IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LOWER EAST SIDE PEOPLE'S FEDERAL CREDIT UNION,

Plaintiff,

v.

DONALD JOHN TRUMP and JOHN MICHAEL MULVANEY,

Defendants.

Case No. 1:17-cv-09536-PGG

DEFENDANTS' MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION
AND IN SUPPORT OF THEIR MOTION TO DISMISS

Table of Contents

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

FEDERAL RULES OF CIVIL PROCEDURE

CONGRESSIONAL MATERIALS

D.C. CODE

OFFICE OF LEGAL COUNSEL OPINIONS

OTHER AUTHORITIES

INTRODUCTION

Consumer Financial Protection Bureau Director Richard Cordray's resignation left the Bureau's Director position vacant. The parties dispute which Act of Congress authorizes the designation of an acting officer to perform the Director's duties during the vacancy. One, the Federal Vacancies Reform Act ("FVRA"), refers explicitly to vacancies and resignations, is the traditional statutory authority for addressing Executive Branch vacancies, and contains limited exceptions expressly articulated in the statute itself (none of which apply here). The other, Section 5491 of the Dodd-Frank Act, does not clearly apply to a vacancy and does not include a clear statement displacing the FVRA's preexisting procedures. In view of these and other considerations, both the Department of Justice's Office of Legal Counsel and the CFPB's General Counsel (as well as the U.S. District Court for the District of Columbia, in denying an application for a temporary restraining order in a parallel case) concluded that the FVRA was, at the very least, an available means for the President to designate Mr. Mulvaney as Acting CFPB Director.

Plaintiff says otherwise. In its view, Section 5491 of Dodd-Frank is not only an available means for identifying an Acting CFPB Director, but in fact is the *exclusive* means for doing so, thereby removing *any* role for the President in selecting the acting head of an Executive agency.

This unusual legal argument follows equally unusual developments at the Bureau. Over the two years preceding his resignation, then-Director Cordray ran the CFPB without appointing a Deputy Director. Yet in the waning hours of his last day in office, then-Director Cordray reassigned Leandra English—a CFPB employee then serving as his chief of staff—to serve as the Bureau's Deputy Director.

However, on the same day that former Director Cordray tendered his resignation, effective at midnight on November 24, 2017, the President exercised his authority under the FVRA, designating Mr. Mulvaney, the Director of the Office of Management and Budget, to serve as Acting CFPB Director, effective at 12:01 a.m. on November 25, 2017.

Seeking to undo the President's designation of Mr. Mulvaney, Plaintiff claims that Ms. English's few hours as Deputy Director entitle her to accede automatically to the Acting Director position. Invoking the Dodd-Frank Act (but not the Federal Vacancies Reform Act), Plaintiff seeks an order invalidating the President's designation of Mr. Mulvaney as Acting Director.

Plaintiff's case lacks merit. Indeed, it fails at the outset because Plaintiff has not established Article III standing. Plaintiff claims that it has standing simply because it is regulated by the CFPB. But that is not enough to give Plaintiff a cognizable personal stake in the outcome of this controversy. Where, as here, a plaintiff does not seek relief from any regulatory burden that imposes costs the plaintiff would avoid if it prevailed, a plaintiff's mere status as a regulated entity does not satisfy the requirements of injury in fact, causation, and redressability. Accordingly, this case should be dismissed for lack of subject matter jurisdiction.

In any event, Plaintiff's claims fare no better on the merits. The FVRA generally authorizes the President to designate any Senate-confirmed officer to perform the functions and duties of an office in an "Executive agency" when an officer subject to Senate confirmation "resigns," unless the designee has been nominated to fill the office. On its face, the FVRA applies here because the CFPB is an Executive agency; the CFPB Director is a position requiring Senate confirmation; the CFPB Director does not fall within any of the FVRA's carefully defined exceptions; and Mr. Mulvaney, as the Senate-confirmed Director of OMB, is eligible to serve as Acting Director.

There is no merit to Plaintiff's argument that the FVRA does not apply here because the CFPB Director serves *ex officio* on the board of directors for the Federal Deposit Insurance Corporation. The FVRA exclusion Plaintiff invokes, 5 U.S.C. § 3349c(1), applies only to persons *appointed to the board*, not those, like the CFPB Director and the Comptroller of the Currency, who serve on the board by virtue of their appointment to a different office.

Also meritless is Plaintiff's contention that the Dodd-Frank Act impliedly displaces the FVRA. To prevail on this claim, Plaintiff must show a "clear and manifest" intent in Dodd-Frank to displace the FVRA. Neither independent agency status nor the existence of an office-specific statutory provision providing for an acting officer (both relatively common characteristics) is sufficient to take an agency outside the scope of the FVRA. Indeed, the Ninth Circuit confirmed that point just last year. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555–56

(9th Cir. 2016). That conclusion is consistent with the long-held view of the Executive Branch, and Congress's understanding when it enacted the FVRA, that office-specific statutes generally supplement—instead of supplanting—the FVRA's procedures. *See, e.g.*, Ex. 2, Memorandum from Steven A. Engel, Asst. Att'y Gen., to Donald F. McGahn II, Counsel to the President, *Designating an Acting Director of the Bureau of Consumer Financial Protection*, at 4–8 & nn.2–3 (Nov. 25, 2017) ("OLC Op."); *see also* S. Rep. 105–250, at 15–17 (1998).

The text of the Dodd-Frank Act does not say otherwise. It declares that all federal laws dealing with officers and employees apply to the Bureau "[e]xcept as otherwise provided expressly by law." 12 U.S.C. § 5491(a). No such express command is found in Dodd-Frank. The Act's instruction that the Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director," *id.* § 5491(b)(5), does not clearly apply to resignations and vacancies. And even if it did, the statute's use of the term "shall" does not clearly mean that it displaces the FVRA, instead of operating alongside it as other similar statutes do. That conclusion is consistent with the presumption against implied repeals.

Nor is there any basis for the claim that Senate-confirmed officers (like Mr. Mulvaney) serving in the Executive Office of the President are excluded from the pool of officers eligible for designation under the FVRA. The FVRA includes no such limitation. Nor does Dodd-Frank.

Plaintiff's substantive theories fail in two more respects. First, they do not comply with the federal quo warranto statute, which establishes the exclusive procedure for direct challenges to an individual's right to federal office. Second, there is no authority justifying the extraordinary and inappropriate relief that Plaintiff seeks against the President himself.

In addition to the merits defects in Plaintiff's case, Plaintiff has also failed to demonstrate that it will suffer irreparable harm in the absence of preliminary relief. With respect to this requirement, Plaintiff offers only speculative and conclusory allegations of harm without identifying any concrete, non-hypothetical way in which Mr. Mulvaney's designation is causing it injury. Plaintiff's bald allegations are insufficient to establish a likelihood that it will suffer any actual and imminent harm in the absence of a preliminary injunction, let alone harm that is irreparable. Indeed, Plaintiff's failure to demonstrate even injury in fact for purposes of Article III standing precludes it from satisfying this separate prerequisite for issuance of a preliminary injunction.

Finally, there is no question that a preliminary injunction would impose substantial harms on the execution of the nation's consumer financial protection laws. An order compelling the President to recognize Ms. English as Acting Director and to withdraw his designation of Mr. Mulvaney would be an extraordinary intrusion into core Executive Branch operations; it would disrupt the agency's operations; and it would sow confusion in the face of the consensus view that Mr. Mulvaney should be recognized as the Acting Director. Plaintiff's proposed preliminary injunction would radically upend the status quo, not maintain it.

For these reasons, the Court should deny Plaintiff's motion and dismiss the Complaint.

BACKGROUND

A. Statutory Background

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 (including the Executive Office of the President, and 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). The FVRA's default rule is that 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 90 of the last 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.

The FVRA applies to every Senate-confirmed "officer of an Executive agency" outside of certain enumerated exceptions. 5 U.S.C. § 3345(a); *id.* § 3349c; *see also* S. Rep. No. 105-250, at

2 ("The bill applies to all vacancies in Senate-confirmed positions in executive agencies with a few express exceptions."). For purposes of Title 5, the CFPB "shall be considered an Executive agency." 12 U.S.C. § 5491(a); *see* 5 U.S.C. § 105.

By its terms, the FVRA is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [Senate-confirmed] office of an Executive agency," other than by recess appointment. 5 U.S.C. § 3347(a). The FVRA ceases to be "exclusive" only when "a statutory provision expressly—(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or (B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." *Id.* In such cases, the FVRA ordinarily provides an alternative procedure for addressing the vacancy. *See, e.g.*, *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555–56 (9th Cir. 2016); *Authority of the President to Name Acting Attorney General*, 31 Op. O.L.C. 208, 209–11 (2007); *Designation of Acting Director of OMB*, 27 Op. O.L.C. 121, 121 n.1 (2003); *Applicability of the FVRA to Vacancies at the International Monetary Fund and the World Bank* ("*Applicability of the FVRA to the IMF and World Bank*"), 24 Op. O.L.C. 58, 60 n.2 (2000); *Guidance on Application of the FVRA*, 23 Op. O.L.C. 60, 62–63 (1999).

The FVRA's coverage is limited only by carefully delineated exclusions. One of those exclusions concerns "any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that (A) is composed of multiple members; and (B) governs an independent establishment or Government corporation." 5 U.S.C. § 3349c(1). Within independent agencies, there are offices which are not covered by those criteria and which therefore are subject to the FVRA. *See Hooks*, 816 F.3d at 556 & n.6 (applying FVRA to the General Counsel of the National Labor Relations Board ("NLRB")).

The Dodd-Frank Act established the CFPB in 2010, imbuing it with "broad authority to enforce U.S. consumer [financial] protection laws." *PHH Corp. v. CFPB*, 839 F.3d 1, 15 (D.C. Cir. 2016), *rehearing en banc granted*, Feb. 16, 2017 Order (No. 15-1177). The CFPB is headed by a Director appointed by the President, with the advice and consent of the Senate, for a term of five years. 12 U.S.C. § 5491(b), (c)(1). According to a statutory removal restriction, the Director is removable by the President only for "inefficiency, neglect of duty, or malfeasance in office," *id.* § 5491(c)(3). The statute also establishes "the position of Deputy Director, who shall—(A) be appointed by the Director; and (B) serve as acting Director in the absence or unavailability of the Director." *Id.* § 5491(b)(5). The statute further provides, though, that "[e]xcept as otherwise provided expressly by law, all Federal laws dealing with . . . officers . . . shall apply to the exercise of the powers of the Bureau." *Id.* § 5491(a).

