

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MICHAEL ROP, STEWART KNOEPP, and
ALVIN WILSON,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE
AGENCY, MELVIN L. WATT, in his official
capacity as Director of the Federal Housing
Finance Agency, and THE DEPARTMENT
OF THE TREASURY,

Defendants.

Case No. 1:17-cv-00497

Hon. Paul L. Maloney

**PLAINTIFFS' RESPONSE TO FHFA'S NOTICE OF SUPPLEMENTAL
AUTHORITY CONCERNING *PHH v. CFPB***

Of the ten judges who served on the en banc panel in *PHH Corp. v. CFPB*, 2018 WL 627055 (D.C. Cir. Jan. 31, 2018), only six endorsed FHFA's position that the separation of powers permits an agency that is headed by a single individual who cannot be removed from office by the President over a policy disagreement. Rather than the *PHH* majority, this Court should follow the dissenting opinions of Judges Henderson and Kavanaugh:

- “[C]onsent of the governed is a sham if an administrative agency, by design, does not meaningfully answer for its policies to either of the elected branches.” *Id.* at *48 (Henderson, J., dissenting); *see also id.* at *55–*56, *65–*67.
- Whereas the FTC approved in *Humphrey’s Executor* is “a deliberative expert nonpartisan agency that reports to the Congress,” “[t]he CFPB is a unitary inexpert partisan agency that reports to no one.” *Id.* at *60; *see also id.* at *96–*99 (Kavanaugh, J., dissenting).
- “The single-Director structure of the CFPB represents a gross departure from settled historical practice,” and is “[p]erhaps the most telling indication of the severe constitutional problem with” the agency’s leadership structure. *Id.* at *73 (Kavanaugh, J., dissenting); *see also id.* at *74–*77, *80–*85.

- “The CFPB’s concentration of enormous power in a single unaccountable, unchecked Director poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than a multimember independent agency does.” *Id.* at *73; *see also id.* at *87–*90.
- “The single-Director CFPB diminishes the President’s Article II authority to control the Executive Branch more than traditional multi-member independent agencies do.” *Id.* at 73; *see also id.* at *91–*96.

Indeed, FHFA is *even more* constitutionally problematic than the CFPB, for courts have interpreted 12 U.S.C. § 4617(f) to mean that it is insulated from meaningful oversight by the judiciary in addition to the insulation it enjoys from oversight by the President and Congress. *See Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 604-16 (D.C. Cir. 2017). The Court should reject constitutional arguments that would permit FHFA to continue to operate as the least accountable agency in our Nation’s history. (*See R.33, Br. in Support of Plfs.’ Mot. for Summ. Disp. at 9–10, PgID 912–13.*)

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February 2018, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system, causing a true and correct copy to be served on all counsel of record.

/s/ Matthew T. Nelson
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