UNITED STATES OF AMERICA
BUREAU OF CONSUMER FINANCIAL PROTECTION

In the matter of:

LAW OFFICES OF CRYSTAL MORONEY, P.C.,

Petitioner.

PETITION TO SET ASIDE OR, IN THE ALTERNATIVE, TO MODIFY THE FOURTH CIVIL INVESTIGATIVE DEMAND

NEW CIVIL LIBERTIES ALLIANCE
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Petitioner Law Offices of Crystal Moroney, P.C. (the "Law Firm" or "Petitioner"), specially appears to challenge the Bureau of Consumer Financial Protection's ("CFPB") statutory authority to conduct investigations because its funding mechanism, as structured under 12 U.S.C. § 5497, is unconstitutional. Without waiving this threshold jurisdictional issue, Petitioner also objects to the Civil Investigative Demand dated September 29, 2021 (the "Fourth CID") on the grounds that it does not provide Petitioner with fair notice as to the investigative hearing topics and it is issued for an improper purpose. Petitioner asks that the Fourth CID be set aside or, in the alternative, modified to cure its defects. Alternatively, CFPB should delay ruling on this Petition until the Second Circuit determines the threshold question of the constitutionality of CFPB's funding structure.

I. Preliminary Statement

The subject of this Petition is CFPB's fourth demand issued to the Law Firm in the last four-and-a-half years. None of the CIDs—including the Fourth CID—has been issued because there was a consumer complaint or any evidence of wrongdoing on the part of the Law Firm. The lack of evidence of misconduct is particularly notable due to the sheer volume of documents and information obtained by CFPB—documents that date back to January 2014.

The November 19, 2019 CID ("Second CID") produced, among other things, the Law Firm's debt collection policies, procedures, and call scripts and recordings. CFPB learned that the Law Firm neither owns debt, nor does it file lawsuits to collect debt. It learned the names of the Law Firm's debt-holding clients and the Law Firm's staff who communicated with debtors. CFPB has the Law Firm's letters, templates, employee handbooks, and training materials. It has quality-assurance reviews, compliance reviews, and audits. It has the Law Firm's financial statements and knows its ownership structure. CFPB has the Law Firm's statistics regarding oral

and written consumer debt disputes and requests for debt verification. It has information regarding oral and written notifications of identity theft and cease-and-desist requests, and the procedure and practice the Law Firm's employees used to address those circumstances.

Subsequently, through the August 26, 2021 CID ("Third CID"), CFPB acquired consumer information for 52 specific accounts, which included consumer identification information and copies of all documents associated with these accounts. CFPB has all the e-mails, letters, receipts, invoices, notes, logs, and file annotations associated with the accounts. And despite that CFPB cannot find ***any*** evidence of systemic or (even) isolated incidents of debt collection misconduct in the voluminous information produced, CFPB continues to issue CIDs hounding the Law Firm in a desperate hope that somewhere, somehow, evidence of wrongdoing will magically emerge. It has not, and it will not.

The Law Firm is now insolvent, thanks in large part to CFPB's suspicionless, never-ending investigations. Neither the Law Firm nor Ms. Moroney collects debt. Thus, nothing has changed since the Third CID—consumers are not at risk of ongoing violations of consumer financial protection laws. The facts of the Law Firm's prior debt-collection activities, as documented by the information in CFPB investigators' hands, are the facts of this investigation. These facts cannot and will not change, and oral testimony will neither elucidate nor contradict the written documentation of facts in CFPB's possession.

Wherever possible and without waiving constitutional or statutory objections to CFPB's dubious authority, the Law Firm has cooperated with CFPB and its CIDs. The Law Firm has been transparent and accommodating for two reasons. First, the Law Firm understood that consumer protection laws must be enforced—it does not object to oversight. Second, the Law Firm has done nothing wrong. CFPB's funding structure is unconstitutional, however, so it lacks

the authority to issue the Fourth CID. But even if it were constitutional, the Fourth CID is fatally flawed because it fails to give the Law Firm fair notice of the topics to be addressed at its investigative hearing. Moreover, the Fourth CID should be set aside because it represents an abuse of process not designed to elicit legitimate investigatory information. Alternatively, since the threshold constitutional question is pending before the Second Circuit awaiting oral argument, CFPB should delay ruling on this Petition until the Second Circuit has decided the issue.

