

No. 19-7

IN THE
Supreme Court of the United States

SEILA LAW LLC,
Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF THE CATO INSTITUTE
AS *AMICUS CURIAE* SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers.

TABLE OF CONTENTS

Interest of *Amicus Curiae* 1

Summary of Argument 3

Argument 5

 I. The CFPB Lacks the Structural Features of
 Executive Agencies and Other Independent
 Agencies..... 5

 II. This Court Should Grant Review to Resolve
 the Exceptionally Important Question
 Whether the CFPB is Unconstitutional 12

Conclusion 14

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bowsher v. Synar</i> , 478 U.S. 714 (1986)	5
<i>Free Enterprise Fund v. Public Company Accounting Oversight Board</i> , 561 U.S. 477 (2010)	<i>passim</i>
<i>Humphrey’s Executor v. United States</i> , 295 U.S. 602 (1935)	<i>passim</i>
<i>PHH Corporation v. Consumer Financial Protection Bureau</i> , 839 F.3d 1 (D.C. Cir. 2016)	8
881 F.3d 75 (D.C. Cir. 2018) (en banc)	<i>passim</i>
<i>Stern v. Marshall</i> , 564 U.S. 462 (2011)	5
CONSTITUTIONAL PROVISION AND STATUTES	
U.S. Const. art. I, § 7, cl. 2	10
12 U.S.C. § 5491(c)(2)	10
12 U.S.C. § 5491(c)(3)	9
12 U.S.C. § 5497(a)(2)(A)	10
12 U.S.C. § 5497(e)	10
12 U.S.C. § 5562	9

12 U.S.C. § 5581(a)(1)(A)	9
15 U.S.C. § 41	7
42 U.S.C. § 7171(b)(1).....	7

OTHER AUTHORITIES

Thaya B. Knight, <i>Behind the Latest Washington War: An Agency That Neither Side Should Control</i> , Cato Institute: Commentary (Nov. 27, 2017), https://www.cato.org/publications/commentary/behind-latest-washington-war-agency-neither-side-should-control	1
Thaya B. Knight & Caleb O. Brown, <i>With Cordray’s Departure, Can CFPB Be Scrapped?</i> , Cato Institute Daily Podcast (Nov. 16, 2017), https://www.cato.org/multimedia/cato-daily-podcast/cordrays-departure-can-cfpb-be-scrapped	1
The Federalist No. 47 (James Madison).....	9
Mick Mulvaney, <i>I’m Not ‘Gutting’ CFPB</i> , USA Today, Feb. 13, 2018	9
Ilya Shapiro, <i>CFPB Neither Protects Consumers Nor Is a Constitutional Board</i> , Cato at Liberty (Jan. 31, 2018), https://www.cato.org/blog/cfpb-neither-protects-consumers-nor-constitutional-board	1

Diego Zuluaga, *Watchdog Agency Must Stop Being
Foe of Consumer Finance*, Cato Institute:
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publications/commentary/watchdog-agency-must-
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Todd Zywicki, *The Consumer Financial Protection
Bureau: Savior or Menace?*,
81 Geo. Wash. L. Rev. 856, 880 (2013)..... 12

INTEREST OF *AMICUS CURIAE**

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Cato has devoted considerable attention to the Consumer Financial Protection Bureau's structure and operations. See, e.g., Diego Zuluaga, *Watchdog Agency Must Stop Being Foe of Consumer Finance*, Cato Institute: Commentary (Apr. 9, 2018), <https://www.cato.org/publications/commentary/watchdog-agency-must-stop-being-foe-consumer-finance>; Ilya Shapiro, *CFPB Neither Protects Consumers Nor Is a Constitutional Board*, Cato at Liberty (Jan. 31, 2018), <https://www.cato.org/blog/cfpb-neither-protects-consumers-nor-constitutional-board>; Thaya B. Knight, *Behind the Latest Washington War: An Agency That Neither Side Should Control*, Cato Institute: Commentary (Nov. 27, 2017), <https://www.cato.org/publications/commentary/behind-latest-washington-war-agency-neither-side-should-control>; Thaya B. Knight & Caleb O. Brown, *With Cordray's Departure, Can CFPB Be Scrapped?*, Cato Institute Daily Podcast (Nov. 16, 2017), <https://www.cato.org/multimedia/cato-daily-podcast/cordrays-departure-can-cfpb-be-scrapped>.

