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 *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The question presented is:

1. 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

Page

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Independent agencies that engage in legislative, executive, and judicial functions like the CFPB violate the separation of powers 3

II. The CFPB's structure and funding violate the separation of powers 7

A. The CFPB's structure improperly concentrates power in a single director with limited accountability to the Executive Branch and the people 8

B. Congress further enhanced the CFPB's independence by allowing it to draw funding from one of the least transparent and accountable elements of the federal government: the Federal Reserve 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Buckley v. Valeo, 424 U.S. 1 (1976) 4

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) 3, 9

Humphrey's Executor v. United States, 295 U.S. 602 (1935) .... *passim*

Morrison v. Olson, 487 U.S. 654 (1988) 8, 9

Myers v. United States, 272 U.S. 52 (1926) 2, 8

PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75 (D.C. Cir. 2018) 11

Printz v. United States, 521 U.S. 898 (1997) 8

CONSTITUTION

U.S. CONST.:

Art. I, § 9, cl. 7 3

Art. II, § 1, cl. 1 8

Art. II, § 2 13

Art. II, § 3 8

FEDERAL STATUTES & REGULATIONS

12 U.S.C. § 241 12

12 U.S.C. § 242 12

12 U.S.C. § 5491(a) 11

12 U.S.C. § 5491(c) 10

TABLE OF AUTHORITIES – Continued

Page

12 U.S.C. § 5491(c)(3) 2, 7

12 U.S.C. § 5492(a)(10) 6

12 U.S.C. § 5492(c)(2) 12

12 U.S.C. § 5497(a) 7, 11

12 U.S.C. § 5497(a)(2)(C) 7, 11

12 U.S.C. § 5497(a)(4)(E) 13

12 U.S.C. § 5512 6

12 U.S.C. § 5563 6

12 U.S.C. § 5581 6

12 U.S.C. § 5581(a)(2)(A) 6

15 U.S.C. § 7211(e)(6) 10

15 U.S.C. § 7217(d)(3) 10

Act of Congress of July 12, 1876, 19 Stat. 80, ch. 179, sec. 6 9

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) 2

OTHER AUTHORITIES

1 Annals of Cong. 463 (1789) 8

The Federalist No. 51 4

The Federalist No. 78 14

Page

Board of Governors of the Federal Reserve System, *Purposes and Functions*, September 28, 2018, https://www.federalreserve.gov/aboutthefed/pf.htm 12

Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111 (2000) 5

Peter Conti-Brown, *Is the Federal Reserve Constitutional?*, Liberty Law Blog, September 1, 2013, https://www.lawliberty.org/liberty-forum/is-the-federal-reserve-constitutional/ 13

Peter Conti-Brown, *The Case for the Federal Reserve Banks' Constitutionality is Uneasy Indeed, part II: Appointing and Removing the Reserve Bank Presidents*, 36 Yale J. on Reg.: Notice & Comment (May 18, 2016), http://yalejreg.com/nc/the-case-for-the-federal-reserve-banks-constitutionality-is-uneasy-indeed-part-ii-appointing-and-rem/ 13

Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, April 1994 6

James Madison, *Notes of Debates in the Federal Convention of 1787*, Ohio University Press (1985) 7

Michael Uhlmann, A Note on Administrative Agencies, in *The Heritage Guide to the Constitution* (David F. Forte & Matthew Spalding, eds. 2d ed. 2014) 4

Page

Danny Vinik, *Trump's unusual chance to stack the Fed*, Politico.com, October 31, 2017, https://www.politico.com/agenda/story/2017/10/31/trump-unusual-chance-stack-federal-reserve-000567 12

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioner. For reasons stated herein, Landmark respectfully urges the Court to rule that the Consumer Financial Protection Bureau's structure and funding violate the Constitution's separation of powers and grant the relief sought by the Petitioner.

INTRODUCTION AND SUMMARY OF ARGUMENT

The separation of powers in our constitutional system protects the people's liberties and ensures political accountability. Congress violated the separation of powers with the creation of the Consumer Financial Protection Bureau ("CFPB") under Title X of the

[1] The parties have provided consent for the filing of Landmark's *Amicus Curiae* brief in this case. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *Amicus Curiae* provided notice to counsel for parties of its intention to file this brief. No person other than *Amicus Curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

The CFPB is an independent bureau or agency, a subcategory of administrative agencies. Independent agencies are governmental entities designed by Congress to be independent of the political influence of the Executive Branch by restricting the President's removal power of their principal officers. The constitutional justification for independent agencies is suspect. Only nine years after the Supreme Court upheld the President's Article II power to remove Executive Branch officers in *Myers v. United States*, 272 U.S. 52 (1926), the Court created an exception. It upheld the protection from removal for the Federal Trade Commission's (FTC) multi-member board in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), citing the board's nature as a body of apolitical experts engaging in quasi-legislative and quasi-judicial, as opposed to executive, functions. Thus, the Court compounded the error of allowing the FTC to operate in the domain of more than one branch of government by restricting the President's removal authority as well.