The Fourth CID is unnecessary because CFPB's initial hypothesis of the Law Firm's wrongdoing has been objectively disproven. It is time to end the forever-investigation. CFPB should set aside the Fourth CID and expeditiously conclude the investigation.

II. Procedural Introduction

The Law Firm appears specially to submit this Petition pursuant to § 1052(f) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Title X") and 12 C.F.R. § 1080.6(e), within 20 days following service of the Fourth CID.

A. Certification of Good Faith Pursuant to 12 C.F.R. § 1080.6(e)(1)

The Petitioner challenges the enforceability of 12 C.F.R. § 1080.6 because CFPB's funding structure is unconstitutional. Without waiving this threshold constitutional claim, undersigned counsel certifies that he has made a good faith effort to resolve the issues identified herein with the CFPB's enforcement attorney in charge of the Fourth CID, E. Vanessa Assae-Bille, Esq. The parties exchanged letters, but they could not resolve their differences by mutual agreement. This Petition is made in good faith and not for an improper purpose or for the purpose of delay.

B. Compliance Period Return Date Pursuant to 12 C.F.R. § 1080.6(f)

As noted above, the Fourth CID is unenforceable because CFPB's funding structure is unconstitutional. Without waiving this threshold constitutional claim, Petitioner also challenges the CID on other grounds, as described below. If CFPB denies any portion of this Petition, Petitioner requests a new CID return date (virtual investigative hearing) at a mutually agreeable date and time not sooner than 14 days from the date of service of CFPB's order.

C. Compliance with 12 C.F.R. § 1080.6(c)(3) Does Not Apply

The Deputy Assistant Director waived 12 C.F.R. § 1080.6(c)(3)'s meet-and-confer requirement because the Fourth CID does not require the production of any materials. Nevertheless, Petitioner proposed to meet and confer with CFPB prior to filing this Petition to resolve its objections to the Fourth CID, but CFPB declined.

III. Relevant Factual Background

Petitioner was a law firm located in New City, New York, until August 31, 2021. Crystal G. Moroney, Esq., the Law Firm's majority shareholder, is an attorney licensed to practice law in New York and New Jersey. The Law Firm represented clients and provided legal advice that included, but was not limited to, consumer financial protection law compliance, legal claims against third parties evaluation, bankruptcy process and procedure analysis, and unpaid debt collection. The Law Firm's debt collection services were offered to clients as "soft-collection debt recovery." Soft-collection debt recovery is the practice of offering debtors affordable repayment terms to cure their defaulted accounts and rehabilitate their credit scores without litigation. Despite three CIDs and the Law Firm's challenge in open court to CFPB's constitutional authority, the Law Firm's Better Business Bureau rating improved from A- to A in 2020.

The extreme financial and human resource challenges caused by three bootless CFPB CIDs between 2017 and 2021, exacerbated by the consequences of various New York State COVID-19 policies, have forced the Law Firm to cease operations. Ms. Moroney is currently unemployed. She is actively seeking employment, but she will not collect debt in the future.

The Fourth CID cannot be viewed in a vacuum—it is the product of an extensive investigation over the last four-and-a-half years. The investigation began with a CID dated June 23, 2017 ("First CID"). The First CID sought documents and answers to interrogatories dating back to January 1, 2014. The Law Firm complied as best it could, but the parties could not resolve their disagreement regarding the applicability of the New York and New Jersey Rules of Professional Conduct to licensed attorneys communicating with their debt-holding clients, including Rule 1.6. Relying upon its Rule 1.6 ethical obligations to protect its clients' confidences from disclosure, the Law Firm withheld responses, in whole or in part, to Interrogatory No. 12, Requests for Written Reports Nos. 1-5 and 7, Document Requests Nos. 2, 6, 12, and 14, and Requests for Tangible Things Nos. 1-4. By October 2, 2018, the Law Firm answered all other interrogatories and produced all other documents. On February 25, 2019, CFPB filed a Petition to Enforce the First CID in the Southern District of New York, No. 7:19-cv-01732-NSR. The Honorable Nelson S. Román ordered a November 8, 2019 hearing on the merits of the First CID's enforcement.

On November 4, 2019, CFPB filed a Notice of Petitioner's Withdrawal of the Civil Investigative Demand and Suggestion of Mootness, asking the court to dismiss CFPB's own enforcement hearing. Three days later, on November 7, 2019, the court denied CFPB's enforcement action as moot and closed the case. But just one week later, CFPB's withdrawal of the First CID proved to be a ruse.

