No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC,
Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF OF AMICUS CURIAE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF THE JUDGMENT BELOW

DOUGLAS N. LETTER
General Counsel
Counsel of Record
TODD B. TATELMAN
Deputy General Counsel
MEGAN BARBERO
Associate General Counsel
JOSEPHINE MORSE
Associate General Counsel
ADAM A. GROGG
Assistant General Counsel
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

Counsel for Amicus Curiae

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MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF OF UNITED STATES HOUSE OF REPRESENTATIVES AS AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

Pursuant to Supreme Court Rules 21.1 and 37.2, the United States House of Representatives respectfully seeks leave to file a brief as amicus curiae in support of the judgment below after the deadline for filing such briefs.[1] The House has notified all parties of its intent to file this motion and amicus brief. Petitioner Seila Law LLC and respondent Consumer

[1] The Bipartisan Legal Advisory Group voted to authorize the filing of this amicus brief. The Bipartisan Legal Advisory Group comprises the Honorable Nancy Pelosi, Speaker of the House, the Honorable Steny H. Hoyer, Majority Leader, the Honorable James Clyburn, Majority Whip, the Honorable Kevin McCarthy, Republican Leader, and the Honorable Steve Scalise, Republican Whip, and "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the U.S. House of Representatives (116th Cong.). The Republican Leader and Republican Whip dissent from this filing.

Financial Protection Bureau (CFPB) do not oppose the filing of this brief out of time.

On September 17, 2019, the CFPB notified Speaker of the House Nancy Pelosi and undersigned Counsel pursuant to 28 U.S.C. § 530D that the CFPB would no longer defend the constitutionality of 12 U.S.C. § 5491(c)(3), which provides that the CFPB's Director may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." The CFPB had defended the constitutionality of this provision in the court of appeals, which agreed with the CFPB's prior position—and the conclusion of the en banc court of appeals for the D.C. Circuit—that this for-cause removal protection is constitutional. *See PHH Corp. v. CFPB*, 881 F.3d 75, 77 (D.C. Cir. 2018) (en banc).

On the same day that the House received the CFPB's Section 530D letter, the Department of Justice—which had not represented the CFPB in the court of appeals—filed a brief in this Court for the CFPB as respondent, arguing that this for-cause removal restriction "violates the Constitution's separation of powers." Resp. Br. 7 (Sept. 17, 2019). The Solicitor General therefore urged this Court to grant review. He pointed out that the CFPB's change of position left no party to defend the constitutionality of Section 5491(c)(3), and noted that the Court "may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals." *Id.* at 20.

A timely amicus brief opposing the petition and in support of the judgment below would have been due on September 18, 2019, the day after the House received the CFPB's Section 530D letter. *See* S. Ct. R.

37.2(a). Because the House received notice of the CFPB's change in position the day before the amicus brief deadline, the House seeks leave to file its brief out of time.

This case presents an issue of significant importance to the House: the constitutionality of the for-cause removal protection that Congress enacted to provide the CFPB Director with a measure of independence, consistent with the agency's functions as a financial regulator. The Solicitor General has decided not to defend this Act of Congress, and the House should be allowed to do so as an amicus.

For the foregoing reasons, this motion should be granted.

DOUGLAS N. LETTER
General Counsel
TODD B. TATELMAN
Deputy General Counsel
MEGAN BARBERO
Associate General Counsel
JOSEPHINE MORSE
Associate General Counsel
ADAM A. GROGG
Assistant General Counsel

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BRIEF OF AMICUS CURIAE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF THE JUDGMENT BELOW

INTEREST OF THE UNITED STATES HOUSE OF REPRESENTATIVES[1]

This case concerns the constitutionality of 12 U.S.C. § 5491(c)(3), which provides that the Director of the Consumer Financial Protection Bureau (CFPB) may be removed from office by the President only for "inefficiency, neglect of duty, or malfeasance in office." The Department of Justice ordinarily defends the constitutionality of Acts of Congress against challenges in court. Here, however, the Solicitor General has determined that the Department will not defend this statutory limitation on removal, even though the CFPB had prevailed in defending the

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund this brief's preparation or submission.

constitutionality of the provision in the court of appeals.

The United States House of Representatives, therefore, has a significant interest in defending the for-cause removal protection that Congress enacted to provide the CFPB Director with some independence from the President. Indeed, this Court has long recognized that "Congress is the proper party to defend the validity of a [federal] statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *INS v. Chadha*, 462 U.S. 919, 940 (1983); *see also* 28 U.S.C. § 530D(b)(2).

