No. 22-730

In the Supreme Court of the United States

MICHAEL ROP, ET AL., PETITIONERS

v.

FEDERAL HOUSING FINANCE AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MARK B. STERN
ABBY C. WRIGHT
GERARD SINZDAK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Housing and Economic Recovery Act of 2008 (Recovery Act), Pub. L. No. 110-289, 122 Stat. 2654 (12 U.S.C. 4501 *et seq.*), created the Federal Housing Finance Agency (FHFA) to supervise and regulate the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and other entities. The Recovery Act states that, "[i]n the event of the death, resignation, sickness, or absence of the Director" of FHFA, the President may designate one of three Deputy Directors to serve as Acting Director "until the return of the Director, or the appointment of a successor." 12 U.S.C. 4512(f).

In August 2009, after FHFA's Director resigned, the President designated Deputy Director Edward DeMarco to serve as Acting Director of the agency. DeMarco was serving in that capacity in August 2012, when he signed a third contract amendment to the financing agreement between FHFA (as conservator of Fannie Mae and Freddie Mac) and the Treasury Department. The question presented is as follows:

Whether Acting Director DeMarco was serving in violation of the Appointments Clause when he signed the contract amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-54) is reported at 50 F.4th 562. The opinion of the district court (Pet. App. 57-140) is reported at 485 F. Supp. 3d 900.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2022. On December 17, 2022, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including February 2, 2023, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "Congress created the Federal National Mortgage Association (Fannie Mae) in 1938 and the Federal Home Loan Mortgage Corporation (Freddie Mac) in

1970 to support the Nation's home mortgage system." *Collins* v. *Yellen*, 141 S. Ct. 1761, 1770 (2021). Although these enterprises are publicly traded companies with private shareholders, they operate under congressional charters to purchase residential loans from banks and other lenders, thereby protecting lenders from the risk of borrower default and providing them with capital to make additional loans. See *id.* at 1770-1771. The enterprises finance those purchases by borrowing money in the credit markets and packaging many of the loans they buy into mortgage-backed securities, which they sell to investors. *Id.* at 1771.

With the 2008 collapse of the housing market, Fannie Mae and Freddie Mac experienced overwhelming losses due to a dramatic increase in default rates on residential mortgages. See *Collins*, 141 S. Ct. at 1771. At the time, the enterprises owned or guaranteed more than $5 trillion of residential-mortgage assets, representing nearly half the United States mortgage market. *Ibid.* The enterprises lost more in 2008 ($108 billion) than they had earned in the previous 37 years combined ($95 billion). *Ibid.*; see Federal Housing Finance Agency (FHFA), Office of Inspector General, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* 5 (Mar. 20, 2013)).

2. Recognizing that the failure of the enterprises would have had catastrophic effects for the national housing market and the economy, Congress enacted the Housing and Economic Recovery Act of 2008 (Recovery Act), Pub. L. No. 110-289, 122 Stat. 2654 (12 U.S.C. 4501 *et seq.*). Through the Recovery Act, Congress created the Federal Housing Finance Agency as an independent federal agency to supervise and regulate the

enterprises and, if necessary, to act as their conservator or receiver. 12 U.S.C. 4511, 4617(a).

FHFA is headed by a single Director nominated by the President and confirmed by the Senate. 12 U.S.C. 4512(a) and (b)(1). The Recovery Act provides that the Director serves a five-year term and can be removed during that term only for cause. 12 U.S.C. 4512(b)(2). The Act further states that, "[i]n the event of the death, resignation, sickness, or absence of the Director," the President may designate one of three Deputy Directors "to serve as acting Director until the return of the Director, or the appointment of a successor." 12 U.S.C. 4512(f). "Since its inception, the FHFA has had three Senate-confirmed Directors, and in times of their absence, various Acting Directors have been selected to lead the Agency on an interim basis." *Collins*, 141 S. Ct. at 1771.

The Recovery Act also grants the Department of the Treasury (Treasury) "[t]emporary" authority to "purchase any obligations and other securities issued by" the enterprises and to "exercise any rights received in connection with such purchases"—but the terms of any such purchase must "protect the taxpayer" and "provide stability to the financial markets." 12 U.S.C. 1455(*l*)(1)(A), (2)(A), and (D); 12 U.S.C. 1719(g)(1)(A) and (B). That authorization "made it possible for Treasury to buy large amounts of Fannie and Freddie stock, and thereby infuse them with massive amounts of capital to ensure their continued liquidity and stability." *Perry Capital LLC* v. *Mnuchin*, 864 F.3d 591, 600 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 978 (2018).

