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 APPELLEE
CONSUMER FINANCIAL PROTECTION BUREAU

Stephen Van Meter
Acting General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Kevin E. Friedl
Senior Counsel
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
(202) 435-9268
kevin.friedl@cfpb.gov

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INTRODUCTION

This case concerns an administrative subpoena known as a civil investigative demand (CID) that the Consumer Financial Protection Bureau issued to Respondent Law Offices of Crystal Moroney, a debt-collection firm, in 2019. The Bureau issued the CID as part of an investigation into possible violations of several federal consumer financial laws, including the Fair Debt Collection Practices Act and the Fair Credit Reporting Act.

Respondent does not dispute as a general matter that such investigation is within the Bureau's statutory authority. Instead, it challenges the CID based on a number of implausible constitutional theories involving the Bureau and the Bureau's pursuit of this case. But its claims that Congress somehow acted unconstitutionally in the way it appropriated money for the Bureau's operations are foreclosed by controlling precedent. And its objection that the Bureau might be pursuing this investigation without adequate presidential oversight was put to rest when an official fully accountable to the President considered this matter and confirmed that the Bureau should continue to seek enforcement of the CID. The district court rejected Respondent's arguments on these points, along with Respondent's claims that the CID sought irrelevant information and information already in the Bureau's possession. The district court's ruling was entirely correct and should be affirmed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this CID-enforcement proceeding under 12 U.S.C. § 5562(h)(1). The district court ordered the CID enforced on August 19, 2020. JA9. Respondent timely appealed on October 7. JA6. This Court has appellate jurisdiction under 12 U.S.C. § 5562(h)(2) and 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did Congress violate the Appropriations Clause or the nondelegation doctrine when it passed a law authorizing the Bureau to spend up to a capped amount of funds to carry out its statutory responsibilities?

2. Was the CID that the Bureau issued to Respondent rendered unenforceable by an invalid statutory restriction on the President's removal power that it is now clear lacks any force or effect?

3. Was the CID otherwise unenforceable when it sought information that was relevant to a legitimate investigation and was not in the Bureau's possession?

STATEMENT

A. The Consumer Financial Protection Act and the Bureau

Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 in response to the recent financial crisis and its aftermath. *See* Pub. L. No. 111-203, 124 Stat. 1376. Title X of that statute, the Consumer Financial Protection Act (CFPA), created the Bureau to consolidate the

administration of the federal consumer financial laws in a single agency. *See* S. Rep. No. 111-176, at 10 (2010).

1. *Civil investigative demands*. Among its other responsibilities, the Bureau is charged with investigating and, where appropriate, bringing enforcement actions to address violations of the federal consumer financial laws. *See* 12 U.S.C. §§ 5511, 5561-65. These laws include the Fair Debt Collection Practices Act (FDCPA), the Fair Credit Reporting Act (FCRA) and its implementing regulation, and the CFPA itself. *Id.* §§ 5481(12)(F), (H), 5481(14).

Like many law-enforcement agencies, the Bureau is authorized to issue administrative subpoenas, known as civil investigative demands (CIDs), in aid of its investigations. *See id.* § 5562(c). The Bureau's regulations provide CID recipients with an opportunity to negotiate appropriate modifications to CIDs through a meet-and-confer process with Bureau staff. *See* 12 C.F.R. § 1080.6(c). CID recipients may also file an administrative petition with the Bureau's Director seeking an order modifying or setting aside the CID. *See* 12 U.S.C. § 5562(f); 12 C.F.R. § 1080.6(e). The filing of such a petition automatically stays the deadlines for responding to the CID. *See* 12 U.S.C. § 5562(f)(2); 12 C.F.R. § 1080.6(f). The Bureau's rules further set out a procedure, similar to that used in ordinary civil discovery, by which CID recipients can assert valid claims of privilege by providing a schedule of the withheld documents. *See* 12 C.F.R. § 1080.8.

To enforce compliance with a CID, the Bureau must file a petition in district court. 12 U.S.C. § 5562(e); 12 C.F.R. § 1080.10. Such CID-enforcement actions are meant to be summary proceedings, *see, e.g.*, *SEC v. House Ways & Means Comm.*, 161 F. Supp. 3d 199, 224 (S.D.N.Y. 2015), to allow enforcement agencies "the rapid exercise of the power to investigate" that provides "the very backbone of [their] effectiveness in carrying out the[ir] congressionally mandated duties," *Fed. Maritime Comm'n v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975). "This subpoena power is indispensable to the carrying out of [the agency's] functions." *See NLRB v. Am. Med. Response, Inc.*, 438 F.3d 188, 192 (2d Cir. 2006).

2. *Funding*. Like many financial regulatory agencies, the Bureau is funded through its enabling statute rather than through annual appropriations bills. *See, e.g.*, 12 U.S.C. § 16 (Office of the Comptroller of the Currency); *id.* § 243 (Federal Reserve Board). Congress, through the CFPA, authorized the Bureau to draw funds from the combined earnings of the Federal Reserve System—of which the Bureau is formally a part, *id.* § 5491(a)—up to a specified cap, *id.* § 5497(a).[1] Since 2013, that cap has been set at 12 percent of the Federal Reserve System's 2009 operating expenses, adjusted annually to account for inflation. *Id.* § 5497(a)(2)(A)(iii), (B).

[1] These earnings primarily come from interest income on government securities that the Federal Reserve purchases in the conduct of monetary policy. *See* Cong. Research Serv., *Independence of Federal Financial Regulators* at 26 (2017), *available at* https://crsreports.congress.gov/product/pdf/R/R43391.

The Bureau may draw up to but no more than this cap, in an amount "determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year)." *Id.* § 5497(a)(1). Congress authorized the Bureau to seek any additional funding through the annual appropriations process. *See id.* § 5497(e).

The CFPA includes numerous provisions to ensure oversight of the Bureau's finances. The Bureau must regularly report details about its financial operations to the Office of Management and Budget and the Comptroller General. *Id.* § 5497(a)(4). The Comptroller General audits the Bureau's finances annually and reports the results of its audits to Congress. *Id.* § 5497(a)(5); *see also id.* § 5496a (requiring Bureau to commission annual independent audits). The Bureau reports to the House and Senate Appropriations Committees on the Bureau's financial operating plans and use of funds. *Id.* § 5497(e)(4). Separately, the Bureau reports semi-annually to the President, the Senate Banking Committee, and the House Energy and Commerce Committee on topics including the Bureau's justification for its most recent budget request. *Id.* § 5496(c)(2). The Director appears before Congress at semi-annual hearings regarding these reports. *Id.* § 5496(a). In addition, the Bureau publishes quarterly updates on the current state of its financial

resources. *See* CFPB, Financial Reports, *available at* https://www.consumerfinance.gov/about-us/budget-strategy/financial-reports/.

3. *The Bureau Director*. The CFPA provides that the Bureau is headed by a single Director. 12 U.S.C. § 5497(b). Like the head of the Office of the Comptroller of the Currency (OCC), the Bureau's Director is appointed by the President, by and with the advice and consent of the Senate, to a 5-year term. *Compare id.* § 2 (OCC), *with id.* § 5497(b), (c)(1) (Bureau). As enacted, the CFPA purported to limit the grounds on which the President could remove the Bureau's Director to "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3).

B. This Proceeding and *Seila Law*

Respondent is a debt-collection law firm that also furnishes information to credit reporting agencies about consumers from whom it seeks to collect debt. JA60. The Bureau issued the CID in this case to Respondent in November 2019 as part of an ongoing investigation into possible violations of the CFPA, the FDCPA, and the FCRA and its implementing regulation. JA36, 59. Among other things, the Bureau seeks to determine whether Respondent or others may be ignoring cease-and-desist requests from consumers or disregarding warnings that the debts they are trying to collect are the result of identity theft. JA36. The Bureau also seeks to

determine whether any such violations are ongoing and, therefore, causing additional harm to the public.[2]

Respondent met and conferred with Bureau staff in December 2019. JA61. Respondent indicated it would seek modifications but did not do so. JA61. Instead, Respondent petitioned the Bureau's Director for an order to set aside or modify the CID. JA61. Notably, the petition did not include requests for any specific changes. JA57, 61. Respondent also did not formally assert any privilege claim over the material sought by the CID. JA62. The Bureau's Director denied Respondent's petition in February 2020. JA55-58. After Respondent confirmed that it did not intend to comply with the CID, the Bureau in April 2020 filed a petition to enforce the CID in the Southern District of New York. JA2, 61-62.