The CFPB is an attempt to make an independent agency even further removed from the President's control. Unlike other independent agencies, such as FTC, the executive control of the CFPB is not diffused in a multi-member board. Instead, power is vested in a single person, the Director, who may not be removed by the President except "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). A single person has sweeping regulatory power over the consumer finance industry. In addition, Congress shielded the CFPB from its greatest check on the executive: the "power of the purse," contained in the Appropriations Clause. Art. I, § 9, cl. 7. The CFPB sets its own budget and draws funds from the Federal Reserve, the only other government entity granted financial independence from Congress. 12 U.S.C. § 5497. The Director does not answer to the President or the Federal Reserve, however. To make matters worse for the President, the Federal Reserve itself has a structure of multi-level protection of leadership from removal that is constitutionally dubious after this Court's decision in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Thus, by its structure and funding, the CFPB is one of the "dangerous innovations in the government" that Alexander Hamilton believed an independent judiciary must prevent. The Court should not extend the holding of *Humphrey's Executor* any further. Instead, the Court should grant the petition for certiorari and, on the merits, hold the CFPB unconstitutional.

ARGUMENT

I. Independent agencies that engage in legislative, executive, and judicial functions like the CFPB violate the separation of powers.

The separation of powers among three branches of the federal government was among the chief virtues of the Constitution, according to James Madison and Alexander Hamilton. Drawing from the political philosophers John Locke and Baron de Montesquieu, they addressed it repeatedly in The Federalist Papers. Madison considered it "essential to the preservation of liberty" and explained that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other." The Federalist No. 51, in Vol. 2, The Debate on the Constitution, 163, 165 (The Library of America, 1993).

The framers expected the branches' vigilance in defense of their prerogatives would prevent the expansion of government. This in turn would protect the liberties of the people. "The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). This separation was a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Id. at 122.

Congress has created an administrative state that betrays this vision. Administrative agencies, once limited in number and scope, have proliferated and now assume broad powers and expansive budgets. "Independent agencies," a subset of administrative agencies, are "wholly accountable neither to the President nor to Congress." Michael Uhlmann, A Note on Administrative Agencies, in *The Heritage Guide to the Constitution*, 278 (David F. Forte & Matthew Spalding, eds. 2d ed. 2014). Although independent agencies differ in form and function, "Independence is a legal term of art in public law, referring to agencies headed by officials that the President may not remove without cause." Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1138 (2000).

The rise of independent agencies stems in large part from *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). The Court considered the character of the FTC while ruling on the President's Article II removal power. The Commission, in its view, was a body of experts, both nonpartisan and impartial. Id. at 624. Furthermore, "Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative." Id. Thus, despite explicit acknowledgement of FTC's dual branch powers, the Court upheld a restriction on the President's removal power of FTC Commissioners to "inefficiency, neglect of duty, or malfeasance in office." Id. at 620. Similar cases in the future would depend upon "the character of the office." Id. at 631. The Court's opinion helped create our current administrative state. As Professor Gary Lawson noted, the administrative state violates the separation of powers:

> The United States Congress today effectively exercises general legislative powers, in contravention of the constitutional principle of limited powers. Moreover, Congress frequently delegates that general legislative authority to administrative agencies, in contravention of Article I. Furthermore, those agencies are not always subject to the direct control of the President, in contravention of Article II. In addition, those agencies sometimes exercise the

> judicial power, in contravention of Article III. Finally, those agencies typically concentrate legislative, executive, and judicial functions in the same institution, in simultaneous contravention of Articles I, II, and III.

Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1233, April 1994.

The CFPB, an independent agency formed in the wake of the financial crisis of 2008, has all these constitutional defects. It has rulemaking power, examination authority and is authorized to conduct hearings and adjudication proceedings. 12 U.S.C. § 5512; 12 U.S.C. § 5581; 12 U.S.C. § 5563. It has power to "establish the general policies of the [CFPB] with respect to all executive and administrative functions." 12 U.S.C. § 5492(a)(10). It was granted authority to administer eighteen consumer finance statutes and assumed consumer financial protection functions from the "Board of Governors (and any Federal reserve bank, as the context requires), the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Department of Housing and Urban Development." 12 U.S.C. § 5581(a)(2)(A). In short, the CFPB exercises legislative, executive and judicial powers. It violates the separation of powers as envisioned by the framers.

