

ORAL ARGUMENT HELD APRIL 12, 2016**No. 15-1177**

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS, LLC,
ATRIUM INSURANCE CORPORATION, AND ATRIUM REINSURANCE CORPORATION,
Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition For Review Of An Order
Of The Consumer Financial Protection Bureau

**SUPPLEMENTAL RESPONSE TO THE PETITION
FOR REHEARING EN BANC**

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* Authorities upon which Petitioners chiefly rely are marked with an asterisk.

GLOSSARY

CFPB	Consumer Financial Protection Bureau
PCAOB	Public Company Accounting Oversight Board
PHH	Petitioners PHH Corporation, PHH Mortgage Corporation, and PHH Home Loans, LLC
RESPA	Real Estate Settlement Procedures Act of 1974

INTRODUCTION AND SUMMARY

This Court invited “[t]he Solicitor General . . . to file a response to the [CFPB’s] petition for rehearing en banc, expressing the views of the United States.” Order 1 (Nov. 23, 2016), ECF No. 1647585. The response, an amicus curiae brief on behalf of the United States submitted by the Civil Division of the Department of Justice (hereinafter referred to as the brief of the United States), asserts support for rehearing en banc, but not for *any* of the reasons advanced by the CFPB. Indeed, the brief never actually defends the CFPB’s structure as consistent with the Constitution. Nor does the brief claim anywhere that the panel *erred* in its choice of remedy, its decision to reach the separation-of-powers issue, or its discussion of the statutory and due-process bases for its decision. Thus, the United States’ brief not only differs with the CFPB’s argument for rehearing but seemingly does not challenge the panel’s outcome, only the panel’s reasoning in reaching that outcome. And, importantly, it does agree with the panel’s underlying thesis that the separation of powers is “ultimately designed to protect individual liberty.” U.S. Br. 3.

The brief of the United States is thus nothing more than an academic debate with Montesquieu and Madison as to why the Constitution mandates the separation of powers, not what that doctrine ultimately requires as applied to the CFPB. It is also premised on a wholly illusory distinction: Individual liberty and structural separation of powers are just two sides of the same constitutional coin.

Having advanced its tenuous argument that the reasoning the panel used to decide the separation-of-powers question is en banc-worthy, the United States then backtracks to suggest that the full Court need not decide that question at all. It is hard to see why this Court should grant rehearing en banc on an issue but then decline to decide it. The most the United States can say is that the full Court “may wish” to duck that question. And it does not claim that the issue of whether the panel properly reached the separation-of-powers question *itself* merits en banc review, much less that the panel was wrong to do so.

In fact, the panel rightly undertook to resolve the separation-of-powers question. PHH asked this Court to strike down the entire CFPB as unconstitutional, and asked for vacatur of the order on review, without remand. But the panel opted for a narrower separation-of-powers remedy and determined that, while the order should be vacated, the case should *also* be remanded to the agency for further proceedings under the corrected interpretation of the Real Estate Settlement Procedures Act (RESPA). The panel thus had to reach PHH’s separation-of-powers arguments because there could *be* no remand to an agency that no longer lawfully exists. In all events, it was the panel’s duty to deal with PHH’s fundamental structural challenge to the CFPB.

In short, the United States, speaking for the Executive Branch and not for the CFPB, cannot bring itself to endorse the CFPB’s arguments or even the CFPB’s

constitutionality, and while it presents its own critique of the panel’s reasoning, it offers no valid legal argument justifying rehearing en banc. Appellate courts review judgments, not opinions or reasoning.

ARGUMENT

I. The Panel Properly Analyzed PHH’s Separation-Of-Powers Challenge Under Governing Precedent.

1. The panel held that the CFPB’s novel structure—which places the President’s core constitutional authority in the hands of a single, unaccountable Director—violates the Constitution’s separation of powers. In rendering that judgment, the panel meticulously followed the Supreme Court’s most recent and most comprehensive statement on the President’s removal power, *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010). That decision explicitly instructs that in a “new situation not yet encountered by the Court,” special “circumstances” must justify “restrict[ing the President] in his ability to remove” an Executive Branch officer. *Id.* at 483–84. The United States concedes that the CFPB presents just such a case—it confers “broad policymaking and enforcement authority on a single person below the President, whom the President may not remove except for cause” and is thus insulated from constitutional accountability. U.S. Br. 2. Yet the United States has not even attempted to identify special circumstances justifying the removal restriction.

