2019 WL 2763117 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

SEILA LAW LLC, Petitioner,
v.
CONSUMER FINANCIAL PROTECTION BUREAU.

No. 19-7.
June 28, 2019.

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

Petition for a Writ of Certiorari

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***I** 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.

*II CORPORATE DISCLOSURE STATEMENT

Petitioner Seila Law LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

***III** TABLE OF CONTENTS

TABLE OF AUTHORITIES

***1** Seila Law LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-8a) is reported at 923 F.3d 680. The order of the district court granting in part respondent's petition to enforce a civil investigative demand (App., *infra,* 9a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

*2 CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of Article II of the United States Constitution provides in relevant part:

> The executive Power shall be vested in a President of the United States of America. ***

Section 3 of Article II of the United States Constitution provides in relevant part:

> [The President] shall take Care that the Laws be faithfully executed[.] ***

Section 5491 of Title 12 of the United States Code provides in relevant part:
(a) Bureau established

There is established in the Federal Reserve System, an independent bureau to be known as the "Bureau of Consumer Financial Protection", which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. The Bureau shall be considered an Executive agency, as defined in section 105 of Title 5.

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(b) Director and Deputy Director

(1) In general

There is established the position of the Director, who shall serve as the head of the Bureau.

(2) Appointment

Subject to paragraph (3), the Director shall be appointed by the President, by and with the advice and consent of the Senate.

***3** ***

(c) Term

(1) In general

The Director shall serve for a term of 5 years.

(2) Expiration of term

An individual may serve as Director after the expiration of the term for which appointed, until a successor has been appointed and qualified.

(3) Removal for cause

The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.

STATEMENT

This case presents the familiar and exceptionally important question whether the novel structure of the Consumer Financial Protection Bureau (CFPB) violates the separation of powers. The United States has already taken the position that the question presented is "important" and "warrants this Court's review in an appropriate case." Br. in Opp. at 9, 12, *State National Bank of Big Spring v. Mnuchin,* No. 18-307 (Dec. 10, 2018). The CFPB has agreed that, absent a legislative change to its structure, the Court "will ultimately need to *** settle[]" the question. *Id.* at 10. And the United States has specifically identified this case as a potentially suitable vehicle in which to resolve the question, see *id.* at 12, and the CFPB consented to a stay of the mandate below so that this petition could be filed.

The time for this Court to resolve the long-running debate about the constitutionality of the CFPB is now. The Court has consistently recognized that the Constitution ***4** empowers the President to keep federal officers accountable by removing them from office. While in limited circumstances the Court has upheld the constitutionality of certain multi-member "independent" agencies, whose leading officers the President can remove only for cause, the Court has never upheld the constitutionality of an independent agency that exercises significant executive authority and is headed by a single person. In 2010, Congress created just such an agency: the CFPB. Headed by a single director removable only for cause, the CFPB possesses substantial executive authority, including the power to implement and enforce 19 federal consumer-protection statutes. The question presented is whether the vesting of such authority in the CFPB violates the separation of powers in light of the agency's structure.

Petitioner in this case is a law firm that provides a variety of legal services to consumers, including assistance with the resolution of consumer debt. As part of the CFPB's investigation into whether petitioner violated certain federal laws, the agency issued a civil investigative demand seeking information and documents from petitioner. Petitioner objected to the demand on the ground that the CFPB was unconstitutionally structured, but the CFPB refused to withdraw the demand and petitioned a federal district court for enforcement. The district court granted the petition, holding that the structure of the CFPB did not violate the separation of powers. The Ninth Circuit affirmed, noting that the issues had been "thoroughly canvassed" in the multiple opinions of the en banc District of Columbia Circuit in *PHH Corp. v. Consumer Financial Protection Bureau,* 881 F.3d 75 (2018), and adopting the position of the *PHH* majority with little further analysis.

Like the *PHH* dissenters, the United States holds the contrary view. It has taken the position in this Court that ***5** "the statutory restriction on the President's authority to remove the Director [of the CFPB] violates the constitutional separation of powers." Br. in Opp. at 13, *State National Bank of Big Spring, supra.* This case, which cleanly presents the question whether the CFPB is constitutional, is an ideal vehicle for the Court's review. And the Court's resolution of the question presented is urgently needed. The petition for a writ of certiorari should therefore be granted.