The statutory removal provision challenged here reflects Congress's considered judgment about how to properly structure the CFPB. As the court of appeals here and the en banc D.C. Circuit recognized in upholding the constitutionality of this provision, "Congress established the independent CFPB to curb fraud and promote transparency in consumer loans, home mortgages, personal credit cards, and retail banking." *PHH Corp. v. CFPB*, 881 F.3d 75, 77 (D.C. Cir. 2018) (en banc); *see* Pet. App. 2a-3a. To ensure a measure of agency independence, Congress chose to protect the Director from at-will Presidential removal using "the very same" removal provision that this Court "approved for the Federal Trade Commission (FTC) back in 1935." *PHH*, 881 F.3d at 78 (citing *Humphrey's Executor v. United States*, 295 U.S. 602, 619 (1935)).

Because the Solicitor General has determined not to defend the constitutionality of the statutory limitation on removal for the CFPB Director, the

House has a compelling interest in participating in this case.

DISCUSSION

Petitioner Seila Law LLC and respondent the Consumer Financial Protection Bureau contend that the CFPB Director's statutory tenure protection violates the separation of powers. The court of appeals correctly rejected this argument. The decision below adopts the position then advanced by the CFPB that this limited restriction on the President's authority to remove the CFPB Director is consistent with the constitutional separation of powers. In reaching this conclusion, the court of appeals joined the en banc court of appeals for the D.C. Circuit, the only other circuit to have addressed this question. *See PHH*, 881 F.3d 75. The court of appeals' decisions do not conflict with any decision of this Court or any other court of appeals. Indeed, the court of appeals concluded that its decision was controlled by this Court's precedent. *See* Pet. App. 6a (citing *Humphrey's Executor*, 295 U.S. 602, and *Morrison v. Olson*, 487 U.S. 654 (1988)). Further review is not warranted.

1. a. The court of appeals correctly held that "the CFPB's structure is constitutionally permissible." Pet. App. 3a. As the court of appeals noted here, "[t]he arguments for and against" the constitutionality of the for-cause removal protection for the Director of the CFPB "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)." Pet. App. 2a. The court of appeals agreed with the majority of the en banc D.C. Circuit that the for-cause removal provision is constitutional, concluding that this "Court's separation-of-powers decisions, in

particular" *Humphrey's Executor* and *Morrison*, demonstrate "that the CFPB's structure is constitutionally permissible." Pet. App. 3a; *see also* Pet. App. 6a.

Congress established the CFPB in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), in response to the 2008 financial crisis. Congress created the CFPB to "help protect consumers from unfair, deceptive, and abusive acts that so often trap them in unaffordable financial products" and to "end[] the fragmentation" of the then-current regulatory system by combining the authority of several federal agencies "involved in consumer financial protection in the CFPB, thereby ensuring accountability." S. Rep. No. 111-176, at 11 (2010). The CFPB is charged with, among other things, "implement[ing] and, where applicable, enforc[ing] Federal consumer financial law consistently for the purpose 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).

Congress provided for a single CFPB Director to be appointed by the President, with the advice and consent of the Senate. 12 U.S.C. § 5491(b)(1)-(2). As the en banc D.C. Circuit observed, Congress chose the single-Director design to "imbue the agency with the requisite initiative and decisiveness to do the job of monitoring and restraining abusive or excessively risky practices in the fast-changing world of consumer finance." *PHH*, 881 F.3d at 81 (citing S. Rep. No. 111-176, at 11).

The CFPB Director generally serves a five-year term, except that a Director may continue to serve after her term "until a successor has been appointed and qualified." 12 U.S.C. § 5491(c)(1)-(2). Congress further provided that "[t]he President may remove the Director for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3). The court of appeals upheld this statutory provision for a five-year term of office subject to removal for cause as a permissible limitation on the President's removal authority under this Court's precedent. *See* Pet. App. 6a.

b. This Court "has long recognized that, as deployed to shield certain agencies, a degree of independence is fully consonant with the Constitution." *PHH*, 881 F.3d at 78. Indeed, this Court "has never struck down a statute conferring the standard for-cause protection at issue here," *id.*, and there is no reason for the Court to break new ground in this case.

