No.

In the Supreme Court of the United States

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THOMAS H. BIENERT, JR.
ANTHONY BISCONTI
BIENERT KATZMAN PC
903 Calle Amanecer, Suite 350
San Clemente, CA 92673

KANNON K. SHANMUGAM
Counsel of Record
MASHA G. HANSFORD
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

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.

CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases—continued:

Constitution, statutes, and regulation:

Page

Page

Miscellaneous—continued:

In the Supreme Court of the United States

No.

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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).

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.
>
> * * *
>
> (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.

* * *

(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

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

"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 Fed-

eral 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-

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

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

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 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.

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.

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.

---

[*] 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.

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 consti-

tutes 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.

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 valid-

ity 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 Executor* v. *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. Boyden 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, *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

"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.

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,

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

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).

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*

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[]

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

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.

THOMAS H. BIENERT, JR.
ANTHONY BISCONTI
BIENERT KATZMAN PC
903 Calle Amanecer,
Suite 350
San Clemente, CA 92673

KANNON K. SHANMUGAM
MASHA G. HANSFORD
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

JUNE 2019

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-56324

CONSUMER FINANCIAL PROTECTION BUREAU
Petitioner-Appellee

v.

SEILA LAW LLC,
Respondent-Appellant

Filed: May 6, 2019

Before: GRABER and WATFORD, Circuit Judges, and ZOUHARY,[*] District Judge.

OPINION

WATFORD, Circuit Judge.

The Consumer Financial Protection Bureau (CFPB) is investigating Seila Law LLC, a law firm that provides a wide range of legal services to its clients, including debt-relief services. The CFPB is seeking to determine

[*] The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

whether Seila Law violated the Telemarketing Sales Rule, 16 C.F.R. pt. 310, in the course of providing debt-relief services to consumers. As part of its investigation, the CFPB issued a civil investigative demand (CID) to Seila Law that requires the firm to respond to seven interrogatories and four requests for documents. *See* 12 U.S.C. § 5562(c)(1). After Seila Law refused to comply with the CID, the CFPB filed a petition in the district court to enforce compliance. *See* § 5562(e)(1). The district court granted the petition and ordered Seila Law to comply with the CID, subject to one modification that the CFPB does not contest. Seila Law challenges the district court's order on two grounds, both of which we reject.

I

Seila Law's main argument is that the CFPB is unconstitutionally structured, thereby rendering the CID (and everything else the agency has done) unlawful. Specifically, Seila Law argues that the CFPB's structure violates the Constitution's separation of powers because the agency is headed by a single Director who exercises substantial executive power but can be removed by the President only for cause. The arguments for and against that view have been thoroughly canvassed in the majority, concurring, and dissenting opinions in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). We see no need to re-plow the same ground here. After providing a summary of the CFPB's structure, we explain in brief why we agree with the conclusion reached by the *PHH Corp.* majority.

Congress created the CFPB in 2010 when it enacted the Consumer Financial Protection Act, 12 U.S.C. §§ 5481-5603. The Act confers upon the CFPB a broad array of powers to implement and enforce federal con-

sumer financial laws, with the overarching goals of "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a). The agency's powers include, among other things, the authority to promulgate rules (§ 5512), conduct investigations (§ 5562), adjudicate administrative enforcement proceedings (§ 5563), and file civil actions in federal court (§ 5564). Congress classified the CFPB as "an Executive agency" and chose to house it within the Federal Reserve System. § 5491(a).

The CFPB is led by a single Director appointed by the President with the advice and consent of the Senate. § 5491(b). The Director serves for a term of five years that may be extended until a successor has been appointed and confirmed. § 5491(c)(1)-(2). The Director may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." § 5491(c)(3). A provision of this sort is commonly referred to as a "for cause" restriction on the President's removal authority.

Seila Law contends that an agency with the CFPB's broad law-enforcement powers may not be headed by a single Director removable by the President only for cause. That argument is not without force. The Director exercises substantial executive power similar to the power exercised by heads of Executive Branch departments, at least some of whom, it has long been assumed, must be removable by the President at will. The Supreme Court's separation-of-powers decisions, in particular *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988), nonetheless lead us to conclude that the CFPB's structure is constitutionally permissible.