On November 14, 2019, CFPB issued another CID ("Second CID") to the Law Firm. Less than one week later, on November 20, 2019, CFPB issued CIDs to the Law Firm's client, FedChex Recovery LLC, and to FedChex's client, Follett Corporation, seeking information regarding Petitioner's debt collection related to those companies. These heavy-handed tactics interfered with the attorney-client relationship and threatened to ruin the Law Firm's business.

On December 18, 2019, the Law Firm filed a Complaint in the Southern District of New York, No. 7:19-cv-11594-KMK. Among other things, the Law Firm asked the court to declare CFPB's leadership and funding structure unconstitutional. Both CIDs sought documents and information related to attorney-client communications between FedChex, Follett, and all other clients of the Law Firm. At the Law Firm's preliminary injunction hearing, CFPB acknowledged that the Second CID "requested largely the same information as the first one, it had a modified notification of purpose[.]" The case has been stayed by the district court, which preferred to have CFPB's April 27, 2020 Second CID enforcement action, 7:20-cv-3240-KMK, proceed instead.

In the enforcement action, the Honorable Kenneth M. Karas ordered the Law Firm to comply with the Second CID and Petitioner appealed to the Second Circuit. While the appeal was pending, the Law Firm satisfied its production and interrogatory responsibilities under the Second CID, withholding nothing. The Second Circuit appeal, No. 20-3471, has been fully briefed and oral argument will be heard the week of January 17, 2022. The Second Circuit will decide the constitutionality of CFPB's unique and unprecedented mode of funding.

On August 24, 2021, Petitioner informed CFPB that the Law Firm would permanently close its doors on August 31, 2021 and that the Post Office will forward all mail to Petitioner's new address. At that time, CFPB informed Petitioner that it would issue the Third CID.

Petitioner asked to have the CID expedited because after August 31st, Petitioner would not have free access to the Law Firm's files. CFPB accommodated the request, issuing the Third CID on August 26th. The Third CID focused on 52 debt accounts. Petitioner had no objections to the Third CID, so it fully complied by transferring all documents through CFPB's Extranet just five days after electronic receipt of the Third CID.

Twelve days later, on September 13, 2021, CFPB informed Petitioner that CFPB had assigned the wrong case number to Petitioners' document upload. It asked Petitioner to resubmit documents to CFPB's Extranet. Petitioner could not accommodate the request since Ms. Moroney no longer had ready access to the materials. It was at this time—for the first time—that CFPB alleged that Petitioner had not fully complied with the Third CID because the Law Firm did not seek to meet and confer with CFPB. The implicit threat being, of course, that the defunct Law Firm may be subjected to another enforcement action in federal court. It was a bewildering and misguided threat. Petitioner fully complied with the Third CID ***one week prior*** to the due date of the meet-and-confer. Moreover, the purpose of a meet-and-confer is "to discuss and attempt to resolve all issues regarding compliance with the civil investigative demand." 12 C.F.R. § 1080.6(c). Petitioner had no objections to the Third CID and had exchanged e-mails with CFPB staff between August 26, 2021 (CID issuance) and September 1, 2021 (CID production) regarding compliance. Even if a document production to which the target did not object nevertheless required a meet-and-confer—an absurd thought—the e-mail exchanges between the parties sufficed to satisfy that requirement. This is yet another example of the unseemly tactics employed by CFPB against a target that was bending over backwards to cooperate with CFPB's investigation.

Then, on September 29, 2021, CFPB used a private process server to serve Ms. Moroney with the Fourth CID at 7:00 p.m., blocking her car from leaving her driveway with her two small children on their way to football practice. All prior CIDs had been served by U.S. mail and Ms. Moroney made it clear to CFPB that it should use her old Law Firm mailing address because mail will be forwarded to her home. But in this instance, CFPB chose to take a more aggressive tack despite the Law Firm's cooperation.

IV. The Fourth CID Should Be Set Aside Because CFPB Lacks the Constitutional Authority to Issue It

This agency's funding structure is unprecedented. The Constitution does not allow an Executive Branch law enforcement agency to be funded outside 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." *Cf. Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2202 (2020) (discussing the power and unique structure of CFPB). The Fourth CID should be set aside because 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.