3. In September 2008, FHFA Director James Lockhart placed the enterprises in conservatorship. *Collins*, 141 S. Ct. at 1772. One day later, Treasury purchased

one million shares of senior preferred stock in each entity. *Id.* at 1772-1773. Under the Purchase Agreements, Treasury committed to provide up to $100 billion in taxpayer funds to each enterprise to maintain their solvency by ensuring that their assets were at least equal to their liabilities. *Ibid.* In exchange for that support, the agreements stated that Treasury would receive various forms of compensation—including preferred stock, dividends in return for the capital actually invested, periodic fees in return for the outstanding capital commitment, warrants to purchase nearly 80% of the enterprises' common stock, and priority over other stockholders in recouping Treasury's investment if the enterprises were later liquidated. *Id.* at 1773. A critical feature of the agreements was that the size of dividends each enterprise owed did not vary with the enterprise's profits, but was tied to the amount of capital Treasury had invested in the enterprise. See *ibid.*

Treasury's initial funding commitment soon proved to be inadequate. *Collins*, 141 S. Ct. at 1773. To address this problem, in May 2009, FHFA and Treasury agreed to double Treasury's funding commitment to $200 billion per enterprise. *Ibid.*

In August 2009, FHFA Director James Lockhart resigned, and President Obama designated Edward DeMarco, one of the three Deputy Directors, to serve as Acting Director under Section 4512(f). Pet. App. 13.

In December 2009, in the face of ongoing losses, Treasury and FHFA amended the Purchase Agreements for a second time to allow the enterprises to draw unlimited amounts from Treasury to cure net-worth deficits until the end of 2012, at which point Treasury's funding commitment would be capped. Pet. App. 10; *Collins*, 141 S. Ct. at 1773.

In the years that followed, the enterprises drew sizable amounts from Treasury's funding commitment and consistently lacked the cash necessary to pay the accompanying dividend obligations. The enterprises became stuck in a "circular practice of drawing funds from Treasury's capital commitment just to hand those funds back as a quarterly dividend." *Collins*, 141 S. Ct. at 1773. By the middle of 2012, the enterprises had drawn more than $187 billion, and had paid $26 billion of that amount to satisfy their dividend obligations. *Ibid.*

In August 2012, Treasury and FHFA (headed by Acting Director DeMarco) agreed to modify the Purchase Agreements for a third time. *Collins*, 141 S. Ct. at 1773. The Third Amendment replaced the previous fixed-dividend obligation with a variable dividend equal to the amount, if any, by which the enterprises' net worth for the quarter exceeded a specified capital buffer. *Id.* at 1774. That change ensured that the enterprises "would never again draw money from Treasury just to make their quarterly dividend payments, but it also meant that the companies would not be able to accrue capital in good quarters." *Ibid.*

In May 2013, President Obama nominated Melvin Watt to serve as FHFA Director; Watt was confirmed by the Senate and was sworn into office in January 2014. Pet. App. 13. At the end of Director Watt's term, President Trump designated Joseph Otting to serve as Acting Director. *Id.* at 70. That same month, President Trump nominated Mark Calabria to serve as Director. *Ibid.* The Senate confirmed Calabria as Director in April 2019. *Ibid.*

In January 2021, Treasury and FHFA agreed to the most recent amendment to the Purchase Agreements. Pursuant to that amendment, Treasury and FHFA

agreed to suspend all quarterly cash dividend payments until the enterprises build sufficient capital to meet specified thresholds. *Collins*, 141 S. Ct. at 1774. Once those thresholds are met, cash dividend payments to Treasury will resume. *Id.* at 1774-1775. In the meantime, the dividends that the enterprises would have paid to Treasury in cash under the Third Amendment are added to Treasury's liquidation preference. *Ibid.*

4. a. Petitioners are three enterprise shareholders. In June 2017—nearly five years after Treasury and FHFA had agreed to the Third Amendment—petitioners filed a complaint alleging, as relevant here, that the Third Amendment should be set aside because FHFA's Acting Director DeMarco (1) was unconstitutionally insulated from removal when the Third Amendment was signed and (2) was serving in violation of the Appointments Clause when he agreed to the Third Amendment because he had been in the position for too long. Pet. App. 14, 70-71. Petitioners sought an order "[v]acating and setting aside the [T]hird [A]mendment"; "[e]njoining [Treasury and FHFA] * * * from implementing, applying, or taking any action whatsoever pursuant to the [T]hird [A]mendment"; and requiring Treasury "to return to Fannie and Freddie all dividend payments made pursuant to the [Third Amendment]." D. Ct. Doc. 17, at 76 (July 27, 2017). Petitioners also requested an order "[d]eclaring that FHFA's structure violates the separation of powers." *Ibid.*

