

No. 18-5007

**In the United States Court of Appeals
for the District of Columbia Circuit**

LEANDRA ENGLISH,
Plaintiff-Appellant,

v.

DONALD J. TRUMP and JOHN M. MULVANEY,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 1:17-CV-2534-TJK (THE HON. TIMOTHY J. KELLY)

APPELLANT'S EMERGENCY MOTION TO EXPEDITE

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January 16, 2018

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COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

As required by Circuit Rules 27(a)(4) and 28(a)(1), undersigned counsel for Appellant Leandra English hereby provides the following information:

I. Parties and *Amici* Appearing Below

The parties and *amici* who appeared before the U.S. District Court were:

1. Leandra English, *Plaintiff-Appellant*.
2. Donald J. Trump and John M. Mulvaney, *Defendants-Appellees*.
3. Public Citizen, Inc., Americans for Financial Reform, Center for Responsible Lending, Consumer Action, National Association of Consumer Advocates, National Consumer Law Center, National Consumers League, National Fair Housing Alliance, Tzedek DC, Inc., and United States Public Interest Research Group Education Fund, Inc., *Amici Curiae*.
4. Consumer Finance Regulation Scholars,¹ *Amici Curiae*.
5. Credit Union National Association, *Amicus Curiae*.
6. Professor Peter Conti-Brown, *Amicus Curiae*.
7. District of Columbia, and States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, *Amici Curiae*.
8. State of Texas, West Virginia, Alabama, Arkansas, Georgia, Louisiana, Oklahoma, and South Carolina, *Amici Curiae*.
9. Chamber of Commerce of the United States of America, *Amicus Curiae*.

¹ Ethan S. Bernstein, Benjamin P. Edwards, Kathleen C. Engel, Robert Hockett, Dalie Jimenez, Adam J. Levitin, Patricia A. McCoy, Christopher Lewis Peterson, Jeff Sovern, and Arthur E. Wilmarth, Jr.

10. Current and Former Members of Congress, *Amici Curiae*:

Beatty, Joyce

Representative of Ohio

Brown, Sherrod

Senator of Ohio

Capuano, Michael

E. Representative of Massachusetts

Clay Jr., William “Lacy”

Representative of Missouri

Cleaver, Emanuel

Representative of Missouri

Cortez Masto,

Catherine Senator of Nevada

Crist, Charlie

Representative of Florida

Crowley, Joseph

Representative of New York

Delaney, John K.

Representative of Maryland

Dodd, Christopher

Former Senator of Connecticut

Ellison, Keith

Representative of Minnesota

Foster, Bill

Representative of Illinois

Frank, Barney

Former Representative of Massachusetts

Green, Al

Representative of Texas

Heck, Denny
Representative of Washington

Himes, Jim
Representative of Connecticut

Hirono, Mazie K.
Senator of Hawai'i

Hoyer, Steny
Representative of Maryland

Johnson, Tim
Former Senator of South Dakota

Kanjorski, Paul E.
Former Representative of Pennsylvania

Kildee, Dan
Representative of Michigan

Lynch, Stephen F.
Representative of Massachusetts

Maloney, Carolyn
Representative of New York

Meeks, Gregory W.
Representative of New York

Menendez, Robert
Senator of New Jersey

Merkley, Jeff
Senator of Oregon

Miller, Brad
Former Representative of North Carolina

Moore, Gwen
Representative of Wisconsin

Pelosi, Nancy
Representative of California

Schatz, Brian
Senator of Hawai'i

Schumer, Charles E.
Senator of New York

Sherman, Brad
Representative of California

Van Hollen, Chris
Senator of Maryland

Vargas, Juan
Representative of California

Velázquez, Nydia M.
Representative of New York

Warren, Elizabeth
Senator of Massachusetts

Waters, Maxine
Representative of California

II. Parties and Amici Appearing in this Court

1. Leandra English, *Plaintiff-Appellant*.
2. Donald J. Trump and John M. Mulvaney, *Defendants-Appellees*.

III. Rulings under Review

The ruling under review in this case is United States District Court Judge John Kelly's January 10, 2018, Memorandum Opinion and Order denying Ms. English's motion for a preliminary injunction.