A. Title X's Funding Structure Divests Congress of Its Constitutional Duty to Allocate CFPB's Appropriations, Reassigning Control to the Executive

CFPB's funding structure is unprecedented because it is the only federal law enforcement agency in history whose appropriations the President controls unilaterally. Instead of funding through bicameral passage and presentment of appropriations bills as the Appropriations Clause

requires, CFPB submits quarterly demands to the Federal Reserve Board of Governors. 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 unilaterally 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. Annual Financial Report FY2020, at 6 (Nov. 16, 2020). 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 CFPB's control until expended, *id.* § 5497(c)(1)-(2). To ensure complete independence from Congress, the Committees on Appropriations of the House and Senate are statutorily ***prohibited*** from reviewing CFPB's funding. *Id.* § 5497.

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 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." *INS v. Chadha*, 462 U.S. 919, 945 (1983).

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 (emphasis added). 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* C*ounty of Suffolk v. Sebelius*, 605 F.3d 135, 141 (2d Cir. 2010) (quoting *Richmond*, 496 U.S. at 424). Title X's *sui generis* funding structure prevents Congress from altering CFPB's funding—particularly if Congress disapproves of the President's policy priorities—because Congress would need a supermajority to overcome a Presidential veto. 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 v. United States*, 139 S. Ct. 2116, 2121 (2019). 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 v. Southard*, 23 U.S. 1, 45-46 (1825) (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 assigned its exclusive legislative appropriations duty to CFPB's Director who is directly answerable to the President, despite that the President does not have inherent power related to appropriations authority outside of his role in the bicameralism-and-presentment lawmaking 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 appropriations power unlawfully divested from and reassigned by Congress, 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—or divestment—of appropriations authority to CFPB's Director and the President is patently unconstitutional.

C. Title X Does Not Establish an Intelligible Principle to Which the Director or the President 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"[1] 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).

[1] 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 Petitioner uses the term "delegate" in this section to be consistent with intelligible-principle language used by the courts.

> 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 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). Moreover, delegations of congressional authority to the President are invalid where they allow 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 controls CFPB's authority, *id.* § 5492(b), including the Director's quarterly appropriations

demand, *id.* § 5497(a). Indeed, the President's 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 because 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.

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. CFPB's Annual Financial Report FY2020 confirms that this is a toothless standard. The Report notes that in

FY2018, the Director "chose to use" $145 million of CFPB's unobligated balance in lieu of appropriations. CFPB Annual Financial Report FY2020, at 9. 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. 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.

V. The Fourth CID Should Be Set Aside or Modified Because CFPB Failed to Describe the Testimony Demanded with Reasonable Particularity and Because the CID's Scope Is Overly Broad and Unduly Burdensome

According to CFPB's regulations, "[w]here a civil investigative demand requires oral testimony from an entity, the civil investigative demand ***shall describe with reasonable particularity*** the matters for examination[.]" 12 C.F.R. § 1080.6(a)(4)(ii) (emphasis added). The Law Firm is an entity to which CFPB is obligated to describe the Fourth CID's matters under examination with particularity. The Fourth CID does not meet this requirement, and due to the absence of reasonable particularity, the Fourth CID is overly broad and unduly burdensome.

The Fourth CID's Notification of Purpose is identical to the Second and Third CIDs' Notifications. Petitioner assumes here, for the sake of argument and without waiving objections to the Second CID pending before the Second Circuit, that the Second and Third Notifications might provide adequate notice regarding the conduct under investigation. But those CIDs are materially different in character and substance to the Fourth CID. The Second and Third CID Notifications also included specific requests for documents and information, so the Law Firm's duty to disclose information was clear upon service of those CIDs. Such is not the case with the Fourth CID, where there are no specifics regarding the topics upon which Petitioner should be conversant at the investigative hearing. The Notification standing alone, therefore, is impermissibly vague, overly broad, and unduly burdensome. *See CFPB v. Accrediting Council for Independent Colleges and Schools*, 854 F.3d 683 (D.C. Cir. 2017) (internal citation omitted) ("[W]here there is 'too much indefiniteness or breadth' in the items requested[,]" courts will not enforce a CID.).

The Fourth CID should be set aside or modified because it is unreasonable to withhold the likely topics for oral testimony from Petitioner. It is unrealistic to expect that Petitioner could testify regarding all debt collections dating back to January 1, ***2014***. CFPB faces a

practical problem here, too. Not only is the Notification overly broad and unduly burdensome to Petitioner, the testimony it seeks is unlikely to assist in CFPB's investigation. Without preparation, the investigative hearing will be reduced to nothing more than Hasbro's Memory Game, with little probative value. Moreover, without a list of topics, Petitioner cannot know whether this Petition should also move to set aside the Fourth CID because it seeks privileged or confidential information, or whether its purpose is to regulate a field outside CFPB's jurisdiction, such as the practice of law.

