No. 19-7

IN THE

Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

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

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates to protect individual rights and the framework set forth to protect such rights in the Constitution. This aspect of its advocacy is reflected in the regular representation of those challenging overreaching governmental and other actions in violation of the constitutional framework. See, *e.g.*, *Util. Air Regulatory Grp.* v. *EPA*, 573 U.S. 302 (2014), and *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617 (2018). SLF also regularly files *amicus curiae* briefs with this Court about issues of agency overreach and deference. See, *e.g.*, *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019).

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, DC, and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

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[1] Both parties consented to the filing of this brief by filing blanket consents with the Clerk. 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 *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus curiae* briefs in cases that will impact small businesses.

Amici's direct interest here stems from their profound commitment to protecting America's legal heritage. That heritage includes the separation of powers enshrined in the Constitution, a vital component of the Nation's laws and a critical safeguard of liberty. This case is about a separation of powers violation based on the substantial power vested in the single Director leading the Consumer Financial Protection Bureau.

SUMMARY OF ARGUMENT

The Constitution created three co-equal branches of government to safeguard individual liberty. As the Framers recognized, the accumulation of governmental powers in a single person or entity would tend to undermine liberty and promote tyranny. The federal government was therefore structured to prevent any single person or entity from growing too powerful.

By dividing the exercise of power among the three branches, and further within each branch, the constitutional framework favors friction over raw efficiency. This friction serves a useful purpose. Because it provides each branch with an institutional basis for defending its own prerogatives from infringement by the others, the tripartite structure discourages the concentration of power and thus supports individual liberty.

During the 20th century, however, the federal government began creating "independent agencies," distinct in form from traditional Executive Branch agencies. Each is typically headed by multiple commissioners who are appointed by the President but cannot be removed at will by the President. These commissioners typically serve for fixed, staggered terms (meaning that a new President cannot replace the whole commission at once but can fill some seats on it). These commissions typically have limitations on how many members of a given political party may sit on the commission at a time. And their multi-member structures ensure these commissions will discuss potential actions and move forward only with a majority or consensus decision.

More recently, Congress created a new type of agency in the Consumer Financial Protection Bureau. This CFPB has only a single Director. 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 Branches 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 already 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. The CFPB cannot be sustained in its current form, as its unconstitutional structure eviscerates structural protections of individual liberty.

ARGUMENT

I. THE SEPARATION OF POWERS ACTS AS AN ESSENTIAL SAFEGUARD OF INDIVIDUAL LIBERTY

When the Framers crafted our government under the Constitution, they recognized that individual liberty could be most effectively protected through a diffuse power structure. The Constitution embodies this principle by apportioning the federal government's power among three separate branches, and further within those branches, to secure liberty under the law.

James Madison explicitly acknowledged the intended connection between the separation of powers and individual liberty. In Federalist No. 47, he quoted with approval Montesquieu's maxim that "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates"—and where "the power of judging be not separated from the legislative and executive powers." The Federalist No. 47, at 298 (Madison) (Clinton Rossiter ed., Signet Classics 2003); see 1 Charles de Secondat Montesquieu, *The Complete Works of M. de Montesquieu* 199 (London: T. Evans, 1777). Madison was explaining how, contrary to critics' arguments, the Constitution would in fact provide for the separation of powers, an "essential precaution in favor of liberty." The Federalist No. 47, at 298 (Madison).

"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 the Constitution. The purpose of the separation of powers principle is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J., concurring) (quoting *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)). "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).

The Constitution further aimed to secure the individual liberty interest as it relates to each branch of government. In structuring the Legislative Branch, the Framers included two separate bodies, each with numerous members chosen by distinct constituencies and processes, which provides both a diversity of opinions and accountability. See The Federalist Nos. 61-62, at 370-380 (Hamilton; Madison) (discussing the House of Representatives and Senate).

The Executive Power, conversely, was placed in a single individual rather than a small group, because the Framers believed that liberty from executive overreach would be better protected by making it impossible to conceal the person ultimately responsible for any "pernicious measures." The Federalist No. 70 (Hamilton). The Framers ensured the President was accountable to the People by requiring a national election for President through the Electoral College; this makes the President dependent on the "the sense of the people" for his office. The Federalist No. 68 (Hamilton); see *Myers*, 272 U.S. at 123 ("[T]he President, elected by all the people, is rather more representative of them all

than are the members of either body of the Legislature * * * .").