A. Background

1. Article II of the Constitution vests "[t]he executive Power" in the "President of the United States of America," Art. II, § 1, cl. 1, who must "take Care that the Laws be faithfully executed," *id.* § 3. Since the Founding, those provisions have "been

understood to empower the President to keep [federal] officers accountable - by removing them from office, if necessary." *Free Enterprise Fund v. Public Co. Accounting Oversight Board,* 561 U.S. 477, 483 (2010).

In its landmark decision in *Myers v. United States,* 272 U.S. 52 (1926), this Court recognized the President's Article II authority to supervise, direct, and remove subordinate officers in the Executive Branch. In *Myers,* the Court confirmed that the President generally retains the "exclusive power of removal" of officers from duty. *Id.* at 122. "[T]o hold otherwise," the Court explained, "would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed." *Id.* at 164.

The Court recognized a narrow exception to that principle in *Humphrey's Executor v. United States,* 295 U.S. 602 (1935). In that decision, the Court upheld a statute protecting the commissioners of the multi-member Federal ***6** Trade Commission from removal except for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 619-620 (quoting 15 U.S.C. 41 (1934)). Reasoning that the President's removal power "will depend upon the character of the office" at issue, the Court noted that the Commission "exercise[d] no part of the executive power vested by the Constitution in the President." *Id.* at 627-628, 631. Instead, the Commission exercised only "quasi legislative or quasi judicial powers," acting as a "body of experts" with staggered terms who "gain experience by length of service." *Id.* at 624-625, 628.

The Court has similarly sustained the restriction of the President's power to remove commissioners of a multi-member body with "intrinsic judicial character," reasoning that Congress was permitted to insulate members of an "adjudicatory body" from removal. *Wiener v. United States,* 357 U.S. 349, 355-356 (1958). And it has sustained restrictions on the power of principal executive officers, themselves accountable to the President, to remove their own inferior officers. See *Morrison v. Olson,* 487 U.S. 654, 691-693 (1988); *United States v. Perkins,* 116 U.S. 483, 485 (1886).

The Court recently reaffirmed that, apart from those limited exceptions, the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties." *Free Enterprise Fund,* 561 U.S. at 513-514. Accordingly, it has refused to extend *Humphrey's Executor* to "new situation[s]" not previously encountered by the Court. *Id.* at 483, 513.

2. In 2007, Elizabeth Warren, then a professor at Harvard Law School, proposed the creation of a new, independent federal agency called the Financial Product Safety Commission. Envisioned as an analog to the multi- ***7** member Consumer Product Safety Commission, the proposed agency would enforce the patchwork of existing consumer financial-protection laws and ensure that consumer financial products, such as mortgages, auto loans, and credit cards, satisfied certain minimum standards. See generally Elizabeth Warren, *Unsafe at Any Rate,* Democracy, Summer 2007, no. 5. That idea gained the backing of the Obama Administration in 2009, when the Department of the Treasury proposed the creation of a Consumer Financial Protection Agency - a multi-member, independent body designed to ensure that "consumer protection regulations are written fairly and enforced vigorously." Department of the Treasury, *Financial Regulatory Reform: A New Foundation* 55, 58 (2009).

In 2010, Congress responded to those proposals by creating the Consumer Financial Protection Bureau as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Tit. 10, 124 Stat. 1955-2113. The CFPB was tasked with "implement[ing] and *** enforc[ing]" federal law related to the "markets for consumer financial products and services." 12 U.S.C. 5511(a).

In line with then-Professor Warren's and the Obama Administration's initial proposals, Congress classified the CFPB as an "independent bureau," housed within the Federal Reserve System. 12 U.S.C. 5491(a). But unlike the initial proposals and even the original bill passed by the House of Representatives, Congress did not structure the CFPB as a multi-member commission. See H.R. 4173, 111th Cong. § 4103 (as passed by House, Dec. 11, 2009). Instead, it created an agency headed by a single director appointed by the President and confirmed by the Senate. See 12 U.S.C. 5491(b)(1)-(2). The Director serves for a term of five years (although the Director may remain in office after the expiration of the term "until a successor ***8** has been appointed and qualified"). 12 U.S.C. 5491(c)(1)-(2). The President may not remove the Director except for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