In *Humphrey's Executor*, the Court rejected a separation-of-powers challenge to the structure of the Federal Trade Commission (FTC), an agency similar in character to the CFPB. The petitioner in that case argued that the FTC's structure violates Article II of the Constitution because the agency's five Commissioners, although appointed by the President with the advice and consent of the Senate, may be removed by the President only for cause. The Court rejected that argument, relying heavily on its determination that the agency exercised mostly quasi-legislative and quasi-judicial powers, rather than purely executive powers. 295 U.S. at 628, 631-32. The Court reasoned that it was permissible for Congress to decide, "in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control." *Id.* at 629. The for-cause removal restriction at issue there, the Court concluded, was a permissible means of ensuring that the FTC's Commissioners would "maintain an attitude of independence" from the President's control. *Id.*

This reasoning, it seems to us, applies equally to the CFPB, whose Director is subject to the same for-cause removal restriction at issue in *Humphrey's Executor*. Like the FTC, the CFPB exercises quasi-legislative and quasi-judicial powers, and Congress could therefore seek to ensure that the agency discharges those responsibilities independently of the President's will. In addition, as the *PHH Corp*. majority noted, the CFPB acts in part as a financial regulator, a role that has historically been viewed as calling for a measure of independence from Executive Branch control. 881 F.3d at 91-92.

To be sure, there are differences between the CFPB and the FTC as it existed when *Humphrey's Executor* was decided in 1935. The Court's subsequent decision in *Morrison v. Olson*, however, precludes us from relying on

those differences as a basis for distinguishing *Humphrey's Executor*.

The most prominent difference between the two agencies is that, while both exercise quasi-legislative and quasi-judicial powers, the CFPB possesses substantially more executive power than the FTC did back in 1935. But Congress has since conferred executive functions of similar scope upon the FTC, and the Court in *Morrison* suggested that this change in the mix of agency powers has not undermined the constitutionality of the FTC. *See Morrison*, 487 U.S. at 692 n.31. Indeed, in *Morrison* the Court upheld the constitutionality of a for-cause removal restriction for an official exercising one of the most significant forms of executive authority: the power to investigate and prosecute criminal wrongdoing. And more recently, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Court left undisturbed a for-cause removal restriction for Commissioners of the Securities and Exchange Commission, who are charged with overseeing a board that exercises "significant executive power." *Id.* at 514.

The other notable difference between the two agencies is that the CFPB is headed by a single Director whereas the FTC is headed by five Commissioners. Some have found this structural difference dispositive for separation-of-powers purposes. See *PHH Corp.*, 881 F.3d at 165-66 (Kavanaugh, J., dissenting). But as the *PHH Corp.* majority noted, *see id.* at 98-99, the Supreme Court's decision in *Humphrey's Executor* did not appear to turn on the fact that the FTC was headed by five Commissioners rather than a single individual. The Court made no mention of the agency's multi-member leadership structure when analyzing the constitutional validity of the for-cause removal restriction at issue. See *Humphrey's Executor*, 295 U.S. at 626-31. And the Court's subsequent decision in

Morrison seems to preclude drawing a constitutional distinction between multi-member and single-individual leadership structures, since the Court in that case upheld a for-cause removal restriction for a prosecutorial entity headed by a single independent counsel. 487 U.S. at 696-97; *see PHH Corp.*, 881 F.3d at 113 (Tatel, J., concurring). As the *PHH Corp.* majority noted, if an agency's leadership is protected by a for-cause removal restriction, the President can arguably exert more effective control over the agency if it is headed by a single individual rather than a multi-member body. *See* 881 F.3d at 97-98.

In short, we view *Humphrey's Executor* and *Morrison* as controlling here. Those cases indicate that the for-cause removal restriction protecting the CFPB's Director does not "impede the President's ability to perform his constitutional duty" to ensure that the laws are faithfully executed. *Morrison*, 487 U.S. at 691. The Supreme Court is of course free to revisit those precedents, but we are not.

