IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMIR HAMEL, *et al.* *Plaintiffs*, v. Peter O'Rourke, in his official capacity, *and* U.S. Department of Veterans Affairs, *Defendants*.	Case No. 1:18-cv-1005 (RC)

MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants United States Department of Veterans Affairs and Acting Secretary of Veterans Affairs Peter O'Rourke, in his official capacity only, respectfully move to dismiss the Complaint. The reasons for this motion are set forth in the accompanying Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss. A proposed order is filed herewith.

Dated: July 13, 2018

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Plaintiffs Samir Hamel and William Fisher, recipients of health care from the U.S. Department of Veterans Affairs ("VA" or "Department"), challenge the President's designation of Peter O'Rourke as Acting VA Secretary under the Federal Vacancies Reform Act of 1998, Pub. L. 105-277, § 151(b), 112 Stat. 2681-611(codified at 5 U.S.C. § 3345) ("FVRA"), and the Appointments Clause of the U.S. Constitution. They make the same claim as to the President's earlier designation of Robert Wilkie, whose nomination as VA Secretary is now before the U.S. Senate.

Plaintiffs lack standing to assert their claims for three reasons, so this case should be dismissed under Federal Rule of Civil Procedure 12(b)(1). First, Plaintiffs fail to allege the sort of injury-in-fact necessary to establish standing. They claim standing based on their mere status as VA health care recipients, but that assertion is the kind of generalized grievance that cannot satisfy standing's injury-in-fact requirement. Their other purported injuries-in-fact based on their

professed disagreements with positions allegedly espoused by both Acting Secretaries and on their alleged uncertainty as to the validity of actions taken during either's tenure are inherently conjectural and neither concrete nor particularized. Second, they fail to request any relief that might redress their claimed injuries because their requested relief would neither result in the lawful designation of a different Acting VA Secretary, nor eliminate the cloud of legal uncertainty that Plaintiffs allege. Indeed, the relief they seek would only worsen any injuries they might have. Third, with regard to Plaintiffs' claims for declaratory relief against Mr. Wilkie, the fact that he is no longer serving as Acting VA Secretary further undercuts Plaintiffs' already-deficient showings on the injury-in-fact and redressability requirements for standing.

Even if Plaintiffs could establish standing, their claims would be properly dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on the merits. Both their statutory and constitutional claims are procedurally improper because direct challenges to appointments and designations, such as the one Plaintiffs bring in this case, are only cognizable through a petition for a writ of *quo* warranto, which Plaintiffs failed to bring. In any event, the President acted within his statutory authority when he designated the Acting Secretaries. Both the FVRA and the Department of Veterans' Affairs Codification Act, Pub. L. No. 102-83, 105 Stat. 378, 379 (1991) (codified in Title 38 of the U.S. Code) ("VA Codification Act"), independently authorized the President to designate Acting VA Secretaries of his choosing, regardless of the circumstances surrounding former VA Secretary David Shulkin's departure from office. Finally, Plaintiffs' constitutional claim fails because an Acting VA Secretary is, at most, an inferior officer and Congress has authorized the President to designate an Acting VA Secretary without the advice and consent of the Senate.

The Court should thus dismiss this action for lack of standing under Rule 12(b)(1) or, in the alternative, for failure to state a claim under Rule 12(b)(6).

BACKGROUND

I. Statutory Background

The Department is the "executive department of the United States" tasked with "administer[ing] the laws providing benefits and other services to veterans and the dependents and the beneficiaries of veterans." 38 U.S.C. §§ 301(a), (b). The Department is headed by the VA Secretary, who "is appointed by the President, by and with the advice and consent of the Senate." *Id.* § 303. From time to time, though, the Department may find itself without an appointed Secretary. In that situation, the President may designate an Acting VA Secretary through one of two alternative statutory mechanisms: VA's specific vacancy statute, 38 U.S.C. § 304, or the more broadly applicable FVRA, 5 U.S.C. § 3345(a).

The Department's specific vacancy provision, 38 U.S.C. § 304, sets forth two options: a default rule under which the Deputy Secretary serves as Acting VA Secretary during a vacancy and a broad exception under which the President may supersede the default rule by designating another "officer of the Government" to serve as Acting VA Secretary. 38 U.S.C. § 304. As the provision states, "[u]nless the President designates another officer of the Government, the Deputy Secretary shall be Acting Secretary of Veterans Affairs during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary." *Id.*

The FVRA provides an alternate means for the President to designate an Acting VA Secretary during a vacancy. Outside of certain enumerated exceptions not relevant here, the FVRA applies to every Senate-confirmed "officer of an Executive agency." 5 U.S.C. § 3345(a). *See id.* § 3349c (setting out the exceptions). *See also* S. Rep. No. 105-250, at 2 (1998) ("The bill applies

to all vacancies in Senate-confirmed positions in executive agencies with a few express exceptions"). This includes the Department. *See* 5 U.S.C. §§ 101, 105 (providing that VA is an executive agency). The FVRA establishes procedures to authorize an acting official to perform the functions and duties of an office when "an officer of an Executive agency (. . . other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a).

Although in many cases the FVRA provides "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [Senate-confirmed] office of an Executive agency," the FVRA does not limit the President's power to make recess appointments or to exercise his authority under "a statutory provision [that] expressly . . . authorizes the President . . . to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347(a). *See also id.* § 3347(b) (providing further guidance on which statutory provisions qualify under § 3347(a)).

In the event the President does not make a designation under the FVRA and no other succession statute applies, the first assistant to a vacant office "shall perform the functions and duties of the office temporarily in an acting capacity." *Id.* § 3345(a)(1). Alternatively, the President "may direct" a person who already serves in a Senate-confirmed office or a person who has served in a senior position in the relevant agency for at least ninety of the 365 days preceding the vacancy "to perform the functions and duties of the vacant office temporarily in an acting capacity." *Id.* §§ 3345(a)(2), (a)(3). These procedures are subject to precise time limitations and exceptions identified in the text of the statute. *See id.* §§ 3345-3346.

II. Factual and Procedural Background

Secretary Shulkin served as VA Secretary from his confirmation on February 14, 2017, until March 28, 2018. ECF No. 5 (Amended Complaint) ¶¶ 57, 59. Plaintiffs allege that the President terminated the Secretary at that time, although they admit that this allegation is disputed. *Id.* ¶¶ 59, 62.

Rather than have the VA Deputy Secretary serve as Acting VA Secretary, the President designated Robert Wilkie to serve in that role. *Id.* ¶¶ 69-70. *See also* Exhibit A (March 28, 2018 Designation Memorandum).[1] At the time of his designation, Mr. Wilkie was serving in the Department of Defense as Under Secretary of Defense for Personnel and Readiness, a Senate-confirmed position. 10 U.S.C. § 136(a); Office of the Under Secretary for Personnel and Readiness, http://prhome.defense.gov/Leadership/robertWilkie.aspx (last visited June 29, 2018).[2] As Plaintiffs admit, the Department—presumably including then-Deputy Secretary Thomas Bowman—recognized Mr. Wilkie's designation as a valid exercise of the President's authority. Am. Compl. ¶ 70.

