No. _____

In the Supreme Court of the United States

MICHAEL ROP, ET AL.,

Petitioners,

v.

FEDERAL HOUSING FINANCE AGENCY, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In August 2009, the Director of the Federal Housing Finance Agency resigned. The Senate did not confirm a successor for over four years. In the meantime, an individual—who was never nominated by the President nor confirmed by the Senate—served as "Acting" FHFA Director, exercising the full panoply of powers granted to that office. The Sixth Circuit held this extended acting tenure did not run afoul of the Appointments Clause, and thus upheld the "Acting" FHFA Director's regulatory decisions.

The question presented is whether the challenged decisions of the "Acting" FHFA Director should be vacated because the Constitution does not permit the President to designate an "acting" official to exercise the powers of a principal officer indefinitely without the advice and consent of the Senate.

PARTIES TO THE PROCEEDING

Petitioners are Michael Rop, Stewart Knoepp, and Alvin Wilson. Petitioners were the plaintiffs in the United States District Court for the Western District of Michigan and the plaintiffs-appellants in the United States Court of Appeals for the Sixth Circuit.

Respondents are the Federal Housing Finance Agency, Sandra L. Thompson, in her official capacity as Director of the Federal Housing Finance Agency, and the United States Department of the Treasury. Respondents were the defendants in the United States District Court for the Western District of Michigan and the defendants-appellees in the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Michael Rop, et al. v. Federal Housing Finance Agency, et al.*, No. 20-2071 (6th Cir. Cir.) (opinion issued and judgment entered October 4, 2022).
- *Michael Rop, et al. v. Federal Housing Finance Agency, et al.*, 1:17-cv-497 (W.D. Mich.) (opinion issued and judgment entered September 8, 2020).

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Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 50 F.4th 562 and is reproduced at Pet. App. 1. The United States District Court for the Western District of Michigan's opinion is reported at 485 F. Supp. 3d 900 and is reproduced at Pet. App. 57.

JURISDICTION

The Court of Appeals issued its judgment on October 4, 2022. Pet. App. 55. Petitioner's application for an extension of time to file a petition for a writ of certiorari up to and including February 2, 2023 was granted by Justice Kavanaugh on December 17, 2022. *See Michael Rop, et al., v. Federal Housing Finance Agency, et al.*, No. 22A542. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article II, Section 2, Clause 2 of the U.S. Constitution provides, in relevant part, that the President,

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the

> Courts of Law, or in the Heads of Departments.

U.S. CONST., art. II, § 2, cl. 2.

INTRODUCTION

At the center of this Petition are actions taken by the "Acting" Director of the Federal Housing Finance Agency. But "Acting" is something of a misnomer, as this official was "acting" in name only. He served for over four years—longer than a Presidential term, longer than the average tenure of a Cabinet secretary, and longer than the service of exceptional ones, such as Thomas Jefferson's time as Secretary of State. He was never nominated by the President. He was never confirmed by the Senate. Yet the whole time this "Acting" Director exercised significant authority of the United States. The issue in this case is whether such an end-run around the Appointments Clause is constitutionally permissible. It is not.

The Sixth Circuit held that it is. In doing so, the court determined that Congress could "authorize[]" an acting official "to serve indefinitely via statute." Pet. App. 47 (Thapar, J., concurring in part and dissenting in part). Such a holding renders the Appointments Clause an empty formality, splits from other circuit authority, disregards this Court's precedents, and establishes a dubious standard during an era when the Executive's reliance on "acting" officials has grown precipitously.

The Appointments Clause "is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997). Having experienced "swarms of [royal] Officers"

before the Revolution, THE DECLARATION OF INDEPENDENCE ¶ 12 (U.S. 1776), the Founders approached the problem of appointments with a two-sided solution in the Constitution. Officers are nominated by the President ensuring "the blame of a bad nomination would fall upon the president singly and absolutely." THE FEDERALIST NO. 77, p. 517 (J. Cooke ed. 1961) (A. Hamilton). Yet the Senate must confirm these officers, "serv[ing] both to curb Executive abuses of the appointment power, and to promote a judicious choice of persons for filling the offices of the union." *Edmond*, 520 U.S. at 659 (cleaned up). In this way, both the President and the Senate are held accountable for those who wield significant authority of the United States. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021).

Since the "Acting" FHFA Director never went through Senate confirmation, all agree that his exercise of significant authority was only constitutionally permissible if his tenure falls under an exception to the Appointments Clause. He was not recess appointed, thus the only exception available is if he was an "inferior officer" whose designation was provided by Congress. In the mine run case, whether an officer is "inferior" turns on the office's authority and supervision. In this sense, the "Acting" FHFA Director was the polar opposite of an "inferior officer," heading an agency and making decisions that are not "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Arthrex*, 141 S. Ct. at 1980. He exercised the full authority of a principal officer for over four years.

The "Acting" FHFA Director could only be

"inferior"—which is to say constitutionally exercising the powers of his office—under one narrow understanding of the term. This Court's precedent in *United States v. Eaton*, 169 U.S. 331 (1898) establishes that an acting official is "inferior" and can serve without running afoul of the Appointments Clause, *if* that official performs the duties of Director "for a limited time, and under special and temporary conditions," *id.* at 343.

An officer, who is "inferior" only because of his "limited time" of service, must actually serve for only a limited time. Yet in its decision, a divided panel of the Sixth Circuit refused to recognize *any* temporal limitations on "acting" officers. The Sixth Circuit held that the tenure here was "temporary because" the "Acting" Director's appointment "would terminate upon the appointment of [a Senate-confirmed] successor." Pet App. 23 (cleaned up). And the Sixth Circuit refused to consider any limits on "whether the President waited 'too long' before the confirmation of a permanent principal officer" or any "parameters" that might define when an inferior officer has exceeded the "special [or] temporary conditions" permitted by the Constitution. Pet. App. 24. As Judge Thapar explained in dissent, this decision allows the President and Congress to "scrap" the Appointments Clause altogether. Pet. App. 32.