II

Seila Law next argues that the CFPB lacked statutory authority to issue the CID. It asserts two separate grounds in support of this argument.

First, Seila Law contends that the CID violates the Consumer Financial Protection Act's practice-of-law exclusion. That exclusion provides, with important exceptions, that the CFPB "may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law." 12 U.S.C. § 5517(e)(1). Seila Law argues that the CID is invalid because it requests information related to Seila Law's activities in providing legal services

to its clients. Specifically, the CID seeks information relevant to determining whether Seila Law has violated the Telemarketing Sales Rule "in the advertising, marketing, or sale of debt relief services or products, including but not limited to debt negotiation, debt elimination, debt settlement, and credit counseling."

The district court correctly held that one of the exceptions to § 5517(e)(1)'s practice-of-law exclusion applies here. Section 5517(e)(3) states: "Paragraph (1) shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent that such attorney is otherwise subject to any of the enumerated consumer laws or the authorities transferred under subtitle F or H." Subtitle H empowers the CFPB to enforce the Telemarketing Sales Rule, 16 C.F.R. pt. 310, a consumer law that does not exempt attorneys from its coverage even when they are engaged in providing legal services. *See* 15 U.S.C. § 6102; Telemarketing Sales Rule, 75 Fed. Reg. 48,458-01, 48,467-69 (Aug. 10, 2010). The CFPB thus has the authority to investigate whether Seila Law is violating the Telemarketing Sales Rule, without regard to the general practice-of-law exclusion stated in § 5517(e)(1).

Second, Seila Law contends that the CID violates 12 U.S.C. § 5562(c)(2), which provides that "[e]ach civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." The CID at issue here fully complies with this provision. It identifies the allegedly illegal conduct under investigation as follows: "whether debt relief providers, lead generators, or other unnamed persons are engaging in unlawful acts or practices in the advertising, marketing, or sale of debt relief services or products, including but not limited to debt negotiation, debt elimination, debt settlement, and credit counseling." The CID also identifies the provision

of law applicable to the alleged violation as "Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; 12 U.S.C. § 5481 et seq., the Telemarketing Sales Rule, 16 C.F.R. § 310.1 et seq., or any other Federal consumer financial law." That information suffices to put Seila Law on notice of the nature of the conduct the CFPB is investigating, and it is not so general as to raise vagueness or overbreadth concerns. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 17-1081

CONSUMER FINANCIAL PROTECTION BUREAU,
Petitioner,

v.

SEILA LAW, LLC,
Respondent.

Filed: August 25, 2017

ORDER GRANTING IN PART PETITION TO ENFORCE CIVIL INVESTIGATIVE DEMAND

STANTON, United States District Judge.

Before the Court is the Consumer Financial Protection Bureau's (CFPB) Petition to Enforce Civil Investigative Demand. (Pet., Doc. 1.) Respondent Selia Law, LLC, has submitted an Opposition (Opp'n, Doc. 20), and the CFPB has filed a Reply (Reply, Doc. 21). After carefully reviewing the papers, the Court GRANTS IN PART the Petition.

I. BACKGROUND

On February 27, 2017, the CFPB issued a Civil Investigative Demand to Seila Law, LLC, which included a notification of purpose, indicating:

> The purpose of this investigation is to determine whether debt relief providers, lead generators, or other unnamed persons are engaging in unlawful acts or practices in the advertising, marketing, or sale of debt relief services or products, including but not limited to debt negotiation, debt elimination, debt settlement, and credit counseling, in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 USC §§ 5531, 5536; 12 U.S.C. § 5481 et seq., the Telemarketing Sales Rule, 16 C.F.R. § 310.1 et seq., or any other Federal consumer financial law. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

(CID, Exh. 1, Doc. 1-2.) On March 19, 2017, Seila Law filed a petition to set aside or modify the Civil Investigative Demand (Pet. Set Aside, Exh. 5, Doc. 20-1), which the CFPB Director denied on April 10, 2017 (CFPB Decision, Exh. 2, Doc. 1-2). The decision ordered Seila Law to "produce all responsive documents, items, and information within its possession, custody, or control that are covered by the CID" within ten days. (*Id.* at 5.) Seila Law asked for extension of time to comply with the CID, which the CFPB granted. (Singelmann Decl. ¶ 9, Doc. 1-2.)