Plaintiffs filed their original complaint in this action approximately one month after Mr. Wilkie's designation as Acting VA Secretary. ECF No. 1; Ex. A. That pleading raised challenges

[1] Although a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is typically decided solely on the allegations in the complaint, "a legally operative document that is a necessary element of the claim . . . 'form[s] the basis for a claim or part of a claim,'" so a court may consider them in deciding a motion to dismiss. *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1133 (D.C. Cir. 2015) (second alteration in original) (quoting *Carroll v. Yates*, 362 F.3d 984, 986 (7th Cir. 2004)). Here, the Acting Secretaries' designation letters are legally operative documents that form the basis of Plaintiffs' challenges to their designations. They are therefore appropriate to consider at under Rule 12(b)(6).

[2] The Court can take judicial notice of Mr. Wilkie's DOD appointment. *See Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.C. Cir. 2013); *Pharm. Research & Mfrs. of Am. v. U.S. Dep't of Health & Human Servs.*, 43 F. Supp. 3d 28, 33 (D.D.C. 2014) ("Courts in this jurisdiction have frequently taken judicial notice of information posted on official public websites of government agencies.")

based on the same legal theories as the current pleading. *Compare* ECF No. 1 *with* Am. Compl. The relief sought, however, had one significant difference. In the original complaint, Plaintiffs asked the Court to declare that then-Deputy Secretary Bowman was Acting VA Secretary. ECF No. 1 at 32.

While the original complaint was pending, the President announced that he would nominate Mr. Wilkie as VA Secretary. Am. Compl. ¶ 73. Shortly thereafter, Mr. Wilkie stepped down as Acting VA Secretary, and the President designated then-VA Chief of Staff Peter O'Rourke as Acting VA Secretary. *Id.* *See also* Exhibit B (May 29, 2018 Designation Memorandum). The Department and then-Deputy Secretary Bowman again recognized this designation as valid. Am. Compl. ¶ 73. Deputy Secretary Bowman resigned soon after Acting Secretary O'Rourke's designation, leaving the office of Deputy Secretary vacant. *Id.* ¶ 74.

On June 20, 2018, Plaintiffs filed an amended complaint, which added a challenge to Acting Secretary O'Rourke's designation. *See generally id.* The only relationship Plaintiffs allege between themselves and Defendants is that Plaintiffs participate in the VA health care system and have in the past received other benefits through the Department. *See id.* ¶¶ 9-16. Plaintiffs allege that the Acting Secretaries' purportedly unlawful designations have harmed them because (1) decisions made by an improperly designated Acting VA Secretary—either Mr. Wilkie during his tenure or current Acting Secretary O'Rourke—could be subsequently invalidated, and (2) Plaintiffs disagree with the policies they believe Acting Secretary O'Rourke might enact, some of which Plaintiffs allege might affect them. *Id.* ¶¶ 5, 17-18, 78-79.

In the Amended Complaint, Plaintiffs seek declaratory and injunctive relief as well as costs and fees. As substantive relief, they ask the Court for a declaratory judgment that the Acting Secretaries' "appointments are unlawful and that any actions taken in reliance on [their] purported

authority are unlawful and void" and an injunction prohibiting Acting Secretary O'Rourke from "continuing to represent that he is the acting Secretary of Veterans Affairs, the Department from recognizing that he currently serves in that office, and both [Acting Secretary] O'Rourke and the Department from taking any action in reliance on [Acting Secretary] O'Rourke's purported authority as acting Secretary of Veterans Affairs." *Id.* at 32 (prayer for relief paragraphs 1 and 2). Notably, they do not seek an injunction prohibiting VA from taking actions in reliance on Mr. Wilkie's authority as Acting VA Secretary while he served in that position.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) requires dismissal when the plaintiff fails to meet his or her burden of establishing subject-matter jurisdiction, including when a plaintiff fails to establish elements of standing. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d. 29, 33-34 (D.D.C. 2008). When reviewing a facial challenge under Rule 12(b)(1), courts apply the same standard to jurisdictional allegations that they apply to factual allegations under Federal Rule of Civil Procedure 12(b)(6). *See West Virginia v. U.S. Dep't of Health & Human Servs.*, 145 F. Supp. 3d 94, 98-99 (D.D.C. 2015), *aff'd*, 827 F.3d 81 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1614 (2017).

Rule 12(b)(6) requires dismissal when the plaintiff fails to make allegations sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A "claim has facial plausibility" when the remaining "well-pleaded factual allegations" allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "While the complaint is to be construed liberally in plaintiff's favor, the Court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint; nor must the Court accept plaintiff's

legal conclusions." *United States v. All Assets Held at Bank Julius Baer & Co.*, 571 F. Supp. 2d 1, 15 (D.D.C. 2008).

ARGUMENT

The Court should dismiss this case under Federal Rule of Civil Procedure 12(b)(1) because Plaintiffs lack standing to assert their claims and, alternatively, under Rule 12(b)(6) because Plaintiffs' claims are procedurally improper. Even if the Court were to reach the merits, the claims should be dismissed under Rule 12(b)(6) because the President's designations of the Acting Secretaries fell well within his statutory authority under the FVRA as well as the VA Codification Act and did not run afoul of the Appointments Clause.

I. Plaintiffs Lack Standing to Assert Their Claims.

Rather than reach the merits of Plaintiffs' claims, the Court should dismiss their Amended Complaint for lack of jurisdiction because Plaintiffs have failed to establish standing. "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). *See Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 94-95 (1988). "[S]tanding is not dispensed in gross.' Rather, 'a plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (alteration in original) (internal citations omitted). Moreover, standing must exist at the time of filing and persist throughout a case. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 & n.22 (1997). As the party invoking federal jurisdiction, Plaintiffs bear the burden of establishing all three elements of Article III standing: (1) an injury in fact that is (2) traceable to the challenged conduct and (3) would be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-61.

A. Plaintiffs Lack an Injury in Fact from the Acting Secretaries' Designations.

Plaintiffs cannot meet their standing burden because they have not suffered an injury-in-fact. An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan*, 540 U.S. at 560 (internal citations omitted) (quoting *Allen v. Wright*, 468 U.S. 737, 756 (1984)). "[T]o show that the interest asserted is more than a mere general interest in [an] alleged procedural violation common to all members of the public, the plaintiff must show that [a] government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (internal citation omitted). *See also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (to be "particularized," injury must "affect the plaintiff in a personal and individual way").