Indeed, the United States never disputes the panel's *conclusion* that the CFPB's structure is unconstitutional. *See* U.S. Br. 2. And the United States affirmatively *supports* the panel's remedy of severing the Director's removal restriction in order to restore Presidential accountability to the CFPB. *See id.* at 14. Thus, the United States does not dispute either the panel's judgment that the CFPB's structure violates the separation of powers or the remedy chosen by the panel to address that violation.

2. Straining to articulate a basis for rehearing (while obviously unwilling to endorse the one the CFPB has advanced), the United States argues that the panel's "analysis" departed from the Supreme Court's "analysis" in *Morrison v. Olson*, 487 U.S. 654 (1988). U.S. Br. 8. But *Free Enterprise Fund* provides the proper framework for decision here, and the panel followed it to a T. In addition, as the United States concedes, *Morrison* involved only "an inferior officer" with "checks and limitations on her authority that are not present here." *Id.* at 2. Those significant distinctions render *Morrison* inapposite. The United States thus fails to identify any basis on which the panel's judgment *or* its reasoning departs from controlling precedent.

Further, the United States' purported distinction between structural safeguards and personal freedom is wholly illusory because it overlooks the entire point of the

Constitution's separation of powers: securing individual liberty. The Framers designed the Constitution not as an academic exercise in “parchment barriers,” but to ensure that “[a] dependence on the people’ would be the ‘primary control on the government.” *Free Enter. Fund*, 561 U.S. at 501 (citations omitted). As the Supreme Court has repeatedly explained, “[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” *Id.* (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)); *Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1233 (2015) (explaining that “[t]he structural principles secured by the separation of powers protect the individual”) (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)). Even *Morrison* expressly acknowledged that “the Constitution diffuses power the better to secure *liberty*.” 487 U.S. at 694 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)) (emphasis added). At the end of the day, the United States agrees. *See* U.S. Br. 3 (acknowledging that separation of powers is “ultimately designed to protect individual liberty”).

The United States’ argument that courts should consider *only* whether removal restrictions “impede the President’s ability to perform his constitutional duty,” U.S. Br. 7 (quoting *Morrison*, 487 U.S. at 691), also ignores other aspects of *Free Enterprise Fund*, which considered and rejected an identical argument. The dissent in *Free Enterprise Fund* argued that the removal restriction protecting

PCAOB members did not affect the President’s “power to get something done,” because “two layers of ‘for cause’ protection” would not “impose any more serious limitation upon the President’s powers than one layer.” 561 U.S. at 524–25 (Breyer, J., dissenting) (emphasis omitted). In rejecting that argument, the majority concluded that the Framers “did not rest our liberties on such bureaucratic minutiae.” *Id.* at 500 (majority op.). Because “structural protections against abuse of power [a]re critical to preserving liberty,” the Court reasoned, the separation of powers must be enforced to protect those individual “liberties,” even without a showing of a practical impairment of presidential power. *Id.* at 499–501 (quoting *Bowsher*, 478 U.S. at 730).

3. Even under the United States’ crabbed reading of *Morrison*, the panel undoubtedly reached the correct result. The Director’s removal restriction plainly *does* “unduly impair[] the ability of the President to carry out his executive responsibilities.” U.S. Br. 10. The Director exercises vast governmental power over “American business, American consumers, and the overall U.S. economy,” Op. 6, yet he does not answer to the President, the Congress, or the people for his actions. The United States acknowledges, consistent with the longstanding view of the Executive Branch, that Congress lacks the power to insulate at least some principal officers within the Executive Branch from removal by the President. U.S. Br. 10 n.1. As the

Court made clear in *Free Enterprise Fund*, the holding of *Humphrey's Executor* with respect to a Federal Trade Commissioner is an exception, not a general rule.

