No. 20-2071

In the United States Court of Appeals for the Sixth Circuit

MICHAEL ROP, STEWART KNOEPP, and ALVIN WILSON,

Plaintiffs–Appellants,

v.

FEDERAL HOUSING FINANCE AGENCY, SANDRA L. THOMPSON, in her official capacity as Acting Director of the Federal Housing Finance Agency, and U.S. DEPARTMENT OF THE TREASURY,

Defendants–Appellees.

Appeal from the United States District Court
for the Western District of Michigan
Case No. 1:17-cv-00497-PLM-RSK

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). As Plaintiffs have explained, this principle applies fully to violations of the Appointments Clause. The Clause establishes foundational prerequisites for the exercise of executive power, ensuring against the appointment of "unfit characters" and promoting "stability in the administration" of our laws. THE FEDERALIST NO. 76, p. 457 (A. Hamilton) (C. Rossiter ed., 1961). Yet in a dissent issued the day after oral argument in this case, Judge Murphy suggested, without briefing by the parties (or amici) on the issue, that the de facto officer doctrine would generally bar federal courts from granting relief for actions by officials exercising executive power without a valid appointment. *See Calcutt v. F.D.I.C.*, --- F.4th ----, No. 20-4303, 2022 WL 2081430, at *42 (June 10, 2022) (Murphy, J., dissenting).[1] According to this dissent, the Appointments Clause remedies awarded in *Ryder v. United States*, 515 U.S. 177 (1995), and *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018), mirrored the disfavored judge-made remedy of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Thus, Judge Murphy proposes, courts should limit *Ryder* and *Lucia* to their facts, apply the

[1] All *Calcutt* citations refer to the dissent unless otherwise indicated.

de facto officer doctrine to validate other types of executive actions, and relegate appointments challenges to "quo warranto" suits.

Of course, only the majority opinion in *Calcutt*, which was recommended for publication, can control here. *See Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). The majority did not apply the de facto officer doctrine to Calcutt's Appointments Clause claim. *See* 2022 WL 2081430, at **17–19 (majority op.). And, respectfully, if Judge Murphy's reasoning were to become the law of this Circuit, it would drastically constrict the historical equitable power of federal courts, depart from Supreme Court precedent, and license unchecked, unlawful exercises of executive power. This Court should not countenance such an outcome—particularly not where the office being challenged ("acting" director of FHFA) is itself an unlawful one to the extent it allows an official to exercise the power of a principal executive officer without Senate confirmation for longer than the Constitution allows.

ARGUMENT

I. Appointments Clause Remedies Are Not *Bivens* Remedies

When *Ryder* was decided in 1995, the Supreme Court had already rebuffed several attempts to expand *Bivens*. In 1983, the Court refused to extend *Bivens* to First Amendment and race-discrimination claims. In 1987, it refused to extend *Bivens* to substantive-due-process claims. And on and on. *See Ziglar v. Abbasi*, 137

S. Ct. 1843, 1857 (2017) (collecting cases); *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) ("[F]or almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*."). The unanimous *Ryder* decision was authored by Chief Justice Rehnquist and joined by Justices who had also voted to limit *Bivens*, including in another unanimous decision the year before. *See F.D.I.C. v. Meyer*, 510 U.S. 471 (1994). The *Lucia* decision was likewise joined by Justices who had repeatedly refused to expand *Bivens*.

These Justices' votes in *Ryder* and *Lucia* were entirely consistent with their position on *Bivens*. In *Bivens*, the Court implied a claim for *damages* under the Fourth Amendment. *See* 403 U.S. at 389. The relief for Appointments Clause violations awarded in *Ryder* and *Lucia* was different in kind and pedigree. As Justice Scalia said for the Court in *Armstrong v. Exceptional Child Center, Inc.*, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." 575 U.S. 320, 327 (2015). As such, this remedial power lies within "the equity jurisdiction of the federal courts," which, as Justice Scalia explained for the Court elsewhere, "is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of

the Constitution and the enactment of the original Judiciary Act [of] 1789." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).[2]