In *Humphrey's Executor*, this Court unanimously upheld an identical limitation on the President's authority to remove Commissioners of the Federal Trade Commission (FTC) "for inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 619 (quoting 15 U.S.C. § 41 (1934)); *see id.* at 631-32. The Court explained that in administering the Federal Trade Commission Act, the FTC "acts in part quasi legislatively and in part quasi judicially." *Id.* at 628. The Court concluded that the President's "illimitable power of removal" does not extend to officers of such an agency. *Id.* at 629. Instead, where Congress creates agencies like the FTC and "require[s] them to act in discharge of their duties independently of executive control," Congress has the authority to fix

terms of office and "forbid their removal except for cause in the meantime." *Id.* As this Court cautioned (more than eighty years ago), "it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Id.*

The court of appeals here correctly determined that this Court's reasoning in *Humphrey's Executor* "applies equally to the CFPB, whose Director is subject to the same for-cause removal restriction at issue [there]." Pet. App. 4a. As the en banc D.C. Circuit explained in *PHH*, the FTC was "charged with the enforcement of no policy except the policy of the law," 881 F.3d at 79 (quoting *Humphrey's Executor*, 295 U.S. at 624), and "could be independent consistent with the President's duty to take care that the law be faithfully executed," *id.* So too with the CFPB. The agency's "focus on the transparency and fairness of financial products geared toward individuals and families falls squarely within the types of functions granted independence in precedent and history." *Id.*; *see also Wiener v. United States*, 357 U.S. 349, 355-56 (1958) (holding that the "intrinsic judicial character of the task with which the [War Claims] Commission was charged" precluded the President from removing the Commissioners at will); *Morrison*, 487 U.S. at 724-25 (Scalia, J., dissenting) ("[R]emoval restrictions have been generally regarded as lawful for so-called 'independent regulatory agencies,' such as the Federal Trade Commission, the Interstate Commerce Commission, and the Consumer Product Safety Commission, which engage substantially in what has been called the 'quasi-legislative activity' of rulemaking[.]" (citations omitted)).

In *Morrison*, this Court upheld the good-cause removal protection for a special Independent Counsel tasked with investigating and prosecuting high-ranking federal officials for violations of federal criminal law. *See* 487 U.S. at 660, 662-63 (describing relevant provisions of the Ethics in Government Act of 1978). The Court in *Morrison* explained that its characterization of the "quasi-legislative" and "quasi-judicial" offices in *Humphrey's Executor* and *Wiener* was "used to describe the circumstances in which Congress might be more inclined to find that a degree of independence from the Executive, such as that afforded by a 'good cause' removal standard, is necessary to the proper functioning of the agency or official." *Id.* at 690-91 & n.30. The "real question," as *Morrison* framed it, is whether restrictions on the President's authority to remove an official "are of such a nature that they impede the President's ability to perform his constitutional duty." *Id.* at 691. Although the Independent Counsel performed traditionally "executive" functions, this Court held that the removal protection for her was constitutional, explaining that it was "essential, in the view of Congress, to establish the necessary independence of the office." *Id.* at 691, 693.[2]

Morrison thus confirmed that *Humphrey's Executor* allows Congress to provide limited protection against removal for the heads of Executive agencies who are "intended to perform their duties 'without

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[2] CFPB stresses that *Morrison* involved the removal restriction of "*inferior* officers." Resp. Br. 10 n.1. But as the en banc D.C. Circuit detailed in *PHH*, the distinction between principal and inferior officers "is not ground for distinguishing *Morrison* from this case." 881 F.3d at 96 n.2.

executive leave and . . . free from executive control.'" *Id.* at 687 n.25 (quoting *Humphrey's Executor*, 295 U.S. at 628). As the en banc D.C. Circuit summarized in *PHH*, "the Constitution admits of modest removal constraints where 'the character of the office' supports making it somewhat 'free of executive or political control.'" 881 F.3d at 88 (quoting *Morrison*, 487 U.S. at 687, 691 n.30).