* In accordance with Rule 37.2(a), timely notice of intent to file this brief was provided to counsel for the parties, and all parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, has made a monetary contribution to the preparation or submission of this brief.

The constitutionality of the CFPB's structure involves significant issues regarding the separation of powers and the threat posed to individual liberty by the creation of an "independent agency," exercising substantial executive powers while headed by a single person not subject to any meaningful checks or balances.

SUMMARY OF ARGUMENT

The Consumer Financial Protection Bureau is the most independent of independent agencies in the federal government. Despite its significant power, it is essentially accountable to no one. A single director heads the CFPB, this director serves a five-year term, and the director can be removed only for cause. The CFPB does not need Congress to approve its budgets because its funding requests must be rubber-stamped by another independent agency—the Federal Reserve. The CFPB has regulatory authority over 19 federal consumer-protection laws, for which it is empowered to write regulations, investigate potential violations, and bring enforcement actions in its own administrative proceedings. This concentration of power in the hands of a single, unelected, unaccountable official is unprecedented and cannot be squared with the Constitution’s structure or its purpose of protecting individual liberty from government overreach.

The Constitution created three co-equal branches keeping each other in check to promote liberty and prevent any single person or entity from growing too powerful. During the 20th century, the federal government began creating “independent agencies,” typically headed by multiple commissioners appointed by the president. In many cases, the commissioners serve for fixed terms and may be dismissed only for cause. This Court has held such multi-member independent commissions constitutional. But most of these agencies include various other mechanisms to check their powers, such as staggered terms (meaning that a new president cannot replace the whole commission at once, but can fill some seats on it); limitations on how many members of a given political party may sit on the commission at a time; and a multi-member structure through which the commission will

discuss potential actions and move forward only with a majority or consensus decision.

In 2010, however, Congress created a new type of agency in the Consumer Financial Protection Bureau. The CFPB has only one director—instead of a multi-member commission like other independent agencies. Without multiple leaders to appoint, there can be no staggered terms, no partisanship restriction, and no discussion among multiple commissioners. Neither the executive nor legislative branch can truly check the CFPB director, who cannot be removed from office except for cause, and whose budget bypasses Congress.

Worst of all, the CFPB exercises significant executive power, in addition to elements of legislative and judicial functions, in its field of consumer finance regulation. This creates serious constitutional problems for an agency that is unaccountable to the political branches—and, thus, to the people. The Constitution does not permit the unaccountable CFPB to exert such significant and varied power over an important aspect of American life.

Numerous lawsuits have rightly called the CFPB's structure and operations into question. As long as its constitutionality remains in doubt, businesses and individuals will struggle with how to conduct themselves in relation to the CFPB's mandates. This case presents an optimal vehicle to resolve this important constitutional question by clarifying that the CFPB has insufficient checks on its power. The CFPB cannot be sustained in its current form.

ARGUMENT

I. THE CFPB LACKS THE STRUCTURAL FEATURES OF EXECUTIVE AGENCIES AND OTHER INDEPENDENT AGENCIES

In our constitutional republic, the separation of powers among the three branches guarantees liberty under the law. “Even a cursory examination of the Constitution reveals the influence of Montesquieu’s thesis that checks and balances were the foundation of a structure of government that would protect liberty.” *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). “The structural principles secured by the separation of powers protect” not only the branches of government from each other, but “the individual as well.” *Stern v. Marshall*, 564 U.S. 462, 483 (2011). While strict adherence to this framework may sometimes cause the government to be less efficient, that is a feature and not a bug of our Constitution: “The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) (quoting *Bowsher*, 478 U.S. at 730).

When Congress created the CFPB, however, it skirted this usual system of checks and balances. The CFPB is therefore an unconstitutional agency lacking the accountability necessary to protect liberty.