Plaintiffs cannot establish a particularized and personal injury based solely on their participation in the VA healthcare program. Merely being affected by the decisions of an official does not confer standing to challenge that official's designation or appointment. *See Ex Parte Levitt*, 302 U.S. 633, 634 (1937). *See also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216-228 (1974) (rejecting taxpayer and citizen standing to challenge appointments). Indeed, numerous cases have held that plaintiffs with far greater interests in the identity of an appointed official or a designated acting official nonetheless lacked standing to assert such a challenge. For instance, the Supreme Court held that being a member of the Supreme Court bar, membership in which is governed by the Court, does not establish standing to challenge a Justice's appointment to the Court. *Ex Parte Levitt*, 302 U.S. at 634. *Accord Bergen v. Edenfield*, 701 F.2d 906, 907-08 (11th Cir. 1983) (same for federal district court judge). *See also In re Isserman*, 345 U.S. 286, 287 (1953), (stating that the Supreme Court makes disbarment decisions independently of state bar associations), *judgment set aside by* 348 U.S. 1 (1954). Likewise, "the mere fact that

Plaintiff is regulated by the [agency] does not confer standing to bring [a] suit" under the FVRA to challenge the designation of an acting officer of the agency. *Lower E. Side People's Fed. Credit Union v. Trump*, 289 F. Supp. 3d 568, 579 (S.D.N.Y. 2018) (dismissing challenge to President Trump's designation of Acting Director of the Consumer Financial Protection Bureau). Indeed, even being an employee of an agency under the authority of the agency's Secretary does not confer standing to challenge the Secretary's appointment. *Rodearmel v. Clinton*, 666 F. Supp. 2d 123, 128-129 (D.D.C. 2009).

Plaintiffs' relationship to the VA Secretary or Acting VA Secretary is even more attenuated than the relationships in those cases, which were insufficient support Article III standing. Each of these relationships between a plaintiff and an official involved an official who had the discretionary authority to directly affect the plaintiff, meaning that the official's policies and preferences might matter to the official's exercise of that authority. By contrast, the Secretary and Acting Secretary have no authority to deny Plaintiffs the health benefits to which they are entitled by statute, so those officials' policies and preferences do not directly affect Plaintiffs. *See generally* 38 U.S.C. §§ 1710-1720H. Thus, Plaintiffs' status as participants in the VA healthcare program alone cannot confer standing on them to challenge the Acting Secretaries' designations.

To allege an injury in fact, Plaintiffs must identify a harm specific to them, not a generalized grievance about allegedly improper designations of acting officers that would impact all recipients of VA benefits and, indeed, anyone having dealings with the Department. *See Fla. Audubon Soc'y*, 94 F.3d at 664. Here, Plaintiffs assert that they have been specifically injured by the Acting Secretaries' designations in two respects: (1) they disagree with (what they presume to be) the Acting Secretaries' policies; and (2) the purported uncertainty as to the legality of those designations has cast doubt on the validity of the Department's actions during the Acting

Secretaries' tenures. Am. Compl. ¶¶ 5, 17, 18, 98-102. Neither assertion establishes injury-in-fact.

1. *Mere Disagreement with the Acting Secretaries' Policies Does Not Constitute an Injury in Fact.*

Plaintiffs' preference for a different Acting VA Secretary does not amount to an injury in fact that would permit them to challenge these designations. Plaintiffs state that they want a different (but unnamed) Acting VA Secretary because they believe that someone other than Acting Secretary O'Rourke would more "vigorously represent their interests" or more strenuously oppose privatizing VA healthcare services.[3] Am. Compl. ¶¶ 5, 18, 71, 79, 99. However, Plaintiffs' alleged injuries on that basis are neither particularized nor actual or imminent. Rather, they are generalized grievances that rely solely on speculations of future injury. *Cf. English v. Trump*, 279 F. Supp. 3d 307, 311-12 (D.D.C. 2018) ("Thus, the particular policies or priorities that English or Mulvaney might pursue as the CFPB's acting Director are irrelevant to the Court's analysis.").

Plaintiffs' preference for a different Acting VA Secretary is not a "concrete," "particularized" injury. *Lujan*, 540 U.S. at 560. To be sure, informed constituents generally want their government officials to represent their interests and enact their preferred policies (although they may disagree about what their preferred policies are). But when a plaintiff "asserts only the 'generalized interest of all citizens in constitutional governance,' he has alleged only an abstract

[3] Plaintiffs made the same type of assertions regarding then-Acting Secretary Wilkie in their original complaint. *See* ECF No. 1 ¶¶ 5, 17, 18, 78. Plaintiff's Amended Complaint, however, has no allegations that another Acting VA Secretary would have acted any differently from Mr. Wilkie, nor does it allege that any of Mr. Wilkie's actions during his tenure as Acting VA Secretary directly affected Plaintiffs' benefits. Thus, Plaintiffs appear not to have asserted this type of injury in fact as the basis for their standing to pursue the declaratory relief against Mr. Wilkie requested in the Amended Complaint. To the extent Plaintiffs did intend that theory of injury, the absence of allegations supporting it would prevent any relief on that basis. Moreover, it would fail for the same reasons that Plaintiffs' disagreement with Acting Secretary O'Rourke's supposed policy preferences does not amount to an injury in fact sufficient to confer standing.

injury insufficient to confer standing." *Page v. Shelby*, 995 F. Supp. 23, 27 (D.D.C. 1998) (quoting *Schlesinger*, 418 U.S. at 217), *aff'd*, 172 F.3d 920 (D.C. Cir. 1998). This lack of particularity is why the Supreme Court has unequivocally rejected citizen standing to challenge appointments. *See Schlesinger*, 418 U.S. at 216-228. Plaintiffs have no greater injury from the Acting Secretaries' designations than any other constituents who want the Department to advocate for them and enact or advance their preferred policies. Plaintiffs therefore lack a particularized injury on this basis.

By the same token, Plaintiffs' desire for an Acting VA Secretary who would promote different policies is also too speculative to amount to an injury in fact. Plaintiffs can only hypothesize how the actions of a different Acting VA Secretary might differ from those taken by Acting Secretary O'Rourke or Mr. Wilkie.[4] Without identifying specific past or future actions that would have been different, Plaintiffs' purported harm is too speculative to constitute a cognizable injury in fact. This issue is similar to the standing problem addressed in *Hoffman v. Jeffords*, 175 F. Supp. 2d 49 (D.D.C. 2001), *aff'd*, No. 02-5006, 2002 WL 1364311 (D.C. Cir. May 6, 2002). Rejecting a challenge to Senator James Jeffords' decision to switch political parties, the court held that the different policies Congress might adopt as a result of the change were too speculative to amount to an injury in fact because "[t]here [was] absolutely no way of knowing what legislation, if any, would have been enacted had Senator Jeffords remained a member of the Republican party." *Id.* at 51, 57.

Similarly, Plaintiff here cannot do anything more than speculate about the differences between the Acting Secretaries' decisions and those different designees might have made. This

[4] The uncertainty regarding the identity of a new Acting VA Secretary compounds the speculative nature of Plaintiffs' alleged injuries. *See* § I.B, *infra*.

failing is even more pronounced when trying to prognosticate about the differences between Acting Secretary O'Rourke's forthcoming decisions and those an unnamed alternate Acting VA Secretary would make. Plaintiffs' speculative injury will not suffice for Article III standing. *See id.* *See also Page*, 995 F. Supp. at 28 (plaintiff lacked standing to challenge Senate procedural rule; possibility that rule would be used to block laws plaintiff favored too speculative to constitute injury in fact).