In September 2020, the district court granted respondents' motions to dismiss. Pet. App. 57-140. With regard to petitioners' removal-authority claim, the court stated that the Recovery Act provision limiting the President's authority to remove FHFA's Senate-confirmed Director, 12 U.S.C. 4512(b)(2), was "almost

certainly unconstitutional." Pet. App. 114. But the court concluded that the removal restriction did not impugn the validity of the Third Amendment because, at the time that amendment was executed, FHFA was headed by an Acting Director who was removable at will. *Id.* at 123-124.

The district court also dismissed petitioners' Appointments Clause claim. Pet. App. 125-132. Although petitioners conceded that DeMarco had been validly designated as Acting Director, they argued that he had served in an acting capacity for "too long" and that his service had begun to violate the Appointments Clause. *Id.* at 125. The court concluded that the question whether Acting Director DeMarco had served "too long" was not one susceptible to "judicially discoverable and manageable standards." *Id.* at 128-132 (citation omitted).[1]

b. Several months after the district court dismissed petitioners' complaint, this Court announced its decision in *Collins*, *supra*. The plaintiffs in *Collins* contended that FHFA had exceeded its statutory authority in agreeing to the Third Amendment, and that Acting Director DeMarco was unconstitutionally insulated from Presidential control when he agreed to the amendment. The Court rejected those claims. 141 S. Ct. at 1775-1778, 1781-1783. The Court held, however, that the statutory restriction on the President's authority to remove FHFA's Senate-confirmed Director was unconstitutional

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[1] The district court also dismissed petitioners' claims alleging that Congress had impermissibly delegated legislative authority to FHFA, unconstitutionally insulated FHFA from the appropriations process, and unlawfully shielded FHFA's actions as conservator from judicial review. See Pet. App. 123-124, 132-139. Petitioners did not appeal the court's dismissal of those claims.

under its prior decision in *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020). *Collins*, 141 S. Ct. at 1783-1789.

Like the district court here, the *Collins* Court further held that the unconstitutional removal restriction had no bearing on FHFA's agreement to the Third Amendment because FHFA was headed by an Acting Director at the time, and the Acting Director was removable at will by the President. *Collins*, 141 S. Ct. at 1781-1783. The Court therefore rejected the request to set aside the Third Amendment. *Id.* at 1788.

With respect to the later implementation of the Third Amendment by Senate-confirmed Directors, this Court held that there was "no reason to regard any of the actions taken * * * as void." *Collins*, 141 S. Ct. at 1787. But because it remained "possible" that actions taken by unconstitutionally insulated, Senate-confirmed Directors while implementing the Third Amendment could have resulted in harm to shareholders, the Court remanded the case to the Fifth Circuit to decide whether the shareholders were entitled to retrospective relief. *Id.* at 1789.

c. The court of appeals in this case subsequently affirmed the district court's judgment in relevant part. Pet. App. 1-54. The court rejected petitioners' claim that Acting Director DeMarco had been serving in violation of the Appointments Clause when he signed the Third Amendment on FHFA's behalf. *Id.* at 16-26. The court noted the established principle that, "when a government official fills a vacancy of a principal officer, that acting officer is an inferior officer." *Id.* at 18; see *id.* at 17 (citing *United States* v. *Eaton*, 169 U.S. 331 (1898) and *NLRB* v. *SW General, Inc.*, 580 U.S. 288 (2017)). Because the Constitution authorizes the President to appoint inferior officers, and because Acting Director

DeMarco had been validly appointed by the President, the court concluded that DeMarco was at all times serving in compliance with the Appointments Clause. *Id.* at 18-19.

The court of appeals rejected petitioners' contention that Acting Director DeMarco had been transformed from an inferior officer into a principal officer at some point in his tenure before signing the Third Amendment. See Pet. App. 20-26. The court concluded that DeMarco's tenure had been appropriately "limited" and "temporary" because it had terminated upon appointment of his successor. *Id.* at 23-24 (citation omitted).