While that action was pending, the Supreme Court resolved the constitutionality of the CFPA's removal restriction in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). The Court held that the removal restriction violated the

[2] The Bureau previously sent Respondent a CID containing similar requests for information as this CID. JA13-29. Respondent produced certain information in response to the prior CID but then clawed back significant portions of that production based on claims (which the district court later rejected, JA145-46) that the information was confidential. JA60. Respondent also disputed whether the prior CID satisfied the requirement in 12 U.S.C. § 5562(c)(2) that it describe the nature of the conduct under investigation and relevant provisions of law. In response to that objection, the Bureau withdrew the prior CID and issued this CID, which provided additional details about the scope of the investigation. JA60; *compare also* JA36 (this CID), *with* JA13 (prior CID).

separation of powers because it impeded the President's executive authority under Article II. The Court also held that the provision was severable from the rest of the CFPA, rejecting Seila Law's claim that the "offending removal provision means the entire agency is unconstitutional and powerless to act." *Id.* at 2208, 2211 (plurality op.); *see also id.* at 2245 (Kagan, J., dissenting in part and concurring with respect to severability). The Court stressed that its holding was a limited one and was not meant to "trigger a major regulatory disruption." *Id.* at 2210 (plurality op.). It emphasized that "[t]he agency may … continue to operate" with a Director who is "removable by the President at will." *Id.* at 2192 (majority op.). And it noted that "[t]he provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction." *Id.* at 2209 (plurality op.). The Court remanded for the Ninth Circuit to determine whether the CID in that case had been validly ratified. *Id.* at 2211.

In the wake of the Supreme Court's decision confirming she was removable at will by the President, the Bureau's then-Director, Kathleen Kraninger, considered the bases for the Bureau's decisions to issue and seek to enforce the CID in this case, and to deny Respondent's petition to modify or set aside the CID, and formally ratified those decisions on behalf of the Bureau. JA68-69.

The district court, after briefing and oral argument, ordered Respondent to comply with the CID in August 2020. JA9. In doing so, the court rejected

Respondent's constitutional attacks on the Bureau's funding. JA122-27. It noted that under binding Supreme Court precedent, the Appropriations Clause simply requires that federal spending be "authorized by statute," and that the Bureau's funding was so authorized. JA123. And it held that Respondent's related challenge under the nondelegation doctrine was likewise foreclosed by Supreme Court precedent. JA127. The court further held that Director Kraninger's "ratification of the prior action is valid" and that such ratification fully resolved Respondent's objection to the removal restriction. JA127-41. Finally, the court held that the CID sought information relevant to a legitimate purpose and found that it did not seek information already in the Bureau's possession. JA141-46.

Respondent moved for a stay in the district court, and the district court denied that motion, holding that Respondent had not shown either irreparable harm or a likelihood of success on the merits. JA169-87. Respondent moved for a stay in this Court, and the Court denied that motion. ECF No. 66. Respondent has now produced some material in response to the CID.[3]

[3] Despite Respondent's partial compliance with the CID, this case is not moot because if Respondent were to prevail, the Court could provide meaningful relief by (a) excusing Respondent's production of further material and (b) ordering that the materials already provided be returned or destroyed. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 15 (1992).

On January 20, 2021, Director Kraninger resigned and the President designated David Uejio to serve as the Bureau's Acting Director. In that capacity, Mr. Uejio is, like his predecessor, removable by the President at will.

SUMMARY OF ARGUMENT

The Bureau's CID to Respondent, a debt-collection law firm, sought information about Respondent's business operations as part of an ongoing investigation into possible violations of several federal consumer financial laws. After Respondent confirmed that it would not provide the information, the Bureau filed a petition in district court to enforce the CID. The court enforced the CID.

Respondent challenges that decision on a number of grounds, but none have merit. Respondent claims the CID cannot be enforced because the Bureau's statutory method of funding violates the Appropriations Clause of the Constitution and the nondelegation doctrine. Those arguments are foreclosed by binding precedent from this Court and the Supreme Court. Both courts have held that the Appropriations Clause simply requires that federal spending be authorized by statute. The Bureau's spending is so authorized. So too, the Supreme Court has upheld numerous delegations far broader than the Bureau's authority to draw and spend up to a set amount of funds in order to carry out its statutory responsibilities. Moreover, that sort of appropriation—authorizing the executive to spend up to, but

no more than, a set amount of money on a particular program—is something Congress has done regularly since the Founding.

Respondent also claims the CID cannot be enforced because at the time the Bureau filed its petition to enforce, a provision of the Bureau's statute purported to limit the grounds on which the President could remove the Bureau's Director. But that objection has been fully resolved. The Supreme Court held the provision invalid but severable, making clear that it has no effect on the President's removal power. And in the wake of that decision, the Director considered and ratified the Bureau's pursuit of the CID, making clear that Respondent is not being subjected to investigation without sufficient presidential oversight. It is now apparent that the invalid removal restriction has no effect on the President's removal power or the Bureau's efforts to enforce the CID. It provides no grounds for reversal.

Finally, Respondent claims that the information sought in the CID is not relevant to a legitimate investigation and was already in the Bureau's possession. But the district court correctly rejected these arguments, and Respondent identifies no error in that conclusion.

The Court should affirm in full the district court's order enforcing the CID.

ARGUMENT

I. The Bureau's Statutory Method of Funding is Constitutional

A. Congress complied with the Appropriations Clause when it passed a law appropriating funds for the Bureau's operations.

The way Congress chose to fund the Bureau complies with the text of the Appropriations Clause and with binding precedent from this Court and the Supreme Court interpreting that clause. It is consistent with widespread and longstanding historical practice. As every court to have considered the issue has held, the Bureau's method of funding does not violate the Constitution.

1. The Bureau's spending complies with the Appropriations Clause because Congress authorized it by statute.

The Appropriations Clause 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, cl. 7. The clause "was intended as a restriction upon the disbursing authority of the Executive department." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). Its "straightforward and explicit command … 'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *OPM v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap*, 301 U.S. at 321). "[I]n other words, the payment of money from the Treasury must be authorized by a statute." *Id.*; *accord Butts v. Barnhart*, 416 F.3d

101, 105 (2d Cir. 2005) (Appropriations Clause allows the "payment of money by the federal government only where authorized by statute").

Both the Bureau's receipt of funds and its use of those funds are so authorized. Congress provided in the CFPA that the Bureau can draw up to a capped amount of funds each year from the combined earnings of the Federal Reserve System. 12 U.S.C. § 5497(a). The CFPA further provides that the Bureau can spend that money "to pay the expenses of the Bureau in carrying out its duties and responsibilities." *Id.* § 5497(c). The CFPA was enacted through the constitutionally prescribed process of bicameralism and presentment. (And Congress remains free to change the method or amount of the Bureau's funding at any time through the same process.) Thus, the Bureau's receipt and use of funds transferred from the Federal Reserve complies with the Appropriations Clause's "straightforward and explicit command" that federal spending "be authorized by a statute." *Richmond*, 496 U.S. at 424. That alone forecloses Respondent's argument.

As well, every court to have considered the Bureau's funding mechanism, including the en banc D.C. Circuit, has agreed it is constitutional. *See, e.g.*, *PHH Corp. v. CFPB*, 881 F.3d 75, 95-96 (D.C. Cir. 2018) (en banc) ("Congress can, consistent with the Appropriations Clause, create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process."), *abrogated on other grounds*, *Seila Law*, 140 S. Ct. 2183; *CFPB v.*

Citizens Bank, N.A., --- F. Supp. 3d ---, 2020 WL 7042251, at *13 (D.R.I. Dec. 1, 2020) ("The CFPB's funding does not violate the Appropriations Clause."); *CFPB v. Fair Collections & Outsourcing, Inc.*, No. 8:19-cv-02817, 2020 WL 7043847, at *7-9 (D. Md. Nov. 30, 2020) ("[T]he CFPB's funding structure complies with the Appropriations Clause's mandate … .").[4]

The Supreme Court itself strongly suggested as much in *Seila Law*. In considering Seila Law's constitutional attack on the Bureau, the Court closely examined the CFPA's funding provisions, 140 S. Ct. at 2193-94, 2204, which Seila Law claimed had "ceded" Congress's "power over the purse," Br. for Pet'r at 43-43, *Seila Law*, 2019 WL 6727093 (U.S. 2019). Yet the only significance the Court accorded these provisions is that they further showed the need that the Director be removable at will by the President. *See* 140 S. Ct. at 2204. The Court said nothing to suggest the Bureau's funding is inconsistent with the Appropriations Clause or otherwise problematic on its own. To the contrary, the Court emphasized that "[t]he *only* constitutional defect we have identified in the CFPB's structure is the Director's insulation from removal" and that "[i]f the Director were removable at will by the President, the constitutional violation would disappear." *Id.* at 2209

[4] *Accord CFPB v. Think Finance LLC*, No. 17-cv-127, 2018 WL 3707911, at *1-2 (D. Mont. Aug. 3, 2018); *CFPB v. Navient Corp.*, No. 3:17-cv-101, 2017 WL 3380530, at *16 (M.D. Pa. Aug. 4, 2017); *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 896-97 (S.D. Ind. 2015); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014).

