after the unconstitutional *nonvoting* members were removed. *See Legi-Tech*, 75 F.3d at 708. At all times, the Commission and its *voting* Commissioners were constitutional. *See id.*. Even so, the FEC held a *three-day hearing* to consider whether to ratify. *Id.* at 706. The court below

wrongly asserted that *Legi-Tech* stands for the proposition that where “it is virtually inconceivable that [agency] decisions would differ in any way the second time[,]” enforcement actions are ratifiable. Hr’g Tr. at 66 (J.A.-135) (internal quotations omitted). The district court’s futility-holding has neither merit, nor precedential support. *Legi-Tech* permitted ratification because the FEC was at all times empowered to act through its voting members, so jurisdiction to bring an enforcement action was not at issue. *See Gordon*, 819 F.3d at 1202 n.5 (Ikuta, J., dissenting) (“*Legi-Tech* held that a properly constituted FEC had the authority to continue an enforcement action, and did not address any standing issue.”). On the other hand, CFPB’s unconstitutional structure directly implicates the district court’s jurisdiction to hear the enforcement action in the first instance.

As the Supreme Court noted, CFPB’s “Director has the *sole* responsibility to administer 19 separate consumer-protection statutes[.]” *Seila Law*, 140 S. Ct. at 2199. CFPB’s defective directorship involved “the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB’s behalf.” *RD Legal Funding, LLC*, 332 F. Supp. 3d at 785 (holding that ratification cannot cure CFPB’s for-cause removal defect). “[R]atification does not cure the constitutional injury—enforcement of an investigative demand by an unconstitutionally insulated Director.” *Seila Law*, 140 S. Ct. at 2221 (Thomas, J., concurring and dissenting in part).

D. CFPB Cannot Ratify the Unlawful CID Because It Lacked Constitutional Capacity to Issue the CID in November 2019

The court below erred by holding that either the Director or CFPB was a valid principal when the unlawful CID first issued. “Ratification addresses situations in which an agent was without authority at the time he or she acted and the principal later approved of the agent’s prior unauthorized acts.” *RD Legal Funding*, 332 F. Supp. 3d at 785. *See also* Restatement (Second) of Agency § 87 (A.L.I. 1958) (“To become effective as ratification, the affirmance must be by the person identified as the principal at the time of the original act or, if no person was then identified, by the one for whom the agent intended to act.”).

The court incorrectly interpreted the requirement that “the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at time the ratification was made[,]” as merely “a timing issue.” *See* Hr’g Tr. at 61-62 (J.A.-130-31). The court engaged in the wrong line of inquiry. The court should have asked a two-part question: (1) did someone with legal authority to issue the CID on November 14, 2020 ratify it; and if that person ratified it, (2) did the ratification defeat “[t]he intervening rights of third persons[?]”

The court cited *Advance Disposal*, where the Third Circuit held that the NLRB was “both the principal and the agent, simply acting at different points in time.” *Advance Disposal*, 820 F.3d at 602. But *Advance Disposal* is an Appointments Clause case. The offices held by the Board were not questioned as

constitutional there—it was only *the how* of the members holding their offices that was invalid. *Id.* at 596 (challenging the composition of a board constituted through recess appointments, not the structure of the NLRB itself). Once the board’s members became validly appointed, the board could act as principal to ratify prior unlawful acts. *Id.* at 602.

The district court also cites *CFPB v. Gordon*, but that case is like *Advance Disposal*. The Recess Appointments Clause raised an issue regarding whether CFPB’s Director validly held that office, not whether the office itself was constitutional. *Gordon*, 819 F.3d at 1192.

Based on these inapposite cases, the district court below incorrectly concluded “that there appears to be no limitation that would prevent Director Kraninger from bringing an enforcement action[.]” Hr’g Tr. at 64 (J.A.-133). But in this case, the directorship *itself* was unconstitutional, not the Director’s appointment. The Second CID cannot be ratified because, as the Supreme Court observed, CFPB’s “single-Director structure is an innovation with *no foothold in history or tradition.*” *Seila Law*, 140 S. Ct. at, 2202 (emphasis added). Additionally, “the Director has the *sole responsibility* to administer 19 separate consumer-protection statutes[.]” *Id.* at 2200 (emphasis added). Title X’s purpose is to “vest[] significant governmental power in the hands of a *single individual accountable to no one.*” *Id.* at 2200-01 (emphasis added).