In counsels' exchange of letters (Exhibits A and B), CFPB Senior Litigation Counsel Assae-Bille informed Petitioner, as a courtesy, that questions will include those regarding the Law Firm's structure, operations, policies, procedures, and practices, as well as the policies and circumstances regarding the Law Firm's document retention policy. Letter from E. Vanessa Assae-Bille, Esq. to Michael P. DeGrandis, Esq. (Oct. 14, 2021). This additional information is helpful, but it does not cabin the scope of the inquiry since the investigative hearing also "likely will inquire about areas covered by the CIDs issued to [the Law Firm] in November 2019 and August 2021[.]" *Id.*

There is no reason why CFPB should refuse to identify the investigative hearing topics to afford Petitioner the opportunity to provide meaningful and substantive testimony. Thus, the Fourth CID should be set aside or modified to cure this defect.

VI. The Fourth CID Should Be Set Aside Because It Was Issued for an Illegitimate Purpose

CFPB's conduct in its four-and-a-half-year investigation demonstrates that its professed concern for financial consumers and dedication to its statutory mandate has been a mere pretense, at least as it pertains to the Law Firm. As summarized in Section III above, time and again, CFPB has abused administrative and judicial process to punish the Law Firm for

challenging the constitutionality of CFPB's structure in federal court. For example, it withdrew the First CID on the eve of the enforcement hearing, only to turn around and issue a substantially similar Second CID one week later. Petitioner's attorneys were prepared for the hearing, but after CFPB withdrew the First CID and issued the Second, Petitioner could not afford to pay attorneys for a second enforcement hearing. And now the Law Firm has been driven out of business. Adding insult to injury, Petitioner asked CFPB to communicate with her through the Post Office because neither the Law Firm's telephone number nor e-mail was in service after August 31, 2021. CFPB ignored this request and sent a process server to her home instead.

CFPB has also taken strident positions unmoored to logic or administrative efficiency. For example, CFPB alleged that the Law Firm was obligated to meet and confer regarding the Third CID, a CID to which Petitioner offered no objection except the standing objection to CFPB's constitutionality, and where the Law Firm produced 100% of the documents requested. CFPB's nonsensical assertion did not serve to protect the interests of consumers—the only interest it served was CFPB's desire to browbeat Petitioner. Now, CFPB tells Petitioner that a meet-and-confer is not required for the Fourth CID because there is nothing about which to meet-and-confer. These inconsistent positions are telling and cannot be reconciled unless the Fourth CID was issued for the improper purpose of using the investigative process as a punishment.

Despite years of investigation that produced thousands of pages and bytes of information, CFPB still cannot identify a single instance of the Law Firm's wrongdoing. Out of options, CFPB uses the Fourth CID to turn the last procedural screw to punish the Law Firm: oral testimony without opportunity for Petitioner to familiarize itself with the topics to be covered. CFPB counsel has explained that CFPB does not believe that it is obligated to identify topics of a

virtual investigative hearing. *Id.* But without proper notice of the topics to be examined at an investigative hearing, the CID must fail. Not only do *gotcha* and *hide-the-ball* tactics constitute a violation of the CFPB's own rules and practices, but they constitute an abuse of process that deprives Petitioner of its right to due process, which never serves a legitimate purpose.

VII. Alternatively, CFPB Should Delay Deciding the Issues Presented in this Petition Until the Second Circuit Rules on the Constitutionality of CFPB's Funding Structure

The constitutional issues presented in this Petition are pending appeal before the Second Circuit in *CFPB v. Law Offices of Crystal Moroney, P.C.*, No. 20-3471. The Second Circuit will decide whether CFPB has the constitutional authority to issue CIDs, given its unlawful funding structure. Absent an extended return date, CFPB may be required to revisit, modify, withdraw, or even refile a new petition to enforce the Fourth CID depending on the outcome of Petitioner's appeal. This effort creates unnecessary burden on CFPB and the Law Firm. This burden may be lessened or avoided by waiting to decide this Petition until the Second Circuit has ruled. Thus, the circumstances weigh in favor of extending Petitioner's compliance with the Fourth CID until after the Second Circuit has decided the dispositive constitutional issues raised in this petition.