The Judiciary under Article III, in contrast, does not directly incorporate democratic accountability. Instead, the courts are constrained to decide only "cases" and "controversies," rather than opining on broader issues that are outside "the proper—and properly limited—role of the courts in a democratic society." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (quoting *Allen* v. *Wright*, 468 U.S. 737, 750 (1984)). Impartial judges, too, play a significant role in safeguarding individual liberty, because impartiality "promot[es] [ ] participation and dialogue by affected individuals in the decisionmaking process." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citation omitted).

Consequently, "[s]eparation of powers and federalism form the fundamental matrix or Euclidian plane of our constitutional law." Martin H. Redish & Elizabeth J. Cisar, *If Angels Were to Govern: The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L.J. 449, 450 n.8 (1991) (quoting Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 Soc. Phil. & Pol'y 196 (1991)). "In structuring their unique governmental form, the Framers sought to avoid undue concentrations of power by resort to institutional devices designed to foster three political values: checking, diversity, and accountability." *Id.* at 451.

Under these principles, any action taken by one branch of the federal government that encroaches upon the constitutionally assigned functions of another branch presents a fundamental threat to the preservation of liberty. "Political liberty * * * is there only when there is no abuse of power." 1 Montesquieu 197. Montesquieu warned that the consolidation of legislative and executive powers endangered

liberty, due to the risk that "the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." *Id.* at 199. Combining the judicial power with others would raise similar concerns. Under a combined judicial-legislative power, Montesquieu argued, "the life and liberty of the subject would be *exposed to arbitrary control*"; alternatively, a judge with executive power "might behave with violence and oppression." *Ibid.* (emphasis added). Madison would later quote these passages to "sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author." The Federalist No. 47, at 300.

Time and again, from the Constitutional Convention to our own time, the proper separation of powers has gone hand-in-hand with the protection of individual liberty. From 1787: "In a government, where the liberties of the people are to be preserved * * * the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other." Charles Pinckney, *Observations on the Plan of Government, Submitted to the Federal Convention of May 28, 1787*, *reprinted in* 3 M. Farrand, *Records of the Federal Convention of 1787* at 108 (rev. ed. 1966); see also The Federalist Nos. 47-51, at 297-322 (Madison) (explaining and defending the Constitution's structural design of separated powers). And in 1998: "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton* v. *New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); see *id.* at 447 (opinion for the Court) (invalidating the line-item veto as unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes").

This Court has recognized that "[it has] not yet found a better way to preserve freedom than by making the

exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *INS* v. *Chadha*, 462 U.S. 919, 959 (1983) (holding legislative veto violates separation of powers). In his *Chadha* concurrence, Justice Powell took this idea a step further, acknowledging outright that—even if Congress were correct in arguing that the "legislative veto" at issue there did not infringe on the power of the executive—"it does not address the concern that the Congress is exercising unchecked judicial power *at the expense of individual liberties*. It was precisely to prevent such arbitrary action that the Framers adopted the doctrine of separation of powers." *Id.* at 963 n.4 (Powell, J., concurring) (emphasis added).

This Court has acknowledged the inextricable link between the separation of powers and preserving liberty. For example, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833 (1986), explained that the judicial independence contemplated by Article III and mandated by the separation of powers doctrine helped protect "primarily personal, rather than structural, interests." *Id.* at 848. To this end, the Court engaged in an analysis of the personal interests at stake to find no due process concern because the interested party voluntarily subjected himself to the agency's jurisdiction. *Id.* at 848-850. See also *Stern*, 564 U.S. at 483 ("Article III protects liberty * * * through its role in implementing the separation of powers."); cf. *Bond* v. *United States*, 564 U.S. 211, 222 (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

Thus, while the specific mechanisms for preserving liberty depend on the functions at issue (legislative, executive, or judicial), the principle is the same: The separation of powers exists in large part to protect individual liberty,

and infringements on the separation of powers must be assessed with that in mind.