The court of appeals rejected petitioners' contention that the Constitution imposes a specific time limit on the service of acting officers. Pet. App. 23-24. Rather, the court concluded that Congress may authorize the President to appoint acting officers and may limit those officers' service in whatever way it deems appropriate. *Id.* at 20-21 & n.4 (citing Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281 and Act of Feb. 13, 1795, ch. 21, 1 Stat. 415). Consistent with that view, the court noted that Congress has placed time limits on the service of some, but not all, acting officers. *Id.* at 21-22 & n.4.

The court of appeals also declined to apply to acting officers the time limits imposed on recess appointees by the Recess Appointments Clause. Pet. App. 24-25. The court found "no indication in the Constitution, case law, or historical precedent indicating that the Recess Appointments Clause applies to any officer of the United States other than those appointed during a Senate recess." *Ibid.*

The court of appeals also declined to adopt a "functionalist" approach to determining whether a particular official has served too long in an acting capacity. Pet.

App. 25-26 (citation omitted). The court agreed with the district court that such an inquiry would improperly embroil courts in an "evaluation plainly committed to the political branches and wholly irrelevant to interpreting the text of the Appointments Clause." *Id.* at 26.[2]

Judge Thapar dissented with respect to the court of appeals' Appointments Clause holding. Pet. App. 32-54. He would have held that DeMarco's tenure as FHFA's Acting Director exceeded an implied constitutional limit on the length of time an acting officer may serve. *Ibid.* As to what that limit might be, Judge Thapar suggested three possibilities. First, he stated that "historical practice suggests a line at six months." *Id.* at 40. The primary evidence of this "historical practice" (which Judge Thapar acknowledged did "not fully decide the question") was the enactment by an early Congress of a statute that limited the service of acting officers to six months. *Id.* at 41-42. Judge Thapar recognized that his proposed six-month limit was contrary to this Court's decision in *Eaton*, which had found no Appointments Clause violation where an acting officer had remained in his post for longer than six months. *Id.* at 42. But he deemed *Eaton* to represent a "narrow exception to the six-month rule" based on the relevant officer's service in a diplomatic post in Asia. *Ibid.*

Based on the Recess Appointments Clause, Judge Thapar alternatively suggested that the tenure of acting officers was limited to two years. Pet. App. 43. While recognizing that the Recess Appointments Clause

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[2] While affirming the dismissal of petitioners' Appointments Clause claim, the court of appeals remanded petitioners' removal-authority claim to allow the district court to determine in the first instance whether petitioners were entitled to retrospective relief under this Court's decision in *Collins*. Pet. App. 26-31.

does not apply directly to acting officers, he understood the Clause to reflect the Framers' view of the outer limit on a non-Senate-confirmed officer's permissible length of service. *Ibid.*

Finally, Judge Thapar noted that the Office of Legal Counsel had stated that the Constitution might limit the tenure of acting officers to a "reasonable" time. Pet. App. 44 (citing *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.LC. 287 (1977)). Though he expressed skepticism that the Constitution imposes an amorphous "reasonableness" standard, he concluded that Acting Director DeMarco's tenure would have failed that test as well. *Id.* at 45.

ARGUMENT

Petitioners contend (Pet. 13-31) that the court of appeals diverged from other circuits in concluding that Acting Director DeMarco was serving in conformity with the Appointments Clause when he signed the Third Amendment. The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. And even if petitioners prevailed on their Appointments Clause challenge, they would not be entitled to an order invalidating the Third Amendment. Further review is not warranted.

1. The decision below is correct. Acting Director DeMarco was serving in compliance with the Appointments Clause when he signed the Third Amendment.

a. The Appointments Clause states a general rule that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2. Congress, however, may "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." *Ibid.* Both principal and inferior officers exercise "significant authority pursuant to the laws of the United States." *Edmond* v. *United States*, 520 U.S. 651, 662 (1997) (citation omitted). Although this Court has not "set forth an exclusive criterion for distinguishing between" the two, *id.* at 661, it has long held that the President may "direct certain officials to temporarily carry out the duties of a vacant [Presidential appointed and Senate confirmed (PAS)] office in an acting capacity, without Senate confirmation," *NLRB* v. *SW Gen., Inc.*, 580 U.S. 288, 293 (2017). Indeed, the President's power to designate acting officials "to temporarily perform the functions of a vacant PAS office without first obtaining Senate approval" is one that Congress recognized in "President Washington's first term." *Id.* at 294.