II. The CFPB's structure and funding violate the separation of powers.

Even if *Humphrey's Executor* remains good law, it should not be extended to cover the separation of powers violations inherent in the CFPB's structure and funding. Congress made extraordinary effort to shield the CFPB from accountability to the Legislature and the Executive. To prevent influence from the Executive Branch, executive control of the CFPB is vested in a single person, the Director. The Director may not be removed by the President except "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). In addition, Congress granted the CFPB independence from its own Article I "power of the purse." 12 U.S.C. § 5497(a)(2)(C). The CFPB sets its own budget and draws its funds from another self-financed entity – the Federal Reserve. 12 U.S.C. § 5497(a). These factors ultimately shield the CFPB from accountability from the American people, in contravention of Madison's ideal of well-constructed government: "An independence of the three great departments of each other, as far as possible, and the responsibility of all to the will of the community." James Madison, *Notes of Debates in the Federal Convention of 1787*, 313, Ohio University Press (1985). The CFPB's structure and funding does not survive the holistic analytical approach found in *Humphrey's Executor* and its progeny.

A. The CFPB's structure improperly concentrates power in a single director with limited accountability to the Executive Branch and the people.

The Constitution provides: "The executive Power shall be vested in a President of the United States." Art. II, § 1, cl. 1. "[T]his does not mean some of the executive power, but *all* of the executive power." *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting). The President " 'shall take Care that the Laws be faithfully executed,' Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the 'Courts of Law' or by 'the Heads of Departments' who are themselves Presidential appointees), Art. II, § 2." *Printz v. United States*, 521 U.S. 898, 922 (1997). Yet, other than impeachment, the power to remove officers was not explicitly addressed in the Constitution.

In the first Congress, James Madison stated "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789). This longstanding view of the executive power was affirmed in *Myers v. United States*, 272 U.S. 52 (1926). Congress's attempt to restrict the President's removal power of postmasters with a requirement of senatorial advice and consent was struck down.[2]

[2] "Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for

In *Humphrey's Executor*, less than 10 years later, a restriction on the removal of a commissioner of the five member Federal Trade Commission was upheld due to the quasi-legislative and quasi-judicial nature of the commission. Commissioners were removable for inefficiency, neglect of duty, or malfeasance in office. The Court distinguished the FTC commissioner from the purely executive employee at issue in *Myers*. Id. at 632. It further stated: "whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause *will depend upon the character of the office.*" Id. at 631. (Emphasis added.) This analysis of the position and statutes at issue continued in later removal power cases.

In *Morrison v. Olson*, a broad "for cause" restriction was upheld where an official had "limited jurisdiction and tenure" and lacked "policymaking or significant administrative authority." Id. at 691. The Court also noted that where officials are subject to the President's removal power, courts must examine whether the statutory framework "taken as a whole . . . violates the separation of powers by reducing the President's ability to control" the use of executive power. *Morrison v. Olson*, 487 U.S. 654, 685 (1988).

In *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), the Court considered the

four years unless sooner removed or suspended according to law." Act of Congress of July 12, 1876, 19 Stat. 80, 81, ch. 179, sec. 6.

Public Company Accounting Oversight Board ("PCAOB" or "Board"), an entity created under the Sarbanes-Oxley Act of 2002. Board members could be removed only "for good cause shown" by the Securities and Exchange Commission ("SEC"). 15 U.S.C. §§ 7211(e)(6), 7217(d)(3). Officers of the SEC in turn could only be removed by the President under the *Humphrey's Executor* standard for "inefficiency, neglect of duty, or malfeasance in office." The Court held that "dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers." 561 U.S. 477, 492. Writing for the majority, Justice Roberts considered the Board's "novel structure" and the possibility that if allowed to stand, the "dispersion of responsibility" could be multiplied across government. Id. at 496, 497.

Taking the statute as a whole, there are novel aspects to the CFPB's structure and funding, such as its single directorship and its ability to draw funds from the Federal Reserve. There are multiple protections to the tenure of the CFPB Director: The Director has a five-year term; the Director may stay in office after the term is over until a successor has been appointed and qualified; and the Director may not be removed except "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c). The Director thus can outlast a sitting President and, depending on partisan control of the Senate, could stay in the post indefinitely. In addition, the Director has significant power. In then-Judge Kavanaugh's words in his dissenting opinion, "The Director enjoys significantly more unilateral power than any single member of any other independent agency. . . . Indeed, other than the President, the Director of the CFPB is the single most powerful official in the entire United States Government, at least when measured in terms of unilateral power." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 171 (D.C. Cir. 2018). If allowed to stand, Congress could create more independent agencies led by single directors with czar-like powers, protected from Presidential authority and control.