The Sixth Circuit's holding that there are effectively no constitutional limits on the tenure of an acting official is an outlier. In fact, it diverges from courts that have considered this issue, including the D.C., First, Fourth, and Federal Circuits. *Arthrex, Inc., v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1333 (Fed. Cir. 2022); *United States v. Smith*, 962 F.3d 755,

765 (4th Cir. 2020); *United States v. Hilario*, 218 F.3d 19 (1st Cir. 2000); *Williams v. Phillips*, 482 F.2d 669, 670 (D.C. Cir. 1973) (per curiam). These circuits recognize that "a statute" that "may authorize an acting tenure so lengthy that it *exceeds* the 'special and temporary conditions' contemplated by *Eaton*" could "amount[ ] instead to a circumvention of the Appointments Clause." *Smith*, 962 F.3d at 765 n.3 (emphasis added).

The Sixth Circuit's decision cannot be squared with this Court's Appointments Clause precedents either. From this Court's very first recognition of the temporary service exception to Senate confirmation, this Court has implicitly recognized that there comes a point when an inferior officer is impermissibly "transformed into the superior and permanent official." *Eaton*, 169 U.S. at 343. In other words, it is "[t]he *temporary* nature of the office [which] is the . . . reason that *acting* heads of departments are permitted to exercise authority without Senate confirmation." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 708 n.17 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (first emphasis added). This Court's repeated statements that the "acting" exception means "temporary" or "temporarily" only reaffirms that such an official cannot serve indefinitely. *See, e.g., Edmond*, 520 U.S. at 661; *Morrison v. Olson*, 487 U.S. 654, 672 (1988); *id.* at 721 (Scalia, J., dissenting). If a temporary appointment were not *really* temporary, "the structural protections of the Appointments Clause" would be "avoided based on . . . trivial distinctions." *N.L.R.B. v. Sw. Gen., Inc.*, 580 U.S. 288, 314 n.1 (2017) (Thomas, J., concurring).

Constitutional text, history, and precedent all

indicate that, if an "acting" official exercises the duties of a principal officer, that official may only serve without Senate confirmation for up to six months or at most two years. Pet. App. 40–44 (Thapar, J., concurring in part and dissenting in part). Thus, the over four years that the "Acting" FHFA Director wielded power far exceeds any constitutionally permissible line or fair understanding of *Eaton's* "limited time" and "special or temporary conditions." And, at the time of the challenged actions in this case, the "Acting" FHFA Director had been serving for over three years, which certainly crosses that line as well. *Sw. Gen., Inc.*, 580 U.S. at 314 n.1 (Thomas, J., concurring) (explaining there is "nothing special or temporary" about serving "more than three years in an office limited by statute to a 4–year term, and . . . exercis[ing] all of the statutory duties of that office"). In fact, so far in this litigation, the Government has failed to identify a single acting official during the first *two hundred years* of the Constitution that exercised the power of a principal officer without Senate confirmation for as long as the "Acting" FHFA Director did.

In recent decades, the rise of acting officers has been "pervasive" with one survey indicating that from 1981 to 2020 "nearly as many acting officers have filled cabinet positions as confirmed cabinet secretaries." Pet. App. 40 (Thapar, J., concurring in part and dissenting in part). Some statutes "expressly limit an acting officer's tenure. Others do not." *Id.* Regardless of what any particular statute provides, the Constitution—contrary to the Sixth Circuit—must serve as the ultimate backstop. And this structural protection of liberty is not something

Congress and the President can bargain away by legislative compromise.

This Court should grant this Petition to clarify that the Constitution does not permit an acting official to serve indefinitely, that the "Acting" FHFA Director exceeded those limits, and that relief should be granted to Petitioners.

STATEMENT

Petitioners are shareholders in Fannie Mae and Freddie Mac (the "Companies"), two for-profit companies that are chiefly regulated by FHFA and for which FHFA is currently acting as conservator.

The Director. FHFA is an "independent" agency headed by a single director who serves a five-year term and who, by statute, could only be removed by the President "for cause." 12 U.S.C. § 4512(b)(2). In *Collins v. Yellen*, 141 S. Ct. 1761 (2021), this Court held that FHFA's "novel" structure violated the separation of powers by concentrating executive power "in a unilateral actor insulated from Presidential control," *id.* at 1784. And the Court noted how powerful this agency (and by extension the individual serving as Director) is: "no board or commission can set aside the FHFA's rules;" "FHFA has regulatory and enforcement authority over two companies [Fannie and Freddie] that dominate the secondary mortgage market and have the power to reshape the housing sector;" and "FHFA actions with respect to those companies could have an immediate impact on millions of private individuals and the economy at large." *Id.* at 1785 (citing *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2241 (2020) (Kagan, J., concurring in the judgment with respect to

severability and dissenting in part) (noting that "the FHFA plays a crucial role in overseeing the mortgage market, on which millions of Americans annually rely")).

As with all other principal officers of the United States, the FHFA Director must be nominated by the President and confirmed by the Senate. 12 U.S.C. § 4512(b)(1); U.S. CONST., art. II, § 2, cl. 2. But when the office of FHFA Director is vacant, the Housing and Economic Recovery Act ("HERA") authorizes the President to designate an acting official to exercise the Director's powers during a temporary vacancy. 12 U.S.C. § 4512(f).