On April 27, 2017, Seila Law submitted its response to the CID. (*Id.* ¶ 10.) A week later, the CFPB sent Seila Law a letter claiming that Seila Law's response improperly asserted general objections, failed to provide a privilege log for claims of attorney-client and attorney work

product privilege, raise untimely claims of privilege, withheld relevant documents based on assertions of "confidentiality," and otherwise provided incomplete or deficient responses. (CFPB May 4 Letter, Exh. 3. Doc. 1-2.) Seila Law responded in a letter dated May 22, 2017, challenging the "the enforceability of the CID" and "declin[ing] the CFPB's request at this time to provide further information or documents in response to the CID." (Seila Law Letter May 22, Exh. 4, Doc. 1-2.) In response, the CFPB filed in this Petition to Enforce its Civil Investigative Demand. (Pet., Doc. 1.)

II. LEGAL STANDARD

"To determine whether to enforce an administrative subpoena, a court consideres '[1] whether Congress has granted the authority to investigate; [2] whether procedural requirements have been followed; and [3] whether the evidence is relevant the material to the investigation.'" *CFPB v. Future Income Payments, LLC*, No. 8:17-CV-00303-JLS-SS, 2017 WL 2190069, at *2 (C.D. Cal. May 17, 2017) (quoting *EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc), *overruled on other grounds as recognized in Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994)). If the agency has satisfied these "narrow" requirements, a court should enforce an administrative subpoena unless the respondent can demonstrate that compliance would pose an undue burden. *Id.*; *Children's Hosp. Med. Ctr. of N. California*, 719 F.2d at 1428. In response to a petition to enforce an administrative subpoena, a subpoenaed party is free to raise any constitutional challenges, which this Court reviews a plenary basis. *Future Income Payments*, 2017 WL 2190069, at *2.

III. DISCUSSION

Selia Law objects to the enforcement of the CFPB's Civil Investigative Demand because, it asserts, (1) the CFPB is unconstitutionally structured, (2) the notification of purpose is inadequate, (3) the CFPB's practice of law exclusion would preclude any enforcement action, and (4) the CID is overly broad and seeks privileged information.[1] (Opp'n 10-16.) The court considers each argument in turn.

A. CFPB's Constitutionality

In *CFPB v. Morgan Drexen* and *CFPB v. Future Income Payments*, this Court addressed the same constitutional challenges that Seila Law raises. *See Future Income Payments*, 2017 WL 2190069, at *6-9; *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1086-92 (C.D. Cal. 2014). Like the respondent in *Future Income Payments*, Seila Law relies heavily on the arguments advanced in *PHH Corp v. CFPB*, a vacated 2-1 decision from the D.C. Circuit that this Court continues to find unpersuasive. (*See* Opp'n at 3-7.) Notably, the *PHH* majority acknowledged, "'there is no meaningful difference in responsiveness and accountability to the President' between an agency headed by a commission and a director." *Future Income Payments*, 2017 WL 2190069, at *7 (quoting *PHH*, 839 F.3d at 32). "That is enough to end the inquiry" because the controlling standard enunciated in *Morrison v. Olson* is whether the CFPB Director's for-cause protection from removal "'interfere[s] with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully ex-

[1] The Court does not separately consider Seila Law's fleeting Fourth and Fifth Amendment objections because they are entirely derivative of its other arguments. (*See* Opp'n at 8.)

ecuted' under Article II.'" *Id.* (quoting *Morrison v. Olson*, 487 U.S. 654, 690 (1988)). Even if *Morrison* were not controlling, there is no meaningful constitutional distinction that could be drawn between the CFPB and other director-led independent agencies, such as the Social Security Administration, and no "empirical evidence . . . establishes the superiority of either" director or multimember-led independent agencies. *Id.* at *5-8.