B. Congress further enhanced the CFPB's independence by allowing it to draw funding from one of the least transparent and accountable elements of the federal government: the Federal Reserve.

The CFPB is an "independent bureau" within the Federal Reserve System. 12 U.S.C. § 5491(a). Congress granted the CFPB the ability to designate up to 12 percent of the Federal Reserve's operating expenses for itself. 12 U.S.C. § 5497(a). Congress further provided that the funds derived from the Federal Reserve System are not subject to review by the House or Senate Committees on Appropriations. 12 U.S.C. § 5497(a)(2)(C). The CFPB has structural protections from the Federal Reserve as well. The Federal Reserve cannot intervene in any matter or proceeding before the Director; appoint, direct, or remove any officer or employee of the Bureau; or merge or consolidate the Bureau, or any of its functions or responsibilities with any division or office of the Board of Governors or the Federal Reserve banks. 12 U.S.C. § 5492(c)(2).

It is worth noting that the Federal Reserve System is itself extremely insulated from executive and legislative accountability, adding to the Matryoshka doll nature of the CFPB. The Federal Reserve System has three major components: the Board of Governors, the Federal Reserve Banks and the Federal Open Market Committee ("FOMC"). See Board of Governors of the Federal Reserve System, *Purposes and Functions*, September 28, 2018, https://www.federalreserve.gov/aboutthefed/pf.htm. The seven members of the Board of Governors, appointed by the President and confirmed by the Senate, each serve a remarkable 14-year term.[3] 12 U.S.C. § 241. The Chairman and Vice Chairman, chosen from among the sitting governors, are appointed by the President and confirmed by the Senate and serve four-year terms. 12 U.S.C. § 242. Twelve Federal Reserve Banks regulate privately owned banks around the country. The Governors and presidents of the Federal Reserve Banks make up the FOMC, the policy arm of the system, although only five presidents have voting rights. Thus, the Federal Reserve System has public and private elements.

[3] Although most governors do not serve their full terms, their lengthy terms were designed to prevent political interference over monetary policy. Danny Vinik, *Trump's unusual chance to stack the Fed*, Politico.com, October 31, 2017, https://www.politico.com/agenda/story/2017/10/31/trump-unusual-chance-stack-federalreserve-000567.

With these private elements, it is important to note that the Federal Reserve has *Free Enterprise Fund* issues of its own. The process for appointing Reserve Bank presidents may not meet the Article II, § 2, clause 2 requirements of the appointment of "Officers of the United States." The process for removing Reserve Bank presidents may not meet the constitutional requirements for the removal of Officers. Peter Conti-Brown, *The Case for the Federal Reserve Banks' Constitutionality is Uneasy Indeed, part II: Appointing and Removing the Reserve Bank Presidents*, 36 Yale J. on Reg.: Notice & Comment (May 18, 2016), http://yalejreg.com/nc/the-case-for-the-federal-reserve-banks-constitutionality-is-uneasy-indeed-part-ii-appointing-and-rem/. "Stating the holding in Free Enterprise Fund reveals the constitutional defect of the FOMC. The President cannot remove members of the FOMC without reaching through two explicit for-cause removal restrictions, on top of a third layer of at-will removability." Peter Conti-Brown, *Is the Federal Reserve Constitutional?*, Liberty Law Blog, September 1, 2013, https://www.lawliberty.org/liberty-forum/is-the-federal-reserve-constitutional/.

Finally, the President has limited ability to conduct financial oversight of the Director. The Director has no obligation to get approval from the Office of Management and Budget ("OMB") and the OMB has no jurisdiction or oversight over the CFPB. 12 U.S.C. § 5497(a)(4)(E). Congress increased the CFPB's independence from external control and accountability in its funding as well as its single director structure and removal protection. Thus, the CFPB enjoys many more layers of protection than the FTC of 1935. The "nature of the office" of CFPB director is beyond the scope of *Humphrey's Executor*.

CONCLUSION

In its quest to regulate consumer finance in the wake of a financial crisis, Congress has created a uniquely egregious organization, largely free from Executive Branch control or congressional financial oversight. Alexander Hamilton wrote that an independent judiciary is necessary to protect the Constitution and individual liberty from ill-conceived ideas.

> This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion *dangerous innovations in the government*, and serious oppressions of the minor party in the community.

Federalist No. 78. (Emphasis added.) Given its structure and funding, the CFPB is a dangerous innovation in the government that violates the Constitution's separation of powers. For the foregoing reasons, the Court should grant Petitioner's request for a writ of certiorari.

Respectfully submitted,

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