

**In the United States Court of Appeals
for the Ninth Circuit**

No. 17-56324

CONSUMER FINANCIAL PROTECTION BUREAU,
PETITIONER-APPELLEE

v.

SEILA LAW LLC, RESPONDENT-APPELLANT

MOTION BY APPELLANT FOR STAY OF THE MANDATE

Pursuant to Federal Rule of Appellate Procedure 41(d), appellant Seila Law LLC moves the Court for a stay of the mandate pending the filing of a petition for a writ of certiorari in the United States Supreme Court. The Consumer Financial Protection Bureau has notified appellant that it opposes this motion.

1. Seila Law is a law firm that offers a variety of legal services to consumers, including assistance in obtaining relief from consumer debt. *See* E.R. 143-144. In 2017, the Consumer Financial Protection Bureau (CFPB) issued a civil investigative demand to Seila Law as part of an investigation into whether the firm violated federal consumer-finance laws. *See* E.R. 271. The investigative demand requested various information and documents

about Seila Law's structure, organization, and business practices. *See* E.R. 272-273.

In response, Seila Law petitioned the CFPB to set aside or modify the investigative demand. *See* E.R. 89-97. As is relevant here, Seila Law argued that the demand was invalid because the CFPB's structure violated the constitutional separation of powers. *See* E.R. 91. In support, Seila Law cited the panel opinion in *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016) (Kavanaugh, J.), which held that the CFPB's structure violated Article II by vesting significant executive power in a single director removable by the President only for cause. *See id.* at 5-11. At the time, the District of Columbia Circuit had granted rehearing en banc, but the full court had not yet issued its decision.

The Director of the CFPB denied Seila Law's petition and ordered compliance with the investigative demand. *See* E.R. 311-315. Seila Law submitted partial responses, reiterated its objections, and declined to provide further information. *See* E.R. 317, 324.

2. The CFPB subsequently filed a petition to enforce the investigative demand in the United States District Court for the Central District of California. E.R. 260; *see* 12 U.S.C. § 5562(e)(1). Seila Law opposed the petition on the ground, *inter alia*, that the CFPB's structure was unconstitutional. The district court disagreed. It ordered Seila Law to comply with the

CFPB’s civil investigative demand within 10 days or at a later date established by the court or the agency. *See* E.R. 12.

Seila Law appealed to this Court and sought a stay of the district court’s order. Absent such a stay, Seila Law argued, it would be forced immediately to turn over sensitive information to an unlawfully constituted agency in violation of its constitutional rights. *See* Dkt. 2-1, at 17-19. This Court granted the stay. *See* Dkt. 8, at 1. While the appeal was pending, the full D.C. Circuit concluded in a fractured decision that the CFPB’s structure did not violate the separation of powers. *See PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75 (2018) (en banc).

On May 6, 2019, this Court affirmed. The Court first considered the Supreme Court’s decision in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), which upheld the structure of the Federal Trade Commission. The Court recognized “notable differences” between the structure of the CFPB and the Federal Trade Commission—namely, the CFPB’s leadership by a single director. Slip op. 7. “Some,” the Court observed, “have found this structural difference dispositive” (including now-Justice Kavanaugh). *Id.* Agreeing with the D.C. Circuit’s en banc majority in *PHH*, however, this Court held that the Supreme Court’s decision in *Morrison v. Olson*, 487 U.S. 654 (1988), foreclosed reliance on that structural difference. In *Morrison*, the Supreme Court upheld the appointment of a single person

protected from removal to serve as independent counsel. *See id.* at 659-660. This Court noted that, while “[t]he Supreme Court is of course free to revisit [its] precedents,” a court of appeals is not. Slip Op. 8. Accordingly, the Court upheld the investigative demand. The mandate in this case is due to issue on June 27, 2019. *See* Fed. R. App. P. 40(a)(1)(B), 41(b).

3. Federal Rule of Appellate Procedure 41(d) governs motions to stay the mandate pending the filing of a petition for a writ of certiorari. Under that rule, a court of appeals may stay the mandate when a petition for certiorari “would present a substantial question” and “there is good cause for a stay.” Fed. R. App. P. 41(d)(1). In contrast, this Court will not stay the mandate if it “determines that the petition for certiorari would be frivolous or filed merely for delay.” 9th Cir. R. 41-1; *see United States v. Pete*, 525 F.3d 844, 851 n.9 (9th Cir. 2008).