B. Factual Background

From the CFPB's inception, Presidential appointees in the Treasury Department and the Executive Office of the President have played key roles in shaping the agency. Before the Bureau's first Director was confirmed, for example, the Secretary of the Treasury was authorized to perform certain functions delegated to the CFPB. *See* 12 U.S.C. § 5586(a). In 2010, President Obama appointed Elizabeth Warren (without Senate confirmation) to serve as Assistant to the President and Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau. *See* Office of the Press Secretary, Warren Press Release, The White House (Sept. 17, 2010), https://obamawhitehouse.archives.gov/the-press-office/2010/09/17/president-obama-names-elizabeth-warren-assistant-president-and-special-a; *see* 12 U.S.C. § 5586(a). From her position on the President's senior staff, Warren "play[ed] the lead role in setting up the Bureau." *Id.* President Obama later nominated Richard Cordray to serve as the CFPB's first Director for a term of five years. *See* 159 Cong. Rec. S718; *see also* 12 U.S.C. § 5491(c). The Senate confirmed his nomination on July 16, 2013. *See* 159 Cong. Rec. S5715.

Four years into his five-year term, Director Cordray announced on November 15, 2017 that he would resign by the end of the month. *See* Renae Merle, *Richard Cordray Is Stepping Down as Head of Consumer Financial Protection Bureau*, Wash. Post (November 15, 2017), https://www.washingtonpost.com/news/business/wp/2017/11/15/richard-cordray-is-stepping-down-as-head-of-consumer-financial-protection-bureau/?utm_term=.197172ea17be. Nine days later, on Friday, November 24, 2017, Director Cordray reassigned Ms. English, his chief of staff, to serve as Deputy CFPB Director, and in turn resigned, effective at midnight. *See* ECF 24-1 (Memorandum from the Director); ECF 24-2 (Letter from Richard Cordray to President Trump).

That same day, President Trump—acting pursuant to the FVRA, 5 U.S.C. § 3345(a), and consistent with legal advice from the Department of Justice, *see* OLC Op.—directed Mr. Mulvaney "to perform the functions and duties of the office of Director, Bureau of Consumer Financial Protection, until the position is filled by appointment or subsequent designation effective 12:01 a.m. eastern standard time, November 25, 2017." Ex. 1, Memorandum for Mick Mulvaney (Nov. 24, 2017). In a memorandum dated November 25, 2017, the CFPB's General Counsel outlined her "legal opinion that the President possesses the authority to designate an Acting Director for the Bureau under the FVRA" and accordingly "advise[d] all Bureau personnel to act consistently with the understanding that Director Mulvaney is the Acting Director of the CFPB." Ex. 3, Memorandum from Mary E. McLeod, CFPB General Counsel, to CFPB Senior Leadership Team, *Acting Director of the CFPB*, at 1, 3 (Nov. 25, 2017) ("McLeod Memo"). The next day, senior CFPB leadership, including the General Counsel and all of the other Associate Directors, agreed to act in accordance with the understanding that Mr. Mulvaney is the Acting Director. *See* Ex. 4, Decl. of Kate Fulton, ¶ 6.

On Monday morning, November 27, 2017, Acting Director Mulvaney arrived at CFPB headquarters, was given access to the building and the Director's office, and began his work as Acting Director for the day. *See id.* ¶ 7. He has maintained a regular schedule at the Bureau since then, while continuing to serve as OMB Director, and Bureau operations have continued with the understanding that he is the Acting Director. *See id.* ¶¶ 8–10; *see also* Ex. 5, CFPB Press Roundtable Tr. (Dec. 4, 2017). Acting Director Mulvaney has, among other things, held meetings with senior members of the executive team and their staff, approved an allocation of money from the CFPB Civil Penalty Fund to victims of violations of the consumer financial protection laws, received memoranda requesting decisions from the Director, and issued directives that have been followed by Bureau staff. *See* Ex. 5, at 1–2; Ex. 4, ¶¶ 9–10. He has also asked Ms. English to perform certain duties in her capacity as Deputy Director. *See* Ex. 5, at 4.

C. This Litigation and *English v. Trump*

Plaintiff filed its Complaint in this case on December 5, 2017, ECF No. 1, and a Motion for a Preliminary Injunction on December 12, 2017. ECF No. 10 ("Pl.'s Br."). Plaintiff represents that it is a not-for-profit community development financial institution that provides "financial services—including savings and checking accounts, credit cards, and consumer home mortgage, small business and real estate loans—and community development investment." Pl.'s Br. Ex. C, Decl. of Linda Levy ("Levy Decl.") ¶ 4, ECF No. 10-3. Plaintiff asserts that it is "subject to the CFPB's rulemaking authority," *id.* ¶ 6, and that actions by Mr. Mulvaney during his temporary service as Acting CFPB Director may harm Plaintiff or its members.

Plaintiff's lawsuit follows on the heels of a parallel action filed by Ms. English in the U.S. District Court for the District of Columbia. *See* Compl., *English v. Trump*, No. 1:17-cv-2534 (D.D.C. filed Nov. 26, 2017), ECF No. 1. Ms. English applied for a temporary restraining order ("TRO"), which the court denied on November 28, 2017. In denying the TRO, the court held that Ms. English had failed to demonstrate a likelihood of success on the merits; that she failed to show irreparable harm; and that she failed to show that the balance of the equities tipped in her favor.

Ms. English then filed a motion for a preliminary injunction, *English* ECF Nos. 23–26, which has been fully briefed and argued.

LEGAL STANDARD

Defendants oppose Plaintiff's motion for a preliminary injunction and move to dismiss Plaintiff's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008). To meet this burden, a plaintiff must establish that four factors have been met: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. Insofar as Plaintiff seeks a mandatory injunction that would alter the status quo, it faces an even greater hurdle. *See Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995). Such an injunction "should issue 'only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.'" *Id.* (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985)).

"A district court properly dismisses an action under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction if the court 'lacks the statutory or constitutional power to adjudicate it,' such as when (as in the case at bar) the plaintiff lacks constitutional standing to bring the action." *Cortlandt Street Recovery Corp. v. Hellas Telecomms., S.À.R.L.*, 790 F.3d 411, 417 (2d Cir. 2015) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). A district court properly dismisses an action pursuant to Rule 12(b)(6), in turn, if there are not "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under either Rule 12(b)(1) or (6), courts "constru[e] the complaint in plaintiff's favor and accept[ ] as true all material factual allegations contained therein." *Donoghue v. Bulldog Investors Gen. P'ship*, 696 F.3d 170, 173 (2d Cir. 2012). However, this assumption of truth does not apply to allegations that "are no more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *accord Conyers v. Rossides*, 558 F.3d 137, 143 (2d Cir. 2009) (stating that on a facial Rule 12(b)(1) challenge, the court is not "bound to accept as true a legal conclusion couched as a factual allegation" (quoting *Sharkey v. Quarantillo*, 541 F.3d 75, 83 (2d Cir. 2008))). In conducting this inquiry, a court may consider "documents attached to the complaint as exhibits" and "documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). In addition, under Rule 12(b)(1), "the court may also rely on evidence outside the complaint." *Cortland Street Recovery Corp.*, 790 F.3d at 417.

ARGUMENT

I. PLAINTIFF HAS FAILED TO ESTABLISH STANDING

This Court should not reach the merits of Plaintiff's claims because Plaintiff has failed to establish standing, "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 (1998). As the party invoking federal jurisdiction, Plaintiff bears the burden of establishing all three elements of Article III standing. *See Lujan*, 504 U.S. at 560–61. First, Plaintiff "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan*, 504 U.S. at 560 (quoting *Allen v. Wright*, 468 U.S. 737, 756 (1984)); *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (explaining that a "concrete" injury is one that is "'real[]' and not 'abstract'" and a "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way"). Second, Plaintiff must show that its injury is "fairly traceable to the challenged action"—the President's designation of Mr. Mulvaney to serve temporarily as Acting CFPB Director. *Lujan*, 523 U.S. at 560. And third, Plaintiff must demonstrate that it is "likely, as opposed to merely speculative," that its injury will be redressed by a favorable decision. *Id.* at 561.

All Plaintiff's brief offers on standing is six words in a footnote: "Plaintiff is regulated by the CFPB." Pl.'s Br. at 17 n.21. That bald assertion does not suffice. The sole, out-of-circuit decision Plaintiff cites, *State National Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015), did *not* hold that the plaintiff bank had standing to challenge the constitutionality of the CFPB's structure—and of Richard Cordray's initial appointment as its Director—merely because "[t]he Bank is regulated by the Bureau." *Id.* at 53. Rather, the bank had standing, according to the court, because the Bureau, under Director Cordray, had "already exercised its broad regulatory authority to impose new obligations on [the plaintiff bank]," which had "cause[d] [the bank] to incur costs" that it would not incur if it were to prevail on its claims. *Id.*; *see id.* at 54.

Plaintiff is in a very different position. Unlike the Bank in *State National Bank*, Plaintiff does not claim that the Bureau, under Acting Director Mulvaney, has taken any regulatory action that imposes compliance costs on Plaintiff and that a favorable decision would relieve Plaintiff of that pocketbook injury. Plaintiff identifies CFPB regulations, which Plaintiff asserts it "must comply with," Compl. ¶ 11; Levy Decl. ¶¶ 6-10, but seeks relief from none of these regulations. Moreover, because all of these regulations predate Mr. Mulvaney's leadership, no decision in this case would affect their validity. Accordingly, injury, causation, and redressability are all lacking. *State National Bank* therefore is of no help to Plaintiff.

And since *State National Bank*, the D.C. Circuit has reaffirmed that a plaintiff's status as a regulated entity does not excuse it from separately satisfying each of the three requirements for Article III standing. In *John Doe Co. v. CFPB*, 849 F.3d 1129 (D.C. Cir. 2017), a regulated entity that had received a non-self-executing investigative demand from CFPB sought to avoid compliance by challenging the constitutionality of the agency's structure. *Id.* at 1130–32. Emphasizing that "standing is not dispensed in gross," the court concluded that the plaintiff lacked standing to challenge the investigative demand, *id.* at 1132–33 (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)), and that the plaintiff could not otherwise establish standing because the plaintiff—like Plaintiff here—did not "object to any other regulatory measure[s] taken by the Bureau, or identify in its injunction papers other regulatory burdens to which it objects." *Id.* at 1132 n.1 (citing *State Nat'l Bank*, 795 F.3d at 53)).