This power manifested in *Ex parte Young*, 209 U.S. 123 (1908), which permits injunctions against state officials who act without lawful authority and which this Court frequently applies. This remedial power is "equally applicable to a Federal officer acting . . . under an authority not validly conferred." *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912); *see also, e.g.*, *Harmon v. Brucker*, 355 U.S. 579, 581–82 (1958) ("Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers."). The Supreme Court has reaffirmed this power even where it has refused to extend *Bivens*. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)

[2] The 1789 Act conferred equity jurisdiction in diversity cases, 1 Stat. 78, § 11, but the same relief is available in federal-question cases. After Congress solidified the operative federal-question regime in 1875, the Supreme Court came "to treat the remedy of injunction as conferred directly by federal law for any abuse of state authority which in the view of federal law ought to be remediable." Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 (1954). As Judge Silberman later put it, the Court "gradually concluded that an implied cause of action under the Constitution existed where the remedy sought was an injunction." *Crawford-El v. Britton*, 93 F.3d 813, 831 (D.C. Cir. 1996) (Silberman, J., concurring), *rev'd on other grounds*, 523 U.S. 574 (1998). This use of "implied cause of action" was somewhat a misnomer; as Justice Scalia explained in *Armstrong*, injunctions against officials stem from courts' historical equitable authority, not constitutional causes of action. *See* 575 U.S. at 327; *accord Nat'l Juv. L. Ctr., Inc. v. Regnery*, 738 F.2d 455, 459 (D.C. Cir. 1984) ("[T]he constitutional claims of the individual plaintiffs," including for "a violation of the constitutional principle of separation of powers," "do not depend on the implication of any private right of action.").

("[U]nlike the *Bivens* remedy . . . injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally."); *accord Bush v. Lucas*, 462 U.S. 367, 373–74 (1983).

The relief awarded in *Ryder* and *Lucia* thus was not born in the heady days of implied damages actions during the Burger Court. Rather, it reflects the "long established" and "broad power of federal courts to grant equitable relief for constitutional violations" recognized even by *Bivens*-skeptical jurists. *Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting); *accord Franklin v. Massachusetts*, 505 U.S. 788, 828–29 (1992) (Scalia, J., concurring in part and in the judgment). It does not reflect *Bivens*-like, policy-driven constitutional construction. True, *Ryder* and *Lucia* note the need to preserve "incentives to raise Appointments Clause challenges." *Lucia*, 138 S. Ct. at 2055 n.5 (cleaned up). But the *Lucia* Court first made clear that "our Appointments Clause remedies are designed . . . to advance" the Clause's "[structural] purposes directly." *Id*.

Moreover, equitable remedies—like the injunctions that courts have unquestionable power to grant for constitutional violations—commonly account for policy-type considerations like "the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). To refuse an Appointments Clause remedy on that basis would simply be to spurn this Court's traditional remedial authority. To do so by applying the de facto officer doctrine would make particularly little sense:

That judge-made doctrine was *itself* "introduced into the law as a matter of policy." *State v. Carroll*, 38 Conn. 449, 467 (1871).

As *Ryder* and *Lucia* demonstrate, the public interest plainly favors remedying violations of structural constitutional provisions like the Appointments Clause. If anything, those provisions are the most important to protect because they are the most important to liberty. *See Seila Law LLC v. C.F.P.B.*, 140 S. Ct. 2183, 2202 (2020) ("The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." (internal quotation marks omitted)); Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1418 (2008) (noting that the USSR constitution's robust speech protections "were not worth the paper they were printed on" because that constitution contained no structural protections against autocracy).

If Mr. DeMarco had used his position to restrict Plaintiffs' individual rights, Plaintiffs indisputably could have sought declaratory and injunctive relief. *See Stimson*, 223 U.S. at 620. They likewise may do so on the ground that his position itself was unconstitutional. The Court's authority to grant such relief traces not to *Bivens*, but to the founding of the federal judiciary.

