[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEANDRA ENGLISH, **Plaintiff-Appellant,** **v.** **DONALD J. TRUMP and JOHN MICHAEL MULVANEY,** **Defendants-Appellees.**	**No. 18-5007**

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO EXPEDITE APPEAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in plaintiff's motion to expedite this appeal:

Gonzalez, Vicente

Kihuen, Ruben, J.

State of Arizona

State of Florida

State of Kansas

State of Michigan

State of Nebraska

s/Melissa N. Patterson
MELISSA N. PATTERSON

INTRODUCTION

On January 10, 2018, the district court denied plaintiff-appellant Leandra English's motion for a preliminary injunction that would have unseated the acting head of the Consumer Financial Protection Bureau (CFPB) and instead installed English as the Acting Director. Plaintiff appealed that decision on January 12, and filed a motion to expedite her appeal on January 16. Under 28 U.S.C. § 1657(a) and this Court's Rule 47.2(a), appeals from orders granting or denying preliminary injunctive relief are to receive expedited consideration. The statute and this Court's rules, however, do not constrain this Court's discretion in how to expedite consideration of an appeal, nor do they require an abbreviated briefing schedule. On the contrary, "[a]n order granting expedition does not automatically shorten the briefing schedule." D.C. Cir. Handbook of Practice and Internal Procedures VIII.B (2017).

Plaintiff seeks a briefing schedule that would make her opening brief due January 30, amici briefs in her support due February 6, and the government's response due February 13. The government does not oppose either plaintiff's proposal to file her own brief 20 days after the district court issued its opinion, or her plan to file a reply 9 days after service of the response brief. Similarly, the government has no objection to the Court scheduling oral argument in this matter as expeditiously as possible after the close of briefing. However, the government opposes plaintiff's

proposed abbreviation of the government's time to prepare and file a response brief. Under plaintiff's suggested schedule, while plaintiff would have 20 days to prepare her opening brief, the government would have only 14 days to respond to plaintiff's brief, and only 7 days to respond to amici. For the following reasons, this Court should decline to shorten the usual 30 days the government would have to respond to plaintiff's opening brief. In the alternative, if this Court does reduce the government's briefing time, it should at minimum grant the government no fewer than the 20 days that plaintiff will have under her requested schedule to prepare a brief.

BACKGROUND

1. Whenever an officer in an "Executive agency" whose position is subject to Senate confirmation "dies, resigns, or is otherwise unable to perform the functions and duties of the office," the Federal Vacancies Reform Act of 1998 (FVRA) provides comprehensive procedures to designate an acting official to perform the functions of the vacant office. 5 U.S.C. § 3345(a). By default, the FVRA provides that the first assistant to the office "shall" perform the duties of the vacant office on a temporary basis. *Id.* § 3345(a)(1). However, "notwithstanding" that provision, the FVRA expressly provides that the President "may" instead designate any official "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." *Id.* § 3345(a)(2); *see also id.* § 3345(a)(3) (other eligible officers and employees). Congress made the FVRA generally applicable

to "Executive agenc[ies]," while specifically exempting particular offices at various agencies from its provisions. *Id.* §§ 3345(a), 3349c.

Congress expressly provided that 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 only exception to FVRA's exclusivity comes when "a statutory provision expressly" either "authorizes" various officers to designate an acting official, or directly "designate[s] an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." *Id.* In contrast to other provisions of the FVRA, which specify circumstances in which the Act "shall not apply," *id.* § 3349c, the FVRA does not provide that statutory provisions authorizing alternative designations will render the FVRA's designation methods inapplicable, providing only that those methods become nonexclusive.

2. In 2010, Congress established the CFPB to enforce consumer financial protection laws. *See* Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010). Congress specified that the CFPB "shall be considered an Executive agency." 12 U.S.C. § 5491(a). Congress further provided 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.*

The CFPB is headed by a single Director appointed by the President, with the Senate's advice and consent, for a five-year term. *See* 12 U.S.C. § 5491(b), (c)(1). By statute, the Director is removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3). Under the CFPB's organic statute, the CFPB's Deputy Director "shall … be appointed by the Director" and shall "serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5).

3. The CFPB's then-Director Richard Cordray "resigned effective at midnight on the day after Thanksgiving: Friday, November 24, 2017." District Court Opinion (Op.), Dkt. 47 at 1. "That same day, he named Plaintiff Leandra English the CFPB's Deputy Director, in an apparent attempt to select his successor." *Id.* However, also on November 24, the President invoked his authority under the FVRA to designate John "Mick" Mulvaney as the Bureau's Acting Director, effective upon Mr. Cordray's resignation. Op. 6; Dkt. 41-1. On Saturday, November 25, the Office of Legal Counsel and the CFPB's General Counsel separately issued memoranda concluding that the FVRA permitted the President to designate an Acting Director. Op. 6. "[I]n a conference call on Sunday, November 26, the Associate Directors of the CFPB's six divisions agreed that they would act consistently with the understanding that Mulvaney was the acting Director." *Id.* Mulvaney arrived at CFPB headquarters as Acting Director on November 27, and "the record evidence suggests that CFPB

operations have continued with the understanding that Mick Mulvaney is the Acting Director." Op. 7 (quotation marks omitted).