The Conservatorship. In addition to creating FHFA to regulate Fannie and Freddie, Congress empowered FHFA to appoint itself as the Companies' conservator under certain circumstances. *See* 12 U.S.C. §§ 4511(b), 4617(a). When acting as conservator, the Director's decisions are unreviewable by "any other agency of the United States." 12 U.S.C. § 4617(a)(7).

FHFA's first Director, James Lockhart, exercised the agency's power to place the Companies into conservatorship in September 2008. The next day, FHFA entered into agreements with Treasury, in which Treasury "exercised its temporary authority to buy" the Companies' stock. *Collins*, 141 S. Ct. 1772. In exchange for providing each company up to $100 billion in capital, Treasury received "1 million shares of specially created senior preferred stock in each company." *Id.* at 1773. With these shares, Treasury received four key entitlements:

First, Treasury received a senior liquidation

> preference equal to $1 billion in each company, with a dollar-for-dollar increase every time the company drew on the capital commitment. In other words, in the event the FHFA liquidated Fannie Mae or Freddie Mac, Treasury would have the right to be paid back $1 billion, as well as whatever amount the company had already drawn from the capital commitment, before any other investors or shareholders could seek repayment. Second, Treasury was given warrants, or long-term options, to purchase up to 79.9% of the companies' common stock at a nominal price. Third, Treasury became entitled to a quarterly periodic commitment fee, which the companies would pay to compensate Treasury for the support provided by the ongoing access to capital. And finally, the companies became obligated to pay Treasury quarterly cash dividends at an annualized rate equal to 10% of Treasury's outstanding liquidation preference.

Id. FHFA and Treasury later amended this deal twice in 2009 to provide more capital support for the Companies.

"Acting." Director Lockhart resigned in August 2009. Pursuant to HERA, President Obama designated Deputy Director Edward DeMarco as "Acting" FHFA Director. DeMarco's Deputy Director position did not require Senate confirmation and thus DeMarco had never been Senate confirmed. Thus began the "acting" tenure at issue in this Petition.

Fifteen months later, President Obama

nominated Joseph A. Smith, Jr. to serve as FHFA Director. *See* 156 CONG. REC. S7911-03 (Nov. 15, 2010). The Senate did not confirm Mr. Smith, so the nomination was returned to the President on December 22, 2010. *See* 156 CONG. REC. S11070-07 (Dec. 22, 2010). The President would wait more than two years before nominating someone else.

In the meantime, "Acting" Director DeMarco ran FHFA, exercising the full panoply of the office's statutory powers. Under his supervision, the Companies were forced to dramatically write down the value of their assets and to incur substantial non-cash accounting losses that forced the Companies to make more draws on Treasury's funding commitment—causing the liquidation preference on Treasury's Government Stock to swell to $189 billion. Based on the Companies' performance in the second quarter of 2012, however, it was apparent the Companies' private shares still had value.

In August 2012, Mr. DeMarco, acting as the Companies' conservator, signed the Third Amendment to the PSPAs. Among other things, this amendment imposed what is known as the "Net Worth Sweep." The Net Worth Sweep replaced the Government Stock's prior dividend structure with one that required Fannie and Freddie to pay Treasury their entire net worth on a quarterly basis, leaving only a small capital buffer. *Id.* Effectively, the federal government skimmed off the Companies' net worth every quarter.[1]

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[1] Treasury and FHFA have since modified the quarterly dividend payments to permit the Companies to build up capital

As FHFA expected, the Net Worth Sweep resulted in massive and unprecedented payments to the government. All told, through the third quarter of 2019, the Net Worth Sweep has required the companies to transfer to Treasury over $300 billion in purported dividends—$136 billion more than Treasury could have received under the original agreements. *See* FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, https://bit.ly/33Bqlz0. By that time, Treasury had already recouped over $109 billion more than it disbursed to the Companies. *See id.*; FHFA, TABLE 1: QUARTERLY DRAWS ON TREASURY COMMITMENTS TO FANNIE MAE AND FREDDIE MAC PER PSPAS, https://bit.ly/3e0AlDK.

It was nearly another year after the imposition of the Net Worth Sweep—in May 2013—when the President finally sent another nomination to the Senate. He nominated Congressman Melvin L. Watt for FHFA Director. Seven months after that, the Senate confirmed Mr. Watt on December 10, 2013. Director Watt took office in January 2014.

For the first time in over four years, FHFA had a Director who had been confirmed by the Senate.

Proceedings Below. Petitioners are shareholders who challenged FHFA's actions, arguing (among other things) that "Acting" Director DeMarco's lengthy tenure violated the Appointments Clause. The Western District of Michigan had jurisdiction over Petitioners' claims under 28 U.S.C.

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to specified thresholds; but as this Court has held, this modification does not moot Plaintiffs' request for relief. *Collins*, 141 S. Ct. at 1780.

§ 1331. On September 8, 2020, the district court dismissed the complaint. Pet. App. 141. Petitioners timely appealed.

A divided panel of the Sixth Circuit affirmed the dismissal of Petitioners' Appointments Clause claim. Pet. App. 2–3. The panel majority held that "DeMarco was not serving in violation of the Constitution when he signed the" Net Worth Sweep. Pet. App. 16. According to the Sixth Circuit, "when a government official fills a vacancy of a principal officer, that acting officer is an inferior officer. And inferior officers can be designated by the President alone, so long as Congress has vested the President with the authority to do so." Pet. App. 18. Since HERA authorized DeMarco's indefinite appointment *by statute*, the Sixth Circuit rejected any *constitutional* argument grounded in "text, history, and precedent" that his tenure must be limited. Pet. App. 20. So long as there is a statute without a time-limit, the Sixth Circuit would hold that the Constitution allows an acting officer to serve indefinitely.