II. The De Facto Officer Doctrine Does Not Apply to Appointments Clause Violations

Neither this Court nor the Supreme Court has *ever* used the de facto officer doctrine to deny relief for an Appointments Clause claim that was timely and not

forfeited—*i.e.*, brought within the statute of limitations and raised at the appropriate stage of litigation, as Plaintiffs' was. *See* Pls.-Appellants' Opening Br. 34–35, Doc. 31 (Dec. 21, 2021); Pls.-Appellants' Reply Br. 10–11, Doc. 40 (Mar. 11, 2022).[3]

Such a holding would conflict with controlling precedent. In *Nguyen v. United States*, which Judge Murphy's dissent does not mention, the Supreme Court refused to use the de facto officer doctrine to bless rulings by a Ninth Circuit panel that included a non-Article III judge. "Typically," the Court explained, "a judge's actions [are] valid *de facto* when there is a *merely technical defect* of statutory authority." 539 U.S. 69, 77 (2003) (emphasis added; internal quotation marks omitted). Thus, in *McDowell v. United States*, the Court held that a judge who improperly sat in another district was "a judge de facto, if not a judge de jure," since "he *was a judge* of the United States district court." 159 U.S. 596, 601 (1895) (emphasis added). "By contrast," the Supreme Court has remedied "violations of a statutory provision that embodies a strong policy concerning the proper administration of judicial business"—even where, unlike here, "the defect was not raised in a timely manner." *Nguyen*, 539 U.S. at 78 (internal quotation marks omitted).

What is true of *statutory* appointment defects is necessarily true of constitutional ones. The Constitution certainly "embodies a strong policy concerning

[3] *Ex parte Ward* is not to the contrary. There, the authority of the judge presiding over a criminal trial was challenged only in a habeas action, not on direct review. 173 U.S. 452, 454 (1899).

the proper administration of," in this case, executive authority. *Id*. Accordingly, the Supreme Court has considered an Appointments Clause challenge to an agency adjudicator even though the parties had *consented* to the adjudicator and thereby allowed him to exercise authority over them. *See Freytag v. C.I.R.*, 501 U.S. 868, 878–79 (1991). A few years later, *Ryder* explicitly held that the de facto officer doctrine did not preclude an Appointments Clause remedy. *See* 515 U.S. at 188. This precedent refutes any argument that courts' remedial authority is weaker, or the de facto officer doctrine stronger, for violations of structural provisions like the Appointments Clause than for violations of the Bill of Rights.

Nor is this precedent limited to adjudications. Faced with an Appointments Clause claim in *Free Enterprise Fund v. P.C.A.O.B.*, the Supreme Court noted that "equitable relief has long been recognized as the proper means for preventing entities from acting unconstitutionally" and that "no reason" or "authority" supported the argument "that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim." 561 U.S. 477, 491 n.2 (2010) (cleaned up). That case did not arise from an adjudication, *see id*. at 487, and this language is not specific to adjudications. If it were, it would have contravened *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), another case that did not arise from an adjudication—the plaintiffs challenged the makeup of the FEC in anticipation of "impending future rulings and determinations by the Commission,"

id. at 117—and where the Court *remedied* the Appointments Clause violation. Although the Court "quite summarily" afforded validity to the FEC's past acts, the Court later observed that "the declaratory and injunctive relief [the plaintiffs] sought was awarded to them." *Ryder*, 515 U.S. at 183; *see* Opening Br. 35–36 (explaining that this aspect of *Buckley*'s remedial holding had been confined to its facts); Reply Br. 12 (same). Despite using the phrase "de facto" to describe the validity it afforded the FEC's past acts, it is apparent that *Buckley* was not employing the de facto officer doctrine that Judge Murphy describes. If it was, the litigants could not have had their Appointments Clause claim heard at all, much less received the relief they sought. *See Ryder*, 515 U.S. at 183 (noting that *Buckley* did not "explicitly rel[y] on the *de facto* officer doctrine"). *Buckley*, after all, was not a quo warranto action.

If the de facto officer doctrine precluded *any* relief for Appointments Clause violations, then *Buckley* could not have awarded any. But that doctrine simply does not apply to timely Appointments Clause claims.