Congress endowed the CFPB with significant powers. As an initial matter, Congress consolidated in the CFPB "all authority to prescribe rules or issue orders or guidelines pursuant to any [f]ederal consumer financial law," 12 U.S.C. 5581(a)(1)(A), which the Act defines to include 18 preexisting federal consumer-protection statutes. See 12 U.S.C. 5481(12), (14). In addition, Congress created a new prohibition on "any unfair, deceptive, or abusive act or practice" by certain participants in the consumer-finance industry, 12 U.S.C. 5536(a)(1)(B); see 12 U.S.C. 5481(6), (26), and authorized the CFPB to issue regulations identifying such acts or practices. See 12 U.S.C. 5531(a), (b). Congress also endowed the CFPB with a number of "[e]nforcement [p]owers," 124 Stat. 2018, including the authority to conduct investigations, issue subpoenas and civil investigative demands, and file lawsuits in federal court to impose civil penalties or obtain other appropriate relief. See 12 U.S.C. 5562, 5564(a), (f). In short, led by its Director, the CFPB "wields enormous power over American businesses, American consumers, and the overall U.S. economy." *PHH,* 881 F.3d at 165 (Kavanaugh, J., dissenting).

In creating the CFPB, Congress chose to exempt the agency from the normal congressional appropriations process. The CFPB instead receives most of its funding from the Federal Reserve System. Each year, the Director may request, and the Federal Reserve must provide, an amount the Director determines is "reasonably necessary to carry out" the duties of the CFPB, not to exceed a set percentage of the Federal Reserve's total operating expenses. 12 U.S.C. 5497(a)(1), (2)(A)(iii), (2)(B). The ***9** CFPB can obtain additional funds if necessary by requesting appropriations from Congress. See 12 U.S.C. 5497(e)(1).

B. Facts And Procedural History

1. Petitioner is a California-based law firm that offers a variety of legal services to consumers, including assistance in obtaining relief from consumer debt. In February 2017, the CFPB issued a civil investigative demand to petitioner as part of an investigation into whether petitioner violated federal consumer-financial law. The investigative demand requested various information and documents about petitioner's business structure, organization, and practices. App., *infra,* 10a; C.A. Dkt. 14-2, at 271-278.

Petitioner asked the CFPB to set aside the demand. See 12 U.S.C. 5562(f); 12 C.F.R. 1080.6(e). As is relevant here, petitioner asserted that the demand was invalid because the structure of the CFPB violated the separation of powers. To support that argument, petitioner relied on the panel's opinion in *PHH,* which held that the CFPB's structure violated Article II by vesting significant executive power in a single director removable only for cause. See 839 F.3d 1, 36 (D.C. Cir. 2016). At the time, the D.C. Circuit had granted rehearing en banc in *PHH* but had not yet issued its decision. App., *infra,* 10a; C.A. Dkt. 14-2, at 89, 91.

The Director of the CFPB denied petitioner's request to set aside the demand. Petitioner submitted partial responses to the demand, reiterated its objections, and declined to provide further information or documents. App., *infra,* 10a-11a.

2. The CFPB then filed a petition to enforce the civil investigative demand in the United States District Court for the Central District of California. See ***10** 12 U.S.C. 5562(e)(1). Petitioner renewed its constitutional challenge to the structure of the CFPB and raised additional arguments about the validity and scope of the demand. The district court rejected petitioner's separation-of-powers argument. The court narrowed the scope of the investigative demand in one respect that the CFPB did not subsequently contest; it then ordered petitioner to comply with the modified demand. App., *infra,* 9a-23a.

Petitioner appealed and sought a stay of the district court's order. The court of appeals granted the stay. See C.A. Dkt. 8.

3. While petitioner's appeal was pending in the Ninth Circuit, the D.C. Circuit issued its en banc decision in *PHH.* Over vigorous dissents, the court held that the structure of the CFPB did not violate the separation of powers. The case produced seven opinions that span over 125 pages of the Federal Reporter, exhaustively setting out the arguments in favor of and against the CFPB's constitutionality.

In an opinion written by Judge Pillard, the D.C. Circuit began its analysis by observing that the statutory provision protecting the Director of the CFPB from removal used identical language to the removal protection that this Court upheld in *Humphrey's Executor, supra.* See *PHH,* 881 F.3d at 93. Although *Humphrey's Executor* involved the Federal Trade Commission, an independent agency led by a multi-member commission, the D.C. Circuit concluded that the holding in *Humphrey's Executor* extended to single-director leadership structures as well. See *ibid.* The court reached that conclusion in part by relying on this Court's decision in *Morrison, supra,* which upheld a for-cause removal restriction for independent counsel appointed under the Ethics in Government Act. See *id.* at 96.