IV. Related Cases

This case has not previously been filed with this Court or any other court. Counsel is aware of the following case qualifying as related under Circuit Rule 28(a)(1)(C): *Lower East Side People's Federal Credit Union v. Donald J. Trump and John M. Mulvaney*, 1:17-Civ-9536-PGC (S.D.N.Y.).

Respectfully submitted,

/s/ Deepak Gupta

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TABLE OF CONTENTS

Introduction 1

Background 3

Argument 6

 I. The Court should expedite this appeal. 6

 A. The public has an unusual interest in prompt disposition. 6

 B. The opinion below is subject to substantial challenge. 9

 C. Delay will cause Ms. English irreparable injury. 11

 II. The Court should order that briefs be filed under the
 proposed schedule. 12

Conclusion 13

INTRODUCTION

Plaintiff-Appellant Leandra English respectfully moves the Court for expedited briefing and oral argument under 28 U.S.C. § 1657(a), Federal Rule of Appellate Procedure 27, and this Court's Rule 27.

This case presents the type of extraordinary circumstances that justify expedited consideration. At midnight on November 24, 2017, Richard Cordray resigned as Director of the Consumer Financial Protection Bureau (CFPB). Under the Dodd-Frank Act, Ms. English—then the CFPB's Deputy Director—immediately became Acting Director. *See* 12 U.S.C. § 5491(b)(5)(B) (mandating that the Deputy Director “shall . . . serve as the acting Director in the absence or unavailability of the Director”). But in disregard of that rule, defendant Donald J. Trump purported to appoint defendant John M. Mulvaney as Acting Director under the Federal Vacancies Reform Act (FVRA). *See* 5 U.S.C. § 3345(a)(2).

On November 26, 2017, Ms. English filed this lawsuit and requested a temporary restraining order (1) prohibiting the President from appointing or recognizing a new Acting Director of the Bureau and (2) prohibiting Mr. Mulvaney from holding that position or exercising the Bureau's authority. Given the extraordinary national importance and time-sensitive nature of this litigation, the district court set a highly expedited briefing schedule. At a hearing on November 28, 2017, it denied Ms. English's motion for a TRO and refused to entertain her

formal request that her motion also be treated as a request for a preliminary injunction. The district court then set another expedited briefing schedule to consider her renewed request for a preliminary injunction. That motion was filed on December 6, 2017, and was supported by *amicus* briefs from Members of Congress, States, consumer groups, scholars, and experts in financial regulation. The district court heard argument on the motion for a preliminary injunction on December 22, 2017, and subsequently denied relief on January 10, 2018.

In the interim, a credit union whose operations are affected by the CFPB filed a lawsuit in the Southern District of New York. *See Lower East Side People's Federal Credit Union v. Donald J. Trump and John M. Mulvaney*, 1:17-Civ-9536-PGC (S.D.N.Y.). That case raises the same fundamental question as this one: who is the Acting Director of the CFPB? On January 12, 2018, Judge Gardephe heard argument on the credit union's motion for a preliminary injunction.

These disputes over President Trump's unlawful appointment have enveloped the CFPB in a cloud of legal uncertainty. Until the Judiciary offers a final resolution—or until President Trump nominates and the Senate confirms a Director of the CFPB—the Bureau's employees and the companies it regulates will suffer continuing disruption and anxiety. Further, Ms. English has suffered and will continue to suffer irreparable injury: the loss of her statutory right to function as the head of a federal agency, in a role that will disappear as soon as a new Director is

confirmed. The Court should therefore expedite review of this case to promote stability in the nation's financial sector and to halt the harm that the defendants continue to inflict on Ms. English. To that end, she respectfully proposes this schedule:

- **Appellant's Opening Brief:** January 30, 2018
- **Amicus Briefs Supporting Appellant:** February 6, 2018
- **Appellees' Brief:** February 13, 2018
- **Amicus Briefs Supporting Appellee:** February 20, 2018
- **Appellant's Reply Brief:** February 22, 2018.