Judge Thapar dissented because the Sixth Circuit's holding "permits the President and Congress to scrap" the Appointments Clause. Pet. App. 32.[2] Although historical practice and this Court's precedents permit acting officials to serve without confirmation for some period of time, "no acting officer can serve without confirmation longer than the Constitution permits." Pet. App. 40. Judge Thapar then suggested three "interpretative tools . . . for

[2] Judge Thapar concurred in the majority's decision to remand Petitioners' removal claim, which is not at issue in this Petition. Pet. App. 32 n.1.

deciding when an acting officer has overstayed his welcome." Pet. App. 40.

"First, historical practice suggests a line at six months. For up to six months, an acting officer may fill a regularly occurring vacancy, while service beyond that mark is presumptively unconstitutional." Pet. App. 40. Beyond six-months, there may be "special" circumstances supporting a longer tenure—as in *Eaton*, when a consul fell ill on the other side of the planet "in an era before telephones, automobiles, or airplanes." Pet. App. 43. Since the vacancy that the "Acting" FHFA Director filled was "routine," his tenure exceeded these limits. Pet. App. 43.

"Second, the Constitution's text and structure suggest an alternative line: An acting officer may serve until the current Senate expires—that is, for up to two years or as little as one day, depending on when the vacancy occurs." Pet. App. 43. To begin with, the "the Appointments Clause itself states that appointees must be confirmed by 'the Senate.'" If "the Senate" refers to "'the Senate in existence when the acting officer's service begins,' that gives the acting officer at most two years to seek confirmation before a new Senate sits." Pet. App. 43. Tying service to the Senate is further buttressed by the Recess Appointments Clause, which would be a "dead letter" if Acting officials—not appointed during any recess at all—could serve *longer* than recess-appointed officials who can serve, at most, for two years. Pet. App. 44.

Third, a functional, "reasonableness" inquiry into the length of acting service "has an obvious appeal. But it lacks any apparent rooting in the Appointments Clause's text, historical practice, or the Constitution's

structure." Pet. App. 44–45. Nonetheless, even under such an inquiry—informed by the Executive Branch's own guidance on how long is too long for an acting official to serve—the "Acting" FHFA Director "flunks even this amorphous standard." Pet. App. 45.

As Judge Thapar explained, under "whichever metric . . . DeMarco's tenure violated the Appointments Clause. No viable interpretation of the Clause permits an acting officer to skip confirmation for three years under these circumstances. By the time DeMarco signed the [Net Worth Sweep,] he signed it unlawfully." Pet. App. 46.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Decision Diverged From Other Circuits.

A. The Sixth Circuit held that the Appointments Clause places no limit on the duration of an "acting" official's service.

The Sixth Circuit drew a simple, if plainly wrong, line: if Congress authorizes acting tenure, then the Constitution must as well. The majority explained that Congress "accounted for vacancies by providing for an Acting Director to take on the responsibilities of FHFA Director under certain circumstances." Pet. App. 18. "President Obama complied with this procedure when he designated Deputy Director DeMarco to serve as Acting Director upon the resignation of Director Lockhart" and the "Acting" Director's "service terminated . . . upon the appointment of the new Director." Pet. App. 18–19. "Therefore," the Sixth Circuit said, "we find no violation of the Appointments Clause." Pet. App. 19.

In reaching its conclusion that whatever line Congress draws is coextensive with whatever the Constitution permits, the Sixth Circuit made several points. First, the majority rejected Petitioners' argument based on "constitutional text, history, and precedent." Pet. App. 20. Disregarding the first two centuries of historical practice under the federal Constitution, the Sixth Circuit observed that "[t]he President has installed acting officers, who Congress has declined to place time restrictions on, for well over twenty years." Pet. App. 23. This recent history "represents longstanding congressional acquiescence to the reality that disagreements between the President and the Senate result in vacancies that require principal officers' duties to be carried out temporarily by acting officials." Pet. App. 23. Relying on this Court's decision in *Noel Canning*, the Sixth Circuit explained that the past two decades of practice was "entitled to great regard." Pet. App. 23.

Second, the Sixth Circuit held that under this Court's decision in *Eaton* the "Acting" Director's tenure was actually temporary. Pet. App. 23–24. It did *end* after all—when his successor was appointed more than four years later. Pet. App. 69–70.

Third, the Sixth Circuit declined to consider whether other provisions in the Constitution, namely the Recess Appointments Clause, offered insight into how long acting officials may permissibly serve. In its view, "[t]he presidential practice of appointing acting officers to fill vacancies, which can arise at any time and last for unknown duration, cannot be logically tied to the comings and goings of the Senate." Pet. App. 25. Besides, the Sixth Circuit stated again, "Congress has acquiesced to this practice and is free

to impose time limits on acting officials' terms of service." Pet. App. 25.

Fourth, the Sixth Circuit rejected consideration of a "functionalist" approach to determine the reasonableness of an acting officer's tenure. Pet. App. 25. Such an approach would have been chiefly derived from the Executive Branch's *own* guidance that an acting appointment should "not continue beyond a reasonable time." Pet. App. 26. (quoting *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 289–90 (1977)). An evaluation of the reasonableness of an acting official's tenure, according to the Sixth Circuit, "contemplate[d] an evaluation plainly committed to the political branches and wholly irrelevant to interpreting the text of the Appointments Clause." Pet. App. 26.

In sum, the Sixth Circuit saw no "reason to read an explicit time limit on acting officials into the constitutional . . . scheme[]." Pet. App. 19.

B. Other courts of appeals have recognized that the Appointments Clause imposes a backstop on acting appointments.

The Sixth Circuit did not cite any other circuit court decisions in support of its novel indefinite service rule. For good reason, the other circuits that have addressed this issue have all recognized that the Appointments Clause serves as a backstop on the length of service of an "acting" official.