***11** Judge Tatel, joined by Judges Millett and Pillard, concurred and wrote separately to address non-constitutional issues presented by the case. See *PHH,* 881 F.3d at 111-113. Judge Wilkins, joined by Judge Rogers, also concurred, focusing on the fact that the case arose from a CFPB adjudication (and not the CFPB's use of purely executive power). See *id.* at 113-124. And Judge Griffith concurred in the judgment, interpreting the removal restriction to permit removal of the Director for "ineffective policy choices," which in his view mitigated any separation-of-powers concerns. See *id.* at 124-137.

Then-Judge Kavanaugh and Judges Randolph and Henderson dissented. Judge Kavanaugh, joined by Judge Randolph, reasoned that the novel structure of the CFPB created constitutional problems that this Court had not squarely addressed. See *PHH,* 881 F.3d at 164-200. In particular, Judge Kavanaugh took the view that this Court's approval of removal protections in *Humphrey's Executor* applied only to members of multi-member commissions and did not extend to an agency headed by a single director. See *id.* at 193-194. He also reasoned that *Morrison* was not controlling because it involved an inferior officer with narrow jurisdiction and limited powers. See *id.* at 195. Judge Kavanaugh ultimately concluded that the restriction on removal of the Director, while invalid, was severable from the remainder of the Dodd-Frank Act. See *id.* at 198-200. Judge Henderson also dissented, agreeing with Judge Kavanaugh that the structure of the CFPB was invalid but disagreeing that the removal provision was severable. See *id.* at 137-164. Judge Randolph also wrote a separate dissent, which addressed a constitutional question related to the appointment of the administrative law judge involved in that case. See *id.* at 200-202.

***12** 4. After the D.C. Circuit issued its en banc decision in *PHH,* the Ninth Circuit affirmed the district court's order. App., *infra,* 1a-8a. As is relevant here, the Ninth Circuit held that the CFPB's structure comports with the Constitution. *Id.* at 6a.[*]

In an opinion written by Judge Watford, the court of appeals recognized that "[t]he arguments for and against" the view that the CFPB's structure violates the separation of powers had been "thoroughly canvassed" in the majority, concurring, and dissenting opinions in *PHH.* App., *infra,* 2a (citation omitted). Seeing "no need to replow the same ground," the court offered only a "brief" explanation of why it agreed with the *PHH* majority. *Ibid.*

The court of appeals began by observing that, in *Humphrey's Executor,* this Court had upheld the structure of the Federal Trade Commission. App., *infra,* 4a. The court acknowledged that "the CFPB possesses substantially more executive power than the [Federal Trade Commission] did back in 1935," when *Humphrey's Executor* was decided. *Id.* at 5a. And it further recognized that the leadership of the CFPB by a single director creates a "structural difference" from the multi-member Federal Trade Commission that "[s]ome have found *** dispositive." *Ibid.* Yet the court of appeals took the view that this Court's decision in *Morrison* "preclude[d] drawing a constitutional distinction between multi-member and single-individual leadership structures." *Id.* at 5a-6a. Because the court viewed *Humphrey's Executor* and *Morrison* as "controlling," it held that the CFPB's structure was constitutional. *Id.* at 6a.

***13** The court of appeals acknowledged that petitioner's argument was "not without force." App., *infra,* 3a. But it concluded that, while "[t]he Supreme Court is of course free to revisit those precedents," "we are not." *Id.* at 6a.

5. After the entry of judgment, petitioner filed a motion to stay the mandate pending the filing of this petition for certiorari. The CFPB initially indicated that it would oppose the motion, but it later "reconsidered its position *** [i]n light of the unique circumstances in this case." C.A. Dkt. 48. The court of appeals granted petitioner's motion and stayed the mandate "until final disposition" by this Court. C.A.Dkt.49.

REASONS FOR GRANTING THE PETITION

This case presents a question of extraordinary importance: whether the structure of the CFPB violates the separation of powers. The United States - and the CFPB itself - have recognized that the question presented warrants the Court's review. In fact, the United States has specifically identified this case as a potentially suitable vehicle in which to resolve the question. The United States was correct. The substantial arguments on both sides of the question have been fully aired in a multitude of lower-court opinions; the court below erred in upholding the CFPB's structure; and this Court's resolution of the question presented is urgently required. The petition for a writ of certiorari should therefore be granted.