Consistent with that well-established legal authority, the Recovery Act states that, "[i]n the event of the death, resignation, sickness, or absence of [FHFA's Senate confirmed] Director, the President shall designate" one of three Deputy Directors "to serve as acting Director until the return of the Director, or the appointment of a successor." 12 U.S.C. 4512(f). President Obama exercised that authority in August 2009 when, upon the resignation of FHFA's first Director, he designated Deputy Director DeMarco to perform the Director's duties on an acting basis. Pet. App. 13.

b. Petitioners do not dispute that Acting Director DeMarco was validly designated. They contend (Pet. 19-31), however, that at some indeterminate point before he signed the Third Amendment, his continued service began to violate the Appointments Clause, rendering his subsequent actions invalid. That argument

lacks support in constitutional text, precedent, and history.

Neither the Appointments Clause nor any other constitutional provision expressly limits the length of time during which an individual may be designated as an acting official. In *United States* v. *Eaton*, 169 U.S. 331, 343 (1898), this Court recognized that an acting official is an inferior officer whose appointment may be vested in the President alone. The Court reasoned that the acting officer "is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions," such that he is not "transformed into the superior and permanent official." *Ibid.*

That reasoning squarely controls here. Congress specified the circumstances and limited time when the President may appoint an acting Director—"[i]n the event of the death, resignation, sickness, or absence of the Director," and only "until the return of the Director, or the appointment of a successor." 12 U.S.C. 4512(f). DeMarco served in accordance with those conditions. He was appointed upon the resignation of Director Lockhart and served until Director Watt was confirmed. Pet. App. 23-24. Neither the Appointments Clause nor this Court's precedents establish any further limitation. See *Eaton*, 169 U.S. at 343-344 (concluding that Congress could vest the President with authority to appoint vice consul as acting consul under a statute that lacked a time limit for such acting service); *Morrison* v. *Olson*, 487 U.S. 654, 672 (1988) (concluding that an independent counsel's service was "temporary," even though there was "concededly no time limit on the appointment of a particular counsel," because the counsel's service would end upon the completion of her task).

Petitioners argue that a specific time limit for service as an acting officer should be inferred from the constitutional limits that apply to recess appointments. Pet. App. 22-23. That argument lacks merit. Unlike the Appointments Clause, the Recess Appointments Clause expressly limits the tenure of recess appointments, providing that they last until the next session of Congress, which by definition is less than two years from the time of any recess appointment. See *NLRB* v. *Noel Canning*, 573 U.S. 513, 550-557 (2014). The Framers' decision to impose such limits on the tenure of recess appointees, without similarly restricting the tenure of acting officials, implies that the Constitution does not limit acting officials' tenure. Cf. *GE Energy Power Conversion Fr. SAS, Corp.* v. *Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020) ("[I]n general, a matter not covered is to be treated as not covered.") (citation and internal quotation marks omitted).

The use of acting officials to fill vacant positions temporarily was a well-recognized practice when the Constitution was adopted. See Pet. 24; Pet. App. 40-41 (Thapar, J. concurring in part and dissenting in part); *SW Gen., Inc.*, 580 U.S. at 294. Indeed, petitioners assert (Pet. 23-24) that the Founders were acutely aware of the President's likely use of acting officials. Under those circumstances, the absence of any constitutional provision specifying time limits for such officials should be viewed as intentional.

Petitioners contend (Pet. 22) that a lack of time limits on certain acting officials would render the Recess Appointments Clause mere "surplusage." But longstanding practice proves otherwise. Presidents can and frequently do make recess appointments even where existing statutes authorize service by specified acting officials.

See Henry B. Hogue, Cong. Research Serv., R 42329, *Recess Appointments Made by President Barack Obama* 3 (Sept. 7, 2017) (noting that recent Presidents have made more than 100 recess appointments).

Congress has imposed various limits on the President's use of acting officials. Those restrictions often involve tenure limits, see, *e.g.*, 5 U.S.C. 3345, 3346, but the imposition of such limits is far from uniform, see S. Rep. No. 250, 105th Cong., 2d Sess. 15-17 (1998) (Senate Report) (noting that the Senate was aware of "statutes specifically governing a vacancy in 41 specific offices," "[m]ost" of which "do not place time restrictions on the length of an acting officer"). As this case illustrates, Congress may place other limitations on a President's authority to designate acting officials, such as limits on the universe of individuals whom the President may appoint. See 12 U.S.C. 4512(f) (limiting the President's choice of an FHFA Acting Director to one of three deputies). Congress's carefully tailored approach to the authorization of acting officials has neither rendered the Recess Appointments Clause a "dead letter," Pet. 13 (citation omitted), nor resulted in the common "appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity," Pet. 20 (quoting *Noel Canning*, 573 U.S. at 523).