Nor has Plaintiff presented any other ground for finding that it has standing. Plaintiff's vague, conclusory statements that it is "uncertain[]" about "who should be lawfully running the Bureau" certainly does not satisfy the requirements of Article III. Compl. ¶ 13; *see* Levy Decl. ¶¶ 12, 14. Article III courts exist to resolve cases and controversies presented by litigants suffering "distinct and palpable" injuries, *Allen*, 468 U.S. at 751 (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979), not to issue advisory opinions answering plaintiffs' abstract legal questions. "It would be a strange thing indeed if uncertainty were a sufficiently certain harm to constitute an injury in fact." *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013); *see also Habeas Corpus Res. Ctr. v. DOJ*, 816 F.3d 1241, 1250 (9th

Cir. 2016) ("The Defender Organizations' bare uncertainty regarding the validity of the Final Regulations and the applicability of Chapter 154 to their clients' federal habeas cases, absent 'any concrete application that threatens imminent harm to [their] interests,' cannot support standing." (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009)); *In re Wingerter*, 594 F.3d 931, 946 (6th Cir. 2010) ("Uncertainty, like unfavorable dicta and the possibility of future relitigation, is an insufficient basis for Article III standing.").

In any event, Plaintiff cannot explain why Plaintiff's uncertainty is attributable to Defendants instead of to Ms. English, who has continued to insist that she is the Acting Director notwithstanding the legal opinion of OLC, the legal opinion of the General Counsel of the agency Ms. English purports to head, and the position of CFPB senior leadership, and a ruling by the U.S. District Court for the District of Columbia. Notably, a national association of credit unions, noting the same uncertainty as Plaintiff, has filed an amicus brief supporting Defendants rather than Ms. English in the litigation between Ms. English and the President and Mr. Mulvaney. *See* Br. of Credit Union National Association as Amicus Curiae in Support of Defendants at 1, *English v. Trump*, No. 1:17-cv-02534 (D.D.C.), ECF No. 38. And Plaintiff cannot show that this lawsuit will redress Plaintiff's alleged uncertainty, as the President could at any time nominate a new Director.

Plaintiff's claims of potential future harms to it are all "too speculative for Article III purposes," and none are "actual or imminent." *Lujan*, 504 U.S. at 564 & n.2 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); *see id.* ("Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure . . . that the injury is 'certainly impending.'" (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Plaintiff cannot predicate its standing on "the possibility an agency may one day reverse its position" on some existing policy. *New England Power Generators*, 707 F.3d at 369. And, of course, Plaintiff cannot "satisfy the requirement that threatened injury must be certainly impending," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013), with rank speculation that Mr. Mulvaney's statutorily time-limited stewardship of the CFPB until the Senate confirms the next Director may result in "a recurrence of the 2008 financial crisis," Levy Decl. ¶ 18, through some "highly attenuated chain of possibilities." *Clapper*, 568 U.S. at 410; *see, e.g.*, *New England Power Generators*, 707 F.3d at 369 (rejecting standing based on "broad-based market effects stemming from regulatory uncertainty," which "are quintessentially conjectural"); *Taylor v. Bernanke*, No. 13-CV-1013 (ARR), 2013 WL 4811222, at *1–2, 7 (E.D.N.Y. Sept. 9, 2013) (holding a claim that federal agencies' failure to implement provisions of Dodd-Frank caused plaintiffs to face "increasing risk of loss of their bank deposits" was "too speculative to confer standing").

Likewise, Plaintiff's assertions that Acting Director Mulvaney's tenure is adversely affecting Plaintiff's "mission," Pl.'s Br. at 20–21; Levy Decl. ¶¶ 15, 17, cannot satisfy the injury-in-fact element, as they are speculative and conclusory. *See Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003). Beyond the impermissibly hypothetical and conclusory nature of these assertions, "an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976); *see also Baur*, 352 F.3d at 632 ("[T]he requirement of concrete injury recognizes that if an injury is too abstract, the plaintiff's claim may not be capable of, or otherwise suitable for, judicial resolution."). The Supreme Court has held, for example, that "organizations, which described themselves as dedicated to promoting access of the poor to health services, could not establish their standing" to challenge a policy giving favorable tax treatment to hospitals that limited their care to indigents to emergency-room services "simply on the basis of that goal." *E. Ky. Welfare*, 426 U.S. at 39–40. Similarly, Plaintiff could not establish standing based on purported harms to its mission of "promot[ing] economic justice and opportunity in New York City neighborhoods," Pl.'s Br. at 5, even if Plaintiff had challenged a specific agency action and identified the manner in which that action injured it, instead of speculating about what the CFPB might do and offering bald assertions of harm.

Finally, Plaintiff faces similar problems to the extent it attempts to assert standing based on conclusory and speculative assertions of harm to its "members." *See* Compl. at 1 (purporting to sue "on behalf of itself and its members"). To establish that it has standing to bring a claim on behalf its members, an organization must demonstrate that (1) "its members would otherwise have standing to sue in their own right," (2) "the interests at stake are germane to the organization's purpose," and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000); *accord Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 362 (2d Cir. 2016).

Plaintiff has not even attempted to satisfy the second and third requirements, but the first alone is fatal. Plaintiff fails to identify any way in which any of its members has been injured or "faces a direct risk of harm which rises above mere conjecture" as a result of Defendants actions. *Baur*, 352 F.3d at 636; *see Summers*, 555 U.S. at 499 (noting that "the Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm"); *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) ("When a preliminary injunction is sought, a plaintiff's burden to demonstrate standing 'will normally be no less than that required on a motion for summary judgment.'" (quoting *Lujan*, 497 U.S. at 907 n.8 (1990))). Its Complaint and declaration offer conclusory allegations of injury to its members at some point in the future based on speculation about how the CFPB will conduct itself during Mr. Mulvaney's statutorily time-limited service as Acting Director and about how third-parties not before the Court will respond to the actions of the CFPB (*i.e.*, that the CFPB will rescind regulations and reduce its enforcement activity, which may lead other financial institutions to engage in conduct which may harm Plaintiff's members). *See* Compl. ¶ 14; Levy Decl. ¶¶ 13, 15; *see also* Pl.'s Br. at 21. Courts are usually "reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 133 S. Ct. at 1150. Plaintiff's presentation is insufficient to overcome that usual reluctance, to survive a motion to dismiss, or to carry Plaintiff's burden in seeking preliminary relief. *See Baur*, 352 F.3d at 642; *see, e.g.*, *Schwartz v. HSBC Bank USA, N.A.*, No. 14 CIV. 9525 (KPF), 2017 WL 95118, at *6–8 (S.D.N.Y. Jan. 9, 2017), *appeal filed*, No. 17-2309 (2d Cir. July 27, 2017). Further, to the extent Plaintiff argues that actions already undertaken by Mr. Mulvaney during his tenure as Acting Director are somehow harming its members, Pl's.

Br. at 21, Plaintiff's assertion of harm again is wholly conclusory, and thus also insufficient to establish a legally cognizable injury. *Baur*, 352 F.3d at 637. Because Plaintiff has not shown that any of its members would have standing in their own right, Plaintiff cannot establish standing to sue on their behalf. *See Friends of the Earth*, 528 U.S. at 181.[1]

In sum, Plaintiff lacks standing, and its Complaint must be dismissed for lack of jurisdiction. *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012).[2]

---

[1] Plaintiff's assertion of an Appointments Clause violation, aside from its lack of merit, is also insufficient, without more, for Plaintiff to establish standing. *See, e.g.*, *Lujan*, 504 U.S. at 573–74 ("[A] plaintiff . . . claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large . . . does not state an Article III case or controversy."); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 482–83 (1982) ("[T]he Art. III requirements of standing are not satisfied by 'the abstract injury in nonobservance of the Constitution asserted by . . . citizens.'" (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974)).

[2] For many of the same reasons Plaintiff lacks standing, it cannot identify a valid cause of action to challenge the validity of Mr. Mulvaney's designation as Acting Director. Plaintiff does not identify a final agency action that could properly be the basis of an action brought under the APA. Neither the FVRA nor the provision of the Dodd-Frank Act invoked by Plaintiff provides for a cause of action. Moreover, as explained below, *see infra*, Part B, Plaintiff's Appointments Clause argument merely refashions its statutory arguments in constitutional terms, and does not state a claim for relief. The Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, "is procedural only . . . and does not create an independent cause of action." *Chevron Corp. v. Naranjo*, 667 F.3d 232, 244 (2d Cir. 2012). Nor can Plaintiff rely on the Mandamus Act, 28 U.S.C. § 1361. *See, e.g.*, *Huli v. Way*, 393 F. Supp. 2d 266, 269–70 (S.D.N.Y. Oct. 13, 2005) ("[Section 1361] offers a remedy only where the government official or agency owes the petitioner a 'clear nondiscretionary duty'" (quoting *Heckler v. Ringer*, 466 U.S. 602, 616 (1984)). And the All Writs Act, 28 U.S.C. § 1651, is merely "a residual source of authority to issue writs that are not otherwise covered by statute." *Penn. Bureau of Correction v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). "Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Id.* As explained below, *see infra*, Part D, Congress has set out in the quo warranto statute, D.C. Code §§ 16-3501 *et. seq.*, the requirements for an "interested person" to bring the type of direct attack on a public officeholder Plaintiff asserts here; Plaintiff cannot satisfy those requirements.

II. PLAINTIFF HAS NOT ESTABLISHED A LIKELIHOOD OF SUCCESS AND HAS FAILED TO STATE A CLAIM

The President lawfully exercised his authority under the FVRA when he designated Mr. Mulvaney to serve as Acting CFPB Director upon the resignation of former Director Cordray. Plaintiff contends that the President lacked this authority. As recognized by OLC, the CFPB's General Counsel, and the U.S. District Court for the District of Columbia in denying Ms. English's application for a TRO, Plaintiff's position is contrary to the text and context of the FVRA and not compelled by the Dodd-Frank Act. And even if the President's designation of Mr. Mulvaney to serve as Acting Director were in doubt, Plaintiff would not be entitled to the relief it seeks here, including an extraordinary and inappropriate injunction against the President himself.

A. The FVRA Authorizes the President to Designate an Acting CFPB Director

1. On Its Face, the FVRA Authorizes the President to Designate an Acting CFPB Director When a Vacancy Exists

The FVRA on its face applies to vacancies in the office of CFPB Director. The FVRA provides several statutory means of "temporarily authorizing an acting official to perform the functions and duties" of an office of an Executive agency that ordinarily must be filled by appointment "by the President, by and with the advice and consent of the Senate." 5 U.S.C. § 3347(a); *see id.* § 3345(a). And the Dodd-Frank Act makes plain that the CFPB "shall be considered an Executive agency" for purposes of Title 5, which includes the FVRA. *See* 12 U.S.C. § 5491(a); *see* 5 U.S.C. § 105. Mr. Mulvaney was previously confirmed by the Senate to serve as the Director of the Office of Management and Budget, 163 Cong. Rec. S1313 (Feb. 16, 2017), and thus is among the officials whom the FVRA expressly authorizes the President to designate to perform the functions and duties of a vacant office temporarily in an acting capacity. 5 U.S.C. § 3345(a)(2). Accordingly, the FVRA on its face authorizes the President's designation of Mr. Mulvaney unless the CFPB Director is among the few officers excluded from the FVRA's coverage by its four carefully delineated exceptions. *See id.* § 3349c.