(plurality op.) (emphasis added). "The agency may therefore continue to operate," the Court held, with its Director removable at will. *Id.* at 2192 (majority op.). The Court thus "strongly implied that the CFPB's source of funding was not a problem by itself." *Rop v. Fed. Housing Fin. Agency*, 485 F. Supp. 3d 900, 940 (W.D. Mich. 2020); *accord Fair Collections & Outsourcing*, 2020 WL 7043847, at *9.

What is more, the Bureau's method of funding is entirely typical of federal financial regulators. The Federal Reserve Board of Governors, National Credit Union Administration, Federal Deposit Insurance Corporation, and Federal Housing Finance Agency are all funded through appropriations in their enabling statutes rather than annual spending bills. *See* 12 U.S.C. § 243 (Federal Reserve Board); *id.* § 1755 (NCUA); *id.* §§ 1815(d), 1820(e) (FDIC); *id.* § 4516 (FHFA). The example of the Office of the Comptroller of the Currency is particularly relevant here. Just like the Bureau, the OCC is headed by a single official whom the President may remove "for any reason." *Seila Law*, 140 S. Ct. at 2201 n.5; *see also* 12 U.S.C. § 2. And, for more than 150 years, the OCC has been, just like the Bureau, funded outside the annual appropriations process. *See* National Bank Act of 1863, ch. 58, § 19, 12 Stat. 665, 670 (codified as amended at 12 U.S.C. § 16). It has long been understood that the Appropriations Clause "does not in any way circumscribe Congress from creating self-financing programs" such as the OCC and the (century-old) Federal Reserve Board. *See AINS, Inc. v. United States*, 56

Fed. Cl. 522, 539 (2003), *aff'd*, 365 F.3d 1333 (Fed. Cir. 2004), *abrogated on other grounds by Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2011).

Nor are such examples found only among financial regulators. Congress has from the very first chosen to fund a wide variety of programs and agencies through statutory authorizations rather than annual spending bills. The First and Second Congresses, for example, established a national post office headed by a Postmaster General answerable to the President and funded through rates of postage. *See* An Act for the temporary establishment of the Post-Office, 1 Stat. 70 (1789); An Act to establish the Post-Office and Post Roads within the United States, 1 Stat. 232 (1792). Today there are numerous federal agencies and programs funded through "fees, assessments, or investments rather than the ordinary appropriations process." *See PHH Corp.*, 881 F.3d at 95; *see also, e.g.*, 21 U.S.C. § 379f *et seq.* (authorizing FDA to collect and spend fees on drug applications); 35 U.S.C. §§ 41-42 (Patent and Trademark Office funded through fees on patent applications). These examples include the federal court system itself. *See* Cong. Research Serv., *Judiciary Appropriations, FY2020* 9-11 (May 18, 2020) ("The judiciary also uses nonappropriated funds to help offset its funding requirements. The majority of these nonappropriated funds are from the collection of fees… ."), *available at* https://crsreports.congress.gov/product/pdf/R/R45965/. This widespread practice

offers further evidence, if any were needed, that Congress's choice how to fund the Bureau is constitutionally sound.

2. Respondent's contrary argument finds no support in constitutional text and is foreclosed by binding precedent.

Acknowledging the "straightforward" requirement of the Appropriations Clause that federal spending be authorized by Congress, Resp't Br. at 17-18, Respondent struggles to explain why the Bureau's funding mechanism would violate that requirement. Its arguments come up short.

Respondent first suggests (at 14) that the Appropriations Clause is satisfied only if Congress authorizes spending through the annual appropriations process—not through a statute like the CFPA. But that argument finds no support in the text of the Constitution, is contradicted by controlling precedent, and would mean that most federal spending violates the Appropriations Clause.

Nothing in the text of the Appropriations Clause, or in the rest of the Constitution, supports Respondent's view that any federal spending not authorized via annual appropriations bills is unconstitutional. Rather, Article I makes clear Congress is not limited to *annual* appropriations. It provides that Congress may "raise and support Armies," but that "no Appropriation of Money *to that Use* shall be for a longer Term than two Years." U.S. CONST. art. I, § 8, cl. 12 (emphasis added). The Constitution thus expressly contemplates, and authorizes, multiyear appropriations. And, tellingly, while it specifies that appropriations for the army

cannot last longer than two years, it puts no similar time limit on appropriations for other purposes.

Any doubt on this point is resolved by the Supreme Court's and this Court's repeated holdings that it is enough under the Appropriations Clause that payments "be authorized *by a statute*." *Richmond*, 496 U.S. at 424 (emphasis added); *accord Butts*, 416 F.3d at 105 (payments are allowed "only where authorized by statute"); *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 195 (2d Cir. 1991) (explaining that "the Appropriations Clause of the Constitution mandates that funds from the Treasury be expended in accordance with statutory law"). Again, the Bureau's funding is so authorized.

Nothing in these decisions suggests that when the courts referred to "statutes," what they really meant was "annual appropriations bills passed via the modern congressional budget process." In fact, the decisions directly contradict that view. For example, the Supreme Court in *Cincinnati Soap* considered a statutory provision that levied a tax on coconut oil and provided that all funds raised should be paid to the newly established government of the Philippines. 301 U.S. 308, 310 (1937). Far from suggesting that this spending authorization was unconstitutional because it was not enacted via an annual appropriations bill, the Supreme Court held that the Appropriations Clause was "without significance here" because the clause merely requires that spending be authorized "by an act of

Congress." *Id.* at 321. So too, this Court in *Butts v. Barnhart* held that the Appropriations Clause did not bar a Social Security claimant from pursuing his disability claim because any resulting award of benefits would be congressionally authorized under the Social Security Act. 416 F.3d at 105.

These decisions are consistent with congressional practice. Congress frequently authorizes spending in legislation passed outside the annual appropriations process, as it did for example in establishing the September 11th Victim Compensation Fund. *See, e.g.*, Air Transportation Safety and System Stabilization Act, Pub. L. 107-42, §§ 404-06, 115 Stat. 230, 237-40 (2001); *see also Richmond*, 496 U.S. at 431 (noting Congress's well-established practice of "employ[ing] private legislation to provide remedies in individual cases of hardship").

Respondent's position would call into doubt the constitutionality not only of these enactments but also of most federal spending. The discretionary spending Congress authorizes through the annual appropriations process accounts for just 30 percent of the federal government's total outlays. *See* Cong. Budget Office, *The Federal Budget in 2019* (Apr. 2020), *available at* https://go.usa.gov/xHPFw. The rest is mandatory spending, typically "governed by formulas or criteria set forth in authorizing legislation rather than by [annual] appropriations. Examples of mandatory spending include: Social Security, Medicare, veterans' pensions,

rehabilitation services, Members' pay, judges[']' pay and the payment of interest of the public debt." Senate Budget Cmte., *The Congressional Budget Process: An Explanation* 5-6, 56 (1998), S. Prt. 105-67. Under Respondent's view, most or all of this spending would be unconstitutional. That is not what the Appropriations Clause says and that is not how it has been interpreted by the Supreme Court, this Court, or Congress itself.[5]

Next, Respondent tries unsuccessfully to differentiate the Bureau from other federal programs that are not funded through annual spending bills. Respondent points out (at 29-30) that some agencies are funded through fees they collect, while the Bureau draws from the earnings of the Federal Reserve System. But any difference here cuts *against* Respondent's position: The Bureau's funding is, if anything, more constrained than that of many financial regulators that rely on fees because the Bureau's funding is statutorily capped, whereas other agencies have no such cap and are empowered to set the amount of the fees they collect. *See PHH Corp.*, 881 F.3d at 95 (citing Cong. Research Serv., *Independence of Federal*

[5] As Respondent notes, the CFPA states that funds transferred to the Bureau "shall not be construed to be Government funds or appropriated monies." 12 U.S.C. § 5497(c)(2). That clause, like similar provisions applicable to the Farm Credit Administration, *id.* § 2250(b)(2), the Federal Reserve Board, *id.* § 244, and the OCC, *id.* §§ 16, 481, determines the degree to which various *statutory* restrictions on appropriations apply to the Bureau's use of funds. *See, e.g.*, GAO, Principles of Federal Appropriations Law, 4th ed., at 2-22–2-26 (2016), *available at* gao.gov/assets/2019-11/675709.pdf. It has nothing to do with the constitutional requirement (satisfied here) that Congress authorize the executive to spend money.