A. The Question Presented Is Exceptionally Important And Warrants Review In This Case

The importance of the question presented cannot be overstated. The case presents a fundamental constitutional question at the heart of the separation of powers. What is more, it does so in the context of the CFPB, an agency with expansive powers whose structure constitutes ***14** a "dramatic and meaningful" departure from the independent-agency structures this Court has previously upheld. *PHH Corp. v. Consumer Financial Protection Bureau,* 881 F.3d 75, 167 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). The obvious importance of the question is only confirmed by the scores of pages the en banc D.C. Circuit devoted to debating its every facet. The question presented is of vast legal and practical significance, and this case presents an ideal opportunity for the Court to resolve it.

1. The CFPB "is an agency like no other." *PHH,* 881 F.3d at 137 (Henderson, J., dissenting). It "wields broad authority over the U.S. economy," "implement [ing] and enforc[ing] 19 federal consumer protection statutes, covering everything from home finance to student loans to credit cards to banking practices." *Id.* at 165, 171 (Kavanaugh, J., dissenting). At the same time, the CFPB is headed by a single director, and the President cannot remove that Director except for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

In light of the CFPB's unique structure, "the Director enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government," aside from the President himself. *PHH,* 881 F.3d at 166 (Kavanaugh, J., dissenting). The Director alone decides "what rules to issue," "how to enforce" the law, "whether an individual or entity has violated the law," and "what sanctions and penalties to impose on violators of the law." *Id.* at 165. Yet the President cannot remove the Director except for cause. "That combination" - "power that is massive in scope, concentrated in a single person, and unaccountable to the President" - raises grave constitutional concerns. *Id.* at 165-166.

***15** At the same time, the CFPB is largely exempt from the congressional appropriations process. As James Madison famously wrote in the Federalist Papers, Congress's "power over the purse" may be the people's "most complete and effectual weapon *** for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58. Yet the CFPB obtains its primary funding from another federal agency in almost automatic fashion. See 12 U.S.C. 5497(a)(1)-(2). With its degree of independence from both the President and Congress, the CFPB is "the first [agency] of its kind." *PHH,* 881 F.3d at 173 (Kavanaugh, J., dissenting).

2. The question whether the CFPB's unprecedented structure is constitutional is of vital importance. By separating the executive, legislative, and judicial powers, the Framers sought to ensure that "no man or group of men will be able to impose its unchecked will." *United States v. Brown,* 381 U.S. 437, 443 (1965). The separation of powers thus works to secure "the people's rights," *United States v. Morrison,* 529 U.S. 598, 616 n.7 (2000), and the Framers viewed that separation as "the absolutely central guarantee of a just Government," *Morrison v. Olson,* 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). "Liberty" is thus "always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York,* 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). The concentration of so much power in the hands of the Director of the CFPB threatens the people's liberty in a serious way.

A decision upholding the structure of the CFPB could provide a blueprint for Congress to reshape the Executive Branch in dramatic fashion. As explained in further detail below, see pp. 20-23, this Court's precedents on the validity ***16** of removal restrictions for principal officers have addressed only the structure of multi-member agencies that exercise predominantly legislative or judicial authority. See, *e.g., Humphrey's Executory. United States,* 295 U.S. 602, 624 (1935). The Court has intentionally left a "field of doubt" regarding the constitutionality of differently structured independent agencies. See *id.* at 632.

The decisions of the court of appeals in this case and the divided D.C. Circuit in *PHH,* however, appear to resolve much of that doubt by permitting Congress to insulate from removal any official who does not "assist with the President's core constitutional responsibilities." 881 F.3d at 107; see App., *infra,* 4a-5a. Allowing Congress to insulate those officials from at-will removal would threaten to reduce the President's power over crucial sectors of the federal government.

Lest any doubt remain that the question presented has sweeping legal and practical ramifications, the sheer volume of commentary would dispel it. See, *e.g.,* Richard J. Pierce Jr., *The Scope of the Removal Power Is Ripe for Reconsideration,* 58 Judges' J., no. 2, 2019, at 19; C. Boy den Gray, *Extra Icing on an Unconstitutional Cake Already Frosted? A Constitutional Recipe for the CFPB,* 24 Geo. Mason L. Rev. 1213 (2017); Neomi Rao, *Removal-Necessary and Sufficient for Presidential Control,* 65 Ala. L. Rev. 1205, 1269-1275 (2014); Eric Pearson, *A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau,* 47 Creighton L. Rev. 99 (2013); Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection,* 7 Brook. J. Corp. Fin. & Com. L. 25 (2012); see Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance,* 36 Yale J. on Reg. 273, 315 (2019); Kristin E. Hickman, ***17** *Symbolism and Separation of Powers in Agency Design,* 93 Notre Dame L. Rev. 1475, 1485-1500 (2018);

Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?,* 81 Geo. Wash. L. Rev. 856, 872-916 (2013). The question presented is undeniably and seemingly undisputedly important, and further review is warranted.