None of these exceptions applies. Contrary to Plaintiff's contention, the CFPB Director's incidental service on the board of the Federal Deposit Insurance Corporation ("FDIC") does not bring the CFPB Director within the exception codified in Section 3349c(1) of the FVRA. *See* Pl.'s Br. at 13–14. That provision states that the FVRA shall not apply to "any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that (A) is composed of multiple members; and (B) governs an independent establishment or Government corporation." 5 U.S.C. § 3349c(1).

Plaintiff misreads Section 3349c(1). Although the person appointed to the office of CFPB Director serves on the FDIC board, that person is not "appointed . . . to" the board "by the President, by and with the advice and consent of the Senate." 5 U.S.C. § 3349c(1). Rather, the CFPB Director serves on the FDIC board only by the force of a statute providing that one of the members of the FDIC board "shall be the Director of the [CFPB]." 12 U.S.C. § 1812(a)(1)(B). *Ex officio* positions like this one—where service on a multi-member body is an additional germane duty of the office to which the person is actually appointed—do not fall within Section 3349c(1)'s express exception to the FVRA, which applies only to officers appointed directly to the multi-member body.[3]

The FDIC's organic statute illustrates the point, distinguishing between the Director of the CFPB and the Comptroller of the Currency—who are *ex officio* members of the board—and the board's three "appointed members." *See* 12 U.S.C. § 1812(a)(1)(C), 1812(c). Unlike the CFPB Director and the Comptroller of the Currency, the "appointed members" of the FDIC board are not covered by the FVRA, and no other statute provides for temporarily replacing them with acting officers in the event of a vacancy. In asserting that Section 3349c(1) excludes "any members of an independent multi-member board or commission" from the reach of the FVRA, Pl.'s Br. at 13, Plaintiff reads the "appointed . . . to" phrase out of the statute.

[3] In addition to the "appointed members" of the FDIC, discussed below, Section 3349c(1) would apply, for example, to members of the Federal Trade Commission, 15 U.S.C. § 41, and the Securities and Exchange Commission, 15 U.S.C. § 78d, both of which are "independent establishments." Section 3349c(1) also applies to multimember boards that govern "Government corporation[s]" without regard to whether such boards are "independent."

Plaintiff's expansive reading of Section 3349c(1) would lead to the implausible conclusion that Cabinet offices and other high-ranking Executive Branch officers are also implicitly excluded from the FVRA given their service on various federal boards and commissions. The Secretaries of the Treasury, Labor, and Commerce, for example, serve as members of the board of directors of the Pension Benefit Guaranty Corporation. *See* 29 U.S.C. § 1302(d). The United States Trade Representative and the Administrator for the Agency for International Development serve on the board of directors for the Overseas Private Investment Corporation, 22 U.S.C. § 2193(b), and both, together with the Secretary of State and the Secretary of the Treasury, also serve on the board of the Millennium Challenge Corporation, *id.* § 7703(c)(3); *see also* 42 U.S.C. § 12651a(a)(3) ("The Secretary of Education, the Secretary of Health and Human Services, the Secretary of Labor, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Housing and Urban Development, the Secretary of Defense, the Attorney General, the Director of the Peace Corps, the Administrator of the Environmental Protection Agency, and the Chief Executive Officer shall serve as ex officio nonvoting members of the Board [of the Corporation for National and Community Service]"). It is implausible to read Section 3349c(1) to exclude the CFPB Director and these other high-ranking Executive Branch officials from the FVRA's coverage because of their incidental service on a multi-member board that governs an independent establishment or Government corporation.

In sum, the CFPB Director is not expressly excluded from the FVRA's sweep.

2. The Dodd-Frank Act Does Not Repeal the President's Authority Under the FVRA to Designate an Acting CFPB Director

Plaintiff erroneously contends that the Dodd-Frank Act, by providing that the Deputy Director "shall" serve as acting Director in the absence or unavailability of the Director, is the exclusive succession statute for the CFPB Director. *See* Pl.'s Br. at 9. In effect, Plaintiff argues that the Dodd-Frank Act repeals the President's authority to designate an Acting Director of the CFPB pursuant to the FVRA. However, as OLC and the CFPB's General Counsel have each independently concluded, Section 5491(b)(5) is, at most, best read as *supplementing* the FVRA rather than superseding it. This interpretation reconciles the two statutes in a way that gives effect to both. And even if an irreconcilable conflict did exist, only Defendants' interpretation would avoid the problematic and probably unconstitutional consequences of Plaintiff's position.

a. Office-Specific Statutes Generally Supplement, Rather Than Displace, the FVRA's Procedures

Confirming the conclusion that Section 5491(b)(5) of the Dodd-Frank Act operates alongside (but does not displace) the FVRA is the text of the FVRA itself. Section 3347 of the FVRA, titled "Exclusivity," provides that the FVRA is the "exclusive means" for authorizing acting service in the event of a vacancy "unless" the President makes a recess appointment or unless another statutory provision expressly:

> (A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
>
> (B) designates 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). Even where one of these exclusivity exceptions applies, the FVRA's procedures for addressing the vacancy continue to be available. In that case, that the FVRA is not the "*exclusive* means" of designating an acting officer, but instead one of two available options for addressing the vacancy.

This understanding is consistent with the longstanding interpretations of the FVRA. As OLC has consistently maintained, the FVRA operates alongside other statutory authorities that designate a specific official to serve as an acting officer for a vacant office or that authorize the President, a court, or the head of an Executive department to designate an acting officer. *See, e.g.*, *Acting Attorney General*, 31 Op. O.L.C. at 209–11; *Acting Director of OMB*, 27 Op. O.L.C. at 121 n.1; *Applicability of the FVRA to the IMF and World Bank* 24 Op. O.L.C. at 60 n.2; *Guidance on Application of the FVRA*, 23 Op. O.L.C. at 62–63.

The Ninth Circuit's decision in *Hooks* illustrates how the FVRA historically has been reconciled with other statutory authorities. A party in that case argued that the President could not invoke the FVRA to designate an Acting General Counsel for the NLRB during a vacancy because the National Labor Relations Act itself authorized the President "to designate the officer or employee who shall act as the General Counsel during such vacancy," but for a shorter period than the FVRA would allow. *See Hooks*, 816 F.3d at 555–56 & n.5 (quoting 29 U.S.C. § 153(d)). Rejecting that argument, the Ninth Circuit held that while the NLRA expressly provided a means for designating an Acting General Counsel, the FVRA remained available as another option: "[N]either the [FVRA] nor the [NLRA] is the *exclusive* means of appointing an Acting General Counsel," and "the President is permitted to elect between these two statutory alternatives." *Id.* at 556. The Ninth Circuit reached that conclusion notwithstanding that the NLRA, unlike Section 5491(b)(5), speaks explicitly to what happens in case of a "vacancy." 29 U.S.C. § 153(d).

Plaintiff does not acknowledge the Executive Branch precedents that informed passage of the FVRA. And its attempt to distinguish *Hooks* on the ground that both the FVRA and the NLRA "provide for the same person to fill the same vacancy," Pl.'s Br. at 11 n.17, falls short. Under the plain terms of the FVRA, office-specific statutes are treated the same under the statute whether they "designate[] an officer or employee" to serve as the acting officer or instead "authorize[] the President, a court, or the head of an Executive department[] to designate" the acting officer. 5 U.S.C. § 3347(a)(1). And as a precedential matter, neither past OLC opinions nor the Ninth Circuit's reading of Section 3347 in *Hooks* turned in any way on the fact that the agency-specific statute in question permitted the President to designate the acting official. *See Hooks*, 816 F.3d at 556; OLC opinions cited *supra*, at 5.

The FVRA's text likewise provides no support for distinguishing Section 5491(b)(5) from other office-specific statutes that were enacted before the FVRA. *See* Pl.'s Br. at 11 (arguing that Dodd-Frank controls because it "was enacted **more recently** than the FVRA"). Section 3347(a)(1) applies equally to any "statutory provision expressly" providing for another procedure for identifying an acting officer, regardless of when that office-specific provision was enacted. On that score, it bears noting that an earlier version of the bill that became the FVRA, by contrast, would have treated an office-specific "statutory provision in effect on the date of enactment" differently than one enacted later. *See infra*, at 21 n.4.

Nor is Plaintiff's focus on the timing of Dodd-Frank's enactment consistent with the FVRA's historical context. While many office-specific statutes predated the FVRA, they often postdated—and existed alongside——the pre-FVRA Vacancies Act, which had generally applied since 1868 to vacancies in the offices that headed executive departments. *See* Act of July 23, 1868, ch. 227, 15 Stat. 168; Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 424–26; Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 7, 102 Stat. 985, 988 (1988); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 206–07 (D.C. Cir. 1998); *cf. United States v. Lucido*, 373 F. Supp. 1142, 1151 (E.D. Mich. 1974) (holding that the Deputy Attorney General could serve as Acting Attorney General under both the Vacancies Act and an office-specific statute, which allowed acting service beyond the 30-day limit of the Vacancies Act). There is no basis for concluding that office-specific statutes enacted after the FVRA displace the FVRA any more than similarly worded office-specific statutes enacted after the Vacancies Act displaced it.[4]

[4] The FVRA's legislative history is in accord. A Senate Committee Report on an earlier version of the bill noted the existence of statutes other than the Vacancies Act "that expressly authorize the President, or the head of an executive department to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity" or "that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee." S. Rep. 105–250, at 15 (1998). The Report explained that the bill would "retain[]" these provisions, *id.* at 16, some of which "may have been passed without knowledge of the Vacancies Act," and some of which contained language not distinguishable from Section 5491(b)(5), although they might be repealed in the future "in favor of the procedures contained in the [FVRA]." *Id.* at 17. "In any event," the Report continued, "even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office." *Id.*

This discussion related to a provision of the bill which would have addressed only "statutory provision[s] in effect on the date of enactment" of the FVRA. *See id.* at 26 (draft § 3347(a)(2)); *see also id.* at 15. The bill was subsequently amended to, among other things, remove this temporal limitation and to have § 3347 address the FVRA's exclusivity instead of its applicability, as § 3347 had in the earlier version of the bill.