2. *Plaintiffs Have Not Suffered an Injury in Fact Based on Their Uncertainty as to the Validity of the Acting Secretaries' Actions in Office.*

Plaintiffs assert that they have been harmed by not knowing the legal effect of the Acting Secretaries' allegedly improper designations on the actions taken by the Department during their tenures. *See* Am. Compl. ¶¶ 5, 18, 98, 101. Notably, Plaintiffs fail to allege that any of those actions affected them directly or even that invalidating any of the actions would affect them. *See generally* Am. Compl. ¶¶ 75-77. Instead, they base their injury on the uncertainty itself. *See* Am. Compl. ¶¶ 5, 18, 98, 101. This fails for two reasons.

First, a "[p]laintiff's bare desire to have this Court determine the legality of [a government official's] actions is neither a concrete nor a particularized injury." *Smith v. Obama*, 217 F. Supp. 3d 283, 291 (D.D.C. 2016), *appeal filed sub nom. Smith v. Trump*, No. 16-5377 (D.C. Cir. 2016). *See also John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017) (plaintiff claiming that any action taken by agency would be unconstitutional was unlikely to demonstrate standing when it had not yet been harmed by agency action). As a result, the "bare disagreement with, or simple uncertainty about the legality of," a challenged government action "does not constitute an injury in fact." *Smith*, 217 F. Supp. 3d at 290. *See also New Eng. Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013) ("It would be a strange thing indeed if uncertainty were a sufficiently certain harm to constitute an injury in fact."); *In re Wingerter*, 594 F.3d 931, 946 (6th

Cir. 2010); *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 (D.C. Cir. 1987). Were that not the case, plaintiffs could seek advisory opinions from federal courts on any legal question about which there was uncertainty, which would violate of the Constitution's Article III case or controversy requirement. *See Flast v. Cohen*, 392 U.S. 83, 97 (1968).

Second, even if uncertainty could be an injury, Plaintiffs' claims do not justify any uncertainty about the continued validity of the Department's actions during the Acting Secretaries' times in office. "The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder v. United States*, 515 U.S. 177, 180 (1995). *See also Sw. Gen., Inc. v. NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff'd* 137 S. Ct. 929 (2017). Although there would be a prospective effect on Acting Secretary O'Rourke from a direct challenge to his designation, there would be no retrospective effect, meaning that there is no legal basis for Plaintiffs' uncertainty about the Acting Secretaries' past actions.[5]

* * *

[5] An individual action by Mr. Wilkie or Acting Secretary O'Rourke could be invalidated through a collateral attack if a court were to find that he lacked authority to take the action. *See Sw. Gen., Inc.*, 796 F.3d at 81-82. But, that attack would have to be brought by a plaintiff with a genuine stake in the specific challenged action who complied with the requirements for bringing such claims. *Id. See also Newman v. United States ex rel. Frizzell*, 238 U.S. 537, 549-52 (1915) (requiring "an interested person" to bring the claim). Plaintiffs have not challenged any particular action, have not alleged any particular action harmed them, and have not pleaded compliance with the applicable requirements. This is in sharp contrast to cases in which courts have held a claim to be a permissible collateral attack. *See, e.g., Sw. Gen., Inc.*, 796 F.3d at 81-83 (collateral attack on appointment of member of board that issued unfair labor practice complaint against plaintiff); *Andrade v. Lauer* 729 F.2d 1475, 1497-1501 (D.C. Cir. 1984) (collateral attack on appointments of officials who conducted reduction in force by terminated employees). *See also NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (appointment of member of board that issued order by plaintiff subject to the order). Moreover, the uncertainty from the possibility of a collateral attack is no greater than the uncertainty of relying on any government action that could be invalidated upon review. *See generally* 5 U.S.C. § 702 (providing for judicial review of all final agency actions not committed to agency discretion).

In sum, Plaintiffs have failed to allege an injury in fact. Simply being recipients of VA healthcare who take issue with the Acting Secretaries' policies and have abstract questions about the legality of their designations does not give Plaintiffs a legally cognizable stake in the outcome of their claims. Defendants are therefore entitled to dismissal on this basis.

B. Plaintiffs' Requested Relief Would Only Compound, Not Redress, Their Alleged Injuries.

Plaintiffs also lack standing to challenge the Acting Secretaries' designations because the relief they seek would not redress their claimed injuries. With regard to both Acting Secretaries, Plaintiffs ask the Court to declare their designations and all their actions unlawful. Am. Compl. at 32 (paragraph 1 of prayer for relief). Plaintiffs also ask the Court to enjoin Acting Secretary O'Rourke from representing himself as Acting VA Secretary and to enjoin both him and the Department "from taking any action in reliance on [his] purported authority as [A]cting Secretary of Veterans Affairs." *Id.* (paragraph 2 of prayer for relief). Granting this relief, however, would not redress Plaintiffs' injuries because it would neither result in the lawful designation of an Acting VA Secretary more to Plaintiffs' liking nor permit (much less ensure) agency actions devoid of the cloud of legal uncertainty that Plaintiffs allege.

Plaintiffs' claims in this case are premised entirely on their assertion that the President lacks authority to designate an Acting VA Secretary under the circumstances they allege (*i.e.*, in the event the past Secretary was removed from office). Am. Compl. ¶¶ 3, 59. In their original pleading, Plaintiffs argued that the Deputy Secretary must become Acting VA Secretary pursuant to the Department of Veterans' Affairs Codification Act. ECF No. 1 ¶ 3. However, there is currently no Deputy Secretary. Am. Compl. ¶ 74. Plaintiffs address this change in circumstances by relying on an executive order that lists the VA officials who assume the position of Acting VA Secretary if the offices preceding them on the list are vacant. *Id.* (citing *Providing an Order of*

Succession Within the Dep't of Veterans Affairs, Exec. Order 13,736 of August 12, 2016, 81 Fed. Reg. 54711 (Aug. 17, 2016)). Pursuant to that order, a currently serving Under Secretary would become Acting VA Secretary.[6] *Id.* Alternatively, Plaintiffs imply that the position must remain vacant and the Department remain headless. *Id.* ("In any event, the President lacks authority to select another official . . . to serve as [A]cting Secretary."). The inconsistency of Plaintiffs' position undercuts their standing here.

The executive order supplying the order of succession on which Plaintiffs rely is an action taken by President Obama "[b]y the authority vested in [him] as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, as amended . . . ." 81 Fed. Reg. at 54,711. In this respect, it no different from President Trump's exercise of the same authority to designate an Acting VA Secretary. *Compare id. with* Ex. A (relying on the same sources of authority); Ex. B (same and adding the VA Codification Act as a source of authority). If an executive order can designate someone as Acting VA Secretary when the offices of Secretary and Deputy Secretary are vacant, then so can the President's directive designating Mr. O'Rourke as Acting VA Secretary. *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order*, 24 O.L.C. 29, 29 (2000) (". . . [T]here is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is styled other than as an executive order."). *See also Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of State*, 300 F. Supp. 3d 540, 542 n.1 (S.D.N.Y. 2018). Indeed, the VA Chief of Staff—Acting Secretary O'Rourke's position of record—is listed in the executive order's

[6] In any event, Plaintiffs allege no differences between the policy views or representational vigor of Acting Secretary O'Rourke and those of the Under Secretary for Benefits, the office holder next in the line of succession established by the executive order. *See* Am. Compl. ¶ 74. *See generally id.* ¶¶ 1-102. Thus, they cannot show that the Under Secretary's designation as Acting VA Secretary would remedy their purported injuries.

line of succession. 81 Fed. Reg. 54711. The implicit premise of Plaintiffs' position is that only one presidential action is lawful, which renders it internally inconsistent.[7] Allowing an Acting VA Secretary to assume the post by function of the executive order would not resolve the supposed uncertainty regarding the Acting VA Secretary's authority because it would implicate the same legal concerns under the FVRA that the Plaintiffs raise here and may raise additional questions as to whether an earlier executive action could void a later one. *See* Am. Compl. ¶¶ 5, 18, 98, 101. Relief in the form of a direction that another individual in the order of succession serve as Acting Secretary would therefore not redress Plaintiffs' uncertainty.