3. This case is an ideal vehicle for the Court to address the question presented. That question was pressed below, fully briefed by the parties, and passed on by the court of appeals. As it comes to the Court, this case presents only that question, and it presents it cleanly and squarely: if the structure of the CFPB is constitutional, petitioner must comply with the agency's civil investigative demand; if the structure is unconstitutional, the agency lacks the power to enforce the demand. See *FEC v. NRA Political Victory Fund,* 6 F.3d 821, 828 (D.C. Cir. 1993). Finally, because the court of appeals has stayed its judgment pending the resolution of this petition, there is no risk of the case becoming moot before the Court could issue a decision on the merits.

Nor would further percolation benefit the Court in resolving the question presented in the extraordinary circumstances presented here. As the court of appeals below noted, the majority, concurring, and dissenting opinions from the en banc D.C. Circuit in *PHH* "thoroughly canvassed" the arguments involved in the constitutional debate. App., *infra,* 2a (citation omitted). Five of the seven opinions addressed the constitutionality of the CFPB's structure, with those opinions alone spanning over 120 pages in the Federal Reporter. See *PHH,* 881 F.3d at 75-110 (majority opinion); *id.* at 113-124 (Wilkins, J., concurring); *id.* at 124-137 (Griffith, J., concurring in the judgment); *id.* at 137-164 (Henderson, J., dissenting); *id.* at 164-200 (Kavanaugh, J., dissenting). Given those extensive opinions, the court of appeals saw "no need to re-plow the same ground" as the D.C. Circuit, providing only a ***18** "brief" justification for its major constitutional ruling. See App., *infra,* 2a. Additional opinions from other courts of appeals will add little to this Court's consideration of the issue.

In any event, even outside the circumstances of this case, the Court routinely grants review in cases presenting significant separation-of-powers issues in the absence of a conflict between the courts of appeals. See, *e.g., Free Enterprise Fund v. Public Company Accounting Oversight Board,* 561 U.S. 477 (2010); *Clinton, supra; Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.,* 501 U.S. 252 (1991); *Edmond v. United States,* 520 U.S. 651 (1997); *Morrison, supra; INS v. Chadha,* 462 U.S. 919 (1983). Especially given this Court's practice in similar separation-of-powers cases, the Court's review is amply warranted here.

The need for the Court's review is particularly acute. The lingering legal doubt over the CFPB's structure casts a cloud over every action the agency takes. The longer the question presented remains unresolved, the more resources the CFPB will need to expend fighting challenges to its authority, and the more private parties will be subject to exercises of enforcement powers by a potentially unconstitutional agency. The Court should resolve the constitutionality of the CFPB at the earliest opportunity; this case presents an ideal opportunity for the Court to do so.

B. The Decision Below Is Erroneous

As the dissenters in *PHH* recognized, the structure of the CFPB violates the constitutional separation of powers. The United States itself agrees, having previously taken the position in this Court that "the statutory restriction on the President's authority to remove the Director violates the constitutional separation of powers." Br. ***19** in Opp. at 13, *State National Bank of Big Spring, supra.* The contrary decision below is incorrect and, especially given the position of the United States, warrants the Court's review.

1. Article II vests "[t]he executive Power" in the "President of the United States of America," Art. II, § 1, cl. 1, who must "take Care that the Laws be faithfully executed," *id.* § 3. Those provisions have long "been understood to empower the President to keep [federal] officers accountable - by removing them from office, if necessary." *Free Enterprise Fund,* 561 U.S. at 483. In fact, the First Congress debated extensively whether the President could remove his Cabinet members at will when it created

the Department of Foreign Affairs. See *id.* at 492; 1 Annals of Congress 455-512 (1789). The "prevail[ing]" view was that "the executive power included a power to oversee executive officers through removal." *Free Enterprise Fund,* 561 U.S. at 492. The "traditional default rule," therefore, is that the President has the authority to remove officers whom he appoints. See *id.* at 509; *Myers v. United States,* 272 U.S. 52, 161 (1926). That authority is ordinarily "exclusive" to the President. See *Myers,* 272 U.S. at 122.

The CFPB Director, who alone heads the agency and whose work is not directed or supervised by any superior officer appointed by the President, is unquestionably a principal officer. See *Free Enterprise Fund,* 561 U.S. at 510; *Edmond, supra.* Accordingly, absent some permissible exception to the default rule, the president has the power to remove the Director at will.