The structural defect in Title X goes to the heart of the agency’s statutory authority to act, so the court’s assertion that if the Director was not a valid principal, the CFPB was, flies in the face of well-settled Article III standing requirements. *See* Hr’g Tr. at 64 (J.A.-133). CFPB cannot operate as a principal independent from its officers. *Hollingsworth*, 570 U.S. at 710. Moreover, only officers of the United States may initiate civil litigation in federal courts. *Buckley v. Valeo*, 424 U.S. 1, 140 (1976). This is because “Congress cannot confer executive authority to bring civil enforcement action on an entity created by statute.” *Gordon*, 819 F.3d at 1203 (Ikuta, J., dissenting) (citing *Buckley*, 424 U.S. at 137). In other words, when CFPB issued the CID, adjudicated the Law Firms objections, and sought enforcement in court, **nobody** at CFPB was accountable to the President, so **nobody** could represent CFPB in court to enforce the CID.¹³

A plaintiff must have standing “when the suit is filed,” *Davis*, 554 U.S. at 734, and “throughout all stages of litigation[,]” *Hollingsworth*, 570 U.S. at 705.

¹³ If anyone could act as CFPB’s principal prior to *Seila Law*, it was the President. *See Seila Law*, 140 S. Ct. at 2211 (“In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead.”). The court below was wrong to assert that the President could not ratify “because it would be impossible for one man[.]” Hr’g Tr. at 64 (J.A.-133). The President heads the Office of President of the United States, which includes OMB, which routinely reviews all manner of agency action, and is perfectly capable of assisting the President in reviewing CFPB’s prior unlawful acts for possible ratification.

Yet, no one had the executive authority to bring CFPB’s enforcement action until June 29, 2020—two months *after* it filed its petition. Before *Seila Law*, nobody at CFPB had authority to issue the CID because the Director’s office was invalid, and CFPB’s inferior officers had been appointed by an invalid Director. *See* 12 U.S.C. §§ 5491(b)(5), 5493(a)(1) (deputy director and “all employees” including “attorneys”). Without any officers, CFPB could not invoke federal court jurisdiction, so the Second CID should be dismissed.

III. THE SECOND CID IS UNREASONABLE BECAUSE IT SEEKS INFORMATION PROHIBITED UNDER TITLE X

The Second CID is unenforceable, in whole or in part, because it impermissibly seeks to regulate the practice of law or to interfere with the attorney-client relationship, and it seeks documents already in CFPB’s possession. The district court erred by holding otherwise. *See* Hr’g Tr. at 77 (J.A.-146).

Additionally, although the district court acknowledged that CFPB has some information in its possession, the Court erred by neglecting to strike duplicative demands from the CID. *See* Hr’g Tr. at 77 (J.A.-146).

“It is clear, even in the investigative cases, that respondents may object to the subpoena on the ground of relevance and upon the ground of oppressiveness, *i.e.*, the undue burden of compliance.” *United States v. Associated Merchandising Corp.*, 261 F. Supp. 553, 560 (S.D.N.Y. 1966) (citing *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 307 (1924)). A federal agency may investigate without probable

cause, but it may not “conduct any investigation it may conjure up; the disclosure sought must always be reasonable.” *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 471 (2d Cir. 1996) (citing *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 209 (1946)).

This limitation of reasonableness is satisfied “so long as an agency establishes that an investigation ‘will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought *is not already within [its] possession*, and that the administrative steps required ... have been followed.’”

Constr. Prods. Research, Inc., 73 F.3d at 471 (quoting *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371, 1375 (2d Cir. 1970) (quoting *United States v. Powell*, 379 U.S. 48, 57-58 (1964)) (emphasis added).

A. To the Extent that the Second CID Seeks Information Implicating the Practice of Law, the Second CID Does Not Seek Information Relevant to a Legitimate Purpose

CFPB’s jurisdiction is expansive, but it does not include the practice of law. Indeed, Congress did not intend for CFPB “to act as a federal version of the state bar authorities.” *CFPB v. Mortg. Law Grp., LLC*, 157 F. Supp. 3d 813, 825 (W.D. Wis. 2016). Congress was clear on this point, commanding that “[t]he Bureau *may not exercise any supervisory or enforcement authority* with respect to an activity engaged in by an attorney *as part of the practice of law* under the laws of a State in which the attorney is licensed to practice law.” 12 U.S.C. § 5517(e)(1) (emphasis added). That is not to say that CFPB cannot demand of an attorney,

whose services implicate one of the 19 statutes administered by CFPB, or who may engage in unfair or deceptive collection practices, documents and information related to his or her engagement with financial consumers—of course, it may. *See id.* § 5517(e)(2).