III. The De Facto Officer Doctrine Does Not Preclude Relief Here

Even if applicable, the de facto officer doctrine does not preclude relief where a principal officer has served in an acting capacity longer than the Appointments Clause allows. This is not a "merely technical defect." *Nguyen*, 539 U.S. at 77. Such an officer is better understood as a "mere usurper" in an unlawful office—someone who exercises powers that his "office could 'not lawfully possess'" and whose

actions in that office are therefore "void." *Calcutt*, 2022 WL 2081430, at *36 (quoting *Collins v. Yellen*, 141 S. Ct. 1761, 1788 (2021)). As explained in the treatise on which Judge Murphy relies,

> if a legislative body, whose powers are limited by a written instrument, be permitted to create offices in violation of such instrument, and the courts are to condone such wrongdoing by holding the incumbents thereof officers de facto, it is easily seen that the paramount rights of the people are unduly sacrificed. . . . To sanction such usurpation of power, is to allow the legislature to ignore and override the sovereign will and authority of their masters.

ALBERT CONSTANTINEAU, A TREATISE ON THE DE FACTO OFFICER DOCTRINE § 40, at 61 (1910). Thus, Congress cannot vest executive power in judges, *see Calcutt*, 2022 WL 2081430, at *36 (discussing *United States v. Yale Todd*), or vest effectively legislative powers in the President, *see Clinton v. City of New York*, 524 U.S. 417, 449 (1998). There is no principled distinction between those cases and violations of the Appointments Clause. The same "written instrument" that vests power in different branches, the Constitution, prohibits Congress from conferring *any* power on invalidly appointed officers. CONSTANTINEAU § 40, at 61. But that is exactly what Congress did by creating the position of "acting" FHFA Director and placing no limit on the amount of time that office can be occupied. As Plaintiffs have explained, and contra Treasury's recent 28(j) letter, an office is invalid to the extent it allows someone to assert principal authority in an acting capacity for longer than the constitutionally permissible amount of time. Such an "officer" has no power, de jure

or de facto. The de facto officer doctrine, developed in a country without a written constitution, therefore does not preclude federal courts from enforcing this provision of our written Constitution. Illustrating the point, the portion of *Collins* that Judge Murphy quotes in his usurper discussion—where the Court lists cases "involv[ing] a Government actor's exercise of power that the actor did not lawfully possess"—begins with *Lucia*, which involved an "administrative law judge appointed in violation of [the] Appointments Clause." 141 S. Ct. at 1788. And though *Collins* did not present an Appointments Clause question, *Collins* made clear that an appointments "defect" would provide "reason to regard . . . the actions taken by the FHFA in relation to the third amendment as void." *Id*. at 1787.

The other cases that Judge Murphy cites could not contradict this controlling authority, and none do. Aside from *Buckley* and *Ward*, which do not support application of the de facto officer doctrine here for the reasons above, Judge Murphy cites cases decided under state law. Although contemporaneous interpretations of analogous state constitutional provisions can shed light on the original meaning of the federal Constitution, these cases mostly concern officers who "might not have taken an oath" or met "an eligibility requirement," who were "too young," or who "had been in the Congress that increased the office's salary," *Calcutt*, 2022 WL 2081430, at *35, not violations of state appointments clauses or structural provisions similarly vital to liberty. Moreover, all these cases post-date the Founding—many

by several decades—and thus could not themselves prove the scope of the remedial authority originally granted by the Constitution and Judiciary Act of 1789. *See Gamble v. United States*, 139 S. Ct. 1960, 1975–76 (2019).

Judge Murphy also cites cases where "the officer held the office by reason of an unconstitutional [appointment] *statute*." *Calcutt*, 2022 WL 2081430, at *35. But in none of them was the *office itself* deemed an unconstitutional one. Thus, these cases provide no support for relegating appointments challenges to quo warranto actions where, as here, the official must be deemed to have held an office that violated Congress's limited authority under the Appointments Clause to create acting offices. *See* Opening Br. 19–20.

CONCLUSION

For the reasons in our prior briefing, the District Court's judgment should be reversed. The de facto officer doctrine does not change that result under the Appointments Clause.

Dated: June 21, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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I hereby certify that on this 21st day of June, 2022, I filed the foregoing Supplemental Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered users:

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