Congress attempted to deviate from the traditional operation of Article II when creating the CFPB. Instead of allowing the President to remove the CFPB's single director at will, Congress insulated the Director from removal during his five-year term except for "inefficiency, ***20** neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3). That structure leaves the Director to exercise the CFPB's enormous power entirely as he chooses, without direction or supervision from the President and without any checks from a multi-member group endowed with equivalent authority. That is grossly out of step with the text of the Constitution, the understanding at the time of the First Congress, and this Court's view in *Myers.* See *Free Enterprise Fund,* 561 U.S. at 492-493.

2. Despite the foregoing logic, the court of appeals considered itself bound by *Humphrey's Executor* and *Morrison* to uphold the constitutionality of the CFPB. See App., *infra,* 3a. Neither case addresses the circumstances presented by the CFPB's novel structure, and they should not be expanded to sanction it.

a. As to *Humphrey's Executor,* in that case, the Court upheld the structure of the Federal Trade Commission (FTC) against constitutional challenge, despite the fact that Congress restricted the President's power to remove FTC commissioners. In upholding the for-cause removal restriction, the Court stressed that the Commission acted as a "quasi legislative" and "quasi judicial" "body of experts" "called upon to exercise *** trained judgment." 295 U.S. at 624-625. Its duties were "neither political nor executive." *Id.* at 624.

As the dissenting opinions in *PHH* recognized, the structure of the CFPB deviates from the structure of the FTC, as it then existed, in dispositive respects. See 881 F.3d at 146-151 (Henderson, J., dissenting); *id.* at 193-194 (Kavanaugh, J., dissenting). The CFPB "possesses substantially more executive power than the FTC did back in 1935." App., *infra,* 5a; see, *e.g.,* Daniel A. Crane, *Debunking 'Humphrey's Executor,'* 83 Geo. Wash. L. Rev. 1835, 1864 (2015). Unlike the FTC when it was first created, the ***21** CFPB can issue retrospective penalties for statutory violations and has the power to sue in federal court.

All of the CFPB's power, moreover, is vested in a single director, not in a multi-member "body of experts" like the FTC. See *Humphrey's Executor,* 295 U.S. at 624. That structure "diminishes the President's power to exercise influence over the [agency], as compared to the President's power to exercise influence over traditional multi-member independent agencies." *PHH,* 881 F.3d at 188 (Kavanaugh, J., dissenting). And it creates concomitantly greater power in a single unaccountable officer. An agency with a multi-member structure cannot act without consensus, "mak[ing] it harder for the agency to infringe [individual] liberty." *Id.* at 184. A single director faces no similar constraint on his decision. Similarly, a multi-member structure leads to more reasoned decisionmaking and guards more effectively against agency capture. See *id.* at 184-185. The single-director structure does not provide comparable safeguards.

Removing the CFPB still further from the political branches - and distinguishing it again from the 1935 FTC - the CFPB does not rely on standard congressional appropriations for its core funding. The FTC, "like nearly all other administrative agencies," "is and always has been subject to the appropriations process." *PHH,* 881 F.3d at 146 (Henderson, J., dissenting). The CFPB, however, receives almost automatic funding from the Federal Reserve System. See pp. 14-15, *supra.* That exempts the CFPB from "the most potent form of [c]ongressional oversight." S. Doc. No. 26, 95th Cong., 1 Sess. 42 (1977); see The Federalist No. 58 (James Madison). And it removes the President's ability to exert control during the budgeting process, in which the President has a "constitutional role." *PHH,* 881 F.3d at 146-147 (Henderson, J., dissenting).

***22** In short, the CFPB "is not even a distant cousin of the FTC blessed by *Humphrey's Executor.*" *PHH,* 881 F.3d at 146 (Henderson, J., dissenting). Both because the CFPB possesses substantially more executive power and because its structure provides far less in the way of safeguards that can at least mimic the protections of presidential control, upholding the structure of the CFPB would require substantial expansion of *Humphrey's Executor.* Accordingly, the court of appeals erred in viewing *Humphrey's Executor* as "controlling." App., *infra,* 6a. As one of the dissenters put it in *PHH,* "[f]irst principles, not *Humphrey's Executor,* control here." 881 F.3d at 139 (Henderson, J., dissenting); see *id.* at 193-194 (Kavanaugh, J., dissenting) (describing as "wrong" and "[n]ot even close" the argument that *Humphrey's Executor* controls the question of the CFPB's constitutionality).

b. As to *Morrison*: the Court there upheld a statute insulating an independent counsel appointed under the Ethics in Government Act from removal by the Attorney General except "for good cause." See 487 U.S. at 686 (quoting 28 U.S.C. 596(a)(1)). To be sure, the independent counsel was a single person. But no party argued that this fact alone rendered the Office of the Independent Counsel unconstitutional, meaning that the issue was "not raised or decided." *PHH,* 881 F.3d at 195 (Kavanaugh, J., dissenting).