4. On Sunday, November 26, 2017, plaintiff filed this action in district court. *See* Dkt. 1. Plaintiff alleged that as Deputy Director, she became the Acting Director under 12 U.S.C. § 5491(b)(5), and that the President lacked authority under the FVRA to designate Mulvaney as Acting Director. Plaintiff sought a temporary restraining order, asking the district court to remove Mulvaney as Acting Director, install plaintiff in his stead, and enjoin the President from appointing an Acting Director in any fashion. *See* Dkt. 2. The district court denied that motion on November 28, 2017. *See* 11/28/17 Min. Order; Dkt. 16. Plaintiff then sought a preliminary injunction seeking the same relief. *See* Dkt. 23, 26. The district court denied that motion on January 10, 2018. *See* Op.

The district court issued a lengthy opinion that carefully examined the text, structure, and history of the FVRA and the Dodd-Frank Act provision plaintiff invokes. *See* Op. 11-36. The court explained that "on its own terms," the FVRA "clearly" authorized "the President's appointment of the CFPB's acting Director." Op. 12. The FVRA applies to Senate-confirmed offices at "an Executive agency." *Id.* (citing 5 U.S.C. § 3345(a)). Congress made the CFPB "an Executive agency." *Id.* (citing 12 U.S.C. § 5491(a)); *see also* 12 U.S.C. § 5491(a) (making "all Federal laws dealing with … officers" applicable to the CFPB). Nor does the CFPB fall within the

category of entities to which the FVRA does not apply, since it "is not a multi-member body." Op. 12-13 (citing 5 U.S.C. § 3349c(1), which provides that the FVRA's provisions "shall not apply" to "any member who is appointed by the President, by and with the advice 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"). Thus, "a plain reading of the FVRA's text" authorized the President's designation here. Op. 12, 14.

The district court next examined in detail whether the Dodd-Frank Act displaced the authority provided by the FVRA. Op. 15-29. The court concluded that under "a fair reading of the entirety of these statutes," they "can, and therefore must, be read harmoniously," to permit the President to use his FVRA authority to designate the CFPB's Acting Director. Op. 15. The court based this conclusion on a number of considerations.

The court explained that the text of the FVRA "can only mean" that Congress intended the FVRA to remain "a nonexclusive means for appointing officers" where a separate statute "designates" an acting official. Op. 16. The court also pointed out that the Dodd-Frank Act itself provides that laws such as the FVRA apply to the CFPB unless another provision "expressly" displaces them. Op. 18. The court observed that "there is reason to doubt whether the Deputy Director provision [plaintiff relies on] even covers a vacancy created by a resignation," since it "does not

use the word 'vacancy.'" Op. 20. The court also noted the Dodd-Frank Act's "silen[ce] regarding the President's ability to appoint an acting Director," Op. 21 (emphasis omitted); the fact that even where mandatory, the term "shall" is not "always understood to be *unqualified*," Op. 22; and the canons of statutory construction requiring statutes to be reconciled where possible and counseling against partial implied repeals absent clear and manifest congressional intent, Op. 24-25. Finally, the court pointed out that plaintiff's interpretation "potentially impairs the President's ability to fulfill his obligations under the Take Care Clause." Op. 29.

The district court further considered and rejected plaintiff's arguments that because the CFPB is in some respects independent, the FVRA could not apply to it. Op. 32-33. As the court noted, even the provision plaintiff relies on makes clear that all laws dealing with officers—a category that incontestably includes the FVRA—applies to the CFPB. Op. 32. "[H]osannas to the CFPB's independence cannot override the force of the statute's text." *Id.*

The district court also explained why plaintiff had failed to demonstrate that she would suffer irreparable harm in the absence of injunctive relief. Op. 39-44. The court noted that in the declaration plaintiff submitted, "she include[d] no factual allegations about any harm that she has suffered as a result of the events at issue here." Op. 41. As in her motion in this Court, plaintiff relied solely on a "statutory right to function" recognized only in an unpublished district court case. Motion at

11-12 (citing *Berry v. Reagan*, Civ. No. 83-3182, 1983 WL 538, at *5 (D.D.C. Nov. 14, 1983)). The district court explained that here, unlike in *Berry*, "[t]he CFPB is not and will not be shuttered" absent injunctive relief. Op. 42. And even if the CFPB or other parties might be harmed "if it is later determined that Mulvaney has not been lawfully the acting Director," that possibility could not demonstrate any irreparable harm to plaintiff herself. *Id.* (concluding that plaintiff "has utterly failed to describe any such harm" to herself, "even assuming for argument's sake that she is likely to succeed on the merits").