On remand from this Court, the Federal Circuit evaluated whether the Commissioner for Patents could constitutionally issue a rehearing decision consistent with the Appointments Clause. *Arthrex,*

Inc., v. Smith & Nephew, Inc., 35 F.4th 1328, 1333 (Fed. Cir. 2022). In *Arthrex*, the office of the Director of the Patent and Trademark Office was vacant. Under an agency directive, the Commissioner fulfilled the responsibilities of that office on an acting basis. The Federal Circuit upheld this under an Appointments Clause challenge, in part, because the Commissioner was in fact serving "for a limited time" when the relevant decision was reached. *Id.* "[T]he Commissioner denied Arthrex's rehearing request on his 268th day performing the Director's duties, which is less than the 309 days the Supreme Court deemed acceptable in *Eaton*." *Id.* at 1335. The fact that the Commissioner was serving less than a year, in "*combination*" with other limits—such as the President's ability to name a replacement Acting Director and the eventual appointment of a successor—meant that "the Commissioner was performing the Director's duties 'for a limited time, and under special and temporary conditions.'" *Id.* (quoting *Eaton*, 169 U.S. at 343) (emphasis added). Under the Federal Circuit's analysis, the length of time of service mattered.[3]

The Fourth Circuit similarly considered the length of time of acting service in *United States v. Smith*, 962 F.3d 755 (4th Cir. 2020). In *Smith*, the Fourth Circuit upheld the actions of the Acting Attorney General from an Appointments Clause challenge. Yet in doing so the Fourth Circuit

[3] A petition for a writ of certiorari is currently pending in *Arthrex*. But the petitioners in *Arthrex* do not seek review of the Federal Circuit's Appointments Clause holding. *See* Pet., *Arthrex, Inc. v. Smith & Nephew, Inc., et al.*, No. 22-639, at 15 n.1 (U.S. Jan. 6, 2023).

explained that "[t]o be sure, it is possible that a statute may authorize an acting tenure so lengthy that it exceeds the 'special and temporary conditions' contemplated by *Eaton*, and amounts instead to a circumvention of the Appointments Clause." *Id.* at 765 n.3. But that was not the case in *Smith* because the Acting Attorney General "held his post for only a few months." *Id.* This less-than-one-year of acting service was presumptively reasonable.

The D.C. Circuit likewise considered "the existence of presidential authority to make an interim appointment without Senate approval" in a case involving an Acting Director of the Office of Economic Opportunity. *See Williams v. Phillips*, 482 F.2d 669, 670 (D.C. Cir. 1973) (per curiam). In that case, the Government sought a stay of the district court's decision that the Acting Director had served "illegally in his position since he ha[d] not been nominated by the President and confirmed by the Senate." *Id.* The D.C. Circuit denied the stay, explaining that "[t]he Government concedes that the President cannot designate an acting officer *indefinitely* without any presentation to the Senate for confirmation." *Id.* at 671 (emphasis added). Looking to congressional enactments regulating the length of service of acting officials, the Court held that thirty days of service was "[a]n indication of the reasonable time" and that the Government had not demonstrated that "the President was entitled to hold [the Acting Director] in office for a four-and-a-half-month period without any nomination." *Id.* Under *Williams*, the "Acting" FHFA Director would have overstayed his constitutional limit more than ten-times over.

Further, the First Circuit briefly addressed this

issue in *United States v. Hilario*, 218 F.3d 19 (1st Cir. 2000), in which a career Justice Department official served for more than six years as "interim United States Attorney," 218 F.3d at 21. Given this "inordinate length" of service, an Appointments Clause challenge naturally arose. The court recognized that while "an inferior officer can stand in for a principal officer[,] . . . [s]hould the stand-in remain *so long* in office that he became indistinguishable from the latter, an argument could be made that his continued service required nomination by the President and confirmation by the Senate." *Id.* at 29 (emphasis added). But the First Circuit did not need to reach that question in *Hilario* because it determined that United States Attorneys are not "principal officers."

* * *

The Sixth Circuit's decision diverges from these circuits in at least two critical ways. First, the other circuits *all* recognized the Constitution provides a limit on the tenure of "acting" officials, while the Sixth Circuit effectively held there is none. Second, the "Acting" FHFA Director's tenure at issue in this Petition *far exceeds* the quite limited tenures of most of the acting officials in those cases. Nevertheless, the Sixth Circuit upheld Mr. DeMarco's protracted stay at the top of an agency without the constitutionally required advice and consent of the Senate.

II. The "Acting" FHFA Director Served In Violation of the Constitution.

The Appointments Clause and its requirement for advice and consent by the Senate is the default means for appointing officers of the United States. The

Senate's constitutional role in this process is more than a mere technicality or historical accident. *See* Michael McConnell, THE PRESIDENT WHO WOULD NOT BE KING 157 (2020) (explaining the final version of the Clause "was a major step away from a fully unitary executive—the President would not have subordinates fully of his own choosing"). "[T]he need to secure Senate approval provides 'an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.'" *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 523 (2014) (quoting THE FEDERALIST NO. 76, p. 513 (J. Cooke ed. 1961) (A. Hamilton)).

"Acting" designations strip the Senate of its key role. The Constitution, of course, provides one explicit path for the President to fill vacancies without Senate consent—the Recess Appointments Clause. U.S. CONST. art. II, § 2, cl. 3. But the "Acting" FHFA Director was not so appointed. For "apparent[] . . . reasons of efficiency and practicality," McConnell, *supra*, 266, the Constitution additionally included the last provision of the Appointments Clause, "sometimes referred to as the 'Excepting Clause,'" *Edmond*, 520 U.S. at 660. This provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2.