II. The CFPB Undermines Individual Liberty, Because It Lacks Structural Features Present in Executive Agencies and Other Independent Agencies

When Congress created the CFPB, it ignored the separation of powers and the usual system of checks and balances. And it made no effort to include potentially liberty-protective structural features included with previous agencies Congress has created. The CFPB is therefore an unconstitutional agency because it lacks any of the accountability or limitations necessary to protect individual 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 is a shield against the tyranny the Framers feared.

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 is his authority to remove executive officers. *Ibid*. This removal authority allows the President to hold his subordinates accountable. The President, in turn, is directly accountable to the 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 The 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 People his decision not to do so.

2. The "independent agencies," as distinguished from the more conventional executive agencies, still include notable structural features that the CFPB lacks.

Humphrey's Executor v. *United States*, 295 U.S. 602 (1935), 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 this Court's approval of the FTC's structure, many more agencies and commissions have been created that mimic that Commission's independence from the traditional check of the President's removal authority.

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 over time as

commissioners' terms expire. See *PHH Corp.*, 881 F.3d at 190 (Kavanaugh, J., dissenting).

For some agencies, the President can further influence the agency's direction through his designation of, and removal from, the chair position—which may hold substantial control over the agency's day-to-day operations and the commission's agenda. *Id.* at 189 & n.15 (Kavanaugh, J., dissenting) (identifying 13 examples of agencies for which the President "unilaterally designates" the chair, including the FTC, the FCC, and FERC) (citing Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 818 (2013)).

Many independent agencies also have express limits on their partisan composition. To take just two examples, the FTC and the Federal Energy Regulatory Commission each have 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 agencies act. One commentator has explained that bipartisan boards can improve deliberation, discourage the adoption of extreme positions, and increase the possibility of a formal dissent acting as a "'fire alarm' that alerts Congress and the public at large that the agency's decision might merit closer scrutiny." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 41 (2010).

Finally, but perhaps most relevant to this case, virtually all independent agencies are headed by multi-member commissions that can act only by majority vote. See *PHH Corp.*, 881 F.3d at 173, 183-184 (Kavanaugh, J., dissenting). Requiring that a decision gain support from a

majority of commissioners, presumably after a deliberative process, limits the amount of harm one rogue commissioner can do.

3. The CFPB, by contrast, fits neither the traditional executive branch framework nor the independent agency model. The President lacks the authority to remove the Bureau's Director at will. And because the Bureau is led by a single Director, it is missing the features of staggered terms, partisan balance, and collegial decisionmaking present in the independent agencies following the model upheld by *Humphrey's Executor*. The CFPB's anomalous structure therefore cannot be squared with this Court's precedent or the protection of individual liberty.

Just as in *Free Enterprise Fund*, the CFPB's "novel structure," one lacking "any historical analogues," provides strong evidence of a constitutional problem. 561 U.S. at 505. 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." The Federalist No. 47.

That combination of powers is present in the CFPB 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.*

The CFPB Director also promulgates regulations and conducts investigations, among other powers. See, *e.g.,* 12 U.S.C. §§ 5562, 5581(a)(1)(A). This is a massive accumulation of sweeping governmental power. 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.").

The CFPB Director may be even more powerful than the President in this context. The President and his Executive 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 for its first dollar.

So the CFPB wields substantial power exercised by fiat of a single, almost unreviewable, virtually unremovable Director. The CFPB 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 fund itself and its operations.

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 chair even under the *Humphrey's Executor* independent agency model. See *PHH Corp.*, 881 F.3d at 189 n.15 (Kavanaugh, J., dissenting). 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 commission 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 multimember body, at least some of the commissioners, and possibly the chair, 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 any day-to-day political pressure. 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").

Congress violated the Constitution by granting the single CFPB Director an unprecedented amount of independence from the political branches. Neither the Director nor anyone else in the Director's "chain of command" can be held accountable by the voters for the Director's actions. And unlike the *Humphrey's Executor* independent agency model, the CFPB Director does not share control with others who might raise alternative, moderating views or who might alert elected officials and the public to attempted overreach.

The CFPB's structure is inconsistent with the Constitution's separation of powers. It does not include the types of structural protections that other independent agencies have had, and this significantly undermines individual liberty. As currently constituted, the CFPB is unconstitutional and cannot be sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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