To the extent that Seila Law argues that the CFPB is unconstitutionally structured because the agency receives funding outside of the annual Congressional appropriations process (Opp'n at 7), the CFPB is no different than several other financial regulators, such as the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation. *See* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev. Banking & Fin. L. 321, 343 (2013). In fact, unlike these other agencies, the CFPB's non-appropriated budget is capped by statue. *See id.* Further, "[t]he Appropriations Clause 'does not in any way circumscribe Congress from creating self-financing programs . . . without first appropriating the funds as it does in typical appropriation and supplement appropriation acts." *Morgan Drexen*, 60 F. Supp. 3d at 1089 (quoting *AINS, Inc. v. United States*, 56 Fed.Cl.522, 539 (Fed. Cl. 2003), *aff'd*, 365 F.3d 1333 (Fed. Cir. 2004), *abrogated on other grounds by Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2011)). *Accord Am. Fed'n of Gov't Employees, AFL-CIO, Local 1647 v. Fed. Labor Relations Auth.*, 388 F.3d 405, 409 (3d Cir. 2004) ("Congress itself may choose . . . to loosen its own reins on public expenditure. . . . Congress may also decide not to finance a federal entity with appropriations.").

Even assuming that *Morrison* were not controlling *and* an independent agency could not be constitutionally

headed by a director, the proper remedy would not be to refuse to enforce the CID. *Future Income Payments*, 2017 WL 2190069, at *9. In *Buckley v. Valeo*, for example, the Supreme Court held that the process for appointing commissioners to the Federal Election Commission trammeled upon the President's Appointments Power. 424 U.S. 1, 140 (1976). Yet, the Court held, "[i]nsofar as the powers confided in the Commission are essentially of an investigative and informative nature" the agency may execute them because Congress may properly establish offices that "perform duties . . . in aid of those functions that Congress may carry out by itself." *Id.* at 138-39. Because Congress unquestionably wields the subpoena power, *see e.g., Eastland v. U.S. Servicemen's Fund*, 421 U.S. 419, 504 (1975), the CFPB may lawfully execute this authority as well. *Future Income Payments*, 2017 WL 2190069, at *9; *see In re Application of President's Comm'n on Organized Crime*, 763 F.2d 1191, 1201-02 (11th Cir. 1985) (Fay, J., writing separately).

B. Notification of Purpose

Seila Law further protests that the CID fails to provide sufficient notice about the purpose and contours of the CFPB's investigation. (Opp'n at 9-10.) As recounted already, the CID's notification of purpose provides:

> The purpose of this investigation is to determine whether debt relief providers, lead generators, or other unnamed persons are engaging in unlawful acts or practices in the advertising, marketing or sale of debt relief services or products, including but not limited to debt negotiation, debt elimination, debt settlement, and credit counseling, in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 USC §§ 5531, 5536; 12 U.S.C. § 5481 et seq., the Telemarketing Sales Rule, 16 C.F.R. § 310.1

> et seq., or any other Federal consumer financial law. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

(CID, Exh. 1.)

"The authority of an administrative agency to issue subpoenas for investigatory purposes is created solely by statute." *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 753 (9th Cir. 1993) (quoting *Peters v. United States*, 853 F.2d 692, 696 (9th Cir.1988)). Section 5562, which empowers the CFPB to issue civil investigative demands, provides that "[e]ach civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." 12 U.S.C. § 5562(c)(2). The CFPB's implementing regulation likewise provides that a subpoenaed person "shall be advised of the nature of the conduct constituting the alleged violation that is under investigation and the provisions of law applicable to such violation." 12 C.F.R. § 1080.5. Yet, like every other administrative agency, the CFPB can define the contours of its investigation "quite generally" while still complying with its statutory obligations. *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088, 1090 (D.C. Cir. 1992); *see FTC v. Carter*, 636 F.2d 781, 784, 787-89 (D.C. Cir. 1980) (approving of a very broad notification of purpose); *FTC v. Texaco, Inc.*, 555 F.2d 862, 868, 874, & n. 26 (D.C. Cir. 1977) (same).