Financial Regulators at 26-27 (2017)); *see also, e.g.*, 12 U.S.C. § 16 (authorizing OCC to establish and collect fees from banks it regulates). More fundamentally, Respondent fails to explain why this distinction matters under the Appropriations Clause. Regardless of the source of the funds, Congress has statutorily authorized the Bureau and other financial regulators to spend those funds to defray the cost of their operations. *See, e.g.*, *id.* § 5497(c) (funds transferred to Bureau "shall be immediately available … to pay the expenses of the Bureau in carrying out its duties and responsibilities"). In so authorizing that spending, Congress satisfied the Appropriations Clause.

Respondent also seeks to distinguish the Bureau based on its specific statutory authorities, which Respondent suggests (at 30-31) are somehow more potent or more important than those of other agencies. A number of Respondent's purported distinctions are not distinctions at all. For example, the Federal Reserve Board, like the Bureau, has investigative and enforcement authority, including the power to conduct on-site examinations of the banks under its purview and to impose civil money penalties. *See* 12 U.S.C. §§ 481, 504; *see also Seila Law*, 140 S. Ct. at 2239 (Kagan, J., dissenting in part) (noting that, "if influence on economic life is the measure," the Federal Reserve Board's "every act has global consequence"). More to the point, this inquiry is irrelevant to the Appropriations

Clause, which requires that federal spending be authorized by statute, irrespective of the particular features of the program or agency being funded.

Respondent characterizes the Bureau's funding (at 16-17) as involving "***two*** layers of financial independence" (emphasis in original), and it argued in the district court that this funding mechanism is akin to the two layers of removal protections the Supreme Court held unconstitutional in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). That analogy crumbles at the touch. The basis of the Court's holding in *Free Enterprise* was that having two layers of removal protection (one for SEC Commissioners and another for members of an independent accounting board overseen by the SEC) "does not merely add to the Board's independence, but *transforms it*" by moving board members outside the President's ability to supervise effectively. 561 U.S. at 496 (emphasis added). In contrast, whether the Bureau draws money from the Federal Reserve System's earnings or from fees the Bureau itself collects makes no difference for the controlling question here: whether Congress has statutorily authorized the Bureau to spend that money to operate. *Cf. PHH Corp.*, 881 F.3d at 96 ("[F]or two unproblematic structural features to become problematic in combination, they would have to affect the same constitutional concern and amplify each other in a constitutionally relevant way."). Nor does that difference

matter for Congress's ability to increase, decrease, or even eliminate the Bureau's level of funding going forward.

In short, the statutory provisions authorizing the Bureau's spending fully satisfy the Appropriations Clause's dictate that "the payment of money from the Treasury … be authorized by a statute." *Richmond*, 496 U.S. at 424.

B. Congress complied with the nondelegation doctrine when it authorized the Bureau to spend up to a set amount of funds.

Respondent next claims that the Bureau's funding provisions—particularly 12 U.S.C. § 5497(a)—unconstitutionally delegate legislative authority. But this argument too is foreclosed by binding Supreme Court precedent, which has repeatedly upheld far broader delegations than the CFPA's. What is more, the feature of the CFPA's funding mechanism that Respondent attacks is functionally indistinguishable from an appropriation of funds "not to exceed" a given amount—something Congress has done since the founding of the Republic.

"[A] delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority." *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality op.); *accord Mistretta v. United States*, 488 U.S. 361, 372 (1989). Applying this principle, the Supreme Court has "over and over upheld even very broad delegations." *Gundy*, 139 S. Ct. at 2129 (plurality op.). For example, the Court has upheld instructions for agencies to set air quality standards "requisite to protect the public health," *Whitman v. Am.*

Trucking Ass'ns, 531 U.S. 457, 472-76 (2001); to take action to "avoid an imminent hazard to the public safety," *Touby v. United States*, 500 U.S. 160, 165-67 (1991); to fix "fair and equitable" commodities prices, *Yakus v. United States*, 321 U.S. 414, 426-27 (1944); and to regulate broadcast licensing as "public interest, convenience, or necessity" requires, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (quotation marks omitted). "In short, [the Supreme Court] ha[s] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Whitman*, 531 U.S. at 474-75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

The Bureau's funding provisions easily pass muster under this controlling precedent. Section 5497(a) instructs the Bureau to draw (and Section 5497(c) authorizes the Bureau to spend) an amount, up to a specified limit, that the Director determines is "reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year)." Even standing alone, this provision provides at least as much guidance as those delegations the Supreme Court has approved in the decisions cited above.

But the provision need not be read standing alone, because its reference to "the authorities of the Bureau under Federal consumer financial law" necessarily

incorporates the whole of the CFPA, which describes, over more than 150 pages of detailed provisions, the specific authorities and duties of the Bureau. The Bureau's Director can determine what amount (up to the statutory cap) is "reasonably necessary" to carry out the Bureau's statutory responsibilities only by considering what those statutory responsibilities are. As was true of the law at issue in *Mistretta* establishing the U.S. Sentencing Commission, the CFPA "sets forth more than merely an 'intelligible principle' or minimal standards," it "outlines the policies which prompted establishment of the [agency], explains what the [agency] should do and how it should do it, and sets out specific directives to govern particular situations." 488 U.S. at 379 (rejecting nondelegation challenge to Sentencing Reform Act). Thus, not just Section 5497(a) but the entire CFPA provides, in great detail and at great length, the principles that guide the Director's decisionmaking with respect to funding.

The Court need go no further to resolve this issue. But it is also notable that the limited spending discretion provided for in the CFPA is consistent with longstanding congressional practice. Congress has frequently made available set amounts of money for certain purposes while also authorizing the executive to spend less than the full amount appropriated. "From a very early date Congress … made permissive individual appropriations, leaving the decision whether to spend the money to the President's unfettered discretion." *Clinton v. City of New York*,

524 U.S. 417, 466 (1998) (Scalia, J., concurring in part and dissenting in part). For example, in the years following the Constitution's ratification, "the First Congress made lump-sum appropriations for the entire Government—'sum[s] not exceeding' specified amounts for broad purposes." *Id.* (quoting Act of Sept. 29, 1789, ch. 23, 1 Stat. 95, and citing similar laws).[6] Congress has continued to appropriate money in this way ever since, yet "[t]he constitutionality of such appropriations has never seriously been questioned." *Id.* at 467 (collecting examples); *see also Cincinnati Soap*, 301 U.S. at 321-22 (rejecting nondelegation attack on spending authorization; "That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain.").

Respondent offers a number of arguments why the Bureau's funding mechanism is nonetheless unconstitutional, but those arguments are easily answered. Respondent compares the Bureau's funding (at 23-24) to the delegations struck down in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). But in those cases, "the Court concluded that Congress had failed to articulate *any* policy or standard

[6] In doing so, Congress was following the long-established practice of the English Parliament and of many colonial legislatures. *See* Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto*, 76 Tul. L. Rev. 265, 320-35 (2001) (surveying historical practice and concluding that "the Framers of the United States Constitution were drafting within a British and American tradition that permitted discretionary appropriations").

that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 374 n.3 (emphasis added). Here, Congress set out more than 150 pages of responsibilities and authorities of the Bureau that help guide the determination of the amount "reasonably necessary to carry out the authorities of the Bureau." 12 U.S.C. § 5497(a)(1).

Respondent likewise claims (at 25) that the Bureau's funding lacks an intelligible principle because the CFPA would not prohibit the Director from requesting a transfer of $0. But, under the CFPA, the Director could make such a request only if he determined that it would reasonably allow the Bureau to carry out its duties, *see id.*—presumably because the Bureau had significant cash on hand already. Respondent fails to explain how in that scenario the Director's faithful application of the intelligible principle that Congress set down would show the *lack* of an intelligible principle. Respondent's related concern (at 25) that the Director could request an amount based on some other consideration—or even for a nefarious purpose such as "to drain the public fisc"—is entirely fanciful and, more to the point, contrary to what the statute requires.