By contrast, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), this Court invalidated a "highly unusual" removal restriction for the inferior officers of the Public Company Accounting Oversight Board that "sharply circumscribed" the grounds on which a Board member could be removed and specified "rigorous procedures that must be followed prior to removal." *Id.* at 505. This provision was one of "two layers of for-cause tenure," *id.* at 501—the restrictive layer that protected the Board members and the more ordinary for-cause protection applicable to the Commissioners of the Securities and Exchange Commission, which supervises the Board. This Court invalidated the restrictive limitation on removal of Board members in part because of the two-layered removal protection, where the Commissioners themselves enjoy the same tenure protection that Congress has provided for the CFPB Director. *See id.* at 487 (noting parties' agreement that the Commissioners could only be removed under the *Humphrey's Executor* standard).

c. In urging this Court to grant review, petitioner and respondent principally argue that this Court's precedent upholding limitations on the President's authority to remove agency heads should be limited to multi-member agencies. *See* Pet. 19-24; Resp. Br. 11-16. The court of appeals correctly rejected this

argument, concluding that any difference between multi-member agencies and agencies with a single head was not "dispositive for separation-of-powers purposes." Pet. App. 5a-6a.

Petitioner's and respondent's attempts to cabin *Humphrey's Executor* and its progeny to multi-member agencies finds no support in those cases. In upholding the identical for-cause removal restriction for members of the FTC in *Humphrey's Executor*, this Court "made no mention of the agency's multi-member leadership structure." Pet. App. 5a. This Court referred in passing to the FTC as a "body of experts," Resp. Br. 11 (quoting *Humphrey's Executor*, 295 U.S. at 624), but that description "arose in the course of the Court's statutory holding, not its constitutional analysis," *PHH*, 881 F.3d at 98. Moreover, as both the court below and the en banc D.C. Circuit in *PHH* stressed, *Morrison* "upheld a for-cause removal restriction for a prosecutorial entity headed by a single independent counsel." Pet. App. 6a; *see PHH*, 881 F.3d at 96.

Indeed, where an agency is headed by a single individual, the lines of Executive accountability—and Presidential control—are even more direct than in a multi-member agency. If the President determines that the CFPB Director is failing in her duty to enforce the consumer protection laws, the President can remove and replace the Director. *See* 12 U.S.C. § 5491(c)(3). And unlike in multi-member agencies, removal of "a single officer" will "transform the entire CFPB and the execution of the consumer protection

laws it enforces." *PHH*, 881 F.3d at 98; *see also* Pet. App. 6a.[3]

The court of appeals here joined the en banc majority of the D.C. Circuit in *PHH*—the only other court of appeals to have addressed the question—in upholding the constitutionality of the modest protection from removal that Congress afforded the CFPB Director. The courts of appeals are correct in their agreement that this Court's precedent governs the outcome here, and further review is not warranted.[4]

2. The House urges the Court to deny review for the reasons discussed above and in the courts of appeals' careful decisions on the question presented. If, however, this Court were to determine that the petition for a writ of certiorari should be granted, as

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[3] In a footnote, the Solicitor General suggests that, if this Court concludes that the statutory for-cause removal protection for the CFPB Director is constitutional under the rationale of *Humphrey's Executor* and *Morrison*, the Court "should consider whether those cases should be overruled in part or in whole." Resp. Br. 16 n.2. While the Solicitor General might prefer an Executive Branch without any independent regulatory agencies, there is no sound reason for this Court to overrule eighty years of precedent that has played a significant role in shaping our modern system of government. Nor is there any basis for this Court to strip Congress of its authority to create agencies with a measure of independence from Presidential control, where such a structure "is necessary to the proper functioning of the agency or official." *Morrison*, 487 U.S. at 691 n.30.

[4] If this Court were to grant review and hold that the CFPB Director's for-cause removal protection is unconstitutional, the proper remedy would be to sever the removal restriction, leaving the Director removable at will. *See Free Enter. Fund*, 561 U.S. at 508-09; *see also* Resp. Br. 16-17.

the Solicitor General has noted, the Court "may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals." Resp. Br. 20. The House respectfully requests that, if the Court grants review, it consider appointing the House as amicus curiae, represented by the House General Counsel as counsel of record, to defend the judgment below. As this Court has recognized, each House of Congress has a significant interest in defending the constitutionality of an Act of Congress where the Solicitor General has determined not to defend the statute. *See, e.g.*, *Chadha*, 462 U.S. at 940; 28 U.S.C. § 530D(b)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS N. LETTER
General Counsel
TODD B. TATLEMAN
Deputy General Counsel
MEGAN BARBERO
Associate General Counsel
JOSEPHINE MORSE
Associate General Counsel
ADAM A. GROGG
Assistant General Counsel

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