CFPB cannot, however, interfere with attorney-client relationships or demand from an attorney documents or information that is confidential or privileged between attorney and client. Such is the circumstance presented in this case, where CFPB seeks to compel disclosure of client documents and information which Appellant has an ethical obligation to keep confidential. CFPB does not—because it cannot—allege that the Law Firm’s contacts and communications with clients took place outside the attorney-client relationship. Nor does it allege waiver of confidences or privilege.

The Second CID’s ostensible purpose is to determine whether the Law Firm has been responsive to consumers who provide information contradicting the Law Firm’s record of consumers’ debt, and whether the Law Firm corrects its records and makes required reports in such instances. *See* Am. Pet. to Enforce CID, ECF-6, ¶ 1. This purpose is irrelevant to the attorney-client confidences and privileged information withheld by the Law Firm. Even aside from the limits on CFPB’s jurisdiction in 12 U.S.C. § 5517(e), CFPB would still not be entitled to confidential and privileged documents.

The Supreme Court has explained that one limitation on an agency's broad authority to issue administrative subpoenas is determined by whether the agency could fully perform its statutory duty without the information demanded. *See Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507-08 (1943). While the facts of the Supreme Court case of *Endicott Johnson Corp. v. Perkins*, are different from the facts in this case (for example, *Endicott Johnson* involved a government contractor, not a law firm, and the contractor had admitted to prior wrongdoing, whereas the Law Firm has not been even accused of wrongdoing), the Supreme Court set forth an important principle. In that case, the contractor argued that the Secretary of Labor's administrative subpoena for certain payroll information was unenforceable because it was irrelevant to the minor violations discovered by the Department of Labor. *Id.* at 505-06. The Court reasoned that one of the Secretary's principal functions was to decide questions of fact regarding government contractors who were ineligible for awards after a labor violation, and information regarding payrolls and underpayments was "clearly related" to the violation. *See id.* at 508. Therefore, the Secretary could issue an administrative subpoena to collect the information necessary to render a complete decision on the contractor's alleged violations—because "[t]he evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary[.]" *Id.* at 509.

Thus, a critical question regarding whether the scope of CFPB's administrative subpoena is reasonable, is: Can CFPB fully perform its statutory duty without the attorney-client confidences and privileged materials that CFPB demands in this enforcement action? The answer to this question is an emphatic *yes*. Client confidences and privileged materials are “plainly incompetent or irrelevant” to any conceivable “lawful purpose” of the Director or the Bureau. *See id.* The Law Firm substantially complied with the First CID by providing written responses to interrogatories and by producing thousands of pages of documents and data. The documents and data covered all issues under investigation in the First and Second CIDs, and included the Law Firm's policies, procedures, data, reports, and contact with third parties—including debtors. Nevertheless, CFPB demands disclosure of material related to the Law Firm's contact with its *clients*. The Bureau's overbroad, unfettered, and wholesale request for information relating to the Law Firm's representation of its clients is patently improper.

If CFPB seeks information as to the credit-granting or debt-collection practices of the Law Firm's clients, CFPB can generate a tailored request to one or more clients seeking specific information. CFPB, however, should not be permitted to serve, much less enforce, a CID on a *law firm* and reach the universe of information that the Law Firm possesses relating to the representation of its clients, to include an expansive number of documents that the Law Firm is duty-

bound to keep confidential. Thus, since attorney-client confidences and privileged material are excluded from CFPB's jurisdiction, and since they are plainly irrelevant to any lawful purpose of the Director or CFPB, this Court should reverse the district court's enforcement of the Second CID to the extent that it seeks material related to the practice of law.