Respondent asserts (at 10, 28), without support, that decisions about spending are subject to a more searching nondelegation analysis. That claim runs headlong into the Supreme Court's decision in *Skinner v. Mid-America Pipeline Co.*, which applied ordinary nondelegation principles to a statute that funded an

agency through user fees. 490 U.S. 212, 218-20 (1989). The Court rejected the view that the statute "must be scrutinized under a more exacting nondelegation lens" because it involved the power of the purse (specifically, the taxing power). *Id.* at 220-23; *cf. Synar v. United States*, 626 F. Supp. 1374, 1385-86 (D.D.C.) (decision by three-judge panel, including then-Judge Scalia, rejecting claim that the appropriations power is not subject to ordinary nondelegation analysis), *aff'd on other grounds sub nom.*, *Bowsher v. Synar*, 478 U.S. 714 (1986). Respondent's theory is also belied by Congress's long practice of discretionary appropriations. *See Clinton*, 524 U.S. at 466 (Scalia, J., concurring in part and dissenting in part); *see also Cincinnati Soap*, 301 U.S. at 322 ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies.").[7]

Binding Supreme Court precedent and historical practice establish that the Bureau's funding mechanism does not run afoul of the nondelegation doctrine.

II. Respondent's Objection to the CFPA's Invalid Removal Restriction Has Been Fully Resolved

[7] Relying in part on this history, one noted originalist scholar has argued at length that the nondelegation doctrine does not apply to appropriations at all. *See* Rappaport, 76 Tul. L. Rev. at 320-45; *cf. also* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 344-45 & n.358 (2021) (describing a number of extremely expansive delegations by the early Congresses involving the power of the purse).

Respondent's other constitutional objection concerns a provision of the CFPA that purported to restrict the grounds on which the President could remove the Bureau's Director. *See* 12 U.S.C. § 5491(c)(3). The parties agree that, following the Supreme Court's decision in *Seila Law* holding that provision invalid but severable, the provision has no force or effect and presents no impediment to the Bureau's exercise of its authorities going forward. *See, e.g.*, Resp't Br. at 6. Indeed, Respondent has correctly conceded that if the Bureau sent Respondent a new CID today, the removal restriction would pose no problem for the enforcement of that CID. JA91-92.[8]

Respondent's sole remaining complaint with the removal restriction is that, at the time the Bureau filed its petition in this case, the Supreme Court had not yet confirmed the invalidity of the removal restriction. Thus, according to Respondent, the CID cannot be enforced because it is uncertain whether the Bureau would seek to pursue the CID if the Director were removable at will. That objection was resolved by Director Kraninger's decision, after *Seila Law* made clear she was removable at will, that the Bureau should continue to seek enforcement of the CID.

[8] Reissuing the CID would not have resolved Respondent's other objections to the CID, however, and would in the Bureau's judgment likely have led to unnecessary additional delays in obtaining the information sought as part of this investigation.

That ratification confirms that the case is not proceeding inconsistent with the will of the executive.[9]

The Ninth Circuit reached just that conclusion with respect to the CID in *Seila Law*: On remand from the Supreme Court, the Ninth Circuit held that the Bureau had validly ratified the CID and that it should be enforced. *See* 984 F.3d 715 (9th Cir. 2020), *reh'g en banc denied and opinion amended*, --- F.3d ----, 2021 WL 2035701 (May 14, 2021). Indeed, every court of appeals to consider the issue has agreed that ratification can provide an appropriate remedy for an Article II problem (such as the one caused by the Director's prior purported insulation from at-will removal) at the start of an agency action. Respondent provides no reason this Court should spurn that consensus view.

A. The removal restriction has no effect on the President's removal power or on the Bureau's prosecution of this case.

Following the Supreme Court's ruling in *Seila Law*, there is no dispute that the removal restriction does not limit the President's authority to dismiss the Bureau's Director. And following Director Kraninger's ratification of this case while indisputably removable at will, it is just as clear that Respondent is not being subjected to investigation without sufficient presidential oversight. The removal

[9] Further assurance on this point is provided by the fact that the Bureau has continued to pursue this CID while led by Acting Director Uejio, who, like his predecessor, may be removed as head of the Bureau at the President's discretion.

restriction thus no longer has any effect on the President's removal power, on the Bureau's pursuit of this CID, or on anything else. As the district court correctly held, it provides no grounds for holding the CID unenforceable.

Drawing from established principles of agency law, courts have long recognized ratification as a remedy for an initial defect in government-agency action, including the filing of an enforcement suit. "Ratification occurs when a principal sanctions the prior actions of its purported agent." *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998). In the context of an enforcement suit, such a ratification "remedie[s] the defect in [the] original issuance of the complaint." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017).

Here, ratification took place when the Bureau (the principal), acting through a valid agent (a Director unmistakably removable at will), considered and approved the decisions to issue and seek to enforce the CID, actions that had been taken under the supervision of an agent (a Director purportedly removable only for cause) whose authority was called into question as a result of the removal restriction. Such ratification has retroactive effect: It "operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally." *Marsh v. Fulton Cty.*, 77 U.S. 676, 684 (1870); *accord Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016) ("[T]he general

rule [is] that the ratification of an act purported to be done for a principal by an agent is treated as effective at the time the act was done. In other words, … the ratification 'relates back' in time to the date of the act by the agent.").

Although the Supreme Court held in *Seila Law* that the provision purporting to shield the Director from at-will removal was invalid, thus calling into question whether the Director's past exercises of authority were consistent with the will of the President, the Court's decision did not invalidate or call into question all of the other provisions of the CFPA conferring broad authority on the Bureau, including the authority to issue and seek to enforce CIDs. *See* 12 U.S.C. § 5562(c), (e). To the contrary, the Court rejected Seila Law's argument that the "offending removal provision means the entire agency is unconstitutional and powerless to act." 140 S. Ct. at 2208 (plurality op.). As the Ninth Circuit observed, "[n]othing in the Court's decision suggests that it believed [the invalid removal restriction] rendered all of the agency's prior actions void." *Seila Law*, 984 F.3d at 719. Instead, "the CFPB *as an agency* had the authority to bring the enforcement action both at the time the act was done and at the time the ratification was made," *id.* at 718-19, and so could ratify, as the relevant principal, the initial decision to pursue this case.

Every court of appeals to have addressed the issue has agreed that ratification provides an appropriate remedy for an agency action initially authorized by an official not serving in conformity with Article II. *See, e.g.*,

McKinney v. Ozburn-Hessey Logistics, LLC, 875 F.3d 333, 338-39 (6th Cir. 2017) (ratification cured any constitutional deficiency with complaint that was initially authorized by an improperly appointed official); *CFPB v. Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016) (same); *Advanced Disposal*, 820 F.3d at 602 (3d Cir.) (same); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708-09 (D.C. Cir. 1996) (ratification provided adequate remedy in enforcement action initially approved by unconstitutionally structured agency).

Numerous courts—including the only court of appeals to decide the question—have reached the same conclusion with respect to Bureau actions initiated before the CFPA's removal restriction was definitively declared invalid. *See Seila Law*, 984 F.3d at 718 ("Director Kraninger's ratification remedies any constitutional injury that Seila Law may have suffered due to the manner in which the CFPB was originally structured."); *CFPB v. Navient Corp.*, --- F.Supp.3d ----, 2021 WL 134618 (M.D. Pa. Jan. 13, 2021) (holding that Bureau validly ratified enforcement action following Supreme Court's decision in *Seila Law*), *motion to certify appeal granted*, 2021 WL 772238 (M.D. Pa. Feb. 26, 2021); *CFPB v. Citizens Bank, N.A.*, --- F.Supp.3d ----, 2020 WL 7042251, at *7-11 (D.R.I. Dec. 1, 2020) (same); *CFPB v. Fair Collections & Outsourcing, Inc.*, No. 8:19-cv-02817, 2020 WL 7043847, at *5-7 (D. Md. Nov. 30, 2020) (same); *CFPB v. Chou Team*

Realty LLC, No. 8:20-cv-00043, 2020 WL 5540179, at *3 (C.D. Cal. Aug. 21, 2020) (same).[10]

Respondent ignores these decisions, but they are correct. As in those cases, the Bureau's ratification of the CID here provided Respondent with a remedy precisely tailored to the scope of its objection. *See generally Waller v. Georgia*, 467 U.S. 39, 50 (1984) (emphasizing in a criminal case involving a structural constitutional violation that "the remedy should be appropriate to the violation"); *United States v. Morrison*, 449 U.S. 361, 364 (1981) (noting "general rule that remedies should be tailored to the injury suffered from the constitutional violation"). Respondent complained that the Bureau might not have sought to enforce the CID if the Director had understood at the time that she was removable at will. That objection was resolved by Director Kraninger's decision to affirm that the CID should be enforced, at a time when she was unmistakably removable at will. As the Ninth Circuit concluded in *Seila Law*, there is no longer any reason for

[10] One district court held that a Bureau ratification was barred by the statute of limitations for factual reasons specific to that case. *See CFPB v. Nat'l Collegiate Master Student Loan Tr.*, No. 17-cv-1323, 2021 WL 1169029, at *4-7 (D. Del. Mar. 26, 2021). In particular, the court concluded that the Bureau had not shown that it had diligently pursued its claims and thus in the court's view had not timely ratified the case. *Id.* at *6. The Bureau respectfully disagrees with the district court's conclusion on that point, but what matters here is that, even in that case, the court did not disagree that a timely ratification would resolve any problem stemming from the invalid removal restriction. In addition, Respondent (properly) does not dispute the timeliness of the Bureau's ratification here.

concern that Respondent is "being subjected to investigation without adequate presidential oversight and control." 984 F.3d at 718; *see also Legi-Tech*, 75 F.3d 708 (dismissal of enforcement action was "neither necessary nor appropriate" following ratification).

