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Via ECF

Deborah S. Hunt, Esq.
Clerk of the Court
United States Court of Appeals for the Sixth Circuit
Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, OH 45202

Re: *Rop, et al. v. Federal Housing Finance Agency, et al.*, No. 20-2071

Dear Ms. Hunt:

Defendants filed a Rule 28(j) letter to highlight the Federal Circuit's decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140, 2022 WL 1696322, (Fed. Cir. 2022), but that decision lends no support to their Appointments Clause argument. The Federal Circuit made clear that the acting official at issue there was "on his 268th day performing the [principal officer's] duties, which is less than the 309 days the Supreme Court deemed acceptable in *Eaton*." *Id.* at *4 (citing *United States v. Eaton*, 169 U.S. 331, 333-34 (1898)).

Here, in contrast, Acting Director DeMarco had been exercising the FHFA Director's powers for nearly *three years* when he entered into the Net Worth Sweep—which was far beyond the 309 days at issue in *Eaton*. *See* Reply Br. 6. Thus, the Federal Circuit had no occasion to, and did not, address the situation where an acting official served longer than the time permitted by the Recess Appointments Clause. A decision finding an Appointments Clause violation here would therefore be fully consistent with the Federal Circuit's holding.

Although the Federal Circuit seemingly endorsed the proposition that acting service might be deemed "temporary" under *Eaton* if it ends upon the appointment of a successor, that proposition was merely part "of th[e] combination of facts"—*including* the fact that the acting service was "less than the 309 days" in *Eaton*—that formed the basis of the court's holding. *See* 2022 WL 1696322, at *4. Moreover, as explained in Plaintiffs' reply brief, the idea that acting service is "limited" if it concludes upon appointment of a successor is no limitation at all. Reply Br. 6. The text of the Constitution, the federal government's practice throughout the Nation's history, and *Eaton* itself each call for a limitation on the *amount of time* an official without Senate confirmation may exercise the powers of a principal officer.

It thus remains true that Defendants have cited no constitutional text, no federal statute, no historical practice, and no persuasive decision that would authorize Mr. DeMarco's over two years of acting service as a principal officer without Senate confirmation.

Respectfully submitted,

/s/ David H. Thompson
David H. Thompson

Counsel for Appellants

cc: Counsel of Record (by ECF)