VIII. Conclusion

For the foregoing reasons, Petitioner asks CFPB to set aside or modify the Fourth CID.

Respectfully submitted,

NEW CIVIL LIBERTIES ALLIANCE

Date: October 19, 2021

By: _____

Michael P. DeGrandis
Jared McClain
1225 19th Street NW, Suite 450
Washington, DC 20036
tel.: (202) 869-5210

Counsel for Petitioner

Exhibit A

New Civil Liberties Alliance

October 13, 2021

VIA E-MAIL

E. Vanessa Assae-Bille
Senior Litigation Counsel, Office of Enforcement
Consumer Financial Protection Bureau
elisabeth.assae-bille@cfpb.gov
1700 G Street, NW
Washington, DC 20552

Re: Law Offices of Crystal Moroney, P.C. | September 29, 2021 Civil Investigative Demand

Dear Ms. Assae-Bille,

I write to confirm that, on September 29, 2021, a private process server served Ms. Moroney with a Civil Investigative Demand for oral testimony ("Fourth CID"). I also write to inform you that NCLA represents the Law Firm and Ms. Moroney with respect to the Fourth CID, and with partial respect to the Third CID, if the Third CID has not been withdrawn or superseded, and if you still deny that Ms. Moroney complied with the Third CID.

For Ms. Moroney to testify on October 27, 2021, we need to understand the scope, purpose, and implications of the Fourth CID. If we can engage in a productive dialogue about the Fourth CID, the testimony provided will be much more useful to your investigation. As it currently stands, the Fourth CID offers no specifics regarding the topic or topics you will be covering, or the inquiry's relevant time period. Its Notice of Purpose may be sufficient for some document productions, but it is woefully deficient where oral testimony is demanded. If Ms. Moroney can't familiarize herself with the issues, there's little chance that she could offer you substantive testimony.

As you are aware, Ms. Moroney has fully complied with both the Second (November 14, 2019) and Third (August 26, 2021) CIDs. The CFPB has thousands of pages and bytes of data dating back to January 1, 2014, and detailed interrogatory responses. Nothing has been identified as out of order in Ms. Moroney's production or written responses, except for the CFPB's error in using the wrong case number for Ms. Moroney's Third CID production on September 1, 2021. Ms. Moroney has been exceedingly cooperative with your investigation. She will continue to be as accommodating as she can, but she cannot blindly comply with a CID for oral testimony that could cover eight years of her

law practice. On top of that, because her Law Firm is closed, she doesn't have free access to any of that data, further complicating her ability to give you the information you are seeking.

I have three initial questions related to the Fourth CID. First, could you please let me know what topics you intend to cover in Ms. Moroney's testimony, and over what time period? Perhaps your answer to that question will answer my second question, which is why are you seeking this testimony now? The CFPB didn't seek testimony related to any of the three prior CIDs, two of which were the subject of petitions to enforce in federal court. Written responses seemed to be sufficient in the past—is there a reason you believe that oral testimony in this instance will be more helpful to your investigation?

Third, does the Fourth CID supersede the Third CID in whole or in part? In your September 15, 2021 e-mail to me, you said that I "appear[ed] quite unfamiliar with the Bureau's investigative procedures and applicable regulations[,]" as they pertain to the CFPB's requirement that Ms. Moroney meet and confer with you, despite that she complied with the Third CID one week prior to the due date of the meet-and-confer. You are being generous. Unfamiliarity is not my problem here. I'm completely dumbfounded. I cannot understand the logic in meeting to discuss a CID to which the recipient offers no objections, since the purpose of a meet-and-confer—as I read 12 C.F.R. § 1080.6(c)—is "to discuss and attempt to resolve all issues regarding compliance with the civil investigative demand." Moreover, I'm surprised that Ms. Moroney's exchange of e-mails with you and CFPB staff between August 26, 2021 (CID issuance) and September 1, 2021 (CID production) would not constitute one or more meet-and-confers. Please explain it to me.

If my client and I can better understand what you need, we will be better situated to provide you with the information you seek. I should emphasize, too, that Ms. Moroney is just a lawyer—and one whose Law Firm is closed. You could seek information from her clients—the entities to whom the debts in question are owed—regarding the issues raised in the Fourth CID's Notice of Purpose. Taking such a tack would avoid potential attorney-client privilege issues and are more likely to be fruitful, given that Ms. Moroney's files are in storage. Ms. Moroney's clients are still in business and presumably have instant access to the debtor files you are investigating.