Ratification also provided a remedy that appropriately took into account the legitimate interests of the Bureau and of any consumers injured by the suspected violations under investigation. *Cf. Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2355-56 (2020) (plurality op.) (rejecting challengers' request in First Amendment case for a broad remedy that "would end up harming a different and far larger set of strangers to this suit" than the narrower approach the Court did adopt); *Morrison*, 449 U.S. at 364 (explaining that constitutional remedies "should not unnecessarily infringe on competing interests"). Setting aside the CID would harm these significant interests by further delaying the Bureau's legitimate investigation. It would also undermine the very Article II authority the Supreme Court sought to protect in *Seila Law*. After all, it would make little sense to throw out an action approved by multiple officials subject to the President's plenary oversight in the name of safeguarding the President's executive power.

B. Respondent's objections to the Bureau's ratification of the CID are without merit.

Respondent disputes the Bureau's ratification on a number of grounds, but its arguments do not withstand scrutiny.

First, Respondent claims (at 33-35) Director Kraninger could not ratify this case because she "intentionally violated the Constitution" by allowing the case to proceed after she had determined that the removal restriction was unconstitutional but severable from the rest of the CFPA. Not so. In pursuing enforcement of the CID, the Bureau properly sought to carry out its statutory duties, including to investigate violations of the laws Congress charged the Bureau to enforce. "Neither the Director nor the CFPB engaged in nefarious behavior; rather, they plugged away at the mission entrusted to them by Congress, making the best of a flawed statutory scheme. Their hands are clean." *See Citizens Bank*, 2020 WL 7042251, at *9. Nor did the Supreme Court say anything in *Seila Law* to suggest that the Bureau's (correct) view that the removal restriction was invalid but severable would preclude it from ratifying its actions, including the CID in that case. *Cf.* 140 S. Ct. at 2195 (specifically noting that "Director Kathleen Kraninger … agrees with the Solicitor General's position in this case").

Second, Respondent alleges (at 35-39) that the ratification was ineffective because it was not based on a "detached and considered judgment." But Director Kraninger's sworn declaration established that she considered the basis for each of the Bureau's relevant decisions with respect to the CID and affirmed that the CID should be enforced. That is all that was required; indeed, it exceeds what courts have required. *See, e.g.*, *Wilkes-Barre Hosp. Co.*, 857 F.3d at 371-72 (upholding

blanket ratification by agency official of all his prior actions); *Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016) (similar); *Legi-Tech*, 75 F.3d at 709 (upholding ratification that court concluded "may well" have been little more than a "rubberstamp"). Moreover, courts "have consistently declined to impose formalistic procedural requirements before a ratification is deemed to be effective." *State Nat'l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177, 184 (D.D.C. 2016).

Respondent attempts to dispute the Director's declaration, and to overcome the presumption of regularity that would apply to that document even if it had not been offered under penalty of perjury, *see Advanced Disposal*, 820 F.3d at 604, by objecting (at 35-36) that the declaration was issued not long after *Seila Law* was decided. Although the declaration stands on its own, the Bureau notes that it would hardly have been unreasonable for the Bureau to prioritize review of those matters, such as this one, that at the time had impending litigation deadlines. Respondent cannot turn the Bureau's prompt action into a reason to dismiss the ratification.

Respondent also errs in claiming (at 36) that the ratification was ineffective because it happened before the Bureau ratified certain of its regulations. *See* Ratification of Bureau Actions, 85 Fed. Reg. 41,330 (July 10, 2020) (ratifying the large majority of the Bureau's existing regulations). The Bureau's authority to issue CIDs is established by the CFPA itself, not by regulation. *See* 12 U.S.C.

§ 5562(c)–(h). There was no need for the Director to formally ratify any particular regulation before approving the issuance and enforcement of the CID.

Third, Respondent suggests (at 39-43) that ratification would lead to an inequitable result and leave it with no remedy at all. But as noted already, Director Kraninger's consideration and ratification of this case provided Respondent a remedy neatly fitted to its objection: There is no longer any cause for concern that this investigation might be moving ahead without sufficient presidential supervision. As every other court of appeals to address the issue has agreed, ratification in these circumstances provides "an adequate remedy," *Legi-Tech, Inc.*, 75 F.3d at 709; "cures any initial Article II deficiencies" with the filing of this action, *Gordon*, 819 F.3d at 1191; and "remedies any constitutional injury that [a CID recipient] may have suffered due to the manner in which the CFPB was originally structured," *Seila Law*, 984 F.3d at 718. For this reason, Respondent's concerns about its "intervening rights" have been addressed.

Respondent relies on *Lucia v. SEC*, 138 S. Ct. 2044 (2018), but that decision supports the Bureau's position. There, the Supreme Court noted that its remedies in Appointments Clause cases were meant to "create incentives" to raise such challenges. 138 S. Ct. at 2055 n.5 (internal brackets and quotation marks omitted). But it went on to hold that it "best accomplish[ed] that goal" by remanding that enforcement proceeding for a new decision by a properly appointed judge, *see*

id.—not by dismissing it wholesale, as Lucia had urged (and as Respondent urges here), and not by requiring the new judge to arrive at any particular conclusion on remand. The equivalent remedy here was a new decision by a properly removable official on whether the CID should be enforced. Respondent received exactly that. And had the Supreme Court thought that dismissal was necessary in order to encourage claims like Respondent's, it surely would have done so in *Seila Law* (as Seila Law requested) rather than remanding that case for additional proceedings.

The fact that Director Kraninger's consideration of this action ultimately resulted in the same substantive outcome for Respondent—*i.e.*, a decision that the Bureau should seek to enforce the CID—does not mean Respondent was denied an appropriate remedy. Just as in *Lucia*, Respondent was entitled to a new decision not subject to the initial constitutional defect; Respondent was not entitled to any particular outcome as a result of that new decision. That a Director indisputably removable at will concluded that the Bureau should continue to pursue the CID simply confirms that the removal restriction is now irrelevant to this case.

There is nothing inadequate, or even unusual, about such a remedy. By way of analogy, this Court routinely resolves challenges to an agency's or district court's decision by remanding for further consideration by the agency or court, rather than mandating any particular substantive result. *E.g.*, *Burgess v. Astrue*, 537 F.3d 117, 132 (2d Cir. 2008) (claimant for Social Security benefits was not entitled

"to an outright reversal of the denial of benefits" but was entitled to additional proceedings consistent with the Court's analysis); *Aris v. Mukasey*, 517 F.3d 595, 601 (2d Cir. 2008) (alien who received ineffective assistance of counsel and was deported in absentia was entitled to new—but not necessarily different—decision on his petition for relief). Such additional proceedings can, and frequently do, result in the same outcome as the initial process, yet the parties in such cases have not for that reason been deprived of appropriate relief. The same is true in the criminal context, where even a "structural" constitutional violation typically results in retrial or resentencing—not the outright dismissal of all charges. *See, e.g.*, *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993); *Waller*, 467 U.S. at 49-50.

The fact that Respondent (like Lucia) did not receive its preferred result—not having to comply with the CID—does not mean it was denied relief. *Cf. also Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2355 & n.13 (plurality op.) (explaining that Court had awarded proper remedy in First Amendment challenge to ban on robocalls where it held invalid an exception to the ban—thus expanding the scope of the ban—when what plaintiffs had sought was to invalidate the ban entirely). "'Constitutional litigation is not a game of gotcha against Congress' or the CFPB"—still less against the consumers harmed by the illegal conduct under investigation here. *See Citizens Bank*, 2020 WL 7042251, at *9 (quoting *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2351 (plurality op.)).