B. To the Extent that the Second CID Seeks Information Already Within the Bureau's Possession, the Second CID Impermissibly Seeks Duplicative Information

The Law Firm has already supplied many, if not most, of the documents and information sought by this enforcement action. CFPB freely admits that it may seek enforcement of a CID only where it does not already have the information in its possession. Am. Pet. to Enforce CID, ECF No. 6, ¶ 11. CFPB is wrong to allege that the materials sought by the Second CID are “not already in the Bureau's possession.” *Id.* ¶ 14. CFPB asserts that, “[w]hile the prior CID sought *substantially the same set of materials* requested by the 2019 CID, the two CIDs were not identical[,]” but this does not contradict the fact that it has responsive documents, interrogatories, and reports in its possession. Mem. in Support of Am. Pet. at 2-3 (emphasis added).

Furthermore, CFPB concedes that Ms. Moroney's Law Firm “had submitted only *partial responses* to the prior CID[.]” *Id.* at 3 (emphasis added). While the parties have a genuine dispute regarding the lawful scope of the Second CID, it is

disingenuous for CFPB to compel the Law Firm “to comply fully with the civil investigative demand,” *Id.* at 1, where CFPB already has a substantial portion of the information in its possession. Instead of seeking enforcement of the portions of the First and Second CIDs that were dissimilar, CFPB impermissibly demands that the Law Firm duplicate its prior submission.

CFPB tries to gloss over this important point with feeble process arguments that could have been argued at the First CID Show Cause Hearing in November 2019 had CFPB not unilaterally withdrawn the First CID. For instance, the Bureau complains that the prior submission was not “in a format the Bureau could accept.” *Id.* at 3 (citing Assae-Bille Decl., ¶ 8 (Apr. 24, 2020)). Implicit in this argument is an admission that CFPB possesses the materials the Law Firm submitted. And CFPB does not explain how the Law Firm’s submission of materials in the nonproprietary, fully accessible format in which they are kept in the ordinary course of business is somehow the same as CFPB not having the documents in its possession. Further, CFPB claims that the Law Firm “never certified that any responses it produced were true and complete, as the [First] CID required.” *Id.* at 3 (citing Assae-Bille Decl., ¶ 8 (Apr. 24, 2020)). Again, this is a minor procedural issue that does not contradict the fact that CFPB already has in its possession many of the documents of which it asks this Court to order production.

CFPB also claims that it does not have in its possession “responses to interrogatories” or “written reports.” Am. Pet. to Enforce CID, ECF No. 6, ¶ 14. The Amended Petition does not explain what CFPB did with the Law Firm’s prior responses—let alone attempt to offer a process defect that would render answers already provided unreadable or otherwise nonconforming. Additionally, to the extent that CFPB seeks documents related to the Law Firm’s client, FedChex, and FedChex’s client, Follett Corporation, those companies are subjects of their own CIDs that seek the same communications and information demanded in the Second CID, as it pertains to them. CFPB has conveniently omitted the fact that Follett complied with CFPB’s request on or about March 12, 2020, and, on information and belief, FedChex has complied as well. The Second CID should exclude information already obtained from these sources because it is duplicative.

All this redundancy does not come without a cost. Rather than simply looking at the information already in its possession and seeking that which is not, CFPB seeks to impose further cost on the Law Firm. The Law Firm has already outlined in its Motion for Stay Pending Appeal that its compliance with the First CID has put the Law Firm on the verge of financial ruin, only to have CFPB self-moot that CID. Now CFPB insists that the Law Firm must repeat and reformat that production. For a small business already struggling during a global pandemic, the

additional and unnecessary cost of redundant production is as unreasonable as it is callous.

Thus, the Second CID is unenforceable because it includes information already in its possession. And by demanding production of documents and responses to interrogatories already in its possession, CFPB's Second CID is *per se* overly broad and unduly burdensome.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court reverse the district court's judgment and order the dismissal of the Second CID.

Respectfully submitted,

Dated: March 5, 2021



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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,759 words.

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Dated: March 5, 2021



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

ADDENDUM

Description	
A	Appealed Order (Aug. 19, 2020) (J.A.-9)
B	Appealed Opinion (Aug. 18, 2020) (J.A.-112-148) (relevant pages only)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BUREAU OF CONSUMER FINANCIAL
PROTECTION,

Petitioner,

v.

LAW OFFICES OF CRYSTAL MORONEY,
P.C.,

Respondent.

Case No. 20-CV-3240 (KMK)

ORDER

KENNETH M. KARAS, United States District Judge:

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.

DATED: August 19, 2020
White Plains, New York



KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

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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