Congress, of course, has the power to exclude a new office that would otherwise be covered by the FVRA from the statute's reach. To do so, Congress could either add the office to the FVRA's list of exceptions in Section 3349c or provide with sufficient clarity in an office-specific statute that the FVRA does not apply to the office. With respect to the CFPB Director, however, Congress did precisely the opposite. It provided that "all Federal laws dealing with . . . officers . . . shall apply to the exercise of the powers of the Bureau," "[e]xcept as otherwise provided expressly by law." 12 U.S.C. § 5491(a). Here, that text is dispositive.

b. The Dodd-Frank Act Is Best Read to Operate Alongside the FVRA, Rather Than Impliedly Supersede It

Plaintiff argues that the Dodd-Frank Act supersedes (as opposed to supplements) the FVRA because Dodd-Frank is "the later, more specific, mandatory statute . . . ." Pl.'s Br. at 11. Before deciding that a later-in-time statute displaces an earlier one, however, a court must attempt to reconcile them if possible. Plaintiff drums up a conflict based upon the terms of Section 5491(b)(5) of Dodd-Frank, which provides that the Deputy CFPB Director "*shall* . . . serve as acting Director in the absence or unavailability of the Director," *id*. (quoting 12 U.S.C. § 5491(b)(5)(B), and which purportedly conflicts with the FVRA affording the President additional options for designating an Acting Director. But no real conflict exists between the statutes, let alone an "irreconcilable" one, as Plaintiff must show. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141–42 (2001). The FVRA and the Dodd-Frank Act can (and therefore should) be reconciled in a manner that gives effect to both. *See, e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 144 (1976) ("It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, 'when two statutes are capable of co-existence, it is the duty of the courts to regard each as effective.'" (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974))).

When Congress intends to repeal a prior statutory enactment through subsequent legislation, it must do so in a "clear and manifest" manner. *See Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) ("[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest." (quoting *Rodriguez v. United States*, 480 U.S. 522, 524 (1987))). Congress was well aware of the FVRA when it passed the Dodd-Frank Act and would have known to speak in very clear terms if it intended to exclude the office of the CFPB Director from the FVRA's reach. It did not do so. To the contrary, the text of Section 5491, its relationship with other statutory provisions (including the FVRA), the structure of the CFPB, and the legislative history of Dodd-Frank all confirm that Section 5491 is best interpreted to supplement (not supplant) the FVRA's procedures for addressing vacancies in the office of the CFPB Director.

(1) Far from a clear command that the FVRA does not apply to the CFPB Director, the text of the Dodd-Frank Act reinforces its applicability. Section 5491(a) of Dodd-Frank states: "Except as otherwise provided expressly by law, all Federal laws dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds . . . shall apply to the exercise of the powers of the Bureau." 12 U.S.C. § 5491(a). There is no dispute that the FVRA falls within the ambit of this provision: it is a Federal law dealing with Federal officers. *See* Pl.'s Br. at 12–13.

Against this plain statutory backdrop, Plaintiff contends that another paragraph of the same section, Section 5491(b)(5), not only satisfies the high bar for implied repeals of previously enacted statutes but also speaks so clearly that it overrides the instruction Congress supplied just one subsection earlier. *See* Pl.'s Br. at 8. It does not.

First, the phrase "absence or unavailability of the Director" in Section 5491(b)(5)(B) does not clearly apply to a resignation giving rise to a vacancy. The "absence or unavailability" "phrasing is unusual," OLC Op., at 2, and is ambiguous as to whether it includes resignations and vacancies. *See* McLeod Memo at 1–2 (the question is "debatable"). Unlike the FVRA and many of the other office-specific statutes that supplement it, Section 5491(b)(5)(B) is completely silent as to both vacancies and resignations. *Compare* 12 U.S.C. § 5491(b)(5)(B), *with, e.g.*, 5 U.S.C. § 3345(a), 20 U.S.C. § 3412(a)(1), 28 U.S.C. § 508, 29 U.S.C. § 153(d), 38 U.S.C. § 304, 40 U.S.C. § 302, *and* 42 U.S.C. § 902(b)(4). If Congress had intended to supersede the FVRA, instead of supplementing it, the statute would have at least referred to vacancies.

With respect to "absence[s]" of the Director, many of the officer-specific statutes that supplement the FVRA distinguish between absences and vacancies, indicating that Congress does not view a "vacancy" as a type of "absence." *See, e.g.*, 40 U.S.C. § 302; 42 U.S.C. § 902(b)(4); *cf.* OLC Op. at 3 (collecting other examples). Indeed, other provisions of the Dodd-Frank Act itself draw the same distinction. *See* Pub. L. No. 111-203, § 111(c)(3), 124 Stat. 1376, 1393 (2010) (codified at 12 U.S.C. § 5321(c)(3)) ("In the event of a vacancy in the office of the head of a member agency or department, and pending the appointment of a successor, or during the absence or disability of the head of a member agency or department, the acting head of the member agency or department shall serve as a member of the Council in the place of that agency or department head."); *see also id.* § 336(a)(2), 124 Stat. at 1540 (codified at 12 U.S.C. § 1812(d)(2)). OLC has, accordingly, opined that a statute authorizing a subordinate to perform the duties of a higher office in his superior's "absence" was not triggered when the expiration of the superior's term resulted in a vacancy. *See Status of the Vice Chairman of the Federal Reserve Board*, 2 Op. O.L.C. 394, 395 (1978) ("The term 'absence' normally connotes a failure to be present that is temporary in contradistinction to the term 'vacancy' caused, for example, by death of the incumbent or his resignation."); *see also* OLC Op. at 3.

The term "unavailability" is not entirely clear in its meaning either. In common usage, "unavailability" often has a temporary quality. And other statutes distinguish between situations in which an office is vacant and those in which an officer is "unavailable," much like other statues distinguish between vacancies and absences. *See* 28 U.S.C. § 954. Although OLC ultimately concluded that "unavailability" should be construed to encompass vacancies, it agreed that the issue is "not free from doubt." OLC Op. at 3. At a minimum, therefore, Section 5491(b)(5)(B) could reasonably be read to refer only to an "absence or unavailability" that does not give rise to a vacancy within the meaning of the FVRA. Thus, even if Dodd-Frank's reference to "unavailability" may be read to encompass vacancies—and thereby permits the Deputy Director to serve as Acting Director in the absence of a Presidential designation under the FVRA—this remains a close question, and falls far short of the high standard of clarity required for implied repeals. *See Howard*, 775 F.3d at 437 ("Implied repeals are disfavored and not presumed unless the legislative intent is 'clear and manifest.'").

Second, even if "absence or unavailability" may be read to encompass resignations giving rise to vacancies, the statute's use of "shall" is too slender a reed to support Plaintiff's displacement argument. Although generally a mandatory term, "shall" can also be used in other ways. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995) ("Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.'" (citations omitted)); *see also Sierra Club v. Jackson*, 648 F.3d 848, 855–56 (D.C. Cir. 2011); *DirecTV, Inc. v. Barczewski*, 604 F.3d 1004, 1008 (7th Cir. 2010). Certain Federal Rules, for instance, "use the word 'shall' to authorize, but not . . . require, judicial action." *Lamagno*, 515 U.S. at 432 n.9 (citing Fed. R. Civ. P. 16(e) & Fed. R. Crim. P. 11(b)); *see also* B. Garner, Dictionary of Modern Legal Usage 939 (2d ed. 1995) ("[C]ourts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts, and vice-versa.").

Indeed, one need look no further than Section 5491 of Dodd-Frank for examples of the variety of meanings the term "shall" might carry. For instance, one provision states that the Director "shall serve for a term of 5 years," 12 U.S.C. § 5491(c)(1), and another provides that the President "may remove the Director," *id.* § 5491(c)(3). Because it is clear that Section 5491(c)(3) authorizes the removal of a Director during his five-year term, this provision demonstrates that the term "may" sometimes overrides the term "shall." Further examples from Section 5491 also demonstrate that the term "shall" can be read to authorize but not require a certain action. No one would read Section 5491(c)(1)'s stipulation that "[t]he Director shall serve for a term of 5 years" to prohibit an earlier resignation, for example, or to extend the commission of a recess appointee beyond the end of the Senate's next session. Likewise, the same "shall" that speaks to the Deputy Director's service as Acting Director also provides that the Deputy Director "shall . . . be appointed by the Director." 12 U.S.C. § 5491(b)(5). If this "shall" were the unqualified mandate Plaintiff claims, the former Director would have violated Dodd-Frank by leaving the Deputy Director position vacant for years leading up to his last day in office. At bottom, "shall" can take on too many meanings for this term to provide the clear statement that would be necessary for Section 5491(b)(5) to displace the FVRA.

(2) In any event, the FVRA itself speaks in terms no less mandatory than Section 5491(b)(5) of the Dodd-Frank Act. The FVRA provides that the first assistant to a vacant office covered by the FVRA "*shall* perform the functions and duties of the office temporarily in an acting capacity" but that the President "may" direct certain other persons to perform the same functions and duties, "notwithstanding" that rule. 5 U.S.C. § 3345(a) (emphasis added). Instead of interpreting one statute to be more mandatory than the other, the two statutes should be construed to operate alongside each other. *See* OLC Op. at 7.

Plaintiff's only response on this point is that the statutes cannot be read to act in parallel without rendering Section 5491(b)(5) largely superfluous. *See* Pl.'s Br. at 9–10. Not so. Assuming that Section 5491(b)(5)(B) applies to vacancies, it would serve at least two purposes not served by Section 3345(a)(1) of the FVRA. First, it would allow the Deputy Director to serve as Acting Director beyond the time limitations in the FVRA. *See* 5 U.S.C. § 3346; *cf. Lucido*, 373 F. Supp. at 1151; S. Rep. No. 105-250, at 17 ("Most of these retained statutes do not place time restrictions on the length of [service of] an acting officer."). Second, it would allow the Deputy Director to serve as Acting Director in situations where the FVRA itself would not authorize such service. *See* 5 U.S.C. § 3345(b) (identifying situations in which certain persons may not serve as an acting officer under Section 3345 of the FVRA).

(3) Plaintiff also claims that applying the FVRA to the CFPB Director would be inconsistent with a "statutory scheme" designed to give the Bureau a measure of "independence." Pl.'s Br. at 12–13. At bottom, Plaintiff's argument boils down to the assertion that the selection of an Acting Director of the CFPB—unlike the selection of a Director—must be entirely outside of the President's control. But Plaintiff does not dispute that Congress has authorized the President to designate acting officers at some other "independent" agencies, including the agency head. *See id.* at 9 n.16 (Commissioner of Social Security); *see also* S. Rep. No. 105-205, at 15–17. Although

the FVRA contains specific carve-outs for certain "independent" agencies and commissions, Congress did not include the CFPB Director among those express exceptions. *See supra*, Part A.1. Because Presidential designations of acting officers are not fundamentally at odds with the nature of independent agencies—and, indeed, the Bureau itself was previously overseen by the President's senior staff and Department of Treasury officials, *see supra*, at 6—there is no basis for this Court to infer an extra-statutory limitation on the President's authority.