Moreover, even if the Director's *powers* were in some sense comparable to those of the Federal Trade Commission in 1935, the unitary Director serves a longer term than the President. A President could serve an entire four-year term powerless to nominate or remove the CFPB's leader, and thus be unable even to *influence* the agency in its execution of federal law, whereas a President can nominate multiple FTC Commissioners (owing to their staggered terms) and can unilaterally designate the FTC's Chair. The President's ability to faithfully execute the 19 federal statutes enforced by the Director is not just impaired but decimated by the CFPB's structure.

In sum, the United States' filing illustrates why the panel's separation-of-powers decision is an exceedingly poor candidate for en banc rehearing. The panel applied the governing standard and reached the unavoidable conclusion that the CFPB's structure violates the Constitution's separation of powers. Although the United States would have preferred that the panel take a (supposedly) different path in reaching that conclusion, it never challenges the panel's ultimate result. It is axiomatic that the essential role of appellate courts is to review judgments, not opinions or reasoning. *See, e.g., Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 647 (D.C. Cir. 1998). The United States identifies no reason for the full Court to grant rehearing simply to retrace the panel's steps and arrive at the same place.

II. The Panel Properly Reached The Separation-Of-Powers Violation.

After arguing at length that the en banc Court should review the panel's separation-of-powers analysis (but not its holding), the United States then backtracks to suggest that the full Court "may properly conclude that it should not reach" that issue under the doctrine of constitutional avoidance. U.S. Br. 12. That suggestion is passing strange. The United States cites no examples of an appellate court granting rehearing en banc for the purpose of *not* reaching an issue. Nor does the United States argue that the question whether the panel properly reached the separation-of-powers issue is *independently* en banc-worthy; given its case-specific and discretionary nature, it plainly is not. Presumably this is why the CFPB has never argued that, even if PHH prevails on its statutory arguments, this Court should not reach PHH's separation-of-powers challenge. And an argument raised only by an amicus would not even be properly before the *panel*. See, e.g., *NACS v. Bd. of Governors of the Fed. Reserve Sys.*, 746 F.3d 474, 482 (D.C. Cir. 2014). It certainly cannot be a basis for granting rehearing en banc, because a panel's refraining from doing what no party has asked it to do is hardly a question worthy of the full Court's review.

In any event, as the panel explained, determining whether the CFPB's structure was unconstitutional was necessary to the decision and required by the judicial duty. See Op. 10–11 n.1. PHH asked the panel to strike down the CFPB in its

entirety—a judgment that would preclude *any* remand to the agency for further proceedings. PHH argued that the for-cause removal provision was not severable from the rest of the agency’s organic statute, and, therefore, the CFPB’s unconstitutional structure could be fixed only by Congress. *See id.* at 65. Had the panel agreed with PHH and invalidated the entire statute, the CFPB could not have continued operating and there could *be* no remand to the agency for further proceedings. *Id.* at 10–11 n.1.¹

Even if the CFPB’s very existence had not been at stake, an agency “lacks authority to bring [an] enforcement action” if its structure “violates the Constitution’s separation of powers.” *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993). By reaching the separation-of-powers issue, the panel not only answered the practical question whether it could order a remand, but also sought to vindicate PHH’s individual right to be subject to legal standards “enforced only by a constitutional agency accountable to the Executive.” *Free Enter. Fund*, 561 U.S. at 513.

In similar circumstances, this Court has held an agency’s structure unconstitutional without addressing an appellant’s statutory challenges to the unconstitutional agency’s particular decision. *See NRA Political Victory Fund*, 6 F.3d at 823;

¹ The panel’s ruling on severability is not nearly as straightforward as the United States suggests. *See* U.S. Br. 14. PHH preserves its argument that the proper remedies in this case include, at least, invalidating the CFPB.

Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1334 (D.C. Cir. 2012). In *NRA Political Victory Fund*, for example, this Court noted that “[t]he Supreme Court in similar situations—when plaintiffs challenged the constitutional composition or character of a tribunal—determined the constitutional status issue without reaching the merits.” 6 F.3d at 823 (citing *CFTC v. Schor*, 478 U.S. 833, 859 (1986); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56, 87 (1982)). Here, too, it was appropriate for the panel to decide the separation-of-powers question before addressing the other problems with the CFPB’s order.

