UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL ROP; STEWART KNOEPP; and ALVIN WILSON,

Plaintiffs,

v.

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

Defendants.
____________________________________/

Case No. 1:17-cv-00497

Hon. Paul L. Maloney

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT FEDERAL HOUSING FINANCE AGENCY'S MOTION TO DISMISS

Oral Argument Requested

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INTRODUCTION

The structure of the Federal Housing Finance Agency ("FHFA") is constitutionally infirm for a multiplicity of reasons, and individuals like Plaintiffs who have been harmed by FHFA's actions have the right to challenge those actions in court. As conservator for Fannie Mae and Freddie Mac (the "Companies"), FHFA is empowered to exercise many of Plaintiffs' rights as shareholders. *See* 12 U.S.C. § 4617(b)(2)(A). Plaintiffs have and continue to suffer injuries as a result of FHFA's exercise of these rights, and FHFA is wrong when it argues that Plaintiffs lack standing to challenge FHFA's structure on separation of powers grounds. FHFA's status as an independent agency headed by a single individual and other unusual provisions in the Housing and Economic Recovery Act ("HERA") insulate this agency from oversight by the President, Congress, or the judiciary. Regardless of whether FHFA is treated as a public or private entity when it acts as conservator, it exercises a portion of the sovereign power of the federal government and thus does so in violation of either Article I or Article II. FHFA's arguments to the contrary are not persuasive.

Likewise, FHFA is incorrect when it claims that the Court cannot reach the merits of Plaintiffs' Appointments Clause claim. By the time FHFA's then acting Director, Edward DeMarco, signed the amendment to the Preferred Stock Purchase Agreements that imposed the Net Worth Sweep, he had led FHFA for three years without being nominated by the President or confirmed by the Senate. The Appointments Clause does not permit such acting principal officers to serve for more than two years, and in any event Mr. DeMarco's tenure of far more than two years was unreasonable. The requirements of the Appointments Clause have often been held to be judicially enforceable, and neither justiciability concerns nor the de facto officer doctrine prevent the Court from reaching the merits of Plaintiffs' claim.

BACKGROUND

The facts the Court must accept as true for purposes of both pending motions to dismiss are the same, and Plaintiffs' opposition to Treasury's motion to dismiss provides an overview of those facts.

ARGUMENT

I. Legal standard.

The Court may grant FHFA's motion to dismiss only if Plaintiffs' complaint fails to provide "sufficient factual allegations that, if accepted as true, are sufficient to raise a right to relief above the speculative level." *Cruz v. Don Pancho Market, LLC*, 167 F. Supp. 3d 902, 904 (W.D. Mich. 2016). For purposes of a motion to dismiss, the Court "must accept as true all factual allegations" in the Complaint. *Id.*

II. The Director's for-cause removal protection should be struck down and the Net Worth Sweep should be vacated because FHFA's leadership structure violates the separation of powers.

A. Treasury's approval of the Net Worth Sweep does not defeat Plaintiffs' standing.

FHFA is mistaken when it argues that Treasury's approval of the Net Worth Sweep deprives Plaintiffs of standing to challenge FHFA's structure. (*See* R.25, FHFA Br. 8, Pg.ID 401.) It is well settled that a plaintiff's standing in a separation of powers case cannot be defeated by speculation about what decision the government might have reached had it followed the procedures the Constitution requires. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 512 n.12 (2010) ("We cannot assume . . . that the Chairman would have made the same appointments acting alone; and petitioners' standing does not require precise proof of what the Board's policies might have been in that counterfactual world."); *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir.

2000); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). This rule applies with particular force where, as here, the challenged action is the product of negotiations. *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264-65 (1991). FHFA does not address these precedents or cite authority for its argument to the contrary.

B. FHFA's status as an independent agency headed by a single individual violates the separation of powers.

In a thorough opinion, a panel of the D.C. Circuit ruled that it violates the separation of powers for the Consumer Financial Protection Bureau ("CFPB") to operate as an independent agency headed by a single individual. *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016). Although *PHH* is being reheard by the D.C. Circuit en banc, the panel's decision was correct and applies with equal force to FHFA. FHFA's status as an independent agency headed by a single Director departs from longstanding historical practice, diminishes the President's influence over the agency to an extent not possible with agencies headed by bipartisan, multi-member commissions, and threatens individual liberty. These same points also show that Plaintiffs are entitled to prevail on their separation of powers claims as a matter of law, as Plaintiffs explain in their brief in support of their motion for summary judgment.

C. Mr. DeMarco's status as an acting director does not affect Plaintiffs' claims.

FHFA argues that Plaintiffs' challenge to its independence fails because the Net Worth Sweep was signed by Mr. DeMarco, who FHFA contends did not enjoy for-cause removal protection because he was only the agency's *acting* Director. (R.25, FHFA Br. 7-8, Pg.ID 400-01; *see also* R.23, Treas. Br. 13 n.7, Pg.ID 306-07). But the text of the statute does not support this argument. HERA says that FHFA is an "independent" agency without any suggestion that its

status changes during the tenure of an acting Director. 12 U.S.C. § 4511(a); 44 U.S.C. § 3502(5). Furthermore, "[t]he most reliable factor for drawing an inference regarding the President's power of removal . . . is the nature of the function that Congress vested in" the officer in question. *Wiener v. United States*, 357 U.S. 349, 353 (1958). Given that Congress vested in the acting Director the very same responsibility for running an independent agency that is otherwise assigned to the Director, the only reasonable inference is that Congress intended for the acting Director to enjoy the Director's removal protections. That Congress did not think it necessary to repeat in 12 U.S.C. § 4512(f) what it had already said in 12 U.S.C. § 4512(b)(2)—that the Director enjoys "for cause" removal protection—does not support a different conclusion. Section 4512(f) does not comprehensively enumerate the rights and powers of the acting Director because such acting officers are presumed to "succeed[ ] to all the powers of the office" except as otherwise specified. *United States v. Guzek*, 527 F.2d 552, 560 (8th Cir. 1975). The statute's failure to specify a different rule thus indicates that the acting Director enjoys the same protection from removal as the Director.[1]

The Obama Administration understood that HERA insulated Mr. DeMarco from removal by the President. For example, when a senior Obama Administration official was asked about the possibility of firing Mr. DeMarco over a policy disagreement, he told reporters "[t]hat is not authority that the president has." (R.17, Am. Compl. ¶ 62, Pg.ID 221-22.) And an internal Treasury document created during Mr. DeMarco's tenure similarly recognized that "Treasury

[1] Indeed, to the extent the text of the statute suggests any variation between the removal protection afforded to an acting Director and a Director, it would be in the direction of *stronger* protection for the acting Director. That is because the statute says that the acting Director "serve[s] . . . until the return of the Director, or the appointment of a [Senate-confirmed] successor," 12 U.S.C. § 4512(f), without any suggestion that he may be removed by the President.

cannot compel FHFA to act" because it is an "independent agenc[y]." (*Id.*; *see also id.* ("Mr. DeMarco 'resisted White House and Treasury Department pressure to step down'") (quoting Joseph Williams, *Housing head at home with criticism*, POLITICO (Oct. 26, 2011))). The Administration's legal analysis was correct.

In any case, the series of FHFA actions that ultimately resulted in the nullification of Plaintiffs' economic rights and the Companies operating with no capital were not undertaken exclusively during Mr. DeMarco's tenure. It was FHFA's transitional Director—James Lockhart—who placed the Companies into conservatorship, (R.17, Am. Compl. ¶ 55, Pg.ID 218), and all of the agency's actions as conservator, including the Net Worth Sweep, are infected by that original action undertaken in violation of the separation of powers. Moreover, FHFA's current Senate-confirmed Director has continued to require the Companies to declare dividends under the Net Worth Sweep, blocked shareholder derivative suits seeking to challenge Mr. DeMarco's actions, and vigorously defended the Net Worth Sweep in every court in which it is challenged. (*Id.* ¶¶ 57, 125, 129, Pg.ID 219, 252, 254.) Thus, whether FHFA was an independent agency during Mr. DeMarco's tenure is ultimately of no moment; the Net Worth Sweep was made possible and has been sustained by FHFA Directors who Defendants do not dispute enjoyed for-cause removal protection.

Moreover, even with respect to actions undertaken by Mr. DeMarco, giving the President the power to remove Mr. DeMarco from his post as acting Director without cause would not have cured the constitutional defect in FHFA's leadership structure. If fired, Mr. DeMarco could have only been replaced by one of the agency's other Deputy Directors—individuals selected by Mr. DeMarco or his Republican-appointed predecessor. *See* 12 U.S.C. § 4512(c)-(f). That prevented the President from using any removal power he had to effect a policy change at the

agency, thus unconstitutionally insulating the agency from Presidential control. *See* Mike Lillis, *Rep. Frank joins calls for top Fannie, Freddie regulator to be replaced*, THE HILL (Mar. 11, 2012), https://goo.gl/kK9YrF (recounting observation by House Financial Services Committee ranking member that President could not force change in policies at FHFA by firing Mr. DeMarco because FHFA's Deputy Directors "support DeMarco's strategies" and "would likely continue the same" policies).

D. FHFA cannot evade the separation of powers by labeling its actions as those of a "conservator."

FHFA is mistaken when it argues that Plaintiffs' separation of powers challenge to its independence fails because FHFA is not the government when it acts as "conservator." (R.25, FHFA Br. 10-11, Pg.ID 403-04; *see also* R.23, Treas. Br. 12-13, Pg.ID 306-07). As an initial matter, Plaintiffs were deprived of their economic rights, and the Companies have been forced to operate with no capital, as a result of a series of actions by FHFA, some of which the agency undertook in its *regulatory* capacity. FHFA acted as regulator when it forced the Companies into conservatorship, and that action undertaken in violation of the separation of powers means that its subsequent decisions as conservator—including the decision to enter into the Net Worth Sweep—are likewise invalid. *See* 12 U.S.C. § 4617(a)(1) (stating that "the Director," i.e., FHFA as regulator, "may appoint the Agency as conservator or receiver for a regulated entity"). During conservatorship, the Companies remain subject to oversight by FHFA as regulator, and no financial institution could enter into a transaction depriving it of the capacity to maintain a capital reserve without approval from its supervisory regulator. And FHFA's own regulations say that during conservatorship the Companies cannot pay dividends except with authorization from "[t]he Director," i.e., FHFA as regulator. 12 C.F.R. § 1237.12(a), (b). FHFA is indisputably

the federal government and subject to the separation of powers when it acts as regulator, and Plaintiffs challenge actions FHFA undertook in that capacity.

FHFA's contention that it did not approve the Net Worth Sweep in a governmental capacity is also directly contrary to the position it successfully urged in the D.C. Circuit in *Perry Capital*. This is how FHFA described its conservatorship role to the D.C. Circuit: "HERA expressly permits the Conservator to consider its own best interests—including, for example to promote the public interest." (R.31-2, Br. of Appellees FHFA at 36, *Perry Capital, LLC v. Mnuchin*, No. 14-5243 (D.C. Cir. Mar. 7, 2016), Pg.ID 753.) The D.C. Circuit embraced that understanding of the law when it dismissed APA challenges to the Net Worth Sweep, explaining that FHFA did not violate the statute by working to enrich the federal government at shareholders' expense because "Congress, consistent with its concern to protect the public interest, . . . made a deliberate choice in [HERA] to permit FHFA to act in its own best *governmental* interests, which may include the taxpaying public's interest." *Perry Capital, LLC v. Mnuchin*, 864 F.3d 591, 608 (D.C. Cir. 2017) (emphasis added). Having successfully obtained dismissal of another suit by arguing that FHFA as conservator has "governmental" interests that it lawfully advanced when it entered into the Net Worth Sweep, Defendants should be judicially estopped from arguing the opposite here. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *Reynolds v. CIR*, 861 F.2d 469 (6th Cir. 1988).

In any event, Defendants misstate the law when they argue that a federal conservator is not the government under any circumstances. To the contrary, whether a federal conservator "should be treated as the United States depends on the context," *Auction Co. of America v. FDIC*, 132 F.3d 746, 748 (D.C. Cir. 1997), and the context here is FHFA's decision to expropriate Plaintiffs' investments for the benefit of the federal government. Confronted with

similar allegations that as receiver the FDIC had retained a failed bank's liquidation surplus for itself rather than distributing the surplus to shareholders, the Federal Circuit held that the FDIC could be sued in its receivership capacity under the Tucker Act for a Fifth Amendment taking. *Slattery v. United States*, 583 F.3d 800, 826-29 (Fed. Cir. 2009). The Federal Circuit observed that "whether the FDIC as receiver is 'the government' depends on the context of the claim" and allowed the constitutional claim to go forward because the facts before it were "unlike the standard receivership situation in which the receiver is enforcing the rights or defending claims and paying the bills of the seized bank." *Id.* at 827-28. The cases cited by Defendants are not to the contrary, for none of them involved a similar expropriation to benefit the public fisc. *See, e.g.*, *United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994) (federal receiver's suit for civil penalties did not implicate the Double Jeopardy Clause because the penalties collected would "not go to the United States Treasury" but instead "benefit all stockholders and creditors of the bank"); *Herron v. Fannie Mae*, 861 F.3d 160 (D.C. Cir. 2017) (declining to apply First Amendment to routine personnel decision by conservator).

Treasury argues that FHFA's imposition of the Net Worth Sweep is not attributable to the federal government in light of the "historical practice" of appointing private conservators, (R.23, Treas. Br. 13, Pg.ID 306), but Defendants prevailed in *Perry Capital* on the theory that FHFA's conservatorship powers "bear[ ] no resemblance to the type of conservatorship measures that a private common-law conservator would be able to undertake," *Perry Capital*, 864 F.3d at 613. Indeed, the principal difference between FHFA and a common law conservator identified by the court in *Perry Capital*—that FHFA is entitled to promote the public interest and has no fiduciary duties—cuts strongly in favor of the conclusion that FHFA was acting as the government when it approved the Net Worth Sweep. In distinguishing between private and governmental actors

under the Appointments Clause, the Office of Legal Counsel has opined that a governmental actor exercises "power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit." Officers of the United States Within the Meaning of the Appointments Clause, 2007 WL 1405459, at *11 (O.L.C. Apr. 16, 2007). A private, common-law conservator would not satisfy that definition, but, according to the D.C. Circuit, FHFA does.

Other aspects of FHFA's decision to enter into the Net Worth Sweep further reinforce the conclusion that it exercised sovereign, governmental power when it took this action. The D.C. Circuit ruled that by entering into a contract with Treasury, FHFA suspended the application of provisions of the APA and HERA that would have otherwise restricted Treasury's legal authority to invest in the Companies. *Perry Capital*, 864 F.3d at 615-16. Altering the legal duties of a federal agency is not the act of a private entity. Moreover, the Net Worth Sweep would have been a flagrant violation of the duty of loyalty if it had been signed while the Companies were still under private management. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993). Thus, when FHFA took this action it did not merely exercise powers it inherited from the Companies' private management—those powers did not include giving all of the Companies' assets and future profits to a related entity.

Finally, Treasury's observation that "private financial manager[s]" can "[r]enegotiat[e] dividend agreements" does nothing to advance the analysis. (R.23, Treas. Br. 12, Pg.ID 305.) Private businesses can also operate railroads, but Amtrak is nevertheless "a governmental entity" for purposes of "questions implicating the Constitution's structural separation of powers." *Department of Transp. v. Association of American R.R.*, 135 S. Ct. 1225, 1228 (2015). Even

when FHFA acts as conservator, it is the federal government if it exercises statutory power to expropriate private property and bind third parties to further the public interest.[2]

E. FHFA's unconstitutional structure requires vacatur of the Net Worth Sweep.

If the Court determines that FHFA is unconstitutionally structured, the appropriate remedy is to strike down the Director's for-cause removal protection and vacate the Net Worth Sweep so that FHFA may reconsider that decision once it is no longer insulated from presidential oversight.

As the Department of Justice recently acknowledged in other litigation, a "second proceeding [is] necessary" when an agency official is "unconstitutionally insulated from presidential control at the time of the initial proceeding." Brief of the SEC at 37, *Laccetti v. SEC*, No. 16-1368 (D.C. Cir. May 5, 2017). That is because when a government official acts on behalf of an agency that is structured in violation of the separation of powers, the official's action is *ultra vires* and must be vacated. Thus, in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Supreme Court affirmed a ruling of the D.C. Circuit that an NLRB decision was "void *ab initio*" because the Board "lacked authority to act" due to a violation of the Recess Appointments Clause, *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013). Numerous other authorities support the same approach in separation of powers cases. *See, e.g.*, *Nguyen v. United States*, 539

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[2] In *Buckley v. Valeo*, the Supreme Court ruled that it would not violate the Appointments Clause for the FEC to operate with commissioners chosen by members of Congress if the agency limited itself to exercising investigative powers "in the same general category as those powers which Congress might delegate to one of its own committees." 424 U.S. 1, 137 (1976). Citing this ruling, a divided D.C. Circuit panel recently suggested that the CFPB's structure does not violate Article II to the extent that the agency only exercises investigatory powers. *John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017). FHFA relies on *John Doe Co.* but does not suggest that the Net Worth Sweep was a similar exercise of Congress's investigatory powers. (*See* R.25, FHFA Br. 11, Pg.ID 404.)

U.S. 69, 83 (2003); *Ryder v. United States*, 515 U.S. 177, 182-83 (1995); *Kuretski v. CIR*, 755 F.3d 929, 938 (D.C. Cir. 2014); *IBS, Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340-42 (D.C. Cir. 2012).

Free Enterprise Fund, 561 U.S. at 509, and *John Doe Co. v. CFPB*, 849 F.3d 1129 (D.C. Cir. 2017),[3] are not to the contrary. The plaintiffs in both cases challenged *ongoing* agency investigations, and vacatur was not needed for the constitutionally restructured agencies to decide whether to continue investigating. *See FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996) (declining to dismiss civil enforcement action first brought by unconstitutionally composed FEC because enforcement action was later ratified by constitutionally restructured agency). In "'reject[ing]' the plaintiff's argument that the removal restrictions rendered 'all power and authority exercised by [the Board] in violation of the Constitution,' " (R.25, FHFA Br. 9, Pg.ID 402 (quoting *Free Enterprise Fund*, 561 U.S. at 508-09)), the *Free Enterprise Fund* Court was saying that the Board would be allowed to continue to function in the future after being restructured—not that there is no remedy for past agency actions undertaken in violation of the separation of powers.

In any event, Plaintiffs seek not only vacatur of the Net Worth Sweep but also an order declaring that FHFA may no longer operate as an independent agency. FHFA suggests that this latter form of relief would be inappropriate because all of Plaintiffs' injuries "stem from the historical adoption of the Third Amendment," (R.25, FHFA Br. 10, Pg.ID 403), but that is not correct. As the Companies' conservator, FHFA succeeded to most of Plaintiffs' rights as

[3] In *John Doe*, a D.C. Circuit panel refused to issue an emergency injunction over a well-reasoned dissent. *See* 849 F.3d at 1135-37 (Kavanaugh, J., dissenting). Notably, under very similar circumstances the Ninth Circuit recently issued a stay pending appeal, albeit without explanation. *CFPB v. Future Income Payments, LLC*, 2017 WL 2622774 (9th Cir. June 1, 2017).

shareholders, *see* 12 U.S.C. § 4617(b)(2)(A), and the agency's ongoing policy is to exercise those rights to promote the interests of the federal government without regard to what is best for shareholders or the Companies, *see* C-SPAN, Newsmakers with Mel Watt at 9:00-9:27 (May 16, 2014), http://goo.gl/s3XWqi (statement by Director Watt that he does not "lay awake at night worrying about what's fair to the shareholders" but rather focuses on "what is responsible for the taxpayers").

III. FHFA was operating in violation of the nondelegation doctrine when it imposed the Net Worth Sweep.

As further explained in Plaintiffs' brief in support of their motion for summary judgment, to the extent that the Court concludes that the strictures of Article II do not apply to FHFA because it is a private entity when it acts as conservator, FHFA violated the private nondelegation doctrine when it imposed the Net Worth Sweep. Under that doctrine, private entities may not exercise power conferred by federal statute to bind third parties in the public interest, for such powers constitute "a portion of the sovereign powers of the federal government." Officers of the United States Within the Meaning of the Appointments Clause, 2007 WL 1405459, at *4 (O.L.C. Apr. 16, 2007). And irrespective of whether FHFA's conduct when it imposed the Net Worth Sweep is deemed to be that of a governmental actor, it acted without the benefit of an intelligible principle to guide its exercise of discretion. FHFA accordingly exercised Legislative power in violation of Article I. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (Article I "permits no delegation" of Legislative power").

IV. Mr. DeMarco's lengthy tenure as the acting head of FHFA violated the Appointments Clause by the time he approved the Net Worth Sweep.

A. Mr. DeMarco's tenure as acting director was unreasonably long and violated the Appointments Clause.

As Plaintiffs explain at greater length in their brief in support of their cross-motion for summary judgment, Mr. DeMarco had served as the head of FHFA well in excess of the maximum length of time permissible for an acting principal officer by August 2012 when he approved the Net Worth Sweep. The Recess Appointments Clause reflects a constitutional judgment that is equally applicable to the Appointments Clause that under no circumstances is it reasonable for someone to serve as an acting principal officer without Senate confirmation for more than two years. Mr. DeMarco had held office without presidential nomination or Senate confirmation for three years by the time he approved the Net Worth Sweep, and by any measure the length of his tenure was unreasonable under the circumstances.

Furthermore, and as also explained at greater length in Plaintiffs' summary judgment brief, Mr. DeMarco's designation was statutorily invalid, as HERA does not provide for an acting Director to replace the OFHEO-holdover transitional Director. This provides an independent basis for the Court to strike down Mr. DeMarco's actions without being required to reach the constitutional issues presented by this case.

B. The constitutionality of Mr. DeMarco's tenure is justiciable.

FHFA seeks to avoid the inevitable conclusion that Mr. DeMarco's tenure violated the Appointments Clause by arguing that the question whether an acting officer's tenure is "reasonable under the circumstances" is a non-justiciable political question. (R.25, FHFA Br. at 20-23, Pg.ID 413-16.) As an initial matter, the Court need not reach that question in this case

because Mr. DeMarco's tenure had exceeded the two-year ceiling set by the Recess Appointments Clause when he approved the Net Worth Sweep.

In any event, courts are fully capable of deciding whether the length of an acting principal officer's tenure violates the Appointment Clause. Courts have long adjudicated similar challenges under the Appointments Clause. Indeed, FHFA's own defense of Mr. DeMarco's exercise of the Director's powers—that he acted as an "inferior officer," (R.25, FHFA Br. at 19, Pg.ID 412)—invokes a constitutional line that is "far from clear" and requires the court to consider a multiplicity of factors. *Morrison v. Olson*, 487 U.S. 654, 671 (1988). Yet courts have repeatedly decided whether an officer is a principal officer or an inferior one, including by taking into account the duration of the officer's tenure. *See, e.g.*, *id.*; *Edmond v. United States*, 520 U.S. 651, 666 (1997); *United States v. Eaton*, 169 U.S. 331, 343 (1898). FHFA offers no compelling reason why the temporal factor for determining an officer's constitutional status uniquely defies adjudication.

In another recent case concerning the Constitution's requirements for appointing principal officers, the Supreme Court rejected an argument that is materially indistinguishable from FHFA's: that courts are incapable of determining how short a "recess" is too short to permit a recess appointment. In *NLRB v. Noel Canning*, the Court held "that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause." 134 S. Ct. at 2567. Not only was the Court willing to draw a line in the absence of an express numerical threshold in the Constitution, but it also allowed that courts might have to adjudicate whether "unusual circumstance[s]," including "a national catastrophe . . . that renders the Senate unavailable but calls for an urgent response" would permit an exception to this presumptive rule. *Id.* And as though speaking directly to FHFA's justification for Mr. DeMarco's all-but-

unprecedented tenure as an acting officer, the Court observed that "[i]t should go without saying . . . that political opposition in the Senate would not qualify as an unusual circumstance." *Id.* The types of judgments this precedent makes or invites courts to make are indistinguishable from the judgment whether an acting principal officer's appointment is "reasonable under the circumstances."

To be clear: that is the *only* judgment this Court must make here. The Court need not decide whether the President waited too long to nominate a successor or whether the Senate was unreasonable in rejecting his first nomination. FHFA's argument to the contrary begins with the flawed premise that "an acting official is needed during a vacancy." (R.25, FHFA Br. at 21, Pg.ID 414.) FHFA cites no authority for that proposition, nor could it, for the simple reason that a vacancy may remain vacant.[4] A practical consequence of Article II is that certain offices may remain vacant or inoperative when the constitutional requirements for an appointment cannot be satisfied for one reason or another. But a desire to avoid those consequences cannot relieve a court of its responsibility to give effect to those constitutional requirements when the case before it requires it to do so. *See Olympic Fed. Sav. and Loan Ass'n v. Director, OTS*, 732 F. Supp. 1183, 1196 (D.D.C. 1990). The political question doctrine does not permit courts to "avoid their responsibility merely because the issues have political implications." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quotation marks omitted).