(4) Nor is Plaintiff correct that the legislative history of the Dodd-Frank Act can substitute for an express statement in the statute that Section 5491 supersedes the FVRA. Pl.'s Br. at 12. As Plaintiff notes, the House of Representatives initially passed a bill that would have provided that, "[i]n the event of vacancy or during the absence of the Director . . . an Acting Director shall be appointed in the manner provided in [the FVRA]." *See* H.R. 4173, 111th Cong. § 4102(b)(6)(B)(i) (as passed by House, Dec. 11, 2009). Under this version of the bill, there was no Deputy Director; the Director would have headed the agency only for a limited time until replaced by a commission; and the statute would not have included Section 5491(a)'s statement that federal laws dealing with officers apply to the Bureau except as expressly provided by law. The final legislation was ultimately a very different product, which, in these respects, more closely resembled the Senate-passed version of the bill. Although the final product does not expressly refer one way or the other to the FVRA, it also omits the earlier version's reference to a "vacancy" in the office of the Director and introduces new language indicating that the office is covered by the FVRA. There is no reason to infer from the decision not to enact the House-passed version that the statute as enacted precludes application of the FVRA. *See, e.g.*, *Edison Elec. Inst. v. EPA*, 2 F.3d 438, 451 (D.C. Cir. 1993) (per curiam) ("[W]e need only note that the deletion of a word or phrase in the throes of the legislative process does not ordinarily constitute, without more, evidence of a specific legislative intent.").

If anything, the evolution of the bill indicates that Congress was aware of the FVRA's provisions and intended them to apply in the final legislation. The House bill cited by Plaintiff did not include the explicit instructions, in Section 5491(a) as enacted, that the CFPB is to be considered an "Executive agency" and that it is subject to all federal laws dealing with officers except as otherwise expressly provided. *See* 12 U.S.C. § 5491(a); H.R. 4173, 111th Cong. at § 4101. By replacing the targeted FVRA cross-reference with a provision making the CFPB subject to all federal laws governing federal officers more broadly, Congress did not somehow silently render the FVRA inapplicable. Quite the contrary—both by designating the CFPB as an "Executive agency" and by adding the language in the final Section 5491(a), Congress expressly made the FVRA applicable. Further undermining Plaintiff's claim that Section 5491 manifests congressional intent to displace the FVRA, other portions of CFPB's organic statute explicitly exempted the CFPB from specific portions of Title 5. *See* 12 U.S.C. § 5493(a)(1)(C)(i); 12 U.S.C. § 5584(c)(2). As this history demonstrates, Congress was well aware of the FVRA's provisions in crafting the CFPB. For that reason, Plaintiff's contention that Section 5491(b)(5) was a backhanded means of repealing those provisions is particularly implausible.

In sum, Plaintiff has not demonstrated that Section 5491(b)(5) of Dodd-Frank displaces the FVRA as it applies to the CFPB Director, let alone that it clearly and expressly does so.

c. Plaintiff's Interpretation of the Dodd-Frank Act Creates Practical Problems and Raises Significant Constitutional Issues

Finally, even if there were a true conflict between the FVRA and the Dodd-Frank Act, the Court should avoid reconciling the statutes in a way that gives rise to unintended consequences and potential constitutional difficulties. Plaintiff's position creates both types of problems.

Plaintiff's reading of the Dodd-Frank Act to displace the FVRA could lead to a number of troubling scenarios that Congress presumably did not intend. The Acting Director could for an indefinite period be someone who has never been nominated by any President or confirmed by the Senate to any position, and whom the current President does not want in the role. And there is no reason to assume, as some have suggested, that the person serving as Deputy Director when the office of the Director becomes vacant will have any more expertise or experience at the agency than the other candidates whom the President might designate under the FVRA. *See* 5 U.S.C. § 3345(a). As the facts of this case illustrate, the Director could, for reasons of his or her own, decide to pass over someone who has been serving as Acting Deputy Director and who has served in the agency's senior management nearly since its creation. Moreover, Plaintiff's position raises the question what happens when the Director's office becomes vacant and there is no appointed Deputy Director. If, as Plaintiff contends, the Dodd-Frank Act precludes the President from invoking the FVRA, then no statutory means of designating an Acting Director would be available to address the vacancy at the top of the agency. It is unlikely that Congress intended the Dodd-Frank Act to leave the President without any statutory means to resolve such problems during the time that it may take to secure the Senate's confirmation of the next Director.[5]

Plaintiff's position also gives rise to serious constitutional questions insofar as it assumes that the Senate could keep in place indefinitely an Acting Director who assumed that position by operation of statute (along with her prior assignment to the Deputy Director position) without the President's authorization. Defendants disagree with Plaintiff's apparent assumption that an Acting Director enjoys the same removal protection as a Senate-confirmed Director. *See infra*, at 32. Even with the statutory authority to remove someone from the Acting Director role, however, a President understandably would be loath to invoke that authority when doing so would leave him without any statutory means of designating a different Acting Director and when the Senate may refuse to act on his nominees, potentially leaving the agency headless for an extended period.

That is the consequence of Plaintiff's interpretation of the Dodd-Frank Act, and Plaintiff applauds it as enhancing the Bureau's independence. But inhibiting the removal of an official who can be replaced at any time by the Senate's confirmation of someone else makes that official "less[]

[5] Potentially, the President could invoke his inherent authority under Article II to designate an Acting CFPB Director to serve for a reasonable period of time. *See generally The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 161-64 (1996). Although Plaintiff contends that no such authority exists, Pl.'s Br. 16–17 (citing *Williams v. Phillips*, 360 F. Supp. 1363, 1369 (D.D.C. 1973)), it misreads that decision. The D.C. Circuit's decision in *Williams v. Phillips*, 482 F.2d 669, 670 (D.C. Cir. 1973), declined to rule out the existence of "an implied power, in the absence of limiting legislation, upon the resignation of an incumbent [officer], to appoint an acting [officer] for a reasonable period of time before submitting the nomination of a new [officer] to the Senate." In any event, the Court should not interpret the relevant statutes in a way that would raise this constitutional question.

accountab[le] to the President" but "does not make them more independent." *Swan*, 100 F.3d at 984. Rather, it makes them "more dependent on Senate inaction than on the President," because the Senate would have the power to keep them in office by refusing to act on the President's nominees. *Id.* Such an arrangement would, at a minimum, "be pushing the constitutional envelope to the edge." *Id.* at 986; *see also id.* ("The Senate's power to keep holdover members [of the National Credit Union Administration] in office in this fashion might well raise constitutional problems, since the Supreme Court has explicitly held that Congress cannot exercise control over the tenure of executive branch officials."). Because "the Court has refused to tolerate any arrangements that could aggrandize the powers of Congress at the expense of the President, no matter how 'innocuous' these arrangements might be in practice," *id.* at 987, the Court should not accept Plaintiff's interpretation of the Dodd-Frank Act to permit the Senate to keep an Acting CFPB Director installed in that position indefinitely.

By adopting Defendants' interpretation of the FVRA and Dodd-Frank, in contrast, the Court would respect the balance that the political branches struck in the FVRA between the interests of Congress and the President. The President need not obtain the Senate's advice and consent to select someone from the pool of eligible officials to serve "temporarily in an acting capacity." 5 U.S.C. § 3345(a). But the President has an incentive to nominate someone who can be confirmed by the Senate expeditiously, if he chooses someone other than the Deputy Director to serve as Acting Director, because anyone he designates is subject to the time limitations imposed by the FVRA. *See id.* § 3346. This is the balance that has been struck for most Executive Branch offices requiring Senate confirmation. If Congress and the President had agreed to fundamentally alter that balance in the Dodd-Frank Act, they would have made their agreement clear and manifest in the text of the statute. They did not, and the Court should not strain to read Dodd-Frank to impliedly displace the FVRA as it applies to the CFPB Director.

B. Mr. Mulvaney Is Eligible to Serve As Acting Director Under the FVRA

Plaintiff argues in the alternative that, even if the FVRA authorizes the President to designate an Acting CFPB Director, the President "cannot appoint a White House employee who serves at his whim and pleasure to run this independent agency." Pl.'s Br. at 14. There is no legal basis for this argument.

The FVRA squarely addresses the question of whom the President may designate as an acting officer in any of the Executive agencies covered by the statute. In addition to designating someone from within the relevant agency, 5 U.S.C. § 3345(a)(1), (a)(3), the President may direct "a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity," *id.* § 3345(a)(2). There are exceptions, but none of those exceptions excludes those serving in EOP or at OMB from the pool of those who are otherwise eligible. *See id.* § 3345(b). The decision not to exclude such officers explicitly is particularly significant in light of the FVRA's repeated references to EOP in other provisions. *See id.* §§ 3345(a), 3347(a)–(b), 3348(b), 3348(e)(5), 3349(a).

Undeterred by the FVRA's lack of support for this proposition, Plaintiff insists that the designation of a White House official to serve as Acting CFPB Director conflicts with the CFPB's status as "an independent bureau" in the Federal Reserve System. Pl.'s Br. at 14–15 (quoting 12 U.S.C. § 5491(a)). Plaintiff's purported concern is that the President "can dangle the OMB position over Mr. Mulvaney to get him to serve his bidding at the CFPB." *Id.* at 15.

While Plaintiff presents its argument as limited to "a White House employee," *id.* at 14, the logic of its argument sweeps much more broadly. Most other officers who are appointed with the Senate's advice and consent—and therefore eligible to serve as acting officers under Section 3345(a)(2) of the FVRA—are also subject to at-will removal by the President. And the President could also be said to have influence over lower-level officials who could serve under Section 3345(a)(1) or (3) and wish to be considered for higher positions, such as a Deputy Director who might be angling for a nomination as Director. Thus, not only did Congress decline to establish the "White House employee" carve-out that Plaintiff proposes, but Plaintiff fails to explain why its theory is not really just a covert argument that an extra-textual exemption for independent agencies should be read into the FVRA (or how its theory is consistent with the reliance on Treasury and Presidential staff to run the CFPB in its early days).

An unstated assumption underlying Plaintiff's argument is that the President may remove an Acting CFPB Director from the Acting post only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). That assumption is incorrect. The Dodd-Frank Act included that for-cause removal standard only in a provision addressing the term of a Senate-confirmed Director. The text of the statute does not purport to grant removal protection to an Acting Director. Indeed, conferring for-cause removal protection on an Acting Director would raise substantial constitutional questions above and beyond the constitutional questions for-cause removal protection for a Senate-confirmed Director. *See PHH Corp. v. CFPB*, 839 F.3d 1, 15 (D.C. Cir. 2016), *rehearing en banc granted*, Feb. 16, 2017 Order (No. 15-1177). Like the holdover member of the National Credit Union Administration board whose claim to enjoy for-cause removal protection was rejected by the D.C. Circuit in *Swan*, an Acting CFPB Director serves without any statutory time limit on his or her tenure. And "[p]recluding the President from removing an executive branch official with potentially unlimited tenure arguably might 'impede the President's ability to perform his constitutional duty' under Article II to take care that the laws be faithfully executed." *Swan*, 100 F.3d at 987 (quoting *Morrison v. Olson*, 487 U.S. 654, 672 (1988)). The Court therefore should not "infer such protection absent clear evidence that Congress intended it." *Id.* at 988. That evidence is lacking here.