BACKGROUND

Congress created the CFPB in the wake of the 2008 financial crisis. The CFPB was designed to consolidate regulatory authority in a single independent agency with robust statutory powers and its own source of funding. To help guard against regulatory capture, Congress determined that the agency would be headed by a single director, who would serve a five-year term and be removable by the President only "for cause." 12 U.S.C. § 5491(c). In keeping with its goal of maximizing agency independence, Congress gave the CFPB's Director the authority to appoint a Deputy Director, and provided that the Deputy Director "shall serve . . . as acting Director in the absence or unavailability of the Director." *Id.* § 5491(b)(5).

The agency's first Director was Richard Cordray. Nearly four-and-a-half years into his five-year term, Mr. Cordray resigned his position, effective at midnight on November 24, 2017. Before leaving office, Director Cordray publicly announced that he had appointed Ms. English—until then the Bureau's Chief of Staff—as the Bureau's Deputy Director. He did so to ensure that she would become the Acting Director under § 5491(b)(5) until the Senate confirmed a new Director appointed by the President. He explained this decision in a public statement:

In considering how to ensure an orderly succession for this independent agency, I have also come to recognize that appointing the current chief of staff to the deputy director position would minimize operational disruption and provide for a smooth transition given her operational expertise.

FAC ¶ 14. Mr. Cordray had good reason to trust that Ms. English would do the job well. In addition to serving as the CFPB's Chief of Staff, she has served in number of senior leadership roles at the CFPB, including Deputy Chief Operating Officer, Acting Chief of Staff, and Deputy Chief of Staff.

At approximately 8:50 p.m. on the evening of November 24, the White House press office issued the following statement: "Today, the President announced that he is designating Director of the Office of Management and Budget (OMB) Mick Mulvaney as Acting Director of the Consumer Financial Protection Bureau (CFPB)." FAC ¶ 16. The White House statement did not refer to

Director Cordray's earlier appointment of Ms. English as Deputy Director and was not accompanied by any legal reasoning concerning the President's claimed authority to make the appointment. *Id.*²

On Saturday, November 25, the Department of Justice's Office of Legal Counsel released a memorandum providing legal arguments in support of Mr. Mulvaney's appointment. The memorandum acknowledges that the statutory scheme of the CFPB provides that the Deputy Director shall become the Acting Director when there is a vacancy in the position of the Director. But, the memorandum asserts, the President may instead choose to appoint someone from outside the agency to take the position of Acting Director via the FVRA, 5 U.S.C. §§ 3345–3349d.

The next day, Ms. English filed this lawsuit. Reflecting the importance of the issue—and the need for expeditious resolution—the district court ordered full briefing and argument (and ruled on Ms. English's motion) in less than 48 hours. Maintaining an expedited pace, the district court then ordered that the parties brief her preliminary injunction motion in three weeks, and issued an opinion only a few weeks after hearing argument.

² Unlike Ms. English, Mr. Mulvaney never previously served in any capacity in a consumer-protection enforcement or financial regulatory agency at the state, federal, or local level. FAC ¶ 17. He has described the CFPB as a “sad, sick joke,” has co-sponsored legislation proposing to eliminate the agency, and has said at a hearing in the House of Representatives: “I don't like the fact that CFPB exists, I'll be perfectly honest with you.” *Id.*

ARGUMENT

I. The Court should expedite this appeal.

Even without the special circumstances presented here, Ms. English is entitled to expedited consideration because she appeals from a denial of her request for a preliminary injunction. *See* 28 U.S.C. § 1657(a) (“[E]ach court of the United States shall expedite the consideration of any action . . . for temporary or preliminary injunctive relief.”); Circuit Rule 47.2(a) (directing that the clerk “prepare an expedited schedule for briefing and argument”). But 28 U.S.C. § 1657(a) also mandates expedited review where “good cause therefor is shown.” Good cause exists to expedite an action if “the delay will cause irreparable injury and . . . the decision under review is subject to substantial challenge,” or if “the public generally [has] an unusual interest in prompt disposition.” U.S. Court of Appeals for the D.C. Circuit, *Handbook of Practice and Internal Procedures* at 33 (Mar. 1, 2016). All of those factors favor expedited consideration of this appeal.