Ms. Moroney and I intend to cooperate fully with your investigation. But first, we need a better understanding of the matters under examination. The Fourth CID does not articulate the purpose or scope of the testimony with any particularity, so your responses to my questions will be much appreciated.

Sincerely,

Michael P. DeGrandis
Senior Litigation Counsel

cc: Jehan Patterson, Esq. (via jehan.patterson@cfpb.gov)
Crystal G. Moroney, Esq. (via personal e-mail)

Exhibit B

1700 G Street NW, Washington, D.C. 20552

October 14, 2021

Via Email

Mike DeGrandis
Senior Litigation Counsel
1225 19th St. NW Suite 450
Washington, DC 20036

Re: Civil Investigative Demand served on Crystal Moroney on September 29, 2021

Mr. DeGrandis:

Thank you for your October 13, 2021, letter confirming that you will be representing Ms. Moroney at the virtual investigative hearing (IH) scheduled for October 27, 2021, pursuant to the Civil Investigative Demand (CID) issued to her by the Consumer Financial Protection Bureau (Bureau) on September 29, 2021. Please note that counsel's participation in Bureau IHs is more limited than in depositions taken pursuant to Federal Rule of Civil Procedure 30. In advance of Ms. Moroney's IH, kindly refer to 12 U.S.C. § 5562(c)(13), 12 C.F.R. § 1080.7, and 12 C.F.R. § 1080.9, which cover attorney representation and permissible objections during Bureau IHs.

To address your first question, the Bureau is not obligated to identify topics when noticing IHs of individuals. *See* 12 C.F.R. § 1080.6(a)(4). But as a courtesy to your client, the Bureau states that it likely will inquire about areas covered by the CIDs issued to Law Offices of Crystal Moroney, P.C. (LOCM) in November 2019 and August 2021, such as the company's structure, operations, policies, procedures, and practices during the applicable period. The Bureau may also inquire about the purge from LOCM's systems of all debt collection call recordings and related data older than January 2019, of which Ms. Moroney informed us during a May 26, 2021, telephone call.

Your second question appears to probe into the Bureau's investigative and internal decision-making processes, which implicates, *inter alia*, attorney client privilege, deliberative process privilege, and attorney work product protection. The Bureau is not waiving any of these privileges or protections at this time.

As for your third question, the September 2021 CID does not supersede—a term the Bureau interprets to mean "modify" or "withdraw"—the August 2021 CID.[1]

With respect to the August 2021 CID, please note that the meet-and-confer requirement under 12 C.F.R. § 1080.6(c) is not limited to topics raised by the CID recipient; it also presents an opportunity for the Bureau to preempt issues with the production. Your letter further demands an explanation of why "Ms. Moroney's exchange of e-mails with [me] and CFPB staff between August 26, 2021 … and September 1, 2021 … would not constitute one or more meet-and-confers." Per our records, the universe of emails exchanged during this period comprises:

- one email dated August 26, 2021, from the Bureau to you and Ms. Moroney, containing a courtesy electronic copy of the August 2021 CID;
- one email dated August 26, 2021, from you to the Bureau, copying Ms. Moroney, confirming receipt of the August 2021 CID;
- two consecutive emails dated August 31, 2021, from Ms. Moroney to the Bureau, copying you, producing responses via email attachment instead of pursuant to the Bureau's submission standards; and
- one email dated August 31, 2021, from the Bureau to you and Ms. Moroney, requesting that Ms. Moroney produce responses to the August 2021 CID in accordance with the Bureau's submission standards.

None of the above-referenced emails discussed the August 2021 CID or its corresponding production substantively. The Bureau will thus not retroactively consider this correspondence to fulfill the meet-and-confer requirement.

As always, do not hesitate to contact us with any questions. I may be reached at Elisabeth.Assae-Bille@cfpb.gov or (202) 435-7688. We look forward to seeing you and Ms. Moroney at the virtual IH on October 27, 2021.

Sincerely,

/s/E. Vanessa Assae-Bille
Senior Litigation Counsel

[1] The Bureau's standard practice is to provide written notice of its intent to modify or withdraw any CID, such as when the Bureau modified the June 2017 CID to LOCM with a letter dated July 25, 2017, or withdrew this same CID with a letter dated November 4, 2019.