No. 22-730

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

REPLY BRIEF FOR PETITIONERS

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When Thomas Jefferson resigned as Secretary of State on December 31, 1793, President Washington moved expeditiously. On New Year's Day, Washington submitted the nomination of Edmund Randolph, his then-Attorney General, to the Senate. *Senate Exec. Journal*, 3d Cong., 1st sess. (Jan. 1., 1794), https://bit.ly/45hHcC3. The Senate took up the nomination *the next day* and confirmed Randolph on January 2nd. *Id.* (Jan. 2, 1794), https://bit.ly/3pV0OvJ. Randolph then promptly took the oath of office—the same day—and immediately entered into the "commencement of [his] duties." Letter from E. Randolph to G. Washington (Jan. 2, 1794), https://bit.ly/41PuKa3.

"What chumps!" *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 825 (2015) (Roberts, C.J. dissenting). Did everyone forget that the Appointments Clause allows the President to bypass the Senate by designating "acting" officials to serve in the most senior positions in the Executive Branch indefinitely? By the Government's lights, Washington could have unilaterally designated Randolph the "acting" Secretary of State and left him in office for the remaining four years of his administration—the Constitution providing no temporal limit since Congress had passed a statute authorizing acting officials without specifying a maximum length of tenure. *See* Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281; BIO 15–16. But the structural features of the Constitution that protect liberty cannot be so easily nullified by statute; "the separation of powers does not

depend . . . on whether the encroached-upon branch approves the encroachment." *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010) (cleaned up). Neither the Constitution's text, historical practice, nor this Court's precedents support the Government's contrary position. As Randolph himself stated, "[t]he Spirit of the Constitution favors the participation of the Senate in all appointments." Opinion on Recess Appointments (July 7, 1792), https://bit.ly/3OlvRLo.

In truth, the Government's opposition brief is rather tepid. The Government cannot deny that the Sixth Circuit's analysis is out of step with the analyses of every other circuit to address whether "acting" officials have overstayed their constitutional welcome. The Government does nothing to dispute the extraordinary nature of the "Acting" Director's over-four-year tenure as the head of the Federal Housing Finance Agency ("FHFA")—not even mustering a single example of another individual exercising so much authority for so long without Senate confirmation during the first two hundred years of the Republic.

Instead, the Government concentrates its fire on reasons it says this Court should deny relief anyway—even if the "Acting" Director's prolonged stay at the top of FHFA violated the Constitution. The Government claims the de facto officer doctrine, unspecified statutory authority, laches, and a forfeited ratification argument preclude relief. These remedial defenses are unavailing, and, in all events, this Court need not resolve them before reaching the

question presented.

As Judge Thapar explained in dissent, "[n]o viable interpretation of the [Appointments] Clause permits an acting officer to skip confirmation for three years" under the circumstances presented here. Pet.App. 46. When he signed the Third Amendment, the "Acting" FHFA Director was unconstitutionally exercising significant authority of the United States. The Sixth Circuit's contrary decision is in serious conflict with this Court's precedents and other circuits' caselaw. The Court should grant the writ.

I. The Sixth Circuit's Decision Is Wrong and Cannot Be Squared with Other Circuits' Precedents.

The constitutional text itself is silent as to "acting" principal officers who serve without Senate confirmation. The Appointments Clause does not explicitly contemplate acting officers. The Recess Appointments Clause recognizes a certain kind of temporary appointment to fill a vacancy, permitting the President to appoint principal officers when the Senate is in recess. But there the Constitution limits tenure to until the Senate's next session, which means any recess appointment will be less than two years.

Nevertheless, "acting" officers, who serve temporarily, have been a feature of the Executive Branch since at least 1792. This Court's first treatment of an "acting" official in *United States v. Eaton*, 169 U.S. 331 (1898), located the constitutional authority for this practice in the Appointments Clause provision for "inferior officers." Under *Eaton*, an acting principal officer is "inferior" and can serve

without Senate confirmation, *if* that officer performs the duties of a principal officer, "for a limited time, and under special and temporary conditions." *Id.* at 343. Since then, this Court has re-affirmed that the *Eaton* gloss on "inferior" only holds when the acting officer serves "temporarily." *N.L.R.B. v. Sw. Gen., Inc.*, 580 U.S. 288, 294 (2017); *Edmond v. United States*, 520 U.S. 651, 661 (1997); *see also Morrison v. Olson*, 487 U.S. 654, 672 (1988).

The Government stakes out the position that such "temporary" limits are beside the point because the Constitution's silence on time limits for "acting" officers should be viewed as an "intentional" endorsement of indefinite acting service. BIO 14. This gets the Constitutional analysis exactly backward. The Federal Government is one of limited authority. It "can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). The Constitution's silence as to "acting" officers without Senate confirmation means such officers *cannot* be designated to exercise the authority of the United States *unless* some provision can be said to enable it. As discussed, this Court has rooted this authority in the view that such officers are "inferior." This is "admittedly sketchy." *Morrison*, 487 U.S. at 721 (Scalia, J., dissenting). But insofar as acting officers are "inferior," it is *because* they serve temporarily. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 708 n.17 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). Remove the temporary character of their

service, and there is no constitutional basis for their exercise of the authority of the United States without Senate confirmation.