ARGUMENT

This case presents an important issue of statutory interpretation regarding the President's ability to designate acting officials under the FVRA. Plaintiff contends that the President's express authority under the FVRA is implicitly repealed by a provision of the Dodd-Frank Act that makes no reference to vacancies, but provides that the CFPB's Deputy Director shall "serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5). Plaintiff's position is inconsistent with the longstanding position of the Office of Legal Counsel, which has consistently concluded that agency-specific vacancy provisions coexist with the FVRA

rather than displace it.[1] Plaintiff's position also conflicts with the decision of the only court of appeals that has addressed the relationship between agency-specific vacancy provisions and the FVRA. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555-56 (9th Cir. 2016) (concluding that a statute specific to the Acting General Counsel of the National Labor Relations Board did not preclude the President from "elect[ing] between" that statute and the FVRA "to designate an Acting General Counsel"). Indeed, here, the Dodd-Frank Act itself confirms the applicability of laws such as the FVRA unless another law "expressly" provides otherwise. 12 U.S.C. § 5491(a). As the district court's opinion shows in meticulous detail, plaintiff's position cannot be squared with either the FVRA or the CFPB-specific provisions of the Dodd-Frank Act.

Because plaintiff is appealing from the denial of a preliminary injunction, a federal statute and this Court's rules provide for expedited consideration of the appeal. *See* 28 U.S.C. § 1657; D.C. Cir. R. 47.2(a). However, expedited consideration does not require an abbreviated briefing schedule. *See* D.C. Cir. Handbook and

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[1] *See Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208, 209-11 (2007); *Designation of Acting Director of the Office of Management and Budget,* 27 Op. O.L.C. 121, 121 n.l (2003); *see also Applicability of the Federal Vacancies Reform Act to Vacancies at the International Monetary Fund and the World Bank*, 24 Op. O.L.C. 58, 60 n.2 (2000); *Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 62-63 (1999).

Internal Procedures VIII.B ("An order granting expedition does not automatically shorten the briefing schedule."). Given the importance of the underlying issues here, plaintiff's continued failure to articulate any irreparable harm to herself, and the extraordinary relief that plaintiff seeks, this Court should ensure that the parties have adequate time to prepare thorough briefs that provide the most possible assistance to the Court.

Plaintiff proposes that she be given 20 days to prepare her opening appellate brief, but that the government be allowed only 14 days to prepare its responsive brief. If plaintiff believes that 20 days affords her a sufficient opportunity to brief this case, the government does not object to this portion of her proposal. There is no cause, however, to truncate the government's response time, much less to allow the government less time than plaintiff herself is seeking. This Court should set a briefing schedule that gives the government the normal period of 30 days to respond to plaintiff's opening brief. This period would afford the government a reasonable period for internal consultations and ensure that the government's brief provides the Court with the fully considered views of the Executive Branch. And even if there were reason to shorten the government's briefing time, the government should not receive less time to prepare its brief than plaintiff receives. Plaintiff was free to file her notice of appeal and motion to expedite as soon as the district court issued its opinion on January 10. Under her proposed schedule, she will have until January 30

to prepare her opening brief. The government should likewise receive, at minimum, no less than less than 20 days to respond to plaintiff's brief.

Affording the government an adequate briefing period is all the more important given that the government will almost certainly need to respond to multiple amicus briefs. As plaintiff notes, this case has created considerable public interest, and in district court, multiple amici filed in support of each side, with five briefs filed in support of plaintiff. Given the likelihood that these amici will file their views in this Court, it would be inappropriate to require the government to file its brief only seven days after the deadline for amici to file in support of plaintiff.

CONCLUSION

For the foregoing reasons, this Court should issue a briefing schedule permitting the government 30 days to file its response to appellant's opening brief. In the alternative, the Court should issue a schedule that gives the government no less than the 20 days that plaintiff has requested to prepare her opening brief.

Respectfully submitted,

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JANUARY 2018

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 27(d)

I hereby certify that this motion complies with Federal Rule of Appellate Procedure 27(d)(1) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that it complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,582 words according to the count of Microsoft Word.

/s/ Melissa N. Patterson
MELISSA N. PATTERSON

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 19, 2018, I electronically served and filed the foregoing document with the Clerk of the Court by using the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

/s/ Melissa N. Patterson
MELISSA N. PATTERSON