In *Eaton*, this Court interpreted "inferior" to include temporary service. This is, as Justice Scalia described, an "admittedly sketchy precedent in this area." *Morrison*, 487 U.S. at 721 (Scalia, J.,

dissenting); *see also Sw. Gen.*, 580 U.S. at 313 (Thomas, J., dissenting) (questioning whether acting officers can even serve as "principal officers"). But this Court has held that some temporary service, authorized by Congress, is broadly consistent with congressional practice at the time of the Founding and longstanding practices since. *Sw. Gen.*, 580 U.S. at 294 ("Since President Washington's first term, Congress has given the President limited authority to appoint acting officials to temporarily perform the functions of a vacant PAS office without first obtaining Senate approval"); *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 600 (2014) (Scalia, J., concurring in the judgment).

Yet since an "acting" officer can only avoid Senate confirmation to the extent that officer is actually "inferior"—which is to say actually serving "temporarily"—it is this Court's "solemn responsibility" to demarcate when that acting official is "transformed into the superior and permanent official" serving unconstitutionally. *Noel Canning*, 573 U.S. at 571; *Eaton*, 169 U.S. at 343. In this, as Judge Thapar explained, the Constitution's text, history, and precedent provide guidance: no more than six months absent unusual circumstances, and never more than two years. Pet. App. 40–44 (Thapar, J., concurring in part and dissenting in part).

A. The text of the Constitution counsels no acting service beyond two years.

Start with the text. The Constitution's text does not contemplate "acting" appointments, thus it is similarly silent on the permissible duration of those

appointments. But the Constitution is not silent as to "vacancies." The Recess Appointments Clause "gives the President alone the power 'to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next session.'" *Noel Canning*, 573 U.S. at 519 (quoting U.S. CONST., art. II, § 2, cl. 3). This Court's interpretation of that clause allows an official appointed under the Recess Appointments Clause "to serve for . . . almost 2 years" depending on when the President makes the appointment within a congressional session. *Id.* at 534. And it ties that service to the expiration of the Senate's session.[4]

"[T]he rule against surplusage dictates that the Recess Appointments Clause must be as large as the acting-officer exception or larger. Otherwise, the President could do with acting officials what he could not with recess appointments." Pet. App. 44 (Thapar, J., concurring in part and dissenting in part). There would be no need to recess appoint, if the President could simply announce an acting appointment to last indefinitely—even longer than the two-year sitting of

[4] The Constitution addresses vacancies in two other provisions: the House Vacancies Clause and the Senate Vacancies Clause. The Founders did not allow for the Governors of the several states to fill vacancies in the House, but the original Senate Vacancies Clause (and as amended by the Seventeenth Amendment) makes a provision for temporary appointments of Senators. This clause allowed these appointments to last "until the next Meeting of the Legislature, which shall then fill such vacancies." This is yet further evidence that indefinite "temporary" appointments to fill vacancies are foreign to the Constitution's design. And, critically, here too the Founders tied the Executive authority to fill a temporary vacancy to the meeting of the Legislature.

the Senate. But "[i]t is unthinkable that such an obvious means for the Executive to expand its power would have been overlooked during the ratification debates." *See Noel Canning*, 573 U.S. at 596 (Scalia, J., concurring in the judgment).

If the text of the Constitution for "practical reason[s]" envisages an officer acting without Senate confirmation for at most two years, McConnell, *supra*, 266, then a largely atextual practice of designating acting officials cannot permit service longer than what the text otherwise provides. Under this test, the "Acting" FHFA Director exceeded his lawful tenure well before he took the action that Petitioners challenge in this case.

B. Historical practice advises that acting officials can generally serve no longer than six months.

History only underscores the unlawfulness of the "Acting" FHFA Director's tenure. Here, Founding era evidence provides guidance, *Noel Canning*, 573 U.S. at 514, and the actions of the early Congresses and of President Washington's administration have unique salience, *cf. Myers v. United States*, 272 U.S. 52, 136 (1926). *See* Pet. App. 42 (Thapar, J, concurring in part and dissenting in part).

To begin with, the idea that a President may struggle to fill a role with the Senate's approval was well-known to the Founders. As future-Justice Iredell explained at the North Carolina ratifying convention, "The President proposes such a man for such an office. The Senate has to consider upon it. If they think him improper, the President must nominate another, whose appointment ultimately again depends upon

the Senate." 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 134 (2d ed. 1836), *available at* https://bit.ly/3DsWckv. This should not be too much of a problem because for a "vacant" office, there might be a "hundred men on the continent . . . equally well[-]qualified" among whom the President may choose. *Id.* But Senate refusal, as Hamilton put it, would necessarily lead to "a second or . . . subsequent nomination" by the President. THE FEDERALIST NO. 76, *supra,* p. 512. There may be many reasons, both practical and political, for the President and Senate to come to an agreement on a nominee sooner rather than later. But the fact that an office would not be filled without agreement was well understood.

Equally well-understood was that a previously filled principal officer role may be temporarily unoccupied. Initially, Congress only authorized acting appointments of an officer in the Departments of State, Treasury, and War and in only three specific circumstances: "death, absence from the seat of government, or sickness." Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281. Congress provided *in only these* circumstances that the President may "authorize any person or persons . . . to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease." *Id.* [5] Yet only three years later, Congress

[5] This statute thus provides no support for any indefinite stay in office because of a prior official's resignation. In all events, some have argued that the 1792 statute was unconstitutional. *See* Michael B. Rappaport, *The Original Meaning of the Recess*

amended the statute in two relevant ways. *See* Act of Feb. 13, 1795, ch. 21, 1 Stat. 415. First, Congress removed the restrictions on the *type* of vacancy, referring only to a "case of vacancy." *Id*. And second, Congress stated that "no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months." *Id*. This six-month period appears to accord with prior understandings under English law. Pet. App. 41 n.6. (Thapar, J., concurring in part and dissenting in part).