The Government then asserts that since Congress has imposed various statutory limits on the length of some acting officials' tenure in the past, it is ultimately up to Congress how long is too long. But Congress cannot authorize indefinite tenure if the Constitution does not permit it. *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 880 (1991); *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 609 (2014) (Scalia, J., concurring in the judgment).

In all events, that Congress has allowed for extensive acting tenures is not evidence of the constitutionality of the "Acting" FHFA Director's tenure, especially since in *Eaton* itself the relevant statute lacked an express time limit. 169 U.S. at 336–39. This Court explained that the "legality of the appointment in question is . . . *first* to be determined by ascertaining whether it was authorized by the regulations." *Id.* at 339 (emphasis added). After deciding the temporary appointment was authorized by statute, the Court considered whether "congress was without power to vest" it. *Id.* at 343. Statutory authorization has never been a shortcut for the constitutionality of an "acting" appointment.

Contrary to the Government's opposition brief, the circuits are divided on the analysis governing the tenure of acting officers. While it is true that the other courts have not found an Appointments Clause violation, all but the Sixth Circuit agree such a violation is possible, and *none* of the other cases dealt with a tenure or scope of authority comparable to the

"Acting" FHFA Director.

In *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328 (Fed. Cir. 2022), the Federal Circuit did not bless a regulation that failed to "specify how long the acting official's tenure would be." BIO at 17. To the contrary, the Federal Circuit upheld the validity of the acting appointment because, in part, the acting officer performed the challenged action on "his 268th day performing the Director's duties," which was less than the 309 days of service in *Eaton*. *Arthrex*, 35 F.4th at 1335. In other words, if 309 days was "temporary" and constitutional in 1898, the Federal Circuit considered a shorter tenure of service to be lawful in 2022. The Sixth Circuit refused to consider such lines in assessing the tenure in this case, which is more than three times as long as the one in *Eaton* when the Third Amendment was signed.

The Fourth Circuit—directly contrary to the Sixth Circuit and the Government's litigating position—also observed that a tenure "so lengthy that it exceeds the 'special and temporary conditions' contemplated by *Eaton*, and amounts instead to a circumvention of the Appointments Clause" could be unconstitutional. *United States v. Smith*, 962 F.3d 755, 765 n.3 (4th Cir. 2020). This is so even if a statute "authorize[d]" such tenure. *Id.* But the court did not have to worry about it in that case because the Acting Attorney General only served for a "few months." *Id.* That length of time was temporary. Yet, in this case, the "Acting" FHFA Director served for over three years by the time he signed the Third Amendment and over four years by the end of his time at the top—longer than the tenure of twenty-five Presidents, including Abraham Lincoln.

The First Circuit in *United States v. Hilario*, 218 F.3d 19 (1st Cir. 2000), similarly recognized that "[s]hould the stand-in" for a principal officer "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. The First Circuit did not reach the merits of this argument because of its prior holding that the U.S. Attorney was an inferior officer by virtue of his supervision, not because the Constitution fails to impose any temporal limit on acting service. The potential recognized by the First Circuit (and rejected by the Sixth Circuit) is, of course, present here because the "Acting" FHFA Director *is* a principal officer and can only be "inferior" if he is, in fact, serving temporarily.

The Government strains to argue that *Williams v. Phillips*, 482 F.2d 669 (D.C. Cir. 1973) (per curiam), is "wholly inapposite" because *there*, no statute authorized indefinite acting service, but *here*, such a statute does authorize it. As discussed above, statutory authorization for acting appointments since *Eaton* has been an analytically separate inquiry. And the relevant question presented by both this case and *Williams* is whether the Constitution permits indefinite service without Senate confirmation. The D.C. Circuit plainly said no. It did so, even "[a]ssuming" that a non-statutorily authorized acting appointment "was not invalid *ab initio*" because a "four-and-a-half month period without any nomination" was too long anyway. *Id.* at 671.

* * *

The Petition asks this Court to decide as a matter of constitutional text, historical practice, and precedent whether an "acting" official can serve indefinitely without effectively "circumvent[ing]" the Appointments Clause. *Smith*, 962 F.3d at 765 n.3; *see also Sw. Gen., Inc.*, 580 U.S. at 314 n.1 (Thomas, J., concurring). Judge Thapar, in his thoughtful dissent below, discussed three potential analytical approaches that could be taken. By granting this Petition, the Court would have the opportunity to determine which is most consistent with the Appointments Clause. But under all three, the "Acting" FHFA Director exceeded any plausible constitutional line.

II. The Remedial Issues Raised by the Government Are Unavailing and Do Not Pose an Obstacle to This Court's Review of the Merits of Petitioners' Appointments Clause Claim.