A few examples illustrate when an agency crosses from defining the scope of its investigation broadly, which it may do, to violating its statutory notice requirements. In *Peters v. United States*, the Ninth Circuit held that, although the Immigration and Naturalization Service had a "broad subpoena and investigatory authority," it could not

issue so-called "John Doe" subpoenas, which demand information about unknown targets of an investigation from third parties. 853 F.2d 692, 696-99 (9th Cir. 1988). Similarly, in *In re Sealed Case (Admin. Subpoena)*, the D.C. Circuit affirmed the district court's determination that the Office of Thrift Supervision could seek information for two stated purposes, but determined that the agency had no authority to demand information for a third proffered purpose, namely to determine whether the targets of the investigation committed "other wrongdoing, as yet unknown." 42 F.3d 1412, 1415-19 (D.C. Cir. 1994). More recently, in *CFPB v. Accrediting Council for Independent Colleges & Schools*, the D.C. Circuit held that a notification of purpose stating that "the purpose of this investigation is to determine whether any entity or person has engaged or is engaging in unlawful acts and practices in connection with accrediting for-profit colleges" failed to identify adequately the conduct subject to the investigation. 854 F.3d 683, 690 (D.C. Cir. 2017). The D.C. Circuit reaffirmed that "a notification of purpose may use broad terms to articulate an investigation's purpose[,]" but found that "§ 5562(c)(2) mandates that the Bureau provide the recipient of the CID with sufficient notice as to the nature of the conduct and the alleged violation under investigation." *Id.* The notification of purpose provided no clue about what "unlawful acts and practices" were under investigation. *Id.* This shortcoming made it impossible to determine what the CFPB was investigating or whether any investigation was within the scope of its statutory authority. *Id.* at 690-91.

Seila Law cleverly uses ellipses to suggest that the CID's notification of purpose provides no clue about the nature of the CFPB's investigation other than that the agency seeks "to determine whether . . . unnamed persons

are engaging in unlawful acts or practices in the advertising, marketing, or sale of debt relief services or products . . . in violation of . . . any other Federal consumer financial law." (Opp'n at 9-10.) But what Seila Law omits through ellipses provides the fair notice that it supposedly seeks. The CID identifies specific types of businesses under investigation ("debt relief providers" and "lead generators"), the conduct subject to investigation ("advertising, marketing, or sale of debt relief services or products, including but not limited to debt negotiation, debt elimination, debt settlement, and credit counseling"), and specific statues and regulations that may have been violated (such as the Telemarketing Sales Rule, 16 C.F.R. § 310.1 *et seq.*). Seila Law's argument reduces to arguing that an administrative agency cannot use more general categories at the end of lists in a notification of purpose. That, however, is not the law. The D.C. Circuit has long affirmed the use of such phrasing, *see, e.g., Texaco, Inc.*, 555 F.2d at 868 (approving of a notification of purpose that listed certain companies and then included the more general phrase "other persons and corporations"), and *Accrediting Council for Independent Colleges & School* held simply that a notification of purpose cannot include *only* broad catch-alls. Indeed, under the *ejusdem generis* and *noscitur a sociis* canons of construction, the broader categories included in this CID are limited based on the other items included in the lists. And unlike in *Peters*, the CFPB is not seeking to enforce a John Doe subpoena; the CFPB seeks information *about* Seila Law *from* Seila Law. Accordingly, Seila Law's contention that the CID's notification of purpose is inadequate lacks merit.

C. Practice of Law Exclusion

Seila Law next contends the CFPB's practice of law exclusion would bar any enforcement action against it.