Plaintiff's asserted injuries would likewise not be redressed by having no one serve as Acting VA Secretary during the present vacancy, as Plaintiffs tacitly propose. Am. Compl. ¶ 74. The indefinite absence of an Acting VA Secretary would not remedy Plaintiffs' alleged injury premised on the absence of an Acting VA Secretary who would "vigorously represent their interests before Congress and the rest of the executive branch." *Id.* ¶¶ 5, 18. Preventing anyone from being designated Acting VA Secretary only ensures that Plaintiffs' interests will not be represented by a Cabinet-level official at all, much less with the vigor they supposedly desire. Far from redressing this alleged injury, Plaintiffs' requested relief would only worsen it.

Nor would requiring that no one serve as Acting VA Secretary redress Plaintiffs' alleged injury from the purported legal uncertainty over the Acting Secretaries' designations and, as a result, the validity of VA's actions during their tenures. *Id.* ¶¶ 5, 18, 98, 101. The only actions Plaintiffs identify as being subject to this uncertainty are the rules and guidance the Department

[7] Defendants' position, by contrast, is fully consistent. The same authority gives the President the power to issue an order establishing a default order of succession and to designate an Acting VA Secretary of his choosing instead of allowing the position to be filled automatically by the executive order.

has issued and the contracts the Department has entered into since Secretary Shulkin left office.[8] *Id.* ¶¶ 76-78. However, Plaintiffs allege no injury from any VA action during this period. *See generally id.* A non-existent injury cannot be redressed, and so cannot establish standing.

Plaintiffs' only facially plausible claim to injury—which is not set even forth in the Amended Complaint—is that they could be harmed by the later invalidation of the Acting Secretaries' actions that benefited Plaintiffs. However, this harm is precisely the relief Plaintiffs *request* from the Court. Am. Compl. at 32 (paragraph 1 of prayer for relief). Further, by seeking a ruling that the President presently lacks authority to designate an Acting VA Secretary, Plaintiffs are effectively asking the Court to deprive VA of leadership until the Senate confirms a VA Secretary. This would render the Department unable to perform any non-delegable functions of the Secretary. *See* 5 U.S.C. §§ 3348(a)(2), (d). The Secretary's non-delegable functions, if any, are precisely the actions that, if taken by the Department under the Acting Secretaries, Plaintiffs would have a basis in the FVRA to challenge. *Id.* No harm to Plaintiffs from the possible future invalidation of a non-delegable action by one of the Acting Secretaries would be remedied by Plaintiffs' request relief of invalidating the action now and indefinitely delaying the designation of an Acting VA Secretary who could approve it. Moreover, the *de facto* officer doctrine would likely prevent any retroactive effect to a future determination that the Acting Secretaries' designations were invalid, avoiding any hypothetical future harm that would need to be redressed. *See Ryder*, 515 U.S. at 180. *See also Sw. Gen., Inc.*, 796 F.3d at 81.

[8] Plaintiffs fail to identify which of these actions are required by statute or regulation to be undertaken only a VA Secretary or Acting VA Secretary. This is significant because only non-delegable actions constitute a "function or duty" that would be void under the FVRA if undertaken by an unlawfully designated Acting VA Secretary. *See* 5 U.S.C. §§ 3348(a)(2), (d).

In sum, Plaintiffs cannot show redressability because the relief they seek would not remedy their purported injuries. All veterans, including Plaintiffs, are better served by the Department having leadership and every available resource to represent veterans' interests while waiting for the Senate to confirm a VA Secretary. Plaintiffs therefore lack standing for this reason as well.

C. Plaintiffs Lack Standing to Pursue Declaratory Relief Regarding the Validity of Mr. Wilkie's Designation as Acting VA Secretary.

Regarding Mr. Wilkie's designation as Acting VA Secretary, Plaintiffs ask the Court to declare his "unlawful and that any actions taken in reliance on . . . [Mr.] Wilkie's purported authority are unlawful and void." Am. Compl. at 32 (prayer for relief paragraph 1). Plaintiffs, however, lack standing to seek this relief. *See Davis*, 554 U.S. at 734 (plaintiffs must show standing for each claim for relief). "Where a plaintiff . . . seeks injunctive or declaratory relief, a plaintiff 'must allege a likelihood of future *violations* of [its] rights . . ., not simply future *effects* from past violations.'" *Citizens for Responsibility & Ethics in Wash. v. Cheney*, 593 F. Supp. 2d 194, 225 (D.D.C. 2009) (alterations and emphasis in original) (quoting *Fair Emp't Council v. BMC Mktg. Cor.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994)). *See also Haase v. Sessions*, 835 F.2d 902, 911 (D.C. Cir. 1987)). A plaintiff that fails to allege a likelihood of future violations has not met its burden to establish standing. *See Fair Emp't Council*, 28 F.3d at 1272-73.

Plaintiffs lack standing to obtain a declaration concerning the validity of Mr. Wilkie's designation because he is no longer Acting VA Secretary, and he therefore cannot take any actions in that capacity that would affect Plaintiffs. Even if Plaintiffs' allegations that they are uncertain about possible future harms that could result from Mr. Wilkie's purportedly unlawful designation were sufficient to plead an injury-in-fact—and they are not, *see* § I.A, *supra*—those harms are merely later effects of his designation and tenure. As "'future *effects* from past violations,'" those possible future harms cannot confer standing to seek declaratory relief. *Citizens for Responsibility*

& Ethics in Wash., 593 F. Supp. 2d at 225 (emphasis in original) (quoting *Fair Emp't Council*, 28 F.3d at 1273). Once Mr. Wilkie stepped down, Plaintiffs lost standing to seek injunctive or declaratory relief based on a direct challenge to his designation as Acting VA Secretary.

Plaintiffs also lack standing to seek declaratory relief regarding Mr. Wilkie because a declaration would not redress any injuries they might suffer. Because Plaintiffs are challenging the validity of Mr. Wilkie's designation, not any particular action by Mr. Wilkie that directly affected Plaintiffs, the *de facto* officer doctrine applies. *See Sw. Gen., Inc.*, 796 F.3d at 81. Under that doctrine, even when a person is later found not to have been lawfully installed in an office or other governmental position, a court will accept as valid his or her actions taken in that office or position. *Ryder*, 515 U.S. at 180. Thus, a declaration regarding Mr. Wilkie's designation would not be sufficient to alter the validity of his actions and would therefore not redress any injury Plaintiffs might have suffered from those actions.