Respondent offers a number of other arguments on this point that can be addressed quickly. It cites (at 41-42) two decisions setting aside agency actions that, unlike the CID in this case, had not been ratified—but both cases were followed by related decisions *approving* ratification. *Compare FEC v. NRA Pol. Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993) (Silberman, J.) (dismissing unratified enforcement action), *with Legi-Tech*, 75 F.3d at 708-09 (Silberman, J.) (holding that "dismissal is neither necessary nor appropriate" for action that had been ratified); *compare also Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (Sentelle, J.) (setting aside unratified agency action), *with Noel Canning v. NLRB*, 823 F.3d 76, 78, 81 (D.C. Cir. 2016) (Sentelle, J.) (enforcing new decision and order "essentially adopting" earlier decision). Respondent also quotes (at 43) a decision from a district court in this Circuit while failing to note that this Court vacated that judgment because the district court had held—contrary to the Supreme Court's later holding in *Seila Law*—that the CFPA's removal restriction was not severable. *See CFPB v. RD Legal Funding, LLC*, 828 F. App'x 68 (2d Cir. 2020).[11]

Respondent points (at 43) to Justice Thomas's dissent in *Seila Law*, but the view expressed there—which was joined by only one other Justice—is no help to

[11] This vacated district court decision, *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729 (S.D.N.Y. 2018), is the sole case Respondent offers in which ratification was found not to provide an adequate remedy. And its analysis was directly contradicted by the Supreme Court's decision in *Seila Law*.

Respondent. The Bureau argued in *Seila Law* that its CID had been ratified by an acting official (Mick Mulvaney) to whom the removal restriction did not apply. Justice Thomas opined that such ratification was insufficient because the case had continued on after the Bureau was once again headed by an official (Director Kraninger) who, for a time, was purportedly insulated from at-will removal, and the acting official could not have ratified *that* portion of the proceeding. *See Seila Law*, 140 S. Ct. at 2221 (Thomas, J., dissenting in part) (noting that even if the acting official had "properly ratified" the action, he logically could not have "ratif[ied] the continuance of the enforcement action by his successor, Director Kraninger"). But that argument simply does not apply to this case, which Director Kraninger ratified in full following the decision in *Seila Law*.

Fourth, Respondent argues (at 44-47) that the Bureau could not ratify the CID because the invalidity of the removal restriction meant that, until the Supreme Court's decision in *Seila Law*, the Bureau itself lacked authority to issue or enforce CIDs, and thus the initial petition to enforce the CID was void and incapable of ratification. This argument turns *Seila Law* on its head.

Like Respondent here, Seila Law argued in the Supreme Court that "an agency with a structural constitutional defect lacks the authority to take executive action" and therefore "any exercise of executive power by the agency is void." Br. for Pet'r at 35-36, *Seila Law*, 2019 WL 6727093 (U.S. 2019). The Court disagreed.

It rejected the argument that "the offending removal provision mean[t] the entire agency is unconstitutional and powerless to act." 140 S. Ct. at 2208 (2020) (plurality op.). Instead, the Court emphasized that the "only constitutional defect we have identified" was the Director's insulation from removal. *Id.* at 2209. That insulation left the Director insufficiently accountable to the President and thus called into question *her* exercise of authority. *See id.* at 2196 (majority op.) (explaining that Seila Law had been "aggrieved by *an official's* exercise of executive power" and thus, under the Court's precedents, could seek "to challenge *the official's* authority to wield that power while insulated from removal by the President") (emphasis added).

The Court's decision did not cast doubt on the authority of the Bureau itself. It held instead that the Bureau could "*continue* to operate" going forward, *id.* at 2192 (emphasis added), with "[t]he provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties *remain[ing]* fully operative," *id.* at 2209 (plurality op.) (emphasis added); *see also Seila Law*, 984 F.3d at 718-19 (holding that "the CFPB *as an agency* had the authority to bring the enforcement action").[12]

[12] For this reason, Respondent errs in seeking (at 44-45) to distinguish those cases approving ratifications of actions initially authorized by an improperly appointed official. *See, e.g.*, *Gordon*, 819 F.3d at 1190-91. "Just as in [those cases], the constitutional infirmity [concerning the Director's removability] relates to the Director alone, not to the legality of the agency itself." *Seila Law*, 984 F.3d at 719.

The Court's ruling that the removal restriction was invalid but severable did not—contrary to Respondent's position—establish a newly empowered Bureau or suddenly make effective the provisions of the CFPA charging the Bureau with the duty to enforce the consumer laws. Rather, consistent with longstanding severability principles, the Court exercised "the negative power to disregard an unconstitutional enactment." 140 S. Ct. at 2211 (plurality op.) (quotation marks omitted); *accord Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2351 & n.8 (plurality op.). In particular, the Court disregarded "Congress's unconstitutional attempt to insulate the agency's Director from removal." *Seila Law*, 140 S. Ct. at 2208 (plurality op.). The result is that the unconstitutional removal provision cannot be enforced, but the remainder of the statute continues to operate without interruption. *See, e.g.*, *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2355 & n.12 (plurality op.) (holding that where a statutory exception to a general restriction resulted in unequal treatment in violation of the First Amendment, the exception should be severed and the general restriction should remain in force, including with respect to prior violations).

The outcome in *Seila Law*—a remand to the Ninth Circuit for further proceedings—also would not make sense if the Supreme Court had agreed with Respondent's position that the Bureau's prior actions were irremediably void. "Indeed, had that been the Court's view, it presumably would have ordered the

dismissal of th[e] proceeding." *Seila Law*, 984 F.3d at 719; *see also Fair Collections & Outsourcing*, 2020 WL 7043847, at *2 ("If dismissal were absolutely required, [the Supreme Court] would not have remanded … ."). As the Supreme Court itself observed, returning the case to the Ninth Circuit would not have been "the appropriate course" if "such a remand would be futile." *Seila Law*, 140 S. Ct. at 2208 (plurality op.).

Respondent's view that every action the Bureau took from its establishment in 2010 until *Seila Law* is void and incapable of ratification is not just wrong as a matter of law. It would also sow significant uncertainty in the consumer financial marketplace by calling into question the validity of countless other actions the Bureau took prior to *Seila Law* and that it has since ratified. These actions include, for example, regulations governing the nation's multitrillion-dollar mortgage market. *See, e.g.*, Brief for Mortgage Bankers Ass'n, National Ass'n of Home Builders, and National Ass'n of Realtors as Amici Curiae at 20, 10, *Seila Law*, 2019 WL 6910300 (U.S.) (explaining that "the CFPB's rules and guidance have permeated nearly every aspect of residential mortgage loan origination and servicing" and that "a ruling calling into question the ongoing legitimacy of the CFPB's past actions … could be catastrophic for the real estate finance industry"). Condemning these past actions without the possibility of ratification would trigger

just the sort of "major regulatory disruption" the Supreme Court sought to avoid as a result of its decision in *Seila Law*. 140 S. Ct. at 2211 (plurality op.).

Respondent's related argument (at 46-47) that the Bureau lacked Article III standing to pursue this case is likewise incorrect.[13] The Bureau, as an executive agency seeking to enforce federal law, has at all times had standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992) (Executive Branch is responsible for "[v]indicating the public interest" under Article II); *In re Debs*, 158 U.S. 564, 584 (1895) (governments have Article III standing by virtue of their duty to promote the public welfare). The Article II problem with the Director's removability had no effect on the standing of the Bureau. *See Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 778 & n.8 (2000) (explaining that the question "whether qui tam suits violate Article II," including "the 'take Care' Clause," is not "a jurisdictional issue" that could potentially deprive a qui tam relator of Article III standing). "[N]o court, including the Supreme Court, has ever suggested that Article II problems nullify Article III jurisdiction." *Gordon*, 819 F.3d at 1190.

[13] This argument is also at odds with this Court's adjudication on the merits of an appeal from another Bureau enforcement action, where the defendants-appellees pressed the same argument in seeking rehearing. *See RD Legal*, 828 F. App'x 68; *see also* Appellees' Pet. for Rehearing at 10 & n.5, *RD Legal*, No. 18-2743 (2d Cir. Dec. 14, 2020) (arguing that the removal restriction deprived the Bureau of standing to initiate the action and authority to file an appeal), ECF No. 258.

Respondent has identified no reason that a statutory provision with no effect on the Bureau's continued pursuit of this case—or on anything else—could justify holding the CID unenforceable.[14]

III. The CID Was Otherwise Enforceable

"To win judicial enforcement of an administrative subpoena, [an agency] 'must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the [agency's] possession, and [4] that the administrative steps required ... have been followed … .'" *RNR Enterprises, Inc. v. SEC*, 122 F.3d 93, 96 (2d Cir. 1997) (quoting *United States v. Powell*, 379 U.S. 48, 57-58 (1964)). The district court correctly held that the Bureau had established all of these factors and ordered the CID enforced. JA141-47.