The Government argues that the Court should deny the Petition because, under a variety of remedial doctrines, Petitioners are said not to be entitled to a remedy even if Acting Director DeMarco's lengthy service was unconstitutional. The Government's remedial arguments do not pose an obstacle to this Court reaching the merits of Petitioners' Appointments Clause claim. Indeed, remedial defenses of the sort the Government identifies are present in nearly all of the cases this Court decides about the structural provisions of the Constitution. Sometimes when this Court finds an Appointments Clause or other separation of powers violation, it goes on to address the appropriate remedy. *Lucia v. SEC*,

138 S. Ct. 2044, 2055 (2018). Other times, it remands so that the lower courts can resolve remaining remedial issues in the first instance. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207–2211 (2020). But the fact that the parties disagree about what should happen if the Court determines that Mr. DeMarco's multi-year tenure violated the Constitution is not a reason to leave unreviewed the Sixth Circuit's extraordinary discovery of a constitutional loophole that allows the President to skip Senate confirmation for the most senior officials in the Executive Branch.

Regardless, the remedial defenses the Government raises are meritless and, if anything, make this case even more worthy of this Court's review. First, the Government attempts to resuscitate the "de facto officer" doctrine. This Court rejected the doctrine in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), with the plurality explaining it had no application when "[t]he alleged defect [in] authority here relates to basic constitutional protections designed in part for the benefit of litigants," *id.* at 536 (plurality op.). If anything remained of the de facto officer doctrine after *Glidden*, this Court's decision in *Ryder v. United States*, 515 U.S. 177 (1995), "sounded the doctrine's death knell." Pet.App. 53 (Thapar, J., concurring in part and dissenting in part). In *Ryder*, this Court "announced a new rule," *id.*, that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." 515 U.S. at 182–83. In *Lucia*, this Court doubled down on the same rule. 138

S. Ct. at 2055.

The Government argues that *Ryder* and *Lucia* should be limited to the *adjudication* context. This makes little sense, as both *Ryder* and *Lucia* did not rest their decision on the specifics of adjudication but rather on the general principle that incentives for plaintiffs to bring Appointments Clause claims matter. *Ryder*, 515 U.S. at 183; *Lucia*, 138 S. Ct. 2055 n.5. Those incentives persist whether the claim relates to a hearing officer or an administrator directly affecting the rights of a plaintiff. In addition, *Ryder* did not carve out an adjudication exception to an otherwise vibrant de facto officer doctrine. Just the opposite—this Court held that the de facto officer doctrine's application should *not* extend past the "facts" of the handful of cases that *may* have applied it in the past. *Ryder*, 515 U.S. at 184. The de facto officer doctrine, if it could be said to even still exist after *Ryder*, is a mere zombie of the U.S. Reports, not seen for over a half-century. *Cf. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment). The Government offers no reason to bring it back to life.

In all events, this Court previously granted petitions regarding the interaction between the Appointments Clause and the de facto officer doctrine. *See Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1656 (2020). While the Court did not have occasion to further assess the doctrine's applicability in *Aurelius*, *see id.* at 1665, the Court's prior grant of review on this issue suggests the Government's effort to raise a de facto officer defense makes this Petition more worthy of

certiorari, not less.

Second, the Government asserts that even if the "Acting" FHFA Director was serving unconstitutionally, he could have executed the Net Worth Sweep in his role as Deputy Director. The support for this proposition? The Government cites nothing. Moreover, the Government's argument simply begets another Appointments Clause problem: if the Deputy Director could engage in a transaction that the Government insists was monumentally important to the Nation's economy, then the Deputy Director, lacking Senate confirmation and acting without the direction and supervision of others appointed by the President, would be an unconstitutionally designated principal officer without even the veneer of "acting" tenure. *Edmond*, 520 U.S. at 662–63.

Third, the Government argues that the equitable doctrine of laches bars relief. But Petitioners sued within the statute of limitations, and courts cannot use laches "to jettison Congress' judgment on the timeliness of suit." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960, 961 n.4 (2017). To be sure, fifty years ago the Court suggested in dicta that laches might be an available defense in APA cases. *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967). But that case was decided a decade before a consensus emerged that APA claims are subject to the six-year statute of limitations that appears in 28 U.S.C. § 2401(a). *See Walters v. Sec'y of Def.*, 725 F.2d 107, 111–12 (D.C. Cir. 1983). "Laches is a gap-filling doctrine, and where there is a statute of limitations, there is no gap to fill." *SCA Hygiene*

Prods. Aktiebolag, 137 S. Ct. at 961.

Fourth, the Government grasps for an argument it failed to make below: ratification. The Government claims the latter-day acts of properly Senate-confirmed officers have "ratified" the Third Amendment. BIO at 23. As Judge Thapar noted, the government "toss[ed] away" its ratification defense by "failing to rais[e] it before the district court" and "*again* fail[ing] to develop the argument at any length, even after [Petitioners] noted the forfeiture in their opening [Sixth Circuit] brief. Then at oral argument, the government admitted as much." Pet.App. 46 n.8 (Thapar, J., concurring in part and dissenting in part). A forfeited argument is no basis to deny relief and certainly no basis to deny consideration of an antecedent legal question.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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