1. Our Constitution ensures that no single branch, and certainly no single individual, can obtain unchecked power over the American people. The tripartite distribution of responsibility across multiple branches of government therefore acts as a substantive shield against the tyranny the Framers feared.

Liberty goes hand-in-hand with democratic accountability. As this Court has explained, the president’s duty to “take Care that the Laws be faithfully executed” implies

that he must have control over executive officers. *Free Enter. Fund*, 561 U.S. at 483 (quoting U.S. Const. art. II, § 1, cl. 1). The president’s control manifests in formal and informal ways, but one fundamental means of control has always been his unfettered authority to remove most executive officers at will. *Ibid.* This removal authority allows the president to hold his subordinates accountable. The president, in turn, is directly accountable to the American people. This chain of accountability protects liberty because it grants the people the final word on any decision made by a presidential administration. See *id.* at 498 (“Without a clear and effective chain of command, the public cannot ‘determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.’” (quoting Federalist No. 70 (Hamilton))). Simply put, if the attorney general, the secretary of homeland security, or any other typical executive branch official unacceptably infringes upon citizens’ rights and liberties, the president may either remove the official from office or else explain to the electorate his decision not to do so.

2. The “independent agencies,” as distinguished from the more conventional executive agencies, do not quite fit this typical executive branch framework. These other independent agencies, though, still include notable features that the CFPB lacks.

In *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), this Court approved an agency (the Federal Trade Commission) headed by multiple commissioners, each of whom could be removed only for cause—specifically, “inefficiency, neglect of duty, or malfeasance in office.” *Id.* at 623. Since that approval of the FTC’s structure, many more agencies and commissions have been created that mimic the Commission’s independence from the traditional check of the president’s removal authority. These independent agencies represent an excep-

tion to the traditional constitutional roles. See *Free Enter. Fund*, 561 U.S. at 483.

Commissioners of the FTC and many other independent agencies serve staggered terms. See, e.g., *Humphrey's Ex'r*, 295 U.S. at 620; *PHH Corp. v. CFPB*, 881 F.3d 75, 99 (D.C. Cir. 2018) (en banc) (citing independent-agency statutes providing for staggered terms of varying lengths). *Humphrey's Executor* explained that these staggered terms provided institutional continuity and experience to what was intended to be a body of experts. See 295 U.S. at 624 (Congress fixed commissioners' terms so that "the membership would not be subject to complete change at any one time"). While the president therefore cannot necessarily remove all commissioners with whom he disagrees on policy grounds, he nonetheless will have the opportunity, with the advice and consent of the Senate, to gradually reshape these agencies to his position over time as commissioners' terms expire. See *PHH Corp.*, 881 F.3d at 190 (Kavanaugh, J., dissenting).

Many of these independent commissions also have express limits on their partisan composition. To take just two examples, the FTC and the Federal Energy Regulatory Commission each has five commissioners, and no more than three commissioners may belong to the same political party. 15 U.S.C. § 41 (FTC); 42 U.S.C. § 7171(b)(1) (FERC). These rules ensure that diverse political viewpoints will be highlighted when these independent commissions act.

Perhaps most relevant to this case, virtually all independent agencies are headed by multi-member commissions that can take action only by majority vote. See *PHH Corp.*, 881 F.3d at 173, 183-84 (Kavanaugh, J., dissenting). Demanding that a majority of commissioners consent to an action, presumably after a deliberative process, limits the amount of harm one rogue commissioner

might do. This has been called a “substitute check,” as a means of protecting liberty even when an agency lacks presidential control. *PHH Corp. v. CFPB*, 839 F.3d 1, 26 (D.C. Cir. 2016), vacated in part on reh’g en banc, 881 F.3d 75 (D.C. Cir. 2018).

3. The CFPB, by contrast, fits neither the traditional executive branch framework nor the *Humphrey’s Executor* independent agency model. The President lacks the authority to remove the Bureau’s Director at will, an authority that ordinarily contributes to his power over the executive agencies. And because the Bureau is led by a single director, it is missing the features of staggered terms, partisan balance, and collegial decision-making present in the independent agencies that follow the model upheld by *Humphrey’s Executor*. The CFPB’s novel structure therefore raises significant constitutional problems that this Court should resolve.