(Opp'n at 10-14.) This court recently rejected this argument in the related case *CFPB v. Howard*. *See* Order Denying Defendants' Motion to Dismiss at 5-8, Doc. 42, Case No. 8:17-cv-00161-JLS-JEM (May 26, 2017). To summarize, section 5517(e)(3) ("Paragraph 3") provides that the Consumer Financial Protection Act's general prohibition against the CFPB regulating the practice of law "shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent that such attorney is otherwise subject to any of the enumerated consumer laws or the authorities transferred under subtitle F or H." 12 U.S.C. § 5517(e)(3). Section 1100C in subtitle H of the Consumer Financial Protection Act empowers the CFPB to enforce the Telemarketing Sales Rule, a regulation promulgated by the FTC that does not contain an exception for those engaged in the practice of law. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1100C, 124 Stat. 1376, 2111 (2010); *see also* Telemarketing Sales Rule, 75 Fed. Reg. 48458, 48467-69 (Aug. 10, 2010) (declining to make an exception for the practice of law in the TSR amendments). As such, the practice of law exclusion does not bar the CFPB from enforcing the Telemarketing Sales Rule against Seila Law. *See FTC v. Lainer Law, LLC*, 194 F. Supp. 3d 1238, 1283 (M.D. Fla. 2016). While Seila Law references a district court that adopted a contrary interpretation based on policy concerns (Opp'n at 12-13), this Court opts instead to follow the plain meaning of Paragraph 3, which unmistakably empowers the CFPB to take enforcement actions against attorneys under the transferred authorities insofar as those transferred authorities implicate the practice of law. Congress included the practice of law exclusion to ensure that the CFPB did not employ its general authority over unfair, deceptive,

and abusive practices to regulate the practice of law. Order Denying Defendants' Motion to Dismiss at 7, Doc. 42, Case No. 8:17-cv-00161-JLS-JEM (May 26, 2017). But, to the extent that Congress enacted other statutes that already affect the legal field, nothing in the practice of law exclusion suggests Congress intended a massive curtailment of federal enforcement authority. *Id.*

Seila Law's contrary interpretation—that Paragraphs 3 merely means that "an attorney is not exempt from enforcement by the CFPB merely because his or her status as an attorney . . . ." (Opp'n at 13)—would render it entirely superfluous because section 5517(e)(2) ("Paragraph 2") already accomplishes this. *See* 12 U.S.C. § 5517(e)(2) (allowing the CFPB to regulate attorneys' provision of covered products that are "not offered or provided as part of, or incidental to, the practice of law" or that are provided to a consumer "who is not receiving legal advice or services from the attorney in connection with such financial product or service"). "A cardinal principle of statutory construction" teaches that "a statue ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Paragraph 3 offers a classic instance where the canon against surplusage should be applied: Seila Law's construction would mean, quite improbably, that Congress fashioned an entirely redundant statutory provision immediately following the provision that would render that provision redundant. Because courts should resist ascribing that odd statutory drafting to Congress and plain language supports the CFPB's construction, the Court concludes that the practice of law exclusion would not bar an enforcement action by the agency.

D. Overbreadth and Vagueness

Seila Law finally challenges a few of the CID's interrogatories and requests for documents as overbroad or vague. (Opp'n at 14-16.) The CFPB responds that Seila Law has waived these arguments, and that the CID seeks only relevant information. (Reply at 13-16.)

"Courts 'generally will not entertain a challenge to a subpoena that was not first brought before the [administrative agency].'" *NLRB v. Uber Techs., Inc.*, 216 F. Supp. 3d 1004, 1007 (N.D. Cal. 2016) (quoting *NLRB v. Fresh & Easy Neighborhood Mkt., Inc.*, 805 F.3d 1155, 1159 (9th Cir. 2015)). This administrative exhaustion requirement "is grounded in important prudential considerations, such as providing an agency with the opportunity to correct its mistakes before it is haled into court and ensuring that parties do not employ judicial review to weaken an agency's administrative processes." *Seraji v. Gowadia*, No. 8:16-CV-01637-JLS-JCG, 2017 WL 2628545, at *3 (C.D. Cal. Apr. 28, 2017) (Staton, J.); *see Fresh & Easy Neighborhood Mkt., Inc.*, 805 F.3d at 1159 (noting that the exhaustion requirement reflects "deference to the Board's interest and expertise in managing the cases before it"). Courts have excused a subpoenaed party's failure to exhaust its administrative remedies where it raises a constitutional challenge or identifies "exceptional circumstances." *Uber Techs., Inc.*, 216 F. Supp. 3d at 1007; *see EEOC v. Lutheran Soc. Servs.*, 186 F.3d 959, 964-67 (D.C. Cir. 1999); *EEOC v. Cuzzens of Georgia, Inc.*, 608 F.2d 1062, 1064 (5th Cir. 1979).