Petitioners' claim (Pet. 23-28) that historical practice establishes a six-month limit on acting officials fares no better. Rather, "history demonstrates that the Constitution permits Congress to choose" the limits on acting service. Pet. App. 21 n.4. Throughout the Nation's history, Congress has enacted legislation authorizing acting officials and defining the scope of their service. See *ibid.* The first such statute imposed no tenure limit on

the relevant acting positions. See *ibid.*; see also Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281. Nor have several other agency-specific statutes, see Senate Report 15-17, including the statute at issue in *Eaton*, see 169 U.S. at 338, 341-342, where the relevant acting official served for 309 days, see *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, 35 F.4th 1328, 1335 (Fed. Cir. 2022), petition for cert. pending, No. 22-639 (filed Jan. 6, 2023). Far from indicating that the Constitution imposes a strict six-month limit on the service of acting officers, this history establishes that "Congress can determine the length of acting officer tenure and at various points in history chose to adjust the limit according to its policy preferences." Pet. App. 21 n.4.

The principle that Congress cannot waive the Appointments Clause's structural protections is thus beside the point. See Pet. 30 (citing *Freytag* v. *Commissioner*, 501 U.S. 868, 880 (1991)). When Congress authorizes the appointment of acting officials and places limits it deems appropriate on those officers' service, it is not acquiescing in a constitutional violation but is instead exercising its own Appointments Clause authority in accordance with the Framers' intent.

Petitioners' reliance (Pet. 26-27) on a 1977 memorandum from the Office of Legal Counsel (OLC) is similarly misplaced. The memorandum discusses whether an individual who had served for three months as Acting Director of the Office of Management and Budget (OMB) could continue to do so. See *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 287 (1977)). OLC concluded that no statute imposed a specific time limit on the Acting Director's service. OLC nevertheless construed Congress's directive (now codified at 31 U.S.C. 502) that OMB's Deputy

Director would act as the Director during a vacancy as implying that acting service should "not continue beyond a reasonable time." 1 Op. O.L.C. at 289-290. Considering a variety of factors, OLC determined that the individual's tenure as Acting Director was lawful under the statute. That analysis was not grounded in the Appointments Clause, nor did the opinion purport to announce a "reasonableness" standard for acting officials generally.

2. Contrary to petitioners' contention (Pet. 16-19), the decision below does not conflict with any decision of another court of appeals. No circuit has held that an acting official's service violated an unwritten time limit implicit in the Appointments Clause. Indeed, most of the decisions petitioner cites do not even address such an argument.

Like the court below, the Federal Circuit in *Arthrex*, held that a non-Senate-confirmed official's temporary service in a position that otherwise required Senate confirmation did not violate the Appointments Clause. 35 F.4th at 1332-1335. In so holding, the court rejected the plaintiffs' claim that the acting official's service violated the Appointments Clause because his tenure was not "limited." *Id.* at 1335. Echoing the court of appeals' analysis in this case, the Federal Circuit emphasized that the acting official's tenure, while "'indefinite[],'" was nonetheless temporary because it was "limited to the period in which the Director and Deputy Director offices remained vacant." *Ibid.* (citation omitted); see Pet. App. 23. The court found it "immaterial" that the applicable regulation did not specify how long the acting official's tenure would be, noting that the same was true of the appointment at issue in *Eaton*. *Arthrex*, 35 F.4th at 1335 (citing *Eaton*, 169 U.S. at 331-332). And while

the court noted that the acting official in *Arthrex* had been serving in that capacity for only 268 days when he took the relevant action, the court did not suggest that a longer tenure would have violated the Appointments Clause. *Ibid.*