In *Free Enterprise Fund*, the Court observed that an agency’s “novel structure,” one lacking “any historical analogues,” provided strong evidence of a constitutional problem. 561 U.S. at 505. That observation applies equally to the CFPB. To reject the CFPB’s structure, the Court need not hold that the Constitution commands any particular size, tenure, or partisan makeup for independent agency leadership. The question, instead, is whether the attributes of the CFPB’s structure *combine* to fall short of providing the accountability required by the Constitution. See *PHH Corp.*, 881 F.3d at 155 (Henderson, J., dissenting) (explaining that, when assessing whether an agency’s structure is constitutional, its distinctive characteristics must be analyzed together rather than separately).

The CFPB’s most glaring problem is the unacceptable concentration of varied types of powers in a single entity led by a single person. Madison addressed this concern in rebutting the allegation that the proposed

Constitution’s separation of powers was inadequate: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” Federalist No. 47.

That combination of powers precisely describes the CFPB’s place with respect to consumer finance law. Its former acting director wrote that “[t]he CFPB is one of the most—if not the most—powerful federal agencies in existence.” Mick Mulvaney, *I’m Not ‘Gutting’ CFPB*, USA Today, Feb. 13, 2018, <https://www.usatoday.com/story/opinion/2018/02/13/mick-mulvaney-changing-cfpb-editorials-debates/110383654>. He lamented that, in some cases, his role was to be that of “judge, jury, and executioner.” *Ibid.*

Even that may have been an understatement. The CFPB director also promulgates regulations and conducts investigations, among other projects. See, e.g., 12 U.S.C. §§ 5562, 5581(a)(1)(A). This is a massive accumulation of sweeping governmental power in one unaccountable official. See *PHH Corp.*, 881 F.3d at 172 (Kavanaugh, J., dissenting) (“The Director’s view of consumer protection law and policy prevails over all others. In essence, the Director of the CFPB is the President of Consumer Finance.”). After all, the CFPB director may be removed only in cases of “inefficiency, neglect of duty, or malfeasance in office.” 12 U.S.C. § 5491(c)(3). This statutory removal language mirrors the FTC statute in *Humphrey’s Executor*, and it was President Roosevelt’s purported firing of Commissioner Humphrey for policy differences that was rejected by this Court. See *Humphrey’s Ex’r*, 295 U.S. at 618-19.

The CFPB director may be even more powerful than the president in this context. The president and the exec-

utive branch, after all, remain subject to congressional appropriations, in which the president plays a role but cannot unilaterally insist on a certain level of funding for any particular agency. See U.S. Const. art. I, § 7, cl. 2. By contrast, the CFPB director may never need to ask for a dime from Congress because she can make an unreviewable demand to the Federal Reserve for any budget she wants (up to the amount of 12% of the Federal Reserve System’s operating expenses). 12 U.S.C. § 5497(a)(2)(A); *PHH Corp.*, 881 F.3d at 82. Only if that funding stream somehow fell short would the CFPB have to ask Congress for money, see 12 U.S.C. § 5497(e)—something almost every other federal agency must do from its first dollar.

So the CFPB wields substantial power exercised by the fiat of a single, almost unreviewable, virtually unremovable director. The CFPB director can issue regulations that bind any person under its jurisdiction, investigate potential violations of those regulations, prosecute actions in its own administrative tribunals, and appropriate Federal Reserve money to itself.