In the 1860s, Congress expanded the number of offices for which the President could authorize acting service—but service in an acting capacity "occasioned by death or resignation" was limited to only ten days. *See* Anne O'Connell, *Actings*, 120 COLUM. L. REV. 613, 626 & n.51 (2020) (citing Act of July 23, 1868, ch. 227, 15 Stat. 168 and Act of Feb. 20, 1863, ch. 45, 12 Stat. 656). The ten-day limit was extended to thirty days in 1891. *See id.* at 626 & n.53 (citing Act of Feb. 6, 1891, ch. 113, 26 Stat. 733). These statutes remained until 1988. *Sw. Gen.*, 137 S. Ct. at 935–36.

Executive designation of "acting" officers largely complied with Congress's commands. According to one survey, from 1792–1868 only one individual ever appears to have served close to a year in an "acting" capacity. *See* Thomas Berry, *Is Matthew Whitaker's Appointment Constitutional? An Examination of Early Vacancies Acts*, YALE J REGUL. NOTICE &

Appointments Clause, 52 U.C.L.A. L. REV. 1487, 1516 n. 80 (2005).

COMMENT (Nov. 26, 2018), https://bit.ly/404TXgU. [6] The majority served less than six months, and none served for anything close to the over four year tenure of FHFA's "Acting" Director. *Id.*

"Where the constitutional text is silent, 'the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine.'" Pet. App. 41 (Thapar, J., concurring in part and dissenting in part) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting)). For most of the first two centuries of the Constitution's history, Congress's customary practice was to impose statutory time limits on the duration of acting officers' tenure—time limits that were never more than six months and often considerably less.

The historical understanding of Congress is largely consistent with past Executive branch guidance. In a 1977 opinion, President Carter's Office of Legal Counsel addressed how long the Acting Director of the Office of Management and Budget could serve. *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287 (1977). The opinion stated unequivocally that "[w]hile there is no express statutory limit on the length of such

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[6] Chief Clerk of the War Department George Graham began his service as Secretary of War ad interim on October 22, 1816. His tenure carried over from the end of the Madison Administration into the first year of the Monroe Administration. His designation formally ended either on October 8, 1817 (when John C. Calhoun was appointed) or on December 10, 1817 (when Calhoun entered upon his duties). *See* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–2005, at 5 (2005), *available at* https://bit.ly/3l5SJSm.

tenure as Acting Director, it *may not continue* indefinitely." *Id*. (emphasis added). This accords with the position taken by the Nixon Administration. *See Williams*, 482 F.2d at 671 (noting that "[t]he Government concedes that the President cannot designate an acting officer indefinitely").

The 1977 OLC opinion, written in an era when constitutional text and history often received less than their due regard, identified a number of "pertinent" factors that could inform whether an officer's acting tenure was "reasonable." *Id.* at 290. Those factors included "the specific functions being performed" by the acting official; "the manner in which the vacancy was created," whether death, resignation, firing, or other reasons; "the time" within the session of the Senate "when the vacancy was created"; whether a nomination is pending; and "particular factors affecting the President's choice" or "ability to devote attention to the matter." *Id.* at 289–90. These factors suggested that the Acting OMB Director's tenure of three months was permissible, but the President needed to "make a nomination . . . within a reasonable period." *Id*. at 290.

The "Acting" FHFA Director's time in office vastly exceeded a reasonable tenure for acting service under OLC's guidance. He held office for fifteen months before the President even nominated someone else to the post. And once that nomination was returned to the President, another two years passed before the President put forth a new nominee. Thus, when the "Acting" FHFA Director signed the Third Amendment, he had served the previous eighteen months as "Acting" Director without a nomination even pending. And by that time, whatever might have

influenced the President's choice when he first designated the "Acting" FHFA Director—such as the need for quick action in response to an ongoing financial crisis—those factors no longer held: The financial crisis had passed, and the Companies were about to report the largest profits in their history.

The upshot of history is clear: neither Congressional practice nor Executive Branch guidance on this issue demonstrates that the President possessed the authority that the Sixth Circuit has now conferred.

C. This Court's precedents confirm that acting service must be limited and temporary.

This Court's precedents inform this analysis in three ways. First, *Eaton* expressly held that there *is* a limit to how long an individual can serve as a principal officer—only to the extent it is for a "limited time" and "under special and temporary conditions." In that case, it appears that Vice Consul Eaton served for 309 days. That is less than one fifth of the "Acting" FHFA Director's tenure here. And, it is important to note that the "special and temporary conditions" that existed in *Eaton* were the illness and eventual death of the Consul to Siam. Eaton had to step in to serve, thousands of miles away from the United States' shores "in an era before telephones, automobiles, or airplanes." Pet. App. 43 (Thapar, J., concurring in part and dissenting in part). To the extent the Appointments Clause under *Eaton* permits some "special circumstances" to allow an acting officer to serve for a prolonged period without Senate confirmation, such circumstances are not present

during an ordinary resignation and subsequent impasse on filling that office—even if it would be more efficient if the Constitution permitted such a practice. *See Noel Canning*, 573 U.S. at 601 (Scalia, J., concurring in the judgment) ("The Constitution is not a road map for [a] maximally efficient government.").