Respondent disputes the first two elements, claiming that a provision in the CFPA that limits in certain respects the Bureau's authority regarding the practice

[14] Since Respondent filed its brief, the Ninth Circuit issued an order in *Seila Law* declining to rehear en banc its decision upholding the Bureau's ratification. *See* 2020 WL 9595879 (9th Cir. May 14, 2021). Four of the Ninth Circuit's 29 active judges dissented from that decision. *See id.* at *2-7 (Bumatay, J., dissenting from the denial of rehearing). The dissent argued that (1) ratification left Seila Law without a remedy, *id.* at * 5, and (2) the Bureau "lacked Executive authority" until the Supreme Court held the removal restriction invalid and severable, *id.* at *6-7. Because those conclusions are contrary to the Supreme Court's decisions in *Lucia* and *Seila Law*, and for the other reasons stated in this brief, the Bureau respectfully submits that this Court should reject the erroneous view expressed in that dissent.

of law, *see* 12 U.S.C. § 5517(e), means that the information sought in the CID was not relevant to a legitimate purpose. But for multiple reasons Section 5517(e) has no application here. Respondent disputes the third element as well, claiming the CID sought information already in the Bureau's possession. But the district court correctly found that was not the case, and Respondent can point to no error in that finding—let alone the clear error Respondent would need to show to prevail.

A. The CID sought information relevant to a legitimate purpose.

The Bureau sent the CID as part of an investigation into suspected violations of a number of the federal consumer laws the Bureau administers, including the FDCPA and the FCRA. *See* 12 U.S.C. § 5481(12), (14) (defining both statutes as "Federal consumer financial laws"); *id.* §§ 5562, 5564 (authorizing the Bureau to investigate and bring enforcement actions relating to violations of such laws).

The investigation is squarely within the Bureau's authority and is being "conducted pursuant to a legitimate purpose." *RNR Enterprises*, 122 F.3d at 96. Further, all of the requests in the CID are relevant to that legitimate inquiry. "In enforcing administrative subpoenas, courts broadly interpret relevancy," and will "defer[] to the agency's appraisal of relevancy, which must be accepted so long as it is not obviously wrong." *NLRB v. Am. Med. Response, Inc.*, 438 F.3d 188, 193 (2d Cir. 2006) (quotation marks omitted). Respondent cannot meet this high

burden and does not even identify any particular request in the CID it thinks would be irrelevant.

Respondent instead seeks to hide behind its status as a law firm. It points (at 48-49) to a provision in the CFPA concerning the Bureau's authority over attorneys engaged in the practice of law. *See* 12 U.S.C. § 5517(e). For at least two reasons, that provision has no application here.

First, the CFPA provides that, notwithstanding Section 5517(e), an attorney "may be subject to requests from, or requirements imposed by, the Bureau regarding information in order to carry out the responsibilities and functions of the Bureau and in accordance with [12 U.S.C. § 5562]" (the provision that authorizes the Bureau to issue CIDs). *Id.* § 5517(n)(2). The plain text of Section 5517(n) thus forecloses Respondent's argument that it is not subject to the requests for information in the CID because it is a law firm.

Second, Section 5517(e) provides that it does not "limit the authority of the Bureau with respect to any attorney, to the extent that such attorney is otherwise subject to any of the enumerated consumer laws" (or certain authorities transferred from other agencies). *Id.* § 5517(e)(3). The FDCPA, a law that is central to this investigation, is an "enumerated consumer law." *Id.* § 5481(12)(H). Respondent, a debt-collection law firm, is "subject to" the FDCPA. *See generally Heintz v. Jenkins*, 514 U.S. 291, 299 (1995) (FDCPA applies to debt-collection attorneys).

Thus, under the plain language of Section 5517(e) itself, Section 5517(e) does not limit the Bureau's ability to issue or seek to enforce this CID. *See also CFPB v. Seila Law LLC*, 923 F.3d 680, 684-85 (9th Cir. 2019) (holding that Section 5517(e) did not prevent Bureau from issuing CID to law firm to investigate violations of a different law referenced in Section 5517(e)(3)), *vacated on other grounds and remanded*, 140 S. Ct. 2183, *relevant holding reinstated*, 984 F.3d at 720.[15]

Respondent also claims that the CID demands privileged information, but that is incorrect. The Bureau does not seek any privileged information from Respondent, and the Bureau's regulations give Respondent an avenue for raising any valid claims of privilege through a process akin to that used in ordinary civil litigation. *See* 12 C.F.R. § 1080.8. Since receiving the CID, Respondent has made

[15] There is yet another reason that Section 5517(e) does not limit the Bureau's ability to investigate the conduct at issue here. Section 5517(e) does not restrict the Bureau's authority with respect to a consumer financial product or service (a category that includes debt collection) offered by an attorney "to any consumer who is not receiving legal advice or services from the attorney in connection with such financial product or service." 12 U.S.C. § 5517(e)(2). It is doubtful that the consumers Respondent duns could be said to be "receiving legal advice or services" from Respondent. Such fact-specific questions, however, should await resolution in a future enforcement action, in the event the Bureau brings one after completing its investigatory fact-gathering. *See United States v. Constr. Prod. Research, Inc.*, 73 F.3d 464, 470 (2d Cir. 1996) ("[A]t the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought … .").

no effort to avail itself of that process by, for example, submitting a log of the information withheld on the basis of privilege. *See* JA116, 145-146.

The information sought by the CID is directly relevant to the Bureau's legitimate investigation, and Respondent has not shown otherwise.

B. The CID did not seek information in the Bureau's possession.

Finally, Respondent claims (at 52-55) that the CID is invalid because it sought information already in the Bureau's possession. The district court found this objection "not to be persuasive" because Respondent failed to show it had complied with a prior CID that sought some of the same material (and that the Bureau later withdrew). JA146. This Court reviews that factual finding for clear error. *See generally Red Rock Commodities, Ltd. v. Standard Chartered Bank*, 140 F.3d 420, 421 (2d Cir. 1998).

The Bureau previously sent Respondent a CID seeking some of the same information as this CID. JA12-33, 60. Respondent provided a partial response to that prior CID, then clawed back most of the material it had provided based on claims that the material was protected as confidential (claims the district court later rejected, JA145-46). JA60. The limited information that remained with the Bureau was not in the form required by the Bureau's rules. JA57-58, 60; *see also* 12 C.F.R. § 1080.6(b). Nor did Respondent certify the completeness of its production, a necessary step for the Bureau to assess whether it can rely on the information

obtained. JA60. Given these serious deficiencies, the district court correctly found that Respondent had not shown that the CID at issue here sought information in the Bureau's possession. JA146.

Respondent identifies no clear error in that finding. It claims (at 52) that it "already supplied many, if not most, of the documents and information sought" in response to the Bureau's prior CID—but neglects to mention that it clawed back much of that material. (And, of course, Respondent's argument implicitly admits that Respondent did not provide any material at all in response to other requests in the prior CID.) Respondent dismisses as mere technicalities (at 53) the Bureau's standards concerning the manner and form for producing documents. Yet those requirements are essential to ensuring the integrity of information collected in response to CIDs and allowing the Bureau to understand that information. (For example, metadata associated with a document produced in the proper format can reveal when and by whom the document was created.) Respondent's position would render these important requirements a dead letter, since it would allow a CID recipient to provide material in whatever manner it chose, then defeat attempts to enforce proper compliance with the CID on the grounds that the agency already had the requested information in its possession. Respondent fails also to support its bare assertion (at 54) that the Bureau later obtained some of the information sought by this CID through other CIDs to third parties. For example, Respondent

identifies no specific information that it believes was produced by third parties and that was also sought by this CID.

In short, Respondent showed no error, let alone clear error, in the district court's finding that the CID did not seek information in the Bureau's possession.

CONCLUSION

For all these reasons, the Court should affirm the order enforcing the CID.

Date: June 4, 2021

Respectfully submitted,

/s/ Kevin E. Friedl

Stephen Van Meter
Acting General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Kevin E. Friedl
Senior Counsel
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
(202) 435-9268
kevin.friedl@cfpb.gov

Counsel for Petitioner-Appellee
Consumer Financial Protection Bureau

CERTIFICATE OF COMPLIANCE

This filing complies with the type-volume limitation in Federal Rule of Appellate Procedure 27(d)(2)(A). It contains 12,800 words, excluding the portions exempted by Rule 32(f).

/s/ Kevin E. Friedl
Kevin E. Friedl