The Fourth Circuit similarly relied on *Eaton* to reject an Appointments Clause claim directed at the Acting Attorney General. *United States* v. *Smith*, 962 F.3d 755, 762-766, cert. denied, 141 S. Ct. 930 (2020). The court emphasized that, under *Eaton*, "[s]omeone who temporarily performs the duties of a principal officer is an inferior officer for constitutional purposes, and accordingly may occupy that post without having been confirmed with the advice and consent of the Senate." *Id.* at 764. Because the Acting Attorney General's service was governed by the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.*, which limits the tenure of certain acting officials, the court had no occasion to consider the constitutionality of a statute authorizing an acting official to serve until a replacement received Senate confirmation. See *Smith*, 962 F.3d at 764-765. In a footnote, the court stated that it was "possible" that such a statute might violate the Appointments Clause if it authorized a tenure "so lengthy that it exceeds the 'special and temporary conditions' contemplated by *Eaton*." *Id.* at 764 n.3 (citation omitted). But the court declined to opine on the issue, noting that it "is not this case." *Ibid.*

The First Circuit's decision in *United States* v. *Hilario*, 218 F.3d 19, cert. denied, 531 U.S. 1014 (2000), likewise did not address the issue petitioners raise here. In *Hilario*, federal district judges appointed a Justice Department lawyer to serve as "interim United States Attorney" for the District of Puerto Rico. *Id.* at 21. The

lawyer served in that capacity for more than six years. *Ibid.* The court of appeals held that the attorney's service as interim U.S. Attorney did not violate the Appointments Clause because U.S. Attorneys are "inferior officers" and therefore may be appointed by the Judiciary without Senate confirmation. *Id.* at 25. In dicta, the court noted that "an argument could be made" that the interim U.S. Attorney's six-year-plus tenure exceeded the length of time "an inferior officer can stand in for a principal officer." *Id.* at 29. But the court had no reason to consider that argument because "no principal officers [were] involved." *Ibid.*

Finally, the D.C. Circuit's decision in *Williams* v. *Phillips*, 482 F.2d 669 (1973) (per curiam), is wholly inapposite. The court in *Williams* denied the government's request for a stay pending appeal, concluding that the government was unlikely to establish that the four-and-a-half-month tenure of the Acting Director of the Office of the Economic Opportunity was constitutionally valid. *Id.* at 670. But that decision was based on Congress's failure to authorize the President to appoint an acting official to serve as an acting director in the event of a vacancy. *Ibid.* The D.C. Circuit concluded that, in the absence of a statute authorizing the appointment of an acting officer, the President's constitutional obligation to take care that the laws be faithfully executed may imply a power "to appoint an acting director for a reasonable period of time before submitting the nomination of a new director to the Senate." *Id.* at 670-671. For an "indication of the reasonable time required by the President to select persons for nomination," the court looked to the Vacancies Act, which then limited the tenure of acting officers to 30 days. *Id.* at 671. *Williams* thus has no bearing on the circumstances

here, where Congress has expressly authorized the President to appoint an acting officer and has specified alternative limits on such appointments.

3. Even if Acting Director DeMarco's tenure had exceeded an implied constitutional limit, petitioners would not be entitled to the relief they seek: an injunction setting aside the Third Amendment. Indeed, the other court of appeals to address an Appointments Clause challenge to the Third Amendment rejected it on that ground, without reaching the merits of the claim. See *Bhatti* v. *FHFA*, 15 F.4th 848, 853 (8th Cir. 2021).

In fashioning equitable relief to remedy a constitutional violation, a court must consider "what is necessary, what is fair, and what is workable." *North Carolina* v. *Covington*, 581 U.S. 486, 488 (2017) (per curiam). Consistent with those principles, this Court has long held that in certain circumstances, the "*de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder* v. *United States*, 515 U.S. 177, 180 (1995); see *Calcutt* v. *FDIC*, 37 F.4th 293, 343 (6th Cir. 2022) (Murphy, J., dissenting) (explaining that, from "English courts" onward, courts have applied the de facto officer doctrine in affirming actions taken by an officer whose appointment was later alleged to be defective), mandate recalled and stay granted, No. 22A255, 2022 WL 4546340 (Sept. 29, 2022), and petition for cert. pending, No. 22-714 (filed Jan. 30, 2023). The doctrine "springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the

orderly functioning of the government." *Ryder*, 515 U.S. at 180 (citation omitted).

Petitioners' theory presents a clear threat of such chaos. Unlike in other Appointments Clause challenges, petitioners do not contest the relevant officer's initial appointment. See *Ryder*, 515 U.S. at 182; *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018). Instead, they contend that DeMarco's appointment as Acting Director became unconstitutional at some undefined point before he approved the Third Amendment.