Second, this Court has previously discussed the role of "acting" officials. In *Noel Canning,* this Court explained its view that "[a]cting officers may have *less authority* than Presidential appointments" and that reliance on "acting officers" would be an "inadequate expedient" to appointments. 573 U.S. at 541 (emphasis added). As Justice Scalia explained, this view was apparently based on Executive branch guidance that described an "acting official" as a "caretaker without a mandate to take far-reaching measures." *Id*. at 601 (Scalia, J., concurring in the judgment). This "caretaker" view accords with *Eaton*'s reference to the Vice Consul as a "subordinate" officer. *Eaton*, 169 U.S. at 343; *see also Morrison*, 487 U.S. at 721 (Scalia, J., dissenting). "An inferior officer must at least be subordinate to another officer of the United States." *Morrison*, 487 U.S. at 721 (Scalia, J., dissenting); *accord Arthrex*, 141 S. Ct. at 1980.

An "acting" official that fills in during a principal officer's illness or temporary absence is subordinate in the sense that the principal may in fact return, potentially undoing anything the acting official does. An acting official serving while a nomination is pending may also be similarly and precariously situated. But an acting official who persists at the top of an agency for years on end is no caretaker and is subordinate to no other officer. Such an "acting officer" is instead "circumventing the Appointments

Clause." *Weiss v. United States*, 510 U.S. 163, 174 (1994). The Constitution does not permit such an expedient disregard of its structural provisions.

Third, contrary to the Sixth Circuit's conclusions, congressional acquiescence is emphatically not a ground to permit a structural violation of the Constitution. As Judge Thapar put it, "[c]onfirmation is not a Senate prerogative to be disposed of for the government's convenience. It is a check designed to protect the people against the misuse of governmental power." Pet. App. 47–48. Since "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic," "[n]either Congress nor the Executive can agree to waive this structural protection." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 880 (1991). *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010) ("[T]he separation of powers does not depend . . . on whether the encroached-upon branch approves the encroachment." (cleaned up)). And courts must "be concerned about protecting the separation-of-powers interests at stake" when a private party raises a violation of the Appointments Clause. *Freytag*, 501 U.S. at 879–80. While the settlements of the early Congresses are relevant to determining the original public meaning of the Constitution's provisions, *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819), later twentieth and twenty-first century innovations are not, *cf. Sw. Gen.*, 580 U.S. at 308 (rejecting reliance on 1998 enactment of the Federal Vacancies Reform Act as evidence of "historical practice" or congressional approval).

Such congressional bargaining away of a say on

the tenure of acting officials, as was done in HERA, is particularly problematic in the Appointments Clause context because that structural feature of the Constitution compels the President and the Senate to share accountability for the most senior positions in the federal government. The Senate "shares in the public blame 'for both the making of a bad appointment and the rejection of a good one.'" *Arthrex*, 141 S. Ct. at 1979 (quoting *Edmond*, 520 U.S. at 660). Congress cannot assist the Senate to shirk this duty. Pet. App. 32 (Thapar, J., concurring in part and dissenting in part).

III. This Case Presents A Good Vehicle to Address An Important and Increasingly Common Issue.

As Judge Thapar's opinion describes, the rise "of acting officers is striking." Pet. App. 40. "A recent survey shows that from 1981 to 2020, nearly as many acting officers have filled cabinet positions as confirmed cabinet secretaries—a ratio of 147 to 171." *Id*. "And no definitive tally exists for the sub-cabinet level. This species of officer is as little documented as it is pervasive." *Id*.

Moreover, the length of time that acting officers are wielding significant authority of the United States is growing. As discussed, during the first century of the Constitution, there is evidence that only a single individual headed a cabinet-level department in an acting capacity for a year. And the Government has not identified a single acting official during the first *two hundred years* of the Constitution that exercised the power of a principal officer without Senate confirmation for as long as the "Acting" FHFA

Director did. Although the Constitution's limits have not changed, in recent times the tenure of acting officials has expanded dramatically beyond historical precedent. The Bureau of Alcohol, Tobacco, Firearms and Explosives had acting directors for over seven years (early 2006 to July 2013). The Social Security Administration had an acting administrator for nearly four years, followed by another acting administrator for two and a half more (February 2013 to January 2017; January 2017 to June 2019). The National Labor Relations Board's acting general counsel served for over three years (June 2010 to October 2013). These agencies—no less than FHFA—have significant authorities with material effects on the everyday lives of millions of Americans. Yet, by the Sixth Circuit's lights, the individuals leading these agencies need not be confirmed by the Senate so long as a statute—enacted by a single Congress and signed by a single President—allows indefinite "acting" service.

It is, of course, hardly surprising that the political branches may find it expedient to do away with one of the Constitution's structural protections. *Cf. Morrison*, 487 U.S. at 733 (Scalia, J., dissenting). The Appointments Clause is a bulwark to ensure that significant powers are only entrusted to those individuals that the President and a majority of the Senate can agree upon. *See* THE FEDERALIST No. 76, *supra*, p. 513. It also ensures political accountability for both the President and the Senate for choosing "unfit characters" who are ill-suited to the responsibilities of governance. *Id*. Accomplishing both ends necessarily requires time, effort, and due

diligence with which the political branches may rather not be encumbered.

This case calls for this Court's intervention because, as this Court has said in the Appointments Clause context, incentives matter. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 n.5 (2018); *Ryder v. United States*, 515 U.S. 177, 183 (1995). The Sixth Circuit's decision and the Government's current litigating position provides the President and the Senate exactly *zero* incentive to bother with confirming officials. It also provides the President no incentive to ever recess appoint an official—why bother with putting a time limit on service when simply calling an official "acting" stops the clock? The structural protections of the Constitution should not turn on such "trivial distinctions," *Sw. Gen.*, 580 U.S. at 314 n.1 (Thomas, J., concurring), but that is what the Sixth Circuit has done. Such a decision should not be allowed to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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