II. Plaintiffs Fail to State Cognizable Claims.

Plaintiffs claim that the President lacked statutory authority to designate the Acting Secretaries and that the designations violated the Appointments Clause.[9] Am. Compl. ¶¶ 83-95. Even if Plaintiffs had standing to bring those claims, Defendants would be entitled to judgment as a matter of law on both because they are procedurally improper and because they fail on their merits.

[9] Plaintiffs also assert a third claim for declaratory judgment Act under 28 U.S.C. § 2201. Am. Compl. ¶¶ 96-102. That claim fails because the Declaratory Judgment Act does not provide a cause of action; it only codifies courts' authority to issue declaratory judgments as relief for claims under other causes of action. *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011).

A. Plaintiffs' Statutory and Constitutional Claims are Procedurally Improper Because the Sole Mechanism for Considering the Claims is a Petition for a Writ of *Quo Warranto*.

Under the *de facto* officer doctrine, Plaintiffs' claims may be brought only through a petition for a writ of *quo warranto*. Because they have neither sought such a writ nor complied with the requirements to obtain one, Plaintiffs' claims are procedurally improper and must be dismissed.

Federal *quo warranto* law, which Congress codified for historical reasons in the D.C. Code, provides a civil action against any person who, within the District of Columbia, "usurps, intrudes into, or unlawfully holds or exercises . . . a public office of the United States, civil or military." D.C. Code § 16-3501. *See also Newman v. United States ex rel. Frizzell*, 238 U.S. 537, 545-46 (1915) (discussing the adoption of the statute). The D.C. Circuit has stated that the *quo warranto* statute is the sole means for launching a direct attack on the authority of another person to perform the duties of a public office (as opposed to an indirect attack on his or her official actions).[10] *See Sw. Gen., Inc.*, 796 F.3d at 81 ("The de facto officer doctrine allows [direct] attacks [on an officer's authority,] but they can be brought via writ of quo warranto only."). Here, Plaintiffs' FVRA claim amounts to nothing more than a direct attack on the Acting Secretaries' authority to hold that position. *See* Am. Compl. ¶¶ 83-89. *See also id.* at 32 (prayer for relief paragraphs 1 and 2). Thus, it could be brought only by a petition for a writ of *quo warranto*.

[10] Courts have indicated that direct attacks on public officeholders may be subject to even more significant restrictions than other *quo warranto* actions. *See, e.g., Sibley v. Obama*, No. 12-5198, 2012 WL 6603088, at *1 (D.C. Cir. Dec. 12, 2012) ("With respect to plaintiff's petition for writs quo warranto, the district court was correct that, under this court's precedent, 'actions against public officials (as opposed to actions brought against officers of private corporations) can only be instituted by the Attorney General.'" (quoting *Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984))), *aff'g* 866 F. Supp. 2d 17.

Plaintiffs have not pursued that exclusive remedy. "To obtain quo warranto against a federal official, an interested party must petition the Attorney General of the United States to institute a proceeding in federal court. If the Attorney General declines, the interested party can petition the court to issue the writ instead." *Sw. Gen., Inc.*, 796 F.3d at 81 (internal citations omitted). Because Plaintiffs have not submitted any petition to the Attorney General, they have not properly sought a writ of *quo warranto*.

Even if Plaintiffs had complied with the procedural requirements for seeking a writ of *quo warranto* and filed a petition seeking that relief, the petition would fail because neither Plaintiff is "an interested party" entitled to have a petition considered on its merits. *See Sw. Gen., Inc.*, 796 F.3d at 81. *See also Newman*, 238 U.S. at 549-52; *In re James*, 241 F. Supp. 858, 859 (S.D.N.Y. 1965). The interested party requirement imposes a higher burden than the injury in fact requirement for standing, or it would be vacuous. *See Sibley v. Obama*, 866 F. Supp. 2d 17, 19-21 (D.D.C. 2012) (applying the standing and *quo warranto* requirements separately). *See also United States ex rel. Schneider v. J.P. Morgan Chase Bank, N.A.*, 224 F. Supp. 3d 48, 57 (D.D.C. 2016) (reciting the canon of construction that avoids relegating language to surplusage), *aff'd* 878 F.3d 309 (D.C. Cir. 2017). However, Plaintiffs do not have sufficient personal stakes in the designations of Mr. Wilkie or Acting Secretary O'Rourke to meet even the lower injury in fact threshold for constitutional standing. *See* § I.A, *supra*.

Although Plaintiffs' claims are all direct challenges that would have to be brought by a petition for a writ of *quo warranto*, they seek one type of relief that superficially resembles a collateral challenge. Plaintiffs ask the Court for a declaration that "any actions taken in reliance on [Acting Secretary] O'Rourke's or [Mr.] Wilkie's purported authority are unlawful and void." Am. Compl. at 32 (prayer for relief paragraph 1). However, collateral challenges must be

"specific, focused attack[s]," not "wholesale attacks on the actions of de facto officers." *Andrade v. Lauer*, 729 F.2d 1475, 1500 (D.C. Cir. 1984). *See also id.* (approving of a collateral challenge to a designation that did not seek a "wholesale invalidation of actions taken by" the de facto officers). Plaintiffs do not seek "declaratory and injunctive relief for [a] specific . . . [action] as it affect[s]" them. *Id.* Indeed, they do not allege that they were directly harmed by any particular action taken by the Department under either of the Acting Secretaries. *See* § I.A, *supra* (discussing this defect in the context of standing). Plaintiffs cannot avoid the requirement to bring direct challenges through a petition for a writ of *quo warranto* simply by tacking on a prayer for relief asking the Court to invalidate every action taken by either of the Acting Secretaries.[11]

Because a petition for a writ of *quo warranto* is the sole means for launching the kind of direct challenge to a designation that Plaintiffs bring here, the Amended Complaint should be dismissed for failure to state a claim. *Cf. Delgado v. Sunderland*, 767 N.E.2d 662 (N.Y. 2002) (directing dismissal of a challenge to an individual's entitlement to a public office for noncompliance with New York's *quo warranto* statute).

[11] Plaintiffs' challenge to the Department's activities under the Acting Secretaries also fails to meet the requirements for a cognizable collateral attack, which are that (1) Plaintiffs brought their claims "at or around the time that the challenged government action [was] taken" and (2) the Department "had reasonable notice under all the circumstances of the claimed defect in the [Acting Secretaries'] title to office." *Id.* at 1499. Plaintiffs did not file their initial complaint until more than a month after Mr. Wilkie's designation as Acting VA Secretary or their amended complaint until three weeks after Acting Secretary O'Rourke's designation. *See* Exs. A, B; ECF No. 1; Am. Compl. This compares very unfavorably with the collateral challenge the D.C. Circuit held to be timely, when the plaintiffs "brought their action . . . one day before the action under attack." *Andrade*, 729 F.2d at 1500. Plaintiffs also gave no notice of their challenge to Mr. Wilkie's designation until they filed their original claim, instead waiting until the Department "issued five final rules, nine proposed rules, and twenty-nine notices" as well as "approv[ing] 390 contracts." ECF No. 1 ¶¶ 75, 76.