In short, the FVRA itself identifies the individuals whom the President may designate to serve as Acting CFPB Director. As the presidentially nominated and Senate-confirmed Director of OMB, Mr. Mulvaney is among them, and Plaintiff's efforts to identify some atextual basis for deeming him ineligible should be rejected.

C. Plaintiff's Appointments Clause Argument Adds Nothing to Its Case

The arguments offered by Plaintiff in support of its Appointments Clause claim simply restate its statutory arguments in constitutional terms. *See, e.g.*, Pl.'s Br. at 17 (concluding that Mr. Mulvaney's designation to serve as Acting CFPB Director violates the Appointments Clause because "[t]he government's statutory arguments fail"). The new packaging adds no substance to its statutory claims.

In reframing its statutory arguments as constitutional ones, Plaintiff makes multiple unsupported assumptions about the operation of the Appointments Clause in the context of designating an official to serve as an acting officer in the event of a vacancy.[6]

It is by no means clear that an official who has been designated to perform the duties of an office temporarily in an acting capacity has been appointed to an office within the meaning of the Appointments Clause. For one thing, it is not clear that the position of Acting CFPB Director is an "office," considering that it is necessarily temporary in nature.[7] Relatedly, a person exercising the duties of an office in an acting capacity might not even be accurately said to "hold" the office in the first instance.[8] The Supreme Court drew the latter distinction in *United States v. Eaton*, 169

---

[6] The FVRA does not speak of acting-officer designations in terms of "appointments." Although the statutory terminology is not dispositive with respect to the constitutional issues, and acting-officer designations are sometimes casually labeled "appointments," the statutory text provides some indication that the Congress saw a distinction when it enacted the FVRA.

[7] *See Appointment of Department of Interior Associate Deputy Secretary*, No. B-290233, 2002 WL 31388352, at *3 (Oct. 22, 2002) (General Counsel, GAO) (noting that early cases and statutes "recognized that exercising <u>all</u> of a PAS officer's authorities, if done temporarily, does not necessarily transform an employee into an officer."); *see, e.g.*, *Auffmordt v. Hedden*, 137 U.S. 310, 327 (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. Acting Director of OMB*, 27 Op. O.L.C. at 123 n.5.

[8] *See Officers Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 101 n.11 (2007); *Acting Attorney General*, 31 Op. O.L.C. at 210 n.2 (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 . . . .").

U.S. 331 (1898), in holding that Congress could constitutionally vest the appointment of a "vice consul" in the President alone and that the vice consul could then constitutionally be designated to serve as the acting consul, even though the consul was a principal officer of the United States who could only be appointed with the Senate's advice and consent. *See id.* at 343. The *Eaton* Court explained that "[b]ecause 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. To so hold 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.* (quoted with approval in *Morrison*, 487 U.S. at 672–73); *cf. Williams*, 482 F.2d at 670 (reserving the question of whether the President can designate an acting officer to serve for a reasonable period of time without any statutory authorization).

Moreover, Plaintiff's argument suffers from another problem to the extent that it views the position of Acting Director as a principal office of the United States. Under that theory, Ms. English could not constitutionally serve in the role. If Congress cannot lawfully give the President alone the authority to designate an Acting CFPB Director—because it is a principal office—then it could not effectively give such authority to the CFPB Director by providing that an inferior officer (or an employee) would accede to the principal office by operation of law.

In sum, Plaintiff's cloaking of its statutory arguments in constitutional terms raises more questions than it answers, none of which has been adequately briefed by Plaintiff.[9]

D. Plaintiff's Claims Are Statutorily Precluded and Plaintiff Has No Right to the Relief It Seeks

Aside from the lack of substantive merit to Plaintiff's claims, two additional obstacles further undermine Plaintiff's likelihood of success: a statute precludes Plaintiff from pursuing its claims and Plaintiff lacks entitlement to the relief it seeks.

[9] The Government reserves the right to contest the validity of Ms. English's purported appointment as CFPB's Deputy Director.

First, Plaintiff's suit appears to be an attempted end-run around the requirements and restrictions for bringing a quo warranto action. The federal quo warranto statute, 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. The D.C. Circuit has indicated 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). *See Sw. Gen., Inc. v. NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017) ("The de facto officer doctrine allows [direct] attacks [on an officer's authority,] but they can be brought via writ of quo warranto only." (citing *Andrade v. Lauer*, 729 F.2d 1475, 1496–97 (D.C. Cir. 1984)). Plaintiff has not satisfied the statutory requirements for bringing such an action, however, because it "asserts no personal interest in the office," *In re James*, 241 F. Supp. 858, 859 (S.D.N.Y. 1965), and has not satisfied the statute's other requirements for a direct challenge to Mr. Mulvaney's authority to perform the duties of Acting CFPB Director. Plaintiff therefore cannot prevail in this litigation. *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).[10]

---

[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*, 866 F. Supp. 2d 17, 20 (D.D.C. 2012), *aff'd*, 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*, 729 F.2d 1475, 1498 (D.C. Cir. 1984))). But even if Plaintiff somehow were an "interested person" authorized to bring a quo warranto action, it is clear that such an action—including compliance with its procedures—is the "only" way to launch such an attack. *Sw. Gen., Inc.*, 796 F.3d at 81. Plaintiff cannot satisfy those requirements. *See also Newman v. U.S. of America ex rel. Frizzell*, 238 U.S. 537, 549–52 (1915) (holding that a "third person"—as opposed to an "interested person" with a "personal interest in the office"—could not bring a direct attack on a public officeholder if the Attorney General declined to bring suit).

This does not mean that Plaintiff could not question the validity of the President's designation of Mr. Mulvaney in a lawsuit challenging an action taken by Mr. Mulvaney in his official capacity—and in which Plaintiff satisfied the usual requirements of standing, ripeness, final agency action, and the like. *See, e.g.*, *SW Gen.*, 796 F.3d at 81-83 (allowing a party to challenge an adverse final agency action based on an FVRA violation); *Andrade*, 729 F.2d at 1499-1500 (allowing plaintiffs to challenge a specific action "as it affected them—not wholesale invalidation of actions taken by" the officials whose status the plaintiffs challenged); *cf. United States v. Allocco*, 305 F.2d 704, 706-08 (2d Cir. 1962) (allowing collateral attack on conviction based on alleged infirmity in judge's recess appointment). But here, the quo warranto statute precludes Plaintiff's attempted direct attack on Mr. Mulvaney's designation as Acting CFPB Director and requires Plaintiff to wait until it could properly bring a collateral challenge.

Second, even if the President's designation of Mr. Mulvaney as Acting CFPB Director was not authorized by the FVRA, this Court still should dismiss the Complaint and deny Plaintiff's motion to the extent it seeks relief from the President himself. *See* Compl. at 13–14; Pl.'s Br. Ex. A, [Proposed] Order to Show Cause at 1–2, ECF No. 10-1. For a century and a half, the Supreme Court has maintained that courts, "in general," have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) (plurality opinion) (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 485, 501 (1867)); *see also id.* at 826–27 (Scalia, J., concurring). A "District Court's grant of injunctive relief against the President himself is extraordinary, and should . . . raise judicial eyebrows." *Id.* at 802 (plurality opinion); *accord Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 582–83 (S.D.N.Y. 2002). "[S]imilar considerations regarding a court's power to issue relief against the President himself apply to [a] request for a declaratory judgment." *Swan*, 100 F.3d at 976 n.1. "The reasons why courts should be hesitant to grant such relief [against the President himself] are painfully obvious." *Id.* at 978. Granting Plaintiff's requested relief would "at best create[] an unseemly appearance of constitutional tension and at worst risk[] violation of the constitutional separation of powers." *Id.*

* * *

For all of these reasons, Plaintiff (1) cannot establish that it is likely to prevail on the merits of its challenge to the President's designation of Mr. Mulvaney to serve as Acting CFPB Director and (2) has failed to state a claim. The FVRA and Dodd-Frank are best read in harmony, not in tension, and allow the President to select an Acting CFPB Director. The President validly exercised that authority here.

III. PLAINTIFF HAS NOT DEMONSTRATED THAT A PRELIMINARY INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM TO IT

"Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) (internal quotation marks omitted). The moving party therefore must show that irreparable harm is likely before any other elements may be considered. *See id.* To satisfy the irreparable harm requirement, Plaintiff "must demonstrate that absent a preliminary injunction [it] will suffer 'an injury that is neither remote nor speculative, but actual and imminent,' and one that cannot be remedied 'if [the Court] waits until the end of trial to resolve the harm.'" *Id.*

As explained above, Plaintiff has not demonstrated that it has suffered an injury in fact for Article III standing. *A fortiori*, Plaintiff has not made a showing of irreparable harm. But even if Plaintiff could clear the standing hurdle, it has not demonstrated that it likely will suffer an irreparable injury absent a preliminary injunction. Plaintiff argues that it will suffer irreparable harm for three alleged reasons: (1) Mr. Mulvaney's appointment violates the Constitution's Appointments Clause, and that alleged injury is *per se* irreparable; (2) as Acting Director, Mr. Mulvaney is regulating the Credit Union "with no lawful authority," Pl.'s Br. at 18; and (3) Mr. Mulvaney's appointment is frustrating Plaintiff's mission. None of these arguments has merit.

First, contrary to Plaintiff's contention, *id.* at 17–18, a purported violation of the Appointments Clause is not, in itself, an irreparable harm. While an alleged violation of certain personal constitutional rights may trigger a presumption of irreparable harm, *see, e.g.*, *Statharos v. N.Y. City Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999), that principle does not extend to violations of the Constitution that establish the structure of the Government, such as the

Appointments Clause. *See, e.g.*, *Pub. Serv. Co. of New Hampshire v. Town of W. Newbury*, 835 F.2d 380, 382 (1st Cir. 1987) (cases holding that a constitutional deprivation amounts to irreparable harm "are almost entirely restricted to cases involving alleged infringements of free speech, association, privacy[,] or other rights as to which temporary deprivation is viewed of such qualitative importance as to be irremediable by any subsequent relief"); *Live365, Inc. v. Copyright Royalty Bd.*, 698 F. Supp. 2d 25, 45–46 (D.D.C. Feb. 23, 2010) (noting that plaintiffs relying on principle that alleged deprivation of a constitutional right is sufficient to show irreparable injury "usually assert personal denial of a constitutional right," and distinguishing alleged Appointments Clause violation); *see also Freytag v. Commissioner*, 501 U.S. 868, 880 (1991) (describing the "structural interests" protected by the Appointments Clause).