In any event, the independent counsel was also "an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority." *Morrison,* 487 U.S. at 691. As a result, this Court "had no occasion to consider the validity of removal restrictions affecting principal officers, officers with broad statutory responsibilities, or officers involved in executive branch policy formation." *The* ***23** *Constitutional Separation of Powers Between the President and Congress,* 20 Op. O.L.C. 124, 169 (1996). Because the Director of the CFPB performs each of those roles, *Morrison* is inapplicable, and the court of appeals was wrong to conclude that the decision "preclude[d] drawing a constitutional distinction between multi-member and single-individual leadership structures." App., *infra,* 5a-6a; cf. *PHH,* 881 F.3d at 195 (Kavanaugh, J., dissenting) (rejecting the suggestion that *Morrison* "controls" the inquiry as "even further afield" than the suggestion that *Humphrey's Executor* does so).

c. This Court should refuse to extend the reasoning of *Humphrey's Executor* and *Morrison* to the single-director structure of the CFPB.

To begin with, the CFPB's structure lacks historical support. Aside from a few recent anomalies, "each of the independent agencies has traditionally operated - and each continues to operate - as a multi-member 'body of experts appointed by law and informed by experience.' " *PHH,* 881 F.3d at 170 (Kavanaugh, J., dissenting) (quoting *Humphrey's Executor,* 295 U.S. at 624). While "innovation" does not alone render an agency structure unconstitutional, see *Mistretta v. United States,* 488 U.S. 361, 385 (1989), "[p]erhaps the most telling indication of [a] severe constitutional problem" with an agency's structure is the "lack of historical precedent" for it. *Free Enterprise Fund,* 561 U.S. at 505.

What is more, expanding the *Humphrey's Executor* exception to this circumstance would leave no meaningful limiting principle on Congress's ability to restrict the President's removal power. Indeed, the en banc majority in *PHH* seemingly would have upheld removal protections for any "financial and commercial regulator." 881 F.3d at 102. That has the potential to reshape the Executive Branch and to violate the Founders' "conscious[] ***24** deci [sion] to vest Executive authority in one person rather than several." *Clinton v. Jones,* 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment).

3. For all of the foregoing reasons, the Court should grant review and hold that neither *Humphrey's Executor* nor *Morrison* justify the structure of the CFPB. If, however, this Court were to agree with the court of appeals that *Humphrey's Executor* or *Morrison* are controlling here, petitioner respectfully submits that, in light of their gross departure from constitutional text, history, and the principles articulated in *Myers,* those cases should be overruled or limited. See *PHH,* 881 F.3d at 125 n.2 (Griffith, J., concurring in the judgment) (observing that "*Humphrey's Executor* and *Morrison* appear at odds with the text and original understanding of Article II"); *id.* at 179 n.7 (Kavanaugh, J., dissenting) (observing that, "[a]s a matter of first principles, there [is] a strong argument that *** independent agencies violate Article II"); *id.* at 194 n.18 (noting that *Humphrey's Executor* is "inconsistent" with *Myers*); see generally *Morrison,* 487 U.S. at 697-734 (Scalia, J., dissenting). Put simply, an agency with the sweeping executive powers of the CFPB, headed by a single individual accountable to no one, has no place in our constitutional structure.

*****

This case presents the question whether the vesting of substantial executive authority in the CFPB, an independent agency headed by a single director, violates the separation of powers. That question is of extraordinary constitutional and practical importance, and the United States has already recommended that this Court grant review to resolve the question in an appropriate case (and identified this case as a candidate). This case is an ideal ***25** vehicle for the Court's review. The Court should therefore grant the petition for certiorari and, on the merits, hold that the structure of the CFPB is unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Footnotes

* Before the court of appeals, petitioner also argued that the CFPB lacked the statutory authority to issue the civil investigative demand. The court of appeals summarily rejected that argument, see App., *infra,* 6a-8a, and petitioner does not renew it before this Court.