A. The public has an unusual interest in prompt disposition.

There is an urgent public need for clarity as to the Acting Director position at the CFPB. The CFPB is the primary federal regulator of many consumer financial products and services, issuing rules and taking enforcement actions affecting a large portion of the economy—including consumer-facing banks with more than \$10 billion in assets. *See* David H. Carpenter, *The Consumer Financial*

Protection Bureau (CFPB), at 9–14, Congressional Research Service (2014). The dispute between Ms. English, the President, and Mr. Mulvaney has generated substantial attention in the media, which has noted public confusion over the agency’s leadership. See Victoria Guida, *Trump taps Mulvaney to head CFPB, sparking confusion over agency’s leadership*, Politico (Nov. 24, 2017), <https://goo.gl/j5s6D4>; Katie Rogers, *2 Bosses Show Up to Lead the Consumer Financial Protection Bureau* (Nov. 27, 2017), <https://goo.gl/MbtyAU>. And at least one additional lawsuit has been filed to secure clarity over the Acting Director role. See *Lower East Side People’s Federal Credit Union v. Trump et al.*, No. 1:17-cv-09536 (S.D.N.Y. 2017). It would be harmful and disruptive for the Court to prolong this extremely irregular state of affairs at the CFPB.

Mr. Mulvaney, meanwhile, has indicated that he has a sweeping agenda to usher in change at the Bureau. See Jessica Silver-Greenberg and Stacy Cowley, *Consumer Bureau’s New Leader Steers a Sudden Reversal*, N.Y. Times (Dec. 5, 2017), <https://goo.gl/CN4Pdc>. But doubt over who is the legitimate Acting Director hurts the public by casting a pall over the validity of the agency’s actions, since actions taken by an illegally appointed Director may themselves be unlawful. See, e.g., *F.E.C. v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993). Indeed, attorneys who advise entities regulated by the CFPB have sounded alarms about the agency’s current reliability as a regulator. For example, Alan Kaplinsky—head of the

consumer financial services group at Ballard Spahr—recently told the *Los Angeles Times*:

The industry needs certainty when it comes to any federal agency. They need to know who's in charge and who's got authority and right now they don't I'd be very reluctant to enter into any kind of agreement with the CFPB right now because I can't be assured that the director has authority.

Jim Puzzanghera, *CFPB leadership remains uncertain despite another Trump administration court victory*, *Los Angeles Times* (January 11, 2018). These concerns are justified. If Mr. Mulvaney makes big changes that end up being invalid due to the illegality of his appointment, it may be difficult for this Court or a subsequent Director to unscramble those actions. It also may be unlawful for subsequent officers to ratify Mr. Mulvaney's changes: the FVRA prohibits the ex-post ratification of actions by officials appointed outside of the FVRA's parameters. *See* 5 U.S.C. § 3348(d).

In addition to being ill-served by legitimate doubt as to any actions the CFPB takes, the public will also be hurt if this doubt has the effect of chilling the agency. Mr. Mulvaney has declared a “freeze” on significant agency actions. *See* Andrew Restuccia, *Mulvaney imposes temporary hiring, regulations freeze on CFPB*, *Politico* (Nov. 27, 2017), <https://goo.gl/dgKQpG>. To the extent that such a freeze is motivated by concern for the legality of Mr. Mulvaney's actions, the public is deprived of the protections and guidelines that Congress intended the CFPB to provide.

Accordingly, the public has an unusual interest in expedited review of this appeal. Until President Trump nominates and the Senate confirms a new Director, only the Judiciary can offer the nation clarity and regularity.

B. The opinion below is subject to substantial challenge.

The district court decided several major statutory and constitutional questions. In addition to interpreting applicable provisions of the Dodd-Frank Act and the FVRA, the district court also addressed the relevance of the Take Care Clause, the nature of agency independence in general, and the President's asserted power to appoint White House personnel to leadership positions in independent agencies tasked with financial regulation.

The district court's rulings on each of these important issues is, at the very least, subject to substantial challenge. For proof, this Court need look no further than the bevy of *amicus* briefs filed below. These include:

- The brief by 37 current and former members of Congress, including the sponsors and drafters of Dodd-Frank (Senator Dodd and Representative Frank), who agree with Ms. English's stance that the Act displaces the FVRA and is the sole means for filling a vacancy in the position of CFPB Director. *See* ECF No. 29-1.
- The brief by the District of Columbia and 17 States arguing that the mandatory successor language in Dodd-Frank is an essential component of

the independent structure at the heart of the CFPB's statutory scheme. *See* ECF No. 32.

- The brief by 10 consumer groups noting that the public interest requires an injunction in this case because the CFPB's independence is necessary for it to pursue its public mission. *See* ECF No. 36, at 25–31.
- The brief by Peter Conti-Brown of the University of Pennsylvania describing how the precedent that the President is attempting to set in this case is an assault on norms of independence that are core parts of our nation's financial regulatory system. *See* ECF No. 33.
- The brief by 10 leading scholars of consumer financial regulation arguing that the appointment of Mr. Mulvaney in particular is a direct violation of Congress's intentions for the CFPB's independence. *See* ECF No. 28-2, at 28–32.

As these filings make clear, the questions of law here at issue are important—and the district court's holdings are deeply flawed. That position has been echoed by leading academic commentators. *See* Laurence H. Tribe, *Sorry Mr. President. You Can't Make Mulvaney 'Acting' Head of the Consumer Financial Protection Bureau*, Washington Post (November 27, 2017) (discussing the legal issues raised by this case); Peter H. Schuck, *Trump's Bureaucratic Showdown*, New York Times (November 27, 2017) (same); Nina Mendelson, *More Thoughts on the CFPB Puzzle: President Trump Can*

Select Someone to Run the CFPB Only if the Senate Has an Opportunity to Confirm, Notice & Comment (November 27, 2017) (same); Marty Lederman, *Who's the acting director of the CFPB? Understanding the legal dispute at the center of the kerfuffle*, Balkinization (November 26, 2017) (same); Adam Levitin, *OLC Legal Opinion and the Missing Legislative History*, Credit Slips (November 25, 2017) (same).

C. Delay will cause Ms. English irreparable injury.

Ms. English has suffered an irreparable injury that will continue every day that Mr. Mulvaney claims to hold the office of Acting Director. The irreparable harm analysis “assumes, without deciding, that the movant has demonstrated a likelihood that the non-movant’s conduct violates the law,” and courts should “examine only whether that violation, if true, inflicts irreparable injury.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006). On that assumption, the harm that she has suffered is clear: the usurpation of her statutorily-conferred position at the fore of a major federal agency, in a role that will disappear as soon as the President nominates and the Senate confirms a new Director.

This isn’t a run-of-the-mill employment case, as the defendants contended below. Ms. English’s injury is not simply the loss of a salary or an intangible reputational benefit; it is the loss of a “statutory right to function” in a position directly related to a federal agency’s “ability to fulfill its mandate.” *Berry v. Reagan*,

1983 WL 538, at *5 (D.D.C. Nov. 14, 1983). She is the rightful Acting Director of an independent agency tasked with protecting the nation’s consumers. It is her lawful prerogative to ensure that the agency functions efficiently, and to make critical decisions regarding policy and enforcement. The loss of her “right of function” in that capacity is an irreparable injury. *Id.* And this injury continues every day that the courts do not issue an injunction.

Finding that these injuries don’t qualify as “irreparable” would make no practical sense in light of the extraordinary circumstances of this case. Any such finding would also have the pernicious result of rewarding and encouraging illegal temporary appointments. Not only is that a recipe for bureaucratic chaos, but it is also at odds with cases affirming “the general importance of [the] agency’s faithful adherence to its statutory mandate.” *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977).

II. The Court should order that briefs be filed under the proposed schedule.

Considering the need for the utmost expedition in this matter, Ms. English proposes the following briefing schedule:

- **Appellant’s Opening Brief:** January 30, 2018
- **Amicus Briefs Supporting Appellant:** February 6, 2018
- **Appellees’ Brief:** February 13, 2018
- **Amicus Briefs Supporting Appellees:** February 20, 2018

- **Appellant's Reply Brief:** February 22, 2018

Counsel for Ms. English has contacted counsel for the defendants, and they have declined to take a position on this proposal.

CONCLUSION

For the foregoing reasons, Ms. English respectfully requests that consideration of this matter be expedited, that the Court issue an order setting the above briefing schedule, and that the Court direct the Clerk to schedule oral argument on the earliest available date following the completion of briefing.

Respectfully submitted,

/s/ Deepak Gupta

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January 16, 2018

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2018, I electronically filed the foregoing motion for an extension of time with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Deepak Gupta
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