Plaintiff relies on cases involving alleged violations of *personal* constitutional rights, which are not relevant here. *See Statharos*, 198 F.3d at 322 (privacy rights); *Conn. Dep't of Envtl. Prot. v. O.S.H.A.*, 356 F.3d 226, 230-31 (2d Cir. 2004) (state right of immunity against suit by private party); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (Eighth Amendment rights). Even in the context of personal constitutional rights, however, the Second Circuit has declined to adopt Plaintiff's *per se* rule that irreparable harm can simply be presumed, rather than proven. *See Amandola v. Town of Babylon*, 251 F.3d 339, 343 (2d Cir. 2001) ("[T]his Court has not spoken with a single voice on the issue of whether irreparable harm may be presumed with respect to complaints alleging the abridgement of First Amendment rights." (citing cases)); *Savage v. Gorski*, 850 F.2d 64, 67 (2d Cir. 1988) (requiring a finding of irreparable harm in a First Amendment case); *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999) (same). Thus, even if Plaintiff could demonstrate a likelihood of success on the merits, Plaintiff's allegation that Mr. Mulvaney's appointment violated the Appointments Clause would not, in itself, establish a likelihood of irreparable harm.

Second, Plaintiff cannot demonstrate a likelihood of irreparable harm based on Mr. Mulvaney's purported lack of authority to regulate Plaintiff, *see* Pl.'s Br. at 18–20, because Plaintiff has not identified any specific harm stemming from Mr. Mulvaney's tenure as Acting

Director, let alone one that would be irreparable. Plaintiff's vague and conclusory assertion that Mr. Mulvaney's appointment has caused "uncertainty and . . . confusion" that "make any planning and compliance impossible," *id.* at 19, does not suffice. *See, e.g.*, *Tilton v. SEC*, 824 F.3d 276, 286 (2d Cir. 2016) (holding, in Appointments Clause challenge to SEC judges, that the injury of "'being subjected to an unconstitutional adjudicative procedure,' with the attendant 'embarrassment, expense, . . . ordeal, . . . [and] state of anxiety and insecurity'" was not an "irremediable harm" (alterations in original; citation omitted)).

The cases cited by Plaintiff are inapposite and do not support Plaintiff's argument that an agency head's purported lack of authority suffices to show a likelihood of irreparable harm. Indeed, none of the cited authorities even considers that issue. For example, the quoted language from *Olympic Federal Savings & Loan Association v. Director, Office of Thrift Supervision* appears in the midst of a discussion of prudential standing and does not address the irreparable harm element of the preliminary injunction standard. 732 F. Supp. 1183, 1189–90 (D.D.C.), *appeal dismissed and remanded*, 903 F.2d 837 (D.C. Cir. 1990). Moreover, contrary to Plaintiff's contention, the court in that case did not hold that "regulated entities are 'directly harmed by unconstitutional appointments.'" Pl.'s Br. at 18 (quoting *Olympic*, 732 F. Supp. at 1189). Plaintiff selectively quotes the relevant sentence, which concerns the zone of interests test for prudential standing, and which states that "entities *which will be* directly harmed by unconstitutional appointments clearly fall within the zone of interests which the *Appointments Clause* and the entire system of checks and balances was designed to protect." *Olympic*, 732 F. Supp. at 1189-90 (first emphasis added). The *Olympic* court did not hold that regulated entities are always directly harmed by unconstitutional appointments—let alone irreparably harmed—but rather explained that an entity falls within the zone of interests protected by the Appointments Clause *if* it will be directly harmed by an unconstitutional appointment.

Likewise, in *State National Bank of Big Spring v. Lew*, the D.C. Circuit did not hold that an unconstitutional appointment is an irreparable harm, but rather considered whether the plaintiff had alleged injury sufficient to establish Article III standing. 795 F.3d 48, 53–54 (D.C. Cir. 2015).

Indeed, in *John Doe Co. v. CFPB*, 849 F.3d 1129 (D.C. Cir. 2017), a later decision that actually addressed the preliminary injunction standard, the D.C. Circuit soundly rejected the approach Plaintiff advocates here. Citing *inter alia*, the Second Circuit's decision in *Tilton*, the D.C. Circuit explained that the CFPB's allegedly unconstitutional structure was "not invariably an irreparable injury" where the plaintiff had shown no "immediate or ongoing harm stemming from the [Bureau's] alleged constitutional defects." *John Doe Co.*, 849 F.3d at 1135 (citing cases, including *Tilton*, 824 F.3d at 286); *see also In re Al-Nashiri*, 791 F.3d 71, 79–80 (D.C. Cir. 2015) (holding that a trial before judges of the Court of Military Commission Review allegedly appointed in violation of the Appointments Clause does not cause irreparable harm).

Free Enterprise Fund is even less on point, as the Supreme Court there was addressing whether the procedures in 15 U.S.C. § 78y for review of SEC actions were the exclusive means by which the plaintiff could raise its constitutional claims regarding the Public Company Accounting Oversight Board, *see Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 490 (2010), not evaluating whether the plaintiff had made a showing of irreparable harm.

Third, Plaintiff has not shown that it is likely to suffer irreparable harm on the basis that Plaintiff's "mission is being frustrated by defendants' conduct . . . ." Pl.'s Br. at 20. While Plaintiff is correct that frustration of a nonprofit organization's mission may constitute irreparable harm in some circumstances, *see, e.g.*, *First Step, Inc. v. City of New London*, 247 F. Supp. 2d 135, 157 (D. Conn. 2003), Plaintiff has not demonstrated the likelihood of any such harm here. Plaintiff asserts in a conclusory manner that its "mission and its members" are being harmed because Director Mulvaney has, inter alia, frozen the issuance of new regulations, new contracting, and the filing of new lawsuits by the CFPB. Pl.'s Br. at 21. But Plaintiff does not identify how any of these actions are harming it, let alone demonstrate that such harm is irreparable. In the cases cited by Plaintiff, in contrast, the plaintiff organizations identified concrete and specific harms that would likely result from the absence of a preliminary injunction. *See Resolution Trust Corp. v. Elman*, 949 F.2d 624, 629 (2d Cir. 1991) (failure to transfer files to entity appointed as receiver for bank would render receiver "unable to accomplish its statutory objectives" by preventing receiver from concluding appropriate foreclosure actions); *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003) (mass removal of boarding students from school, absent injunction, would harm school's ability to fulfill its mission); *Caron Found. of Florida, Inc. v. City of Delray Beach*, 879 F. Supp. 2d 1353, 1373 (S.D. Fla. 2012) (rehabilitation provider's mission to assist recovering addicts at its property would be thwarted absent injunction of transient use ordinance); *Stewart B. McKinney Found., Inc. v. Town Plan & Zoning Comm'n of Town of Fairfield*, 790 F. Supp. 1197, 1209 (D. Conn. 1992) (plaintiff would be unable to provide housing at the relevant property to needy HIV-infected persons absent injunction). Because Plaintiff has identified no actual or imminent, nonspeculative injury that it will likely suffer absent a preliminary injunction, let alone any irreparable injury, there is no basis for the Court to issue a preliminary injunction.

IV. THE PUBLIC INTEREST AND THE BALANCE OF THE EQUITIES FAVOR DENYING PLAINTIFF'S EXTRAORDINARY MOTION

The final two factors in considering a motion for a preliminary injunction, which are merged when the Government is the non-movant, are "the harm to the opposing party and weighing the public interest." *Nken v. Holder*, 556 U.S. 418, 435 (2009). It is a well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'" *Sampson*, 415 U.S. at 83 (quoting *Cafeteria & Rest. Workers Union, Local 473, A.F.L.-C.I.O. v. McElroy*, 367 U.S. 886, 896 (1961)). Thus, in the government personnel context, courts must "give serious weight to the obviously disruptive effect which the grant of the temporary relief [would] likely . . . have on the administrative process." *Id.* Here, the disruptive effect of a preliminary injunction is considerable, tipping the final factor in favor of Defendants.

Mr. Mulvaney has been serving as the Acting Director for nearly one month and is already directing agency policy. *See supra*, at 7–8. To intervene at this point with another management reshuffle would sow confusion in the face of the consensus view that Mr. Mulvaney should be recognized as the Acting Director. It would further delay agency business and upend some of the decisions that Mr. Mulvaney, in consultation with the executive team, has made, and would thereby interfere with the Bureau's execution of the nation's consumer protection laws. Moreover, an order compelling the President to recognize Ms. English as Acting Director and to withdraw his designation of Mr. Mulvaney would be an extraordinary intrusion into core Executive Branch operations. In short, Plaintiff's proposed preliminary injunction would radically upend the status quo, not maintain it.

Plaintiff's explanation for why the balance of equities tips in its favor is heavy with rhetorical flourishes but light on substance. Plaintiff has no distinct argument for why the balance of equities and public interest support a preliminary injunction, and merely repeats its contention that Mr. Mulvaney's appointment was unlawful—arguing, in other words, that the Court should issue a preliminary injunction because it should agree with Plaintiff's legal arguments on the merits. Pl's. Br. at 22. Moreover, Plaintiff does not dispute that granting its motion would disrupt agency operations and delay agency business. And Plaintiff itself points out that the President could at any time nominate a permanent Director for the agency. *Id.* Plaintiff's preference for Ms. English and Plaintiff's belief that Ms. English's experience better qualifies her for the position of Acting Director than Mr. Mulvaney do not suffice to establish that the balance of equities and public interest favor issuance of a preliminary injunction.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Preliminary Injunction should be denied and Defendant's Motion to Dismiss should be granted.

Dated: December 22, 2017

Respectfully submitted,

Of Counsel:

MARY McLEOD
General Counsel
Consumer Financial Protection Bureau

JOHN R. COLEMAN
Deputy General Counsel
Consumer Financial Protection Bureau

STEVEN Y. BRESSLER
LAURA HUSSAIN
Assistant General Counsels
Consumer Financial Protection Bureau

CHAD A. READLER
Acting Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

CHRISTOPHER HALL
Assistant Director
Civil Division

/s/ *Benjamin T. Takemoto*
MATTHEW J. BERNS
BENJAMIN T. TAKEMOTO
ELIZABETH TULIS
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, DC 20530
Tel: (202) 532-4252
Fax: (202) 616-8470
E-mail: benjamin.takemoto@usdoj.gov

Attorneys for Defendants