The United States cites *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), in which the Supreme Court avoided holding a provision of the Voting Rights Act unconstitutional, but that case is inapt. The Supreme Court’s ultimate holding—that the appellant was eligible for complete relief under the statutory provision, correctly construed—provided the appellant *all the relief it sought* and hence made it unnecessary for the Court to decide the constitutional challenge. *See id.* at 205–06. Here, in contrast, ruling for PHH on the statutory grounds would not grant it as much relief as success on its constitutional arguments would, *i.e.*, invalidation of the unconstitutional agency in its entirety.

The United States further notes that PHH requested vacatur of the CFPB’s order and described its separation-of-powers challenge as an “independent reason” for declaring that order invalid. U.S. Br. 13 (internal quotation marks and emphasis

omitted). That is true as far as it goes, but the United States ignores the remand component of the panel's judgment. PHH sought *vacatur simpliciter*—without any remand to the CFPB. Because the panel determined that the proper remedy was to vacate the order but *also* to remand the case for further proceedings under the proper interpretation of RESPA, it had to address the CFPB's constitutional shortcomings because it could not further violate PHH's constitutional rights by sending the case back to an agency that could no longer operate. The United States claims that the remedy question was easy, but it never explains how the panel could have answered that remedy question without first answering the antecedent question whether there was a constitutional violation to remedy.

In all events, as the panel recognized, when a litigant challenges “the very structure or existence of an agency enforcing the law against it, courts ordinarily address that issue promptly, at least so long as jurisdictional requirements such as standing are met.” *Op. 11 n.1* (citing *Free Enter. Fund*, 561 U.S. at 490–91; *Morrison*, 487 U.S. at 669–70). In such circumstances, it would be “irresponsible” for the Court to “delay ruling on such a fundamental and ultimately unavoidable structural challenge, given the systemic ramifications of such an issue.” *Id.* And even if the panel could have avoided the separation-of-powers question in this case (and it could not), that issue cannot be avoided for long.

For these reasons, the panel properly reached the separation-of-powers question—something the CFPB has never disputed and the United States does not claim constituted any actual error. Accordingly, the United States’ suggestion that the full Court should grant rehearing on the separation-of-powers question but then decline to decide it should be rejected.

III. There Is No Basis For Revisiting The Panel’s Plainly Correct RESPA And Due-Process Holdings.

The United States addresses “only the panel’s separation-of-powers holding,” and takes no position on “the other issues raised by the petition.” U.S. Br. 1. Thus, the United States does not contest the panel’s unanimous and plainly correct interpretation of RESPA. As explained in PHH’s response to the CFPB’s petition, the agency’s contrary interpretation would *create* a split with every other court to have considered the proper scope of RESPA.

Likewise, the United States does not take issue with the panel’s holding that under the Due Process Clause, the CFPB cannot apply its newfound interpretation of RESPA to PHH retroactively. As the panel correctly held, the CFPB’s attempt to apply its interpretation retroactively failed “Rule of Law 101.” Op. 86. Accordingly, there is no possible basis to rehear either the panel’s RESPA or due-process holdings.

CONCLUSION

For the foregoing reasons, and those discussed in PHH's separate response to the CFPB, this Court should deny the petition for rehearing en banc and promptly issue the mandate.

Dated: January 27, 2017

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Petitioner PHH Corporation is a publicly traded company (NYSE: PHH). It has no parent company and no publicly held corporation owns 10% or more of its stock. Petitioners Atrium Insurance Corporation, Atrium Reinsurance Corporation, and PHH Mortgage Corporation are wholly-owned subsidiaries of PHH Corporation, and no other company or publicly held corporation owns 10% or more of their stock. Petitioner PHH Home Loans, LLC is owned in part by subsidiaries of PHH Corporation and in part by affiliates of Realogy Holdings Corporation, a publicly traded company (NYSE: RLGY).

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CERTIFICATE OF COMPLIANCE

The body of this document is 13 pages and thus complies with the 15-page limit specified in this Court's January 13, 2017 Order. This document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: January 27, 2017

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I hereby certify that, on January 27, 2017, an electronic copy of the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon the following counsel for respondent Consumer Financial Protection Bureau, who is a registered CM/ECF user:

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