Seila Law plans to file a petition for certiorari presenting the exceptionally important question whether the CFPB’s structure violates the constitutional separation of powers. Applying the relevant standards here, a stay of the mandate is warranted.

a. The question whether the CFPB’s structure violates the constitutional separation of powers is “substantial” under any sense of the term. *See* Fed. R. App. P. 41(d)(1). That question has engendered serious debate among federal judges. After rehearing en banc in *PHH*, the D.C. Circuit

produced six opinions regarding the constitutionality of CFPB’s structure that span nearly 125 pages of the Federal Reporter. Three judges—including now-Justice Kavanaugh—would have held that the structure of the CFPB was unconstitutional. *See PHH*, 881 F.3d at 138 (Henderson, J., dissenting); *id.* at 167 (Kavanaugh, J., dissenting, joined by Randolph, J.). The United States, for its part, agrees 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 v. Mnuchin*, No. 18-307 (Dec. 10, 2018), *cert. denied*, 139 S. Ct. 916 (2019); *accord* U.S. Br. at 1-3, *PHH* (No. 15-1177). A district court in the Second Circuit has reached the same conclusion. *See Consumer Financial Protection Bureau v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 784-785 (S.D.N.Y. 2018), *appeal filed*, No. 18-3156 (2d Cir. Oct. 23, 2018); *see also Collins v. Mnuchin*, 896 F.3d 640, 666 (holding that the structure of the Federal Housing Finance Authority is unconstitutional in part because it is led by a single director with for-cause removal protection), *rehearing en banc granted*, 908 F.3d 151 (5th Cir. 2018).

In light of all of this, the United States has already told the Supreme Court that “th[e] question [of the CFPB’s constitutionality] is important” and “warrants the Court’s review in an appropriate case.” Br. in Opp. at 9, *State National Bank, supra*; *see id.* at 9-10 (arguing that the case was “a poor ve-

hicle for considering the constitutionality of [the CFPB’s] structure”). And it has expressly cited this case as a potentially appropriate vehicle in which to resolve the question. *See id.* at 12. Even the CFPB itself “agrees that, absent legislative action eliminating the restrictions on removal,” the Supreme Court “will ultimately need to . . . settle[]” the question. *See id.* at 10. Accordingly, there is a reasonable chance the Supreme Court will grant further review in this case.

b. In addition, “there is good cause for a stay” of the mandate. Fed. R. App. P. 41(d)(1). This Court previously stayed the district court’s order pending appeal, *see* Dkt. 8, and the same justification for a stay remains now. Under the district court’s order, Seila Law must comply with the CFPB’s civil investigative demand within 10 days, unless the district court or the CFPB establishes a later compliance date. If the 10-day compliance window remains in place, Seila Law will face a Hobson’s choice. It could comply with the district court’s order by providing the CFPB with all of the information the investigative demand requests—including sensitive proprietary information. But that of course is part of the harm Seila Law seeks to avoid, and compliance could potentially moot the case, thwarting Supreme Court review and allowing a potentially unconstitutional investigation to continue unabated. Absent a stay, therefore, Seila Law will suffer the exact prejudice it seeks to avoid by litigating the question whether the structure of the CFPB

is constitutional. In these circumstances, a stay is appropriate. *Cf. In re Roche*, 448 U.S. 1312, 1316 (1980) (Brennan, J., in chambers) (continuing a stay pending the resolution of a petition for certiorari when applicant faced choice of mooting his assertion of privilege or facing jail time for contempt); *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (noting that “[t]he fact that disclosure would moot that part of the Court of Appeals’ decision requiring disclosure . . . would also create an irreparable injury”); *see also Bond v. United States*, 564 U.S. 211, 222-223 (2011) (observing that individuals have a constitutionally recognized interest in objecting to violations of the separation of powers). A short additional stay to allow the Supreme Court to act on a petition for certiorari is amply warranted.

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For these reasons, the motion for a stay of the mandate should be granted.

Respectfully submitted,

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JUNE 7, 2019

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, hereby certify that, on June 7, 2019, a copy of the foregoing motion was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM