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

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Statutes

Page(s)

Other Authorities

INTRODUCTION

This case presents the Court with several alternative routes to a single destination: the Federal Housing Finance Agency ("FHFA") violated the constitutional separation of powers when it entered into a contract with the Treasury Department that effectively nationalized Fannie Mae and Freddie Mac (the "Companies"). If FHFA was acting in a governmental capacity when it took this action, it was exercising either Executive power without the constitutionally required degree of presidential oversight or Legislative power in violation of the non-delegation doctrine. If FHFA instead acted as a private entity when it nationalized the Companies, it violated the private non-delegation doctrine by exercising statutorily conferred power to bind third parties for the public interest. And however FHFA's actions are categorized, it violated the Appointments Clause by operating for over two years under the direction of an acting principal officer who was never nominated by the President or confirmed by the Senate. Whichever path the Court chooses, in the end the correct conclusion is that FHFA violated the separation of powers when it imposed the so-called "Net Worth Sweep" and that this action must therefore be vacated.

In their motions to dismiss, Defendants repeatedly trumpet the decisions of a number of other courts that have dismissed previous challenges to the Net Worth Sweep brought by other plaintiffs. But each of those suits was dismissed in whole or in part based on 12 U.S.C. § 4617(f)—a limitation on judicial review that Defendants do not even argue is applicable to the constitutional claims at issue here. And while it is true that a single district court has rejected one of the constitutional claims Plaintiffs advance in this case, *see Collins v. FHFA*, 2017 WL 2255564 (S.D. Tex. May 22, 2017), *appeal pending*, No. 16-3113 (5th Cir.), that court ruled as it did only after expressly rejecting the reasoning of a D.C. Circuit panel decision that the Department of Justice has endorsed, *see PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016),

vacated and rehearing en banc granted (Feb. 16, 2017). To an even greater degree than the identically structured agency deemed unconstitutional by the panel in *PHH*, FHFA operates without meaningful direction or oversight from the President, Congress, or the judiciary. This anomalous arrangement violates the separation of powers, and the Court should enter summary judgment in favor of Plaintiffs.

BACKGROUND

Plaintiffs' Amended Complaint and brief in opposition to Treasury's motion to dismiss provide a more complete narrative of the events that gave rise to this action, but only a very small number of operative facts must be established to show that Plaintiffs are entitled to judgment as a matter of law. First, as shown by the attached declarations, Plaintiffs are shareholders in both Fannie and Freddie. (*See* R.30-1, Ex. 1, Rop Decl., Pg.ID 433; R.30-2, Ex. 2, Knoepp Decl., Pg.ID 435; R.30-3, Ex. 3, Wilson Decl., Pg.ID 437). Plaintiffs thus have standing to challenge the Net Worth Sweep and FHFA's ongoing exercise of their rights on separation of powers grounds.

Second, FHFA is an "independent" agency, 12 U.S.C. § 4511(a); 44 U.S.C. § 3502(5), and it is headed by a Director who is only removable "for cause by the President," 12 U.S.C. § 4512(b)(2). Although Plaintiffs do not concede the relevance of whether acting Director DeMarco was removable by the President when he approved the Net Worth Sweep, the text and structure of HERA, combined with background legal principles, make clear that an acting Director, just like a Senate-confirmed Director, is protected from removal.[1]

[1] The Obama Administration likewise concluded that HERA insulated Mr. DeMarco from presidential removal authority. Mr. DeMarco refused to approve the Administration's proposal that the Companies reduce the principal on certain mortgages in an effort to jumpstart the

Third, James Lockhart announced that he would resign from his position as the head of FHFA on August 5, 2009. (R.30-5, Ex. 5, Diana Golobay, *Lockhart to Leave FHFA Soon*, HOUSING WIRE (Aug. 5, 2009), Pg.ID 448.) On August 25, 2009, President Obama designated Edward DeMarco to serve as FHFA's acting Director. (R.30-6, Ex. 6, Presidential Order (Aug. 25, 2009), Pg.ID 450). Mr. DeMarco was still FHFA's acting Director when he signed the amendment to the Preferred Stock Purchase Agreements on August 17, 2012. (*See* R.23-3, Third Am. Restated PSPA at 8, Pg.ID 374.)

ARGUMENT

I. Legal standard.

The Court should grant Plaintiffs' motion for summary judgment if it determines that "there is no genuine issue of material fact" in dispute and that Plaintiffs are "entitled to judgment as a matter of law." *Boyer v. Petersen*, 221 F. Supp. 3d 943, 952 (W.D. Mich. 2016).

II. The constitutional separation of powers does not allow FHFA to operate as an independent agency headed by a single director.

"Congress's 2008 creation of a single head of the new Federal Housing Finance Agency

---

recovery in housing prices. (*See* R.30-4, Ex. 4, Ltr. from Timothy F. Geithner, Secretary, Treasury, to Edward DeMarco, Acting Dir., FHFA (July 31, 2012), Pg.ID 439-40.) Internal Treasury documents concerning negotiations over the Net Worth Sweep reveal that Treasury officials viewed those negotiations in the context of the Administration's broader disputes with Mr. DeMarco and that they sought to leverage the negotiations to "keep estrangement" "to a minimum." (R.30-7, Ex. 7, UST00517875), Pg.ID 452.) 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." *See* Rob Blackwell, *HUD Chief: Obama Can't Fire FHFA's DeMarco*, NAT'L MORTGAGE NEWS (Aug. 3, 2012), http://goo.gl/Ql039i. And an internal Treasury document created during Mr. DeMarco's tenure recognized that "Treasury cannot compel FHFA to act" because it is an "independent agenc[y]." (R.30-8, Ex. 8, UST00552426, at 4, Pg.ID 458; *see also* R.30-9, Ex. 9, Joseph Williams, *Housing head at home with criticism*, POLITICO (Oct. 26, 2011), Pg.ID 494 (reporting that Mr. DeMarco "resisted White House and Treasury Department pressure to step down").)

. . . raises the same question" presented in *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 20 (D.C. Cir. 2016), *vacated and reh'g en banc granted* (Feb. 16, 2017). No less than the CFPB, FHFA's status as an independent agency headed by a single Director "represents a gross departure from settled historical practice" and "poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency." *Id.* at 8. Although *PHH* is being reheard by the D.C. Circuit en banc, the panel's decision was correct, has been endorsed by the Department of Justice, and applies with equal force to FHFA.

The Constitution vests the Executive power in the President, who must "take Care that the Laws be faithfully executed." U.S. CONST. art. II, §§ 1, 3. Restrictions on the President's removal power are presumptively unconstitutional, and the Supreme Court has recognized only two exceptions: Congress may limit the President's ability to remove (1) a multimember "body of experts," *see Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935), and (2) inferior officers with a narrow scope of powers, *see Morrison v. Olson*, 487 U.S. 654, 671-73, 695-97 (1988).

When a court is asked "to consider a new situation not yet encountered by the [Supreme] Court," there must be special "circumstances" to justify "restrict[ing the President] in his ability to remove" an officer. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483-84 (2010). FHFA is precisely such a "new situation." Unlike the Federal Trade Commission, which was at issue in *Humphrey's Executor*, FHFA is headed not by an expert and nonpartisan multimember commission that contains its own internal checks, but by a single unchecked Director. *Humphrey's Executor*, 295 U.S. at 624 (citation omitted). Furthermore, the continued viability of *Humphrey's Executor* after *Free Enterprise Fund* has been questioned. *See In re Aiken Cty.*, 645

F.3d 428, 444, 446 (D.C. Cir. 2011) (Kavanaugh, J., concurring). *Humphrey's Executor* should be read narrowly and not extended, and Plaintiffs respectfully preserve the argument that the Supreme Court should overrule it (and *Morrison*).

Neither do the powers of FHFA's Director bear resemblance to those of the independent counsel whose authority the Supreme Court upheld in *Morrison*. The independent counsel was an inferior officer who had only "limited jurisdiction" for defined investigations, 487 U.S. at 691; *see also id.* at 671-72, and "lack[ed] policymaking or significant administrative authority," *id.* at 691. FHFA's Director, in contrast, is a principal officer with broad regulatory power over the Nation's multi-trillion-dollar housing finance system. *See* 12 U.S.C. § 4526. Indeed, FHFA's acting Director at the time of the Net Worth Sweep has written that "the entire housing system . . . rel[ies] almost entirely on [its] decisions," (R.30-10, Ex. 10, MICHAEL BRIGHT & ED DEMARCO, MILKEN INSTITUTE CENTER FOR FINANCIAL MARKETS, WHY HOUSING REFORM STILL MATTERS 3 (June 2016), Pg.ID 499).

"A long line of Supreme Court precedent tells us that history and tradition are important guides in separation of powers cases," *PHH*, 839 F.3d at 21; *see id.* at 21-25; *Free Enter. Fund*, 561 U.S. at 505, and FHFA's structure finds no support in historical precedent. Plaintiffs are aware of only two instances in which Congress authorized a single individual to head an independent agency prior to the creation of FHFA: the Office of Special Counsel and the Social Security Administration. The Office of Special Counsel "has a narrow jurisdiction" mainly involving government personnel rules, its current structure was only established in 1978, and the Reagan and Carter Administrations both argued against the current structure on separation of powers grounds. *PHH*, 839 F.3d at 19; *see also* Presidential Appointees, 2 Op. O.L.C. 120, 120 (1978) (concluding that the Special Counsel "must be removable at will by the President"). The

Social Security Administration was headed by a multi-member board until 1994, and when it was restructured President Clinton issued a signing statement arguing that the change was constitutionally problematic. *PHH*, 839 F.3d at 18-19; *see* President William J. Clinton, Statement on Signing the Social Security Independence and Program Improvements Act of 1994 (Aug. 15, 1994), https://goo.gl/odVumQ ("[I]n the opinion of the Department of Justice, the provision that the President can remove the single Commissioner only for neglect of duty or malfeasance in office raises a significant constitutional question."). Because the structure of both of these agencies is of recent vintage and has been constitutionally contested by the Executive Branch, they do not demonstrate a "longstanding practice" of independent agencies headed by a single individual. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014). Accordingly, these "few scattered examples" are at most "anomalies" set against the backdrop of an otherwise uniform practice throughout our Nation's history. *Id.* at 2567; *see PHH*, 839 F.3d at 18-19.

Despite FHFA's arguments to the contrary, its unusual structure also diminishes the President's constitutional power and responsibility to supervise the agency's decisionmaking and ensure its faithful execution of laws that give it significant policymaking and administrative responsibility. (*See* R.30-11, Ex. 11, Br. of United States as Amicus Curiae at 14-16, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Mar. 17, 2017) (making similar point and arguing that CFPB's identical structure is unconstitutional), Pg.ID 542-44.) The terms of most multi-member commissions are staggered, and the President inevitably has the ability to influence the deliberations of such commissions by appointing one or more members. *See PHH*, 839 F.3d at 33. Many statutes establishing independent agencies expressly require bipartisan membership, thus guaranteeing that at least some members will belong to the President's party. *See, e.g.*, 15 U.S.C. § 41 (mandating that no more than three of FTC's five commissioners be members of the

same political party). The President has unilateral authority to select the chair of many independent multi-member commissions. *See* HENRY B. HOGUE & MAEVE P. CAREY, CONG. RESEARCH SERV., R44083, APPOINTMENT AND CONFIRMATION OF EXECUTIVE BRANCH LEADERSHIP: AN OVERVIEW 11 (2015), https://goo.gl/wShSp4 ("For many independent boards and commissions, the chair is appointed from among the group's members by the President alone, without a separate nomination."). Multi-member commissions also must deliberate and compromise in ways that reduce the risk that they will adopt extreme policies that are inconsistent with those of the President. Taken together, these features of agencies headed by bipartisan, multi-member commissions establish a floor beneath which presidential influence cannot fall.

FHFA's structure eliminates this floor and makes possible something that could never occur with an agency headed by a bipartisan, multi-member commission: someone opposed to the President's policies exercising exclusive and long-term control over a significant component of the Executive Branch. The Oval Office is today occupied by a Republican, but FHFA is run by a Democratic appointee (Melvin Watt). Acting Director DeMarco, who signed the Third Amendment during the tenure of a Democratic President, attained his position because he was previously made Deputy Director by Republican-appointed FHFA Director James Lockhart. *See* 12 U.S.C. § 4512(f). In both instances, FHFA's structure reduced the incumbent President's influence to a nadir that could never be reached with a multi-member bipartisan commission. It is no answer to say, as FHFA does, that in some *other* situations the President might prefer that an independent agency be led by a single individual. (*See* R.25, FHFA Br. 14-16, Pg.ID 407-08.) The President must at all times have at least as much influence over an independent agency as was guaranteed with the bipartisan multi-member commission at issue in *Humphrey's Executor*.

FHFA's structure reduces presidential influence beneath this constitutional minimum.

Furthermore, the *PHH* court correctly concluded that an independent agency headed by a single Director poses a serious threat to the individual liberty that the separation of powers safeguards. As that court explained, "[t]he basic constitutional concern with independent agencies is that the agencies are unchecked by the President, the official who is accountable to the people and who is made responsible by Article II for the exercise of executive power." *PHH*, 839 F.3d at 26. Accordingly, "[i]n the absence of Presidential control, the multi-member structure of independent agencies acts as a critical substitute check on the excesses of any individual independent agency head—a check that helps to prevent arbitrary decisionmaking and abuse of power, and thereby to protect individual liberty." *Id.* Multi-member independent agencies better protect individual liberty because they do not concentrate power in the hands of any one unelected individual, must necessarily account for multiple viewpoints, tend to make decisions that are less extreme, and better resist capture by interest groups. *Id.* at 26-28. The ultimate aim of the separation of powers is to safeguard individual liberty, *see Bowsher v. Synar*, 478 U.S. 714, 721 (1986), and "neither *Humphrey's Executor* nor any later case gave Congress a free pass, without any boundaries, to create independent agencies that depart from history and threaten individual liberty." *PHH*, 839 F.3d at 33.

Although FHFA's structure violates the separation of powers without regard to the agency's relative importance in national life, there can be no serious dispute that it, like the CFPB, "wields vast power over the U.S. economy." *Id.* at 8. FHFA is "responsible for the oversight of vital components of the secondary mortgage markets," regulates entities that "provide more than $5.8 trillion in funding for the U.S. mortgage markets and financial institutions," and oversees programs that "have helped millions of Americans remain in their

homes." (R.30-12, Ex. 12, FHFA, *About FHFA: Who We Are & What We Do*, Pg.ID 555.) It "is charged with directing the largest conservatorships in U.S. history in support of the Nation's multi-trillion dollar mortgage finance system," (R.30-13, Ex. 13, Watt 5/29/14 Decl. ¶ 7, Pg.ID 561)—a system that underpins the entire housing sector and thus directly affects every American. FHFA exercises broad powers over an industry that is responsible for roughly 15% of the Nation's Gross Domestic Product (*see* R.30-14, Ex. 14, David Logan, *Housing Share of GDP Expands*, NAT'L ASS'N OF HOME BUILDERS (June 28, 2016), Pg.ID 567-68), and there can thus be no doubt that its decisions "have an almost unrivaled effect on a broad swath of the economy," (R.30-15, Ex. 15, Joe Light, *Fannie-Freddie Regulator Said to Plan to Stay On Under Trump*, BLOOMBERG NEWS (Dec. 15, 2016), Pg.ID 571).

The character of the powers FHFA exercises within its domain makes its structure even more constitutionally problematic. FHFA is the regulator of two of the Nation's largest privately owned financial institutions, and in other cases it has asserted that it enjoys "plenary power" over the Companies and the rights of their shareholders during conservatorship. (R.31-2, FHFA Motion to Dismiss at 16, *Collins v. Mnuchin*, No. 16-3113 (S.D. Tex. Jan. 9, 2017), Pg. ID 733); *see also* 12 U.S.C. §§ 4511 *et seq.* (granting FHFA's Director extensive regulatory powers over the Companies). When FHFA exercises its powers, it benefits from a variety of statutory restrictions on judicial review. *See* 12 U.S.C. § 4617(f); *id.* § 4617(b)(2)(A)(i); *id.* § 4617(b)(5)(E); *id.* § 4617(b)(11)(D); *id.* § 4623(d). And unlike every other independent agency headed by a single individual save the CFPB, FHFA is not subject to the congressional appropriations process. *See* 12 U.S.C. § 4516(f)(2).

In the absence of meaningful judicial review or congressional oversight, presidential control is an even more important safeguard against the threat that arbitrary agency

decisionmaking poses to individual liberty. *See PHH*, 839 F.3d at 35-36. Although FHFA dismisses this argument as "a classic situation of zero plus zero equals zero," (R.25, FHFA Br. 16-17, Pg.ID 409-10), the Supreme Court held in *Free Enterprise Fund* that two separately permissible features of an agency's structure ran afoul of the separation of powers when combined. *Free Enter. Fund*, 561 U.S. at 483-84. The separation of powers does not permit a single, unsupervised government official to exercise broadly defined powers with no guidance from Congress, no prospect of review by the courts, and no accountability to the elected President.

III. FHFA violated the non-delegation doctrine when it imposed the Net Worth Sweep.

To the extent that the Court agrees with Defendants that FHFA "step[ped] into the shoes" of the Companies and acted as a private entity when it imposed the Net Worth Sweep, (R.25, FHFA Br. 10, Pg.ID 403), that will only point the way to a different constitutional basis for vacating the Net Worth Sweep. As FHFA concedes, "[u]nder the private nondelegation doctrine, Congress generally cannot delegate sovereign legislative or executive power to a private entity." (*Id.* at 28, Pg.ID 421 (citing *Pittston Co. v. United States*, 368 F.3d 385, 394-95 (4th Cir. 2004))); *see Department of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1252-53 (2015) (Thomas, J., concurring). While the law is not well developed on this point, at a minimum the doctrine does not permit a private entity to exercise powers that are "essentially governmental." *Pittston*, 368 F.3d at 397.

Despite FHFA's arguments to the contrary, several aspects of its decision to impose the Net Worth Sweep show that this was an exercise of the sovereign powers of the United States. First, in imposing the Net Worth Sweep, FHFA exercised authority under a federal statute to

alter the legal rights and obligations of third parties—the Companies and their shareholders—and promote what it deemed to be in the public interest. Such actions are by definition an exercise of "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). Second, 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, LLC*, 864 F.3d 591, 615-16 (D.C. Cir. 2017). Whether denominated as legislative or executive, the power to alter the legal responsibilities of a federal agency is essentially governmental. Third, the most basic principles of corporation law did not give the Companies' private management the power to enter into a contract like the Net Worth Sweep, *see Cede & Co. v. Technicolor Inc.*, 634 A.2d 345, 361 (Del. 1993), so FHFA's actions cannot be treated as an exercise of powers it merely inherited from the Companies.

Finally, to the extent FHFA acted as the government when it imposed the Net Worth Sweep, FHFA is wrong when it argues that Congress gave it an intelligible principle to guide its exercise of discretion. In *Perry Capital*, the D.C. Circuit said that as conservator FHFA has "permissive, discretionary authority." *Perry Capital*, 864 F.3d at 607. Under this interpretation, neither FHFA's power to "carry on the business of the [Companies]" pursuant to their charters nor its power to pursue the Companies' "best interests" provides the necessary intelligible principle because these are powers that FHFA "may" but is not required to exercise. *See* 12 U.S.C. § 4617(b)(2)(D), (b)(2)(J). The D.C. Circuit thus "eras[ed] any outer limit to FHFA's statutory powers." *Perry Capital*, 864 F.3d at 591 (Brown, J., dissenting). Even when Congress

delegates power to another organ of the federal government, the non-delegation doctrine requires more. *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 472 (2001).

IV. Mr. DeMarco's tenure as acting director violated the Appointments Clause.

The Net Worth Sweep is invalid for the additional, independent reason that, when the FHFA approved it, it was headed by an acting Director who held his office in violation of the Appointments Clause.

1. The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" all officers of the United States. U.S. CONST. art. II, § 2, cl. 2. The Constitution permits two, and only two, exceptions to the rule that officers may assume and hold office only after being nominated by the President and confirmed by the Senate: First, Congress 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." *Id.* (emphasis added). Second, the President "shall have Power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." U.S. CONST. art. II, § 2, cl. 3.

FHFA does not dispute that its Director is a *principal* officer of the United States under the Appointments Clause, who must therefore either be nominated by the President and confirmed by the Senate or receive a temporary presidential commission during the recess of the Senate. Neither does it dispute that Mr. DeMarco had not been confirmed by the Senate, nor received a temporary commission during the recess of the Senate, at the time he purported to approve the Net Worth Sweep.

FHFA nevertheless contends that Mr. DeMarco had authority to exercise powers ordinarily reserved to principal officers appointed pursuant to the Appointments Clause. They contend that he enjoyed that authority by virtue of 12 U.S.C. § 4512(f), which empowers the President, upon the resignation of the Director of FHFA, to designate one of three Deputy Directors to serve as "acting Director until . . . the appointment of a successor." James B. Lockhart III, who served as transitional Director pursuant to 12 U.S.C. § 4512(b)(5), resigned in August 2009, and President Obama exercised his statutory power to designate then-Deputy Director DeMarco as acting Director. Given the notable absence of an "acting director" exception to the Appointments Clause in the Constitution, the question arises how Mr. DeMarco could constitutionally exercise the powers of the Director.

The United States Supreme Court has provided some guidance on that question in the context of another group of officers that require Senate confirmation: consuls. In *United States v. Eaton*, 169 U.S. 331 (1898), the Court held that a "vice consul" could "be charged with the duty of temporarily performing the functions of the consular office" for ten months, despite having not been confirmed by the Senate. *Id.* at 343. Allowing that Article II requires consuls to be appointed by the President "by and with the advice and consent of the senate," the Court concluded that "the word 'consul' therein does not embrace a subordinate and temporary officer like that of vice consul." *Id.* "Because the subordinate officer is charged with the performance of the duty of the superior *for a limited time*, and under special *and temporary conditions*," he remained an "inferior Officer," and his appointment could be vested in the President alone. *Id.* (emphases added).[2]

[2] To the extent that it may be argued that acting principal officers are themselves principal officers, Plaintiffs respectfully reserve the argument that such officers may not be selected by the

The Supreme Court reaffirmed this temporal dimension to the Appointments Clause in *Morrison v. Olson*, 487 U.S. 654 (1988), in which it identified several factors that distinguish inferior from principal officers. *Id.* at 671-72. They were: the degree to which the officer is subject to supervision by another officer; the scope and nature of the duties assigned to the officer; the scope and nature of the officer's jurisdiction; and the limitations on the officer's tenure. *Id.*[3] *Cf. United States v. Germaine*, 99 U.S. (9 Otto) 508, 511 (1878) (looking to "tenure, duration, emolument, and duties" to distinguish grades of federal officers and employees).

Under *Morrison*, an acting Director can claim classification as an "inferior" officer, if at all, under only one circumstance: if he serves "for a limited time" and under "temporary conditions." *Eaton*, 169 U.S. at 343. As with many "acting" positions, including the position of vice consul in *Eaton*, the degree of supervision, and the scope and nature of the officer's duties and jurisdiction do not distinguish the position of the acting Director from that of the principal officer whose shoes the acting Director fills. It follows *a fortiori* that an "acting" position may not be occupied *indefinitely* by a person who has not been appointed to that office "by and with the Advice and Consent of the Senate;" instead, his or her tenure must be "temporary" and "limited." *Id.*

The structure of the Constitution reinforces the Supreme Court's interpretation of its text. Article II provides a carefully reticulated scheme for selecting officers of the United States: one

---

President without running afoul of the Appointments Clause. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 945-49 (2017) (Thomas, J. concurring).

[3] To the extent that the Supreme Court has moved away from its definition of "inferior officers" in its much-criticized decision in *Morrison v. Olson*, it has been in a direction that casts further doubt on the constitutional status of acting principal officers. In *Edmond v. United States*, the Court defined "inferior officers" as "officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate." 520 U.S. 651, 663 (1997). This definition would seem to exclude officers who perform the duties of principal officers unsupervised *for any period of time*.

that balances pragmatic considerations like exigency and efficiency with institutional ones like accountability and deliberation. *See Noel Canning*, 134 S. Ct. at 2558-59; *see also Edmond v. United States*, 520 U.S. 651, 663 (1997) (interpreting "inferior officer" "in the context of a Clause designed to preserve political accountability relative to important Government assignments"). The result is a system that requires the President to solicit and receive the Senate's approval for the most important appointments, but permits Congress to authorize unilateral action in the selection of officers who exercise less power by virtue of the subordinate, limited, or temporary nature of their responsibilities. *See Edmond*, 520 U.S. at 660. That same system also permits the President to meet public need by filling vacancies while the Senate is in recess, but it once again reinforces the importance of Senate input by placing strict time limits on these unilateral "recess appointments."

It would be strange indeed for this densely woven fabric to include a loophole through which the President might introduce permanent, unilateral appointments to the most powerful offices in the Executive Branch. Yet that is precisely what FHFA suggests: that the President may designate acting principal officers to serve indefinitely, thereby frustrating the Senate's constitutional role. Indeed, FHFA's interpretation would permit the President as well as the Senate to be cut out of the appointments process for certain independent agencies, by permitting the independent head of a federal agency to select his own acting successor to serve indefinitely, so long as the Senate refused to confirm any presidential nominee. *See* 12 U.S.C. § 4512(c)-(e) (authorizing the Director of FHFA to choose the three deputy directors from which the President selects the Director's successor). In short, merely labeling an officer as an "acting officer," while permitting him to serve indefinitely, does not render him "inferior." "[T]he structural protections

of the Appointments Clause can[not] be avoided based on such trivial distinctions." *SW Gen., Inc.*, 137 S. Ct. at 946 n.1 (Thomas, J., concurring).

2. Having established that acting appointments must be temporary, the question remains: how long is too long?

Whatever the answer to this question in closer cases, an acting principal's tenure must be less than two years. This constitutional ceiling derives from the Recess Appointments Clause, which provides that even when necessitated by the most exigent of circumstances—a recess of the Senate that necessarily prevents appointment "by and with the Advice and Consent of the Senate"—a unilateral appointment by the President may not exceed the length of the period from the start of the recess until the end of the Senate's next session. U.S. CONST. art. II, § 2.[4] During the first nearly 150 years of this Republic, the maximum period for which someone could hold a recess appointment was usually shorter than one year. *Noel Canning*, 134 S. Ct. at 2579-83 (app'x A). Today, by virtue of the Twentieth Amendment, that period must be less than two years. U.S. CONST. amend. XX, § 2. Because Mr. DeMarco had served for more than two years at the time FHFA approved the Net Worth Sweep, he held his office in violation of the Appointments Clause, and the Net Worth Sweep is therefore void.

[4] FHFA dismisses the Recess Appointments Clause as irrelevant because Mr. DeMarco was not serving as a recess appointee. Plaintiffs do not contend that Mr. DeMarco was a recess appointee whose tenure is defined by this Clause. Instead, Plaintiffs argue that the Recess Appointments Clause reflects a constitutional judgment that, even under circumstances that make unilateral action by the President *most reasonable*—that is, when a vacancy for a critical office arises during a recess of the Senate—officers commissioned without Senate confirmation ought to serve just long enough to give the President a full session of the Senate in which to attempt to secure confirmation for a regular appointment. *See Noel Canning*, 134 S. Ct. at 2565. It follows that a *longer* tenure would be "unreasonable" under any circumstances, whether as a stand-alone matter or under OLC-derived test described below.

Even in the absence of a fixed constitutional ceiling, however, Mr. DeMarco's tenure would violate the Appointments Clause. The Office of Legal Counsel has opined that someone may serve as an acting principal officer without Senate confirmation only for "as long as is reasonable under the circumstances." Designation of Acting Director of OMB, 2003 WL 24151770, at *1 n.2 (June 12, 2003). FHFA dismisses this test with the irrelevant observation that OLC was "simply contrasting the open-ended nature of an acting OMB director's service (under a non-time-limited provision akin to § 4512(f)) with the time-limited nature of an acting officer under the Vacancies Act." (R.25, FHFA Br. 21, Pg.ID 414.) True, OLC was drawing a comparison, but significantly, it did not perceive that comparison as one between a "non-time-limited" tenure and a "time-limited" one. To the contrary, OLC assumed that even in the absence of a *statutory* time limit, the Constitution imposed a requirement that the tenure be "reasonable under the circumstances." *See also Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 287 (1977) (A tenure as an acting officer "may not continue indefinitely.").

In determining how long a tenure is "reasonable under the circumstances," OLC identified the following considerations as "pertinent": "the specific functions being performed by the [acting officer]; the manner in which the vacancy was created (death, long-planned resignation, etc.); the time when the vacancy was created (*e.g.*, whether near the beginning or the end of a session of the Senate); whether the President has sent a nomination to the Senate; and particular factors affecting the President's choice (*e.g.*, a desire to appraise the work of an Acting Director) or the President's ability to devote attention to the matter." *Id.* at 290.[5] It is also

[5] FHFA proposes two additional factors: " 'the difficulty of finding suitable candidates' for 'complex and responsible positions,' " and the " 'uncertainties created by delays in the

relevant whether there is a statutory time limit on the tenure of the principal officer whose position is being filled on a temporary basis. *SW General*, 137 S. Ct. at 946 n.1 (Thomas, J.).

Every single "pertinent consideration" militates in favor of the conclusion that Mr. DeMarco's tenure was, by the fall of 2012, unreasonable under the circumstances: *First*, Mr. DeMarco exercised the full powers of the Director of FHFA, 12 U.S.C. § 4512(f), the head of an independent federal agency, without *anyone's* supervision—even the President's. Contrast these functions with those being performed by the vice consul in *Eaton*, who appears to have been in regular contact with and received direction from the State Department. 169 U.S. at 333 (statement of facts from reporter).

Second, the vacancy Mr. DeMarco filled was created by Mr. Lockhart's voluntary resignation after holding the post for thirteen months under a transitional provision of HERA that made the outgoing Director of the Office of Federal Housing Enterprise Oversight the head of the agency until a permanent Director could be nominated and confirmed. 12 U.S.C. § 4512(b)(5). Contrast these circumstances with those in *Eaton*, where the vacancy was occasioned by the sudden, terminal illness of the consul in the remote posting of Siam in the days before air travel. 169 U.S. at 331-32 (statement of facts from reporter).

---

enactment' of pending legislation." (R.25, FHFA Br. 26, Pg.ID 419 (quoting *Department of Energy—Appointment of Interim Officers—Department of Energy Organization Act*, 2 Op. O.L.C. 405, 410 (1978))). These factors were proposed by OLC as considerations relevant to deciding whether the President's delay in submitting a nomination to the Senate removes an interim acting appointment from the realm of an implied statutory authorization to designate an acting officer. *Id.* at 409-10. OLC did not advance them as independent factors going to the constitutionality of an acting officer's tenure. In any event, even this inapposite authority does not support the proposition that uncertainty justifies a full fourteen-month delay in even *nominating* someone to fill this critical vacancy (followed by a further two-and-a-half year delay before the next nomination). *See id.* at 410 (admitting that it was "not so clear" that a nearly *four-month* delay in submitting a nomination was reasonable, despite the complexity of the position, the uncertainty engendered by pending legislation, and the fact that the Senate was in recess for over a month during that period).

Third, President Obama did not send a nomination for Director of FHFA to the Senate until November 2010, and when he did, the Senate refused to act on it. *See* 156 CONG. REC. S7911 (Nov. 15, 2010). By the time the Net Worth Sweep was approved, that nomination had been withdrawn and shelved for nearly two years. *Id.*

Fourth, whatever factors might have influenced President Obama's choice when he appointed Mr. DeMarco—the need for quick action in response to an ongoing crisis, the desire to assess Mr. DeMarco's performance—those factors no longer held by the time Mr. DeMarco approved the Net Worth Sweep three years later. In *Eaton*, the factors that apparently influenced the choice of acting consul once again stand in marked contrast to those in this case: the departing consul called upon a trusted aide who was physically located in Bangkok and therefore capable of immediately taking up the duties of consul. 169 U.S. at 331.

Fifth, there appears to be no claim in this case that, in the three years between Mr. DeMarco's appointment and the approval of the Net Worth Sweep, President Obama simply did not have the time or attention to devote to the question who should serve as Director of one of the most powerful (and independent) agencies in the country. There was similarly no such claim advanced in *Eaton*, but it would at least be understandable if, during a decade in which colonial upheavals rocked the Western Hemisphere, the choice of consul to the far-away kingdom of Siam was not the first matter of foreign relations occupying President Harrison's attention.

Sixth, in contrast to Mr. Eaton's ten months in office, Mr. DeMarco served four years and four months in an office limited by statute to a 5-year term. "There was thus nothing 'special and temporary' about [his] appointment." *SW General*, 137 S. Ct. at 946 n.1 (Thomas, J.) (quoting *Eaton*, 169 U.S. at 343).

Perhaps recognizing that they uniformly weigh in favor of the conclusion that Mr. DeMarco's tenure was unreasonable under the circumstances, FHFA does not analyze these considerations individually. Instead, it points out that during Mr. DeMarco's tenure, the country was "reeling from recession" and Fannie's and Freddie's "very future was uncertain." (R.25, FHFA Br. 26, Pg.ID 419 (asserting purported facts not supported by the Complaint).) Leaving aside that these factors would seem to militate in favor of putting a Director who had been through the rigors of a Senate confirmation at the helm, it was simply not the case that the country or Fannie and Freddie remained in crisis a full four years after HERA was enacted.

In addition, FHFA cites President Obama's own opposition to Mr. DeMarco as evidence that keeping him in office was "reasonable under the circumstances." (*Id.* at 25, Pg.ID 418.)[6] But the "reasonable under the circumstances" inquiry is not about assigning blame: whether it is the President's or the Senate's fault that Mr. DeMarco's successor was such a long time coming, the fact is that the duration of Mr. DeMarco's tenure rendered him a principal officer who could not act unless nominated by the President *and* confirmed by the Senate. Indeed, given that the appointment power is vested jointly in the President and the Senate, the fact that Mr. DeMarco enjoyed the support of *neither* the President *nor* the Senate reinforces rather than undermines the conclusion that his protracted tenure violated the Appointments Clause.

Unable to establish that the length of Mr. DeMarco's tenure was "reasonable under the circumstances," FHFA takes refuge in modern practice, arguing that a few acting officials have served in their respective positions for extended periods approaching (and in one case exceeding)

[6] FHFA also relies on the President's opposition to Mr. DeMarco as evidence that presidents would not seek to circumvent the Appointments Clause if they possessed the power to appoint acting principal officers to indefinite terms. (R.25, FHFA Br. 22-23, Pg.ID 415-16.) But the possibility that no abuse has occurred in this case—a questionable inference—does not make unreasonable an interpretation of the Clause that would prevent such abuse altogether.

Mr. DeMarco's tenure. (*Id.* at 26-27, Pg.ID 419-20.) These very recent examples—all of the tenures FHFA identifies lasting longer than one year date to 1990 or later—should be given little to no weight in the face of the textual, structural, and longstanding doctrinal support for the proposition that acting principal officers may serve only for a limited time. *See INS v. Chadha*, 462 U.S. 919, 944-45 (1983) ("[O]ur inquiry is sharpened rather than blunted by the fact that [the challenged practice was] appearing with increasing frequency . . . ."); *see, e.g., Noel Canning*, 134 S. Ct. at 2567 (considering and rejecting anomalous historical examples of recess appointments made during recesses of fewer than ten days).

3. While Mr. DeMarco's appointment was constitutionally invalid for the reasons just discussed, the Court can avoid this issue and still rule for Plaintiffs. *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *National Advertising Co. v. City of Rolling Meadows*, 789 F.2d 571, 574 (7th Cir. 1986). That is because Mr. DeMarco's purported appointment as an "inferior officer" was invalid for the additional reason that it did not comply with 12 U.S.C. § 4512(f). Congress has authorized the President to designate an acting Director "[i]n the event of the death, resignation, sickness, or absence of *the Director*." 12 U.S.C. § 4512(f) (emphasis added). But none of these events preceded Mr. DeMarco's designation as acting Director. Instead, President Obama designated him upon the resignation of former OFHEO Director Lockhart, who was merely authorized to "act" as FHFA Director until one was appointed. 12 U.S.C. § 4512(b)(5). No "Director" whose departure from office could trigger the President's powers under Section 4512(f) had yet even been appointed by the President pursuant to Section 4512(b)(1), much less died, resigned, fallen ill, or otherwise absented himself from office. *Cf. Doolin Sec. Sav. Bank, FSB v. OTS*, 139 F.3d 203, 207-08 (D.C. Cir. 1998) (holding that the President's powers under the Vacancies Act cannot be triggered by the resignation of a

mere acting official), *superseded by statute*, Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998), *as recognized in SW Gen. v. NLRB*, 796 F.3d 67, 70-71 (D.C. Cir. 2015). Because no "Director" resigned, the President was not vested with the power to appoint an acting Director, and Mr. DeMarco's appointment violated 12 U.S.C. § 4512.

CONCLUSION

Accordingly, and for all the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment, vacate the amendment to the Preferred Stock Purchase Agreements that imposed the Net Worth Sweep, and strike down provisions of HERA that unconstitutionally insulate FHFA's Director from presidential oversight, including the Director's for-cause removal protection in 12 U.S.C. § 4512.

Dated: October 6, 2017

/s/ Matthew T. Nelson

Matthew T. Nelson
Ashley G. Chrysler
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
616.752.2000
mnelson@wnj.com
achrysler@wnj.com

Attorneys for Plaintiffs

16338954-6