Seila Law raised its overbreadth and vagueness objections to certain interrogatories and requests for documents in its petition to set aside or modify the CID. (Pet. Set Aside, Exh. 5.) The CFPB declined to consider these arguments, reasoning that Seila Law failed to comply with

12 C.F.R § 1080.6 because it did not "submit specific modification requests in writing" during the meet-and-confer process. (CFPB Decision at 4-5, Exh. 2.) The applicable regulation, however, does not provide that a party waives its challenges by failing to submit proposed written modifications during the meet-and-confer process; all it says is that, in a petition to set aside a CID, the agency "will consider only issues raised during the meet-and-confer process." 12 C.F.R. § 1080.6(c)(3). Because neither side suggests that Seila Law failed to raise its specific concerns during the meet-and-confer process, Seila Law did not waive these objections.

Seila Law contends that the CID's request for information about "other services," or simply "services," could be construed to encompass information related to the firm's immigration, personal injury, criminal defense, and real estate practices that have nothing to do with the stated purposes of the subpoena. (Opp'n at 15-16; *see also* Opp'n at 11-12.) The Court agrees. The CID does not define what "other services" are, and the CFPB has not articulated how any investigation into Seila Law's immigration, personal injury, criminal defense, or real estate practices would not be barred by the CFPB's practice of law exclusion. The court will accordingly limit the definition of "other services" in Interrogatories Nos. 5 and 6 to the areas of inquiry identified in the CID that would not be barred by other CFPB's practice of law exclusion, specifically the "advertising, marketing, or sale of debt relief services or products," including "debt negotiation, debt elimination, debt settlement, and credit counseling." (CID, Exh. 1.) Similarly, the mention of "services" in Interrogatory No. 5 and Requests for Documents Nos. 2 and 4 shall be limited to the "advertising, marketing or sale of debt relief services or products," including "debt negotia-

tion, debt elimination, debt settlement, and credit counseling." By narrowing the definition of "other services" and "services," the Court also ensures that the definition of "consumer" will not sweep in information unrelated to the stated lawful purposed of this investigation.[2] (See Opp'n at 15.)

Separately, Seila Law complains that the term "affiliated" in Interrogatory No. 4—and by cross-reference Request for Documents No. 3—is vague and overbroad. (Opp'n at 14-15.) As the CFPB has not defined the term, there is no reason to suggest that the word should not take its commonsense meaning in this context—specifically, those who had a close professional connection or association with Seila Law or Aissac Seila Aiono during the relevant period. *See, e.g.*, Merriam-Webster's Collegiate Dictionary 21 (11th ed. 2003). Under this plain-meaning interpretation, the court rejects Seila Law's suggestion that the word "affiliated" is vague and overbroad. The requested information is necessary, for instance, to determine whether "the Howard defendants . . . transferred the debt relief business, including the files of former Morgan Drexen consumers, to Seila Law." (Notice of Related Case at 3, Doc. 5.)

Finally, Seila Law claims that the CID seeks information projected by the attorney-client and work product privileges. (Opp'n at 16.) But, like in any civil litigation, Seila Law must first make an adequate privilege log (see CID at Instruction D, Exh. 1), which it has not done yet.

---

[2] Seila Law contends that the CFPB cannot seek information about attorneys' marketing of "debt relief and other services," because states have traditionally regulated attorney advertising. (Opp'n at 15.) But the Telemarketing Sales Rule bars certain marketing practices for debt relief services when offered through telemarketing, *see* 16 C.F.R. § 310.4(a)(2), and Paragraph 3 commits the CFPB to enforcing the TSR, so Seila Law's contention is unavailing.

Thus, with the narrowing construction, the Court finds that the CID seeks only relevant information and is not vague.

IV. CONCLUSION

For the aforementioned reasons, CFPB's petition is GRANTED IN PART. Seila Law is hereby COMPELLED to comply with the CID within ten (10) days of this order or at a later date as may be established by this court or the CFPB, except for the following limitations to the definition of "other services" and "services" in the CID. "Services" and "other services" shall be construed to mean the "advertising, marketing or sale of debt relief services or products," including "debt negotiation, debt elimination, debt settlement, and credit counseling."