B. Plaintiffs' Statutory and Constitutional Claims Fail on the Merits.

Even if Plaintiffs had standing to pursue their claims and complied with the procedural requirements to do so, their challenges to the President's designations of the Acting Secretaries based on his purported lack of statutory authority and his alleged violation of the Appointments Clause would still fail on their merits. *See* Am. Compl. ¶¶ 83-95. Accepting as true Plaintiffs' allegation that the President terminated Secretary Shulkin, the President's designation of the Acting Secretaries nonetheless satisfied all applicable statutory and constitutional requirements.

1. *The President Has the Statutory Authority to Designate an Acting VA Secretary, Regardless of the Reason for the Absence of a VA Secretary.*

Plaintiffs contend that the President's designations of the Acting Secretaries were defective because the FVRA provision allowing the designation of acting officers does not apply when the President removes the immediate past officer holder.[12] Am. Compl. ¶¶ 3, 86. But, even assuming the truth of Plaintiff's allegation that the President removed Secretary Shulkin, the President's Acting Secretary designations were valid exercises of his statutory authority. Indeed, although only one source of statutory authority would be sufficient to refute Plaintiffs' claims, here the President had authority under both the FVRA and the VA Codification Act.

a. The FVRA Authorizes the President to Designate an Acting VA Secretary When the VA Secretary has been Removed.

The President has the authority to designate an Acting VA Secretary under the FVRA, and that authority is available when the past VA Secretary has been removed. The FVRA authorizes the President to designate an acting official to replace an agency's Senate-confirmed official when

[12] Although Plaintiffs bring this challenge under the FVRA and the APA, the APA is inapplicable because the challenged actions—the designations of the Acting Secretaries—were done by the President, whose actions are not subject to judicial review under the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). To the extent Plaintiffs' claims are cognizable, it is only through their invocation of the FVRA.

the official "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). Plaintiffs contend that former Secretary Shulkin did not die or resign and that he remains able to perform his former functions and duties. Am. Compl. ¶ 86. But Plaintiff's contention runs contrary to the plain language of the FVRA because a former VA Secretary is not endowed with the authority to perform the duties and functions of the vacated office, regardless of whether he or she was removed from the office.

There is no question that the President possesses the authority to remove a VA Secretary. "Since 1789, the Constitution has been understood to empower the President to keep executive officers accountable—by removing them from office, if necessary." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2009). *See also Myers v. United States*, 272 U.S. 52, 117 (1926). Nothing in the VA Codification Act, the FVRA, or any other statute purports to limit the President's power to remove the VA Secretary. Indeed, Plaintiffs do not even allege that the President lacked the authority to remove former Secretary Shulkin from office.

Once an individual has been lawfully removed as an executive officer, he or she lacks the authority to execute the functions and duties of that office. The VA Secretary has extensive statutory authority and duties; a former Secretary has none. *See generally* 38 U.S.C. §§ 501-32. As a result, a former Secretary—regardless of the reason for his or her departure from office—is "unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). The plain language of the FVRA therefore permits the President to designate an Acting VA Secretary subject to the limits set out in that statute. *See id.* This understanding is only confirmed by the fact that "[i]n floor debate, Senators said, by way of example, that an officer would be 'otherwise unable to perform the functions and duties of the office' if he or she were fired, imprisoned, or sick." *Guidance on Appl. of the Fed. Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 61 (1999)

(emphasis added) (citing 144 Cong. Rec. S12,823, S12,824 (daily ed. Oct. 21, 1998) (statements of Sen. Thompson and Sen. Byrd))).

b. The VA Codification Act Authorizes the President to Designate an Acting VA Secretary Whenever the Office of VA Secretary is Vacant.

The President also has the independent statutory authority under the VA Codification Act to designate an Acting VA Secretary, regardless of the reason the office of the VA Secretary is vacant. When there is a vacancy in the office of VA Secretary, the VA Codification Act makes the Deputy Secretary the Acting VA Secretary by default, but includes an expansive carve-out: "Unless the President designates another officer of the Government, the Deputy Secretary shall be Acting Secretary of Veterans Affairs during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary."[13] 38 U.S.C. § 304. By its plain language, the statute permits the President to "designate[] another officer of the Government . . . in the event of a vacancy in the office of Secretary." *Id.* The President's authority to make the designation is not conditioned on any particular reason for the vacancy. Thus, if the office of Secretary were vacant because the President terminated the past officeholder, that would not affect the President's

[13] Congress's use of the phrase "officer of the Government" indicates that the President may select among a wider group of officials than just principal and inferior officers within the meaning of those terms under Appointments Clause jurisprudence. *See Lamar v. United States*, 241 U.S. 103, 111 (1916) (holding a statute referring to an "officer of the government" was not limited to principal or inferior officers subject to the Appointments Clause). *See also Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1365-71 (Fed. Cir. 2006) (Gajarsa, J., concurring); *Validity of Exec. Order Authorizing the Sec'y of Agric. to Acquire Land for Wildlife Conservation Purposes*, 38 U.S. Op. Atty. Gen. 445 (1936). Principal and inferior officers are identified by the specific term art "Officers of the United States." *See SW Gen., Inc.*, 137 S. Ct. at 934. *See also Steele v. United States*, 267 U.S. 505, 507 (1925). As other statutes demonstrate, Congress knows to use this term of art to make clear it intends to refer only to principal and inferior officers. S*ee, e.g.*, 12 U.S.C. § 4244; 15 U.S.C. § 2412 (b)(2); 47 U.S.C. § 1102(b)(2). The statutory language therefore shows that Congress did not intend to officials eligible for designation as Acting VA Secretary to be coextensive with those subject to the Appointments Clause.

authority to designate "another officer of the Government" as Acting VA Secretary. *Id.* The Acting Secretaries' designations were therefore valid exercises of the President's authority under the VA Codification Act.

This conclusion is in no way in tension with the FVRA. That law explicitly permits the President to exercise his authority under any "statutory provision [that] expressly . . . authorizes the President . . . to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347(a). *See also Hooks ex rel. NLRB v. Kitsap Tenant Support Servs.*, 816 F.3d 550, 556 (9th Cir. 2016) (stating that, when there is a separate statutory grant of authority for designating an acting officer, "the President is permitted to elect between these two statutory alternatives"). The VA Codification Act's grant of authority in 38 U.S.C. § 304 is precisely such a statutory provision. Indeed, in the Senate Report on the FVRA, § 304 is listed among the statutes providing alternate bases of authority for the President to designate acting officials. S. Rep. No. 105-250, at 17. Likewise, the district court in *English*, 279 F. Supp. 3d 307, specifically noted § 304 as an example of a statute that uses language that shows Congress's intent to legislate an issue independently of the FVRA. *Id.* at 322.