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[4] True, the statute states that "the President *shall* designate [one of the Deputy Directors] to serve as Acting Director," 12 U.S.C. § 4512(f) (emphasis added), but that language should not be understood as *requiring* the President to make an appointment once the office becomes vacant. *See Ambassadors and other Public Ministers of the United States*, 7 U.S. Op. Atty. Gen 186, 217-19 (May 25, 1855). Even if it were so interpreted, it does not follow that the Deputy Director so designated may continue to exercise the powers of the Director indefinitely. Once his authority is lost, the office is effectively vacant but not open to a second appointment under Section 4512(f).

For the same reason, FHFA's argument that Congress has the ability to protect its own prerogative through political means misses the mark. (R.25, FHFA Br. at 23, Pg.ID 416.) Because the structural protections contained in the Appointments Clause are "critical to preserving liberty," the validity of an appointment does not depend on "whether the encroached-upon branch approves the encroachment." *Free Enter. Fund*, 561 U.S. at 501, 497 (quotation marks omitted). Thus, the Court's role is not "lessened here because the two political branches are adjusting their own powers between themselves." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring). The Appointments Clause "is more than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659 (quotation marks omitted).

C. The de facto officer doctrine cannot salvage the Net Worth Sweep.

Finally, FHFA argues that Plaintiffs' challenge to the Net Worth Sweep based on Mr. DeMarco's tenure is precluded by the de facto officer doctrine—an "ancient" doctrine that has fallen out of favor in recent decades. *United States v. Gantt*, 194 F.3d 987, 998 (9th Cir. 1999); (*see* R.25, FHFA Br. at 23-25, Pg.ID 416-18). Because Plaintiffs challenge Mr. DeMarco's *constitutional* authority to impose the Net Worth Sweep, the de facto officer doctrine has no application to this case.

The de facto officer doctrine operates only where the challenge is based on a "merely technical" defect in the incumbent's title to the office. *Nguyen v. United States*, 539 US. 69,77. (2003). In *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), for example, the Court rejected the Solicitor General's argument that a party could not raise an Article III challenge to the judge who decided its case for the first time on appeal. Writing for a plurality, Justice Harlan noted first that the de facto officer doctrine did not apply "when the statute claimed to restrict authority is not

merely technical but embodies a strong policy concerning the proper administration of judicial business," *id.* at 535-36, and held that "[a] fortiori is this so when the challenge is based upon nonfrivolous constitutional grounds." *Id.* at 536; *accord Nichols v. City of Cleveland*, 247 F. 731, 739-40 (6th Cir. 1917) (rejecting an argument that the constitutional authority of park commissioners to exercise the power of eminent domain was not subject to collateral attack under the de facto officer doctrine on the ground that "[i]t would be a strange, and certainly an arbitrary, rule that would forbid an owner to protect his property rights through challenge of the constitutional validity of the only statute relied on to justify the exercise of such a power as that of eminent domain").

Contrary to FHFA's argument based on non-binding D.C. Circuit decisions, the rule enunciated in *Glidden* and *Nguyen* is not limited to timely challenges. To the contrary, non-technical, and especially constitutional, violations are not protected by the de facto officer doctrine "even though the defect was not raised in a timely manner." *Nguyen*, 539 U.S. at 78; *accord Wrenn v. District of Columbia*, 808 F.3d 81, 84 (D.C. Cir. 2015) (refusing to apply the de facto officer doctrine where district judge sitting by designation exceeded his authority to hear specific cases even though "no party challenged the judge's authority until after the decision issued"). Regardless, Plaintiffs filed suit within the six-year statute of limitations, *see* 28 U.S.C. § 2401, and no more should be required for Plaintiffs' nonfrivolous constitutional claim to be deemed "timely."[5]

[5] Although the constitutional nature of Plaintiffs' challenge makes it unnecessary for them to satisfy *either* prong of the D.C. Circuit's exception to the de facto officer doctrine, it is also the case that FHFA "had reasonable notice under all circumstances of the claimed defect in the official's title to office." FHFA and Mr. DeMarco were on notice of the claimed defect in his power to act as Director as early as August 2011—a full year *before* the Net Worth Sweep was approved—when they were served with a lawsuit challenging Mr. DeMarco's appointment under

CONCLUSION

For all the foregoing reasons, the FHFA's motion to dismiss should be denied.

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the Appointments Clause. *See* Complaint, *Ohio Pub. Emps. Retirement Sys. v. FHFA*, No. 11-1543 (D.D.C. Aug. 26, 2011).