There is yet a further novel aspect of the CFPB when compared to the *Humphrey’s Executor* independent agency model: A president could potentially serve a full four-year term and never have the opportunity to nominate a head of the agency. The president typically gets to select an agency’s chairman even under the *Humphrey’s Executor* independent agency model. See *PHH Corp.*, 881 F.3d at 189 n.15 (Kavanaugh, J., dissenting) (citing 13 examples of agencies for which the president “unilaterally designates” the chair, including the FTC, the FCC, and FERC). But with the CFPB, the unaccountable director’s five-year term is longer than the president’s four-year term. Even after five years have passed, the Director may continue to serve until a successor has been confirmed. 12 U.S.C. § 5491(c)(2). So unlike with a com-

mission made up of multiple individuals with staggered terms, a President could serve a full four-year term without even one chance to nominate a single official who can influence CFPB policies. This oddity illustrates that the policy preferences of the CFPB director may have nothing to do with the policies of the presidential administration. Conversely, in a multi-member body, at least some of the commissioners will likely be replaced with appointees of the current president.

An official with broad regulatory and enforcement authority over an entire industry—and significant influence over the economy as a whole—can easily overreach. Political pressure has historically been one way to protect liberty from government interference. See *Free Enter. Fund*, 561 U.S. at 498. Yet the CFPB’s independence means it is less susceptible to those efforts. In fact, one goal of the CFPB’s design may have been to insulate it from day-to-day political pressure coming from those being regulated. See *PHH Corp.*, 881 F.3d at 78 (“Congress has historically given a modicum of independence to financial regulators” to protect the economy from “manipulation or self-dealing by political incumbents.”).

But the statute here goes too far, granting a single director an unprecedented amount of independence from the political branches. Unlike the *Humphrey’s Executor* independent agency model, the CFPB director does not share control with others who might bring alternative, moderating views to the table.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE EXCEPTIONALLY IMPORTANT QUESTION WHETHER THE CFPB IS UNCONSTITUTIONAL

This Court should grant review in this case to resolve the exceptionally important question whether the CFPB is unconstitutional. The CFPB holds enormous power over the Nation’s economy, and businesses need certainty and predictability regarding the CFPB’s regulatory authority. As described above, the CFPB as currently constituted risks substantial infringement on constitutionally protected liberty interests by a powerful and unaccountable federal agency. This untenable situation warrants this Court’s immediate attention.

There is little to be gained by waiting for further decisions in the lower courts. As the court of appeals observed below, “[t]he arguments for and against [petitioner’s] view have been thoroughly canvassed in the majority, concurring, and dissenting opinions” in the D.C. Circuit’s *PHH Corp.* en banc decision. Pet. App. 2a. The Ninth Circuit therefore saw “no need to re-plow the same ground” in its short opinion agreeing with the *PHH Corp.* majority. *Ibid.* Further percolation is therefore unlikely to provide any additional guidance.

All the while, the CFPB will continue to operate unconstitutionally, affecting liberty interests with each decision it makes. The CFPB’s regulations, enforcement actions, and civil investigative demands all create direct infringements on the liberty of individuals and entities who must comply with them—even if these decisions later turn out to have been unconstitutional. Furthermore, the CFPB causes collateral harms on consumers, because the costs and restrictions it imposes on the providers of financial services will result in higher consumer prices and limitations on consumer choice and freedom. See, e.g., Todd Zywicki, *The Consumer Financial Protection*

Bureau: Savior or Menace?, 81 Geo. Wash. L. Rev. 856, 880 (2013). Even assuming that some CFPB regulation genuinely protects consumers, that end would not justify the unaccountable means. Regulation demands a public policy cost-benefit analysis that is properly in the hands of politically accountable officials who must defend their choices to the voters.

Until this Court acts, pending litigation will raise a specter of uncertainty over every action the CFPB takes. As applied to this significant regulatory and enforcement agency, uncertainty itself imposes a high cost on liberty interests. The CFPB purports to regulate and investigate private entities, against whom it may levy penalties. Those who defy or ignore the CFPB's dictates as unconstitutional do so at their own peril. Many will therefore conclude that the safest course is to follow CFPB regulations, comply with its investigations, and accede to its enforcement actions. In effect, the CFPB can actively, but unconstitutionally, restrain individual liberty and economic conduct until this Court says otherwise.

CONCLUSION

Because this case presents an ideal vehicle to address and remedy the systemic constitutional violation that is the CFPB's structure, the Court should grant review and reverse the decision below.

Respectfully submitted,

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July 2019