The plain language of VA Codification Act authorizes the President to designate any government officer as Acting VA Secretary when the office of the Secretary is vacant. There is no explicit or implied limit on his authority based on the reason for the vacancy. Thus, Plaintiffs' claim fail on their merits for this reason as well.

2. The President's Exercise of Statutory Authority to Designate an Acting VA Secretary Does Not Violate the Appointments Clause of the Constitution.

Plaintiffs also contend that the President's designation of the Acting Secretaries without the advice and consent of the Senate violated the Appointments Clause of the U.S. Constitution. Am. Compl. ¶¶ 90-95. But this contention fails because Congress gave the President the statutory

authority to designate the Acting Secretaries. As explained above, both the VA Codification Act and the FVRA authorized the President to designate the Acting Secretaries. *See* § II.b.1. This alone refutes Plaintiffs' constitutional claim.

Regardless, the designation of an Acting VA Secretary does not require the Senate's advice and consent because, although the Secretary is a principal officer, an Acting Secretary is, at most, an inferior officer. *Designation of Acting Dir. of the Office of Mgmt. & Budget*, 27 Op. O.L.C. 121, 123 (2003). There is no question that Congress has "'authoriz[ed] the President to direct certain officials to temporarily carry out the duties of a vacant PAS office in an acting capacity without Senate confirmation.'" *English*, 279 F. Supp. 3d at 312 (quoting *Sw. Gen., Inc.*, 137 S. Ct. at 934)). As the Supreme Court has explained: "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 is not thereby transformed into the superior and permanent official." *United States v. Eaton*, 169 U.S. 331, 343 (1898) (quoted with approval in *Morrison v. Olson*, 487 U.S. 654, 672–73 (1988)). And to conclude otherwise "would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered." *Id. Cf. Williams v. Phillips*, 482 F.2d 669, 670 (D.C. Cir. 1973) (reserving question whether President can designate an acting officer to serve for reasonable period without any statutory authorization). Any contrary rule would make no sense because the purpose of an acting officer is to allow the agency to continue to function until an appointee is confirmed.[14]

[14] There is also good reason to doubt that a temporary office—such as the office of Acting VA Secretary—is even an "office" that can be "held" under the Appointments Clause. Exercising the authority of officer "if done temporarily, does not necessarily transform [a non-officer] into an officer." *See Appointment of Dep't of Interior Assoc. Deputy Sec'y*, No. B-290233, 2002 WL 31388352, at *3 (Comp. Gen. Oct. 22, 2002). *See, e.g.*, *Auffmordt v. Hedden*, 137 U.S. 310, 327

Because an Acting VA Secretary is, at most, an inferior officer under the Appointments Clause whom Congress has authorized the President to appoint, the President was not required to seek the Senate's advice and consent to designate the Acting Secretaries. Plaintiffs have therefore not alleged a facially valid constitutional claim.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to dismiss Plaintiffs' Amended Complaint.

(1890) (concluding that a merchant appraiser was not an officer in part because "he acts only occasionally and temporarily"); *United States v. Germaine*, 99 U.S. 508, 511–12 (1878) (concluding that a surgeon was not a constitutional officer because the duties of his position "are *not* continuing and permanent, and they *are* occasional and intermittent"). *But cf. Designation of Acting Dir. of OMB*, 27 Op. O.L.C. 121, 123 n.5 (2003). Similarly, an acting officer, whose authority is necessarily temporary, does not "hold" an office in the usual sense. *See Officers Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 101 n.11 (2007); *Auth. of the President to Name an Acting Att'y Gen.*, 31 Op. O.L.C. 208, 210 n.2 (2007) (distinguishing between an Acting United States Attorney and an interim United States Attorney "who would fill the office (not be an acting officer)"); *Designation of Acting Solicitor of Labor*, 26 Op. O.L.C. 211, 214–15 (2002) ("An acting official does not hold the office . . . . He is not 'appointed' to the office, but only 'direct[ed]' or authorized to discharge its functions and duties . . . .").

Dated: July 13, 2018

Respectfully submitted,

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Acting Assistant Attorney General

CHRISTOPHER HALL
Assistant Branch Director

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Counsel for Defendants

EXHIBIT A

THE WHITE HOUSE

WASHINGTON

March 28, 2018

MEMORANDUM FOR ROBERT L. WILKIE

Under Secretary of Defense for Personnel and Readiness

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, you are directed to perform the functions and duties of the office of Secretary of Veterans Affairs, until the position is filled by appointment or subsequent designation.

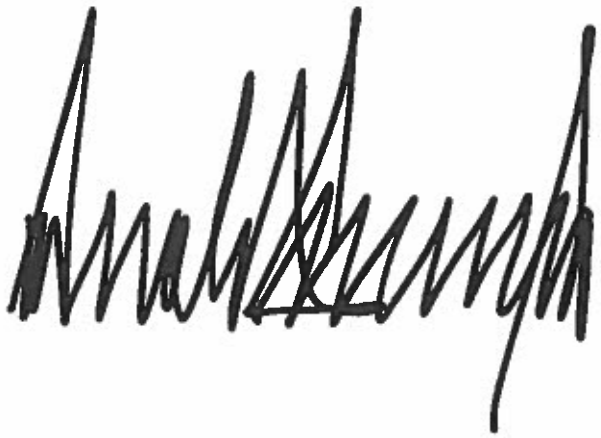


EXHIBIT B

THE WHITE HOUSE

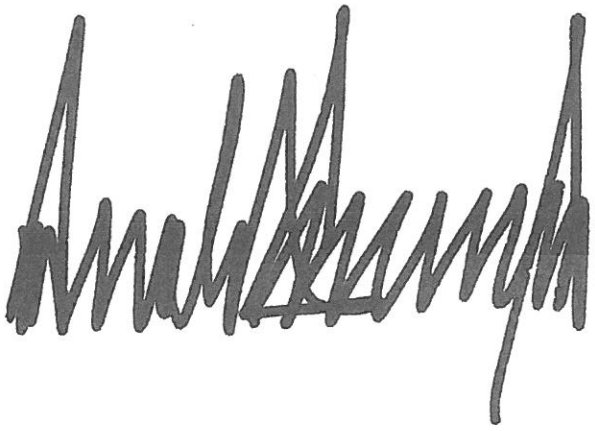
WASHINGTON

May 29, 2018

MEMORANDUM FOR PETER O'ROURKE

Chief of Staff of the Department of Veterans Affairs

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5 and section 304 of title 38, United States Code, you are directed to perform the functions and duties of the office of Secretary of Veterans Affairs, until the position is filled by appointment or subsequent designation.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMIR HAMEL, *et al.* *Plaintiffs*, v. Peter O'Rourke, in his official capacity, *and* U.S. Department of Veterans Affairs, *Defendants*.	Case No. 1:18-cv-1005 (RC)

Upon consideration of the Motion to Dismiss and the entire record herein,

IT IS HEREBY ORDERED that the motion is GRANTED; and it is

FURTHER ORDERED that Plaintiffs' claims are DISMISSED.

Signed ___, _____, 2018, at Washington, DC

_____
Honorable Rudolph Contreras
United States District Court
For the District of Columbia