Nor did petitioners pursue a "timely" challenge to the contested administrative action. *Ryder*, 515 U.S. at 182. In both *Ryder* and *Lucia*, the parties who challenged the appointments of the relevant adjudicative officials raised their challenges during the adjudications at issue. See *ibid.* (noting that Ryder had "raised his objection to the judges' titles before those very judges and prior to their action on his case"); *Lucia*, 138 S. Ct. at 2050 (explaining that Lucia had raised his challenge to the appointment of an agency ALJ during his administrative appeal to the SEC). Petitioners, by contrast, filed suit nearly five years after FHFA and Treasury adopted the Third Amendment. Treasury, the enterprises, and a host of individuals and corporations—including mortgage borrowers, originators, and securitization investors—have conducted their affairs for nearly ten years in reliance on the Third Amendment and the assurances it provided.[3]

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[3] Judge Thapar concluded that the de facto officer doctrine does not apply to Appointments Clause challenges because the Court declined to apply it in *Ryder* and *Lucia*. Pet. App. 51-54. In addition to ignoring the difference between challenging an initial appointment and challenging its continuing validity, Judge Thapar failed to take into account petitioners' long delay in filing suit and the

Although petitioners filed suit within the six-year statute of limitations set out in 28 U.S.C. 2401, a litigant does not demonstrate entitlement to particular equitable relief merely by satisfying a general limitations period. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 155 (1967) (stating that "equitable defenses" such as "laches" "may be interposed" under the APA); *Collins*, 141 S. Ct. at 1789 n.26 (noting that "the doctrine of laches [may] preclude[]" shareholders from receiving "any relief" on their constitutional claim); *Chirco* v. *Crosswinds Communities, Inc.*, 474 F.3d 227, 235 (6th Cir.), cert. denied, 551 U.S. 1131 (2007). That is particularly true here, given the ill-defined nature of the constitutional limit that petitioners advocate, the lengthy delay between the Third Amendment and the commencement of petitioners' suit, and the extraordinary consequences for third parties and the mortgage market of the remedy they seek. As another court explained in rejecting a comparable request to set aside the Third Amendment, petitioners "are attempting to unwind the actions of an executive agency going back more than five years—actions of national (indeed, international) significance that have been the basis of trillions of dollars' worth of economic activity." *Bhatti* v. *FHFA*, 332 F. Supp. 3d 1206, 1225 (D. Minn. 2018), aff'd in part, rev'd in part, and remanded, 15 F.4th 848 (8th Cir. 2021); see *Chirco*, 474 F.3d at 236 (concluding that laches barred plaintiffs' request for retrospective injunctive relief, and emphasizing that plaintiffs' 18-month

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reliance interests that developed as a result, as well as the difference between adjudicators (whose appointments were at issue in *Ryder* and *Lucia*) and other officers. See *Bhatti* v. *FHFA*, 332 F. Supp. 3d 1206, 1224-1225 & nn.8-9 (D. Minn. 2018), aff'd in part, rev'd in part, and remanded, 15 F.4th 848 (8th Cir. 2021).

delay in filing suit was "inordinately lengthy" and had permitted significant reliance interests to develop).

Moreover, during the period between Acting Director DeMarco's tenure and the January 2021 letter agreement that ended the Third Amendment, FHFA had two Senate-confirmed Directors and one Acting Director. Each of those officers defended the Third Amendment against challenges by shareholders and implemented it in accordance with its terms. See *Collins*, 141 S. Ct. at 1781 ("[C]ontinuing to implement the [T]hird [A]mendment was a decision that each confirmed Director has made since 2012."); *Bhatti*, 15 F.4th at 853 (declining to set aside the Third Amendment because "[a]ny defect [in Acting Director DeMarco's service] was resolved when the subsequent FHFA directors—none of whose appointments were challenged—ratified the [T]hird [A]mendment").

The disconnect between petitioners' Appointments Clause claim and their requested remedy is further evidenced by DeMarco's contemporaneous status as a Deputy Director. Even assuming that DeMarco transitioned from a validly serving Acting Director to an unconstitutionally appointed officer at some indeterminate point in his tenure, he was at all times validly serving in his permanent position of Deputy Director. Petitioners provide no basis to question his ability to approve the Third Amendment in that capacity.

Finally, petitioners' concerns about the import of the decision below and the prevalence of acting officials are greatly overstated. Acting officials, with and without statutory tenure limits, have participated in the Nation's governance since its Founding. Their presence has not led Presidents to abandon the confirmation or

recess-appointment process. This Court's intervention is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MARK B. STERN
ABBY C. WRIGHT
GERARD SINZDAK
Attorneys

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